tion within the construction industry in particular, minority contractors have had an especially difficult time getting their feet in the door. As Representative John Conyers stated during the debates on the MBE ten percent set aside,

> "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.... [T]hrough no fault of their own, [they] simply have not been able to get their foot in the door." 123 Cong.Rec. H. 1440 (daily ed. Feb. 24, 1977).

Governments at all levels--federal, state, county, municipal--have done little to alter the pervasive effects of this discrimination and exclusion. For the most part, they have subsidized and entrenched past exclusionary patterns.

Recognizing the exclusionary practices of past contracting methods and the perpetuation of past discrimination, Congress also recognized the opportunity presented to alter the record of substantial and chronic exclusion. "In the present legislation before us, it seems to me that we have an excellent opportunity to begin to remedy this situation." Rep. Mitchell, 123 Cong.Rec. H.1437 (daily ed. Feb. 24, 1977). Representative Biaggi echoed the need: "This is a situation that must be [r]emedied." Id. at 1440. He added, in view of the past, that the ten percent figure was "not an unreasonable [percentage]--in fact it is quite modest." Id.

The modest MBE ten percent set aside also satisfied the second part of the test in the intermediate standard in that it neither "stigmatizes any group [n]or ...singles out those least well represented in the political process to bear the brunt of [the] benign program." 438 U.S.

at 361 (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.).

In Bakke, four members of this Court recognized that this "second prong of our test" was "clearly satisfied" by the sixteen percent set aside. In this regard the MBE ten percent set aside is identical.

The set aside obviously does not stigmatize whites. "Unlike discrimination against racial minorities, the use of racial preferences for remedial purposes does not inflict a pervasive injury upon individual whites in the sense that wherever they go or whatever they do there is a significant likelihood that they will be treated as second class citizens because of their color." 438 U.S. at 375 (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.) (emphasis added). And there, of course, is no stigma attributable to the minority beneficiaries of the program especially since there is no question whatsoever about the qualifications of the minority business enterprises. Moreover, there is no stigma associated with the program

since it merely assures access to government contracts; as in Bakke, the "program does not establish a quota in the invidious sense of a ceiling on the number of minority applicants to be admitted." Id. Even the petitioners here, it would seem, would admit that receipt of government contracts involves no stigma but rather enhances economic viability.

Finally, the MBE ten percent set aside does not single out any identified group which is underrepresented in the political process to bear the brunt of this benign program. In fact, with this program, as with the sixteen percent set aside in Bakke, it cannot be "even claimed that [the] program in any way operates to...single out any discrete and insular, or even any identifiable, nonminority group." 438 U.S. at 374 (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.).

Like the sixteen percent set aside in Bakke, the MBE ten percent set aside herein fully satisfies both prongs of the intermediate standard of review applicable to benign race conscious

programs. As such, the MBE ten percent set aside is constitutional.

IV. EVEN IF THE STRICT SCRUTINY STANDARD OF REVIEW WERE APPLICABLE, THE MBE TEN PERCENT SET ASIDE STILL WOULD BE CONSTITUTIONAL

Although the intermediate standard of review is applicable to benign racial classifications, and although the MBE ten percent set aside satisfies the intermediate standard of review, the MBE ten percent set aside also would be constitutional under the strict scrutiny standard of review.

A. Under the Standards Applied by Justice Powell in Bakke, Congress Is Both Authorized and Competent To Find Minority Underrepresentation in Government Contracting and To Devise a Remedy for that Underrepresentation

In his opinion in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), Justice Powell indicated that the strict scrutiny standard of review was not necessarily applicable to benign racial classifications premised upon judicial, legislative or administrative findings of past discrimination

or severe minority underrepresentation. See pp.73 -86, supra. Nevertheless, even where strict scrutiny is applicable, Justice Powell also stated that the strict standard could be satisfied by a classification designed to remedy past practices--for a government "certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination." 438 U.S. at 307 (opinion of Powell, J.). Again, however, Justice Powell referred to the necessity of appropriate governmental "findings", and he added the condition that the government body must be authorized and competent to make such findings:

> "[The University] does not purport to have made, and is in no position to make, such findings. Its broad mission is education, not the formulation of any *legislative policy* or the adjudication of particular claims of illegality. For reasons similar to those stated in Part III of this opinion, isolated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of *legislative mandates and legislatively determined criteria*. *Cf. Hampton* v. *Mow Sun Wong*, 426 U.S. 88 (1976); n.41, *supra*. Before relying upon these sorts

> of findings in establishing a racial classification, a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination. See, *e.g.*, *Califano* v. *Webster*, 430 U.S. at 316-321." 438 U.S. at 309 (opinion of Powell, J.) (footnote omitted; emphasis added).

