

The Burger Court Opinion Writing Database

Fullilove v. Klutznick

448 U.S. 448 (1980)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

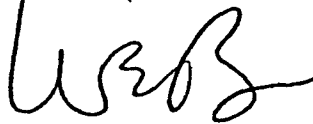
May 30, 1980

RE: 78-1007 - Fullilove v. Klutznick

MEMORANDUM TO THE CONFERENCE

Enclosed is first draft in the above case.
It may well develop that the Appendix, or parts of
it, may be deleted. It is sent now to expose the
whole background.

Regards,



To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: MAY 30 1980

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-1007

H. Earl Fullilove et al.,
Petitioners,
v.
Philip M. Klutznick, Secretary
of Commerce of the United
States, et al.

On Writ of Certiorari to the
United States Court of Ap-
peals for the Second Circuit.

[May —, 1980]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider a facial constitutional challenge to a requirement in a congressional spending program that, absent an administrative waiver, 10% of the federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from businesses owned and controlled by members of statutorily identified minority groups. 441 U. S. 960.

I

In May 1977, Congress enacted the Public Works Employment Act of 1977, Pub. L. 95-28, 91 Stat. 116, which amended the Local Public Works Capital Development and Investment Act of 1976, Pub. L. 94-369, 90 Stat. 999. The 1977 amendments authorized an additional \$4 billion appropriation for federal grants to be made by the Secretary of Commerce, acting through the Economic Development Administration (EDA), to state and local governmental entities for use in local public works projects. Among the changes made was the addition of the provision that has become the focus of this litigation. Section 103 (f)(2) of the 1977 Act, referred to

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 5, 1980
Personal

Re: No. 78-1007 - Fullilove v. Klutznick

Dear Lewis:

I have your memo re the above.

Would it not be better to try for a "united front" instead of a cluster of concurring opinions -- a practice of which I increasingly receive complaints from judges all over the country!

With all deference to your right to express views separately in any way you wish, may I suggest that we may accomplish a good deal by exchange of memos -- one-on-one -- rather than by concurring opinions which tend to get people "locked in"? After consultation on the points of your concern, I may well be able to embrace them!

Regards,

Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

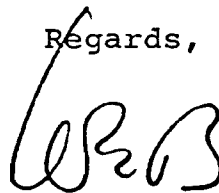
June 6, 1980

Re: 78-1007 - Fullilove v. Klutznick

Dear Bill and Thurgood:

I do not consider the points you raise as presenting any insoluble problems. However, I will wait other reactions before spending more time on this case.

Regards,



Mr. Justice Brennan

Mr. Justice Marshall ✓

cc: Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 9, 1980

Re: No. 78-1007, Fullilove v. Klutznick

MEMORANDUM TO THE CONFERENCE

I will defer response to the several memos until the "dust settles."

I do not share the passion expressed by some for stating "tests." The test is the Constitution. Harry once observed, accurately, that tests are often announced by us to fit the result reached in a given case.

More later.

Regards,

W.B.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 12, 1980

PERSONAL

Re: 78-1007 - Fullilove v. Klutznick

Dear Lewis:

Of course there is much in your memorandum with which I agree. In fact, each of the arguments you make as to why this program is constitutional is made in my opinion. My draft demonstrates that "strict scrutiny" has been given, although I avoid articulating our action in those words because I fear we are going astray with all sorts of "tiers of tests." I do not agree that it is essential to use any ritual of words to describe the standard of review employed -- so long as it is clear that the 5th and 14th Amendments are satisfied. These "tests" assume a talismanic quality that in my view is becoming increasingly unhelpful. I prefer to decide only this case, which deals with a Congressional program, strictly hedged in every respect indicated by the opinion.

I have attached "for your eyes" a draft of changes that I am willing to make in the opinion. My hope is that you will be satisfied that, as revised, the opinion is "not inconsistent" with the views you expressed in Bakke. I will await your comments on the attached before I circulate any proposed changes to the Conference.

I intend to stay with the limits expressed by this opinion, not stray from the narrow holding as some have done in the past. (Compare the "straying" from Swann in Milliken I.)

Regards,



Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 16, 1980

RE: 78-1007 - Fullilove v. Klutznick

MEMORANDUM TO THE CONFERENCE

Enclosed is "one last try" which I am prepared to
stay with-provided four or more join.

Regards,

CRB

2, 5, 9, 21-23, 25, 26, 28, 30-32, 34, 35, 37-39

Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: MAY 30 1980

Recirculated: JUN 16 1980

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-1007

H. Earl Fullilove et al.,
Petitioners,
v.
Philip M. Klutznick, Secretary
of Commerce of the United
States, et al.

On Writ of Certiorari to the
United States Court of Ap-
peals for the Second Circuit.

[May —, 1980]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider a facial constitutional challenge to a requirement in a congressional spending program that, absent an administrative waiver, 10% of the federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from businesses owned and controlled by members of statutorily identified minority groups. 441 U. S. 960.

I

In May 1977, Congress enacted the Public Works Employment Act of 1977, Pub. L. 95-28, 91 Stat. 116, which amended the Local Public Works Capital Development and Investment Act of 1976, Pub. L. 94-369, 90 Stat. 999. The 1977 amendments authorized an additional \$4 billion appropriation for federal grants to be made by the Secretary of Commerce, acting through the Economic Development Administration (EDA), to state and local governmental entities for use in local public works projects. Among the changes made was the addition of the provision that has become the focus of this litigation. Section 103 (f)(2) of the 1977 Act, referred to

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 18, 1980

Re: No. 79-1007 - Fullilove v. Klutznick

MEMORANDUM TO CONFERENCE

I will try to respond, but only preliminarily, to Bill's and Thurgood's June 18 memo and to Lewis' June 17 memo.

At the outset, it seems to me there is a "tempest in a saucer" aspect as to terms. I frankly believe that adopting a magic "word-test" is a serious error and I will neither write nor join in these "litmus" approaches. However, we are supposed to be proficient with words and I will keep trying as soon as I see the direction of the dissent or dissents.

Of course, each of us is free to write anything, but I am not prepared to subscribe to a Court opinion that is undermined by concurring opinions which undertake to say that the author of the Court opinion adopts a particular test; I would prefer to let the fragments fly.

Regards,

WRB

✓

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 20, 1980

MEMORANDUM TO THE CONFERENCE

Re: No. 78-1007, Fullilove v. Klutznick

I propose to modify the final paragraph of the opinion circulated June 16 to read substantially as follows:

"Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees. This case is one which requires, and which has received, that kind of examination. This opinion does not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as University of California Regents v. Bakke, 438 U.S. 265 (1978). However, our analysis demonstrates that the MBE provision would survive judicial review under either "test" articulated in the several Bakke opinions cited above. The MBE provision of the Public Works Employment Act of 1977 does not violate the Constitution.⁷⁶"

I suggest that it is possible to achieve the benefits of a majority opinion on this important question without abandonment of any of the views separately expressed in Bakke.

Regards,

WJ B

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 24, 1980

PERSONAL

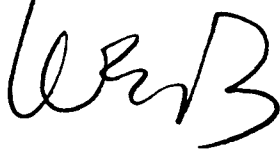
RE: 78-1007 - Fullilove v. Klutznick

Dear Lewis:

I have no problems with your memo of June 23. Reference to the General Welfare Clause on page 31 is deleted. Your suggested footnote as adapted is attached.

