IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-1007

H. EARL FULLILOVE, et al., *Petitioners*

v.

JUANITA M. KREPS, Secretary of Commerce, et al., *Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECRETARY OF COMMERCE

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OPINIONS BELOW

The opinion of the court of appeals (A. 206a-224a) is reported at 584 F.2d 600. The opinion of the district court (A. 183a-204a) is reported at 443 F. Supp. 253.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1978. The petition for a writ of certiorari was filed on December 21, 1978, and granted on May 21, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the minority business enterprise provision of the Public Works Employment Act of 1977 violates the Fifth Amendment or Title VI of the Civil Rights Act of 1964.

STATEMENT

1. In July 1976, Congress enacted legislation designed to alleviate national unemployment and to stimulate the economy by distributing two billion dollars to state and local governments for public works projects. The legislation, entitled the Local Public Works Capital Development and Investment Act of 1976, 42 U.S.C. 6701-6710, charged the Secretary of Commerce with the responsibility of disbursing the funds through the Economic Development Administration. The Act provided that the funds were to be available for appropriation until September 30, 1977. 42 U.S.C. 6710.[1] In May 1977 Congress amended the 1976 Act by authorizing an additional four billion dollars for similar projects. The total of six billion dollars was to be available for appropriation until December 31, 1978. 42 U.S.C. (Supp. I) 6710.[2]

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[1] The Local Public Works Act itself merely authorized the appropriation of two billion dollars for the local public works program. Congress made the actual appropriation several weeks later in the Public Works Employment Appropriations Act, Pub. L. No. 94-447, 90 Stat. 1497.

[2] On the same day that Congress authorized the appropriation of an additional four billion dollars for the local public works program, it appropriated the full amount of the newly authorized funds. 91 Stat. 123-124.

The new statute, entitled the Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat 116-121, made various changes in the 1976 Act, including the addition of Section 103(f)(2), 42 U.S.C. (Supp. I) 6705(f)(2), the "minority business enterprise" provision.[3] Section 103(f)(2) 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 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph the term "minority business enterprise" means a business at least 50 per centum of which is owned by minority group members or, in the case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts.

The circumstances under which the Secretary will waive the 10% minority set-aside requirement are described in regulations promulgated under the Act. 13 C.F.R. 317.19(b)(2).

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[3] The changes are codified in 42 U.S.C. (Supp. I) 6701 and note, 6705-6708, and 6710 and note.

Section 103 of the Public Works Employment Act of 1977 added subsection (f)(2) to Section 106 of the Local Public Works Capital Development and Investment Act of 1976 (see 91 Stat. 116-117). The parties and the courts below have referred to the minority business enterprise provision as Section 103(f)(2) and, to avoid confusion, we will continue to refer to it in that manner.

The 1976 Act and the 1977 amendments containe several provisions designed to ensure that the loca public works program would have its intended effec of providing an immediate boost to the economy gen erally and the construction industry in particular Congress directed that no part of any public works project funded under the statute should be performec directly by any state or local government agency, but rather that all project construction should be performed by private contractors who submit the lowest competitive bids in response to invitations from the grantees and who meet established criteria of responsibility (42 U.S.C. (Supp. I) 6705(e)(1)). In addition, Congress required grant applicants to give satisfactory assurance that on-site labor would begin within 90 days of project approval (42 U.S.C. 6705(d)) and instructed the Secretary to make a final determination on each grant application within 60 days of receipt (42 U.S.C. (and Supp. I) 6706). Moreover, the federal funds were required to be committed to state and local grantees by September 30, 1977 (see note 30, *infra*).

In accordance with the requirements of the 1976 Act, 42 U.S.C. (and Supp. I) 6706, the Secretary issued regulations to implement the local public works program. The regulation concerning the minority business enterprise provision stated (13 C.F.R. 317.19 (b)):

> (1) No grant shall be made under this part for any project unless at least ten percent of the amount of such grant will be expended for contracts with and/or supplies from minority business enterprises.

> (2) The restriction contained in paragraph (b)(1) of this section will not apply to any grant for which the Assistant Secretary [for Economic Development] makes a determination that the 10 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 supplies intended to be procured.

See also 13 C.F.R. 317.35(j). To supplement and elaborate on the statute and regulation, the Economic Development Administration issued guidelines governing minority business participation in local public works grants (A. 156a-167a) and a technical bulletin (A. 129a-155a) providing detailed instructions and information to assist grantees and their contractors in meeting the 10% minority business enterprise (MBE) requirement.

The guidelines state (A. 157a) that "[t]he primary obligation for carrying out the 10% MBE participation requirement rests with EDA Grantees." This obligation can be satisfied through the grantee's "own simple or prime contracts or through the subcontracts or supply contracts of its prime contractors" (A. 162a). Grantees must submit reports to EDA, both before the first federal letter of credit is issued and when the project is 40% complete, describing actual and expected minority business participation (A. 162a-164a). In addition, grantees must file a statement from each participating minority firm "certifying that the minority firm is a *bona fide* minority business enterprise and that the minority firm has executed a binding contract to pro-

vide a specific service or material to the project for a specific dollar amount" (A. 164a).

The guidelines provide that EDA will approve a grantee's request for a waiver of the minority business requirement if the grantee "demonstrate[s] that there are not sufficient, relevant, qualified minority business enterprises whose market areas include the project location" (A. 165a). Recognizing the problems that a grantee may encounter in attempting to comply with the MBE provision in an area where the minority population is small, the guidelines permit a grantee to "apply for a waiver before requesting bids on its project or projects if it can show that there are no relevant, available, qualified minority business enterprises which could reasonably be expected to furnish services or supply materials for the project" (A. 166a).

By the time Congress authorized the additional four billion dollars of local public works grants in May 1977, all grants authorized by the 1976 Act had been awarded. The further grants authorized in 1977—the grants to which the minority business enterprise provision applied—were all awarded by September 30, 1977. Information submitted to the district court shows that respondent New York State received at least 45 grants totaling $42,119,000 from funds appropriated in 1977 and that respondent New York City received at least 83 grants totaling $193,838,646 (A. 36a).[4]

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[4] Although all grants were awarded more than two years ago, construction on many funded public works projects is not yet complete. Moreover, in October 1979, we were in-

2. On November 30, 1977, petitioners—four associations of construction firms and a mechanical contracting firm specializing in heating and air conditioning work—filed this action in the United States District Court for the Southern District of New York. They alleged (A. 11a-12a) that Section 103(f)(2) of the Act, the minority business enterprise provision, caused them competitive injury by excluding them from participating in subcontracts that they otherwise would have obtained in competitive bidding, by requiring them to subcontract work that they ordinarily would have performed themselves, and by compelling them to choose subcontractors according to criteria other than the amount of their bids and their performance records. They contended (A. 13a-15a) that Section 103(f)(2) establishes an impermissible racial classification and violates the Fifth and Fourteenth Amendments, the Reconstruction Civil Rights Acts (42 U.S.C. 1981, 1983, 1985), and Titles VI and VII of the Civil Rights Act of 1964 (42 U.S.C. 2000d, 2000e *et seq.*). Petitioners sought a temporary restraining order and a permanent injunction

formed by the Economic Development Administration that there were some cost underruns on New York City projects and that additional contracts would be let to utilize the remaining funds and that the MBE provision may apply to these contracts. There is also the possibility that on some projects the EDA will find that a subcontractor represented to be a minority business enterprise is not in fact a *bona fide* MBE. This may result in a requirement that the grantee expend other project funds for an acceptable minority contract, that he return a portion of the grant funds to the United States Treasury, or that he obtain a waiver.

against enforcement of the minority business enterprise provision by the Secretary of Commerce and the state and local respondents (recipients of funds distributed under the Act). Petitioners also sought a declaratory judgment that Section 103(f)(2) is "unconstitutional, illegal[,] void[,] and unenforceable" (A. 19a).

After a trial,[5] the district court denied petitioners' requests for relief and dismissed the complaint. The court held (A. 187a) that

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[5] Petitioners presented only two witnesses. Both were officers in construction firms belonging to one of the petitioner associations. Each testified that his company had been awarded contracts funded under the Act and that, in order to satisfy the requirements of Section 103(f)(2), the company would obtain supplies or services from minority subcontractors. The witnesses stated that, in the absence of the MBE provision, their firms would deal with other subcontractors who could offer lower prices, more experience, or both. They conceded, however, that any additional costs attributable to the use of minority subcontractors would be reflected in the overall bid and would thus be passed on to the local grantee (and ultimately to the federal government) (A. 58a-97a).

The president of petitioner Shore Air Conditioning Company submitted an affidavit (A. 23a-27a) alleging that the company's low bid on one project had been rejected because the grantee determined that the purported minority subcontractor with which Shore proposed to deal was not a bona fide minority business enterprise within the meaning of the Act and that therefore Shore's bid did not satisfy the requirements of Section 103(f) (2). With the exception of this affidavit, petitioners offered no direct evidence that they or any of their member firms had lost business as a result of the MBE provision. No subcontractor testified at trial.

James F. McNamara, an Assistant Commissioner of the New York State Division of Human Rights, appeared as a

> the MBE requirement is an entirely constitutional method of remedying prior acts of discrimination in the construction industry and one which is fully consistent with the civil rights laws that preceded it.

The court acknowledged that the provision "distinguishes among various business enterprises, at least in part, based upon the racial background of their principals" (A. 191a). Because of the statute's reliance on race, "an inherently 'suspect' classification," the district court determined that "rigid scrutiny of

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witness for the Secretary and testified about the problems encountered by minority contractors in the construction industry. He explained that bonding requirements frequently pose a serious obstacle for minority businessmen "because the insurance companies and the banks will not cooperate with them if they don't have an established track record [and t]hey can not establish a track record if they don't get a chance to perform" (A. 113a). He also stated that minority firms have difficulty securing contracts because many of their employees are minority workers who are not union members and whom the unions refuse to accept (*ibid.*). In addition, the witness said that minority contractors operate at a disadvantage because "[t]hey are not plugged in on the information. They may not be able to get advanced drawings or may not be able to get access to * * * the preliminary plans and budget estimates. * * * [B]y not having access to this information they are further frozen out" (A. 114a). McNamara reported that the New York State agencies participating in the MBE program considered it to be "the first really successful route in assuring that there will be a portion of the work going to minority contractors" (*ibid.*). He also testified that the MBE provision had improved the employment prospects for minority workers, among whom the unemployment rate was almost twice as high as that prevailing within the white population (A. 115a).

both Congressional purpose and the means selected to effectuate that purpose is clearly mandated" (*ibid.*). The court stated that, in order to satisfy constitutional requirements, the MBE provision must serve a compelling governmental interest and must be no more discriminatory than other available means of accomplishing the same objective (*ibid.*). The court found (A. 192a-202a) that the MBE provision passes both parts of this test.

With respect to the legitimacy of the congressional purpose underlying the 10% minority participation standard, the court first noted petitioners' concession that a racial classification serves a compelling government interest if it is intended to remedy the effects of present or past discrimination (A. 192a). The district court then reviewed the available materials and concluded that Congress acted with just such a remedial purpose in mind. The court examined the limited legislative history of the MBE provision itself, the numerous other federal antidiscrimination measures in recent years, and the empirical data available to Congress reflecting the disproportionately small role of minority business concerns in the national economy generally and the construction industry in particular. On the basis of this evidence, the district court concluded that Section 103(f)(2) "was incorporated into the Act after only brief debate because of a general awareness of the compelling need for legislative action capable of overcoming the effects of prior discrimination against minority busi-

nesses seeking to participate in government contracting" (A. 196a-197a).

Turning its attention to the means chosen by Congress to accomplish this purpose, the district court ruled (A. 199a-202a) that the 10% MBE requirement is a reasonable method of "promptly alleviating the handicap imposed upon minority businesses due to the lingering effects of discriminatory conduct in the construction industry" (*id.* at 202a). In support of this holding, the court cited (1) "the consistent failure of less intrusive attempts to nurture the growth of minority enterprises" (A. 202a); (2) the limited percentage of annual government contracting affected by the MBE requirement (A. 201a); (3) the short-term nature of the local public works program established by the Act (A. 201a-202a); and (4) the availability of a waiver provision to guard against the possibility that work on funded projects would be disrupted in particular areas by the lack of sufficient qualified minority businesses to fulfill the 10% requirement (A. 201a).

Finally, the district court rejected (A. 202a-203a) petitioners' contention that the MBE provision violates the Civil Rights Act of 1866 and 1964. The court stated that "it defies credulity to argue that measures intended to correct the invidious effects of racial discrimination must be limited to remedies which are not race sensitive, for minority groups would forever be frozen into the status quo if that were the intent of the Civil Rights Acts" (*ibid.*).

4. The court of appeals affirmed (A. 206a-224a). The court held that "even under the most exacting standard of review the MBE provision passes constitutional muster" (A. 211a). The court therefore found it unnecessary to determine "[w]hether rigid scrutiny is mandated whenever an act of Congress conditions the allocation of federal funds in a manner which differentiates among persons according to their race" (*ibid.*).

The court of appeals agreed with the district court that the minority business enterprise provision in the 1977 Act was intended to remedy past discrimination against minority construction businesses (A. 215a). The court also agreed with the district court that materials available to Congress provided ample support for the conclusion that the severe shortage of potential minority entrepreneurs with general business skills is a result of their historic exclusion from the mainstream economy and that "the history of discrimination was specific to the construction industry" (A. 218a; see also A. 194a).

