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Challenges to Employment Testing Under Title VII: Creating "Built In Headwinds" for the Civil Service Employer

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NEW YORK CITY'S LOCALLY BASED ENTERPRISE SET-ASIDE: LEGITIMATE EXERCISE OF MAYORAL POWER OR UNCONSTITUTIONAL QUOTA IN DISGUISE?

I. Introduction

Bringing minorities and other disadvantaged groups into the economic mainstream is widely accepted as a legitimate government activity.[1] Numerous programs on the federal and local levels have been developed to attain this goal.[2] Agreement on the importance of promoting equal opportunity, however, has not always translated into agreement on the means selected to reach this goal. For instance, some programs have involved preferential treatment for members of disadvantaged groups at the expense of those individuals who are already within the mainstream.[3] These programs have been subjected to challenge on equal protection grounds as "reverse discrimination."[4]

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1. Government efforts have been directed at aiding both the minority employee and the minority employer. For an overview of congressional and presidential action to eliminate discrimination in employment, see Note, *Doing Good the Wrong Way: The Case for Delimiting Presidential Power Under Executive Order No. 11,246*, 33 VAND. L. REV. 921, 921 nn. 2-3 (1980)[hereinafter cited as *Doing Good the Wrong Way*](list includes, *e.g.*, Civil Rights Acts of 1964 and 1972, Equal Employment Opportunity Act of 1972, Vocational Rehabilitation Act of 1973 and Age Discrimination Act of 1975, as well as relevant presidential Executive Orders since 1941). A representative list of the many federal programs to encourage minority businesses is found in Levinson, *A Study of Preferential Treatment: The Evolution of Minority Business Enterprise Assistance Programs*, 49 GEO. WASH. L. REV. 61, 61 n.1 (1980)(programs have been initiated pursuant to Executive Order No. 11,625 and to specific congressional enactments, such as Small Business Act § 8(a) and (d) and Railroad Revitalization and Regulatory Reform Act of 1976, § 905).

2. *Id.*

3. *See* Comment, *Beyond Strict Scrutiny: The Limits of Congressional Power to Use Racial Discrimination*, 74 NW. U. L. REV. 617, 617-18 (1979). These measures have come to be known as affirmative action, which has been defined as the use of "benign racial classifications" to remedy the effects of past discrimination. Affirmative action may take one of three forms: (1) a court order pursuant to the fourteenth amendment or a civil rights statute after a judicial finding of particular discriminatory practices; (2) a voluntary program initiated by a governmental agency or private organization; or (3) a legislatively mandated program. *Id.* The terms "affirmative action" and "preferential treatment" will be used interchangeably throughout this Note.

4. The Supreme Court has considered reverse discrimination cases on three separate occasions, with mixed results. The use of benign racial quotas was first examined in Regents of the University of California v. Bakke, 438 U.S. 265 (1978). The Court rejected the special admissions plan under which the Medical School of the University of California at Davis set aside a number of places for qualified minority applicants, but did not invalidate the use of race as a factor in considering

New York City, in addition to complying with federal and state guidelines, has sought to foster equal opportunity by means of mayoral executive orders prescribing minority hiring goals and other preferential treatment.[5] No such executive order, however, has survived the scrutiny of the courts. In 1968, Mayor Lindsay issued Executive Order No. 71, which conditioned the awarding of city construction contracts upon submission by the bidder of an affirmative action program. The order also empowered the Deputy Mayor-City Administrator to formulate rules and regulations to implement its provisions.[6] Executive Order No. 71, and two sets of rules and regulations promulgated to implement it, were invalidated by the New York State Court of Appeals for exceeding mayoral power and for mandating quotas of questionable constitutional character.[7]

Executive Order No. 53, issued by Mayor Koch in 1980, attempted to satisfy the court's objections to the city's earlier affirmative action efforts under Executive Order No. 71 by proposing a plan for preferential treatment that did not involve racial or ethnic classification, but rather relied on social and economic criteria. Executive Order No. 53 created a locally based enterprise set-aside, whereby city agencies were directed to seek to award ten percent of all city construction contracts to locally based enterprises (LBEs), which were defined as small businesses either earning 25 percent of their receipts from work in economically disadvantaged areas or employing a workforce at least 25 percent of which is economically disadvantaged.[8] The Appellate Division of the Supreme Court, however, struck down Executive

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applications for admissions. In United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979), the Court held that the ban against racial discrimination in employment practices contained in Title VII of the Civil Rights Act of 1964 did not prohibit a private employer and a union from voluntarily agreeing upon an affirmative action plan giving preferential treatment to minority apprentices. A congressionally-enacted affirmative action plan for minority business enterprises was upheld by the Court in Fullilove v. Klutznick, 448 U.S. 448 (1980). *See infra* notes 82-98 and accompanying text. *See generally*, Lavinsky, *The Affirmative Action Trilogy and Benign Racial Classifications—Evolving Law in Need of Standards*, 27 WAYNE L. REV. 1 (1980). While the Supreme Court has not ruled out all use of benign racial classifications, the justices have been unable to agree on the precise circumstances in which such classifications might satisfy equal protection guarantees. *See infra* notes 156-61 and accompanying text.

5. *See infra notes* 18-27, 51-64 and accompanying text.

6. 96 THE CITY RECORD 2842 (April 10, 1968).

7. Broidrick v. Lindsay, 39 N.Y.2d 641, 350 N.E.2d 595, 385 N.Y.S.2d 265 (1976); Fullilove v. Beame, 48 N.Y.2d 376, 398 N.E.2d 765, 423 N.Y.S.2d 144 (1979). *See infra* notes 28-38 and accompanying text.

8. 108 THE CITY RECORD 2275 (Aug. 22, 1980). *See infra* notes 51-64 and accompanying text.

Order No. 53.[9] The court found the order to be an improper exercise of legislative power by the executive branch and an unconstitutional quota in disguise. Furthermore, the court held that Executive Order No. 53 was inconsistent with existing state laws on competitive bidding.[10]

In reaching its conclusion, the appellate division treated Executive Orders No. 53 and 71 as identical.[11] Nevertheless, there are significant differences between them. After comparing Executive Order No. 53 to the earlier order and to other preferential treatment programs with which it shares key features, this Note examines each of the grounds given for invalidating Executive Order No. 53.[12] It concludes that the differences between the orders are significant enough to enable Executive Order No. 53 to withstand judicial review. Unlike racial classifications, which trigger strict equal protection scrutiny, the LBE preference, because it is socially and economically based, is better equipped to survive equal protection analysis. In addition, this Note argues that the absence of legislative authorization does not preclude the mayor from instituting a preferential treatment program on his own initiative, provided that he has independent authority to take such action. Finally, this Note suggests an interpretation of the term "lowest responsible bidder" that includes the concept of "social responsibility," thus eliminating any potential conflict between Executive Order No. 53 and the competitive bidding requirements of state and local statutes.[13]

II. Minority Hiring Quotas and Executive Order No. 71: Limiting the Mayor's Power to Initiate Affirmative Action

In the 1960's, federal efforts to ensure equal employment opportunity for minorities proceeded along two separate lines. In Title VII of the Civil Rights Act of 1964, Congress imposed fair employment obligations on contractors dealing with the federal government or working on federally assisted projects.[14] Shortly after the enactment of the Civil Rights Act, President Johnson issued Executive Order No.

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9. Subcontractors Trade Ass'n v. Koch, 96 A.D.2d. 774, 465 N.Y.S.2d 825 (1st Dep't 1983), *appeal docketed*, No. 1326 (N.Y. Aug. 5, 1983).

10. *Id.* at 827. See *infra* notes 78-88 and accompanying text for a discussion of the decision.

11. *See infra* notes 69-73 and accompanying text.

12. *See infra* Parts IV-VI, notes 140-243 and accompanying text.

13. *See infra* notes 212-43 and accompanying text.

14. 42 U.S.C. §§ 2000e to 2000e-17 (Supp. V 1981).

11,246, which required all federally-assisted construction contracts to include provisions for affirmative action to ensure equal employment opportunity.[15] The first major program developed pursuant to Executive Order No. 11,246 was the Philadelphia Plan, which had as its central feature the requirement that contractors submit with their bids a statement of minority employment "goals."[16] The Philadelphia Plan, the validity of which was upheld by the Third Circuit,[17] became the prototype for subsequent programs implementing Executive Order No. 11,246 in other metropolitan areas, including New York City.

A. *Broidrick v. Lindsay*

New York City set forth its own equal employment requirements in Executive Order No. 71, signed by Mayor Lindsay on April 2, 1968.[18]

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15. 3 C.F.R. 339 (1964-65), *reprinted in* 42 U.S.C. § 2000e (1981). The use of presidential executive orders to combat employment discrimination began in the 1940s. The early orders prohibited discrimination by government defense contractors and derived their authority from various war powers acts and defense production acts, but did not require the contractors to take any specific actions. *See Doing Good the Wrong Way*, *supra* note 1, at 923-24. The scope of presidential action was substantially expanded in 1961 with the appearance of the first affirmative action provision in an executive order. *See* Exec. Order No. 10,925, 3 C.F.R. 448, 450 (1959-60).

16. The text of the plan, and the circumstances surrounding its development, are discussed in Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. CHI. L. REV. 723, 739-43 (1972).

17. Contractors Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159 (3rd Cir.), *cert. denied*, 404 U.S. 854 (1971). The court reviewed the use of presidential executive orders in the area of employment discrimination and concluded that the Philadelphia Plan was within the implied authority of the President. *Id.* at 166-71. In considering the effect of the Civil Rights Act of 1964 on Executive Order No. 11,246, the court held that congressional action had not preempted the field of equal employment opportunity and that the provision in Title VII prohibiting preferential treatment based on race did not prevent the Philadelphia Plan from being "color-conscious" in its attempt to remedy the absence of minority workers in the construction trades. *Id.* at 171-73.

The use of specific percentage goals and timetables for minority hiring has also been upheld by other courts reviewing programs similar to the Philadelphia Plan. *See, e.g.*, Southern Illinois Builders Ass'n v. Ogilvie, 327 F. Supp. 1154 (S.D. Ill. 1971), *aff'd*, 471 F.2d 680 (7th Cir. 1972)(Illinois Ogilvie Plan); Joyce v. McCrane, 320 F. Supp. 1284 (D.N.J. 1970)(Newark Plan); Weiner v. Cuyahoga Community College Dist., 19 Ohio St. 2d 35, 249 N.E.2d 907 (1969), *cert. denied*, 396 U.S. 1004 (1970)(Cleveland Plan).

18. 96 THE CITY RECORD 2842 (April 10, 1968). The executive order has been frequently used by New York City mayors in exercising the powers of their office. One of the most widespread applications of the executive order has been to make appointments. *See, e.g.*, Exec. Order No. 2, 106 THE CITY RECORD 52 (Jan. 1, 1978)(appointing seven deputy mayors); Exec. Order No. 8, 106 THE CITY RECORD 663 (March 15, 1978)(appointing Health Services Administrator). Executive orders

The influence of presidential Executive Order No. 11,246 is apparent both in the use of governmental contracting powers to ensure equal employment compliance and in the specific non-discrimination provisions to be incorporated into the contracts. Under Executive Order No. 71, all city construction contracts, as well as all city-assisted construction contracts, had to contain a pledge by the contractor to refrain from discriminating against any employee or applicant for employment because of race, creed, color, or national origin and to undertake affirmative action to ensure equal employment opportunity.[19] The order also required the contractor to include these non-discrimination provisions in all of its subcontracts and to cooperate with the contracting agency to enforce compliance by the subcontractor.[20]

In December, 1970, New York City joined a federally approved state-wide plan to establish a training program in the construction industry. The state plan was intended to replace local affirmative action programs throughout the state with a uniform affirmative action program conforming to the applicable federal, state and city legislation, regulations, and executive orders.[21] New York City withdrew from the plan in 1973 when progress being made under the plan did not meet city expectations, and reinstated the affirmative action program that had been in effect under Executive Order No. 71.[22] The

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have also been used to further policy goals by creating various commissions designed to meet recognized public needs, *see* Exec. Order No. 13, 106 THE CITY RECORD 1319 (May 22, 1978)(establishing Council on the Environment); Exec. Order No. 30, 107 THE CITY RECORD 2047 (July 12, 1979)(establishing city-wide occupational safety and health committee); Exec. Order No. 37, 107 THE CITY RECORD 3443 (Nov. 1, 1979)(establishing Productivity Council), or to express policy objectives, *see* Exec. Order No. 20, 98 THE CITY RECORD 4931 (July 20, 1970)(requiring good faith efforts to train minority group workers).

19. Exec. Order No. 71, § 2(a)(1), 96 THE CITY RECORD 2842 (April 10, 1968). The order conditioned the awarding of city contracts on submission by the bidder of an acceptable affirmative action program. *Id.* § 9(a).

20. *Id.* § 2(b). Failure of the contractor or the subcontractor to comply with these provisions may result in publication of the offender's name, recommendation of legal action, cancellation, suspension or termination of the contract, and a declaration that the contractor is ineligible for further city contracts. *Id.* § 8(e)-(f). Executive Order No. 20, dated July 20, 1970, provided for on-the-job training programs and the rapid advancement of qualified minority employees in city-financed or city-assisted construction projects. 98 THE CITY RECORD 4931 (July 20, 1970).

21. For a description of the terms of the other local affirmative action programs (the Rochester and Buffalo plans), as well as the circumstances surrounding the establishment of the state-wide plan, see Note, *The Infirmities of Affirmative Action: The New York City Plan*, 2 FORDHAM URB. L. J. 305, 321-23 (1974)[hereinafter cited as *The Infirmities of Affirmative Action*].

22. *Id.* at 325-26.

Deputy Mayor-City Administrator, acting pursuant to the authority vested in him by Executive Order No. 71, promulgated rules and regulations to implement the city's plan (1973 Rules and Regulations).[23] The rules applied to construction contracts receiving direct or indirect city financial assistance, and required contractors to make good faith efforts to employ certain percentages of minority workers within ranges set by the city.[24] The rules also required contractors to participate in programs to advance minority trainees to "journeyman" status,[25] and called for monthly compliance reports.[26] In terms of its goal, the correction of racial imbalance in the construction industry, and its approach, specifying percentages of minority employment in proportion to the local minority population, New York City's program closely resembled the Philadelphia Plan.[27]

The validity of Executive Order No. 71 and the 1973 Rules and Regulations was challenged in *Broidrick v. Lindsay*,[28] an action brought by representatives of the city's construction industry.[29] The New York State Court of Appeals, in a unanimous decision, struck down the rules as being in excess of mayoral power.[30] The holding was

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23. 101 THE CITY RECORD 2594 (July 14, 1973)[hereinafter cited as 1973 Rules and Regulations].

