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BENIGN RACIAL CLASSIFICATIONS: A GUIDE FOR TRANSPORTATION ATTORNEYS

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Just prior to its adjournment in 1982, and subsequent to hotly contested debates, the 97th Congress enacted the Surface Transportation Assistance Act of 1982 (STAA).[1] The Act contained a number of controversial provisions, not the least of which was one requiring that "not less than 10 per centum of the amounts authorized to be appropriated" by the act were to be expended on small business "owned and controlled by socially and economically disadvantaged individuals . . . ."[2] Such small businesses have become known, as disadvantaged business enterprises, or DBE's.

Congress' sole reference and guide for future implementation of its mandate is contained in the short statement in section 105(f) of STAA.[3] As a result of this lack of direction, a significant number of questions have arisen regarding not only Congress' intent, but also the constitutionality of its mandate and the states' statutory, constitutional and practical ability to carry out that mandate.

This article's purpose is to suggest the probable intent of Congress, to offer practical considerations that are necessary for the successful implementation of a DBE program, and finally, to discuss the philosophical, statutory and constitutional issues at the federal and state levels. This commitment is undertaken with the full understanding that more questions may be raised than

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1. Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 105(f), 96 Stat. 2097, 2100 (1982).

2. Except to the extent that the Secretary determines otherwise, not less than 10 per centum of the amounts authorized to be appropriated under this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals as defined by section 8(d) of the Small Business Act (15 U.S.C. section 637(d)) and relevant subcontracting regulations promulgated pursuant thereto.

Id.

3. *Id.*

answered.

I. SECTION 105(F) OF THE STAA

What was Congress' intent when it enacted section 105(f) of STAA? Did it intend the program to be a haphazard shot in the arm of DBE's, or did it intend to enable DBE's to compete in the open market? The latter appears to be the more logical conclusion for two reasons. First, it is clear that the highway construction field lacks a significant number of DBE's.[4] Second, Congress cross-referenced section 8(d) of the Small Business Act[5] and the "relevant subcontracting regulations promulgated pursuant there to"[6] for further definition of its intent. Since the history of the Small Business Act demonstrates an attempt to place minorities on a competitive footing with majority firms, the same purpose can be logically imputed to the enactment of section 105(f).[7]

Assuming this congressional intent, it is incumbent upon state governments to approach the DBE program in a manner that will help DBE's establish a sound base for future competition. Failure to do so will only enrich those firms already participating in highway construction and deter potential new DBE's which desire to organize but lack the capital, training and experience to do so. It is axiomatic that the enrichment of present DBE's will not increase the number of competitive firms. In fact, unless firms are created nationwide, arguably there will not be sufficient DBE's to meet the congressional mandate. The creation and success of new firms will not be an easy undertaking even with the congressional guarantee of contracts.[8]

Federal aid alone cannot create viable DBE's and cure the problem of the small number of DBE's competing for federally assisted

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4. *Cf.* Fullilove v. Klutznick, 448 U.S. 448, 475 (1980) (recognizing the impaired access of minority businesses to public contracting opportunities).

5. Small Business Act § 8(d), 15 U.S.C. § 637(d) (1982). Section 8(d)(1) establishes 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. . . ." The remaining provisions of section 8(d) of the Small Business Act outline procedures for awarding federal contracts which are designed to achieve this policy.

6. Surface Transportation Assistance Act of 1982 § 105(f).

7. *See* Drabkin, *Minority Enterprise Development and the Small Business Administration's Section 8(a) Program: Constitutional Basis and Regulatory Implementation*, 49 BROOKLYN L. REV. 433 (1983).

8. *Id.*

contracts. For example, "[o]nly four per cent, or 166 of the 4,598 firms admitted to the (section 8(a)) program, have graduated as competitive and self-sufficient businesses."[9] Instead of seeking competitive status, many of these firms have oriented their attention to merely "attaining noncompetitive section 8(a) contracts."[10] This behavior is caused by the incentives of such a program. A preference program such as the section 8(a) effort may initially place a DBE firm in a limited competition setting, allowing it to demand more payment and more profit than its open market competitors. However, if a DBE is to survive outside of the program, it must learn to compete outside of this limited setting. Otherwise, when the DBE preference is abrogated by Congress, the firm will not understand competition in the real marketplace, which can be fatal to a firm's continued existence. Such firms must avoid becoming "set-aside contract junkies."[11]

Responsible government dictates that incentives be created to entice the DBE to seek competitive status; otherwise, when the section 105(f) money is exhausted, the DBE firm will collapse or find itself just as disadvantaged as it was prior to entering the program.[12] In fact, it is possible that those firms that were successful when they entered the program could become so dependent on the preferences offered under the DBE programs that they will fall into the trap of dependence and, thereby, lose their competitive edge.[13]

Even if a DBE learns competitive techniques and develops management skills, it can still find itself at a disadvantage in the open market. In the construction industry, unless the DBE has established a sound reputation as a solid qualified contractor, prime contractors may subcontract to other contractors with better reputations. This situation is common:

> The federal government is a prime example of the phenomenon of customer preference for products and services of particular firms with established reputations. . . . Approximately sixty-four percent of the Department of Defense dollar volume of procurement in fiscal

9. *Id.* at 448 (citing COMPTROLLER GENERAL OF THE U.S. REPORT TO THE CONGRESS: THE SBA 8(A) PROCUREMENT PROGRAM—A PROMISE UNFULFILLED GAO Report CED 81-55 (Apr. 8, 1981) [hereinafter cited as A PROMISE UNFULFILLED]).

10. Drabkin, *supra* note 7, at 448-49.

11. *Id.* at 467 (citing A PROMISE UNFULFILLED, *supra* note 9, at 15-19).

12. Drabkin, *supra* note 7, at 448.

13. *Id.*

> 1980 was noncompetitive in nature. It was either sole source or follow-on after design or price competition.[14]

These extraordinary figures suggest that a new firm which has not yet established its reputation may find it difficult to break into federal government procurement.[15] However, this problem of customer preference probably does not occur at the state highway contract level, where the majority of contracts are advertised for bid to the lowest responsible bidder. Nonetheless, since subcontracts awarded by prime contractors are frequently not bid competitively, the prime could look to reputation rather than price.

While reputation is important, experience leads this writer to believe that price plays a more important role than reputation when a prime is choosing a subcontractor. Obviously, the prime will not look at price alone, because he must assure that the work will be properly performed. In addition, he must be convinced that the subcontractor will work with the other contractors on the project and complete the project without incident or delay. Nevertheless, price is a very important factor. Consequently, new firms must be able to compete on price. This may be difficult because "new firms with a small scale of operation [may] have higher per-unit costs than larger firms already entrenched in the marketplace."[16] The larger the firm, the more capable it is of using "more efficient machinery and more efficient labor and management functions."[17] Larger firms also buy in larger quantities, enabling them to purchase supplies at a lower price and pass savings on to their customers. In addition, new, small firms may have to pay interest rates higher than those paid by established firms,[18] and supplier credit may also be more difficult to arrange.[19] These are but a few of the problems that face new DBE firms.

The past experience of contractors who have built their firms from the ground up can prove invaluable to DBE's. Recognizing this potential tool, Commissioner Hal King of the Virginia Depart-

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14. *Id.* at 462 (citing U.S. DEPT. OF DEFENSE, WASHINGTON HEADQUARTERS SERVS., DIRECTOR FOR INFORMATION OPERATIONS AND REPORTS, 100 LARGEST DEFENSE CONTRACTORS AND THEIR SUBSIDIARY CORPORATIONS, FISCAL YEAR (1980)).

15. *Id.*

16. *Id.*

17. *Id.* at 463.

18. *Id.* at 464. Discussions with contractors also confirm this.

19. *Id.* Recent conferences with DBE's confirm this. This problem is not peculiar to DBE's; it has always been a factor in the highway construction field.

ment of Highways and Transportation is currently promoting the "mentor-protege" concept. By taking DBE firms under their wings, established contractors can help with both management and technical advice.[20] This "mentor-protege" approach can also involve other methods, such as low interest loans or stock purchases, which can help DBE firms develop a solid foundation for competition. These methods, however, must be carefully implemented so that the DBE is truly independent and not a clone of the mentor.

Even with these various types of assistance, companies entering the highway construction field for the first time must have patience. They must be prepared to wait between four and eleven years before they "reach a positive operating profit, and between nine and twenty years for cumulative profits to become positive."[21]

II. THE PHILOSOPHY OF REVERSE DISCRIMINATION[22] OR BENIGN RACIAL CLASSIFICATIONS

It is clear that the section 105(f) program is to be implemented on the basis of racial classifications. It is designed to benefit small businesses owned and controlled by socially and economically disadvantaged individuals. Whether the Constitution will support such use of racial classifications for benign, non-discriminatory purposes to benefit a race has been one of the most debated concepts facing students of the Constitution for the past ten years. As will be discussed below,[23] prior to 1980 whenever a racial classification was employed to discriminate against or to disfavor a particular race, the Supreme Court viewed such a classification with a jaundiced eye and employed a strict scrutiny test which proved fatal to all but two such classifications.[24] The question then arose

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20. Care must be taken that these "mentor-protege" relationships are not improperly used. The protege must have the controlling interest in the firm and perform a commercially useful function.

21. Drabkin, *supra* note 7, at 454 (citing SBA, REPORT OF THE TASK FORCE ON VENTURE AND EQUITY CAPITAL FOR SMALL BUSINESS 5 (1977)).

22. The term "reverse discrimination" as it is used today means that instead of steps being taken to discriminate against minorities, steps are taken to grant special treatment to minorities. Professor Jones takes issue with the use of the term "reverse discrimination." He argues that the term is "a popular misconception . . . a buzz word [which] clearly carries a pejorative connotation [but] is rarely accompanied by any legal analysis." Jones, *"Reverse Discrimination" in Employment: Judicial Treatment of Affirmative Action Programs in the United States*, 25 HOW. L.J. 217 (1982).