Acknowledging that remedies for past discrimination should be "sensitive to interests which may be adversely affected" by such relief (A. 220a), the court of appeals analyzed the likely impact of the minority business enterprise provision on non-minority contractors. For reasons similar to those that persuaded the district court, the court of appeals ruled that Section 103(f)(2) would not have an inequitable effect on a " 'small, ascertainable group of non-minority persons' " (A. 221a, quoting from

EEOC v. *Local 638, Sheet Metal Workers*, 532 F.2d 821, 828 (2d Cir. 1976)). The set-aside for minority contractors, the court noted (A. 221a-222a; footnote omitted),

> extends to only .25 percent of funds expended yearly on construction work in the United States. The extent to which the reasonable expectations of [petitioners], who are part of that industry, may have been frustrated is minimal. Furthermore, since according to 1972 census figures minority-owned businesses amount to only 4.3 percent of the total number of firms in the construction industry, the burden of being dispreferred in .25 percent of the opportunities in the construction industry was thinly spread among nonminority businesses comprising 96 percent of the industry. Considering that nonminority businesses have benefitted in the past by not having to compete against minority businesses, it is not inequitable to exclude them from competing for this relatively small amount of business for the short time that the program has to run.

SUMMARY OF ARGUMENT

1. In the exercise of its power to spend public money for the general welfare, Congress enacted the Public Works Employment Act of 1977 to revive the sluggish construction industry and stimulate the economy generally. As part of its prescription for the appropriate use of four billion dollars in federal funds, Congress provided that, to the extent possible, 10% of the funds granted for each local public works project should be expended for minority business en-

terprises. By thus conditioning the grant of federal monies to state and local applicants, Congress sought to remedy the effects of racial and ethnic discrimination in the construction industry and to ensure that minority contractors would share equitably in the benefits conferred by the public works program. Such a legislative purpose is unquestionably legitimate.

The Thirteenth and Fourteenth Amendments empower Congress to enforce the constitutional prohibition against slavery and involuntary servitude and to secure the equal protection of the laws for persons of every racial and ethnic background. When Congress acts in pursuit of its enforcement responsibilities under the Civil War Amendments, it enjoys a considerable flexibility in fashioning measures to achieve its important antidiscrimination objectives. As Mr. Justice Powell observed in *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 302 n.41 (1978), this Court has "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." When the congressional aim is to eliminate discrimination and remedy its effects, race-conscious affirmative measures are permissible, provided that they do not impose excessive burdens on persons outside the group benefited by the legislative action. See *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 362-369 (opinion of Brennan, White, Marshall, and Blackmun, JJ.);

United Jewish Organizations v. *Carey*, 430 U.S. 144 (1977); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 435 (1975).

2. Petitioners contend that the minority business enterprise provision is invalid, because Congress did not adequately describe and document the remedial purpose for the statute's enactment. This argument rests on an erroneous view of the legislative process.

Congress does not sit as a court or an administrative agency making individualized decisions on the basis of a limited record. Rather, Congress legislates broad general rules for the governance of the nation as a whole, and it acts on the basis of everything it knows about a particular problem, regardless of the source. Congress is not bound to consider only materials that satisfy certain evidentiary standards, and it is not required to announce, in accordance with some predetermined format, the reasons for legislative action. Article I of the Constitution prescribes the procedures that Congress must follow in enacting a law, and nowhere does it mention any requirement of "detailed findings in the legislative record" such as petitioners would impose.

The courts below properly examined all evidence of the legislative purpose underlying the minority business enterprise provision and correctly concluded that Congress enacted the measure in order to remedy the effects of discrimination against minority-owned businesses. While the primary aims of the Public Works Employment Act were economic, Section 103(f)(2) was added to the statute to ensure

that the newly authorized funds would not be used to perpetuate or reinforce discrimination in the construction industry. Congress' purpose in enacting the 10% minority set-aside provision emerges clearly when the contemporaneous legislative history is considered in conjunction with Congress' knowledge of the economic plight of minority businesses and workers, its awareness of past discriminatory practices, and its disappointing experience with earlier legislative efforts to encourage the development of minority business firms.

3. The MBE provision was a proper means by which Congress could accomplish its remedial purpose. Congress ordinarily enjoys considerable discretion in exercising its enumerated powers, and that principle is particularly compelling when Congress acts to enforce the guarantees of the Civil War Amendments. Because of its investigative capabilities and its representative role in our tripartite system of government, the Legislative Branch is uniquely suited to devise remedial measures that promise effective solutions to difficult social problems and that take adequate account of the competing interests at stake in the distribution of government benefits, and to adjust those remedies in the light of experience.

The 10% minority set-aside provision was a reasonable congressional response to the failure of previous legislative measures to generate significant minority participation in federal contracting programs and to the need for expedition in providing emergency economic relief under the local public

works program. Congress had ample reason to believe that, if minority businesses were to obtain any meaningful benefit from the new appropriation authorized in 1977, affirmative measures like those contained in the MBE provision were necessary.

The solution chosen by Congress did not impose any undue disadvantage on nonminority contractors. This Court has acknowledged that some "sharing of the burden" of past discrimination may be required for remedial purposes (*Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 777 (1976)), and the "sharing" required here did not have any significant adverse effect on the members of petitioner associations. The racial classification was employed only on a short-term basis and only in one federal program. No contractor was precluded from bidding on any particular contract, and, as long as the overall 10% requirement was met, no grantee was required to award any particular contract to a minority business. The 10% set-aside did not "stigmatize" any identifiable nonminority group, and no nonminority contractor was excluded from his occupation by the partial preference given to nonminority businesses. Pursuant to the statutory authorization in Section 103(f)(2), the Secretary established and utilized a waiver procedure to deal with the possible unavailability of sufficient qualified minority contractors to satisfy the 10% requirement on particular projects.

For all these reasons, the members of petitioner associations suffered no unnecessary adverse impact from the 10% minority set-aside provision. Peti-

tioners' argument that Congress could have achieved the same result through "less drastic" means is unpersuasive. The alternatives suggested by petitioners also involve the use of race as a selection or eligibility criterion and in that way are constitutionally indistinguishable from Section 103(f)(2). A broader selection standard, such as social or economic disadvantage, would have included many persons who were not members of minority groups that had suffered discrimination in the past. Congress reasonably could have concluded that the eligibility of such persons for the limited special treatment required in the federally funded program would have impeded the achievement of the legitimate goal of remedying the effects of discrimination in the construction industry.

4. The minority business enterprise provision does not violate Title VI of the Civil Rights Act of 1964. *Regents of the University of California* v. *Bakke*, *supra*, established that Title VI does not prohibit a constitutionally valid, remedial race-conscious program. 438 U.S. at 287 (opinion of Powell, J.); *id.* at 325-326 (opinion of Brennan, White, Marshall, and Blackmun, JJ.). Where two statutes are capable of co-existence, the courts must regard each as effective. *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). Moreover, even if there were a conflict, it should be resolved in favor of the later-enacted and more specific statute, the Public Works Employment Act of 1977.

ARGUMENT

THE MINORITY BUSINESS ENTERPRISE PROVISION OF THE PUBLIC WORKS EMPLOYMENT ACT OF 1977 DOES NOT VIOLATE THE FIFTH AMENDMENT OR TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

A. Congress Has Broad Authority to Remedy the Effects of Past Discrimination Through the Exercise of the Spending Power and the Powers Conferred by the Enforcement Sections of the Thirteenth and Fourteenth Amendments

This Court has often acknowledged the congressional power to spend money in the national interest and to impose conditions on such expenditures, especially those in the form of grants to state or local governments or private entities. See, *e.g.*, *Helvering* v. *Davis*, 301 U.S. 619, 640-641 (1937); *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127 (1940); *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127, 143, 144 (1947); *Lau* v. *Nichols*, 414 U.S. 563, 569 (1974); *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 50 (1974); *Buckley* v. *Valeo*, 424 U.S. 1, 91 (1976). Moreover, the Court has recognized that the concept of the general welfare is not static and that Congress retains substantial discretion to determine the ways in which federal funds should be allocated and distributed. As Mr. Justice Cardozo wrote for the Court in sustaining the constitutionality of the Social Security Act, "[n]eeds that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation. What

is critical or urgent changes with the times." *Helvering* v. *Davis, supra,* 301 U.S. at 641.

The elimination of the effects of past or present racial and ethnic discrimination is unquestionably a legitimate purpose for which Congress may exercise its spending power. The Constitution itself establishes the legitimacy of such a legislative aim. The enforcement sections of the Thirteenth and Fourteenth Amendments authorize Congress to enact measures to eliminate slavery and involuntary servitude and to ensure that no state denies to any person within its jurisdiction the equal protection of the laws. Whatever the precise scope of congressional power under the Civil War Amendments,[6] those additions to the

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[6] In *Katzenbach* v. *Morgan,* 384 U.S. 641, 650-651 (1966), the Court stated that, by including Section 5, the enforcement section, in the Fourteenth Amendment, "the draftsmen sought to grant to Congress * * * the same broad powers expressed in the Necessary and Proper Clause * * *. Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." Similarly, in *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409, 440 (1968), the Court declared that the enforcement section of the Thirteenth Amendment gives Congress the power "rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." Congressional power under the Thirteenth Amendment extends to private as well as public activity. See *Runyon* v. *McCrary,* 427 U.S. 160, 168-173 (1976); *Johnson* v. *Railway Express Agency, Inc.,* 421 U.S. 454, 459-460 (1975); *Tillman* v. *Wheaton Haven Recreation Assn,* 410 U.S. 431, 439-440 (1973); *Jones* v. *Alfred H. Mayer Co., supra.* See also *United States* v. *Guest,* 383 U.S. 745, 762 (1966) (Clark, J.,

Constitution plainly demonstrate that remedying the effects of discrimination based on race or national origin is one goal toward which Congress may properly exercise each of its enumerated powers. In particular, Congress may spend public funds in a manner designed to guarantee that the benefits of federal grant programs are not denied to persons who have suffered discrimination in the past.

In the last 20 years, Congress has enacted numerous statutes intended to eliminate discrimination and its effects from federally funded programs.[7] Congress has also passed other antidiscrimination measures addressed to different areas of public and private activity.[8] The form of this legislation has varied as

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concurring); *id.* at 781-782 (Brennan, J., concurring in part and dissenting in part) (congressional power under the Fourteenth Amendment may reach private activity).

[7] The statute with the most comprehensive coverage is Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, which broadly prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving federal financial assistance. Since the passage of Title VI, many other specific federal grant statutes have contained similar prohibitions against discrimination in particular funded activities. See, *e.g.*, State and Local Fiscal Assistance Amendments of 1976, 31 U.S.C. 1242; Energy Conservation and Production Act, 42 U.S.C. 6870; Housing and Community Development Act of 1974, 42 U.S.C. 5309; Comprehensive Employment and Training Act of 1973, 29 U.S.C. 991.

[8] The congressional effort to end discrimination and its effects began after the Civil War with the enactment of the Civil Rights Act of 1866, 42 U.S.C. 1981 *et seq.* See generally B. Schwartz, *Statutory History of the United States-Civil Rights* (1970). Legislative activity has substantially increased

Congress has acquired experience in dealing with the continuing problems of racial and ethnic discrimination. Compare, for example, the relatively simple provisions enacted in 1957 to protect the voting rights of racial minorities[9] with the elaborate procedures established eight years later for the same purpose.[10]

Although many early federal statutes did not go beyond bare prohibitions against discrimination, Congress is not limited to such negative commands. This Court has sustained legislation that requires race-conscious affirmative measures to eliminate discrimination and its effects. See generally *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 362-369 (1978) (opinion of Brennan, White, Marshall, and Blackmun, JJ.). For example, under Title VII of the Civil Rights Act of 1964, employers

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since this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). See, *e.g.*, the Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634; the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437; the Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314; the 1975 Amendments to the Voting Rights Act of 1965, Pub. L. No. 94-73, 89 Stat. 400; the Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81-90; the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103; the Equal Credit Opportunity Act, Pub. L. No. 93-495, 88 Stat. 1521; and the Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, 90 Stat. 251.

[9] See Section 131 of the Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 637 (codified in 42 U.S.C. (1958 ed.) 1971(b)-(e)).

[10] See the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified in 42 U.S.C. (1964 ed., Supp. III) 1973-1973p).

may be required to avoid racially disparate effects of employment tests by using racial criteria (*i.e.*, one passing score for blacks and another for whites) so that tests will predict success on the job equally well for each racial group. See *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 435 (1975) (discussing with approval EEOC Guidelines requiring "differential validation" of employment tests for minority and nonminority groups where technically feasible). The Voting Rights Act of 1965 permits officials to take race into account in apportioning legislative districts in a way that fairly represents the voting strength of different racial and ethnic groups. *United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977). Guidelines issued under Title VI of the Civil Rights Act of 1964 require "affirmative steps to rectify the language deficiency * * * [w]here inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district." 35 Fed. Reg. 11595 (1970); see *Lau* v. *Nichols, supra*, 414 U.S. at 568.

This Court has held that Congress may generalize in identifying the victims of discrimination where, as here, measurement of the effects of discrimination on an individual basis is impractical or impossible. See *Gaston County* v. *United States*, 395 U.S 285, 295-296 (1969); *Regents of the University of California* v. *Bakke, supra*, 438 U.S. at 377-378 (opinion of Brennan, White, Marshall, and Blackmun, JJ.). See also *Teamsters* v. *United States*, 431 U.S. 324, 357-

362 (1977). Similarly, the impact of remedial legislation enacted by Congress to eliminate and redress the effects of past discrimination need not be limited to proven discriminators. See *Regents of the University of California* v. *Bakke, supra*, 438 U.S. at 366 (opinion of Brennan, White, Marshall, and Blackmun, JJ.); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 774-775, 777 (1976); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1971). Even if individual recipients of financial assistance or nonminority contractors have not themselves discriminated, Congress may require them to adjust their conduct in order to ensure, for example, that in the allocation of funds under the 1977 local public works program minorities do not suffer the lingering effects of past discrimination in the construction industry.

Katzenbach v. *Morgan*, 384 U.S. 641 (1966), illustrates this point. There, the Court upheld federal legislation prohibiting application of New York State's literacy requirements to citizens educated in schools accredited by the Commonwealth of Puerto Rico, regardless of whether the New York requirement itself violated the Fourteenth Amendment. The Court explained (384 U.S. at 653) that Congress, in the exercise of its power under Section 5 of the Fourteenth Amendment, was the proper governmental branch to

> assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on

> the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement as applied to residents who have successfully completed the sixth grade in a Puerto Rican school.