24. 1973 Rules and Regulations, § 2(a). The minimum goal, to be attained by 1978 through annual increments, was to "employ minority journeymen in each building and construction trade in approximately the same proportional representation as the percentage of minorities in the population of the City of New York." *Id.* § 2(a)(1).

25. *Id.* § 2(b).

26. *Id.* § 3. The sanctions provided for in the rules, *id.* § 4, were the same as those in the executive order. *See supra* note 20.

27. *See supra* note 16. It has been suggested that the New York City Plan represented an improvement over the Philadelphia Plan in that it defined good faith in narrower terms, thus making it more difficult for the contractor to evade his responsibilities, and provided for swifter reprisals against those who fail to act in good faith. *See* Note, *The Infirmities of Affirmative Action*, *supra* note 18, at 328. Judicial review of the plan, however, has focused not on the likelihood of its success, but on whether it exceeded mayoral power. *See infra* note 30.

The reactivation of Executive Order No. 71 meant that on projects funded by a combination of city and federal money, contractors would have to comply with two different sets of affirmative action requirements. The issue of whether federal equal employment regulations prohibit action by the city in that area was resolved in the city's favor in City of New York v. Diamond, 379 F. Supp. 503 (S.D.N.Y. 1974), which upheld the power of the city to apply its own equal opportunity rules on federally-assisted projects as long as these rules were not in conflict with federal law.

28. 39 N.Y.2d 641, 350 N.E.2d 595, 385 N.Y.S.2d 265 (1976)(Breitel, Ch. J.).

29. Plaintiffs in the action were trustees of the New York Building and Construction Industry Board of Urban Affairs Fund. *Id.*

30. 39 N.Y.2d at 644, 350 N.E.2d at 596, 385 N.Y.S.2d at 266. The court also invalidated the regulations for being inconsistent with existing state law governing apprenticeship programs, which provide that apprentices shall be selected solely on

based on a reading of the applicable city law on employment discrimination.[31] The court acknowledged that the executive branch has a certain amount of flexibility in fulfilling its responsibility to enforce legislation, especially in an area as sensitive as eliminating discriminatory practices. Nevertheless, the court held that the executive branch may not usurp the legislative function by adopting a policy different from that contemplated by the legislature.[32] Mandating minority employment percentages was, in the opinion of the court, such an unauthorized expansion of policy, reaching beyond the means prescribed by the New York City Administrative Code to remedy discrimination.[33]

In reaching its conclusion, the court declined to follow those federal cases which had upheld the use of presidential executive orders to mandate minority employment percentages on the basis that they were rationally related to cost considerations.[34] The mayoral regulations, in the court's view, were not so related. Because they applied to all of a contractor's projects, regardless of whether city funds were involved, there would be instances where establishing minority employment percentages would have no effect on the costs of city-sponsored projects.[35] Rather than seeking to save money, the regulations were an "attempt to use the city's contracting power to promote an extrinsic social policy, for which there is no grant of legislative power."[36]

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the basis of objective qualifications without any consideration of minority status. N.Y. LAB. LAW § 815(5) (McKinney 1977) and N.Y. EXEC. LAW § 296(1-a)(a)(McKinney 1982). *See* 39 N.Y.2d at 648, 350 N.E.2d at 600, 385 N.Y.S.2d at 269. The regulations, in contrast, require that one minority apprentice be accepted for every three non-minority apprentices. 1973 Rules and Regulations § 3(c). *See* 39 N.Y.2d at 648, 350 N.E.2d at 600, 385 N.Y.S.2d at 269.

31. N.Y.C. ADMIN. CODE § 343-8.0 (1966)("[i]t shall be unlawful for any person engaged . . . in . . . construction . . . pursuant to a contract with the city . . . to refuse to employ or to refuse to continue in any employment any person on account of the race, color or creed of such person"). Section 343-8.0 further prohibits employers from seeking information about the race, color or creed of an employee or applicant. *Id.*

32. 39 N.Y.2d at 645-46, 350 N.E.2d at 597-98, 385 N.Y.S.2d at 267.

33. *Id.* at 646-47, 350 N.E.2d at 597-98, 385 N.Y.S.2d at 267. The only affirmative requirement expressed in section 343-8.0, as the court noted, was that all city contracts contain the anti-discrimination provisions set forth in subdivisions (a) and (b). *Id.*

34. *See, e.g.*, Contractors Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159 (1971).

35. 39 N.Y.2d at 648, 350 N.E.2d at 599, 385 N.Y.S.2d at 268-69.

36. *Id.* The court also distinguished *Broidrick* from the line of federal cases upholding employment ratios to correct past discrimination in the context of a

The court also questioned the constitutionality of the executive regulations, noting that the employment percentages were, in effect, quotas that substituted a standard based on the ethnic composition of a specific area for the standard of individual merit.[37] Nevertheless, the court was careful not to rule out all executive-initiated affirmative action. For example, a program based on discrimination-free merit selection directed at increasing the pool of those eligible for employment by including previously excluded minority workers would be permissible.[38]

B. *Fullilove v. Beame*

New York City made another effort to require affirmative action in the construction industry in 1977 when Mayor Beame directed the city administrator to promulgate a new set of rules and regulations (1977 Rules and Regulations) pursuant to Executive Order No. 71.[39] The new rules required, as did the earlier rules, that contractors submit with their bids a program to increase minority representation within their workforce.[40] The new rules, however, attempted to meet the objections raised in *Broidrick* by avoiding specific percentages and timetables, and by restricting application of the rules to city-funded and city-assisted construction contracts.[41] To help the rules pass judicial scrutiny, other provisions were included which outlined in greater detail than did the 1973 Rules and Regulations the specific steps an employer could take to be in compliance[42] and the procedures for administrative review where the goals had not been achieved.[43]

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judicial remedy under Title VII of the Civil Rights Act of 1964. *Id.* at 649, 350 N.E.2d at 599, 385 N.Y.S.2d at 269.

37. *Id.* at 647, 350 N.E.2d at 598, 385 N.Y.S.2d at 268. That the court felt compelled to address the constitutional question even though it was not necessary for its decision would seem to indicate a fundamental aversion to the use of quotas. The proper method of prohibiting discrimination, according to the court, would be to allow individual employment opportunity without invidious impediments. *Id.*

38. *Id. Cf.* State Div. of Human Rights v. Kilian Mfg. Corp., 35 N.Y.2d 201, 318 N.E.2d 770, 360 N.Y.S.2d 103 (1974)(upholding order by State Division of Human Rights finding manufacturer guilty of discriminatory hiring practices and directing manufacturer to engage in affirmative action to recruit minority employees). A similar rationale for justifying the government's interest in promoting affirmative action in the construction industry had been presented in Contractors Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d at 170-71.

39. 95 THE CITY RECORD 767 (Jan. 15, 1977)[hereinafter cited as 1977 Rules and Regulations].

40. 1977 Rules and Regulations, § 3.

41. *Id.*

42. *Id.* § 6.

43. *Id.* § 6(e).

Despite these adjustments, the 1977 Rules and Regulations, when challenged by several building contractor associations and labor organizations, fared no better than the 1973 Rules and Regulations. In *Fullilove v. Beame*,[44] the Court of Appeals reaffirmed its *Broidrick* holding that adopting a policy of affirmative action, however desirable it might be, was the prerogative of the legislative branch.[45] Relying on its analysis in *Broidrick*, the court, in a brief *per curiam* opinion, stressed that it was not merely the means employed to achieve racial balance, that is, the regulations, that were defective. Rather, it was the very attempt itself by the executive to impose affirmative action requirements without specific legislative authorization that was improper. In the court's view, any independent exercise of mayoral power in this area was invalid.[46]

The city's effort to tailor the rules and regulations to satisfy the *Broidrick* standards did not pass the court entirely without comment. The dissenting opinion questioned the majority's reading of *Broidrick*, arguing that the majority's view would leave the heads of state and local governments powerless to take meaningful steps to enforce state and local policies against discrimination.[47] The mayoral executive

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44. 48 N.Y.2d 376, 398 N.E.2d 765, 423 N.Y.S.2d 144 (1979).

45. *Id.* at 379, 398 N.E.2d at 766, 423 N.Y.S.2d at 145.

46. *Id.* The court acknowledged that the state legislature had endorsed the voluntary use of state-approved affirmative action plans, *see* EXEC. LAW § 296(12) (McKinney 1982), but held that permitting voluntary affirmative action could not be equated with directing that such action be undertaken involuntarily under the threat of legal sanction. 48 N.Y.2d at 378, 398 N.E.2d at 765-66, 423 N.Y.S.2d at 144-45.

That executive power at the state level was subject to the same limitations as mayoral action was made clear by the court in a decision handed down the same day as *Fullilove v. Beame*, affirming without opinion the overturning of a gubernatorial executive order directing contractors to undertake affirmative action programs to promote minority manpower utilization. *See* Fullilove v. Carey, 48 N.Y.2d 826, 399 N.E.2d 1203, 424 N.Y.S.2d 183 (1979), *aff'g* 62 A.D.2d 798, 406 N.Y.S.2d 888 (3d Dep't 1978). Executive Order No. 45, signed by Governor Carey on January 4, 1977, provided for essentially the same type of program incorporating goals and timetables as that mandated by mayoral Executive Order No. 71. *See* [1977] 9 N.Y.C.R.R. § 3.45. Just as the mayoral order exceeded legislative authorization under section 343-8.0 of the New York City Administrative Code, the gubernatorial order, in the appellate division's view, went beyond the type of action envisioned in the nondiscrimination provisions of New York Labor Law section 220-e. 62 A.D.2d at 800-01, 406 N.Y.S.2d at 889. That court held that it was not necessary to wait until the State Commissioner of Human Rights developed regulations pursuant to his authority under Executive Order No. 45 to review the validity of the order, inasmuch as the issue at stake was the extent of executive power. *Id.* at 800-01, 406 N.Y.S.2d at 889-90.

47. *Fullilove v. Beame*, 48 N.Y.2d at 379, 382-84, 398 N.E.2d at 766, 768-69, 423 N.Y.S.2d at 145, 147-49 (Fuchsberg, J., dissenting). Judge Fuchsberg prefaced his dissent by attempting to remove the "scare factor" from affirmative action.

order was, in the dissent's view, a valid exercise of executive power. The program took costs into consideration and was directed against a specific pattern of discrimination within the construction industry.[48] Moreover, the new city regulations avoided the pitfalls of the earlier regulations: the new regulations applied only to city contracts and city-assisted contracts, provided greater procedural fairness,[49] and, although race-conscious, did not depart from the principles of merit selection.[50] Thus, the dissent suggests that an executive-implemented affirmative action program is not facially invalid, and articulates circumstances under which the *Broidrick* standards might be satisfied.

III. Executive Order No. 53: The Use of Racially Neutral Criteria to Aid the Underprivileged

Less than one year after *Fullilove v. Beame* was decided, Mayor Koch issued Executive Order No. 53, in which he utilized conditions attached to city construction contracts to achieve a different set of policy objectives. Abandoning the efforts aimed specifically at minorities, Mayor Koch focused on the economically disadvantaged in general. Executive Order No. 53 sought to aid the economically disadvantaged by increasing their direct and indirect involvement in city construction contracts.[51] This change of orientation was motivated both by Mayor Koch's desire to circumvent the limitations on mayoral

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Although affirmative action sometimes leads to the imposition of quotas, which Judge Fuchsberg, like the rest of the court, viewed with disfavor, such quotas are not essential to the primary goal of affirmative action, namely, fostering equal opportunity by taking positive steps to speed the elimination of the stubborn vestiges of discrimination. *Id.* at 379-80, 398 N.E.2d at 766-67, 423 N.Y.S.2d at 145-46.

48. *Id.* at 380, 398 N.E.2d at 767, 423 N.Y.S.2d at 146.

49. *Id.* at 381-82, 398 N.E.2d at 767-68, 423 N.Y.S.2d at 147. As an example of the regulations' procedural fairness, Judge Fuchsberg pointed to the provisions for reviewing a contractor's failure to achieve the anticipated goals before sanctions were imposed. *Id.*

50. *Id.* Judge Fuchsberg also reviewed legislative manifestations of support for affimative action as expressed in other laws to show that the mayor's actions were consistent with the policies of the state. *Id.* at 382-86, 398 N.E.2d at 768-70, 423 N.Y.S.2d at 147-50.

51. The order was promulgated on August 1, 1980. Its stated purpose was "to promote the development of business and employment within economic development areas of the City of New York by ensuring that small enterprises conducting business in such areas, or employing economically disadvantaged persons, receive a greater share of all construction contracts awarded by the City of New York." Exec. Order. No. 53, § 1, 108 THE CITY RECORD 2275 (Aug. 22, 1980).

power imposed by *Broidrick* and *Beame*, and by his opposition to racially-based affirmative action.[52]

A. Assisting Locally Based Enterprises

Executive Order No. 53 directed all city contracting agency heads to "seek to ensure that not less than ten percent of the total dollar amount of all contracts awarded for construction projects . . . be awarded to locally based enterprises."[53] The order also required that in the event that any part of the contract was subcontracted, at least ten percent of the total dollar amount was to be set aside for LBEs.[54] The order further provided for the inclusion of a non-discrimination clause in all contracts.[55]

Pursuant to the authority vested in it by the order,[56] the Bureau of Labor Services promulgated rules and regulations which were made applicable to all construction contracts awarded by the city, except those which received federal and state funds and were subject to conflicting requirements.[57] The regulations established that, for a business to qualify as an LBE, it must have: (1) annual gross receipts of $500,000 or less and (2) either earn 25 percent of these receipts from work in economic development areas or employ a work force of which

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52. N.Y. Times, Aug. 3, 1980, at A31, col. 3. Earlier in 1980, Mayor Koch promulgated Executive Order No. 50, the purpose of which was to ensure compliance with the equal employment opportunity requirements of city, state and federal law in city contracting. Exec. Order No. 50, § 1, 108 THE CITY RECORD 1869 (April 25, 1980). Unlike the invalidated Executive Order No. 71, Executive Order No. 50 did not contain any specific programs or goals, but rather restated the responsibilities of the Bureau of Labor Services, which continued to have the responsibility for monitoring compliance. *Id.* §§ 2, 4.