I also suggest references in your concurring opinion will be stronger if you substitute "plurality" for "Chief Justice's" opinion since Byron is with us. See copy.

Regards,

A handwritten signature in dark ink, appearing to be 'WB' or 'W.B.', written in a cursive, stylized manner.

Mr. Justice Powell

6/23/80

No. 78-1007, Fullilove v. Klutznick

Mr. Justice Powell, concurring.

Although I would place greater emphasis than the ~~Chief~~ ^{plurality opinion} ~~Justice~~ ^{does} on the need to articulate judicial standards of review in conventional terms, I view ~~the~~ ^{the plurality} opinion as substantially in accord with my own views. Accordingly, I join that ~~Chief Justice's~~ opinion and write separately to apply the analysis set forth in my opinion in University of California v. Bakke, 438 U.S. 265 (1978) (hereinafter Bakke).

The question in this case is whether Congress may enact the requirement in § 103(f)(2) of the Public Works Employment Act of 1977 (PWEA), that 10% of federal grants for local public work projects funded by the Act be set aside for minority business enterprises. Section 103(f)(2) employs a racial classification that is constitutionally prohibited unless it is a necessary means of advancing a compelling state interest. Bakke at 299, 305; see In re Griffiths, 413 U.S. 717, 721-722 (1973); Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 196 (1964). For the reasons stated in my Bakke opinion, I consider adherence to this standard as important and consistent with precedent.

The Equal Protection Clause, and the equal protection component of the Due Process Clause of the Fifth Amendment, demands that any classification among groups must be

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 24, 1980

MEMORANDUM TO THE CONFERENCE

Re: Holds for No. 78-1007, Fullilove v. Klutznick

The cases held for Fullilove present some real difficulties. On one group of five cases, I see a clear remand. They are as follows:

- { No. 78-1107, Armistead v. Associated General Contractors
- { No. 78-1108, City of Los Angeles v. Assoc. Gen'l Contr.
- { No. 78-1114, County of L.A. v. Assoc. Gen'l Contr.
- { No. 78-1382, Kreps v. Assoc. Gen'l Contr.
- { No. 78-1442, NAACP v. Assoc. Gen'l Contr.

These five consolidated cases arise on appeal from the District Court for the Central District of California. They raise the constitutional and statutory validity of the MBE provision of the Public Works Employment Act of 1977. On Nov. 2, 1977, the District Court held the provision unconstitutional and violative of Title VI of the Civil Rights Act of 1964. 441 F.Supp. 955. After the Bakke opinion was issued by this Court, the judgment in these cases was vacated and they were remanded for consideration of mootness. 438 U.S. 909. On remand, the District Court held that the cases were not moot because the issues were capable of repetition yet evading review and because, applying the reasoning of United States v. W.T. Grant Co., 345 U.S. 629 (1953) (which dealt with voluntary cessation of allegedly illegal conduct), the court was of the view that failure to consider the merits would leave Congress "free to return to [its] old ways" by enacting similar legislation. The District Court reentered judgment striking down the MBE program.

Although the District Court's approach to the mootness issue may be questionable, the merits of the case do not appear to be moot for the same reason that Fullilove v. Klutznick remained a live controversy -- at a minimum, performance of subcontracts by MBEs continues and, should one such enterprise fail to perform fully, application of the MBE provision assertedly would require that the substitute subcontractor also qualify as an MBE.

On the merits, the issues in these cases have been resolved in Fullilove. Therefore, I will vote to vacate and remand on the basis of Fullilove. ✓

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 25, 1980

MEMORANDUM TO THE CONFERENCE

RE: 78-1007 - Fullilove v. Klutznick

As indicated in my original circulation memo of May 30, I will delete from my opinion the extensive quotation from the legislative history, which was included for your convenience. Paragraphs 1-7 of the Appendix will be eliminated.

Two changes as follows are being made in the final print, both being acceptable to Byron and Lewis:

- 1) On pages 31-32 the phrase "to advance the general welfare as well as" will be deleted.
- 2) Attached new footnote 73 will be added at p. 35, 3rd line from the bottom, and the subsequent footnotes will be remembered.

There will also be other purely formal changes.

Regards,


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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 26, 1980

MEMORANDUM TO THE CONFERENCE

Re: Holds for No. 78-1007, Fullilove v. Klutznick

The first three cases discussed below deal with race-conscious hiring, promotion or transfer programs undertaken by state or city entities subject to the strictures of the Fourteenth Amendment. It may be advisable to grant only one, holding the other two. On the other hand, a multiple grant may give us an opportunity to examine a variety of differing factual contexts.

(1) No. 79-1061, Maehren, et al. v. City of Seattle
This case comes to us on petition for certiorari to the Supreme Court of Washington. It involves the constitutional and statutory validity of a plan employed by the Seattle Fire Department for increasing employment of minorities. In the view of the State Supreme Court, which upheld the program, various federal and state laws and administrative regulations imposed a duty upon the City of Seattle to refrain from engaging in racial discrimination in employment and to take affirmative action to eliminate the effects of past discrimination. Pursuant to this duty, the mayor of Seattle issued an executive order in 1972 establishing an affirmative action program for all departments of the City. The stated goal of the program was to increase the number of minorities, women, and persons over 40 years of age employed by the City to correspond with their statistical composition within the available work force of the City's population. The Mayor's executive order stated that the condition of underrepresentation of such persons was "caused by present or past practices, customs or circumstances that have limited employment opportunities for members of the affected group."

The Fire Department plan adopted pursuant to the Mayor's order uses a process of "selective certification" to enhance representation of minorities among candidates considered for civil service appointments. Under the standard procedures, previously in effect, when a vacancy exists the Civil Service Commission certifies as the pool of candidates from which appointment will be made the top 5 "eligible candidates" (those who have passed the civil service exam) or the top 25 percent of the eligible candidates, whichever is greater. Under the

2-11, 14, 16-18, 20, 24, 26, 29, 30, 32, 36, 38, 40

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: JUN 30 1980

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-1007

H. Earl Fullilove et al., Petitioners, v. Philip M. Klutznick, Secretary of Commerce of the United States, et al.	}	On Writ of Certiorari to the United States Court of Ap- peals for the Second Circuit.
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[May —, 1980]

MR. CHIEF JUSTICE BURGER announced the judgment of the Court and delivered an opinion in which MR. JUSTICE WHITE and MR. JUSTICE POWELL joined.

We granted certiorari to consider a facial constitutional challenge to a requirement in a congressional spending program that, absent an administrative waiver, 10% of the federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from businesses owned and controlled by members of statutorily identified minority groups. 441 U. S. 960.

I

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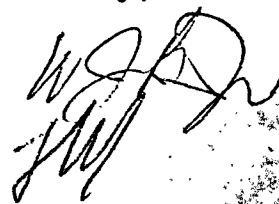
June 4, 1980

RE: No. 78-1007 Fullilove v. Kreps

Dear Byron and Harry:

The two of us and you two had a common approach in Bakke. We put together the enclosed as comments to the Chief in his Fullilove. Before sending it on we hope you might give us your reaction to these comments.