23. *See infra* notes 114-17 and accompanying text.

24. *See* Phillips, *Neutrality and Purposiveness in the Application of Strict Scrutiny to Racial Classifications*, 55 TEMP. L.Q. 317, 323-24 (1982).

whether the same standard should be employed when a benefit rather than a detriment is being bestowed upon minorities.[25]

Justice Powell, in *Regents of the University of California v. Bakke*,[26] cites an article by Professor Bickel which sums up the view taken by many who disfavor benign racial classifications. Professor Bickel points out that until the benign classification issue reached the Supreme Court, the Court had consistently held racial classifications to be patently unconstitutional. Now, he asserts,

> this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is being gored. Those for whom racial equality was demanded are to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution.[27]

A number of questions arise when reviewing the philosophical acceptability of benign classifications. For example, when a preference is granted to a particular group and that preference is found to be constitutional, what criteria should be used to determine when to discontinue the preference? What standard will be invoked to determine whether, from a societal, employment or other standpoint, the minorities are now actually equal both in opportunities and societal acceptance? It appears that the Supreme Court will be forced to make such decisions and the basis of those decisions will be subjective. The Court's decision on these issues will be subjective because it cannot evaluate the true conditions that exist. This is no condemnation of its ability, but merely a statement of practical reality. Whatever criteria the Court adopts to judge the success of a benign classification must be subjective.[28]

The following discussion points out the philosophical pros and cons surrounding benign classifications. The writer recognizes that there are many scholars who have voiced a myriad of opinions on

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25. This issue has resulted in five cases in which the Court has approached the problem, but has given no clear analysis or guidance. *See infra* notes 121-42 and accompanying text.

26. 438 U.S. 265, 295 (1978).

27. A. BICKEL, THE MORALITY OF CONSENT 133 (1975). *See also* Christian Sci. Monitor, Sept. 20, 1983, at 4, col. 1 (interview with Clarence M. Pendleton, Jr., Chairman of the Civil Rights Commission, where he assails affirmative action and supports a color blind approach).

28. It is well-accepted that there are those who now believe there is no discrimination that warrants a remedy.

the subject; however, as a matter of journalistic perogative, the positions of two writers on the subject will be emphasized.

A. *Support for Preferential Programs*

Professor Nickel, in an article concerning preferential hiring practices, introduces and discusses three separate rationales for approaching the issues: (1) compensatory justice, (2) distributive justice and (3) utility.[29] It should be noted that Professor Nickel did not invent these rationales. "Aristotle articulated the principles of rectification (compensatory justice) and distributive justice, and utilitarianism was set out by Jeremy Bentham and John Stuart Mill."[30]

1. Compensatory Justice

"Compensatory justice awards reparations for past injury. Its aim is to make whole those who were injured by putting them where they would have been 'but for' the injustices suffered."[31] This rationale faces the initial hurdle that "some of the injury for which compensation is sought was inflicted on persons long since dead."[32] Professor Duncan argues, however, that it is impossible to separate past and present injury.[33] According to this hypothesis, present day conditions would not exist "but for" the results of prior history.

If one accepts the proposition that compensation is owed, the next question becomes to whom is that compensation owed? Is it owed to all members of the racial group or only to those who have been harmed substantially by discrimination and hardship?[34] Is a person who was once harmed by discrimination, but who has since overcome that harm through his own effort, also entitled to reparation?[35] Should governments, companies or individuals compensate for these losses even though there is no evidence that they caused

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29. Nickel, *Preferential Policies on Hiring and Admissions: A Jurisprudential Approach*, 75 COLUM. L. REV. 534 (1975).

30. Duncan, *The Future of Affirmative Action: A Jurisprudential Legal Critique*, 17 HARV. C.R.—C.L. L. REV. 503, 510 (1982). This is an excellent article which further discusses and applies these rationales.

31. *Id.*

32. *Id.*

33. *Id.* at 510-11.

34. Nickel, *supra* note 29, at 537.

35. *Id.*

the loss?[36]

Professor Nickel argues that the only ones "who have a right to compensation are those who have personally been injured by discrimination and who have yet not been able to overcome this injury."[37] Other commentators disagree. Professor Duncan concludes that "because discrimination was and is suffered by black individuals solely because of their membership in the group of blacks, compensation is due purely on the basis of membership in that group."[38] Although Professor Nickel believes not everyone in the group is entitled to compensation, he supports reparation to the group based upon administrative convenience.[39] Professor Duncan, on the other hand, disagrees with the idea that administrative convenience is the sole justification for group compensation.[40] He believes those who have overcome the harm are equally deserving of compensation because in reaching their success, they have suffered discrimination.[41]

In direct contrast to the approaches of Duncan and Nickel, there are those who cannot support compensation solely because of one's race.[42] This view holds that for a person to recover, he must demonstrate that he is one from which the spoils were actually taken.[43]

There are also commentators who favor compensation but not in the form of preferential treatment.[44] Their approach favors reparative efforts such as special training programs, head start activities, financial aid and community improvement programs.[45] The idea is

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36. *Id.*

37. *Id.* at 539.

38. Duncan, *supra* note 30, at 511, 513-14. *Cf.* Taylor, *Reverse Discrimination and Compensatory Justice*, 33 ANALYSIS 177 (1973) (supporting Duncan's view in part). *But see* Cowan, *Inverse Discrimination*, 33 ANALYSIS 10, 12 (1972); Goldman, *Limits to the Justification of Reverse Discrimination*, 3 SOC. THEORY & PRACTICE 289 (1975). *See also* Cohen, *Why Racial Preference is Illegal and Immoral*, COMMENTARY, June 1979, at 40, 42 (arguing that title VII of the Civil Rights Act forbids deliberate racial discrimination in all cases except those where it is necessary to redress "identifiable persons" injured by discrimination and where the party inflicting the injury is the same party that makes them whole).

39. Nickel, *Should Reparations Be To Individuals or to Groups?*, 34 ANALYSIS 154 (1974).

40. Duncan, *supra* note 30, at 516.

41. *Id.*

42. Cohen, *supra* note 38, at 43-44.

43. *Id.*

44. Lipset & Schneider, *The* Bakke *Case: How Would it be Decided at the Bar of Public Opinion*, PUBLIC OPINION, March/April 1978, at 38, 44.

45. *Id.* at 41.

to give special consideration without preferential treatment.[46]

2. Distributive Justice

Under this precept, benefits as well as burdens are "distributed in accordance with relevant considerations such as the rights, deserts, merits, contributions and needs of the recipients."[47] An individual is entitled to preference not as a reparation for past wrongs but solely because "he or she deserves a greater share of community resources."[48] Once again, however, the question arises as to whether the entire group or only those who can demonstrate injury are entitled to preference.

Professor Duncan supports group entitlement. He argues that: (1) the fact that one has, for example, received a quality education does not immunize that person from discrimination, (2) administrative convenience dictates it and (3) there are clear examples of "unmistakable large scale inequality of opportunity" and the pervasiveness of the inequality requires a group remedy.[49]

Professor Nickel, on the other hand, points out that such a theory is unrealistic.[50] He asserts that too many other factors could have contributed to inequality and it is impossible to sort out these other influences from those caused by discrimination.[51] In addition, this approach is potentially underinclusive. Although distributive justice attempts to allocate benefits and burdens among all of society, disadvantaged whites would not benefit if relief is aimed solely at minorities.[52]

3. Social Utility

The rationale underlying the social utility theory is that the overall public good will be promoted by reducing poverty and inequality.[53] "Since neither past nor present discrimination need be

46. *Id.* at 44.
47. Duncan, *supra* note 30, at 520.
48. *Id.*
49. *Id.* at 523-24.
50. Nickel, *supra* note 29, at 540.
51. *Id.* at 539.
52. It should be noted that the implementation of the STAA has not precluded whites. Whites may participate if they qualify as disadvantaged.
53. Duncan, *supra* note 30, at 524; Nickel, *supra* note 29, at 541. *See also* Posner, *The* Defunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 16.

shown, this theory presents fewer justification problems than the two theories" previously discussed.[54]

How does preferential treatment help society as a whole? It increases employment and educational opportunities, alleviating poverty "and its attendant evils by eliminating the sort of economic inequality that leads to resentment and strife."[55]

In addition, it promotes the development of role models within a minority group which, in turn, suggests the opportunities that are available while encouraging self improvement.[56] Preferential treatment also creates a more diverse society, allowing the free exchange of opinions and knowledge.

Finally, it is argued that educational and employment opportunities will help provide legal and medical services for disadvantaged minorities.[57] This conclusion presumes that minority professionals will provide their services to disadvantaged minorities, which may or may not be true. Professor Nickel defends such preferential treatment, however, on the theory that minority lawyers and doctors are *more likely* to help meet the legal and medical needs of the minority community than are white lawyers and doctors.[58]

B. *General Objections to Affirmative Action*

Notwithstanding the specific criticisms of the three approaches highlighted above,[59] there remain several general philosophical objections that may be lodged against preferential programs.

1. The Competency of Minorities

Some argue that granting less qualified people jobs, promotions and educational opportunities will lower the standards and the quality of services provided.[60] "Those who are opposed to preferen-

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54. Duncan, *supra* note 30, at 524.

55. Nickel, *supra* note 29, at 541. It is axiomatic that poverty and discrimination encourage crime, family strife, lack of self confidence and social tension. *Id.*

56. *See* Duncan, *supra* note 30, at 525.

57. *Id.* at 526; Nickel, *supra* note 29, at 541.

58. Nickel, *supra* note 29, at 542.

59. It is recommended that both Professors Duncan's and Nickel's treatises be read for a more complete understanding of the three approaches. *See* Duncan, *supra* note 30; Nickel, *supra* note 29.