Justice Powell's views leave no question that Congress--as a matter of constitutional authority--is authorized, capable and competent to make not only findings but also far reaching policy decisions. Mow Sun Wong stands for precisely this proposition. And Webster illustrates the minimal legislative findings necessary to support such policy decisions.

In Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), this Court struck down a rule of the United States Civil Service Commission which denied aliens permanent employment in the competitive service. The Court's decision was based in part upon the role of the Commission. This occurred because the Commission had defended its discriminatory rule on numerous grounds relating to its pur-

ported role in foreign affairs and in immigration and naturalization. The Court rejected these proffered rationales since neither the President nor the Congress had authorized such a role for the Commission.[1] As the Court made clear, the Commission's role is quite limited and specific:

> "[T]he Commission performs a limited and specific function.
>
> The only concern of the Civil Service Commission is the promotion of an efficient federal service. In general it is fair to assume that its goals would be best served by removing unnecessary restrictions on the eligibility of qualified applicants for employment." 426 U.S. at 114, 115 (footnote omitted).

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1. The Court stated:

> "It is the business of the Civil Service Commission to adopt and enforce regulations which will best promote the efficiency of the federal civil service. That agency has no responsibility for foreign affairs, for treaty negotiations, for establishing immigration quotas or conditions of entry, or for naturalization policies. Indeed, it is not even within the responsibility of the Commission to be concerned with the economic consequences of permitting or prohibiting the participation by aliens in employment opportunities in different parts of the national market." 426 U.S. at 114.

The fact that the Commission's asserted interests for its discriminatory rule exceeded its legislatively authorized role was crucial. Indeed, the Court intimated that its result would have been different if the Commission's rule had been directly related to its interests, or if the President or the Congress had mandated the rule:

> "When the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest. If the agency which promulgates the rule has direct responsibility for fostering or protecting that interest, it may reasonably be presumed that the asserted interest was the actual predicate for the rule. That presumption would, of course, be fortified by an appropriate statement of reasons identifying the relevant interest. Alternatively, *if the rule were expressly mandated by the Congress or by the President, we might presume that any interest which might rationally be served by the rule did in fact give rise to its adoption.*" 426 U.S. at 103 (emphasis added)

Here, of course, the Court is not faced with a mere rule promulgated by, for example, the Economic Development Administration or by the Small Business

Administration. Instead, as Justice Powell indicated was necessary in Bakke, 438 U.S. at 309 (opinion of Powell, J.), the MBE ten percent set aside is a "legislative mandate [with] legislatively defined criteria. Cf. Hampton v. Mow Sun Wong, 426 U.S. 88 (1976)."

Justice Powell's reliance on Califano v. Webster, 430 U.S. 313 (1977), as noted, illustrates the minimal legislative findings necessary to support a legislative mandate such as the MBE ten percent set aside. At issue in Webster was a provision of the Social Security Act which allowed a female wage earner, for social security benefit computation purposes, to "exclude from the computation of her 'average monthly wage' three more lower earning years than a similarly situated male wage earner could exclude." 430 U.S. at 315-316. Assuming that the female and the male had earned precisely the same amount of wages in the past, the differential computation "would result in a slightly higher 'average monthly wage' and a correspondingly higher level of old-age benefits for

the retired female wage earner." 430 U.S. at 316.

In Webster, this Court unanimously upheld the challenged provision on the basis of its legislative history. In the Court's view, the legislative history of the challenged provision "reveal[ed] that Congress directly addressed the justification for differing treatment of men and women...and purposefully enacted the more favorable treatment for female wage earners to compensate for past employment discrimination against women." 430 U.S. at 318. But the legislative history relied on by the majority to find that the challenged provision had been enacted "to remedy discrimination against women in the job market," 430 U.S. at 319, was a slim reed indeed. First, referring to the legislative history not of the challenged provision enacted in 1961, but of an analogous statutory differential enacted six years earlier, the Court cited a House Report which in turn cited a study by the United States Employment Service in the Department of Labor which "showed that

age limits are applied more frequently to job openings for women than for men and that age limits applied are lower." Id. Second, referring to subsequent legislative history in 1961 which related to the reason for the 1955 statutory differential, the Court cited a statement made by a legislator at a hearing which justified the earlier statutory differential on "the theory...that a woman at that age [62] was less apt to have employment opportunities than a man." Id. Based upon this legislative history --and none other--the Court concluded that "the legislative history is clear that the differing treatment of men and women" was not accidental, "but rather was deliberately enacted to compensate for particular economic disabilities suffered by women." 430 U.S. at 320.