Sincerely,



Mr. Justice White

Mr. Justice Blackmun

DRAFT COPY SENT TO BRW AND HAB

Supreme Court of the United States
Washington, D. C. 20543

June 4, 1980

Re: No. 78-1007 - Fullilove v. Klutznick

Dear Chief:

We have had an opportunity to give a preliminary reading to your careful opinion in this case. We are troubled that the opinion does not explicitly identify what we think you agree are the two major questions to be decided. The first is whether Congress has the enumerated or implied power to enact the remedial statute in question. Your opinion fully answers this question by finding congressional authority in the Spending Power and in § 5 of the Fourteenth Amendment. We agree. Since Congress has general authority to enact the statute, the crucial question then becomes whether the enactment is nonetheless unlawful under any constitutional prohibition. In this case, of course, petitioners argue that the statute violates equal protection.

We agree with the opinion's implicit recognition that remedying the present effects of prior discrimination is an important governmental interest that would justify the limited and carefully tailored use of racial or ethnic criteria to accomplish that objective. But we think that the opinion should make this more explicit. What we find especially troubling is the absence of any express declaration that the enumerated powers of Congress, such as the Spending Power, are nonetheless limited by the prohibitions of the equal protection component of the Due Process Clause of the Fifth Amendment.

These views are certainly implicit in your present draft; therefore, no major revisions would be necessary to satisfy our fundamental concerns. For example, much of our difficulty could be taken care of by deleting the sentence following the quote from Justice Jackson on the ninth line of the first full paragraph of page 28, and substituting the following:

"At the same time, Congress may employ racial or ethnic classifications in exercising its Spending Power or its enforcement authority under § 5 of the Fourteenth Amendment only if those classifications do not violate the equal protection component of the Due Process Clause of the Fifth Amendment. We recognize the need for careful judicial inquiry to assure that governmental programs that employ racial or ethnic criteria to accomplish the important objective of remedying past discrimination must be narrowly tailored to the achievement of that goal."

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There are other parts of the opinion that also concern us. For example, in order to avoid any implication that the Spending Power is not subject to constitutional restraints, we suggest (1) on page 22, lines 7-8, deleting the phrase "plenary within its sphere and"; and (2) on page 23, deleting the first sentence of the first full paragraph. In addition, because we are troubled by reference to the MBE provision as an "experimental project," we suggest (1) on page 34, line 20, deleting the word "experimental"; and (2) on page 37, changing lines 8-16 to read as follows:

"the congressional judgment that this limited program is a necessary step to effectuate the mandate for equality of economic opportunity. The MBE program is limited in extent and duration; this relatively short-term remedial measure will be"

It may be that after giving the opinion a more comprehensive reading, other aspects of the draft will prove troublesome. At present, however, the failure to include explicit mention of the equal protection problem is the major obstacle to our joining the opinion. If you can make the changes that would permit us to join, we will be happy to do so, although perhaps adding a few words of our own.

- Sincerely,

Supreme Court of the United States
Washington, D. C. 20543

June 5, 1980

Re: No. 78-1007 - Fullilove v. Klutznick

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Sincerely,

WJB, Jr.

TM

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

June 17, 1980

Re: No. 78-1007 - Fullilove v. Klutznick

Dear Chief:

We have read your recirculation of June 16 in this case, and we appreciate your revising the initial draft in response to the comments and suggestions of Byron, Harry, Lewis, and ourselves. For our own part, although your second draft goes long way towards satisfying our concerns, we are troubled by the addition of the concluding paragraph, particularly the second and third sentences, commencing with "Some have characterized . . ." and ending with "probing examination." As we indicated in our original memorandum, we believe that some standard of review is necessary, and we intend to circulate a concurring opinion that articulates our view of the correct standard and explains how that standard is implicit in the analysis you apply to this case. Would you be willing to delete these sentences in order to avoid any inconsistency between your opinion and our concurrence? We do not think these sentences are necessary to your decision. If you find it possible to delete them, and two others agree, we would be happy to join to put together a Court.

Sincerely,

WJB, Jr.

TM

The Chief Justice

Copies to the Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 2, 1980

Re: No. 78-1007, Fullilove v. Klutznick

Dear Chief,

I shall in due course circulate a
dissenting opinion.

Sincerely yours,

P.S.
/

The Chief Justice

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: 16 JUN 1969

Recirculated: _____

FULLILOVE V. KLUTZNICK, No. 78-1007

MR. JUSTICE STEWART, dissenting

"Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.... The law regards man as man, and takes no account of his surroundings or of his color...." Those words were written by a Member of this Court eighty-four years ago. Plessy v. Ferguson, 163 U.S. 537, 559 (Harlan, J., dissenting). His colleagues disagreed with him, and held that a statute that required the separation of people on the basis of their race was constitutionally valid because it was a "reasonable" exercise of the police power that had been "enacted in good faith for the promotion [of] the public good...." Id., at 550. Today, the Court upholds a statute that accords a preference to citizens who are "Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts", because the statute is reasonable and was enacted in good faith for the promotion of the public good. I think today's decision is wrong for the same reason that Plessy v. Ferguson was wrong, and I respectfully dissent.

1-8, 10-11

1st PRINTED DRAFT Recirculated: 20 JUN. 1980

No. 78-1007

H. Earl Fullilove et al.,
Petitioners,
v.
Philip M. Klutznick, Secretary
of Commerce of the United
States, et al.

On Writ of Certiorari to the
United States Court of Ap-
peals for the Second Circuit,

[June —, 1980]

MR. JUSTICE STEWART, with whom MR. JUSTICE REHNQUIST joins, dissenting.

“Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. . . . The law regards man as man, and takes no account of his surroundings or of his color. . . .” Those words were written by a Member of this Court 84 years ago. *Plessy v. Ferguson*, 163 U. S. 537, 559 (Harlan, J., dissenting). His colleagues disagreed with him, and held that a statute that required the separation of people on the basis of their race was constitutionally valid because it was a “reasonable” exercise of legislative power and had been “enacted in good faith for the promotion [of] the public good. . . .” *Id.*, at 550. Today, the Court upholds a statute that accords a preference to citizens who are “Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts,” for much the same reasons. I think today’s decision is wrong for the same reason that *Plessy v. Ferguson* was wrong, and I respectfully dissent.

A

The equal protection standard of the Constitution has one clear and central meaning—it absolutely prohibits invidious discrimination by government. That standard must be met by every State under the Equal Protection Clause of the

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Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 30, 1980

Re: No. 78-1007, Fullilove v. Klutznick

Dear Chief,

In my annual effort to preserve the art form, I plan to announce my dissenting opinion in this case on Wednesday.

Sincerely yours,

P.S.
/

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 9, 1980

Re: 78-1007 - Fullilove v. Klutznick

Dear Chief,

I would favor changes in your circulating draft along the lines suggested by Bill and Thurgood. I hope not to write separately.

Sincerely yours,



The Chief Justice

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cmc

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 23, 1980

Re: 78-1007 - Fullilove v. Klutznick

Dear Chief,

I join your June 16 circulation
as modified by your memorandum of June 20.