60. *See* Nickel, *supra* note 29, at 545.

tial policies often raise the specter of illiterate students, highway patrolmen who do not know how to drive, teachers who cannot handle children and surgeons who remove tonsils by cutting throats."[61] Both Professors Nickel and Duncan argue that such results will not occur if proper steps are taken to establish an efficient affirmative action approach.

Professor Nickel suggests that "preferential policies should be restricted to those who are adequately qualified, or who, with the training provided, can become adequately qualified for the position sought."[62] If a person does not meet this basic test, then he cannot be given a preference.[63]

Professor Duncan, on the other hand, after noting that "no affirmative action program with which [he is] familiar requires hiring or accepting unqualified persons,"[64] asserts that the lack of competency argument "fails because it is based on the false assumption that in the absence of affirmative action positions are awarded on the basis of merit."[65] He states that because talented minorities "have been kept from competing for positions, a true meritocracy has never existed."[66] In support of his position, he points out that the lack of competency objection has never been raised against veterans preference programs or against decisions to admit students to universities because their relatives are wealthy alumni.[67] Thus, he argues, "a double standard is being applied to minorities in yet another instance of discrimination."[68]

Professor Duncan also argues that the evaluation of merit is troublesome. In support of his argument he cites studies[69] which demonstrate that school entrance exams should be reevaluated. Professor Duncan's argument is premised on the belief that test scores and grades are an inadequate measure of a person's abilities,[70] and that admissions criteria should include factors such as human characteristics.[71] He would redefine "competence" to reflect

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61. *Id.*
62. *Id.*
63. *Id.*
64. Duncan, *supra* note 30, at 531.
65. *Id.* at 529.
66. *Id.* at 529-30.
67. *Id.* at 531.
68. *Id.*
69. *Id.* at 530 n.94.
70. *Id.* at 530.
71. *Id.*

the specific task that the individual being measured would be required to perform.[72]

Both Professors Nickel and Duncan agree that the way to overcome the competency issue is to establish a minimum standard of competency that must be met; all persons above that minimum would be deemed qualified.[73] In setting that standard, the minimum level should be set high enough to eliminate the truly unqualified persons, but all above that level would be deemed qualified regardless of the extent by which they exceed the minimum.[74] The use of the minimum level policy would allow one to hire the person given the preference without selecting one who is unqualified.[75]

However, finding the minimum level may not be easy. A higher minimum level may be necessary where "small differences in competence within the range of adequate competence can make a great deal of difference in the level of performance."[76] For example, "[f]or gardeners, postal clerks, x-ray technicians and sales personnel, adequate competence may be sufficient; but in the case of surgeons, professional athletes and airline pilots, small differences in competence can make a great difference, respectively, in lives saved, games won, or crashes averted . . . ."[77]

An arguable weakness with the concept of minimum competence is that it may lead to the selection of a person who has scored lower than other candidates, a result contrary to traditional business principles. In the United States, tradition dictates that those who score highest are entitled to the position. Professor Duncan attempts to refute this argument by noting that the award to the one who scores highest assumes that an absolute merit standard is implicit in the "awarding of societal benefits."[78] He suggests alter-

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72. *Id.* at 530-31. For example, he believes a black lawyer's "greater ability to meet the needs of black clients ought to be factored into the competence calculation." *Id.* at 531. This is a valid argument *if* the black lawyer does practice in the minority community. What happens, however, if he does not choose this avenue? While there are other worthy arguments to support the black applicant, this is a weak one.

73. Duncan, *supra* note 30, at 531; Nickel, *supra* note 29, at 545.

74. Duncan, *supra* note 30, at 531. *See also* Nickel, *supra* note 29, at 545. In other words, while some may score higher above the minimum than others, all those above the minimum are equally qualified.

75. Nickel, *supra* note 29, at 545.

76. *Id.*

77. *Id.*

78. Duncan, *supra* note 30, at 536.

native methods of selection, such as by lottery or on a first come, first served basis among those above the minimum level.[79] He recognizes, however, that there would be an outcry among those scoring high.

While there is merit in the lottery or the first come, first served approach, it might discourage persons from excelling. A person may only strive to meet the minimum level, knowing that, outside of his own personal pride and satisfaction, his reward for achieving a higher competency is relegated to fate.

2. Preferential Programs May Create Unfair Burdens

Who is to bear the burden? Preferential programs may unfairly place the burden on those who are excluded solely by the preference. A person so excluded can argue that, while help may be needed for the preferred person, the burden should not be placed so unequally upon him. Professor Nickel argues that those with a higher score may have "a prima facie right to be chosen."[80] He proposes, however, that although this may be the best way, it is not the only permissible way.[81] He suggests that either the first come, first served or the lottery concepts, as proposed by Professor Duncan, might be employed.[82]

Professor Nickel also suggests that a moral obligation might be recognized. Thus, persons making the decision on the granting of the position may be morally obligated to promote desirable social goals so long as this could be accomplished without significant detriment to the program in which the position is available.[83]

The critical question remains, however, of why a small group, those scoring higher, should bear the entire burden of a preference program. Professor Nickel recognizes this problem and suggests ways to reduce the burden. For example, tax revenues could be used "to create more government jobs, to increase jobs in the private sector, and to provide retirement benefits that will encourage early retirement."[84] In addition, a certain number of available positions could be exempted from the preferential program. In this

79. *Id.*
80. Nickel, *supra* note 29, at 546.
81. *Id.*
82. *Id.*
83. *Id.* at 547.
84. *Id.* at 549.

way those not in the preferred group would not be blocked from all opportunities.[85]

Still, none of these solutions completely satisfies the objections of those who are asked to shoulder the burden. Consequently, Professor Nickel states that, as to whatever unfairness cannot be alleviated, the nonpreferred must recognize "that society requires them to live with reduced opportunities in order to meet its obligations."[86] He supports this posture by pointing to war and highway construction as classic examples of situations where some individuals must inevitably bear heavier burdens than others for the greater good of society.[87]

The Supreme Court addressed this principle of unequal sacrifice for the benefit of society in *Miller v. Schoene*.[88] In *Miller*, certain cedar trees were found to host cedar rust which, although not harmful to cedar trees, threatened apple orchards two miles away. Since apple growing is a major industry in Virginia, the General Assembly of Virginia decided to destroy the cedar trees in order to protect the apple trees. The Court found that the preference of one class of property in order to save another which was of greater value to the public in the judgment of the legislature was constitutional. The Court held that "where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property."[89] The reasoning of *Miller* could be applied to preferential programs. As in *Miller*, preferential programs seek to achieve benefits for the public good while placing economic burdens on seemingly innocent parties.

III. The History of Equal Protection

The basic constitutional issue raised by government programs according preferential treatment to certain groups in society is that of equal protection. In the case of minority groups, however, the

85. *Id.*

86. *Id.* (citing Thomson, *Preferential Hiring*, 2 Phil. & Pub. Aff. 369 (1973)).

87. *Id.* This writer's experience supports the argument as to highway construction and eminent domain. Most people do not want the highway to be built in a manner disruptive to their lives. For example, added traffic or land condemnation inevitably inconveniences persons.

88. 276 U.S. 272 (1928).

89. *Id.* at 279-80.

meaning of the equal protection clause has varied considerably throughout history.

Prior to the Civil War, the United States supported the institution of slavery. The unequal treatment of blacks was constitutionally acceptable.[90] After the Civil War, however, the fourteenth amendment was ratified to insure that all persons would receive equal protection.[91] Since its enactment, however, scholars, historians and courts have debated the scope of its protection.

In essence, the fourteenth amendment

> does not prevent the States from resorting to classification for purposes of legislation. . . . But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the objects of the legislation, so that all persons similarly circumstanced shall be treated alike.[92]

The fact that the amendment allowed the government to classify meant that, by the very utilization of such classification, it could create inequality between classes.[93] Thus, while the amendment pledges equal protection, at the same time it ostensibly allows the creation of inequality. "In tackling this paradox the Court has neither abandoned the demand for equality nor denied the legislative right to classify. It has taken a middle course. It has resolved the contradictory demands of legislative specialization and constitutional generality by a doctrine of reasonable classification."[94] This rational or reasonable basis approach was basic to the interpretation of equal protection until World War II.

Traditionally, the fourteenth amendment supported only mini-

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90. *See* Dred Scott v. Sanford, 60 U.S. (10 How.) 393 (1856).

91. It should be noted that the Constitution also contains an equal protection guarantee under the due process clause of the fifth amendment. *See* Harris v. McRae, 448 U.S. 297 (1980). State actions violating the equal protection concept are challenged under the fourteenth amendment, while those of the federal government pose fifth amendment challenges. Note, *Minority Business Enterprise Set-Aside: The Reverse Discrimination Challenge*, 45 ALB. L. REV. 1139, 1143 (1981). "Equal protection analysis in the Fifth Amendment area is the same as under the Fourteenth Amendment." Buckley v. Valeo, 424 U.S. 1, 93 (1976) (citing Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975)). *But see* Hirabayashi v. United States, 320 U.S. 81, 100 (1943) ("The Fifth Amendment contains no equal protection clause . . . .").

92. Royster Gauno Co. v. Virginia, 253 U.S. 412, 415 (1920).

93. Atchison, Topeka & Santa Fe R.R. v. Mathews, 174 U.S. 96, 106 (1899).

94. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 344 (1949).

mal judicial intervention.[95] This

> "old" variety of equal protection scrutiny focused solely on the means used by the legislature: it insisted merely that the classification in the statute reasonably relate to the legislative purpose . . . . [U]sually that rational classification requirement was readily satisfied: the courts did not demand a tight fit between classification and purpose; perfect congruence between means and ends was not required . . . .[96]

While prior to World War II, the "Court displayed some willingness to strike down racial classifications which, on their face, disadvantaged minorities," it was "willing to tolerate most other state laws using race as a criterion."[97] Professor Phillips points out "that neither the courts nor the other arms of government did much to alter the structure of social forces which consigned blacks and other racial minorities to a condition of social inferiority despite their theoretically equal legal status."[98] Clearly, neutrality[99] was the position of the Court.