53. Exec. Order No. 53, § 3, 108 THE CITY RECORD 2275. No statistical justification was offered by the city for setting the amount of the apportionment at ten percent. The city apparently borrowed this figure from court-approved federal legislation enacting a ten percent minority business enterprise set-aside. *See infra* note 79 and accompanying text.

54. *Id.* at 2275, § 4(a).

55. This clause obligated the contractor not to "discriminate unlawfully on the basis of race, creed, color, national origin, sex, age, handicap, marital status, sexual orientation or affectional preference in the selection of subcontractors." *Id.* § 4(b).

56. *Id.* § 6.

57. Participation by Locally Based Enterprises in Construction Contracts Awarded by the City of New York, § 53.11, 109 THE CITY RECORD 359 (Feb. 19, 1981)[hereinafter cited as 1981 Rules and Regulations]. For example, a federally funded program may mandate a minority business enterprise set-aside, in which case the contractor would not have to comply with the LBE set-aside.

at least 25 percent are economically disadvantaged persons.[58] To ensure that participation would be limited to bona fide LBEs, the regulations prescribed detailed eligibility requirements[59] and entrusted to the Office of Economic Development the verification of certification documents submitted by prospective LBEs.[60] Unlike the earlier programs under Executive Order No. 71, contractors could not rely on a "good faith" defense; compliance was defined in terms implying strict adherence with Executive Order No. 53 and its regulations.[61] A contractor, however, need make only a reasonable effort to identify LBE subcontractors.[62] Furthermore, the contractor was assured of fair treatment by the requirement that conciliation efforts and, where these are unsuccessful, administrative hearings, precede the imposition of sanctions.[63]

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58. *Id.* § 53.12M. "Economic development area" is defined as "those areas of the city delegated as eligible for participation in the Community Development Block Grant Program of the United States Department of Housing and Urban Development." *Id.* § 53.12J. "Economically disadvantaged person" is defined to include (1) a resident in a single person household earning 70 percent or less of the "urban family budget" for the city, as determined by the Bureau of Labor Statistics of the United States Department of Labor; (2) a member of a family which has a family income of 70 percent or less of the "urban family budget" or receives federal, state or local cash welfare payments; (3) an unemployed Vietnam war veteran; or (4) a displaced homemaker returning to work. *Id.* § 53.12K.

59. *Id.* § 53.21.

60. *Id.* § 53.30.

61. *Id.* § 53.12D. Failure to comply with the terms of Executive Order No. 53 and the accompanying regulations leads to the imposition of any or all of the following sanctions: (1) reduction of the contractor's compensation by an amount equal to the dollar value of the percentage of the set-aside not awarded to LBE subcontractors; (2) declaring the contractor in default; and (3) declaring the contractor ineligible to participate in the LBE program for a period of up to three years. *Id.* § 53.46. As of February, 1984, none of the authorized sanctions had been imposed. Telephone interview with Daniel Kryston, Legal Counsel, Office of Dir. of Constr. (Feb. 14, 1984).

62. *Id.* § 53.44. The LBE subcontractor set-aside may be waived only where both the contractor and the contracting agency have determined that there is no LBE subcontractor reasonably available or when the contract involves an emergency requiring immediate attention because of a threat to public health, safety, or welfare. *Id.*

To improve compliance with Executive Order No. 53, the Office of the Director of Construction issued supplementary guidelines in January, 1984. The new guidelines require city agencies to take a more active role in identifying opportunities for LBE prime contractors and subcontractors, attracting bids from LBEs, and tracking the performance once contracts have been awarded. As part of the new procedures, all waivers must now be approved by the Director of Construction. Compliance Guidelines for Executive Order No. 53 (1980) Locally Based Enterprise Program, Directive No. 45, Office of Dir. of Constr., Office of the Mayor (Jan. 13, 1984).

63. 1981 Rules and Regulations, § 53.45(e).

After a slow start, the level of compliance with Executive Order No. 53 has steadily increased. As of the middle of the 1984 fiscal year, there are 300 firms enrolled in the LBE program, accounting for 15 percent of the city's contracts to which the LBE set-aside applies.[64]

B. *Subcontractors Trade Association v. Koch*

In 1982, seventeen New York City area trade associations challenged Executive Order No. 53 and the accompanying rules and regulations as unconstitutional, illegal and unenforceable in *Subcontractors Trade Association v. Koch*.[65] The complaint specifically alleged that the order exceeded mayoral authority, contravened state and city competitive bidding requirements, violated equal protection guarantees, and was inconsistent with the holdings in *Broidrick* and *Beame*.[66] The trial court dismissed the complaint.[67] On appeal, the appellate division reversed by a 3-2 decision.[68] In a memorandum opinion, the court stated that Executive Order No. 53 was "but another undisguised attempt on the part of the Executive branch to mandate unconstitutional 'quotas.' "[69] In concluding that such an attempt was invalid,[70] the *Subcontractors* court relied on *Broidrick*[71] and *Beame*,[72] both of which had held executive-sponsored affirmative action to be an improper exercise of legislative power.[73] No distinction was made between the types of affirmative action mandated by the two executive orders. In particular, the court did not consider that the

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64. Telephone interview with Daniel Kryston, Legal Counsel, Office of Dir. of Constr. (Feb. 14, 1984). The dollar value of the contracts awarded to LBEs was $30 million in fiscal year 1983 and is expected to increase during fiscal year 1984. Compliance with the MBE set-aside on federally-funded construction projects is currently at 17%, which is also above the minimum. *Id.*

65. 96 A.D.2d 774, 465 N.Y.S.2d 825 (1st Dep't 1983).

66. Complaint at 5, Subcontractors Trade Ass'n v. Koch, 96 A.D.2d 774, 465 N.Y.S.2d 825 (1983)(reprinted in Record on Appeal).

67. Memorandum Opinion at 10, Subcontractors Trade Ass'n v. Koch, 96 A.D.2d 774, 465 N.Y.S.2d 825 (trial court decision, reprinted in Record on Appeal).

68. Subcontractors Trade Ass'n v. Koch, 96 A.D.2d 774, 465 N.Y.S.2d 825. Repeal of the program has been stayed pending appeal.

69. *Id.* at 775, 465 N.Y.S.2d at 827. As a threshold matter, the court determined that the plaintiff trade associations had standing to challenge the constitutionality of Executive Order No. 53. Even though no dispute had actually arisen under the order, the plaintiffs were directly affected by, and subject to, the order's requirements. *Id.*

70. *Id.*

71. 39 N.Y.2d 641, 350 N.E.2d 595, 385 N.Y.S.2d 265 (1976). *See supra* notes 28-33 and accompanying text.

72. 48 N.Y.2d 376, 398 N.E.2d 765, 423 N.Y.S.2d 144 (1979). *See supra* notes 44-46 and accompanying text.

73. *See supra* notes 32-33, 44-46 and accompanying text.

LBE set-aside of Executive Order No. 53, unlike the minority hiring goals of Executive Order No. 71, was not racially based. The court also held Executive Order No. 53 unlawful for allowing LBEs to escape the competitive bidding provisions of General Municipal Law section 103(b) and New York City Charter section 343(b), under which city contracts are to be awarded to the lowest responsible bidder.[74]

The shift from minority-oriented to economically based considerations, however, was acknowledged by the dissent. In distinguishing between Executive Order No. 71 and Executive Order No. 53, the dissenting opinion specifically noted that the latter was not intended to establish racial quotas. Rather, Executive Order No. 53 was intended to improve the economic viability of depressed and deprived areas of the city by increasing the participation in city contracts of small enterprises doing business in those areas and of economically disadvantaged workers.[75] Its primary aim, therefore, was "to enlarge the pool of persons eligible for employment, based on discrimination free merit selection."[76] The dissent found specific authorization for Executive Order No. 53 in the New York City Charter, which empowered the mayor to issue directives and adopt rules and regulations in

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74. *Subcontractors Trade Ass'n v. Koch*, 96 A.D.2d at 775, 465 N.Y.S.2d at 827. Although the court did not elaborate upon this point, it apparently assumed that under the LBE set-aside, contracts would be awarded irrespective of the amount of the bids or the existence of lower bids. *See infra* notes 213-15 and accompanying text.

75. 96 A.D.2d at 775-76, 465 N.Y.S.2d at 827-28 (Alexander, J., dissenting). The dissent emphasized that Executive Order No. 53 provided for an attempt to be made to direct more business to LBEs. *Id.* The dissent interpreted this language as suggesting that the LBE program was not as inflexible as the minority hiring goals set pursuant to Executive Order No. 71, even though the LBE set-aside does establish a specific numerical goal (ten percent of all contracts). The essential distinction, however, is not that Executive Order No. 53 avoids the use of quotas, but that it does not impose a racial quota. The effect of the change in criteria to social and economic classifications with respect to equal protection analysis is examined at *infra* notes 169-84 and accompanying text.

The dissenting opinion's distinction between racial quotas and programs aimed at improving the economic viability of underdeveloped areas has been applied to uphold the equal employment opportunity requirements of Executive Order No. 50, *supra* note 52. *See* Great Neck Electric, Inc. v. City of New York, N.Y.L.J., March 1, 1984, at 12, col.2 (Sup. Ct. N.Y. County)(court held that Executive Order No. 50 is necessary to accommodate broad legislative policy which has salutary purpose of eliminating discrimination in employment; thus, requiring report indicating number of women and minorities in employer's workforce is not legislation by fiat).

76. 96 A.D.2d at 775, 465 N.Y.S.2d at 827. This is one of the permissible uses of affirmative action endorsed by the Court of Appeals in *Broidrick v. Lindsay*. *See supra* note 38 and accompanying text.

regard to the execution of capital projects.[77] In addition, the dissent found that there was no violation of the statutory competitive bidding requirements since the regulations required that the award would still be made to the lowest "qualified" bidder.[78]

IV. A Comparison of the LBE Set-Aside to Other Types of Preferential Treatment

Although Executive Order No. 53 rejects the use of racially based criteria, it incorporates other features common to many affirmative action programs. The most significant of these features is the set-aside itself, by which aid is directed to local businesses in economically underdeveloped areas. As employed in the other programs, however, the set-aside has aimed at encouraging minority business enterprises (MBEs), and has made minority ownership the primary qualification for participation. Two of the more noteworthy examples of MBE set-asides are those authorized by the Public Works Employment Act (PWEA) of 1977[79] and the Small Business Administration Act.[80] The other key feature of Executive Order No. 53, the requirement that the participant or his workforce be locally based, also has its precedent on the federal level, namely, in section 3 of the Housing and Urban Development Act of 1968,[81] which created a preference for the employment of local residents in federal housing projects. A brief examination of these three programs and the court decisions upholding their validity will complete the background necessary for an analysis of the validity of the LBE set-aside.

A. The PWEA of 1977

The first congressionally enacted MBE set-aside, and the one which has been given the most attention by the courts and commentators, is the MBE set-aside incorporated as an amendment to the PWEA of 1977.[82] The amendment was introduced to counteract the underutili-

77. 96 A.D.2d at 775, 465 N.Y.S.2d at 827. The extent to which section 228(e) of the City Charter does in fact support Executive Order No. 53 is considered at *infra* note 208 and accompanying text.

78. 96 A.D.2d at 776, 465 N.Y.S.2d at 828. *See infra* notes 221, 243 and accompanying text.

79. 42 U.S.C. §§ 6701-6735 (1976 & Supp. V 1981).

80. 15 U.S.C. § 637(a) (Supp. V 1981).

81. Pub. L. No. 90-448, 82 Stat. 476 (1968) (codified as amended in scattered sections of 12, 15 and 42 U.S.C.).

82. 42 U.S.C. § 6705(f)(2) (Supp. V 1981). *See, e.g.*, Note, *The Minority Business Enterprise Set Aside: A Constitutional Analysis*, 36 WASH. & LEE L. REV. 1223

zation of minority businesses in government contracting and was intended to provide minority business with a "fair share of the action."[83] The set-aside conditioned the receipt of grants for local public works projects upon the grantee's assurance that at least ten percent of the amount of the grant would be spent on contracts with MBEs.[84] The statute defined an MBE as a business at least fifty percent of which is owned by minority group members.[85] The statute further defined minority group members as United States citizens who are "Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."[86]

The constitutionality of the MBE set-aside was upheld by the Supreme Court in *Fullilove v. Klutznick*.[87] In sustaining the set-aside,

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(1979); Note, *The Public Works Employment Act of 1977 and Minority Contracting*, 28 CATH. U.L. REV. 121 (1978). For a comprehensive list of lower court decisions considering the validity of the MBE set-aside, see Comment, *Federal Efforts to Assist Minority Construction Contractors: The Need for Comprehensive Planning*, 14 U.C.D. L. REV. 125, 143 n.76 (1980).

83. 123 Cong. Rec. 5327 (1977) (statement of Rep. Mitchell). According to Representative Parren Mitchell, the amendment's sponsor, minority businesses received annually only one percent of all government contracts. *Id.* The reasons offered by proponents in support of the MBE set-aside are summarized in Levinson, *supra* note 1, at 75 n.89.

84. 42 U.S.C. § 6705(f)(2) (Supp. V 1981). The full text of the statute, the accompanying rules and regulations, the record of the congressional debate and additional legislative history are set out in appendices to Associated Gen. Contractors of Cal. v. Secretary of Commerce, 441 F. Supp. 955, 972-1043 (C.D. Cal. 1977).

85. 42 U.S.C. § 6705(f)(2) (Supp. V 1981). If the business is publicly owned, then 51 percent of its stock must be owned by minority group members. *Id.*

86. *Id.* The Act's definition of minority group members has been criticized as too broad. According to this view, in the absence of a requirement of a specific showing of past discrimination, some minorities who have in fact not been excluded because of discrimination will receive a windfall. Fullilove v. Klutznick, 448 U.S. 448, 534-38 (1980) (Stevens, J., dissenting).