Morgan thus demonstrates that, when Congress has determined that a particular measure is necessary to remedy a Fourteenth Amendment violation or to prevent the occurrence of such a violation (*e.g.*, the discriminatory denial of public services to Puerto Ricans), the Court will not interfere and reweigh the factors considered by Congress in reaching that judgment, even if the legislative solution chosen adversely affects some state practice (*e.g.*, the use of a literacy test as a qualification for voting) that itself does not necessarily violate the Fourteenth Amendment or any other constitutional provision. See also *United Jewish Organizations* v. *Carey*, *supra*, 430 U.S. at 161; *Oregon* v. *Mitchell*, 400 U.S. 112 (1970).

The same reasoning applies here. Congress is the governmental body uniquely well situated to determine which groups have suffered discrimination in the past and what measures are most likely to prevent further discrimination and to restore members of those groups to the position they would have occupied had the discrimination not occurred. As Mr. Justice Powell observed in *Bakke*, this Court has "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." 438 U.S. at 302 n.41.

Indeed, petitioners have conceded (A. 192a) that the racial classification established by the minority business enterprise provisions serves a compelling governmental interest if it is intended to remedy the effects of present or past discrimination. They argue, however, that the legislative history of Section 103(f)(2) "fails to evince findings of prior discrimination sufficient to justify upholding" a federal grant statute that takes race and national origin into account in distributing government funds (Pet. Br. 14-21; GBC Br. 10-17).[11] They also contend (Pet. Br. 21-28; GBC Br. 18-31) that, even if Congress' purpose was to remedy the effects of past discrimination, the 10% minority set-aside is an unacceptable method of accomplishing that end, because it imposes an unnecessary burden on nonminority businesses that wish to compete for local public works funds. We address these arguments in turn.

B. Congress Concluded that Legislative Action Was Necessary to Eliminate the Effects of Discrimination in the Construction Industry

1. Inquiry into the congressional purpose underlying the MBE provision must begin with an appreciation of the unique nature of the legislative role. While courts decide cases and controversies on the basis of

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[11] "Pet. Br." refers to the brief apparently filed by all petitioners. "GBC Br." refers to the brief filed by petitioner General Building Contractors of New York State, Inc.

individual records, legislatures address broader problems and attempt to devise solutions that extend beyond the parties to any single dispute. As this Court observed in *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 221 n.10 (1974), "[t]he legislative function is inherently general rather than particular and is not intended to be responsive to adversaries asserting specific claims or interests peculiar to themselves." A legislature, unlike a court or an administrative agency, is not obligated to confine its attention to the material contained in a record compiled for the resolution of a particular dispute. Rather, it is empowered to make laws on the basis of information obtained from a variety of sources in a variety of ways. It may rely on the accumulated experiences of its individual members and on its collective evaluation of the success or failure of past legislative attempts to solve particular problems. When it desires additional information, it may conduct its own investigation unrestricted by many of the procedural rules that govern judicial and agency action.

These distinctive features of the legislative role, which are, of course, rudimentary in our system of separation of powers, bear repeating here because of the kind of attack petitioners level against the minority business enterprise provision. Petitioners assert that Section 103(f)(2) of the Public Works Employment Act is invalid because the legislative history of the statute does not contain the "detailed findings of constitutional or statutory violations (Pet. Br. 15)

allegedly necessary to justify the use of a racial classification in the distribution of government benefits. Petitioners maintain that the courts below erred by "embark[ing] on a search outside of the legislative record in an effort to sustain" the MBE provision (Pet. Br. 17).

This argument is based on a false premise. By their unstated assumption that congressional policy decisions must stand or fall on the basis of a limited collection of materials known as the "legislative record," petitioners cast Congress in the role of an administrative agency whose actions are subject to judicial review under something akin to the "substantial evidence" standard. Petitioners' challenge to the MBE provision thus rests on a fundamental misconception of Congress' place in our constitutional system. Contrary to petitioners' apparent belief, Congress may legislate on the basis of everything it knows about a particular situation, and it need not record every—or even any—element of factual support for a bill in the accompanying committee reports or in the course of floor debates.[12] Specific findings that a proposed remedial measure will assist only those who have suffered injury in the past and will adversely affect only those who have caused such injury are not necessary. "Congress may paint with a much broader brush." *Oregon* v. *Mitchell*, 400 U.S. 112, 284 (1970) (Stewart, J., concurring in part and dissenting in part).

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[12] Indeed, neither committee consideration nor floor debate is required at all in order for a bill to be validly enacted into law under the procedures prescribed by Article I of the Constitution.

Because Congress is engaged in the business of framing general rules for the governance of society, not the resolution of individual disputes, judicial review of a federal statute proceeds differently from review of agency action. An agency ordinarily must state the reasons for its action in the administrative record, and if a reviewing court finds those reasons deficient, it will normally reverse and remand for further proceedings without examining other possible justifications for the agency's decision; this is often true even where the additional or alternative reasons for agency action are known to the court and supported by extra-record material. See *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943). By contrast, in its efforts to ascertain legislative purpose on review of a federal statute, a court need not restrict its vision to the contents of a legislative record compiled by Congress. A court may look not only to the statute's legislative history, narrowly defined, but also to the language of the statute, its relationship with other federal laws, and any other available materials that may explain the congressional decision to adopt a particular measure.

To be sure, when a statutory provision involves a racial classification, a reviewing court must take special care in satisfying itself that the congressional purpose underlying the provision is legitimate and compelling.[13] But this does not mean that the court

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[13] As four members of the Court stated in *Bakke,* "because of the significant risk that racial classifications established

must limit its attention to a discrete body of materials labelled the "legislative record." On the contrary, the court may and should consider all sources of information concerning the reasons for congressional action. Statutes involving racial classifications are, in this respect, no different from any others. Legislative purpose may be found in any materials that tend to reveal the reasons for a statute's enactment.[14] Cf.

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for ostensibly benign purposes can be misused, * * * it is inappropriate to inquire only whether there is any conceivable basis that might sustain such a classification. Instead, to justify such a classification an important and articulated purpose for its use must be shown." 438 U.S. at 361 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

Contrary to petitioners' contention (Pet. Br. 12 & n.4, 15 n.6), this statement was not intended to suggest that a statutory racial classification can never be sustained unless Congress includes in the "legislative record" specific findings of past discrimination and an explicit declaration that the statute's purpose is to remedy that discrimination. Indeed, the four members of the Court who joined the statement would have upheld the admissions program employed by the Medical School of the University of California at Davis, even though, as Mr. Justice Powell observed, the racial classification used in that program was not supported by any "determination by the legislature or a responsible administrative agency that the University engaged in a discriminatory practice requiring remedial efforts." 438 U.S. at 305. See also *id.* at 305-310. A fortiori here, where Congress *has* identified a history of discrimination in the construction industry and has enacted the MBE provision in response to that background, the constitutionality of the statute's reliance on minority ownership as a distinguishing factor for potential contractors in federally funded public works projects should be sustained.

[14] A different rule, such as the one advocated by petitioners, would encumber the legislative process in ways not required

Village of Arlington Heights v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-268 (1977);

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by, and arguably inconsistent with, Article I of the Constitution. An obligation to make a thorough "legislative record" for each statute would severely hamper Congress' ability to perform its lawmaking function, but would not contribute significantly to either the quality of the final legislative product or the reliability of the information available to a court on judicial review. Committee staffs presumably would be assigned the task of inserting voluminous prepared materials into the "legislative record" in order to ensure that a reviewing court would find a sufficient factual basis for congressional action. No substantive benefit would accrue to the lawmakers' empirical knowledge or their deliberative processes, but Congress might often be disabled, for practical purposes, from making eleventh-hour changes in proposed bills to reflect the realities of political compromise. The need to compile a "legislative record" adequate to survive the kind of judicial review contemplated by petitioners would inevitably reduce the usefulness of important legislative devices such as the floor amendment, through which Congress can adjust proposed statutory language in response to concerns raised during general debate and can thereby better fulfill its representative role.

This Court's decisions show that measures first advanced as floor amendments do not fail because of inadequate contemporaneous statements of legislative purpose. In *Katzenbach* v. *Morgan, supra,* for example, the Court sustained Section 4(e) of the Voting Rights Act of 1965, despite Congress' failure explicitly to declare the reasons for the statute's adoption. The Court examined the information known to Congress in order to determine whether there was a sufficient basis for the exercise of legislative power. See 384 U.S. at 651-656. Section 4(e) was a floor amendment to the Act, and the committee hearings and reports therefore did not refer to the provision. 384 U.S. at 669 n.9 (Harlan, J., dissenting). See also *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 252 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294, 299 (1964).

Califano v. *Goldfarb*, 430 U.S. 199, 212-217 (1977); *Califano* v. *Webster*, 430 U.S. 313, 316-321 (1977).

2. Applying these principles of judicial review, the district court and court of appeals in the present case correctly concluded that Congress added the MBE provision to the Public Works Employment Act of 1976 in order to remedy the effects of discrimination against minority-owned businesses. Of course, the primary aim of the Act as a whole (and its predecessor, the Local Public Works Capital Development and Investment Act of 1976) was to stimulate the national economy and especially the sagging construction industry. Unemployment in the industry was high, and Congress hoped that grants for local public works programs would generate construction jobs that would in turn induce a more widespread economic revival. S. Rep. No. 95-38, 95th Cong., 1st Sess. 1-2 (1977); H.R. Rep. No. 95-20, 95th Cong., 1st Sess. 1-2 (1977); A. 35a-44a, 188a & n.6. But those overall aims of the Act do not imply that Congress had no further purpose for enacting particular provisions in the statute. To the contrary, the available evidence demonstrates that the MBE provision was intended to redress past discrimination against black and other minority contractors, while at the same time contributing to the general congressional goal of "target[ing] the Federal assistance more accurately into the areas of greatest need." H.R. Rep. No. 95-20, *supra*, at 2.

When Congress enacted the MBE provision, it knew that the unemployment rate among minority workers was twice as high as that among nonminor-

ity workers. See 123 Cong. Rec. S3910 (daily ed. Mar. 10, 1977) (remarks of Sen. Brooke); *id.* at H1423 (daily ed. Feb. 24, 1977) (remarks of Rep. Stokes). *Public Works Employment Act of 1977: Hearings Before the Subcomm. on Regional and Community Development of the Senate Comm. on Environment and Public Works* 95th Cong., 1st Sess. 110, 137, 155, 401 (1977). Congress also knew that unemployment in the minority construction sector was particularly severe. 123 Cong. Rec. H1423 (daily ed. Feb. 24, 1977) (remarks of Rep. Stokes). Moreover, Congress acted against the backdrop of more than two decades of legislative efforts to end racial and ethnic discrimination in the market place and to remedy the effects of discrimination against minorities.[15] Experience with these earlier efforts gave Congress a broad perspective on the deep-seated nature of the problems encountered by minorities as a result of past discrimination in this country. As the court of appeals held in rejecting petitioners' argument that the MBE provision was not intended to remedy discrimination (A. 215a-216a, footnote omitted),

> [i]n view of the comprehensive legislation which Congress has enacted during the past decade and

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[15] The term "minority" as used in the MBE provision refers to American citizens who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts. Before the enactment of the MBE provision, this definition had been used in federal affirmative action efforts under regulations concerning the procurement of government supplies and the performance of government contracts. See, *e.g.*, 41 C.F.R. 1-1.1302, 1-1.1303, 1-1.1310-2.

> a half for the benefit of those minorities who have been victims of past discrimination, any purpose Congress might have had other than to remedy the effects of past discrimination is difficult to imagine.

See also *Constructors Ass'n of Western Pennsylvania* v. *Kreps*, 573 F.2d 811, 817 (3d Cir. 1978); *Rhode Island Chapter, Associated General Contractors of America* v. *Kreps*, 450 F. Supp. 338 (D. R.I. 1978). Cf. *Regents of the University of California* v. *Bakke, supra,* 438 U.S. at 348-349 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

Many times during the last 10 years, Congress has given specific attention to the problems encountered by minority-owned businesses,[16] and has enacted leg-

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[16] See, *e.g.*, *Review of Small Business Administration's Programs and Policies—1971: Hearings Before the Senate Select Comm. on Small Business,* 92d Cong., 1st Sess. 283-284 (1971); *Government Minority Small Business Programs: Hearings Before the Subcomm. on Minority Small Business Enterprise of the House Select Comm. on Small Business,* 92d Cong., 1st Sess. (1971); *Government Minority Enterprise Programs—Fiscal Year 1974: Hearings Before the Subcomm. on Minority Small Business Enterprise and Franchising of the House Permanent Select Comm. on Small Business,* 93d Cong., 1st Sess. (1973); *Minority Enterprise and Allied Problems of Small Business: Hearings Before the Subcomm. on SBA Oversight and Minority Enterprise of the House Comm. on Small Business,* 94th Cong., 1st Sess. (1975), and the related report, H.R. Rep. No. 94-468, 94th Cong., 1st Sess. (1975); *The Effects of Government Regulations on Small Business and the Problems of Women and Minorities in Small Business in the Southwestern United States: Hearing Before the Senate Select Comm. on Small Business,* 94th Cong., 2d Sess. (1976); *Minority Business Development Ad-*

islation designed to remedy these problems.[17] When Congress enacted the MBE provision, it was fully aware that as a result of discrimination minorities are represented in disproportionately low numbers in the ownership of businesses [18] and that those few minority-owned businesses that do exist receive a minuscule share of the total gross receipts of American businesses and of the federal, state, and local contract dollar.[19] "Of $2.54 trillion in gross business

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ministration: Hearing Before the Minority Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations, 94th Cong., 2d Sess. (1976).