The legislative history here supporting the MBE ten percent set aside of course is considerably more substantial than the two oblique references relied on by the Court to uphold the statutory preference in Webster. During the debates on the MBE ten percent set aside,

Members of Congress repeatedly referred to the need to remedy the high minority unemployment rate[2] and the need to remedy the government's exclusionary history of awarding less than 1% of all government contracts to minority business enterprises.[3] Both of these findings are reiterated in reports made to Congress by agencies authorized to do so.[4] Moreover, Congress presumably was aware of its own failed efforts to enhance the availability of federal contracts to minority business enterprises through the SBA's Office of Minority Business Enterprises and presumably was aware of the similar efforts of President Nixon through Executive Orders 11458, 11518 and 11625. Moreover, Congress, like the

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2. 123 Cong.Rec. H.1440 (daily ed. Feb. 24, 1977) (remarks of Rep. Biaggi); 123 Cong.Rec. S.3910 (daily ed. March 10, 1977) (remarks of Sen. Brooke).

3. *Id.* at 1436-37 (remarks of Rep. Mitchell).

4. *See, e.g.*, GAO Report to Congress: Questionable Effectiveness of 8(a) Procurement Program 32 (April 1975).

judiciary, could take appropriate notice of the extensive discrimination against minorities in the skilled building trades --the training ground for future construction contractors.[5]

That Congress is authorized, capable and competent to make the findings that it made and to try to remedy--minimally-- some of that severe underrepresentation and past discrimination is unquestioned. Beyond a shadow of a doubt, Congress' enactment of the MBE ten percent set aside satisfies the criteria deemed necessary by Justice Powell in Bakke. The set aside is, therefore, constitutional.

B. The MBE Ten Percent Set Aside Furthers a Compelling Governmental Purpose and No Less Restrictive Alternative Is Available

Aside from the fact that Congress is authorized, capable and competent to remedy minority underrepresentation or

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5. 123 Cong.Rec. H.1440 (daily ed. Feb. 24, 1977) (remarks of Rep. Conyers).

past discrimination, the MBE ten percent set aside also is constitutional under strict judicial scrutiny for it meets all the necessary criteria.

As Justice Powell summarized in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), for a classification to pass strict scrutiny, the government "'must show that [1 & 2] its purpose or interest is both constitutionally permissible and substantial, and that [3] its use of the classification is "necessary. . . to the accomplishment" of its purpose or the safeguarding of its interest.'" 438 U.S. at 305 (opinion of Powell, J.) (citations omitted) (ellipsis in original). Additionally, as Justice Brennan pointed out in Bakke, a suspect classification can be justified "even then, [4] only if no less restrictive alternative is available." 438 U.S. at 357 (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.) (footnote omitted). The MBE ten percent set aside meets all of these criteria.

1. The Purpose is Constitutionally Permissible

As discussed at pp.94-103, supra, there is no question that Congress has the power to enact race conscious remedial legislation. Katzenbach v. Morgan, 384 U.S. 641 (1966); South Carolina v. Katzenbach, 383 U.S. 301 (1966); see also, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964). Moreover, it has been firmly settled that Congress has the "power to fix the terms on which its money allotments to the [States] shall be disbursed." Lau v. Nichols, 414 U.S. 563, 569 (1974).

Congress' purpose in enacting the MBE ten percent set aside was, inter alia, to "begin to remedy" the exclusion of minority contractors from government contracts. 123 Cong.Rec. H. 1436-37 (daily ed. Feb. 24, 1977) (remarks of Rep. Mitchell). That purpose is undisputedly permissible.

2. The Purpose Is Substantial

As Justice Marshall stated in Bakke,

the position of racial minorities in American society today "is the tragic but inevitable consequence of centuries of unequal treatment." 438 U.S. at 395 (opinion of Marshall, J.). "It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence and prestige in America." 438 U.S. at 401 (opinion of Marshall, J.). "And in order to get beyond racism, we must first take account of race." 438 U.S. at 407 (opinion of Blackmun, J.).

The MBE ten percent set aside amendment, of course, was directed at the admirable purpose of remedying the exclusion of minority contractors from lucrative government contracting. See pp. 26-37, 55, 89-92, supra. But the underlying purposes are even more substantial. As summarized by Representative Mitchell:

> "We cannot continue to hand out survival support programs for the poor in this country. We cannot continue that forever. The only way we can put an end to that kind of a program is through building a viable minority business system." 123 Cong.Rec. H.1436-37 (daily ed. Feb. 24, 1977).

Representative Biaggi offered similar reasoning:

> "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. The consequences have been felt in millions of minority homes across the Nation.
>
> * * *
>
> "This amendment will go a long way toward helping to achieve [economic] parity and more importantly to promote a sense of economic equality in this Nation." *Id.* at 1440.

On the Senate side, the reasoning was virtually identical. As Senator Brooke explained to that chamber, "minority businesses' work forces are principally drawn from communities with severe and chronic unemployment.... Only with a healthy, vital minority business sector can we hope to make dramatic strides in our fight against the massive and chronic unemployment which plagues minority communities throughout this country." 123 Cong.Rec. S.3910 (daily ed. March 10, 1977).