87. 448 U.S. 448 (1980). Prior to the Supreme Court's ruling, local contractors' associations had challenged the MBE set-aside in federal district courts with mixed results. Although motions for injunctive relief were usually denied, such denials did not necessarily imply approval of the set-aside. *Compare* Carolinas Branch, Associated Gen. Contractors of Am., Inc. v. Kreps, 442 F. Supp. 392, 400 (D.S.C. 1977) (even though reasonably possible that plaintiff would succeed on merits because of judicial aversion to invidious racial quotas, potential harm to public as consequence of halting project precludes issuance of preliminary injunction) *with* Montana Contractors' Ass'n v. Secretary of Commerce, 439 F. Supp. 1331, 1335 (D. Mont. 1977) (contractors failed to establish likelihood of prevailing on merits). Some courts that addressed the constitutionality of the set-aside upheld its validity, while others ruled it to be unconstitutional as applied. *Compare* Rhode Island Chapter, Associated Gen. Contractors of Am., Inc. v. Kreps, 450 F. Supp. 338, 349 (D.R.I. 1978) (equal protection guarantee satisfied because classification is "benign in fact, justified by the compelling interest of remedying inequality pursuant to a congressional finding of past discrimination and closely tailored to achieve its purpose") *with* Wright Farms

the Court produced different rationales in three separate opinions, none of which was signed by more than three justices. In one opinion, Chief Justice Burger, joined by Justices White and Powell, employed a two-step analysis. First, the Chief Justice determined that the objectives of the legislation were within the spending, proprietary and equal protection powers of Congress.[88] In the second part of his inquiry, Chief Justice Burger rejected the contention that, in a remedial context, Congress must act wholly in a color-blind fashion, and concluded that the limited use of racial and ethnic criteria was a constitutionally permissible means for achieving the legislation's objectives.[89] Moreover, the Chief Justice found that it was not unconstitutional to deprive non-minority firms innocent of any discriminatory conduct of access to a portion of the federal public works grants as long as the remedy, namely, the set-aside, was temporary, narrowly drawn and properly tailored to cure the effects of prior discrimination.[90]

Constr., Inc. v. Kreps, 444 F. Supp. 1023, 1027 (D. Vt. 1977) (in absence of finding of discrimination in state construction industry, conferring of benefits on minorities violates fifth amendment equal protection guarantee).

88. 448 U.S. at 473. Chief Justice Burger pointed out that Congressional spending power had frequently been employed in the past "to further broad policy objectives by conditioning the receipt of federal moneys upon compliance by the recipient with statutory and administrative directives." *Id.* at 474. The Chief Justice prefaced his analysis with an extensive discussion of the background of the bill and of other government programs to aid minority businesses in order to show that Congress had given sufficient consideration to the objectives of the set-aside. *Id.* at 453-67. The Chief Justice observed that although the PWEA did not make any specific findings that past discrimination had prevented minority businesses from effectively participating in government procurement, Congress did have sufficient evidence before it of a pattern of discrimination. *Id.* at 478. Under the circumstances, Congress had a reasonable basis for determining that the set-aside was an appropriate measure to ensure equal opportunity by eliminating the barriers to minority business access to federal grants generated by the Act. *Id.*

89. *Id.* at 482. The Chief Justice stressed that Congress was endowed with broad remedial powers to enforce equal protection guarantees, *id.* at 483-84, and that deference should be given to Congress in its choice of means to perform a function within its power. *Id.* at 480.

90. *Id.* at 484. According to Chief Justice Burger, the regulatory scheme implementing the set-aside, which included provisions for administrative scrutiny to limit participation to *bona fide* MBEs as well as for waiver of the requirement where compliance was not feasible, ensured that application of the set-aside would be limited to the remedial objectives set by Congress. *Id.* at 487-89. Justice Stevens disagreed with the Court's holding on this point. In his view, the set-aside was unconstitutional because it raised too many unanswered questions to be characterized as "narrowly tailored." *Id.* at 541 (Stevens, J., dissenting). Justice Stevens criticized the legislation in particular for failing to justify the ten percent figure and the choice of the minorities to whom the preference would apply. *Id.* at 535-36. In the other dissenting opinion, Justice Stewart, joined by Justice Rehnquist, emphati-

Justice Powell, in a separate opinion, applied a modified version of the strict scrutiny standard used in his opinion in *Regents of the University of California v. Bakke*, according to which a racial classification is constitutionally permissible only if it is a reasonable means of advancing a compelling government interest.[91] Justice Powell identified the government's interest as remedying the effects of past discrimination. Since Congress was a competent governmental body for responding to identified discrimination and had made a finding of illegal discrimination, the government's interest could properly be characterized as compelling.[92] Justice Powell then tested the MBE set-aside to determine if it was an "equitable and reasonably necessary" means to redress past discrimination.[93] The MBE set-aside passed this test, inasmuch as it was temporary, set at a reasonable figure, contained a waiver provision, and had only a limited and widely dispersed effect on innocent third parties.[94]

Justice Marshall, joined by Justices Brennan and Blackmun, also wrote separately to demonstrate that the MBE set-aside withstood scrutiny under the intermediate test which they had articulated, along with Justice White, in *Bakke*.[95] In Justice Marshall's view, the proper inquiry for racial classifications that provide benefits to minorities to remedy the present effects of past discrimination is whether they "serve important governmental objectives and are substantially related to the achievement of those objectives."[96] Justice Marshall concluded that the MBE set-aside clearly passed this test,[97] and welcomed

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cally rejected racially-based preferences as violating the absolute prohibition of the equal protection guarantee against invidious discrimination toward persons of any color. *Id.* at 522-26 (Stewart, J., dissenting).

91. 448 U.S. at 496 (Powell, J., concurring). The traditional formulation of the strict scrutiny standard, which Justice Powell applied in *Bakke* to invalidate the special admissions program, is that the means must be necessary for advancing a compelling government interest. *See* 438 U.S. 265, 305 (1978). Although Justice Powell joined with Justice Stevens, Chief Justice Burger, Justice Stewart, and Justice Rehnquist in holding that the program was illegal, he did not rule out the use of race as a factor to be considered in determining an applicant's eligibility for admission. 438 U.S. at 319-21. On this point he was joined by Justices Brennan, White, Marshall and Blackmun.

92. 448 U.S. at 497-506. Justice Powell's conclusion was based on an independent review of congressional power and the legislative history of the MBE provision. *Id.*

93. *Id.* at 509-10.

94. *Id.* at 513-15.

95. 438 U.S. 265, 357-69 (1978)(Brennan, J., concurring in part, dissenting in part).

96. 448 U.S. at 519 (Marshall, J., concurring).

97. *Id.* at 519-21.

the set-aside as a step in the direction of providing for more meaningful equality of opportunity.[98]

Given the divergence of rationales and the fact that the decision dealt with only one specific program, it is difficult to determine the precedential value of *Fullilove v. Klutznick*.[99] Nevertheless, the decision does endorse the use of benign racial classifications under certain circumstances. Subsequent discussions of preferential treatment have concentrated on enumerating these circumstances and determining whether they are present.[100]

B. Section 8(a) of the Small Business Administration Act

The use of economic and social criteria in Executive Order No. 53 was foreshadowed by the MBE set-aside developed by the Small Business Administration (SBA). To facilitate the participation by small businesses in government contracts, section 8(a) of the Small Business Administration Act of 1953 authorized the SBA to secure contracts for government procurement agencies for the purpose of subcontracting them to small businesses.[101] Acting without explicit statutory authority, the SBA interpreted its mandate as being to aid minority small businesses.[102] Accordingly, in awarding subcontracts under the section 8(a) program, the SBA limited eligibility to small businesses "owned or destined to be owned by socially or economically disadvantaged persons."[103] As implemented by the SBA, section 8(a) functioned as an MBE set-aside because "socially or economically disadvantaged" was interpreted to include, although not be restricted to, "Black Americans, American Indians, Spanish Americans, Oriental Americans, Eskimos and Aleuts."[104]

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98. *Id.* at 522.

99. *See* Levinson, *supra* note 1, at 77 n.97.

100. The implications of *Fullilove v. Klutznick* for determining the appropriate standard of review of benign racial classifications are examined *infra* at notes 157-61 and accompanying text.

101. 15 U.S.C. § 637(a) (Supp. V 1981). A detailed history of the section 8(a) program may be found in Levinson, *supra* note 1, at 64-73.

102. Levinson, *supra* note 1, at 64.

103. 13 C.F.R. § 124.8-1(c) (1970), *reprinted in* Ray Baillie Trash Hauling, Inc. v. Kleppe, 477 F.2d 696, 702 n.5 (5th Cir. 1973), *cert. denied*, 415 U.S. 914 (1974).

104. *Id.* These are the same six categories included in the MBE provision of the PWEA of 1977. *See supra* note 86 and accompanying text. In 1975, the New York Legislature enacted two similarly-numbered "minority business concerns" set-asides closely patterned after the SBA set-aside. *See* N.Y. PUB. AUTH. LAW, §§ 1695-1699a (McKinney 1981) (Small Business Concerns Set-Aside Purchases and Contracts for Property and Services at the Hostos Community College); N.Y. PUB. AUTH. LAW, §§ 1695-1699a (McKinney 1981) (Small Business Concerns Set-Aside Purchases and

The SBA's conversion of the section 8(a) program into an MBE set-aside was upheld in *Ray Baillie Trash Hauling, Inc. v. Kleppe.*[105] Rejecting the plaintiff's contention that the section 8(a) program was unauthorized because it was not mentioned in the statute, the court observed that it was not unusual for Congress to formulate its policy in general terms when dealing with complex issues.[106] The real issue was whether the SBA had abused its discretion in implementing the section 8(a) program.[107] The court held that there had been no abuse. Given the disproportionately low number of government procurement contracts awarded in the past to small business concerns owned by disadvantaged persons, it was reasonable, and thus consistent with the statutory policy, for the SBA to make a special effort to correct the imbalance.[108] Moreover, the court held, the program developed was a reasonable means for attaining this goal.[109] The court also dismissed the plaintiff's argument that the set-aside violated federal competitive bidding requirements.[110] However, because the plaintiffs lacked standing, the court did not consider whether the use of racial or ethnic

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Contracts for Property and Services at the Bronx Community College). A similar program was enacted by the 1983 Legislature. *See* N.Y. PUB. AUTH. LAW, §§ 1699m-1699r (McKinney Supp. 1983-1984) (Small Business Concerns Set-Aside Purchases and Contracts for Property and Services at Medgar Evers College, City University of New York). These programs, which have been limited in scope and duration, have not been challenged in the courts.

105. 477 F.2d 696 (5th Cir. 1973), *cert. denied*, 415 U.S. 914 (1974). Plaintiffs, small businesses who had in the past successfully bid for a refuse hauling contract at an Air Force base under the section 8(a) program, sought an injunction to prevent the SBA from setting aside the contract for a black-owned business pursuant to the regulations providing for assistance to small business concerns owned by disadvantaged persons. *Id.* at 699-700.

106. *Id.* at 703.

107. *Id.*

108. *Id.* at 704. As additional authority, the court pointed to the provision in the 1967 amendment to the Economic Opportunity Act, 42 U.S.C. § 2901 (1973) (repealed 1974), directing the SBA to pay special attention to aiding small businesses located in areas with a high proportion of unemployed or low-income individuals or owned by low-income individuals, and to a series of presidential mandates (Executive Orders No. 11,458, 11,511, and 11,625) directing federal departments to establish programs to encourage minority-owned businesses. 477 F.2d at 705-06.

109. 477 F.2d at 705. In Duke City Lumber Co. v. Butz, 382 F. Supp. 362 (D.D.C. 1974), *aff'd in part*, 539 F.2d 220 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977), the court upheld an SBA set-aside for small lumber businesses that came into operation only when timber purchases by the businesses fell more than ten percent below their historic share of the market. Since the program was reasonable in substance and in its adoption, the court concluded that the SBA administrator had acted within the scope of his statutory authority. *Id.* at 371-72.

110. *Ray Baillie*, 477 F.2d at 708-09. *See infra* note 237 and accompanying text.

origin as the primary criterion for eligibility rendered the program unconstitutional.[111]

The SBA set-aside policy received a statutory basis in 1978 when Congress enacted Amendments to the Small Business Investment Act of 1958, which included reforms of the section 8(a) program.[112] Under the revised program, eligibility is determined in terms of both social and economic disadvantage. To qualify, applicants must first demonstrate that they are socially disadvantaged as a result of being "subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group."[113] Applicants must then show that they are economically disadvantaged by demonstrating that their impaired ability to compete in the marketplace is "due to diminished capital and credit opportunities."[114] Thus, while racial classification still serves as an important criterion, it does not guarantee participation in the program because economic disadvantage must also be demonstrated.

The constitutionality of the new section 8(a) program has not been tested in the courts, but it is probable that it would be upheld. Like the MBE set-aside approved in *Fullilove v. Klutznick*, the new program is congressionally mandated and based on the same general findings of discrimination.[115] Moreover, its use of a set-aside is poten-

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111. 477 F.2d at 709-10. The court noted not only that plaintiffs had never applied for participation in the section 8(a) program, but also that they were not eligible to participate and thus would not be directly affected by the outcome of the litigation. *Id.* at 710.

112. Pub. L. No. 95-507, 92 Stat. 1757-73 (1978)(codified in scattered sections of 15 U.S.C.). The congressional action came in response to investigations which had revealed numerous inefficiencies and abuses in the administration of the program. In particular, the reforms sought to eliminate the proliferation of "fronts" representing non-minority owners and to alleviate dissatisfaction with the racial criteria employed by establishing new, more objective criteria for participation. *See* Levinson, *supra* note 1, at 68-70.

113. 15 U.S.C. § 637(a)(5) (Supp. V 1981). Socially disadvantaged persons were presumed to include Black Americans, Hispanic Americans, Native Americans, or members of other minorities. *Id.* § 637(a)(1)(C). Regulations promulgated to implement the new program set forth procedures for adding to the list of designated groups and outlined the factors to be considered in determining whether individuals not members of designated groups were socially disadvantaged. 13 C.F.R. § 124.1-1(c)(3)(iii) (1983).