Was this neutrality on the part of the Court justified and why did it take this position? Arguably, the equal protection provisions in the fourteenth amendment on their face were intended by its drafters to be more than neutral. In 1866, the 39th Congress had passed the Freedmens Bureau Act.[100] This Act provided "race-conscious remedies and limitations."[101] Because of the Freedmen's Bureau Act, some commentators argue that it is "inconceivable that the same Congress intended by its approval of the fourteenth amendment on June 12, 1866, to validate and forbid remedies it had labored so hard to pass."[102] Professor Jones submits that there

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95. G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 670 (10th ed. 1980).

96. *Id.*

97. Phillips, *supra* note 24, at 323.

98. *Id.*

99. The writer uses the term "neutral" to mean that the Court did not interpret the amendment as providing preferential treatment. The Court did not take sides; it only determined that blacks were entitled to no more and no less than whites. This neutrality is clearly demonstrated in Plessy v. Ferguson, 163 U.S. 537, 551-52 (1896). *See infra* notes 104-08 and accompanying text.

100. 13 Stat. 507 (Mar. 3, 1865).

101. Jones, *supra* note 22, at 221. The most notorious race-conscious remedy provided by the Freedmen's Bureau Act was the provision that set apart abandoned lands in the confederate states for the "freedman." 13 Stat. 507, 508 (Mar. 3, 1865).

102. Jones, *supra* note 22, (citing G. BENTLEY, A HISTORY OF THE FREEDMAN'S BUREAU (1955), among others).

is no doubt that Congress intended that there be preferential treatment for blacks, but it was the decisions of the Supreme Court that "eviscerated the reconstruction laws and the constitutional amendments."[103] If the foregoing is true, the two principle cases that achieved this reversal were the *Civil Rights Cases*[104] and *Plessy v. Ferguson.*[105]

In the *Civil Rights Cases*, in a well known passage, Justice Bradley stated:

> When a man has emerged from slavery, and by the aid of beneficient legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.[106]

The Court reaffirmed this neutral approach thirteen years later in *Plessy v. Ferguson*, where the Court upheld a state law requiring separate railway carriages for whites and blacks. Justice Brown, speaking for the majority, stated:

> "[w]hen the government . . . has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized and performed all the functions respecting social advantages with which it is endowed." Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.[107]

Justice Harlan took the neutral approach a step further, employing it to argue against the validity of "separate but equal" legislation. In his dissent in *Plessy*, Justice Harlan introduced his well known premise of a "color-blind" Constitution:

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103. Jones, *supra* note 22, at 221.
104. 109 U.S. 3 (1883).
105. 163 U.S. 537 (1896). *See* Jones, *supra* note 22, at 222.
106. 109 U.S. at 25.
107. 163 U.S. at 551-52 (quoting People v. Gallagher, 93 N.Y. 438, 448 (1883)).

> [I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.[108]

This posture of neutrality continued until World War II.[109] During World War II, however, the Court abandoned the reasonableness or rational basis test when dealing with race questions and adopted a new standard. In *Hirabayashi v. United States*,[110] and *Korematsu v. United States*,[111] the Court was faced with the Japanese exclusion and curfew issues.[112] In *Hirabayashi*, the Court declared that

> [d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection. . . . [R]acial discriminations are in most circumstances irrelevant and therefore prohibited . . . .[113]

One year later in *Korematsu*, the Court introduced the strict scrutiny approach to equal protection analysis of racial classifications.[114] In *Korematsu*, the Court found that "all legal restrictions which curtail the civil rights of a single racial group *are immedi-*

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108. *Id.* at 559 (Harlan, J., dissenting). Note that this concept was espoused by Justices Rehnquist and Stevens in their dissent in Fullilove v. Klutznick, 448 U.S. 448, 522-23 (1980).

109. Phillips, *supra* note 24, at 322. Professor Phillips cites Justice Harlan's "color-blind" premise in *Plessy v. Ferguson* and a case decided sixteen years before *Plessy*, Strauder v. West Virginia, 100 U.S. 303 (1879), to support his position. In *Strauder*, the Court had held that racial discrimination against whites was unconstitutional.

110. 320 U.S. 81 (1943).

111. 323 U.S. 214 (1944).

112. These cases arose out of President Roosevelt's 1942 executive order to the commander of the west coast military area that was aimed at preventing possible espionage and sabotage by Japanese-Americans. *See* Exec. Order No. 9,066, 3 C.F.R. 1092 (1938-1943 Comp.).

113. 320 U.S. at 100.

114. 323 U.S. at 216. The Court continued to apply the rational or reasonable basis standard to issues not having racial overtones. *See* GUNTHER, *supra* note 95, at 864.

ately suspect. . . . [C]ourts must subject them to the most *rigid scrutiny.*"[115]

Thus, the approach developed in the World War II exclusion cases required strict scrutiny of racial classifications and the classification would be upheld only if (1) it would achieve a compelling government objective and (2) there was no less restrictive alternative available to achieve that purpose. This resulted in only two instances where the classification was upheld prior to 1980.[116]

IV. Reaction of the Supreme Court to Benign Racial Classifications

The issue of preferential treatment is not totally new to the Supreme Court. It has dealt with the issue before in school desegregation[117] and voter reapportionment cases.[118] The issue of racial classifications for the purpose of affirmative action, however, did not reach the Court until 1973 when a writ of certiorari was sought and granted in the case *Defunis v. Odeguard.*[119] This case and the four other affirmative action cases[120] since that time have left constitutional scholars across the United States in confusion concerning the status of benign classifications.[121] It is this writer's position

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115. 323 U.S. at 216 (emphasis added). This new standard was suggested by Justice Stone's footnote in United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938). Justice Stone stated that "[t]here may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution." However, he found it "unnecessary to consider now whether legislation . . . is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation." *Id. Carolene Products* dealt with the constitutionality of the Filled Milk Act which prohibited the interstate shipment of "filled" milk. *See generally* Phillips, *supra* note 24, at 323; Note, *supra* note 91, at 1444 n.21.

116. Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943). *See* Phillips, *supra* note 24, at 324-25. *See generally* L. Tribe, American Constitutional Law 994, 1000-01 (1978); Note, *supra* note 91, at 1145-46.

117. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (stating that although quotas were not required, mathematical ratios were useful in shaping a remedy).

118. *See, e.g.*, United Jewish Org., Inc. v. Carey, 430 U.S. 144 (1977) (upholding reapportionment scheme designed to permit certain numbers of minority representatives in the New York state legislature); White v. Regester, 412 U.S. 755 (1973) (overturning a state redistricting plan because it discriminated against blacks and Mexican-Americans).

119. 414 U.S. 1038 (1973).

120. Minnick v. California Dept. of Corrections, 452 U.S. 105 (1981); Fullilove v. Klutznick, 448 U.S. 448 (1980); United Steelworkers of Am. v. Weber, 443 U.S. 193 (1977); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

121. *See infra* notes 125-42 and accompanying text. One contributing factor to the

that the Court has not yet decided what rules are applicable to benign classifications; consequently, its decisions betray what has been called "a clear note of ambivalence."[122]

In *Defunis*, the Court, after granting the writ of certiorari, declared the case moot because the challenger of a law school's preferential admission program was ready to graduate from law school by the time the Court could act.[123] It appeared that the Court wished to gain additional experience with preferential treatment programs.[124] The next case, *Regents of the University of California v. Bakke*,[125] involved a similar challenge to a medical school's special admissions program.[126] In a five to four decision[127] authored by Mr. Justice Powell but receiving little support from the other justices,[128] the Court applied the strict scrutiny test[129] and struck

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Court's confusing posture may be its desire to review societal problems. Hence, a decision that does not necessarily comport with legal logic may result. As Professor Mishkin articulately asserts:

> [T]he issues posed involve broad societal problems, and the decisions of the Court have an impact that the justices cannot ignore (and probably should not if they could). The demands of a wise or politic result may be in tension with the dictates of principle. The issue of the constitutionality of affirmative action poses in particularly intense form one stance of that conjuncture.

Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907 (1983) (Professor Mishkin was senior author of the Brief for Petitioners in *Bakke*).

122. Mishkin, *supra* note 121, at 910.

123. DeFunis v. Odeguard, 416 U.S. 312 (1974). It is puzzling that after being fully briefed on the mootness issue *before* granting the petition for a writ of certiorari, the Court granted the petition to hear the case on the merits and shortly thereafter decided the case was moot. Either the Court was confused as to the proper approach or it was using a means of allowing affirmative action programs to continue without the Court's official approval.

124. Mishkin, *supra* note 121, at 911-12.

125. 438 U.S. 265.

126. The University had set aside 16 places out of each class of 100 for qualified disadvantaged minority students. In defense of the program, the University argued that "discrimination against members of the white 'majority' cannot be suspect if its purpose can be characterized as 'benign.' " *Id.* at 294. Bakke, in part, argued the program operated to exclude him on the basis of his race in violation of the equal protection clause of the fourteenth amendment and title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1983).

127. It is arguable that it is not a 5-4 but a 4-1-4 decision. *See* Jones, *supra* note 22, at 232. There are actually six different opinions. *See* Duncan, *supra* note 30, at 504.