Sincerely yours,



The Chief Justice

Copies to the Conference

cmc

No. 78-1007

Fullilove v. Klutznick

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: 19 JUN 1980

Recirculated: _____

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins,
concurring.

My resolution of the constitutional issue in this case is governed by the separate opinion I coauthored in University of California Regents v. Bakke, 438 U.S. 265, 324-379 (1978). In my view, the 10% minority set-aside provision of the Public Works Employment Act of 1977 passes constitutional muster under the standard announced in that opinion. On the understanding that the approach used by the Court today to uphold the constitutionality of this statute is consistent with my position in Bakke, I join the opinion of the Court. 1/

I

In Bakke, I joined my Brothers BRENNAN, WHITE, and BLACKMUN in articulating the view that "racial classifications are not per se invalid under [the Equal Protection Clause of] the Fourteenth Amendment." Id., at 356 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., concurring in the judgment in part and dissenting in part) (hereinafter cited as joint separate opinion). 2/ We acknowledged that "a government practice or statute which . . . contains 'suspect classifications' is to be subjected to 'strict scrutiny' and can be justified only if it

1, 5, 7, footnote 1
Footnotes deleted

28 JUN 1980

SECOND DRAFT

No. 78-1007

Fullilove v. Klutznick

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: _____

Recirculated: _____

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins,
| concurring in the judgment.

My resolution of the constitutional issue in this case is governed by the separate opinion I coauthored in University of California Regents v. Bakke, 438 U.S. 265, 324-379 (1978). In my view, the 10% minority set-aside provision of the Public Works Employment Act of 1977 passes constitutional muster under | the standard announced in that opinion. 1/

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In Bakke, I joined my Brothers BRENNAN, WHITE, and BLACKMUN in articulating the view that "racial classifications are not per se invalid under [the Equal Protection Clause of] the Fourteenth Amendment." Id., at 356 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., concurring in the judgment in part and dissenting in part) (hereinafter cited as joint separate opinion). 2/ We acknowledged that "a government practice or statute which . . . contains 'suspect classifications' is to be subjected to 'strict scrutiny' and can be justified only if it furthers a compelling governmental purpose and, even then, only

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24 JUN 1980

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-1007

H. Earl Fullilove et al.,
Petitioners,
v.
Philip M. Klutznick, Secretary
of Commerce of the United
States, et al.

On Writ of Certiorari to the
United States Court of Ap-
peals for the Second Circuit.

[June —, 1980]

and MR.
JUSTICE
BLACKMUN

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN
joins, concurring in the judgment.

My resolution of the constitutional issue in this case is governed by the separate opinion I coauthored in *University of California Regents v. Bakke*, 438 U. S. 265, 324-379 (1978). In my view, the 10% minority set-aside provision of the Public Works Employment Act of 1977 passes constitutional muster under the standard announced in that opinion.¹

I

In *Bakke*, I joined my Brothers BRENNAN, WHITE, and BLACKMUN in articulating the view that "racial classifications are not *per se* invalid under [the Equal Protection Clause of] the Fourteenth Amendment." *Id.*, at 356 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., concurring in the judgment in part and dissenting in part) (hereinafter

¹On the authority of *Bakke*, it is also clear to me that the set-aside provision does not violate Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d. In *Bakke* five Members of the Court were of the view that the prohibitions of Title VI—which outlaws racial discrimination in any program or activity receiving federal financial assistance—are coextensive with the equal protection guarantee of the Fourteenth Amendment. See 438 U. S., at 328 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.); *id.*, at 287 (opinion of POWELL, J.).

1, 2, 3

25 JUN 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-1007

H. Earl Fullilove et al, Petitioners, v. Philip M. Klutznick, Secretary of Commerce of the United States, et al.	}	On Writ of Certiorari to the United States Court of Ap- peals for the Second Circuit.
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[June —, 1980]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN join, concurring in the judgment.

My resolution of the constitutional issue in this case is governed by the separate opinion I coauthored in *University of California Regents v. Bakke*, 438 U. S. 265, 324-379 (1978). In my view, the 10% minority set-aside provision of the Public Works Employment Act of 1977 passes constitutional muster under the standard announced in that opinion.¹

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In *Bakke*, I joined my Brothers BRENNAN, WHITE, and BLACKMUN in articulating the view that "racial classifications are not *per se* invalid under [the Equal Protection Clause of] the Fourteenth Amendment." *Id.*, at 356 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ, concurring in the judgment in part and dissenting in part) (hereinafter

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2, 4, 5

TO: THE CHIEF JUSTICE
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: _____

Recirculated: 30 JUN 1980

3d
~~2nd~~ DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-1007

H. Earl Fullilove et al.,
Petitioners,
v.
Philip M. Klutznick, Secretary
of Commerce of the United
States, et al.

On Writ of Certiorari to the
United States Court of Ap-
peals for the Second Circuit,

[June —, 1980]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN
and MR. JUSTICE BLACKMUN join, concurring in the judgment.

My resolution of the constitutional issue in this case is
governed by the separate opinion I coauthored in *Univer-
sity of California Regents v. Bakke*, 438 U. S. 265, 324-379
(1978). In my view, the 10% minority set-aside provision
of the Public Works Employment Act of 1977 passes con-
stitutional muster under the standard announced in that
opinion.¹

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In *Bakke*, I joined my Brothers BRENNAN, WHITE, and
BLACKMUN in articulating the view that "racial classifications
are not *per se* invalid under [the Equal Protection Clause of]
the Fourteenth Amendment." *Id.*, at 356 (opinion of BRENNAN,
WHITE, MARSHALL, and BLACKMUN, JJ., concurring in
the judgment in part and dissenting in part) (hereinafter

¹On the authority of *Bakke*, it is also clear to me that the set-aside
provision does not violate Title VI of the Civil Rights Act of 1964, 42
U. S. C. § 2000d. In *Bakke* five Members of the Court were of the view that
the prohibitions of Title VI—which outlaws racial discrimination in any
program or activity receiving federal financial assistance—are coextensive
with the equal protection guarantee of the Fourteenth Amendment. See
438 U. S., at 328 (opinion of BRENNAN, WHITE, MARSHALL, and BLACK-
MUN, JJ.); *id.*, at 287 (opinion of POWELL, J.).

✓
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 23, 1983

Re: No. 78-1007 - Fullilove v. Klutznick, Secretary

Dear Thurgood:

Please join me in your opinion, circulated June 23,
concurring in the judgment.

Sincerely,

H.A.B.
—

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 5, 1980

78-1007, Fullilove v. Klutznik

Dear Chief:

At Conference I said that I would apply my Bakke analysis to this case. Accordingly, I have prepared a concurring opinion that probably will be circulated Friday or Monday.

I write now primarily because of the memorandum to you from Bill Brennan and Thurgood. I agree that review of this case involves two distinct inquiries: (i) Does Congress have the authority to enact § 103(f)(2), and (ii) Do the terms of § 103(f)(2) violate the equal protection component of the Fifth Amendment. You have answered the first question fully. But I view the second question as the critical issue in this case. Although you answer it generally, I would think it necessary to address the question in terms of established equal protection analysis.