114. 15 U.S.C. § 637(a)(6) (Supp. V 1981). As an additional safeguard against abuse, the statute provides that the individual's assets and net worth are to be examined, *id.*, and that a qualifying small business concern must be at least 51 percent owned and controlled by socially and economically disadvantaged individuals. *Id.* § 637(a)(4). The latter requirement had also been incorporated into the PWEA of 1977. *See supra* note 85 and accompanying text.

115. 15 U.S.C. § 631 (1976 & Supp. V 1981).

tially more equitable, since eligibility is based not only on racial and ethnic classification, but also on economic considerations.[116] In this respect, the section 8(a) program could very well be the model for future affirmative action programs.[117] Executive Order No. 53 has gone even further in attempting to neutralize the potentially adverse consequences of racial classification by eliminating race and ethnicity as explicit factors in determining eligibility.[118]

C. Locally Based Preferential Treatment: The Housing and Urban Development Act of 1968

The third type of federal program which influenced the development of the LBE set-aside was the residency preference enacted as part of the Housing and Urban Development Act of 1968.[119] Section 3 of the Act attempted to increase employment opportunities for lower income persons. The section provided that contracts for work to be performed in connection with HUD-assisted housing and urban development projects "to the greatest extent feasible . . . be awarded to business concerns . . . which are located in or owned in substantial part by persons residing in the area of such project[s]."[120]

The vagueness of the statutory language in section 3 appears to leave implementation of the preference entirely to administrative discretion. Nevertheless, in *Ramirez, Leal and Co. v. City Demonstration Agency*,[121] the term "to the greatest extent feasible" was construed as meaning the "maximum" and thus obligated a city agency "to take every [proper] affirmative action" to make an award to a

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116. In the opinion of one commentator, the real problem presented by the section 8(a) program is not its constitutional validity, but rather the administrative implementation of the program, which has failed to meet the statutory goals. *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, 443-57 (1983)(examining efforts to eliminate abuses through introduction of new regulations limiting participation in program to a fixed term).

117. *See id.* at 442-43.

118. See *infra* notes 169-84 and accompanying text for a discussion of the effect of the change in criteria on determining the validity of the LBE preference.

119. Pub. L. No. 90-448, 82 Stat. 476 (1968)(codified as amended in scattered sections of 12, 15 and 42 U.S.C.).

120. 12 U.S.C. § 1701u (1976 & Supp. V 1981). The statute directed the Secretary of Housing and Urban Development to consult with the Administrator of the Small Business Administration when making such awards and also contained a provision that opportunities for training and employment related to the construction and operation of the housing be given to persons of low income residing in the area. *Id.*

121. 549 F.2d 97 (9th Cir. 1976).

business meeting the statutory qualifications.[122] The main issue in *Ramirez* was not the validity of the preference itself, but whether the preference was applicable to a contract to audit the books of various programs funded by the Model Cities Project.[123] The court examined the legislative history of section 3 of the Housing and Urban Development Act and found that extending the application of the preference improved the quality of life in underprivileged areas and thus was consistent with the purpose of the typical HUD-assisted program.[124]

The constitutionality of a similar provision in the Indiana Housing Finance Authority Act[125] creating local employment and contracting preferences was upheld in *Steup v. Indiana Housing Finance Authority*.[126] The court found that these preferences complied with the equal protection guarantees of both the federal and state constitutions because neither involved a suspect classification nor imposed an unfair or impractical burden.[127] The court also held that the preferences bore a fair and substantial relation to the statutory purpose of providing adequate, affordable housing to low and moderate income persons.[128]

Not all residency-based preferences have met with judicial approval. In New York, a state-wide program granting an employment preference to state residents on state-financed projects[129] has been struck down.[130] The statute was held to violate the privileges and

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122. *Id.* at 105. Regulations subsequently issued by the Department of Housing and Urban Development phrased the requirement in terms of a "good faith effort." 24 C.F.R. § 135.60 (1983).

123. 549 F.2d at 100. The Model Cities program provided for federal assistance to enable cities "to plan, develop, and conduct programs to improve their physical environment, increase their supply of adequate housing . . . and provide educational and social services vital to health and welfare." 42 U.S.C. § 3301 (1976).

124. *Ramirez*, 549 F.2d at 102. "The program will have greater beneficial effect if the money spent on the program goes to persons and firms in the area, and is recycled in the area, and so boosts the local economy." *Id.*

125. IND. CODE ANN. § 5-20-1-5 (Burns 1983).

126. —Ind.—, 402 N.E.2d 1215 (1980).

127. *Id.* at —, 402 N.E.2d at 1223-25. Citing *Ramirez*, *Leal & Co. v. City Demonstration Agency*, the court interpreted "to the extent feasible" as requiring every positive approach that could properly be taken to award contracts to local firms and to employ low income persons, but held that the phrase fell far short of imposing a mandatory quota. *Id.* at —, 402 N.E.2d at 1224.

128. *Id.* at —, 402 N.E.2d at 1225. The court identified at least two distinct ways in which the statutory purpose was served: (1) the improvement of economic conditions in the neighborhood promoted the stability of low and moderate income housing; and (2) resident participation is more apt to foster responsibility and pride than remote bureaucratic control, and thus improve the quality of the project. *Id.*

129. N.Y. LAB. LAW § 222 (McKinney 1965) (repealed 1982).

130. Salla v. County of Monroe, 64 A.D.2d 437, 443-44, 409 N.Y.S.2d 903, 907 (4th Dep't 1978), *aff'd*, 48 N.Y.2d 514, 399 N.E.2d 909, 423 N.Y.S.2d 878, *cert. denied*, 446 U.S. 909 (1979).

immunities clause of the United States Constitution because it did not bear a substantial relationship to the alleviation of unemployment in New York.[131] It also was held to be improper protectionism in violation of the commerce clause.[132]

A residency requirement itself, however, is not necessarily invalid. In *White v. Massachusetts Council of Construction Employees*,[133] the Supreme Court upheld an executive order issued by the mayor of Boston directing that city-funded construction projects be performed by a workforce composed of at least fifty percent Boston residents.[134] The Court concluded that to the extent that the city is spending its own funds on the construction contracts, it is participating in the marketplace rather than regulating it, and thus is not subject to the commerce clause.[135]

The rationale of *White* appears to support the locally-based aspect of the LBE preference.[136] Executive Order No. 53 also involves the expenditure of city funds,[137] making New York City a participant in the market rather than a regulator of the market. Moreover, the LBE preference is clearly distinguishable from the invalidated New York state residency preference. First, the LBE preference, unlike the plan outlined in Labor Law section 222, is not a bar to non-residents, since the requirement can be satisfied by out-of-state contractors employing out-of-state residents provided they engage in a minimum amount of business in economic development areas and do not exceed the fixed income limits.[138] Second, the relationship to a legitimate government purpose is more readily discernible in the case of Executive Order No. 53 than it was with respect to Labor Law section 222, because the LBE preference is consistent with the declared goal of improving conditions in economically disadvantaged areas.[139] The relationship between the governmental objective and the means employed to

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131. *Id.*

132. *Id.* at 444-45, 409 N.Y.S.2d at 908.

133. 103 S. Ct. 1042 (1983).

134. *Id.* at 1048. The executive order also included a 25 percent set-aside for minorities and a ten percent set-aside for women, neither of which were challenged. *Id.* at 1043 n.1.

135. *Id.* at 1048.

136. The *Subcontractors Trade Association* court did not specifically address the locally-based aspect of the LBE preference, since Executive Order No. 53 had been challenged in its entirety as exceeding mayoral authority. *See supra* note 66 and accompanying text.

137. Exec. Order No. 53, 108 THE CITY RECORD 2275 (Aug. 22, 1980).

138. *See supra* note 58 and accompanying text.

139. A similar goal was articulated to justify the residency preference in HUD-assisted projects. *See supra* note 124 and accompanying text.

achieve it not only ensures that the assistance offered by Executive Order No. 53 will be directed to areas where it is needed; it also plays a crucial role in enabling the order to survive an equal protection challenge.

V. The Constitutionality of Executive Order No. 53: Meeting the Equal Protection Challenge

In keeping with the city's announced policy of avoiding racially based affirmative action,[140] Executive Order No. 53 refrains from using language that might suggest the imposition of a quota. Nevertheless, the LBE set-aside clearly involves a classification. By setting aside ten percent of the city's construction contracts for those who qualify as LBEs,[141] it has the effect of denying the same benefit to an equal percentage of contractors who are not members of this class.[142] Unless this classification can withstand judicial scrutiny, it must be deemed a violation of equal protection.

A. Determining the Appropriate Standard of Review for Preferential Treatment

While recognizing that the government may classify people and activities to promote the general welfare, the constitutional guarantee of equal protection requires that all persons similarly situated be treated alike.[143] Traditionally, courts have employed a two-tiered approach in

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140. *See supra* note 52 and accompanying text.

141. Exec. Order No. 53, §§ 3-4, 108 THE CITY RECORD 2275-76 (Aug. 22, 1980).

142. *See* Wright Farms Constr., Inc. v. Kreps, 444 F. Supp. 1023, 1032 (D. Vt. 1977) (dismissing as illusory the distinction between numerical goals, supposedly less permanent, and quotas). *See also* Regents of Univ. of Cal. v. Bakke, 438 U.S. at 289 (Powell, J.) (whether designation of 16 special admissions seats is described as quota or goal, it is a line drawn on basis of race and ethnic status).

143. McGowan v. Maryland, 366 U.S. 420, 425-28 (1961)(upholding Sunday closing law); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 67 (1911)(upholding New York statute regulating sale of spring water); Myer v. Myer, 271 A.D. 465, 472, 66 N.Y.S.2d 83, 90 (1st Dep't 1946), *aff'd*, 296 N.Y. 979, 73 N.E.2d 562 (1947)(upholding statute requiring that shareholder suing on behalf of corporation to have been stockholder at time of challenged transaction).

In light of the holding by the New York Court of Appeals that the scope of the equal protection clause of the state constitution (Art. I, § 11) is coextensive with that of the federal constitution (fourteenth amendment), *see* Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 530, 87 N.E.2d 541, 548 (1949), the two guarantees have been treated in this Note as being equivalent. The court in *Subcontractors Trade Association* (as well as in *Broidrick v. Lindsay* and *Fullilove v. Beame*) in effect also treated them as co-extensive since it did not specify whether it was referring to federal or state guarantees of equal protection.

reviewing equal protection challenges, depending on the type of classification involved. In the area of economics and social welfare, the validity of the classification has been determined by the rational basis test. According to this test, the classification will be upheld if it is reasonably related to a proper governmental objective.[144] Strict scrutiny, on the other hand, is applied in cases involving suspect classifications[145] or important constitutional rights.[146] Strict scrutiny analysis is two-fold: (1) the governmental objective in making the classification must serve a compelling governmental interest and (2) the means of accomplishing that objective must be necessary and the least discriminatory available.[147]

This two-tiered approach to equal protection analysis has been vigorously criticized for being rigid and outcome-determinative.[148] Application of the strict scrutiny test almost invariably leads to invalidation of the statute under review.[149] The rational basis test, in contrast, is so broad that it allows a statute to be upheld upon the articulation of any reasonable basis for its enactment.[150] Dissatisfaction with the inflexibility of the two-tiered approach to equal protection analysis has led to the development of a third, intermediate level of scrutiny. Under this intermediate level test, the classification must

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144. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 485-86 (1970)(upholding Maryland regulation limiting maximum grant available under Aid to Families with Dependent Children program); *In re* Buttonow, 23 N.Y.2d 385, 392, 244 N.E.2d 677, 681, 297 N.Y.S.2d 97, 103 (1968)(affirming right of mentally ill persons converted from involuntary to voluntary status to judicial review of their retention); Bauch v. City of New York, 54 Misc. 2d 343, 349-50, 282 N.Y.S.2d 816, 823 (Sup. Ct. N.Y. County 1967), *aff'd*, 21 N.Y.2d 599, 237 N.E.2d 211, 289 N.Y.S.2d 951 (1968), *cert. denied*, 393 U.S. 834 (1977)(upholding mayoral executive order granting exclusive dues check-off privileges to municipal employees' union).

145. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967) (race); Sugarman v. Dougall, 413 U.S. 634, 641 (1973) (alienage).

146. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 335-41 (1972) (voting); Shapiro v. Thompson, 394 U.S. 618, 634 (1969)(interstate travel).

147. *See, e.g.*, Carolinas Branch, Associated Gen. Contractors of Am., Inc. v. Kreps, 442 F. Supp. 392, 398-99 (D. S.C. 1977).

148. *See* Note, *Minority Business Enterprise Set-Aside: The Reverse Discrimination Challenge*, 45 ALB. L. REV. 1139, 1145-46 (1980) [hereinafter cited as *Reverse Discrimination Challenge*].

149. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1000-01 (1978). The only examples of explicitly racial discriminatory classifications that have survived strict scrutiny are two World War II cases involving exclusion and curfew orders directed against citizens of Japanese descent living on the Pacific Coast. *See* Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1944).

150. *See* McGowan v. Maryland, 366 U.S. 420, 426 (1961) (statutory classification "will not be set aside if any state of facts reasonably may be conceived to justify it").

be substantially related to the achievement of an important governmental objective.[151]

As a result of the correlation between the standard of review and the final result of the review, the selection of the appropriate standard for evaluating racially or ethnically based preferential treatment is particularly important. Because the rational basis test has traditionally been applied only to economic and social classifications, it is clearly inappropriate where a racial classification, including a benign one, is challenged.[152] The need to subject even benign racial classifications to heightened scrutiny, however, does not automatically lead to their invalidation.[153] Nor does it necessarily mean that strict scrutiny should be employed.[154] The intermediate standard has been considered by some courts as particularly well-suited for reverse discrimination cases, since it ensures that the affirmative action plan will be carefully reviewed while taking into account the intended beneficial impact of the plan.[155]

The intermediate level test, however, has never been adopted by the Supreme Court in a reverse discrimination case.[156] Although the

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151. The intermediate level test is usually applied to cases involving gender discrimination. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976)(invalidating Oklahoma statute prohibiting sale of 3.2% beer to males under age of 21 and to females under age of 18). *See* Note, *Reverse Discrimination Challenge*, *supra* note 148, at 1147-48.