128. Justices Brennan, White, Marshall and Blackmun concurred in part and dissented in part. *Bakke*, 438 U.S. at 267-68. The "Brennan Group" rejected Powell's strict scrutiny test, believing it to be appropriate only when confronted with a classification that stigmatized the group. *Id.* at 357. They advocated an "intermediate test" under which racial classifications designed to further remedial purposes "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 359 (quoting Califano v. Webster, 430 U.S. 313, 317 (1977), which quotes from Craig v. Boren, 429 U.S. 190, 197 (1976) (a sex discrimination case applying the intermediate standard)). Applying

down the admission policy[130] on constitutional grounds.[131] At the same time, however, the Court did recognize that race could be a factor in the admissions process.[132] The divergent opinions of the justices left considerable uncertainty as to the Court's approach to benign classifications.[133]

One year after *Bakke*, in *United Steelworkers of America v. Weber*,[134] the Court upheld an affirmative action plan involving job training for blacks[135] yet side-stepped the opportunity to speak definitively.[136] In 1980, the Supreme Court handed down *Fullilove v. Klutznick*,[137] involving a challenge to a portion of the Federal Public Works Employment Act which mandated that at least ten percent of every public works grant go to minority business enter-

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this test, the "Brennan Group" found the admissions program constitutional.

The remaining four justices (Burger, C.J., Stevens, Stewart & Rehnquist, J.J., concurring in part and dissenting in part) voted to invalidate the program on statutory grounds, title VI of the Civil Rights Act of 1964, and therefore never reached the constitutional issue. *Bakke*, 438 U.S. at 408-21.

129. *Id.* at 291. Justice Powell asserted that the Court had "never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative or administrative findings of constitutional or statutory violations." *Id.* at 307. *See* A. BICKET, THE MORALITY OF CONSENT 133 (1975).

130. *Bakke*, 438 U.S. at 271.

131. *Id.* at 287.

132. *Id.* at 315-19. Powell asserted that race was only a "plus" and could "not insulate the individual from comparison with all other candidates for the available seats." *Id.* at 317. Thus, after establishing a neutral position on benign classifications by providing that the same strict scrutiny test applied to benign as well as to invidious racial classifications, Powell then provided "considerable support for covertly race-based admissions preferences through his actual utilization of that test." Phillips, *supra* note 24, at 332-33.

133. Professor Mishkin aptly stated that the *Bakke* opinion "as a whole amounted to a proclamation of ambivalence that dramatically recognized and proclaimed the existence of legitimate moral and constitutional claims on both sides of the issue." Mishkin, *supra* note 121, at 917. There is also the argument that the opinion did little but make the Regents admit Bakke to medical school. *See* Duncan, *supra* note 30, at 504.

134. 443 U.S. 193 (1977).

135. Adopted as part of a collective bargaining agreement, the program provided for on-the-job training for unskilled workers on a one-to-one basis, one black for each white selected. The Fifth Circuit found the program violated title VI because it discriminated against whites without a determination having been made against the company that it was guilty of past discrimination. Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 224 (5th Cir. 1977), *rev'd sub nom.* United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979). In a 5-2 decision the Court held that the plan did not violate title VI. *Id.*, 443 U.S. at 195.

136. The Court held that its decision was directed solely towards voluntary affirmative action plans in relation to title VII and did not involve state action under the equal protection clause of the fourteenth amendment. *Id.* at 200. For an excellent discussion of the *Weber* case, see Meltzer, *The* Weber *Case; The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. CHI. L. REV. 423 (1980).

137. 448 U.S. 448.

prises. Once again the Court was divided as to what level of scrutiny to employ.[138] Writing for the Court, Chief Justice Burger explicitly rejected *Bakke's* strict scrutiny test and employed the term "close examination" instead.[139] It has been argued that the Chief Justice's opinion stands for the concept that the Court will "substantially defer" to schemes of Congress which employ benign racial classifications for remedial purposes.[140] Thus, such congressional schemes will not be subjected to the stringent level of judicial examination ordinarily given racial classifications under the strict scrutiny approach. Finally, in 1981, the Court confirmed its ambivalent approach to benign classifications by dismissing *Minnick v. California Department of Corrections*[141] after it had already granted certiorari and after the case was fully briefed and argued.[142]

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138. While rendering a 6-3 opinion upholding the program, the Court presented four different views, none of which was supported by a majority vote. Chief Justice Burger's position is summarized *infra* note 140. Justice Powell, in a separate concurring opinion, employed the compelling interest standard, under which he deferred to Congress' powers and held that Congress, unlike the Regents in *Bakke*, was "competent to make . . . findings sufficient to uphold the use of a race-conscious remedy" in pursuit of the legitimate government interest in dispelling identified discrimination. *Id.* at 497, 516. For a summary of Justice Powell's position, see Comment, *Reverse Racial Preferences Under the Equal Protection Clause: Round II*, 19 AM. BUS. L.J. 197, 206 n.87 (1981).

Justice Marshall, with Justices Brennan and Blackmun joining, wrote a concurring opinion that employed the same rationale adopted by the "Brennan Group" in *Bakke*, 448 U.S. at 517, in which they advocated the use of the intermediate test. *See supra* note 129.

Justice Stewart, joined by Justice Rehnquist, dissented and appeared to take the color-blind constitution approach, where no distinctions should be allowed. *Bakke*, 448 U.S. at 525-26.

Justice Stevens also wrote in dissent, and appeared to adopt the strict scrutiny test. *Id.* at 532-54; *see* Jones, *supra* note 22, at 239; Phillips, *supra* note 24, at 339.

139. *Bakke*, 448 U.S. at 472. Chief Justice Burger asserted that a program that employs racial or ethnic criteria, even in a remedial context, calls for close examination. *Id.* There are close similarities between Chief Justice Burger's use of "close examination" and Justice Brennan's "intermediate test." *See* Note, *supra* note 91, at 1160-61.

140. *See* Phillips, *supra* note 24, at 336.

141. 452 U.S. 105. *Minnick* involved allegations by two white males that the Department of Correction's affirmative action plan unlawfully discriminated against white males and, as a result, certain white males had been denied promotions.

142. Professor Mishkin has criticized the *Minnick* decision, stating that "[t]he somewhat labored opinion cited 'significant ambiguities in the record' and relied on the fact that the trial court proceedings in the case had taken place before the Supreme Court's decision in *Bakke*." Mishkin, *supra* note 121, at 914 (citing *Minnick*, 452 U.S. at 127). As Professor Mishkin points out, while the Court's holding may be technically supportable, "[i]t is also true, however, that the bases for this conclusion were generally available at the time of the original decision to grant certiorari." *Id.* Originally at least four Justices believed the issue in *Minnick* was ripe for decision. Apparently, three Justices changed their minds because only Justice Stewart voted to decide it on the merits. *Id.*

V. What Test is to be Employed in Reviewing Benign Classifications?

Obviously, there is significant uncertainty on the Court as to how benign classifications should be treated. Any attorney who undertakes the task of outlining a constitutionally permissible affirmative action plan, or attacking an affirmative action plan as being unconstitutional, is faced with a significant burden.

Since the reader has been forewarned as to the inexactitude of the treatment of benign classifications, the writer is willing to leap into the breach with a recommendation for reviewing affirmative action programs in the transportation construction industry.

A. *Checklist for Review*

The following questions must be reviewed, keeping in mind that the answer to one may be dependent upon the answer to one or more of the other questions.

1. Is there a compelling state interest or will the classification serve important governmental objectives?

2. Does the body making the determination have the authority to make the determination set out in the first inquiry above?

3. Has there been a finding of past racial discrimination that affects present minority rules in the contract marketplace?

4. Is the means chosen to remedy the problem the least intrusive?

5. Is the remedy temporary in nature?

6. Does the chosen remedy unnecessarily or improperly burden innocent parties?

7. Are there circumstances that allow for a rational review of a failure to meet the goal? If so, are there provisions for a waiver in the event there is a bona fide reason for such failure?

B. *Discussion and Support of the Checklist*

1. Is there a compelling state interest or will the classification serve important governmental objectives?

The answer to this inquiry will be aided by the answer to the third question concerning whether there is evidence of past racial

discrimination in the transportation contract field. The strength of such evidence may be a determinative factor in deciding how compelling or how important the governmental interest may be. This issue will be further developed below in the interpretation of point three.[143]

In *Bakke*,[144] Justice Powell used a strict scrutiny test which required the interest of the decision-making body to be compelling.[145] He did, however, give credence to race as a "plus" factor to be reviewed with other qualifications.[146] In *Fullilove*,[147] Justice Powell, while giving voice to the compelling interest standard,[148] avoided an absolute application of the strict scrutiny test by arguing that dispelling racial discrimination can be compelling.[149] In other words, while racial preference ordinarily cannot be supported by a compelling interest, it can be if it is necessary to overcome racial discrimination. This analysis is strikingly similar to Justice Brennan's intermediate test, where benign classifications are necessary to serve an important governmental objective.[150]

Although Chief Justice Burger did not reach the issue in *Bakke* or *Fullilove*, ostensibly, he rejects both the strict scrutiny and intermediate standards of review for benign racial classifications.[151] Nonetheless, he did call for a "close examination" of racial classifications.[152] His review in *Fullilove* followed the same line of review usually employed when an intermediate standard is applicable. As a result, he found that Congress need not be color-blind,[153] and if a court could remedy past discrimination, then Congress, with its legislative powers, should likewise be able to do so.[154]

Justices Brennan, Blackmun, Marshall and White employed the intermediate test in *Bakke*.[155] In *Fullilove*, the group also employed the intermediate level test, although Justice White joined

143. *See infra* notes 188-203 and accompanying text.
144. 438 U.S. 265 (1978).
145. *Id.* at 291.
146. *Id.* at 317.
147. Fullilove v. Klutznick, 448 U.S. 448 (1980).
148. *Id.* at 497.
149. *Id.* 497-98.
150. *See supra* note 128.
151. *Id.* at 477.
152. *Id.* at 472.
153. *Id.* at 480.
154. *Id.* at 477-89.
155. *Bakke*, 438 U.S. at 324-78. Note, however, that Justice White joined Justice Powell in his strict scrutiny discussion. *Id.* at 487 n.7.