[17] We have included, as an Appendix to this brief, additional materials describing the problems encountered by minority-owned businesses as a result of discrimination and the programs Congress has developed in an attempt to remedy the effects of previous discrimination and to prevent discrimination in the future.

[18] In 1976, Senator Javits explained on the floor of the Senate that "while minority persons comprise over 15 percent of the Nation's population only 3 percent of the 13 million businesses in the United States are owned by minority persons." 122 Cong. Rec. 13866 (1976).

[19] Petitioners contend (Pet. Br. 19-20) that "a low representation of minorities can be found only if *both* the pre-1965 and post-1965 periods are taken into account together" and that statistics including the effects of discrimination occurring before 1965, the effective date of Titles VI and VII of the Civil Rights Act of 1964, are legally irrelevant. Petitioners' factual contention is unsupported by any authority and is inconsistent with the statistical data that show that, although there has been some increase in minority participation in business, minorities have been significantly under-represented in business revenues on a yearly, not just a cumulative, basis. See, *e.g.*, 124 Cong. Rec. E985 (daily ed.

receipts for the nation, about $16.6 billion, or 0.65 percent, of that total was realized by the minorities." 122 Cong. Rec. 34754 (1976) (statement by Sen. Glenn).[20] Less than one percent of the federal contract dollar goes to minority enterprises. See 123 Cong. Rec. S3910 (daily ed. Mar. 10, 1977) (remarks of Sen. Brooke).[21] Referring to this under-

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Mar. 2, 1978) (remarks of Rep. Hamilton); 122 Cong. Rec. 34754 (1976) (statement of Sen. Glenn). See also notes 21 and 24, *infra*.

More important, petitioners' apparent assumption that Congress does not have a legitimate interest in eliminating the effects of discrimination that occurred before 1965 is incorrect. Whether or not the discriminatory practices that hampered the development of minority businesses were illegal before the passage of the 1964 Civil Rights Act (and they may well have violated 42 U.S.C. 1981 and the Thirteenth and Fourteenth Amendments), Congress is empowered to declare the continuing effects of such discrimination unacceptable and to redress the disadvantages that minority businesses still suffer as a result of deliberate exclusion in the past.

[20] See also *Minority Business Development Administration: Hearing Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations*, 94th Cong., 2d Sess. 2 (1976) (remarks of Sen. Glenn); H.R. Rep. No. 94-1791, 94th Cong., 2d Sess. 124 (1977). The latter report is a summary of the activities of the House Committee on Small Business.

[21] There are few statistics available concerning the amount of state and local contracts going to minority businesses. Firms owned by minority group members received less than seven-tenths of one percent of all contracting dollars spent by those state and local governments that provided data in response to a 1973 United States Civil Rights Commission Survey, the results of which were transmitted to Congress in 1975 (see 42 U.S.C. 1975c(b)). See *Minorities and Women*

representation of minority businesses, a 1975 report of the Subcommittee on SBA Oversight and Minority Enterprise of the House Committee on Small Business concluded that

> [T]he effects of past inequities stemming from racial prejudice have not remained in the past. The Congress has recognized the reality that past discriminatory practices have, to some degree, adversely affected our present economic system.
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> * * * * *
>
> The presumption must be made that past discriminatory systems have resulted in present economic inequities.

H.R. Rep. No. 94-468, 94th Cong., 1st Sess. 1-2 (1975).

Congress, however, did not need to rely solely on the statistical showing of discrimination against minority-owned businesses. Through many years of hearings and debates on legislation to proscribe discriminatory conduct against minorities, and particularly through past efforts to deal with the problems of minority businesses, Congress has gained considerable experience in identifying and dealing with the effects of discrimination. Congress has learned that "[f]or a complex of historical reasons—lack of capi-

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as Government Contractors, A Report of the United States Commission on Civil Rights 2, 86 (May 1975). The report's findings have been cited by congressional committees concerned with the problems of minority-owned businesses. See, *e.g.*, H.R. Rep. No. 94-468, 94th Cong., 1st Sses. 11 (1975).

tal, exclusions from trades,[22] discrimination by business people and the public—minority business has been concentrated in that part of the market found least profitable by other businesses." [23] Moreover, minority-owned businesses have been excluded from opportunities in the construction industry by the operation of subtle, but nonetheless discriminatory, forces.[24] As the Appendix indicates, the discrimina-

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[22] Indeed, "[j]udicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice." *Steelworkers* v. *Weber*, Nos. 78-432, 78-435, 78-436 (June 27, 1979), slip op. 2 n.1. Like this Court, the lower federal courts are well aware of the pervasive nature of discrimination in the construction industry. See, *e.g.*, *United States* v. *Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971); *Contractors Ass'n of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971); *United States* v. *Masonry Contractors Ass'n of Memphis*, 497 F.2d 871 (6th Cir. 1974); *Associated General Contractors of Mass., Inc.* v. *Altshuler*, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974). See also the cases cited by the district court in the present case dealing with discrimination in New York (A. 198a n.17). Among other consequences, employment discrimination has the effect of blocking at an early stage one leading avenue toward becoming a contractor. See *Rhode Island Chapter, Associated General Contractors* v. *Kreps*, 450 F. Supp. 338, 356 (D. R.I. 1978).

[23] *The Effects of Government Regulations on Small Business and the Problems of Women and Minorities in Small Business in the Southwestern United States: Hearings Before the Senate Select Comm. on Small Business*, 94th Cong., 2d Sess. 3 (1976) (remarks of Sen. Bartlett); see also *id.* at 18 (statement of Sen. Laxalt).

[24] In 1972, according to Bureau of the Census statistics, the gross receipts for minority-owned firms constituted approximately 1.1% of the total receipts for all firms. 1972 Census

tory practices of nonminority lenders, insurers, contractors, and purchasers, as well as those of federal and state government officials, have excluded minority-owned businesses from available contracting opportunities.[25] These discriminatory practices continue to

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of Construction Industries, *United States Summary—Statistics for Construction Establishments With and Without Payrolls*, Table A1 (August 1975); 1972 Survey of Minority-Owned Business Enterprises, *Minority-Owned Businesses*, Table 1 (May 1975) (hereinafter "Summary Volume"). Available data indicate that the total number of minority-owned firms (which in some circumstances may include more than one establishment) in the construction industry is approximately 4.3% of the total number of establishments in the construction industry. 1972 Census of Construction Industries, *United States Summary—Statistics for Construction Establishments With and Without Payrolls*, Table A1 (August 1975); 1972 Survey of Minority-Owned Businesses, *supra.* Summary Volume, Table 1. Similarly, the total number of minority-owned firms (which may in some instances include more than one establishment) in the heavy construction industry is approximately 2.3% of the total number of establishments in the heavy construction industry and this group receives only 0.3% of the total receipts for heavy construction work. 1972 Census of Construction Industries, *United States Summary—Statistics for Construction Establishments With and Without Payrolls*, Table A1 (August 1975); 1972 Survey of Minority-Owned Business Enterprises, *supra*, Summary Volume, Table 1.

As used in the Census statistical tables, the term "minority" includes, blacks, persons of Spanish-origin, and persons of Asian American, American Indian, or other ancestry. 1972 Survey of Minority-Owned Business Enterprises, *supra*, Summary Volume at 1.

[25] Petitioners erroneously assert (GBC Br. 14) that a 1975 Report of the United States Civil Rights Commission, Minorities and Women as Government Contractors (May 1975), "does not list discrimination as an obstacle to minority business enterprise participation in federal procurement programs". This assertion is incorrect. See *id.* at 21 and 107.

limit the opportunities available to minority-owned businesses because they deny minority-owned businesses the credentials needed for success in the business community.

Nonminority lenders and insurers make subjective evaluations of the credit-worthiness and insurability of minority owned firms. See App., *infra*, 5a-6a, 17a-20a. Because minority-owned firms have often been discriminated against in their efforts to obtain loans and bonding, nonminority lenders and insurers often deny the applications of minority-owned businesses on the ground that they do not have a sufficient credit-rating or record of success.

Similarly, minorities seeking to obtain contracts as suppliers or subcontractors are often precluded from obtaining employment because of the effects of prior discrimination. Although prime contracts for government funded construction projects are normally let by a competitive bidding process, contracts for supplies and subcontracts for construction work are often let through the subjective process of negotiated contracts. Because minority-owned businesses have been precluded by previous discrimination from gaining experience as contractors and suppliers in the construction industry, many nonminority contractors have no experience in dealing with minority-owned businesses. As a result, nonminority-owned businesses are unlikely to contract with minorities. As the testimony at trial demonstrates, established contrac-

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Moreover, petitioners offer no rational explanation for the low level of minority participation in the construction industry that would rebut the inference that minorities have been excluded by discrimination and its lingering effects.

tors are frequently unfamiliar with the abilities of minority-owned businesses and are reluctant to contract with firms that do not have a known "track record" (A. 65a, 81a, 86a, 89a-91a). See App., *infra*, 16a-18a.

Recognizing the problems encountered by minority-owned businesses, Congress has enacted a number of measures designed to aid minority contractors and subcontractors and to insure that federal programs do not have the effect of excluding minorities. See, *e.g.*, Section 8(a) of the Small Business Act of 1958, Pub. L. No. 85-536, 72 Stat. 389, 15 U.S.C. 637(a). By the time Congress considered the Public Works Employment Act of 1977, however, neither previous legislative efforts, nor parallel efforts by the Executive,[26] had had a substantial impact on the prospects of minority-owned businesses. Nor had antidiscrimination provisions such as 42 U.S.C. 1981 and Title VI of the Civil Rights Act of 1964 been successful in eliminating prejudice against such firms. In November 1976 the House Committee on Small Business described the problems still encountered by minority businesses in the following way (H.R. Rep. No. 94-1791, 94th Cong., 2d Sess. 182-183 (1977)):

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[26] Exec. Order No. 11,458, 34 Fed. Reg. 4937 (1969), as amended by Exec. Order No. 11,625, 36 Fed. Reg. 19967 (1971), established the Office of Minority Business Enterprise within the Department of Commerce. The Office is charged with the responsibility for devising programs and coordinating inter-agency activities to encourage development of minority enterprises. Federal procurement regulations also require all federal agencies to ensure that businesses dealing with the government take efforts to extend contracting opportunities to minority business enterprises. 41 C.F.R. 1-1.1302.

> 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. However, inroads are now being made and minority contractors are attempting to "break-into" a mode of doing things, a system, with which they are empirically unfamiliar and which is historically unfamiliar with them.

Thus, in the face of earlier failures, Congress was aware of the need to develop a program that would insure that the four billion dollars to be appropriated in Round II of the local public works program would not be used to carry forward the effects of discrimination. Although the legislative discussion of the MBE provision is sparse because the provision was proposed as an amendment during floor debate, the contemporaneous evidence fully supports the conclusion that the provision was intended to remedy the effects of discrimination against minority businesses. When the 1977 legislative materials are viewed in light of Congress' previous efforts to accomplish the same purpose, it is indeed "difficult to imagine" (A. 216a) that Congress had anything

else in mind when it added Section 103(f)(2) to the Public Works Employment Act.

On Friday, February 4, 1977, the final day of hearings in the House on H.R. 11, the bill that became the 1977 Act, the subcommittee received testimony from the Michigan Advisory Committee to the United States Commission on Civil Rights. *To Amend and Extend the Local Public Works Capital Development and Investment Act: Hearings before the Subcomm. on Economic Development of the House Comm. on Public Works and Transportation*, 95th Cong., 1st Sess. 808-835 (1977). Jo-Ann Terry, the chairperson of the Advisory Committee, reported on the Committee's "findings regarding the racial impact of the December 1976 local public works project selections in Michigan" (*id.* at 809). On the basis of data received from the Economic Development Administration only a few days earlier, the Committee concluded that "among those jurisdictions funded, those with few minorities received significantly more local public works funding per capita than did those jurisdictions with high minority populations" (*ibid.*). Terry told the House subcommittee that, at least in Michigan and perhaps in other states as well, "the purposes of Congress have been distorted by the EDA's project selections" in implementing Round I of the local public works program (*id.* at 810). Terry charged that the program, intended to provide long-term benefits through capital improvements, had been

"distorted so that it is literally setting discrimination in concrete" (*ibid.*).[27]

In response to the testimony from the Michigan Advisory Committee, Representative Conyers asked the subcommittee's permission to review the materials suggesting the existence of racial discrimination in the distribution of project funds and then to discuss the matter with the subcommittee. Subcommittee Chairman Roe agreed (*Hearings*, at 837) to allow Representative Conyers to meet with the subcommittee after the upcoming weekend and to express his views concerning the Michigan data at that time. On Monday, February 7, 1977, Representative Conyers appeared before the subcommittee to comment on the evidence of "the racially discriminatory im-

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[27] Frank Steiner, a staff representative of the Civil Rights Commission who accompanied Terry at the hearing, testified (*Hearings*, at 830) that

> it is traditionally and generally understood that unemployment rates among minority groups have been generally twice what they have been among whites, and particularly so in areas that are all minority or predominantly minority.
>
> So we would assume that the level of statistical significance of these correlations between LPW funding levels and minority percent of population would probably be another order of magnitude more significant, and doubled perhaps, if based on unemployment data as base data.

Steiner also stated that the bias identified by the Michigan Advisory Committee was a racial one, not one based on the urban or rural character of the funded areas or the size of the areas' population. "It is clearly race and it is statistically significant as race," Steiner said (*ibid.*).

pact of public works grants in the state of Michigan" (*id.* at 937). After discussing some of the probable reasons for the disproportionate distribution of 1976 project funds to communities with low minority populations (*Hearings*, at 937-938), Representative Conyers informed the subcommittee that he had been "contacted by individuals who believe that minorities and women have been deprived of employment and contracting opportunities on LPW-funded projects" (*id.* at 939). Representative Conyers stated that he had not had time to investigate the allegations but that "the historical pattern of discrimination within the construction industry lends credence to their charges" (*ibid.*). He promised to study the subject further and, if it appeared that minorities and women did suffer discrimination under Round I of the local public works program, to propose an amendment to strengthen the nondiscrimination provisions in Title VI of the 1964 Civil Rights Act and in Section 110 of the 1976 Local Public Works Act, 42 U.S.C. 6709.