152. Although benign racial classifications are essentially remedial in nature, they may nevertheless have adverse consequences. For instance, a benign racial classification could conceal an invidious purpose, stigmatize a preferred minority group by belittling its achievements and perpetuating misconceptions about race, intelligence and ability, discourage minorities from being able to compete on an equal basis by lowering competitive standards, or, finally, be detrimental to non-minority individuals. Constructors Ass'n of W. Pa. v. Kreps, 441 F. Supp. 936, 950 (W.D. Pa. 1977).

153. *Id.* at 950. The court applied the "strict scrutiny" standard to the MBE set-aside, finding that it served a compelling governmental interest and was the least discriminatory means for accomplishing that objective. *Id.* at 950-54.

154. *See, e.g.*, Rhode Island Chapter, Associated Gen. Contractors of Am., Inc. v. Kreps, 450 F. Supp. 338, 357 (D. R.I. 1978)(scrutiny of the means adopted need not be as strict in case of benign racial classification as that required in case of invidious racial classification).

155. *See* Valentine v. Smith, 654 F.2d 503, 509-10 (8th Cir.), *cert. denied*, 454 U.S. 1124 (1981) (court applied intermediate level test to uphold preferential hiring program for minority teachers). While acknowledging that racial preferences must be subjected to a searching examination, the court explained its choice of the intermediate level test in terms of its reluctance "to discourage states from acting voluntarily to remedy past racial discrimination." *Id.* at 509.

156. The intermediate level test was first applied to affirmative action programs by Justice Brennan in *Regents of the University of California v. Bakke*, 438 U.S. at 357-78. This application of the test, however, has never received the support of more than four justices. *See generally*, Choper, *The Constitutionality of Affirmative Action: Views from the Supreme Court*, 70 KY. L.J. 1 (1981-82).

use of a benign racial classification was upheld by the Court in *Fullilove v. Klutznick*,[157] no clear guidelines were established regarding the appropriate level of equal protection scrutiny to be applied. Three of the justices upholding the MBE set-aside in that case used the intermediate level test.[158] Justice Powell, in his concurrence, found that the MBE set-aside was able to survive strict judicial scrutiny.[159] Chief Justice Burger, however, explicitly refused to apply either the strict scrutiny or intermediate level standard, though he indicated that the MBE set-aside could satisfy both standards.[160] In cases decided after *Fullilove v. Klutznick*, federal courts have continued to employ both standards of scrutiny in reviewing challenges to affirmative action programs.[161]

The highest state court in New York, however, has resolved the question of the appropriate standard of review in reverse discrimination cases. In *Alevy v. Downstate Medical Center*,[162] the petitioner challenged the constitutionality of the medical school's affirmative action program after being denied admission on the basis that his credentials were superior to those of minority students who had been accepted under the program.[163] The court, after reviewing the traditional two-tiered approach to equal protection analysis,[164] rejected the rational basis and strict scrutiny tests as "polarized and outcome-determinative."[165] The court opted instead for the intermediate level test and held that reverse discrimination is constitutional where it is shown that "a substantial [governmental] interest underlies the policy

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157. *See supra* notes 87-98 and accompanying text.

158. 448 U.S. at 517 (opinion of Marshall, J., joined by Brennan & Blackmun, JJ.). *See supra* notes 95-98 and accompanying text.

159. 448 U.S. at 496-510. *See supra* notes 91-94 and accompanying text.

160. 448 U.S. at 491-92. Justice White, who had been the fourth member of the dissent in *Bakke*, 438 U.S. at 324, which would have applied the intermediate level of scrutiny to uphold the special admissions program, joined the Chief Justice's opinion. 448 U.S. at 453.

161. *Compare* South Fla. Chapter of Associated Gen. Contractors of Am. v. Metropolitan Dade County, Fla., 552 F. Supp. 909, 933 (S.D. Fla. 1982)(interpreting recent cases as indicating evolving doctrine that benign racial classifications are to be subjected to strict judicial scrutiny; 100% set-aside of specified county contracts for black contractors invalidated, but set-aside of specified percentage of dollar amount of contracts upheld) *with* Wygant v. Jackson Bd. of Educ., 546 F. Supp. 1195, 1202 (E.D. Mich. 1982)(affirmative action layoff provisions designed to retain sufficient minority teachers to approximate racial composition of student body met "substantially related" test).

162. 39 N.Y.2d 326, 348 N.E.2d 537, 384 N.Y.S.2d 82 (1976).

163. *Id.* at 328, 348 N.E.2d at 540, 384 N.Y.S. 2d at 85.

164. *Id.* at 332-33, 348 N.E.2d at 542-44, 384 N.Y.S.2d at 87-88.

165. *Id.* at 333, 348 N.E.2d at 543, 384 N.Y.S.2d at 88.

and practice and, further, that no nonracial, or less objectionable racial classifications will serve the same purpose."[166] Although the policy must further some legitimate, articulated governmental purpose, the court noted that the interest "need not be urgent, paramount, or compelling."[167] Rather, the substantial interest requirement would be satisfied where the gain to be derived from the preferential policy is found to outweigh its possible detrimental effects.[168]

B. Evaluating the LBE Set-Aside

Although the Appellate Division in *Subcontractors Trade Association* struck down Executive Order No. 53 as an unconstitutional quota, it did not indicate which, if any, standard of equal protection analysis it had applied.[169] Since eligibility for participation in the LBE

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166. *Id.* at 336-37, 348 N.E.2d at 546, 384 N.Y.S.2d at 90. The court recognized that because the preferential treatment may encourage polarization of the races and perpetuate thinking in racial terms, it should be subjected to more careful scrutiny than that ordinarily entailed by the rational basis test. *Id.* at 335-36, 348 N.E.2d at 545, 384 N.Y.S.2d at 89-90. On the other hand, the court rejected the application of the strict scrutiny test to benign discrimination as contrary to the purpose of the fourteenth amendment: "[i]t would indeed be ironic and, of course, would cut against the very grain of the amendment, were the equal protection clause used to strike down measures designed to achieve real equality for persons whom it was intended to aid." *Id.* at 334-35, 348 N.E.2d at 544-45, 384 N.Y.S.2d at 89.

167. *Id.* at 336, 348 N.E.2d at 545, 384 N.Y.S.2d at 90.

168. *Id.* The court conceded that petitioner had established that the medical school practiced reverse discrimination, but did not proceed any further in the inquiry because the petitioner, due to his position on the priority list, had failed to show his own right to relief, since there was no evidence he would have been admitted had the entire minority program been eliminated. *Id.* at 337-38, 348 N.E.2d at 547, 384 N.Y.S.2d at 91.

The intermediate level test has also been used in New York to examine a classification based on the legitimacy of one's birth, *see In re* Burns, 55 N.Y.2d 501, 507, 435 N.E.2d 390, 393, 450 N.Y.S.2d 173, 176 (1982), and to review the constitutionality of financing elementary and secondary public school education based on local real property wealth. *See* Board of Educ., Levittown Union Free Sch. Dist., v. Nyquist, 83 A.D.2d 217, 240, 443 N.Y.S.2d 843, 857 (2d Dep't 1981), *modified*, 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982), *appeal dismissed*, 103 S. Ct. 775 (1983).

169. 96 A.D.2d at 775, 465 N.Y.S.2d at 827. The opinions in *Broidrick v. Lindsay* and *Fullilove v. Beame* were also silent as to the level of scrutiny employed. *See supra* note 134. In each of these cases, as well as in *Subcontractors Trade Association*, the statement that the dismissal of the executive orders was unconstitutional was made in dictum; the central holding was that the particular affirmative action programs exceeded mayoral power. Assuming, however, that the mayor does have the power to initiate such programs, see *infra* notes 185-211 and accompanying text, the equal protection issue would then require a more detailed analysis. Moreover, the fact that the courts addressed the equal protection challenge, even though it was not necessary to their holdings, indicates their awareness of the importance of the issue.

set-aside is determined by economic and social criteria, no suspect classification is involved. Thus, heightened scrutiny does not appear to be necessary. In the area of socio-economic welfare, government action must be upheld if it is rationally related to a proper purpose, even if such action produces some inequalities.[170] Executive Order No. 53, when analyzed according to the rational basis test, is able to survive scrutiny. The order's goal of improving the economic viability of underdeveloped areas[171] is a legitimate governmental objective. Earmarking a percentage of city construction funds for firms and workers connected to these underdeveloped areas is reasonably related to attaining that objective.[172] The fact that minorities will be among the prime beneficiaries of the LBE program, a reality that city authorities were aware of and apparently welcomed,[173] is not enough by itself to make the classification suspect.[174]

Although the class of LBEs is not suspect, the prevalence of minority group members within the class and the tendency of the New York courts to treat all affirmative action programs alike[175] suggest that it might be appropriate to subject Executive Order No. 53 to heightened

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170. *See* Ray Baillie Trash Hauling, Inc. v. Kleppe, 477 F.2d 696 (5th Cir. 1973), *cert. denied*, 415 U.S. 914 (1974). The program before the court was the SBA § 8(a) set-aside, under which government procurement contracts were awarded to small businesses owned by "socially or economically disadvantaged persons." *See supra* notes 101-04 and accompanying text. The court held that the set-aside was within the statutory goal of promoting the interests of small business concerns. Given the disproportionately small number of government procurement contracts received in the past by small business concerns owned by disadvantaged persons, it was within the SBA's authority to make a special effort to alleviate this imbalance. 477 F.2d at 703-04.

The rational basis test was also applied to uphold the preference for residents of low income areas included in the Indiana Housing Finance Authority Act inasmuch as no suspect classification was involved. Steup v. Indiana Hous. Auth., 402 N.E.2d at 1222-23. *See supra* notes 125-28 and accompanying text.

171. *See supra* note 51.

172. Although the dissent in *Subcontractors Trade Association* did not explicitly refer to the rational basis test, it did emphasize that the LBE program was aimed at improving the economic viability of deprived areas of the city in order to distinguish Executive Order No. 53 from the "racial quotas" established pursuant to Executive Order No. 71. 96 A.D.2d at 775, 465 N.Y.S.2d at 827-28.

While the income limits of the program are likely to exclude some local enterprises which perhaps merit support, as long as the classification is not arbitrary, mathematical precision is not necessary. *See* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911); Bucho Holding Co. v. State Rent Comm'n, 11 N.Y.2d 469, 477, 184 N.E.2d 569, 573, 230 N.Y.S.2d 977, 983 (1958).

173. N.Y. Times, Oct. 31, 1980, at A3, col. 3.

174. Fortec Constr. v. Kleppe, 350 F. Supp. 171, 173 (D.D.C. 1972)(even though in some areas "disadvantaged" is synonymous with "minority," SBA section 8(a) set-aside is constitutional, since it is not designed to award contracts on basis of race).

175. *See supra* note 143.

scrutiny. Such an analysis highlights the difference between the LBE set-aside and the minority hiring quotas imposed pursuant to Executive Order No. 71 and removes any lingering doubts concerning the constitutionality of Executive Order No. 53. Moreover, it answers any objections that might be raised concerning the inadequacy of the rational basis test due to the possible stigmatizing effect of singling out the socially and economically disadvantaged for special treatment.[176]

Since, therefore, it is desirable to supplement the rational basis test with a more rigorous examination, the question of which higher standard to apply must be answered. This question is governed by the holding in *Alevy v. Downstate Medical Center*.[177] If the intermediate standard of scrutiny is appropriate for evaluating racially based preferential treatment programs, then it is surely appropriate for measuring socially and economically based preferential treatment. The LBE preference meets this test. Its aim, the revitalization of economically depressed areas, is certainly a substantial or important governmental objective, as demonstrated by the numerous government efforts aimed at achieving this objective.[178] Executive Order No. 53 does not make any specific findings concerning the existence of areas in need of economic aid. Nevertheless, its adoption of eligibility standards employed by the United States Department of Housing and Urban Development[179] indicates that the LBE program is not based merely on a general perception of economic difficulties, but is designed to meet a concrete, well-documented need.

As articulated in *Alevy*, employing the intermediate standard also requires a showing that the substantial government interest cannot be achieved by a nonracial, or less objectionable, racial means.[180] The means employed to implement the aim of Executive Order No. 53 clearly satisfy this aspect of the test, since the classification involved in the LBE preference is nonracial. Moreover, the size of the preference, ten percent, is reasonable and does not impose a particularly onerous burden on those contractors who do not qualify as LBEs.[181] Indeed, unlike a minority-based program, the eligibility standards here are

176. The potentially adverse consequences of racially based affirmative action are discussed at *supra* note 152 and accompanying text.

177. 39 N.Y.2d 326, 348 N.E.2d 537, 384 N.Y.S.2d 82 (1976).

178. *See supra* note 1. The importance of the program is also illustrated by the adverse consequences likely to result from leaving entire segments of the community outside of the economic and social mainstream. *See supra* note 152.

179. 1981 Rules and Regulations, *supra* note 57, § 53.12J.

180. 39 N.Y.2d at 336-37, 348 N.E.2d at 546, 384 N.Y.S.2d at 90.

181. *See* Fullilove v. Klutznick, 448 U.S. 448, 513-14 (Powell, J., concurring).

not absolute. Any contractor meeting the income limits may comply either by hiring workers from economically disadvantaged areas or conducting more work in those areas.[182]

Finally, the LBE preference also satisfies the standards for a valid affirmative action program as set forth in *Broidrick v. Lindsay*.[183] The LBE preference increases the pool of persons eligible for employment to the extent that economically disadvantaged persons may have been excluded from the workforce in the past.[184] Equally important, to the extent that the LBE preference benefits economically underprivileged persons who are minority group members, it contributes to the remedying of past discrimination without imposing the invidious impediments sometimes associated with racially based affirmative action.

VI. The Authorization for Executive Order No. 53: Reexamining the Extent of Mayoral Power

Even if Executive Order No. 53 satisfies the equal protection guarantee, it still remains to be established whether the order covers an area of proper mayoral action. This question may be divided into two parts: whether the executive branch of government may conduct a preferential treatment program in the absence of express legislative authorization; and, if so, whether, in a proper case, there is a separate grant of power authorizing the executive to undertake such activity.