Chief Justice Burger's opinion.[156]

The remaining three Justices, Stevens, Stewart and Rehnquist, disposed of *Bakke* on statutory grounds without reaching the constitutional issue.[157] In *Fullilove*, the three dissented, with Justices Stewart and Rehnquist taking the color-blind approach, where absolutely no distinctions are allowed,[158] while Justice Stevens appeared to adopt the strict scrutiny test.[159]

This writer submits that Justices Brennan, Marshall, Blackmun and White have expressly adopted the intermediate level standard, while Chief Justice Burger and Justice Powell implicitly endorse it. In light of this conclusion, the author recommends that the intermediate standard be used only *if* there has been a finding of past discrimination.

2. Does the body have the authority to make the determination that there has been past discrimination and that a remedy is required?

Justice Powell found that the Regents in *Bakke* did not have the authority to make decisions regarding past racial discrimination and remedial action.[160] He did not believe that *isolated* segments of government were competent to make such decisions.[161] Congress, on the other hand, did have the competency.[162] This writer believes that Justice Powell would only allow determinations regarding past discrimination to be made by (1) Congress, (2) another legislative body or (3) a non-legislative body of government that has been delegated that authority by the legislature. It should be noted that Justice Powell would require strict scrutiny if a legislative body other than Congress makes the decision.[163]

Chief Justice Burger did not reach the issue of what body of government was making the decision in *Bakke*, but gave great deference to Congress in *Fullilove*.[164] Justice White also joined the

156. *Fullilove*, 448 U.S. at 517.
157. *Bakke*, 438 U.S. at 408-21. Chief Justice Burger joined in their view.
158. *Fullilove*, 448 U.S. at 525-26.
159. *Id.* at 533-55.
160. *Bakke*, 438 U.S. at 309.
161. *Id.*
162. *Id.*
163. *Fullilove*, 448 U.S. at 515 n.14.
164. *Id.* at 473-76.

Chief Justice in this view.[165]

Justices Brennan, Marshall, Blackmun and White supported the Regents' decision in *Bakke*.[166] They believed that the power to make such a decision had been given to the Regents by the California Constitution.[167] Consequently, they found nothing that required the Court to limit the scope of the Regents' powers more narrowly than it had been limited by the California Assembly.[168]

Justices Stevens, Stewart and Rehnquist never reached this issue in *Bakke*.[169] In *Fullilove*, they dissented and once again never addressed the issue.

Who, then, enjoys the authority to make the finding of past discrimination and the consequent need for a remedy?[170] Obviously, Justice Powell did not believe that such authority should be available to everyone. He was concerned with the concept that "all institutions throughout the nation could grant [preference] at their pleasure to whatever groups are perceived as victims of societal discrimination."[171]

The lower courts have been divided on what body has the authority. In candor, they have received little guidance from the Supreme Court.[172] In *Central Alabama Paving, Inc. v. James*,[173] the court found that the United States Department of Transportation was not "expressly empowered by Congress to impose such preferential classifications."[174] In contrast, in *M.C. West, Inc. v. Lewis*,[175] the court upheld the United States Secretary of Transportation's authority on the basis that Executive Order 11,625 and the Small Business Act provided a sufficient "chain of authority."[176] In *Local 35, IBEW v. City of Hartford*,[177] the Second Circuit Court of Appeals reviewed an affirmitive action ordinance adopted by the City

165. *Id.*
166. *Bakke*, 438 U.S. at 324-78.
167. *Id.* at 366 n.42.
168. *Id.*
169. *Id.* at 408-21.
170. For a sound discussion on the issue, see Note, *The Constitutionality of Affirmative Action in Public Employment: Judicial Deference to Certain Politically Responsible Bodies*, 67 VA. L. REV. 1235 (1981).
171. *Bakke*, 438 U.S. at 310.
172. *See* Drabkin, *supra* note 7, at 440 (arguing that there is "no guidance").
173. 499 F. Supp. 629 (M.D. Ala. 1980).
174. *Id.* at 636.
175. 522 F. Supp. 338 (M.D. Tenn. 1981).
176. *Id.* at 346.
177. 625 F.2d 416 (2d Cir. 1980).

Council of Hartford, Connecticut and found it met Justice Powell's *Bakke* test. It held that the City Council was a "competent and responsive legislative body subject to political restraints."[178] In *Detroit Police Officers' Association v. Young*,[179] the Sixth Circuit Court of Appeals, after endorsing Justice Brennan's opinion as the one offering "the most reasonable guidance,"[180] found the Board of Police Commissioners was a "public body" that was competent to make findings of past discrimination.[181] The case of *Ohio Contractors Association v. Keip* [182] involved a decision by the Ohio General Assembly to set aside specific percentages of the total number of contracts and subcontracts for construction, supply and material contracts. The court did not believe that Justice Powell's remarks about the "unique" power of Congress to act limited such acts solely to that body. The court found that

> [n]o enabling provision is required to authorize a state government to enact legislation to prevent the denial of equal protection to persons within its jurisdiction. The prohibition against denial of equal protection carries with it the power to prevent such denial and to remedy past violations. When a state legislature takes steps in compliance with the equal protection clause it is acting in the same capacity as that of Congress in adopting legislation to implement the equal protection component of the Fifth Amendment's due process clause.[183]

In *Michigan Road Builders Association v. Milliken*,[184] the court noted that the plaintiffs did not argue that the Michigan legislature was an inappropriate body for such decisions. The court further noted that the degree of review accorded a race-conscious remedy depends upon the body creating the remedy.[185] Finally, in the recent case of *South Florida Chapter of the Associated General Contractors, Inc. v. Metropolitan Dade County, Florida*,[186] the court found *Fullilove* did not restrict the power to make findings of past discrimination to Congress. The court held that a

178. *Id.* at 421.
179. 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981).
180. *Id.* at 694.
181. *Id.*
182. 713 F.2d 167 (6th Cir. 1983).
183. *Id.* at 172.
184. 571 F. Supp. 173, 177 (E.D. Mich. 1983).
185. *Id.*
186. 723 F.2d 846 (11th Cir. 1984).

county commission "was competent as a matter of State law to make findings of past discrimination and to enact remedial legislation."[187]

3. Has there been a finding of past racial discrimination that affects present minority roles in the contract market place?

This issue has been treated with varying importance by the courts. In *Bakke*, Justice Powell found not only that the Regents were incompetent to make such findings but, in fact, no findings had been made.[188] Justice Brennan's group,[189] on the other hand, rejected the need for a finding of individual discrimination.[190] Justice Brennan thought it sufficient if "each recipient [was] within a general class of persons likely to have been the victims of discrimination."[191] Furthermore, Justice Brennan did not believe that it was necessary that the body employing the remedy find that the body itself had discriminated.[192] Finally, Justice Brennan's group asserted that states may "adopt race-conscious programs designed to overcome substantial, chronic minority underrepresentation where there is reason to believe that the evil addressed is a product of past racial discrimination."[193] The remaining justices did not reach the issue because they decided the question on statutory grounds.

In *Fullilove*, the Chief Justice found that Congress had made a determination of past discrimination.[194] More importantly, however, he rejected the notion that Congress had to compile a "record" supporting such a finding in the same manner as a judicial body.[195] This view was supported by Justice Powell.[196] Justices Marshall, Brennan and Blackmun found that Congress had a "sound basis" for findings of past discrimination,[197] and that particularized findings were unnecessary.[198]

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187. *Id.* at 852.
188. *Bakke*, 438 U.S. at 309.
189. Justices Brennan, White, Marshall and Blackmun. *See supra* note 128.
190. *Bakke*, 438 U.S. at 363.
191. *Id.*
192. *Id.* at 365, 369.
193. *Id.* at 366.
194. *Fullilove*, 448 U.S. 448.
195. *Id.* at 477-78.
196. *Id.* at 502-03.
197. *Id.* at 520.
198. *Id.* at 520 n.4.

The lower federal courts have not had difficulty with this issue once they have found the body advancing the remedy was competent to offer the remedy. In *Michigan Road Builders*, the Court found that a legislative body need not make specific findings of past discrimination.[199] "[I]t may relay [sic] upon any evidence which logically supports the inference of prior discrimination."[200] The court in *Ohio Contractors*[201] found that the Chief Justice's determination that Congress need not compile a record like a judicial or an administrative body also applied to state legislatures.[202] Finally, in *South Florida Chapter* the Court held that the body making the determination need not find that it (the body) had discriminated; it had to determine only that there had been discrimination against the minority in the past.[203]

4. Are means chosen to remedy the problem the least intrusive?

In *Bakke*, Justice Brennan's group[204] found that for the remedy to be valid, it need only be "substantially related" to the achievement of its objective.[205] In *Fullilove*, however, the Chief Justice stated that the means employed as a remedy must be more thoroughly reviewed.[206] He believed that "any Congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination should be narrowly tailored to the achievement of that goal."[207] Justice Powell did not believe that such "remedial plans" must be "limited to the least restrictive means of implementation."[208] Even so, he suggested that the congressional remedy utilized in *Fullilove* met the least restrictive means test because (1) there was a waiver provision,[209] (2) it was of limited duration[210] and (3) it had a limited impact on innocent third parties.[211]

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199. *Michigan Road Builders*, 571 F. Supp. at 178.

200. *Id. See also* Valentine v. Smith, 654 F.2d 503 (8th Cir. 1981) (findings of previous statutory violations of title VI satisfied use of race-conscious remedy).

201. 713 F.2d 167 (6th Cir. 1983).

202. *Id.* at 170-72.

203. *South Fla. Chapter*, 723 F.2d at 852-53.

204. Justices Brennan, White, Marshall and Blackmun. *See supra* note 129.

205. *Bakke*, 438 U.S. at 359.

206. *Fullilove*, 448 U.S. at 480.

207. *Id.*

208. *Id.* at 508. *See also Ohio Contractors*, 713 F.2d at 174.

209. *Fullilove*, 448 U.S. at 481-82.

210. *Id.* at 489.