Two and a half weeks later, during floor debate on H.R. 11, Representative Mitchell moved to amend the bill by adding a minority business enterprise provision very similar to the one ultimately enacted into law. 123 Cong. Rec. H1436 (daily ed. Feb. 24, 1977).[28] He explained (*ibid.*) that "all this amend-

[28] As initially introduced, the provision stated:

> Notwithstanding any other provision of law, no grant shall be made under this Act for any local public works project unless at least 10 per centum of the dollar volume

ment attempts to do is to provide that those who are in minority businesses get a fair share of the action from this public works legislation." Representative Mitchell also described how the 10% set-aside would complement existing federal efforts to aid minority businesses. He stated (*id.* at H1436-H1437):

> We spend a great deal of Federal money under the SBA program creating, strengthening and supporting minority businesses and yet when it comes down to giving those minority businesses a piece of the action, the Federal Government is absolutely remiss. All it does is say that, "We will create you on the one hand and, on the other hand, we will deny you." That denial is made absolutely clear when one looks at the amount of contracts let in any given fiscal year and then one looks at the percentage of minority contracts. The average percentage of minority contracts, of all Government contracts, in any given fiscal year, is 1 percent—1 percent. That is all we give them. On the other hand we approve a budget for OMBE, we approve a budget for the SBA

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of each contract shall be set aside for minority business enterprise and, or [*sic*], unless at least 10 per centum of the articles, materials, and supplies which will be used in such project are procured from minority business enterprises. For purposes of this paragraph, the term "minority business enterprise" means a business at least 50 percent of which is owned by minority group members or, in case of publicly owned businesses, at least 51 percent 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.

> 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.

Characterizing the MBE provision as "the only way we are going to get the minority enterprises into our system," Representative Mitchell urged that his amendment be adopted, "because to the extent we are willing to let minorities do business with the government, we will be able to reduce survival support programs now paid for by the Federal Government" (*id.* at H1437). He concluded by stating that the minority set-aside was designed "to begin to redress this grievance that has been extant for so long" and "to give [local political subdivisions] the added impetus to do those things which are right and fair" (*id.* at H1440).

Representative Biaggi spoke in support of the Mitchell amendment. He stated (123 Cong. Rec. H1440 (daily ed. Feb. 24, 1977)):

> This Nation's record with respect to providing opportunities for minority businesses is a sorry one. Unemployment among minority groups is running as high as 35 percent. Approximately 20 percent of minority businesses have been disolved [*sic*] in a period of economic recession.
>
> * * * * *
>
> [W]ithout adoption of this amendment, this legislation may be potentially inequitable to minority businesses and workers. It is time that the thousands of minority businessmen enjoyed a sense

> of economic parity. This amendment will go a long way toward helping to achieve this parity and more importantly to promote a sense of economic equality in this Nation.

Representative Conyers added (*ibid.*) that "minority contractors and businessmen who are trying to enter in on the bidding process * * * get the 'works' almost every time. * * * The sad fact of the matter is that minority enterprises usually lose out, and * * * through no fault of their own simply have not been able to get their foot in the door." See also *id.* at H1423 (remarks of Rep. Stokes).

The House agreed to the proposed MBE provision after amending it to make clear that the Secretary of Commerce was authorized to waive the 10% minority requirement in project areas where sufficient minority contractors and material suppliers were not available (123 Cong. Rec. H1437-H1438 (daily ed. Feb. 24, 1977)). The amended version of Representative Mitchell's proposal also specified that "10 percent of the amount of each grant shall be expended for minority business enterprises"; this language was substituted in place of the requirement in the original version of the MBE provision that 10% of "the dollar volume of each contract" should be set aside for minority businesses and 10% of the "article, materials and supplies" used in each project should be procured from such firms (*ibid*; see note 28, *supra*). Later the same day, the House passed H.R. 11 (123 Cong. Rec. H1461-H1462 (daily ed. Feb. 24, 1977)).

During the Senate's consideration of its version of the 1977 Public Works Employment Act, Senator Brooke moved to amend the bill by adding a provision requiring that 10% of the "articles, materials and supplies" used in any local public works project be procured from minority business enterprises. 123 Cong. Rec. S3910 (daily ed. Mar. 10, 1977). In support of the amendment, Senator Brooke stated that such a provision is "a legitimate tool to insure participation by hitherto *excluded* or unrepresented groups" (*ibid.*; emphasis added). The Senator also said that the 10% set-aside measure was necessary "because minority businesses have received only 1 percent of the Federal contract dollar, despite repeated legislation, Executive orders and regulations mandating affirmative efforts to include minority contractors in the Federal contracts pool" (*ibid.*). Senator Brooke's amendment was adopted and included in S.427 as it passed the Senate (*id.* at S3910, S3926-S3929).

Without commenting on the matter, the Conference Committee adopted the House version of the MBE provision. S. Conf. Rep. No. 95-110, 95th Cong., 1st Sess. (1977); H.R. Conf. Rep. No. 95-230, 95th Cong., 1st Sess. (1977). The Senate and the House passed the bill as reported by the Conference Committee, and Representative Mitchell's proposal became law. 123 Cong. Rec. S6755-S6757 (daily ed. Apr. 29, 1977); *id.* at H3920-H3935 (daily ed. May 3, 1977).

The limited legislative history of the MBE provision thus shows that the measure was intended to en-

sure that minority businesses would not be excluded from the benefits of the 1977 public works program solely on the basis of past obstacles to minority entry into the construction industry. Although the reasons for the restricted opportunities available to minority contractors before 1977 and the disproportionately small participation of minority businesses in the national economy were not rehearsed in the committee reports or floor debates, Congress was fully aware of the background of discrimination that had affected and continued to affect both the construction industry and many other segments of the American economy. The tone of the floor discussion, as well as Representative Conyer's reference in the House hearing to "the historical pattern of discrimination within the construction industry" (see page 45, *supra*), bears witness to Congress' familiarity with the problem of discrimination against blacks and other minorities. Congress' recognition of the debilitating impact of discrimination on the prospects of minority-owned businesses is amply demonstrated not only by the very fact of Section 103(f)(2)'s inclusion in the 1977 Act but also by the history of previous congressional efforts to prevent such discrimination and to remedy its effects. Petitioners do not contend that this discrimination did not occur, and indeed they offer no satisfactory explanation for the dismal share of construction contracting work performed by minority firms. In light of the full legislative background, the congressional purpose emerges with clarity. As the Third Circuit held in *Constructors Ass'n of West-*

ern Pennsylvania v. *Kreps, supra,* 573 F.2d at 817 (footnotes omitted), the MBE provision

> was designed to "begin to redress" what Congress perceived to be the continuing economic impact of racial discrimination. Such a purpose might well be sufficient to allow the legislature to take notice of findings by the government in other aspects of the national anti-discrimination effort to the effect that minority contractors labor under handicaps requiring remedial action. Moreover, the debates in connection with the MBE set-asides evidence a Congressional determination that other attempts to encourage minority businesses have not proved successful.[29]

C. The MBE Provision Is A Constitutionally Permissible Means By Which Congress May Seek to Eliminate The Effects of Discrimination in the Construction Industry

1. In responding to the second part of petitioners' attack on the minority business enterprise provision, we again begin by emphasizing the special role of Congress in developing appropriate remedial measures to redress the effects of past racial and ethnic discrimination. This Court recognized long ago in *Mc-*

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[29] The congressional determination that more concrete remedial measures are required is shared by the Executive Branch. President Carter has directed that expanded efforts be made by all federal agencies to strengthen minority business development through increased federal deposits in minority-controlled banks and by encouraging greater participation of minority-owned enterprises in supplying the government's procurement needs. See 13 Weekly Comp. of Pres. Doc. 511 (Apr. 8, 1977); *id.* at 1333 (Sept. 12, 1977).

Culloch v. *Maryland,* 17 U.S. (4 Wheat.) 316, 420 (1819), that when Congress exercises its powers under the Constitution, its determination concerning the need for legislation and the proper method of accomplishing legislative goals is entitled to substantial deference. This general principle applies with particular force when Congress acts to enforce the guarantees of the Civil War Amendments. Those Amendments, through their explicit grant of legislative enforcement power, authorize Congress "to exercise its discretion in determining whether and what legislation is needed" to eliminate present discrimination and the continuing effects of past discrimination. *Katzenbach* v. *Morgan, supra,* 384 U.S. at 651.

The framers of the Civil War Amendments wisely entrusted this enforcement responsibility to Congress. In our system of separation of powers, Congress is the branch of government best suited to determine whether broadly applicable remedial action is needed and, if so, what legislative measures are most appropriate in light of all the relevant considerations. Congress' special ability to gather and evaluate a wide range of factual information provides an immeasurable advantage in the formulation of remedial measures that are likely not only to achieve their immediate objectives but also to do so without jeopardizing other important values. See Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights,* 80 HARV. L. REV. 91, 106-107 (1966).

In redressing the effects of discrimination against minorities, for example, Congress is the body best

able to devise meaningful forms of relief for victimized groups while at the same time accommodating the legitimate interests of persons who have neither discriminated nor suffered discrimination and who claim an entitlement to government benefits. Congress' role as the most representative of the three branches of government makes it the appropriate forum in which to balance these competing interests.

Moreover, a legislative compromise, once reached, endures only as long as a more desirable solution to the particular problem at hand does not commend itself to a majority of Congress. Congressional efforts to remedy discrimination therefore possess the dual virtue of being both the best available approximation of majority will at the time of enactment and readily subject to modification or discard in light of increased experience or changed circumstances. See Monaghan, *Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1, 28-29 (1975).

For these reasons, courts reviewing the constitutionality of legislation intended to further the purposes of the Civil War Amendments should be reluctant to disturb the balance struck by Congress. The rule of "presumptive invalidity" advocated by petitioners (Pet. Br. 9-10) is inappropriate. When Congress seeks to remedy the effects of discrimination, a statutory racial classification should be sustained if Congress has reason to believe that such a measure is necessary to accomplish the legislative goal and if the statute is designed to moderate the adverse effects of the classification on persons argu-

ably not involved in past discrimination. Such a standard recognizes Congress' special role under the Civil War Amendments and preserves the flexibility that the Legislative Branch needs to carry out its constitutional responsibilities.

2. Congress properly determined that the 10% minority set-aside provision in the Public Works Employment Act of 1977 was necessary to ensure that the effects of discrimination in the construction industry would not be carried forward in projects funded under the Act. Previous legislative measures to prohibit the kinds of discrimination that have occurred in the industry and to eliminate the effects of such discrimination in federally funded programs had not succeeded in achieving their goals. The antidiscrimination provisions in 42 U.S.C. 1981, Titles VI and VII of the Civil Rights Act of 1964, and the Equal Credit Opportunity Act (15 U.S.C. 1691 *et seq.*) had made little progress, by 1977, toward increasing the participation of minority business enterprises in the national economy, and the results in the construction industry had been particularly disappointing. Specific legislation enacted to help minority-owned businesses obtain financing and bonding (see, *e.g.*, 15 U.S.C. 694a and 694b) had been similarly ineffective. When Congress enacted the MBE provision, the available information all confirmed that the role of minority businesses in the construction industry and in federal, state, and local contracting generally was extraordinarily small.

Moreover, because the primary objective of the

1977 Act was to stimulate the economy by quickly introducing four billion additional dollars in federal funds into the construction industry, Congress could not afford to wait until the existing statutes for the benefit of minority businesses had produced their intended results. In order to achieve its economic goals, Congress had to act with dispatch. The need for haste is evidenced by the statutory provisions requiring the appropriated funds to be distributed on an expedited basis.[30]

In light of the speed with which the local public works program was to be implemented, Congress recognized that some special measure was necessary to ensure that minority firms would participate significantly in the benefits to be derived from the federal funds. Prospective antidiscrimination provisions

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[30] The appropriations acts for the funds authorized in 1976 and 1977 both required that the federal monies be committed to state and local grantees by September 30, 1977, the end of fiscal year 1977. 90 Stat. 1497; 91 Stat. 122. The 1977 Act provided that, with certain limited exceptions, the grantees that would receive the newly authorized four billion dollars should be selected on the basis of applications filed by December 23, 1976, *i.e.*, applications filed under Round I of the local public works program. 42 U.S.C. (Supp. I) 6707(h); 13 C.F.R. 317.30. In addition to relying for the most part on existing applications in order to avoid the delay entailed in the preparation of new ones, Congress retained the provision in the 1976 Act that required the Secretary to "make a final determination with respect to each application * * * not later than the sixtieth day after the date he receives such application." 42 U.S.C. (and Supp. I) 6706; 13 C.F.R. 317.74(e). Finally, Congress also retained the requirement that each applicant give satisfactory assurance that on-site work would begin within 90 days of project approval. 42 U.S.C. 6705(d).

and government loan or bonding assistance were not good enough; they simply could not produce meaningful change within the time limits of the public works program. Without some positive legislative action to guarantee a place for minority contractors in funded project construction, minority firms would have been largely excluded from the local public works program and the effects of past discrimination in the industry would have been perpetuated and reinforced. In these circumstances, Congress had little choice but to adopt a statutory provision directly addressed to the subject of minority participation in the contracting work that would be generated by the newly authorized federal grants. Rather than affirmatively compelling nonminority contractors to change their subcontracting practices (cf. *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 425), Congress offered them a substantial incentive to do so. Prime contractors willing to agree with state and local grantees that, where possible, 10% of project funds would be expended "for minority business enterprises" thereby became eligible to reap the financial benefits of participation in the federally funded public works program. The MBE provision, in short, was a reasonable, narrowly focused legislative response to a difficult problem that could not have been solved in any other way, given the temporal constraints within which Congress was forced to operate in order to achieve its economic aims.