A. Preferential Treatment by the Executive Branch in the Absence of Express Legislative Authorization

Although no precise analogy may be drawn between presidential and mayoral powers, a review of the power of the federal executive branch to initiate preferential treatment provides a useful model for analyzing the limits of mayoral power.

In *Fullilove v. Klutznick*, both the opinion of Chief Justice Burger and the concurrence of Justice Powell carefully analyzed the power of Congress to enact legislation combatting discrimination. Both Justices emphasized that Congress was uniquely situated to act in this area.[185] This emphasis left their opinions open to the interpretation that only Congress had the authority to utilize race-conscious remedies to cor-

182. *See supra* note 58 and accompanying text.
183. 39 N.Y.2d at 647, 350 N.E.2d at 598, 385 N.Y.S.2d at 268.
184. *Id.*
185. *See supra* notes 88 & 92 and accompanying text.

rect the effects of past discrimination.[186] Yet, neither opinion explicitly conditioned the validity of the MBE set-aside on Congressional authorization.[187] At a minimum, the governmental body creating an affirmative action program must have the power to do so.[188] Not every governmental body will be able to satisfy this requirement.[189] Nevertheless, the decision in *Fullilove v. Klutznick* does not foreclose the possibility of executively-initiated preferential treatment.[190]

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186. *See* Central Alabama Paving, Inc. v. James, 499 F. Supp. 629 (M.D. Ala. 1980), in which the court struck down United States Department of Transportation regulations setting goals for the participation of minority and women controlled businesses in highway construction projects. The court held that an administrative agency seeking to establish a preferential classification must have been given the authority by Congress to take such action. In addition, the agency must have made findings of past discrimination and determined that its actions are responsive to that discrimination. *Id.* at 636. The Department of Transportation, the court ruled, had failed to meet either of these requirements. *Id.* at 638.

187. *See* M.C. West, Inc. v. Lewis, 522 F. Supp. 338 (M.D. Tenn. 1981), which upheld the MBE regulations issued by the federal Department of Transportation. Disagreeing with the court's reading of *Fullilove v. Klutznick* in *Central Alabama Paving*, *supra* note 186, that only Congress may authorize race conscious remedies, the *M.C. West* court noted that the Secretary of Transportation was acting in response to remedial goals set by Congress and that the President had, through Executive Order Nos. 11,246 and 11,625, enlisted the aid of federal departments to promote these congressional goals. 522 F. Supp. at 347. The court also observed that the findings of Congress regarding the PWEA of 1977 were broad enough to support ameliorative regulations in the construction industry. Moreover, the court found that the remedy was narrowly implemented and involved little coercion. *Id.* at 348.

188. *Fullilove v. Klutznick*, 448 U.S. at 498 (Powell, J., concurring). This assumption, although not expressly stated, also underlies Chief Justice Burger's extensive analysis of Congress' power to enact the MBE set-aside.

189. *See* Arrington v. Associated Gen. Contractors of Am., Inc., 403 So. 2d 893 (Ala. 1981), *cert. denied*, 455 U.S. 913 (1982), which invalidated a city ordinance mandating a ten percent MBE set-aside. The court held that the Birmingham City Council was not a competent body to identify and address constitutional violations. Even if it were competent, the court continued, the *Fullilove* standards had not been met because the necessary record had not been compiled and the remedy was not carefully tailored to rectify the continuing effects of past discrimination. *Id.* at 900. *But see* Schmidt v. Oakland Unified Sch. Dist., 662 F.2d 550 (9th Cir. 1981), *vacated on other grounds*, 457 U.S. 594 (1982), which upheld an MBE set-aside established by a local school board. Since the school board did not have the same constitutional power as Congress, the court did not automatically extend the results of *Fullilove v. Klutznick*. Instead, it subjected the program to separate analysis, and found that the school board was an appropriate body for asserting an interest in remedying the effects of past discrimination in the construction industry. *Id.* at 559. The court also found the program to be consistent with the demands of equal protection regardless of which standard was applied. *Id.* at 559-60.

190. *See M.C. West, Inc. v. Lewis*, 522 F. Supp. at 343. *See generally* Note, *Fullilove v. Kluztnick: Do Affirmative Action Plans Require Congressional Authorization?* 38 WASH. & LEE L. REV. 1315 (1981).

Since the executive as well as the legislative branches may, in fact, authorize preferential treatment programs, it is necessary to determine whether executive action in this area infringes upon the powers of the legislature. The Supreme Court considered the issue of separation of powers in *Youngstown Sheet and Tube Co. v. Sawyer*.[191] The Court in *Youngstown* invalidated a presidential executive order directing the seizure of steel companies during the Korean War as a violation of the separation of powers between the executive and legislative branches.[192] In a concurring opinion, Justice Jackson, noting that the separation of powers within the federal government was not intended to be absolute, identified three different situations in which assertions of presidential power may be challenged:

> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate . . . .
>
> 2. When the President acts in absence of either a congressional grant or denial of authority, he can rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility . . . .
>
> 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.[193]

As this scheme makes clear, the extent of executive power in a particular area will depend on the action, if any, taken by the legislative branch.[194] The powers of the mayor and the City Council may be

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191. 343 U.S. 579 (1952).

192. *Id.* at 587-89. The Court rejected the argument that the order could be sustained as an exercise of either the President's military power or executive power. Taking possession of private property was exclusively a matter for Congress, and Congress' law-making power was subject neither to presidential nor military supervision. *Id.*

193. *Id.* at 635-37 (footnote omitted). Justice Jackson placed the order under consideration in the third category and could find no constitutional provision granting the President an independent power to act in this area so broad as to outweigh congressional power. *Id.* at 638-47.

194. Justice Jackson's categorization was utilized in Contractors Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971), which upheld the Philadelphia Plan, an affirmative action plan implemented pursuant to

more circumscribed than those of their federal counterparts.[195] Yet, the dynamics of the relationship between the two branches are similar. When the mayor takes specific action, he will be doing so upon the authorization, explicit or implicit, of the City Council, in opposition to enactments of the City Council, or in the absence of any expression of the City Council's will in the matter. Accordingly, any problems concerning assertions of mayoral power will still fall within one of Justice Jackson's three categories.

With respect to Executive Order No. 53, both the first and third categories would appear to be inapplicable. The City Council has not taken any action which either authorizes or prohibits the implementa-

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presidential Executive Order No. 11,246. *See supra* note 17. The court reasoned that the order did not fall within Justice Jackson's third category, since the general prohibition against discrimination in the Civil Rights Act of 1964 did not prevent the President from taking affirmative action to remedy discrimination in the construction industry. *Id.* at 171-73. The court traced the authority for the Plan to the President's general authority to act for the protection of the federal interest. The court found that in the case of federally assisted construction projects, such action, if not authorized by Congress, at least fell within Justice Jackson's second category, namely, the zone of concurrent authority. *Id.* at 171.

Reference to Justice Jackson's categories was also made in *M.C. West, Inc. v. Lewis*, in which the court identified presidential Executive Order No. 11,625, establishing a national program for minority business enterprises, as constituting authority for the Transportation Secretary's MBE set-aside regulations. 522 F. Supp. at 345-46.

195. The organization of government at the federal and local levels is compared in LaGuardia v. Smith, 176 Misc. 482, 27 N.Y.S.2d 321 (Sup. Ct. N.Y. County), *aff'd*, 262 A.D. 708, 27 N.Y.S.2d 992 (1st Dep't 1941), *aff'd*, 288 N.Y. 1, 41 N.E.2d 153 (1942). Based on its analysis of the 1936 City Charter, which the court described as a codification of the current law of the city rather than a constitution, the court concluded that the charter was an instrument of intermingled, not separate, powers. *Id.* at 485-86, 27 N.Y.S.2d at 324-25. Accordingly, the mayor could not claim immunity from a subpoena issued by a special committee of the City Council investigating the Municipal Civil Service Commission. *Id.* at 488-89, 27 N.Y.S.2d at 326-27. The distinction between separate and intermingled powers is more apparent than real, however, since even at the federal level, the separation of powers is not absolute. *See* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 442-43 (1977).

The distribution of powers between the executive and legislative branches under the 1962 Charter remains much the same as that effected by the earlier Charter. Section 21 of the Charter vests the legislative power in the City Council. N.Y.C. Charter § 21 (1962). The specific powers of the council, including the adoption and enforcement of local laws, are enumerated in section 27. Section 3 designates the mayor as the chief executive officer. The only specific grants of power made in this section are the power to delegate authority to fulfill mayoral duties and to create positions within the executive office by means of executive orders. The mayor's powers are described in general terms in section 8(a), which provides that "[t]he mayor, subject to this charter, shall exercise all the powers vested in the city, except as otherwise provided by law." *Id.* § 8(a). The mayor's powers of appointment are set forth in sections 6 and 7.

tion of the LBE program.[196] Rather, Executive Order No. 53 falls within the second category. Although the City Council also could have chosen to take action to aid LBEs, its silence regarding the LBE preference signals neither approval nor disapproval.[197] But if the mayor does have the power to take such action, the overlap of his power with the powers of the City Council is of little import. For Justice Jackson's second category posits such a zone of concurrent authority in which legislative inaction, whatever its cause, enables, if not invites, independent action by the chief executive.[198]

B. The Specific Grant of Mayoral Power

While the concept of "concurrent authority" helps explain the relationship between mayoral and legislative powers, it does not eliminate the need for an inquiry into the specific authorization for a particular mayoral action. The holding in *Subcontractors Trade Association v. Koch* that Executive Order No. 53 exceeded mayoral power ruled out any need for examining the source of the mayor's authority.[199] In support of this proposition, the *Subcontractors* court cited *Broidrick v. Lindsay* and *Fullilove v. Beame* without undertaking a separate analysis.[200] Yet, the LBE preference created by Executive Order No. 53 is sufficiently different from the affirmative action program of Executive Order No. 71 to warrant an independent analysis.

In the case of Executive Order No. 53, the authority for the imposition of the LBE program has been traced to the city's power to impose its requirements on contractors working on its projects.[201] The contracting powers of the city are set forth in section 20 of the General

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196. With respect to Executive Order No. 71, in contrast, the objection was raised that, in addition to exceeding mayoral power, the regulations concerning minority man-hour percentages and minority apprentice programs violated New York City Administrative Code § 343-8.0, which prohibits discrimination in employment by those contracting with the city. *Broidrick v. Lindsay*, 39 N.Y.2d at 645-47, 350 N.E.2d at 597-98, 385 N.Y.S.2d at 266-68.

197. The policy reasons for rejecting the "ratification by inaction" doctrine are considered in Note, *Doing Good the Wrong Way*, *supra* note 1 at 946 (improperly shifts burden of acquiring majority from proponents to opponents of the legislation).

198. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 636-37 (Jackson, J., concurring). *See also Fullilove v. Beame*, 48 N.Y.2d at 385, 398 N.E.2d at 770, 423 N.Y.S.2d at 149 (Fuchsberg, J., dissenting)("it is recognized that each branch, to protect its own independence, to some extent may exercise inherent powers that, strictly speaking, may be thought to belong to another").

199. *Subcontractors Trade Ass'n v. Koch*, 96 A.D.2d at 775, 465 N.Y.S.2d at 827.

200. *Id.*

201. Memorandum Opinion at 6-9, Subcontractors Trade Ass'n v. Koch, 96 A.D.2d 774, 465 N.Y.S.2d 825 (1983) (decision of trial court in *Subcontractors Trade*

City Law.[202] The New York Court of Appeals construed this provision as evincing a design on the part of the State to provide a city, when contracting for the purchase of supplies or the hiring of labor, with full power to fix the terms and conditions upon which it chooses to deal.[203]

The city's contracting power corresponds to the powers enjoyed by government in general to determine those parties with whom it will deal and to fix the terms and conditions upon which it will deal.[204] The city's power to set the terms of its contracts, however, does not by itself constitute authority for Executive Order No. 53. It still must be shown that the mayor shares in this power, and that the LBE program is included within the "terms and conditions" the mayor is empowered to establish.

On the federal level, the government's contracting powers have been extended to the executive by implicitly including them in that branch's general enforcement powers. Specifically, the Supreme Court has held that as long as the executive branch does not contravene any statutory provision, it may freely enter into contracts on whatever conditions and provisions it deems will best promote the interests of government.[205] No New York case has directly addressed this issue. However, the state Court of Appeals, in reviewing the authority of the city to determine the manner in which its business

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Ass'n v. Koch, reprinted in Record on Appeal). *See also* dissenting opinion, *id.* at 827.

202. *See* N.Y. GEN. CITY LAW § 20 (McKinney 1968 & Supp. 1983-84). Subdivision (1) of General City Law section 20 empowers every city "[t]o contract and be contracted with . . ." Subdivision (19) empowers cities "[t]o regulate the manner of transacting the city's business and affairs. . . ." *See also* General City Law section 23(1), which provides that the powers granted by the law "are to be exercised by the officer, officers or official body vested with such powers by any other provision of law or ordinance. . . ."

203. *See* McMillen v. Browne, 14 N.Y.2d 326, 330, 200 N.E.2d 546, 547-48, 251 N.Y.S.2d 641, 644 (1964)(upholding New York City Administrative Code § 343-9.0(a),(e), requiring contractors to pay minimum wage). *See also* Great Neck Electric, Inc. v. City of New York, N.Y.L.J., March 1, 1984, at 12, col.2 (Sup. Ct. N.Y. County) (municipality may establish strict terms according to which it will contract).

204. Perkins v. Lukens Steel Co., 310 U.S. 113, 127 (1940)(upholding power of Secretary of Labor to set minimum wages). *See also* United States v. New Orleans Pub. Serv., Inc., 553 F.2d 459 (5th Cir. 1977), *vacated on other grounds*, 436 U.S. 942 (1978)(local public utility with significant sales to United States required to comply with equal opportunity obligations of presidential Executive Order No. 11,246 even though utility had not expressly agreed to be bound).