The first step in equal protection analysis is identification of the proper standard of review. § 103(f)(2) establishes a racial classification. Prior to Bakke, I had understood - and I read all of the prior decisions to say - that the appropriate standard for a racial classification is strict scrutiny. In Bakke, of the five of us who reached the constitutional question, I was the only Justice who adhered to strict scrutiny analysis.

Although not so characterized, it is my view that the opinion joined by Bill and Thurgood in Bakke essentially applied the intermediate standard that Thurgood had urged in his dissent in Rodriguez. Although I respect their views, I could not agree with them in Bakke and do not now. I believe that our prior precedents establish strict scrutiny as the proper standard for review of racial classifications. See In re Griffiths, 413 U.S. 717, 721-722 (1973); Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 192 (1964). In any event, there have never been five votes (to my knowledge) for application of an

mediate standard where the classification is racial.

What concerns me most is that adoption of this standard presumably would allow all governmental bodies (including state universities), not just Congress, to impose racial quotas without strict scrutiny.

As my concurring opinion will say, a racial classification is constitutional only if it is a permissible means to achieve a compelling state interest. In this case, the legislative history behind § 103(f)(2), as explained in your opinion, establishes the compelling state interest in redressing the continuing effects of discrimination. I regard the enforcement clauses of the Thirteenth and Fourteenth Amendment as giving Congress the power to choose an equitable and reasonably necessary means of redressing identified discrimination. In this case, I believe that the set-aside does pass constitutional scrutiny. But, because of my conclusion that Congress has been granted special powers to fight racial discrimination, my opinion would not give all governmental bodies a carte blanche to establish racial classifications on the basis of an intermediate standard of review.

I do not read your draft as intending to go so far. But as my opinion may not be circulated before you reply to Bill and Thurgood, I want you to know - in general terms - the substance of my views. I voted with you at Conference. But I stated the basis for my vote as requiring, in accordance with precedent, that we apply the classical standard to this classification based solely on race. Still, I hope to be able to join as much of your opinion as possible.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

June 11, 1980

No. 78-1007, Fullilove v. Klutznik

PERSONAL

Dear Chief:

Enclosed is a memorandum of my views in this case. As I indicated in my letter of June 6, I have applied - in accord with my Conference vote - the principles of my Bakke opinion to the facts of this case.

It is settled by our cases that racial classifications should be judged under strict scrutiny analysis (see p. 2-3, 13, memo). Since the formulation of a multi-tier model of equal protection, racial classifications uniformly have been judged under this most searching standard of judicial review. This review is appropriate because of the strong constitutional presumption against the use of racial classifications. Where the probability of illicit classification is less, as in review of strictly economic regulation, the Court has adopted the far less searching "rational basis" standard of review. See e.g., McGowan v. Maryland, 366 U.S. 420, 425-426 (1961). An ill-defined level of scrutiny has been applied in some of our sex discrimination cases. See e.g., Craig v. Boren, 429 U.S. 190, 210-211 n.* (1976) (Powell, J., concurring). Apart from the foregoing, I know of no analytical framework for judging equal protection cases.

I view it as essential to have such a framework. If this Court could decide every equal protection case brought in the federal system, perhaps we could rely simply on our overall judgment as to when a classification is fair. But the value of carefully formulated standards of review lies in the guidance they offer to federal and state judges who are required to apply our constitutional precedents. By emphasizing the heavy burden that a government must bear to demonstrate the legitimacy of a racial classification, this

Court can insure that racial distinctions, so odious to a free society, are not casually imposed upon our citizens.

I do not think I can join a Court opinion that endorses - or can be read reasonably to endorse - some intermediate level of scrutiny for racial classifications. This is where I departed analytically from the "Brennan group" view in Bakke. For me at least, this is not a semantic distinction. Unless I misconceive the "Brennan group's" view as expressed and applied in their several Bakke opinions, it is some general intermediate standard similar to that applied in sex discrimination cases. I recognize - indeed admire - their genuine concern to compensate for the ill effects of past discrimination. I simply disagree as to the proper constitutional standard, and the showing it will require to justify preferential treatment in our society.

I appreciate your willingness to try to meet suggestions for changes in your opinion. It would indeed be fine to have a full Court opinion. Yet, I cannot in good conscience abandon an analytical approach that I view as required by our prior precedents, and as essential to preserve the essence of the American ideal of equality before the law.

I will, of course, await your final changes before making a decision as to what I can join in your opinion. In view, however, of the lateness of the hour, I am inclined to go ahead and circulate my memorandum so that other members of the Court - including perhaps the Brothers from whom we have not heard - will have it before them.

Sincerely,

The Chief Justice

lfp/ss

9,12

As delivered to
CJ on 6/11 with
my letter of that
date

1st DRAFT
6/10/80
SUPREME COURT OF THE UNITED STATES

No. 78-1007

H. Earl Fullilove et al., Petitioners, v. Philip M. Klutznick, Secretary of Commerce of the United States, et al.	}	On Writ of Certiorari to the United States Court of Ap- peals for the Second Circuit.
--	---	---

[February —, 1980]

Memorandum of MR. JUSTICE POWELL.

I write to apply the analysis set forth by my opinion in *University of California v. Bakke*, 438 U. S. 265 (1978), to the issue presented in this case. We are asked to decide whether the Due Process Clause of the Fifth Amendment is violated by the requirement in § 103 (f)(2) of the Public Works Employment Act of 1977 (PWEA), 42 U. S. C. A. § 6705 (f)(2) (Supp. 1978), that 10% of federal grants for local public works projects funded by that Act be set aside for minority business enterprises. I conclude that this set-aside enacted by Congress is justifiable as a remedy that serves the compelling governmental interest in eradicating the continuing effects of past identifiable discrimination.

I

Review of the constitutionality of this set-aside involves two ~~distinct~~ inquiries: (i) Did Congress have the authority to enact § 103 (f)(2), and (ii) Do the terms of § 103 (f)(2) violate the equal protection component of the Due Process Clause of the Fifth Amendment. I regard the answer to the first question as relatively easy. As the opinion of the Court demonstrates, this legislative act can be justified by several explicit grants of power to Congress. I cannot, however, join

broad

June 13, 1980

Fullilove

Dear Chief:

Thank you for your letter of June 12.

I agree that there is a fair amount of duplication in your opinion and my memorandum. Differences do remain, most notably my reliance on an articulated, familiar standard of analysis. I continue to be concerned that your opinion - even though we come out the same way - will be viewed as providing no analytical guide for the future and thus subject to application according to the "eye of the beholder".

I suppose it is fair to say that, to some extent at least, you are in the "middle" position. We know from Bakke that four of our Brothers will sustain the most explicit type of quota system that can be devised, if it is perceived to benefit a "minority". I fought this battle with them in Bakke when you and three other Justices remained on the sidelines in the constitutional debate.

At least until there is a Court for what I call the "Brennan/Marshall" view, I must remain with my Bakke analysis. I believe it is strictly in accord with our precedents, affords a clear framework for the resolution of the future cases and will serve the country well - as indeed my Bakke opinion did. Whatever anyone thinks of my rationale, the country at large - and particularly the universities - have been able to live with Bakke. It also substantially allayed the apprehensions of both the white and minority populations. In short, for reasons I am sure you will understand, I must remain with a position that I took only after many weeks of careful thought and personal study as far back as the summer of 1977.