Nor is the MBE provision subject to criticism on the ground that the benefited group may include

some persons who were not themselves the victims of discrimination. Especially in light of the substantial time pressure, a general rule like the 10% minority set-aside was the best that Congress could devise. Moreover, even if additional time had been available, Congress cannot perform the role that a court plays in identifying individual victims of discrimination in individual lawsuits. The nature of the legislative process requires that Congress act by reference to categories of persons, and statutes are not unconstitutional merely because their beneficiaries include some persons not as deserving as the ones Congress sought to assist. See *Gaston County* v. *United States, supra; Oregon* v. *Mitchell, supra,* 400 U.S. at 147 (opinion of Douglas, J.); *id.* at 216 (Harlan, J., concurring in part and dissenting in part); *id.* at 233-236 (Brennan, White, and Marshall, JJ., concurring in part and dissenting in part); *id.* at 284 (Stewart, J., concurring in part and dissenting in part); *EEOC* v. *American Telephone & Telegraph Co.*, 556 F.2d 167, 177 (3d Cir. 1977), cert. denied, 438 U.S. 915 (1978). Cf. *Califano* v. *Webster, supra.*[31]

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[31] This is not a case like *Craig* v. *Boren,* 429 U.S. 190, 198 (1976), in which a gender classification was used as an inaccurate proxy for other, more precise categories that the legislature could have employed to achieve its legitimate goals. Here, minority status is not a substitute but is the only classification that can be used, because the congressional objective in enacting the MBE provision was the elimination of the effects of past discrimination. Cf. *Califano* v. *Webster, supra* (gender-based classifications upheld where utilized to remedy the effects of gender-based discrimination).

3. Congress designed the MBE provision so that it would have no more than a minimal adverse effect on nonminority contractors arguably not responsible for discrimination in the construction industry. This Court has recognized that, in order to remedy the wrongful exclusion of minorities from economic and social benefits, some "sharing of the burden of the past discrimination" may be necessary. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 777 (1976). Even the most carefully tailored remedial measure may sometimes have an adverse impact on the legitimate interests of nonminorities. *United Jewish Organizations* v. *Carey, supra; Regents of the University of California* v. *Bakke, supra,* 438 U.S. at 366 n.41 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).[32] This alone does not render a racial classification unconstitutional. Rather, when Congress uses race or ethnic background as a distinguishing factor in an effort to eliminate the effects of present or past discrimination, the critical inquiry is whether the means chosen to accomplish the legislative goal strike an acceptable balance between the nonminority interests at stake and the need

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[32] Mr. Justice Powell also concluded in *Bakke* that a university could properly take race into account in its admissions policy in order to promote diversity within the academic community. Thus, a majority of the Court has agreed that a race-conscious program is not unconstitutional solely because it has some adverse effect on nonminorities—who necessarily would be disadvantaged to some extent by an admissions program that considered race as a positive factor, regardless of the reasons for that policy.

for an effective remedial measure. Cf. *Steelworkers* v. *Weber*, *supra*, slip op. 12-13; *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 369-379 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

The MBE provision in the Public Works Employment Act of 1977 properly accommodates the competing interests of minority and nonminority businesses. It ensures meaningful minority involvement in the construction of federally funded public works projects and at the same time imposes only a very limited disadvantage on nonminority contracting firms.

As the court of appeals concluded (A. 221a), the MBE provision "extends to only .25 percent of funds expended yearly on construction in the United States * * * [and] the burden of being dispreferred in .25 percent of the opportunities in the construction industry was thinly spread among nonminority businesses comprising 96 percent of the industry." [33] The

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[33] The court of appeals' calculation of the percentage of total annual construction work represented by minority participation in the public works program should be viewed as an approximation, not an exact finding. The 0.25% figure appears to be based on the assumption that precisely 10% of the funds appropriated under the 1977 Act, or 400 million dollars, were spent for minority business enterprises. In fact, of course, minority contractors participating in some public works projects received more than 10% of the total project grant, while other projects did not involve any minority participation because the unavailability of qualified minority contractors in the appropriate market areas led to the application of the Secretary's waiver rule. See page 62, *infra*. Similarly, the court of appeals' calculation of the percentage

program does not foreclose any nonminority firm from competing with minority firms. Contrary to petitioners' assertion (Pet. Br. 24), the effects of the MBE provision are not concentrated in any identifiable nonminority group. Nonminorities are not excluded from any particular 10% of the funded work. The minority business requirement may be satisfied by a grantee's entering into a prime contract with a minority firm or by a prime contractor's letting subcontracts or supply contracts to minority firms for any portion of the project work or materials. Thus, in competing for each contract, a nonminority bidder is not "foreclosed from all consideration * * * simply because he was not the right color or had the wrong surname." *Regents of the University of California* v. *Bakke, supra,* 438 U.S. at 318 (opinion of Powell, J.). Nor does the program operate "to stigmatize or single out any discrete and insular, or even any identifiable, nonminority group." *Id.* at 374 (opinion of Brennan, White, Marshall and Blackmun, JJ.).[34]

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of minority businesses in the construction industry is also a reliable but inexact approximation. See note 24, *supra.*

[34] The Pacific Legal Foundation, in its brief as amicus curiae (Amicus Br. 17-21), contends that the MBE provision is an illegal bill of attainder because it singles out nonminority contractors for punishment. This contention was not presented to the courts below or in the petition for a writ of certiorari, and therefore is not properly before this Court. See, *e.g., General Pictures Corp.* v. *Western Electric Co.,* 304 U.S. 175, 177-178 (1938); *Lawn* v. *United States* 355 U.S. 339, 362 n.16 (1958). In any event, because the MBE require-

While some nonminority firms may lose some contracts because of the operation of the MBE provision, they are not foreclosed from operating their businesses.[35] They do not suffer the same kind of exclusion from their desired occupation as that suffered by the plaintiffs in *Regents of the University of California* v. *Bakke, supra,* and *Steelworkers* v. *Weber, supra.* The MBE provision, which assures minority participation in one, temporary, federally financed state and local public works program, affecting only one sector of the construction industry, does not entail any total exclusion of nonminorities.

Nonminorities have lost no right or legitimate expectation by the addition of Section 103(f)(2) to the 1976 Act. Cf. *Katzenbach* v. *Morgan, supra,* 384 U.S. at 657. If Congress had not established the 1977 public works program or had omitted the MBE provision from the new authorization but appropriated 10%

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ment can be satisfied by any service, supply, or construction contract and does not foreclose any nonminority contractor from continuing in business or from bidding on any contract let under the local public works program, Section 103(f)(2) is not "a legislative enactment barring designated individuals or groups from participation in specified employments or vocations." *Nixon* v. *Administrator of General Services,* 433 U.S. 425, 474 (1977). Moreover, because of the important remedial purposes served by the MBE provision, it is clear that "viewed in terms of the type and severity of burdens imposed," the statute "reasonably can be said to further nonpunitive legislative purposes." For that reason, it is not a bill of attainder. *Id.* at 475-476.

[35] Indeed, no nonminority plaintiff testified that it had lost a contract as a result of competition with minority contractors.

less money, nonminority contractors would not have benefited in any way.

Moreover, the waiver procedure authorized by the statute and implemented by the Secretary's regulations and guidelines ensures flexibility.[36] The availability of a waiver depends on three factors: (1) the number of qualified minority-owned businesses in the relevant area that are available to perform project work or provide necessary supplies; (2) proof of good-faith efforts by a grantee and prime contractor to find and use such businesses; and (3) the size of the area's minority population (A. 165a-167a).[37] These criteria

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[36] Under internal directives issued by the Economic Development Administration, the Secretary considers additional criteria in those cases in which state or local grantees originally report minority firm contracts sufficient to comply with the MBE provision, but during the course of construction some of the expected minority participation fails to occur. If the reduced minority participation is caused by the inability of the minority firm to complete its contract, the Secretary also considers: (1) the reasons the firm could not complete performance; (2) the extent of assistance provided to the firm by the grantee or prime contractor, such as aid in obtaining bonding or working capital or in meeting union requirements; and (3) the extent of efforts to obtain a substitute minority contractor. If, however, the reduced participation is caused by the Secretary's determination that a firm is not a *bona fide* minority enterprise, the additional criteria are (1) whether the grantee or prime contractor reasonably believed the enterprise was an MBE; and (2) the extent of efforts to obtain a substitute minority firm.

[37] We are informed by the EDA that 1261 waivers were granted as of September 9, 1979, under Round II of the local public works program. Seven of these were granted in connection with projects for which respondent New York State was the grantee, and six were granted in connection with projects for which the grantee was respondent New York City.

are similar to those employed in setting goals for enforcement of the affirmative action requirements of Exec. Order No. 11246.[38]

Because the 1976 and 1977 Acts established a *nationwide* program for the construction, modification, and repair of local public works, Congress needed to adopt a general rule for the benefit of minority businesses. Detailed comparative statistics on business ownership are not available on a local basis,[39] and in any

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[38] 30 Fed. Reg. 12319 (1956), as amended by Exec. Order No. 11,375, 32 Fed. Reg. 14303 (1967), and Exec. Order No. 12,086, 43 Fed. Reg. 46501 (1978). Under these Executive Orders, federal contractors are directed to consider a series of eight factors in "determining whether minorities are being underutilized in any job group * * *." 41 C.F.R. 60-2.11 (b) (1). The factors include:

> (i) The minority population of the labor area surrounding the facility;
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> (ii) The size of the minority unemployment force in the labor area surrounding the facility;
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> (iii) The percentage of the minority work force as compared with the total work force in the immediate labor area;
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> (iv) The general availability of minorities having requisite skills in the immediate labor area;
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> (v) The availability of minorities having requisite skills in an area in which the contractor can reasonably recruit;
>
> (vi) The availability of promotable and transferable minorities within the contractor's organization;
>
> (vii) The existence of training institutions capable of training persons in the requisite skills; and
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> (viii) The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to minorities.

[39] See, *e.g.*, Civil Rights Commission Report, *supra*, note 21, at x.

event Congress could not have hoped to anticipate all the variations that the Secretary would encounter in administering the public works program. Recognizing that the general 10% rule might not be appropriate for certain projects or certain locations, Congress delegated to the Secretary the task of adapting the minority set-aside requirement to specific situations that arose in the course of the program's administration. The Secretary discharged this responsibility through the waiver procedure, and petitioners do not contend that waivers were unfairly denied.

The short-term emergency nature of the public works program, the lack of any total exclusion of nonminority contractors from competition for any particular contract, and the availability of the waiver procedure all serve to distinguish the 10% minority set-aside from the medical school admissions procedure rejected by a majority of the Court in *Bakke*. The short-term nature of the program meant that the impact of the MBE provision was limited from its inception. Whatever the successes or failures of the 10% set-aside, the measure was only temporary and Congress would have been obliged to review the record and legislate again before the provision's effective period could have been extended. In addition, although the 10% MBE requirement had to be satisfied with respect to each public works project viewed as a whole, the lack of any total exclusion of nonminority businesses meant that, on any given contract, a grantee or prime contractor could prefer a nonminority bidder if it regarded that bidder as superior to

qualified minority bidders. Finally, the MBE provision imposed no obligation to spend federal funds on minority businesses, regardless of their qualifications. The availability of the waiver procedure meant that, where qualified minority firms could not be located in the applicable project area, the 10% set-aside requirement would not be enforced and public works construction could proceed unhampered by an impractical requirement that funds be expended for non-existent or unqualified minority firms.

Petitioners contend (Pet. Br. 26-27; GBC Br. 24-31), however, that the MBE provision is unconstitutional because Congress could have found other means of aiding minority businesses that would have been "less drastic." Petitioners suggest, for example, that a minority education and training program or a minority bonding program would have been a "less drastic" means of remedying the effects of discrimiation against minority businesses. But petitioners wholly fail to demonstrate why such programs would be "less drastic" in a constitutional sense. All of the alternative approaches recommended by petitioners would require the use of race or national origin as a selection criterion. Petitioners' programs therefore could not be distinguished, in any principled way, from the MBE provision they deplore. The proposals would be "less drastic" only in the sense that any adverse effect on nonminority groups would be more likely to fall on persons and businesses that are not members of petitioner associations—for example, non-minority contractors in need of special financing help

or training to gain entry into the construction industry.

A slightly different approach, also preferred by petitioners (GBC Br. 29-31), is that embodied in the recent revision of Section 8(d) of the Small Business Act, 15 U.S.C. 637(d). The new version of Section 8(d) (added by Section 211 of the 1978 amendments, Pub. L. No. 95-507, 92 Stat. 1767-1770) declares it to be the policy of the United States that "small business concerns, and small business concerns owned and controlled by socially and economically disadvantaged individuals, shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." Government prime contractors must agree to cooperate with this policy, "to the fullest extent consistent with the efficient performance" of their contracts, by awarding subcontracts to firms controlled by "socially and economically disadvantaged individuals." Although prime contractors are directed to "presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, and other minorities," petitioners maintain (GBC Br. 29-31) that the program established by the recent amendments is preferable to the MBE provision because other individuals found to be disadvantaged are eligible.[40]

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[40] See Section 201 of the amendments, adding a new Section 2(e) to the Small Business Act (92 Stat. 1760; to be codified in 15 U.S.C. 631(e)) (congressional finding that many persons are socially and economically disadvantaged "because

Petitioners' argument misses the point. In enacting the MBE provision, Congress chose a race-conscious method to remedy discrimination against minorities and to prevent its effects from being perpetuated in one short-term federal grant program. The Small Business Act amendments, by contrast, are designed to achieve a broader, long-range legislative goal. Of course, this is not to say that Congress abandoned its concern for minorities when it enacted the 1978 amendments. Indeed, that concern is explicitly reflected in the new statute.[41] But Congress went considerably further and established a continuing program intended not only to remedy discrimination against minority-owned businesses but also to increase the participation of businesses owned by disadvantaged persons in federal procurement projects. When Congress enacted the MBE provision, it could reasonably have concluded that a program open to all disadvantaged persons would have been unlikely to accomplish the primary objective of preventing the exclusion of minorities from the short-term public works program.[42] Cf. *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 376 (opinion of Brennan, White, Marshall and

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of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control").