211. *Id.* at 486, 489. *Cf. Michigan Road Builders*, 571 F. Supp. at 189 (stating that *Fulli-*

In *South Florida Chapter,* the Court of Appeals for the Eleventh Circuit found that sufficient safeguards had been employed in the county ordinance challenged in that case to meet the tailoring requirement.[212] The court noted (1) the type of review process the county used to approve race-conscious measures, (2) the fact that annual reassessment of the program would be made and this could result in an abrogation of a particular course of action, and (3) that there was no impermissible infringement upon innocent third parties.[213]

The district court, on the other hand, had determined that the county's set-aside provision was not acceptable because less intrusive alternatives were available to accomplish the goals.[214] The circuit court overruled, holding that "[t]he County was not required to choose the least restrictive remedy available . . . ."[215]

The foregoing suggests that there are three specific factors to consider when determining whether a particular remedy meets constitutional muster. These factors are considered in detail below.[216]

5. Is the remedy temporary in nature?

This issue arises in determining whether the means employed as a remedy are properly tailored. Chief Justice Burger employed this concept in *Fullilove*[217] when he determined that the means should be narrowly tailored to achieve the goal.[218] A limited or specified duration for the remedy demonstrates that the means employed will be utilized only so long as they are required to remedy past discrimination.[219] Justice Powell accepted this test as a part of the inquiry into the means employed.[220]

Subsequent federal court cases have discussed the propriety of this test. In *Michigan Road Builders,*[221] the court found that no-

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love does not require that remedial act be of limited duration).

212. *South Fla. Chapter*, 723 F.2d at 853-54.

213. *Id.* at 853-56.

214. 552 F. Supp. 909, 935-36 (S.D. Fla. 1984).

215. 723 F.2d at 856 (citing *Fullilove*, 448 U.S. at 528 (Powell, J., concurring)).

216. *See infra* notes 217-49 and accompanying text.

217. *Fullilove*, 448 U.S. at 488.

218. *Id.* at 480.

219. *Id.* at 489.

220. *Id.* at 510.

221. *Michigan Road Builders*, 571 F. Supp. 173.

where in Chief Justice Burger's opinion in *Fullilove* did he require that a "remedial act be of limited duration."[222] The court interpreted the Chief Justice as only requiring that a "reassessment" or "re-evaluation" be made by the body employing the means.[223]

The court in *South Florida Chapter* reached a similar conclusion. It held that "[a]lthough no definite expiration date is specified, the Board is obligated to review the program annually to assess whether it should be continued or modified, and such a review adequately guarantees that the program will not be continued beyond its demonstrated need."[224] The court in *Ohio Contractors* also supports this approach.[225]

In summary, it appears that the plurality of the Supreme Court and the federal circuit courts have reached the conclusion that absolute, definitive time limits are not required. Instead, the means employed must be periodically reviewed in order to assure that they will not extend beyond the time that is required to remedy past discrimination.

6. Does the chosen remedy unnecessarily or improperly burden innocent parties?

In *Bakke*, Justice Powell initially employed the strict scrutiny test which, in practice, would prevent any person from receiving preferential treatment. Thus, no innocent party would be burdened. Later in the opinion, however, Justice Powell weakened his application of the strict scrutiny test by providing that race could "be a factor, although not the sole factor, in a program."[226]

In *Fullilove*, Chief Justice Burger conceded that, in providing a race-conscious remedy, some contracts would be awarded to minority business enterprises that might otherwise go to majority firms.[227] He determined, however, that it was not a constitutional defect in such a program if certain majority contractors were disappointed.[228] The Chief Justice stated that "[s]uch a 'sharing of the burden' by innocent parties is not impermissible."[229] The scope

222. *Id.* at 189.
223. *Id.* at 190.
224. *South Fla. Chapter*, 723 F.2d at 854.
225. *Ohio Contractors*, 713 F.2d at 175.
226. *Bakke*, 438 U.S. at 318.
227. *Fullilove*, 448 U.S. at 484.
228. *Id.*
229. *Id.* (quoting Franks v. Bowman Transp. Co., 424 U.S. 747 (1976)).

of the program in *Fullilove* was so limited (ten percent) that its impact on majority contractors was negligible because ninety percent of the funding was still available for competition by all contractors.[230] In addition, parties other than minorities, although themselves innocent of any discriminatory conduct, "may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities."[231]

In *Fullilove*, Justice Powell, likewise, did not find the burden on third parties to be too great.[232] The funds remaining in open competition made the impact so widely dispersed that no one person suffered disproportionately.[233] Justice Powell noted, however, that set asides may not always be an appropriate remedy.[234]

Several lower federal courts have interpreted the *Fullilove* decision. In *Ohio Contractors*, the Sixth Circuit disagreed with the district court that Ohio's disadvantaged business enterprise provisions imposed an impermissible burden on non-minority contractors.[235] The Sixth Circuit held that "the majority can be required to bear some of the burden which inevitably results from affirmative efforts to rectify past discrimination."[236] The court followed Chief Justice Burger's reasoning that a reasonable burden was justified since non-minorities had previously reaped competitive benefits from past discrimination practices.[237] The court acknowledged, however, that an affirmative action plan could not be used if it unnecessarily trammeled the interests of majority contractors.[238]

In *Michigan Road Builders*, the court held that, although there was an inevitable impact on non-minorities, it was not a significant burden "in light of the scope of the program" as compared to all available contracts.[239]

In *South Florida Chapter*, the Eleventh Circuit disagreed with the district court that the impact of single contracts must be

230. *Id.* at 484-85 n.72.
231. *Id.* at 485.
232. *Id.* at 514-15 (Powell, J., concurring).
233. *Id.* at 515.
234. *Id.* at 515 n.14.
235. *Ohio Contractors*, 713 F.2d at 173.
236. *Id.*
237. *Id.*
238. *Id.* (quoting Detroit Police Officers' Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981)).
239. *Michigan Road Builders*, 571 F. Supp. at 187.

viewed in isolation from the overall contracting program.[240] The court noted that "[a]ll three opinions in *Fullilove* voting to uphold the statute compared the 10% figure in the statute to the total expenditures by the United States government on construction contracts."[241] Consequently, the Eleventh Circuit upheld a "100% set-aside" for a particular county construction contract since it constituted only six tenths of one percent of all county contracts over a ten year period[242] and did not unfairly impact on third party non-minorities.[243] In addition, the court noted that non-minorities were not wholly excluded from the one percentage value set aside from minorities. A minority contractor could still be partners with a non-minority contractor and qualify to bid, as long as the non-minority did not control over forty-nine percent of the minority company. Thus, on the face of the program, it was possible for a non-minority to share forty-nine percent of the six tenths of one percent.[244]

In summary, it appears that the amount targeted for minorities is to be compared with the overall contracting program and not reviewed in isolation. This writer submits, however, that the program suggested by the Federal Highway Administration in accordance with the mandate of the Surface Transportation Assistance Act could have an unwarranted impact on small non-minority contractors. For example, a prime contractor, in order to meet his goal, may set up a small specialty portion of his contract to be performed by minorities. Thus, he may provide that he will give any guardrail or hauling work on a project only to minority contractors. If all other prime contractors take this same course of action, all of a particular specialty field will be dominated by minorities. Small non-minorities, therefore, could be effectively foreclosed from bidding unless, of course, they merge with a minority and allow the minority to have a controlling interest in the company. In light of this potential impact, it is suggested that periodic reviews be made to monitor and preclude such a result. It is also suggested that the history of affirmative action programs would dictate against allowing prime contractors to "load" certain areas of a contract. For the DBE program to be truly effective, DBE's must learn

240. *South Fla. Chapter*, 723 F.2d at 855.
241. *Id.* at 855 n.12.
242. *Id.* at 855.
243. *Id.* at 856.
244. *Id.* at 856 n.15.

all phases of construction; they must not become limited to, or isolated in, a given field.

7. Are there circumstances that would allow a waiver of the goal in the event that no qualified minorities can be found or hired?

Chief Justice Burger recognized in *Fullilove* that a waiver provision existed could be utilized in the event that, "despite affirmative efforts, [the goal] cannot be achieved without departing from the objectives of the program."[245] This waiver provision could be used to prevent a minority from exploiting an opportunity to charge an "unreasonable price, *i.e.*, a price not attributable to the present effects of past discrimination."[246] Justice Powell acknowledged that, without the possibility of waiver, it might be unfair to apply a rigid goal "where minority group members constitute a small percentage of the population."[247]

The federal circuit courts have recognized the importance of a waiver provision. In *South Florida Chapter,* for example, the Eleventh Circuit quoted Powell's opinion in *Fullilove* and acknowledged that a rigid goal could prove unfair.[248] In *Ohio Contractors*, the court noted that the goals were not inflexible because a waiver was available if it could be demonstrated that after good faith efforts the goal could not be reached.[249]

VI. Applicability of State Constitutions to Affirmative Action

A significant error is made and perpetuated when an attorney faced with a due process or equal protection question reviews only the United States Constitution. As Justice Brennan stated, "state courts cannot rest when they have afforded their citizens the full protection of the Federal Constitution. State constitutions, too are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law."[250] He further noted that a number of recent state su-

245. *Fullilove*, 448 U.S. at 481-82.
246. *Id.* at 488.
247. *Id.* at 514.
248. *South Fla. Chapter*, 723 F.2d at 856.
249. *Ohio Contractors*, 713 F.2d at 174.
250. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977).

preme court decisions demonstrate that a state court is entirely free to read its own constitution more broadly than the Supreme Court reads the federal Constitution, or to reject the mode of analysis used by the Supreme Court in favor of a different analysis of corresponding state constitutional guarantees.[251]

The interpretation of the particular state constitution is for state courts; the Supreme Court of the United States lacks the jurisdiction to review state court decisions that address solely state constitutional issues.[252] Only when the interpretation of a state constitutional issue also involves a question of federal law may the Supreme Court of the United States become involved. Justice Brennan cites with approval the case of *People v. Disbrow*,[253] wherein the court stated "[w]e pause finally to reaffirm the independent nature of the California Constitution and our responsibility to separately define and protect the rights of California citizens despite conflicting decisions of the United States Supreme Court interpreting the federal constitution."