Thus, as these legislators recog-

nized, it is clear that the purposes of the MBE ten percent set aside are not only substantial, they are of overwhelming importance.

3. The MBE Ten Percent Set Aside Is Necessary to the Accomplishment of Congress' Purposes

Year after year after year, governments have awarded fewer than one percent of all procurement contracts to minority business enterprises. This pattern was not about to change unless Congress made it change. The MBE ten percent set aside was absolutely necessary in order "to begin to remedy this situation." 123 Cong.Rec. H. 1436-37 (daily ed. Feb. 24, 1977) (remarks of Rep. Mitchell). The remedy of course was not very extensive. The ten percent figure "in fact is quite modest." Id. at 1440 (remarks of Rep. Biaggi). Nonetheless, the ten percent figure was absolutely necessary to begin to accomplish Congress' purposes.

4. There Is No Less Restrictive Alternative Available

In enacting the MBE ten percent set

aside, Congress was not making its first attempt to remedy the exclusion of minority businesses from government contracting. Rather, for a decade Congress had been pouring money into the Small Business Administration and into the SBA's Office of Minority Business Enterprise. By the mid-1970s, it became clear that the SBA's efforts were too insubstantial and too ineffectual to remedy the government's past patterns.

In reports made to Congress by the U.S. Commission on Civil Rights[6] and by the Government Accounting Office,[7] the virtually total ineffectiveness of the SBA programs and of similar programs was thoroughly documented. Similar findings were made in late 1976 by the House of Representatives Committee on Small Business.[8] It became evident to Congress

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6. U.S. Commission on Civil Rights, Minorities and Women as Government Contractors (May 1975).

7. *See* note 4 *supra*.

8. House Comm. on Small Business, Summary of Activities, H.R. No. 94-1791, 94th Cong., 2d Sess. (1977).

that a more substantial program of direct government contracts through a minority set aside was the only feasible means of accomplishing Congress' purpose.

When Representative Parren Mitchell introduced the ten percent set aside amendment, he capsulized the problems faced by minority contractors even with the assistance of the SBA/OMBE programs:

> "Let me tell the Members how ridiculous it is not to target for minority enterprises. We spend a great deal of Federal money under the SBA program creating, strengthening and supporting minority businesses and yet when it comes down to giving those minority businesses a piece of the action, the Federal Government is absolutely remiss. All it does is say that, 'We will create you on the one hand and, on the other hand, we will deny you.' That denial is made absolutely clear when one looks at the amounts of contracts let in any given fiscal year and then one looks at the percentage of minority contracts. The average percentage of minority contracts, of all Government contracts, in any given fiscal year, is 1 percent--1 percent. That is all we give them. On the other hand we approve a budget for OMBE, we approve a budget for the SBA and we approve other budgets, to run those minority enterprises, to make them become viable entities in our system but then on the other hand we say no, they are cut off from contracts." 123 Cong.Rec. 1436-37 (daily ed. Feb. 24, 1977).

Senator Brooke was equally emphatic about the absolute need, based on past experience, for the ten percent set aside. It is "necessary because minority businesses have received only 1 percent of the Federal contract dollar, despite repeated legislation, Executive Orders and regulations mandating affirmative efforts to include minority contractors in the Federal contracts pool." 123 Cong.Rec. S.3910 (daily ed. March 10, 1977).

To Congress, which enacted the ten percent set aside without dissent, there was no less restrictive alternative available to accomplish its purpose. The MBE ten percent set aside "is the only way we are going to get the minority enterprises into our system." Id. (emphasis added). It is, therefore, constitutional.

CONCLUSION

Racial minorities have traditionally been excluded from benefitting directly from government procurement programs through a complex network of events, ranging from overt racial discrimination to more subtle forms of exclusion traceable to discrimination in access to educational facilities and to adequate financial backing. The short-term result of excluding more than fifteen percent of our population from the procurement pie has been to create a substantial competitive advantage for white-owned firms seeking to profit from government procurement. Instead of a market share established by competition, white owned businesses have enjoyed a monopoly of the procurement trade attributable not to superior economic efficiency, but to the artificial exclusion of minority business enterprises as prospective competitors. Congress, in enacting the MBE set aside, sought merely to reconstruct the competitive picture as it would have existed but for the historic

exclusion of minorities from government procurement programs. In recognizing and declining to perpetuate a skewed competitive picture attributable to past racism, Congress was engaged in seeking to eliminate the current effect of past racially discriminatory procurement practices. Since petitioners have neither a moral nor a legal claim to a status quo built on racial exclusion, the decision of the Court of Appeals for the Second Circuit should be affirmed.

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