Accordingly, I am circulating today my memorandum, deleting - at least for this circulation - my original comments on your opinion. I understand, of course, that the Brennan/Marshall group will not accept my analysis today any more than they did in 1978.

I have no idea how the three dissenting Justices in this case, will analyze the issue before us. Potter has

never accepted the "tier" precedents of the Court, relying instead on his case-by-case perception of what constitutes invidious discrimination. As I have said to Potter, this has the advantage of simplicity, but it also has the disadvantage - as I view it - of affording little guidance in this nebulous area of equal protection.

I believe that WHR and JPS have accepted the "strict scrutiny" test, and if they should apply it in this case - and you were also to agree - there would be at least four of us together on a position supported by the precedents. One may differ as to the outcome of a case and still apply the appropriate analysis. I view the present case as quite close, as it involves review of a quota system. I can understand therefore how one can conclude that the statute is invalid.

You have, in effect, three choices: (i) you could join, explicitly or implicitly, the Brennan/Marshall quartet; (ii) you could accept and apply traditional strict scrutiny analysis, leaving you with only my vote but with a Court for the judgment; or (iii) you could remain ambiguously uncommitted "in the middle".

The latter has the attraction of resulting in a "Court opinion". Yet, I think it is reasonable to expect Marshall/Brennan to request changes in your opinion that will enable them to argue - either in concurrence or in future cases - that you have joined them in abandoning strict scrutiny where a racial classification is viewed as "benign". I do not imply criticism of them. I am suggesting what I would do if I were in their place.

I think your opinion essentially is quite good. I am trying to identify what portions of it I can join, possibly with some changes. I will get back to you early next week.

Sincerely,

The Chief Justice

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 13, 1980

Fullilove

MEMORANDUM TO THE CONFERENCE:

I circulate herewith a draft memorandum in which I have applied, consistent with my Conference vote, the strict scrutiny analysis to the racial classification incorporated in §103(f)(2). Like Bakke this is a quota system case. Yet, it differs from Bakke in that the congressional record makes clear - at least for me - that Congress made appropriate findings of racial discrimination against minority contractors. Moreover, as the opinion of the Chief Justice properly emphasizes, Congress has a unique responsibility under §5 of the 14th Amendment. Accordingly, I conclude that the set-aside is constitutional.

I view the Chief's opinion favorably, although differences between us remain. I hope to be able to join much of his opinion, probably retaining my memorandum as a concurrence in whole or in part.

In view of the shortness of time remaining for concluding the work of this Term, I am circulating my views now.

L. F. P.
L.F.P., Jr.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
✓ Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell
JUN 13 1980

FIRST DRAFT

Circulated:

Recirculated:

No. 78-1007, Fullilove v. Klutznick

Memorandum of Mr. Justice Powell.

I write to apply the analysis set forth in my opinion in University of California v. Bakke, 438 U.S. 265 (1978), to the issue presented in this case. We are asked to decide whether the Due Process Clause of the Fifth Amendment is violated by the requirement in § 103(f)(2) of the Public Works Employment Act of 1977 (PWEA),¹ that 10% of federal grants for local public works projects funded by the Act be set-aside for minority business enterprises. I conclude that this set-aside enacted by Congress is justifiable as a remedy that serves the compelling governmental interest in eradicating the continuing effects of past identifiable discrimination.

I

Section 103 (f)(2) employs a racial classification that is constitutionally prohibited unless its use is a necessary means of advancing a compelling state interest. University of California Regents v. Bakke, 438 U.S. 265, 291, 305 (1978)(opinion of Powell, J.)(hereinafter Bakke); see In re

1. 91 Stat. 116, 42 U.S.C. § 6705(f)(2) (1978 Supp).

June 16, 1980

78-1007 Fullilove

Dear Chief:

The changes in your circulated draft of May 30 that are indicated in pen (in the draft sent only to me) are helpful. I appreciate your giving me the opportunity to comment. My hope is to join most, if not all, of your opinion if I fairly can view it as not incompatible with the analysis to which I am committed.

I will now go over your draft (assuming that the changes indicated in pen will be made). I will indicate my tentative view as to each part and subpart, with changes that you may wish to consider:

I and II. I can join.

III. [Introduction to the analysis (pp. 21,22)]. State in the last paragraph at the bottom of page 21 that the legislation is being challenged under the equal protection component of the Due Process Clause. You say this in the language you will add on page 28. With such a change, I could join the introductory portion of III.

III-A(1) (p. 22). Join.

III-A(2) (p. 23). Join.

III-A(3) (p. 24). I am in accord except for some of the language you quote from Katzenbach v. Morgan that I always have thought was erroneous. I am asking my clerk Jon Sallet to discuss this with your clerk. In my view, the decision in City of Rome is a total miscarriage of justice. I am not sure I can go along with citing it except on a "cf." basis. Subject to some changes, I think I can join.

III-A(4) (p. 27). You rely on Lau v. Nichols. I rejected Lau as an authority in Bakke primarily because the remedy did not affect adversely English speaking students. It therefore is materially different from a quota. I cannot join this subpart.

III-B (introduction) (p. 28). You are adding language that describes the applicable standard as "careful judicial evaluation", requiring that the means be "narrowly tailored". As you know, I feel strongly that we should adhere to the precedential standard of "strict scrutiny". Depending upon any further changes that you may think necessary to accommodate other Justices, I may be able to accept your formulation by saying in my concurring opinion that I take it to mean - as our precedents would require - strict scrutiny.

III-B(1) (p. 30). You rely here on the desegregation cases to say that in an appropriate context remedies need not be "color blind", but must be tailored to the violation. The sentence at the bottom of page 31 overstates, as I view it, the power of Congress by referring to its authority to advance the general welfare as well as its power to enforce the post-Civil War Amendments. My primary concern, however, is that this sentence may be construed to include the authority of state legislatures as well. If you are disposed to revise the sentence, I could join this subpart.

III-B(2) (p.32). In general, I view this discussion as compatible with the analysis on pages 20-21 of my concurrence. I am bothered by the sentence stating that "no one has a constitutional right to be awarded a public works contract." Although the statement is clearly correct as a matter of due process, I do not think Congress may condition receipt of a benefit upon unconstitutional considerations. See n.13, p.21 of my concurrence. With deletion of this sentence, I can join this subpart.

III-B(3) (p.33). I am slightly concerned about the suggestion that "one step at a time" analysis always defeats challenges of underinclusiveness. In some circumstances, under-inclusiveness may be relevant to a determination that governmental action is unconstitutional. See Erzoznik v. City of Jacksonville, 422 U.S., at 215. But, because I do not read your discussion of under-inclusiveness as a holding, I could join this subpart.

III-B(4) (p. 34-37). Here you discuss "over inclusiveness" at some length. I have been worried from the outset by the inclusion of Orientals. Yet, I have thought that this claim was not addressed (and may not have been urged) in the Court of Appeals. I prefer to see what the dissenting opinions say about over-inclusiveness. But I may be willing to join this subpart.

III-B(5) (p. 37-39). As my own summary and conclusion tracks my Bakke analysis, and as this is at least substantially different in form from your summary, I cannot join you.