California is not the only state that has made the decision to look primarily to its own constitution in order to interpret the rights and privileges of its citizens. Other states, such as Michigan, New Jersey, and Pennsylvania, are representative of a growing number of states that have manifested their reliance on their own state constitutions, rather than constantly deferring to the United States Constitution.[254]

In summary, Justice Brennan encourages the states to recognize that they have an obligation to their citizens under their state constitutions, and to recognize that automatic deferral to the federal Constitution is not an acceptable course of action. Equal recognition must be given to both documents. "The decisions of the [Supreme] Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law."[255]

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251. *Id.* at 495-502. *But see infra* note 257 and accompanying text (equal protection clause in Virginia is no broader than the federal constitutional provisions. Archer v. Mayes, 213 Va. 633, 194 S.E.2d 707 (1973)).

252. Brennan, *supra* note 250, at 501.

253. 16 Cal. 3d 101, 114-15, 545 P.2d 272, 280, 127 Cal. Rptr. 360, 368 (1976).

254. People v. Beavers, 393 Mich. 554, 227 N.W.2d 511, *cert. denied*, 423 U.S. 878 (1975); State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975); Commonwealth v. Campana, 455 Pa. 622, 314 A.2d 854, *cert. denied*, 417 U.S. 969 (1974).

255. Brennan, *supra* note 250, at 502.

As an example of provisions in state constitutions concerning discrimination, article I, section 11 of the Constitution of Virginia provides, among other things, that the citizens of Virginia are entitled to be free from any governmental discrimination based upon race.[256] Many states have similar provisions in their constitutions; counsel should examine state law to determine if an interpretation by federal courts of the federal Constitution can provide guidance in interpreting the state constitution. In Virginia, the supreme court held in *Archer v. Mayes*[257] that Virginia's equal protection clause is no broader than the fourteenth amendment and, therefore, outlaws only discrimination impermissible under the federal Constitution. Thus, the Supreme Court of Virginia will look to the federal Constitution's equal protection clause, and the cases interpreting that clause, to determine the proper scope of Virginia's equal protection clause.

Obviously, the manner in which different states perceive and interpret the applicability of the United States Constitution to their own state constitutions will vary. Whether a state adheres to Justice Brennan's view or the position taken by Virginia is absolutely crucial toward making any evaluation of an affirmative action plan.

VII. State Statutory Provisions

Once an attorney has determined the applicability of both federal and state constitutional provisions relating to equal protection and the application of those principles to benign racial classifications, he must go a step further. Even though state constitutional provisions may authorize benign classifications, they most likely are not self-executing. Rather, they only grant power to the executive or legislative branches to enact specific provisions for carrying out the constitutional precepts. The actual implementation of programs is found in state statutes and not the state constitution. In reviewing those statutes, it must be determined who has the authority, if anyone, to implement provisions concerning racial classifications; this determination is a vital linchpin under the teachings of *Fullilove*.[258] Under *Fullilove*, the person implementing benign

256. In his commentaries on the Virginia Constitution, A.E. Dick Howard has intimated that the drafters intended, by the use of such language, to prevent any governmental discrimination based upon race, regardless of its benign or remedial purpose. A. Howard, 1 Commentaries on the Constitution of Virginia 234 (1974).

257. 213 Va. 633, 638, 194 S.E.2d 707, 711 (1973).

258. 448 U.S. 448 (1980).

classifications must be a body competent to make that determination.[259] Not only must the body be a politically sensitive one, but it must also be one not prohibited from acting by federal statutes or state statutes and constitutions.

Under Virginia law, for example, if an agency of the state moves to implement benign racial classifications, both the Virginia Constitution and provisions of the General Assembly must be reviewed.[260] There are a number of references contained in the Code of Virginia which establish anti-discrimination principles.[261] More importantly, however, because the implementation of the provisions of the STAA involves contracting, the Virginia Public Procurement Act[262] must be reviewed.

Under the Virginia Public Procurement Act, procurement must be accomplished generally by either competitive sealed bidding or competitive negotiation, unless otherwise authorized by law.[263] The Act does provide, however, that "[a]ll public bodies shall establish programs consistent with all provisions of this chapter to facilitate the participation of small businesses and businesses owned by women and minorities in procurement transactions."[264] Nevertheless, under section 11-44, the Act provides that "[i]n the solicitation or awarding of contracts no public body shall discriminate because of the race . . . of the bidder or offeror." Furthermore, section 11-51 provides that contractors must agree not to "discriminate against any employee or applicant for employment because of race . . . ."

There are also provisions that set out the principle that competition is important in order to obtain a low price for the goods or services required by an agency.[265] For example, the General Assem-

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259. *See id.* at 473.

260. For a discussion of the Virginia Constitution, see *supra* notes 256-57 and accompanying text.

261. *See, e.g.*, VA. CODE ANN. § 11-44 (Cum. Supp. 1984) (prohibits discrimination in the solicitation or awarding of state contracts); *id.* § 2.1-374 (Repl. Vol. 1978 & Cum. Supp. 1984) (declaration of policy to eliminate discrimination from employment practices of government contractors); *id.* § 2.1-376 (Repl. Vol. 1978 & Cum. Supp. 1984) (requires government contracts to include nondiscrimination clause).

262. VA. CODE ANN. §§ 11-35 to -80 (Cum. Supp. 1984). Many states have provisions that the bid must go to the lowest responsible bidder. A determination, therefore, must be made whether benign classifications which provide for minority set-asides are in contravention of the procurement act or provisions of the particular state.

263. *Id.* §§ 11-41.1, -44.

264. *Id.* § 11-48.

265. *Id.* §§ 11-35 to -80.

bly has provided that "competition be sought to the maximum feasible degree" to the end that "all procurement procedures be conducted in a fair and impartial manner . . . [and] that all qualified vendors have access to public business and that no offeror be arbitrarily or capriciously excluded . . . ."[266] Furthermore, all public contracts, with certain exceptions not here relevant, can be let only after competitive sealed bidding or competitive negotiations.[267] Under section 11-37, if competitive sealed bidding is utilized, the award must go to the lowest responsive and responsible bidder. Similarly, under that same section, if competitive negotiation is utilized and if the person is both responsible and responsive, price is a matter to be considered although it is not to be the sole determinant.[268]

The foregoing provisions, therefore, provide that the determining factor in an award is competition. The interjection of a benign classification favoring a bidder eliminates competition to a certain extent. Preferred persons do not compete with all other bidders. They only compete with other DBE's. Thus, under the foregoing provisions, benign racial classifications would not be permitted. Accordingly, if the previous sections were the only provisions enacted by the Virginia General Assembly, benign racial classifications, offering preference to minorities or women, would not be permitted. There are exceptions to the above procedures, however, which may also exist in other states across the nation.

In Virginia, the General Assembly has provided the State Highway and Transportation Commission with a "general consent" provision under section 33.1-12 of the Code, whereby the Commission can take whatever steps are necessary to gain federal aid. Many states have these same "general consent" provisions. In addition, the Virginia General Assembly has provided that when a

> procurement transaction involves the expenditure of federal assistance or contract funds, the receipt of which is conditioned upon compliance with the mandatory requirements in federal laws or regulations not in conformance with the provisions of this chapter [the

266. *Id.* § 11-35(g).

267. *Id.* § 11-41.1

268. A responsible bidder is a person who has "the capability, in all respects, to perform fully the contract requirements and the moral and business integrity and reliability which will assure good faith performance . . . ." *Id.* § 11-37. Under that same section a responsive bidder is "a person who has submitted a bid which conforms in all material respects to the Invitation to Bid." *Id.*

> Virginia Public Procurement Act], a public body may comply with such federal requirements, notwithstanding the provisions of this chapter, only upon the written determination of the Governor, in the case of state agencies, or the governing body, in the case of political subdivisions, that acceptance of the grant or contract funds under the applicable conditions is in the public interest.[269]

Accordingly, since the STAA has mandated that states must have affirmative action programs that provide certain preferences to DBE's, and the failure of the state to follow these federal provisions will proscribe the state from an entitlement to federal aid under the STAA, it is this writer's opinion that the Commonwealth of Virginia, under sections 33.1-12 and 11-39 of the Virginia Code, may take steps to enact affirmative action measures providing preferences to DBE's in order to take advantage of the federal aid offered under the STAA.

Although this discussion has been limited solely to Virginia statutory procedures, it is suggested that the same analysis will prove fruitful to those states attempting to justify affirmative action preferential programs in order to comply with the STAA.

VIII. Conclusion

In summary, a transportation attorney reviewing an affirmative action program for state transportation construction must evaluate the terms of the program from several perspectives. First, one should consider it from the practical point of view of how its goals can best be achieved. Is the program one that will encourage DBE's to establish themselves and learn to compete in the future without benefit of preferential treatment, or is it one that merely fosters dependence on preferential treatment? Second, one must analyze such a program from a constitutional standpoint. As highlighted in this article, there is no explicit agreement within the Supreme Court as to the level of scrutiny applicable to benign racial classifications. In spite of this absence of definitive guidance, however, the Court's indications are clear that an affirmative action plan should be narrowly tailored to its objectives. In determining whether a particular program is sufficiently tailored, the checklist provided above should prove helpful. The reviewing attorney must also consider an affirmative action plan in light of the particular

269. *Id.* § 11-39.

state's constitution since its protections of individual liberties may be broader than those of the federal Constitution. Finally, one must examine state statutory authority for an affirmative action program.

The issue of benign racial classifications raises many difficult questions which elude definitive answers. It is hoped, however, that the foregoing framework of analysis can alleviate some of the confusion for the practicing attorney faced with the task of evaluating the terms of a specific state affirmative action program.