[41] A more detailed description of Pub. L. No. 95-507 may be found in App., *infra*, 8a-9a.

[42] Indeed, as the district court remarked (A. 200a), all construction contractors might have considered themselves economically disadvantaged in 1977 because of the depressed state of the construction industry.

Blackmun, JJ.). Furthermore, in framing remedial legislation, Congress was not, as petitioners appear to contend, required to include all persons in economic need who might legitimately have derived benefits from the public works program. Congress could reasonably limit its 10% set-aside plan to the groups that had suffered racial and ethnic discrimination. Cf. *Katzenbach* v. *Morgan*, *supra*, 384 U.S. at 657; *South Carolina* v. *Katzenbach*, 383 U.S. 301, 331 (1966).[43]

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[43] Similarly, petitioners' argument (GBC Br. 19-21) that the MBE provision is unconstitutional because a 1979 Comptroller General's Report identified a number of problems that arose during implementation of the provision is neither legally relevant nor factually accurate. The constitutionality of an Act of Congress must be judged by the information available at the time the statute was passed, not on the basis of an ex post facto analysis of the program's successes or failures. Moreover, although the Comptroller General's report, entitled *Report To The Congress: Minority Firms in Local Public Works Projects—Mixed Results* (January 16, 1979), did identify a number of problems that had arisen in connection with the MBE provision and its implementation (*id.* at 16-38), it also concluded that (*id.* at 7):

> Minority firms' share of Federal funds under the second round of the LPW [*i.e.*, local public works] program was substantial compared with the results of past Federal attempts to bring the minority business sector into the economy's mainstream. EDA did not have to extend the start of construction for many projects, and only about one of every five projects had construction delays because of difficulties with using minority firms. Thus, a primary purpose of the minority provision—to give more Federal funds to minority firms—was achieved without significant delays to the start of LPW projects.
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> * * * * *
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> Other benefits resulted from using minority firms on public works projects. New minority firms were established, and existing firms gained experience. Some prime

D. The Minority Business Enterprise Provision Does Not Violate Title VI Of The Civil Rights Act of 1964

Petitioners are incorrect in their argument that a statute enacted by Congress in 1977 conflicts with another federal statute passed 13 years earlier and therefore must fall. The MBE provision and Title VI of the Civil Rights Act are far from irreconcilable. As one court has said in rejecting the contention now advanced by petitioners, "there is no inherent inconsistency between a requirement that contracting be done without discriminatory consideration of race and a requirement that every good faith effort be used to achieve minority participation pursuant to legislative mandate in grant funds." *Constructors Ass'n of Western Pennsylvania* v. *Kreps*, 441 F. Supp. 936, 954 (W.D. Pa. 1977), aff'd, 573 F.2d 811 (3d Cir. 1978). Congress has given no indication that the two statutes are incompatible. On the contrary, by incorporating the enforcement procedures of Title VI into the 1976 Act's provision forbidding sex discrimination in the local public works program (42 U.S.C. 6709), a provision retained without change after the 1977 amendments, Congress showed that it did not perceive any disharmony between the two statutes. In the absence of some evidence that Congress itself recognized a tension between the MBE provision and Title VI, the teaching of this Court in *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974), must

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contractors found that minority firms performed adequately and would be given the opportunity to compete on future subcontract work. In addition, minority firms which obtained contracts on LPW projects were able to provide employment for minority workers.

control. *Mancari* held that "[t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed intention to the contrary, to regard each as effective."

Even if there were a conflict between the general provisions of Title VI and the specific MBE provision at issue here, that conflict should be resolved in favor of the later-enacted statute, the Public Works Employment Act of 1977. See *Araya* v. *McLelland*, 525 F.2d 1194, 1196 (5th Cir. 1976). Moreover, as *Mancari* also pointed out (417 U.S. at 550-551), "a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

The following materials are intended to supplement the summary discussion in the body of the brief (pages 34-42, *supra*) concerning the problems encountered by minority businesses and the legislative and administrative response to those difficulties. Taken together, the materials establish beyond any doubt that the Congress that enacted the MBE provision was acutely aware of the disadvantages under which minority contracting firms have labored and continue to labor. The materials also show that Congress believed that the disadvantages are at least in part the result of discrimination in the construction industry and in the economy generally. Finally, the materials demonstrate that the 10% minority set-aside provision was adopted in connection with the local public works program only because Congress recognized that existing measures designed to aid minority businesses were unlikely to ensure that minority contractors would not be unfairly excluded from participation in the benefits of the authorized federal funds.

The Appendix begins with some further statistics concerning the disadvantaged position of minority businesses and minority group members generally in the national economy. We then list and describe briefly some of the many legislative and administrative measures that have been designed to assist minority businesses but that do not include any requirement that a specific percentage of generally available federal benefits be received by minority firms. Fin-

ally, we reproduce a series of statements by various Members of Congress, all of which reflect the legislative recognition of the role played by discrimination in retarding the growth of minority businesses.

Additional Statistical Information

In those industries that sell and produce supplies and equipment for construction, minority-owned firms are even less well represented than they are in the economy generally or in the construction industry taken as a whole (see note 24, *supra*). Minority-owned firms (which may include more than one establishment) in the wholesale trade industry account for only 1.9% of the total number of business establishments and only approximately 0.3% of the gross receipts. 1972 Census of Wholesale Trade, Volume I, *Summary and Subject Statistics*, Table 1 (Aug. 1976); 1972 Survey of Minority-Owned Business Enterprises, *Minority-Owned Businesses*, Table 1 (May 1975) (hereinafter "Summary Volume"). In the manufacturing industry, only 3.5% of the total number of firms are minority-owned. 1972 Census of Manufacturers, Volume I, *Subject and Special Statistics*, Table 3 (Aug. 1976); Summary Volume, Table 1.

Within the wholesale trade industry, minority-owned firms (which may include more than one establishment) dealing in construction, mining, logging, and road maintenance equipment constitute only 0.6% of the total number of establishments and they draw only 0.1% of the total sub-industry receipts. 1972

Census of Wholesale Trade, Volume I, *Summary and Subject Statistics*, Table 1; Summary Volume, Table 1. In the manufacturing industry, only 0.6% of all firms producing construction, mining, and materials-handling machinery and equipment are minority-owned firms. 1972 Census of Manufacturers, Volume I, *Subject and Special Statistics*, General Summary Table 3; Summary Volume, Table 1.

The effects of discrimination against minorities are of course, not limited to the construction industry. Most of this country's racial and language minorities remain poorer and less educated and suffer greater unemployment than the white majority. For example, in 1969 the percentage of families with incomes below the poverty level was 3½ times higher among black than among white families. The 1970 census showed that 8.6% of white families had incomes below the poverty level compared with 29.8% of black families, 20.4% of families of Spanish heritage (U.S. Bureau of the Census, 1970 Census, Vol. I, *Characteristics of the Population*, United States Summary 1-400), and 33.3% of American Indian families (U.S. Bureau of the Census, *Subject Report, American Indians* Table 9 (June 1973)).

Minorities also have received less education than white persons. Among persons 25 years old and older, 54.5% of whites had completed four years of high school or more by the time of the 1970 census. Only 31.4% of black persons, 36.0% of persons of Spanish heritage, and 33.3% of American Indians had completed high school. In the same age group, 11.3% of all white persons had completed four years of col-

lege or more, while only 4.4% of black persons, 6.0% of persons of Spanish heritage, and 3.8% of American Indians had finished college. Median school years completed among whites were 12.1, among blacks and American Indians 9.8, and among persons of Spanish heritage 9.6. U.S. Bureau of the Census, 1970 Census, Vol. 1, *Characteristics of the Population*, United States Summary, 1-386; and *Subject Report, American Indians*, Table 3.

In 1974, the unemployment rate among nonwhites was twice what it was among the white population: 9.9% compared to 5.0%. U.S. Bureau of the Census, *Current Population Reports, The Social and Economic Status of the Black Population in the United States 1974* 64 (1975). In 1976, among men of Spanish origin, the unemployment rate was 10.7%; among women of Spanish origin, the rate was 12.5%. U.S. Bureau of the Census, *Current Population Reports, Persons of Spanish Origin in the United States* 10 (March 1976).

The percent of minority group members holding low-paying and low-status jobs is substantially higher than the comparable percentage among whites. In 1970, only 10.2% of black persons, 13.6% of persons of Spanish heritage, and 14.0% of American Indians held professional, managerial, and administrative positions, compared to 23.9% of all white persons. Similarly, 12.0% of black persons, 11.8% of persons of Spanish heritage, and 12.7% of American Indians held jobs as laborers, while only 5.3% of white persons held similar employment. The disparity is even greater among service and private household workers

—28.1% of black persons, 15.1% of persons of Spanish heritage, and 19.2% of American Indians served in such capacities, but only 11.1% of white persons held that kind of job (1970 Census, Vol. 1, *Characteristics of the Population, supra,* at 1-746 to 1-748); *Subject Report, American Indians,* Table 7).

The figures for Asian-Americans (Japanese, Chinese, and Filipino only) are somewhat different. The number of families with incomes below the poverty level was 8.8% (U.S. Bureau of the Census, *Subject Reports—Japanese, Chinese, and Filipinos in the United States* 42, 101, 160). Among Asian-American persons 25 years old and older, 62.2% had completed four years of high school and 20.4% had completed four or more years of college. The median number of school years completed by Japanese-Americans was 12.5. Among Chinese-Americans, the comparable figure was 12.4, and among Filipino-Americans, 12.2 (*id.* at 9, 68, and 127). 2.0% of Asian-Americans were unemployed (*id.* at 13, 72, 142). 29.1% of Asian-Americans held professional, managerial, and administrative positions, while 7.2% were laborers and 16.9% were service and private household workers (*id.* at 31, 90, 149).

The final piece of supplementary statistical information is derived from a survey of minority construction contractors, published by the Department of Housing and Urban Development. The study reported that most minority business enterprises—indeed, approximately 75%—have had to rely on personal savings as the source of their original capital

investment. *A Survey of Minority Construction Contractors*, Office of the Assistant Secretary for Equal Opportunity, HUD, at 14-15. In the words of the survey, "individuals and institutions with equity money to invest have not been induced to invest in minority contractor enterprises" (*id.* at 15). Because of the relative poverty of the minority community (see page 3a, *supra*), it has been extremely difficult for minority firms to obtain initial capitalization. See *SBIC and SBLC Programs and Selected SBA Activities: Hearings Before the Subcomm. on SBA Oversight and Minority Enterprise of the House Comm. on Small Business*, 94th Cong., 2d Sess. 208 (1976). See generally *Interagency Report on the Federal Minority Business Development Programs*, Office of Management and Budget (1976); *Minority Business Opportunity Committee Handbook*, Office of Minority Business Enterprise, Department of Commerce (1976).

Additional Information Concerning Government Programs For the Aid of Minority Businesses

The Small Business Administration has been assigned the task of administering a number of programs aimed at alleviating some of the problems encountered by minority-owned businesses. Section 8(a) of the Small Business Act of 1958, Pub. L. No. 85-536, 72 Stat. 389, 15 U.S.C. 637(a), empowers the SBA to administer a procurement program designed to increase the number of federal contracts performed by socially and economically disadvantaged

businesses, primarily minority-owned enterprises.[1] Congressional Research Service, *Minority Enterprise and Public Policy* 52 (1977) (hereinafter "CRS Report"). But according to a 1975 report published by the General Accounting Office,[2] the program's success in enabling disadvantaged firms "to become self-sufficient and competitive has been minimal."

The performance of the Section 8(a) program has been a subject of considerable congressional concern almost since the program's inception.[3] In 1978, Con-

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[1] The Small Business Administration's Section 8(a) program has been upheld in the face of numerous attacks on its validity. See, *e.g.*, *Valley Forge Flag Co.* v. *Kleppe*, 506 F.2d 243 (D.C. Cir. 1974); *Ray Baillie Trash Hauling, Inc.* v. *Kleppe*, 477 F.2d 696 (5th Cir. 1973), cert. denied, 415 U.S. 914 (1974); *Eastern Canvas Products, Inc.* v. *Brown*, 432 F. Supp. 658 (D. D.C. 1977); *Massey Services, Inc.* v. *Fletcher*, 348 F. Supp. 171 (N.D. Cal. 1972); *Fortec Constructors* v. *Kleppe*, 350 F. Supp. 171 (D. D.C. 1972). None of these cases addressed the constitutionality of the program.

[2] Comptroller General, *Report to the Congress on Questionable Effectiveness of the 8(a) Procurement Program* 7 (Apr. 16, 1975).

[3] See, *e.g.*, *Small Business and Labor Surplus Area Set-Asides and 8(a) Subcontracts: Hearing Before the Subcomm. on Government Procurement of the Senate Select Comm. on Small Business*, 91st Cong., 2d Sess. (1970); *SBA's 8(a) Subcontracting Program: Hearings Before the Subcomm. on Government Procurement of the Senate Select Comm. on Small Business*, 92d Cong., 1st Sess. (1971); *Small Business Administration 8(a) Contract Procurement Program: Hearing Before the Senate Select Comm. on Small Business*, 94th Cong., 2d Sess. (1976), and related report, 95th Cong., 1st Sess. (1977); *Investigation into the Section 8(a) Program of*

gress amended the Small Business Act in order to strengthen the Section 8(a) program and clarify the eligibility criteria for recipients of government assistance. See Pub. L. No. 95-507, 92 Stat. 1757. Section 201 of the amendments (92 Stat. 1760) added to the statute a series of congressional findings recognizing the role of past discrimination in producing today's socially and economically disadvantaged persons (see note 40, *supra*). On the basis of these findings, Section 202 (92 Stat. 1761-1763) amended Section 8(a) of the Small Business Act to include express eligibility criteria defining "socially disadvantaged individuals" as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." "Economically disadvantaged persons," in turn, are defined in the amended Act as "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." 92 Stat. 1762. In order to assist new small businesses, Section 202 authorized the SBA to waive the government's usual construction contract bonding requirements in certain situations. On May 29, 1979, the SBA issued regulations

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the Small Business Administration: Hearings Before the Subcomm. on Federal Spending Practices and Open Government of the Senate Comm. on Governmental Affairs, 95th Cong., 1st & 2d Sess. (1979).

implementing portions of Pub. L. No. 95-507 and amending in part its Section 8(a) regulations. See 44 Fed. Reg. 30672. See also 44 Fed. Reg. 42832 (July 20, 1979).