My difficulties with your concluding subsection (III-B(5)) are several. The second sentence (p. 37) can be read as a rather open invitation to Congress "to try new techniques, such as the limited use of racial and ethnic criteria to accomplish remedial objectives". I could approve such criteria only where they serve a compelling state interest. The next sentence refers to "voluntary cooperation". If you have Weber in mind, this would be appropriate. But I do not view this case as involving such cooperation.

On page 38, just before the quotation from Justice Jackson, the reference to "reasonable assurance that the program will function within constitutional limitations sounds too much like the "rational basis" test for me. Nor do I like the Jackson reference to what must be done to prevent "domestic disorder and violence". This sort of talk can be read as inviting resort to the streets, as recently happened in Miami, rather than to the process of the law. See TM's dissent in Mobile. I am sure you could not have had this in mind. Yet, I am afraid the language might be viewed in this light by some readers.

* * *

In sum, with relatively minor changes as indicated above, I believe I can join substantially all of your opinion with the exception of your concluding paragraphs. I would say in my concurrence that I write separately to apply my Bakke view, and that I do not understand your opinion - though structured somewhat differently - is inconsistent.

As I indicated in my last letter, you are being "solicited" from both sides. I recognize, of course, that reasonable minds may differ and my comments above are merely "suggestions". If you should find them acceptable, and can

resist the anticipated "suggestions" from our Brothers, I will join as above indicated.

Sincerely,

The Chief Justice

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 16, 1980

MEMORANDUM TO THE CONFERENCE

78-1007, Fullilove v. Klutznick

In due course, I shall circulate a Second Draft of my memorandum in this case. The following language will be substituted for the first paragraph of the First Draft:

Mr. Justice Powell, concurring in part and concurring in the judgment.

The question in this case is whether Congress constitutionally may enact the requirement in § 103(f)(2) of the Public Works Employment Act of 1977 (PWEA), that 10% of federal grants for local public works projects funded by the Act be set aside for minority business enterprises. For the reasons stated in Part III-A of the Court's opinion, I agree that Congress has the legislative authority to enact the set-aside. Because I agree that enactment of the set-aside does not violate the Due Process Clause of the Fifth Amendment, I also join all but subsections (1) & (4) of Part III-B of the Court's opinion.

This is the first case since University of California v. Bakke, 438 U.S. 265 (1978), to present the issue whether a government may establish a racial classification favoring members of minority groups. I believe that § 103(f)(2) is justifiable as a remedy that serves the compelling state interest in eradicating the continuing effects of the past discrimination identified by Congress. Although the Court's opinion does not explicitly adopt a standard for judicial review of racial classifications, I am satisfied that its analysis is essentially consistent with the traditional standard discussed in my Bakke opinion. It is on this understanding that I join the Court's opinion as noted above. I write separately to apply the traditional analysis appropriate to review of racial classifications to this case.

L.F.P.
L.F.P., Jr.

June 17, 1980

No. 78-1007, Fullilove v. Klutznick

Dear Chief:

The changes you have made are very helpful, and they will enable me to join your opinion with the exception only of Parts III-B(1) and III-B(4). Some of the language in these gives me trouble.

I will recirculate my concurrence accordingly, and will make clear that I view the opinion of the Court as essentially consistent with my Bakke position. I think the combination of our two opinions will afford reasonably clear guidance for the lower courts.

Of course, my decision to join your opinion is on the assumption that your draft will remain in its present state, without substantial change.

Sincerely,

The Chief Justice

lfp/ss

June 23, 1980

78-1007 Fullilove

Dear Chief:

In accord with our conversation this afternoon, I have reviewed my separate concurrence for the purpose of identifying ways that will enable me to join your opinion in full, while still filing my separate opinion.

The sentence running from page 31 to page 32 of your opinion still refers to the "general welfare" power. Agreeing with this would give me a great deal of difficulty. Nor do I think it adds anything to your reliance upon the Commerce Clause and §5 of the Fourteenth Amendment. I hope you can simply strike this reference.

On pages 34-37 (III(B)(4)) you discuss the argument that Congress has included some groups who may not have suffered discrimination. John's dissenting opinion, circulated this afternoon, makes a big issue of this. In a draft opinion that I did not circulate, I included a footnote 6 that answers John's argument to a considerable extent. I enclose a copy of my footnote. I would be happy if you wished to add it to your opinion. If not, I will include it in mine.

Finally, I enclose a revision of the opening pages of my opinion.

I fully understand that we differ as to the need to identify a specific standard. Although you prefer, in this case, not to identify a standard, I must do so in view of my Bakke opinion. Also, I have no doubt that your opinion will be read as requiring the highest level of judicial examination.

If the foregoing is acceptable to you, I will join you.

Sincerely,

The Chief Justice

lfp/ss

No. 78-1007, Fullilove v. Klutznick

Mr. Justice Powell, concurring.

Although I would place greater emphasis than the Chief Justice on the need to articulate judicial standards of review in conventional terms, I view his opinion as substantially in accord with my own views. Accordingly, I join the Chief Justice's opinion and write separately to apply the analysis set forth in my opinion in University of California v. Bakke, 438 U.S. 265 (1978)(hereinafter Bakke).

The question in this case is whether Congress may enact the requirement in § 103(f)(2) of the Public Works Employment Act of 1977 (PWEA), that 10% of federal grants for local public work projects funded by the Act be set aside for minority business enterprises. Section 103(f)(2) employs a racial classification that is constitutionally prohibited unless it is a necessary means of advancing a compelling state interest. Bakke at 299, 305; see In re Griffiths, 413 U.S. 717, 721-722 (1973); Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 196 (1964). For the reasons stated in my Bakke opinion, I consider adherence to this standard as important and consistent with precedent.

The Equal Protection Clause, and the equal protection component of the Due Process Clause of the Fifth Amendment, demand that any classification among groups must be justifiable.

⁶ Section 103 (f) (2), 42 U. S. C. A. § 6705 (f) (2) (1978 Supp.) classifies as a minority business enterprise any "business at least 50 per centum of which is owned by minority group members or, in the case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members." Minority group members are defined as "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts." These groups also are classified as minorities in the regulations implementing the nondiscrimination requirements of the Railroad Revitalization and Regulatory Reform Act of 1976, 45 U. S. C. § 803, see 42 Fed. Reg. 4285, 4288 (1977), on which Congress relied as precedent for § 103 (f) (2). The House Subcommittee on SBA Oversight and Minority Enterprise, whose activities played a significant part in the legislative history of § 103 (f) (2), also recognized that these groups were included within the Federal Government's definition of "minority business enterprise." H. R. Rep. No. 94-468, 94th Cong., 1st Sess., 20-21 (1975). The specific inclusion of these groups in § 103 (f) (2) demonstrate that Congress believed they were victims of discrimination. Because the petitioners failed to attack Congress' classification groups in the courts below, there is no reason for this Court to pass upon the issue for the first time.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 24, 1980

78-1007, Fullilove v. Klutznick

Dear Chief:

Please join me.

Sincerely,

Lewis

The Chief Justice

cc: The Conference
lfp/ss

June 24, 1980

78-1007, Fullilove v. Klutznick

MEMORANDUM TO THE CONFERENCE

I will revise my concurrence in this case to include the attached introduction in which I now join the Chief.

In addition, I shall be making some minor changes. In view of the burden on the Print Shop, I do not know when I will be able to circulate my concurrence with these changes added. I view them as purely stylistic and conforming language changes. Clerks from other Chambers will be free to check them here, or my clerk will bring my marked copy to your Chambers.

L.F.P.

L.F.P., Jr.

SS

73/ The MBE provision, 42 U.S.C. § 6705(f)(2) (1976 ed. Supp. I), classifies as a minority business enterprise any "business at least 50 per centum of which is owned by minority group members or, in the case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members." Minority group members are defined as "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts." The administrative definitions are set out in the Appendix to this opinion, ¶ 3. These categories also are classified as minorities in the regulations implementing the nondiscrimination requirements of the Railroad Revitalization and Regulatory Reform Act of 1976, 45 U.S.C. § 803, see 42 Fed. Reg. 4285, 4288 (1977), on which Congress relied as precedent for the MBE provision. See 123 Cong. Rec. S3910 (Mar. 10, 1977) (remarks of Sen. Brooke). The House Subcommittee on SBA Oversight and Minority Enterprise, whose activities played a significant part in the legislative history of the MBE provision, also recognized that these categories were included within the Federal Government's definition of "minority business enterprise." H.R. Rep. No. 94-468, pp. 20-21 (1975). The specific inclusion of these groups in the MBE provision demonstrates that Congress concluded they were victims of discrimination. Petitioners did not press any challenge to Congress' classification categories in the Court of Appeals; there is no reason for this Court to pass upon the issue at this time.

✓
1
To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

6/24/80

No. 78-1007, Fullilove v. Klutznick

From: Mr. Justice Powell

Circulated: JUN 24 1980

Recirculated: _____

Mr. Justice Powell, concurring.

Although I would place greater emphasis than The Chief Justice on the need to articulate judicial standards of review in conventional terms, I view his opinion announcing the judgment as substantially in accord with my own views. Accordingly, I join that opinion and write separately to apply the analysis set forth by my opinion in University of California v. Bakke, 438 U.S. 265 (1978) (hereinafter Bakke).

The question in this case is whether Congress may enact the requirement in § 103(f)(2) of the Public Works Employment Act of 1977 (PWEA), that 10% of federal grants for local public work projects funded by the Act be set aside for minority business enterprises. Section 103(f)(2) employs a racial classification that is constitutionally prohibited unless it is a necessary means of advancing a compelling governmental interest. Bakke, at 299, 305; see In re Griffiths, 413 U.S. 717, 721-722 (1973); Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 196 (1964). For the reasons stated in my Bakke opinion, I consider adherence to this standard as important and consistent with precedent.

The Equal Protection Clause, and the equal protection component of the Due Process Clause of the Fifth Amendment,

2,3,9,11

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

6-25-80

Circulated: _____

2nd DRAFT

Recirculated: JUN 26 1980

SUPREME COURT OF THE UNITED STATES

No. 78-1007

H. Earl Fullilove et al.,
Petitioners,
v.
Philip M. Klutznick, Secretary
of Commerce of the United
States, et al.

On Writ of Certiorari to the
United States Court of Ap-
peals for the Second Circuit.

[June —, 1980]

MR. JUSTICE POWELL, concurring.

Although I would place greater emphasis than THE CHIEF JUSTICE on the need to articulate judicial standards of review in conventional terms, I view his opinion announcing the judgment as substantially in accord with my own views. Accordingly, I join that opinion and write separately to apply the analysis set forth by my opinion in *University of California v. Bakke*, 438 U. S. 265 (1978) (hereinafter *Bakke*).

The question in this case is whether Congress may enact the requirement in § 103 (f) (2) of the Public Works Employment Act of 1977 (PWEA), that 10% of federal grants for local public work projects funded by the Act be set aside for minority business enterprises. Section 103 (f) (2) employs a racial classification that is constitutionally prohibited unless it is a necessary means of advancing a compelling governmental interest. *Bakke*, at 299, 305; see *In re Griffiths*, 413 U. S. 717, 721-722 (1973); *Loving v. Virginia*, 388 U. S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U. S. 184, 196 (1964). For the reasons stated in my *Bakke* opinion, I consider adherence to this standard as important and consistent with precedent.

The Equal Protection Clause, and the equal protection component of the Due Process Clause of the Fifth Amendment, demand that any governmental distinction among

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 19, 1980

Re: No. 78-1007 Fullilove v. Klutznick

Dear Potter:

Please join me in your dissenting opinion.

Sincerely,



Mr. Justice Stewart

Copies to the Conference

FIRST DRAFT

78-1007 - Fullilove v. Klutznick

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

MR. JUSTICE STEVENS, dissenting.

Circulated: JUN 23 '80

Recirculated: _____

The 10% set-aside contained in the Public Works Employment Act of 1977, 91 Stat. 116 ("the Act") creates monopoly privileges in a \$400,000,000 market for a class of investors defined solely by racial characteristics. The direct beneficiaries of these monopoly privileges are the relatively small number of persons within the racial classification who represent the entrepreneurial subclass--those who have, or can borrow, working capital.

History teaches us that the costs associated with a sovereign's grant of exclusive privileges often encompass more than the high prices and shoddy workmanship that are familiar hand maidens of monopoly; they engender animosity and discontent as well. The economic consequences of using noble birth as a basis for classification in eighteenth century France, though disastrous, were nothing as compared with the terror that was engendered in the name of "egalite" and "fraternite." Grants of privilege on the basis of characteristics acquired at birth are far from an unmixed blessing.

3-5, 7, 9-10, 11-14, 15-17, 19-23

Some fns. remembered

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

1st PRINTED DRAFT

Circulated: _____

SUPREME COURT OF THE UNITED STATES

Re-circulated: JUN 27 '81

No. 78-1007

H. Earl Fullilove et al., Petitioners, v. Philip M. Klutznick, Secretary of Commerce of the United States, et al.	}	On Writ of Certiorari to the United States Court of Ap- peals for the Second Circuit.
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[June —, 1980]

MR. JUSTICE STEVENS, dissenting.

The 10% set-aside contained in the Public Works Employment Act of 1977, 91 Stat. 116 ("the Act") creates monopoly privileges in a \$400,000,000 market for a class of investors defined solely by racial characteristics. The direct beneficiaries of these monopoly privileges are the relatively small number of persons within the racial classification who represent the entrepreneurial subclass—those who have, or can borrow, working capital.

History teaches us that the costs associated with a sovereign's grant of exclusive privileges often encompass more than the high prices and shoddy workmanship that are familiar hand maidens of monopoly; they engender animosity and discontent as well. The economic consequences of using noble birth as a basis for classification in 18th century France, though disastrous, were nothing as compared with the terror that was engendered in the name of "egalite" and "fraternite." Grants of privilege on the basis of characteristics acquired at birth are far from an unmixed blessing.

Our historic aversion to titles of nobility¹ is only one

¹"Such pure discrimination is most certainly not a 'legitimate purpose' for our Federal Government, which should be especially sensitive to discrimination on grounds of birth. 'Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people