As we have explained in the body of the brief (see page 66, *supra*), Section 211 of the 1978 statute (92 Stat. 1767-1770) amended Section 8(d) of the Small Business Act to require many federal contractors to make affirmative efforts to let subcontracts to businesses controlled by socially disadvantaged individuals. Section 211 also authorizes each federal agency, when entering into negotiated contracts, "to provide such incentives as such * * * agency may deem appropriate in order to encourage such subcontracting opportunities [for small businesses and small businesses owned and controlled by socially and economically disadvantaged individuals] as may be commensurate with the efficient and economical performance of the contract." The Office of Management and Budget has issued rules implementing Section 211 (44 Fed. Reg. 23610-23613 (Apr. 20, 1979)), and the SBA has issued proposed regulations (44 Fed. Reg. 33884 (June 13, 1979)).

In addition to the Section 8(a) program, the SBA administers an investment program designed to encourage ownership of small businesses by "persons whose participation in the free enterprise system is hampered because of social or economic disadvantages * * *." Since 1972, the program has been explicitly authorized by Section 301(d) of the Small Business Investment Act of 1958, as amended, 15

U.S.C. 681(d). Between 1969 and 1972, the SBA, relying on its general authority under the Act, 15 U.S.C. 661 *et seq.*, conducted a modified version of the same program, limited to the encouragement of minority ownership of small businesses. When Congress expanded the scope of the program to aid all businesses owned by disadvantaged persons, the SBA retained the separate minority enterprise program (the "MESBIC" program) as part of the broader overall scheme. See CRS Report, *supra*, at 51.[4]

Because of the acute problems encountered by small businesses, including those owned by minorities, in obtaining surety bonds, Congress authorized the SBA to establish a Surety Bond Guarantee Program that would cover surety companies for up to 90 percent of their losses on bonds issued to small businesses.[5] In addition, the last five Congresses have considered numerous bills dealing with the difficulties encountered by minority-owned and other small businesses

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[4] The program's effectiveness has been criticized by the General Accounting Office. Report to the Congress by the Comptroller General of the United States, *A Look at How the Small Business Administration's Investment Company Program for Assisting Disadvantaged Businessmen is Working* i, ii (Oct. 8, 1975).

[5] Housing and Urban Development Act of 1970, Pub. L. No. 91-609, 84 Stat. 1813, 15 U.S.C. 694a and 694b. (In 1970, the program covered contracts not exceeding $500,000. In 1974, the ceiling was doubled. In 1978, Congress again revised the Surety Bond program, establishing additional statutory guidelines for eligibility. See Section 111, Pub. L. No. 95-507, 92 Stat. 1758, to be codified at 15 U.S.C. 694b).

in obtaining bonding.[6] These bills include Pub. L. No. 95-89, 91 Stat. 553, enacted August 4, 1977, which increased the loan and surety bond guarantee authority under the legislation administered by the SBA, and Pub. L. No. 95-619, Title VI, Section 641, 92 Stat. 3284, enacted November 9, 1978, which established an Office of Minority Economic Impact within the Department of Energy and authorized the Secretary of Energy to provide loans to minority business enterprises to enable them to participate in contracting opportunities with the Department.

The Executive Branch has also sought to aid minority-owned businesses overcome "the barriers which now prevent many who are members of minority groups from controlling their fair share of American business." Statement of President Nixon, accompanying the issuance of Exec. Order No. 11,625, 7 Weekly Comp. of Pres. Doc. 1404 (Oct. 13, 1971);

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[6] In the 91st Congress, the bills included S. 2609, 2611, H.R. 15470, 17717, 17991, 17992, 17993, and 19819; in the 93d Congress, H.R. 7829; in the 94th Congress, S. 3370; and in the 95th Congress, H.R. 692, 2377, and S. 1442. These bills have been introduced in recognition of the fact that "[t]he Federal government has a duty to not only remove the barriers that restrict minority business development, but also provide a little added help—a few additional opportunities—to encourage minority business expansion." 124 Cong. Rec. S4168 (daily ed. Mar. 20, 1978) (remarks of Sen. Dole). Many other bills were also introduced during the same period to aid economically and socially disadvantaged small businesses: S. 1415 and 1941 (93d Congress); S. 2617, 3427, H.R. 12741, 12826, 13591, 13784, 13785, 14483, 14624, and 14924 (94th Congress); and S. 607, 927, 1228, 1264, H.R. 567, 4362, 4363, 4961, 6153, 7115, and 8912 (95th Congress).

36 Fed. Reg. 19967 (1971). In 1969, Exec. Order No. 11,458, 34 Fed. Reg. 4937 (1969), established the Office of Minority Business Enterprise (OMBE) within the Department of Commerce. OMBE was charged with the tasks of developing programs and coordinating interagency activities to encourage the growth of minority business enterprises. The OMBE program was strengthened and expanded by Exec. Order No. 11,625. More recently, however, a Comptroller General Report to the Congress concluded that "OMBE's assistance program does not appear to appreciably affect OMBE's program objective of closing the gap between the minority population/business ownership ratio." [7]

Under federal procurement regulations, all federal agencies must follow a minority procurement program to ensure that adequate efforts are made to extend contracting opportunities to minority business enterprises. 41 C.F.R. 1-1.1302. At the time the MBE provision was enacted, federal contractors were required to agree to use "best efforts" to provide minority businesses "the maximum practicable opportunity to participate in the performance of Government contracts." 41 C.F.R. 1-1.1310-2 (1976).[8] The

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[7] Report to the Congress by the Comptroller General of the United States, *The Office of Minority Business Enterprise Could Do More to Start and Maintain Minority Businesses*, 7 (Nov. 10, 1977).

[8] This provision has recently been rescinded. See 44 Fed. Reg. 38478 (July 2, 1979). Congress has expanded the scope of the regulation: it now is directed toward increasing participation by all socially and economically disadvantaged businesses, including minority-owned businesses, in the federal

effectiveness of the program was attacked in testimony before the House Subcommittee on SBA Oversight and Minority Enterprise:

> We find that in title 41, where you talk about the utilization of minority businesses in procuring contracts either in prime contractors or through the 8(a) program, [a contractor] has to use his best efforts. Well, that is a lot of baloney. Best efforts usually amount to looking at a directory of minority businesses that is usually out of date and they tried one or two or three and if they are unsuccessful then they say, we have made a best effort and they go on and get a majority guy to do the work.

Effects of New York City's Financial Crisis on Small Business: Hearing Before the Subcomm. on SBA Oversight and Minority Enterprise of the House Comm. on Small Business, 94th Cong., 1st Sess. 34 (1975) (testimony of George Pattison, President of the Brooklyn Local Economic Development Organization).

The federal government has also attempted to prevent discrimination against and to increase the participation of minorities in state and local contracts funded by federal grants. The Department of Justice has issued a regulation to enforce Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, that pro-

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procurement process. See the regulations issued by the Office of Federal Procurement Policy and implemented by the General Services Administration, 44 Fed. Reg. 23610 (Apr. 20, 1979); *id.* at 35068 (June 18, 1979); *id.* at 38478 (July 2, 1979).

hibits recipients of federal financial assistance from the Department from discriminating against minorities by denying them the opportunity to provide contracting services for federally funded programs. See 28 C.F.R. 42.104(b)(vi).[9] In addition, the Office of Management and Budget has established uniform requirements for federal agencies in the administration of grants to state and local governments. These regulations were initially issued in 1971, and at the time the MBE provision was enacted, they provided (42 Fed. Reg. 45890) that recipients of federal funds should make

> [p]ositive efforts * * * to utilize small business and minority owned business sources of supplies and services. Such efforts should allow these sources the maximum feasible opportunity to compete for contracts to be performed utilizing Federal grants funds.

The United States Civil Rights Commission indicated, however, that these efforts did not have a significant impact on the participation of minority businesses in federally funded state and local contracts. See the Commission's Report, *Minorities and Women as Gov-*

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[9] Exec. Order No. 11,246, 30 Fed. Reg. 12319 (1965), as amended by Exec. Order No. 11,375, 32 Fed. Reg. 14303 (1967), and Exec. Order No. 12,086, 43 Fed. Reg. 46501 (1978), prohibits discriminatory hiring practices in federal and federally-assisted projects. In some instances, the Secretary of Labor may require federal contractors to take affirmative action to identify minority businesses for subcontracts.

ernment Contractors 89-93 (1975).[10] OMB has recently revised its regulation to provide (44 Fed. Reg. 47874 (Aug. 15, 1979)):

> It is the national policy to award a fair share of contracts to small and minority business firms. Accordingly, affirmative steps must be taken to assure that small and minority businesses are utilized when possible as sources of supplies, equipment, construction and services.

The remainder of the revised provision lists certain affirmative efforts that recipients of federal funds are required to implement.

Statements by Members of Congress on Minority Business Problems and the Effects of Discrimination

The following remarks by several Members of Congress corroborate our submission that in enacting the MBE provision, Congress was seeking to remedy the effects of discrimination against minorities. Although the statements reproduced below were not made at the time the minority set-aside provision was introduced and considered on the House floor, their frequent repetition by different legislators over a substantial period of time demonstrates that the subject of discrimination against minority businesses

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[10] For a list of some of the more than 100 federal agency programs providing financial, marketing, and management assistance to minority and other small businesses, see *Office of Minority Business Enterprise Federal Assistance Programs for Minority Business Enterprises* (U.S. Department of Commerce 1977).

was one with which Congress was both familiar and highly concerned. The collection of statements that follows is by no means exhaustive.

1. In recent hearings on bills to strengthen federal support for minority business enterprises, Representative Addabbo, Chairman of the House Subcommittee on Minority Enterprise and General Oversight, stated that "there is good reason why minority enterprise has not kept pace with the growth of the national minority population, and that reason—plain and simple—is discrimination." *H.R. 567, H.R. 4960, and H.R. 2379: Hearings Before the Subcomm. on Minority Enterprise and General Oversight of the House Comm. on Small Business*, 95th Cong., 1st Sess. 3 (1977).

2. At the same hearings, Representative Mitchell observed (*Hearings*, at 42):

> As you well know, there are some minority companies which sort of folded overnight. They were doing business for the entire community and then suddenly the word got out that this is a minority-owned firm; it is owned by a black guy, and purchasing just stopped, which means that that man's business had to be confined only to the minority community itself.

3. Almost 10 years ago, in debate on the Senate floor, Senator Bayh explained some of the problems confronting minority businesses generally and minority construction contractors in particular. He stated that, although the construction industry has long served as a vehicle for upward economic mobility, it

"unfortunately has not generally welcomed the participation of non-white workers and contractors." 116 Cong. Rec. 18886 (1970). Quoting from a letter written by a Department of Commerce official working in the Office of Minority Business Enterprise, Senator Bayh said (*id.* at 18888-18889):

> [T]he minority contractor is severely hampered by the general lack of management and technical expertise. Because of the years of discrimination, minority contractors have not been able to develop those skills required in the industry to be a successful entrepreneur. Therefore some vehicle must be perfected which will provide these individuals with the assistance needed * * *.[11]

A further excerpt from the same letter described the difficulties encountered by minority construction firms in attempting to obtain necessary bonding (*id.* at 18888):

> The inability of minority contractors to obtain bid, performance and payment bonds is one of the most crucial of his problems. Surety companies require the minority contractor to have a capital liquidity of 30-100%, whereas his white counterpart is only required to produce 10-20%. The annals of history are filled with the cases of inequities on the part of surety companies who have historically refused to bond minorities in

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[11] The problems arising from minority contractors' lack of adequate management and operational skills are also described in the Civil Rights Commission Report, *Minorities and Women as Government Contractors* 23 (1975). The problems include overbidding, lack of familiarity with government contracting regulations, and inadequate knowledge of future bidding opportunities.

> the construction industry on a parity with whites.[12]

Senator Bayh made the same point a year earlier, quoting from a report by the National Business League (115 Cong. Rec. 19383 (1969)):

> Only one-third of all Negro contractors were successful in securing performance bonds at any time and all of these had experienced "undue difficulty" in securing them. Seventy percent reported they had lost contracts because of inability to secure bonding.

4. In a prepared statement submitted to a Senate committee hearing in 1976, Senator Kennedy observed:

> Black construction contractors struggle [just] to bid on new projects going up right in the heart of the black community. When the firm is lucky enough to land a bid, unions, banks and bonding companies all seem to join together to guarantee that a minority owned firm will not land the job.

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[12] See also 123 Cong. Rec. S4987 (daily ed. Mar. 28, 1977) (remarks of Sen. Bentsen); Report to the Congress by the Comptroller General of the United States, *Ways to Increase the Number, Type and Timeliness of 8(a) Procurement Contracts* 8, 24-26 (1978). See generally *H.R. 2377, H.R. 2379, and Small Business Administration Activities: Hearings Before the Subcomm. on Minority Enterprise and General Oversight of the House Comm. on Small Business*, 95th Cong., 1st Sess. 80-81, 91, 93-103, 144-158 (1977); *Selected SBA Programs and Activities: Hearing Before the Subcomm. on SBA Oversight and Minority Enterprise of the House Comm. on Small Business*, 94th Cong., 1st Sess. 9-10, 14-15, 19-21, 40 (1975).