205. *See* Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 116 (1954)(construing Armed Services Procurement Act of 1947, § 4(a) & (b), 41 U.S.C. § 154(a) & (b), Court affirmed power of Department of Navy to negotiate contracts which provide for private purchasing agents for supplies and materials).

and affairs are transacted, has held that the mayor is empowered to act on its behalf.[206] In addition, it has been held that the mayor, through his power of enforcement, may act to protect the city's well-being by disqualifying certain individuals from participating in city contracts.[207] Although these cases do not define the outer limits of the mayor's powers, they do establish that the mayor may act on the city's behalf in determining with whom, and on what terms, the city will transact its business.

Even though the mayor has the power to control the city's relationship with its contractors, the argument may still be raised that the LBE set-aside is not typical of the "terms or conditions" that appear in contracts. For example, New York City Charter section 228(e), which confers on the mayor the power to issue directives and adopt rules and regulations regarding the execution of capital projects, would appear to refer primarily to the technical aspects of these projects, such as arranging financing or approving designs.[208] A contract term, however, is not necessarily limited to a narrow technical requirement. As indicated by the decision in *Kayfield v. Morris*,[209] any condition which affects the city's well-being may properly be considered.[210] The real limit on the mayor's contracting powers thus appears to be not whether the term is related to the technical details of the contract, but whether the term articulates a *bona fide* city interest. With respect to the LBE set-aside, improving the viability of economically undeveloped areas has been identified as a legitimate city interest.[211]

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206. *See* Bauch v. City of New York, 21 N.Y.2d 599, 605, 237 N.E.2d 211, 213, 289 N.Y.S.2d 951, 953-54 (1968)(upholding mayoral executive order providing for exclusive union dues check-off on city payroll).

207. Kayfield Constr. Corp. v. Morris, 15 A.D.2d 373, 377, 225 N.Y.S.2d 507, 513 (1st Dep't 1962). The particular action under consideration was a mayoral executive order listing contractors who had given gifts to city officials and directing city agencies not to do business with them. *Id.* at 375, 225 N.Y.S.2d at 511.

208. These technical aspects are spelled out in subdivisions (a) through (d) of the section, to which subdivision (e) cross-refers. Section 228(e) of the Charter was cited by the dissent in *Subcontractors Trade Association* as sufficient authority for the issuance of Executive Order No. 53. 96 A.D.2d at 775, 465 N.Y.S.2d at 827. No attempt was made, however, to explore the broader implications of the mayor's contracting powers.

209. 15 A.D.2d 373, 225 N.Y.S.2d 507 (1st Dep't 1962). *See supra* note 207 and accompanying text.

210. The federal government's power to utilize its contracting powers to attain social goals is well-established. *See* Morgan, *Achieving National Goals Through Federal Contracts: Giving Form to an Unconstrained Administrative Process*, 1974 WIS. L. REV. 301.

211. *See supra* note 51 and accompanying text. Whether a similar analysis may also be used to uphold Executive Order No. 71 remains an open question. On the one

VII. The Relation of Executive Order No. 53 to State and Local Competitive Bidding Statutes

Even though Executive Order No. 53 falls within the boundaries of mayoral power, the mayor, in exercising this power, may not take any action inconsistent with state law.[212] Thus, Executive Order No. 53 must also be examined in the light of existing state law before a final determination of its validity may be made.

A. Statutory Obligation to Award Contracts to "Lowest Responsible Bidder"

In addition to ruling that the LBE set-aside mandated by Executive Order No. 53 was unconstitutional and exceeded mayoral power, the *Subcontractors Trade Association* court held that it violated the competitive bidding provisions of General Municipal Law section 103(1) and New York City Charter section 343(b), which require that all public work and purchase contracts above a specified dollar amount be awarded to the lowest responsible bidder.[213] According to this view, the omission of a specific reference to competitive bidding in

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hand, given the mayor's contracting powers, the possibility of including terms setting minority hiring goals should not be entirely ruled out. On the other hand, since racially based affirmative action is involved, the weighing of the relevant city interest may lead to the conclusion that such a program is not one of the contract terms the mayor is empowered to set. Thus, the change from racial and ethnic to social and economic criteria not only permits Executive Order No. 53 to survive an equal protection challenge, but also supports the conclusion that it is within the boundaries of mayoral power.

212. All actions of the city, whether taken by the legislature or the executive branch, are subject to this limitation. McMillen v. Browne, 14 N.Y.2d 326, 331, 251 N.Y.S.2d 641, 644 (1964).

213. 96 A.D. at 775, 465 N.Y.S.2d at 827. The court also held that section 9 of Executive Order No. 53 and 1981 Rules and Regulations § 53.41 conflicted with General Municipal Law § 103(1) insofar as they relieve LBEs of the necessity of posting security bonds. *Id.* A closer look at the relevant statutory and regulatory language, however, indicates that this particular conflict may be more apparent than real. To begin with, the statute states that contracts are to be awarded to the "lowest responsible bidder furnishing the required security. . .", N.Y. GEN. MUN. LAW § 103(1) (McKinney 1977 & Supp. 1983-84), thus suggesting that there is some discretion in establishing what, if any, security is to be required. In addition, under section 9 of Executive Order No. 53, full or partial waivers of performance and completion bonds are not granted automatically, but must be consistent with the rules and regulations of the Board of Estimate and are subject to the approval of the Corporation Counsel. Finally, while 1981 Rules and Regulations § 53.41 provides that each construction contract shall contain a clause to the effect that contractors shall not require performance and payment bonds for LBE subcontractors, the prime contractors themselves are not relieved of the obligation to post such bonds.

Executive Order No. 53 and its accompanying rules and regulations, coupled with the setting of a minimum percentage for LBE participation, is likely to result in the award of a contract to a firm other than the lowest responsible bidder.[214] Moreover, this interpretation appears to regard the provision in Executive Order No. 53 that contract awards are to be consistent with applicable city, state, and federal law[215] as too general to be an adequate safeguard of the competitive bidding process.

The court's deference to competitive bidding in *Subcontractors Trade Association* is consistent with an established line of cases that has sought to preserve the integrity of the competitive bidding process. Attempts to bypass or subvert the competitive bidding process have not survived court challenges.[216] In upholding the validity of competitive bidding requirements, the courts have stressed their two-fold purpose: to obtain the best work and supplies at the lowest possible price and to guard against favoritism, improvidence, extravagance, fraud and corruption.[217]

If the Court of Appeals finds that Executive Order No. 53 permits the awarding of contracts irrespective of competitive bidding requirements, these policy considerations provide more than sufficient

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214. A similar conclusion was reached in Arrington v. Associated Gen. Contractors, 403 So. 2d 893, 898 (Ala. 1981), which struck down a city ordinance mandating a ten percent MBE set-aside in construction contracts as violating the state's competitive bidding law.

215. Exec. Order No. 53, §§ 3, 4.

216. *See, e.g.*, Albion Industrial Center v. Town of Albion, 62 A.D.2d 478, 405 N.Y.S.2d 521 (4th Dep't 1978) (lease agreement with option to purchase between individual and city void since not true lease but effort to evade application of competitive bidding requirements to construction of building); Edenwald Contracting Co., Inc. v. City of New York, 86 Misc. 2d 711, 384 N.Y.S.2d 338 (Sup. Ct. N.Y. County 1974), *aff'd*, 47 A.D.2d 610, 366 N.Y.S.2d 363 (1st Dep't 1975) (directive prohibiting night paving contracts with asphalt plants in certain zoning area is impermissible attempt to design specifications so as to shut out or reduce competitive bidding).

217. *See, e.g.*, Le Cesse Bros. Contracting, Inc. v. Town Bd., 62 A.D.2d 28, 403 N.Y.S.2d 950, 952 (4th Dep't 1978), *aff'd*, 46 N.Y.2d 960, 388 N.E.2d 737, 415 N.Y.S.2d 413 (1979). This policy has been held to be so important that participation in fraudulent and collusive bidding practices will not only render the contract void, but will also prevent the offending bidder from recovering in quantum meruit for any work done before the contract was cancelled. *See* Jered Contracting Corp. v. New York City Trans. Auth., 22 N.Y.2d 187, 192-93, 239 N.E.2d 197, 200, 292 N.Y.S.2d 98, 102-03 (1968). *See also* District Council No. 9 v. Metropolitan Trans. Auth., 115 Misc. 2d 810, 814-15, 454 N.Y.S.2d 663, 668-69 (Sup. Ct. N.Y. County 1982)(policies supporting competitive bidding run so deeply that even laudable and worthwhile purpose, such as, in instant case, supporting organization employing ex-convicts, will not justify letting without bid a contract covered by competitive bidding statute).

ground for its invalidation. But policy arguments may be used to support as well as to void governmental action. Although unreasonable actions by the authorities that tend to limit the list of qualified bidders are illegal,[218] actions taken in conformance with the goals of competitive bidding are legal.[219] The majority opinion in *Subcontractors Trade Association*, by assuming that the implementation of Executive Order No. 53 would, at least in some cases, mean that the contract would not be let to the lowest responsible bidder, concluded that Executive Order No. 53 did not conform to the goals of competitive bidding.[220] If, however, it can be shown that by complying with the LBE set-aside a contractor comes within the definition of a "responsible bidder," then rejection of a low bidder not satisfying the LBE set-aside is consistent with the competitive bidding requirements, since the contractor has not qualified as "responsible."

B. Qualifications of the "Lowest Responsible Bidder"

Had the legislature intended cost to be the sole criterion in determining the letting of contracts, it would have provided merely that contracts be awarded to the lowest bidder. The inclusion of the term "responsible" indicates that other factors are to be taken into consideration.[221] The delineation of these factors, however, has been left to the courts. In a generic sense, a responsible bidder is one who is "accountable" or "reliable."[222] Among the specific attributes found to be in-

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218. *See, e.g.*, Caristo Constr. Corp. v. Rubin, 30 Misc. 185, 194, 221 N.Y.S.2d 956, 969 (Kings County), *modified on other grounds*, 15 A.D.2d 561, 222 N.Y.S.2d 998 (2d Dep't 1961), *aff'd*, 10 N.Y.2d 538, 180 N.E.2d 794, 225 N.Y.S.2d 502 (1962). *See generally*, 10 E. McQUILLAN, MUNICIPAL CORPORATIONS § 29.44 (3rd ed. 1969).

219. Fischbach & Moore, Inc. v. New York City Trans. Auth., 79 A.D.2d 14, 21-23, 435 N.Y.S.2d 984, 988-89 (2d Dep't 1981)(award of contract to lowest responsible bidder after post-bid negotiations held not inconsistent with policies underlying bidding statutes where record contained no suggestion of favoritism, fraud or corruption, competitor was fairly and properly established as lowest responsible bidder and public interest was advanced by reduction in cost and liquidated damages provision obtained through negotiations).

220. 96 A.D.2d at 775, 465 N.Y.S.2d at 827.

221. This conclusion is supported not only by a common-sense reading of the text, but by the well-established rule of statutory construction that meaning and effect is to be given to all the provisions and language of a statute, including each of its words. *See* McKinney's Consol. Laws of New York, Book I, Statutes, § 231 (1971 & Supp. 1983-84), and cases cited therein.

222. Kings Bay Buses, Inc. v. Aiello, 100 Misc.2d 1, 5, 418 N.Y.S.2d 284, 287 (Sup. Ct. Kings County 1979). In an early leading case, the term "lowest responsible bidder" was defined as one "able to respond or to answer in accordance with what is expected or demanded." People *ex rel.* Martin v. Dorsheimer, 55 How. Pr. 118, 120 (N.Y. 1878).

cluded in the term are the financial ability to complete the contract,[223] skill, judgment, and integrity,[224] previous performance of satisfactory work,[225] and possession of the necessary facilities and equipment for doing the work.[226]

These factors, which are directly related to the performance of the contract, make it clear that submission of the lowest bid does not guarantee the award of the contract.[227] No New York court, however, has had occasion to consider the question whether "lowest responsible bidder" encompasses "social responsibility." Thus, whether a contractor's contribution to improving the situation of economically and socially disadvantaged persons through compliance with Executive Order No. 53, either by qualifying as an LBE or subcontracting with an LBE, may be made a condition for bidding on city contracts remains an open question.

Other jurisdictions have, by analogy, answered this question in the affirmative. In *S. N. Nielsen Company v. Public Building Commission of Chicago*,[228] the Illinois Supreme Court upheld a "canvassing formula" under which a bidder receives credits for the percentage of hours worked by minority members in its workforce.[229] These credits are then included in the calculations upon which the awarding of the contract is based. The court found not only that the Public Building Commission, a municipal corporation, had the statutory authority to insert affirmative action requirements in the letting of its contracts,[230] but also that a contractor's commitment to affirmative action is within the meaning of the term responsible because it "may be expected or demanded under the terms of the contract."[231]

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223. Syracuse Intercepting Sewer Bd. v. Fidelity & Deposit Co., 255 N.Y. 288, 294, 174 N.E. 657, 659 (1931).

224. Picone v. City of New York, 176 Misc. 967, 969, 29 N.Y.S.2d 539, 541 (Sup. Ct. N.Y. County 1941).

225. Abco Bus Co., Inc. v. Macchiarola, 75 A.D.2d 831, 832, 427 N.Y.S.2d 876, 878 (2d Dep't 1980), *rev'd on other grounds*, 52 N.Y.2d 938, 419 N.E.2d 870, 437 N.Y.S.2d 967, *cert. denied*, 102 S. Ct. 107 (1981).

226. Gilmore v. City of Utica, 131 N.Y. 26, 35, 29 N.E. 841, 843 (1892). The various factors, and the situations in which they are considered, are discussed at length in Rosenbaum, *Criteria for Awarding Public Contracts to the Lowest Responsible Bidder*, 28 CORNELL L. Q. 37, 43-51 (1942).

227. *See* Rosenbaum, *supra* note 226, at 40.

228. 81 Ill. 2d 290, 410 N.E.2d 40 (1980).

229. *Id.* at 296, 410 N.E.2d at 43.

230. *Id.*

231. *Id.* at 299, 410 N.E.2d at 44 (quoting People *ex rel.* Peterson v. Owen, 290 Ill. 59, 67, 124 N.E. 860, 864 (1919)).

A broad reading of the concept of "responsibility" is also found in *Weiner v. Cuyahoga Community College District*.[232] In rejecting a challenge to a contract containing affirmative action requirements imposed pursuant to a Presidential Executive Order,[233] the Ohio Supreme Court relied on both economic and moral arguments to justify its conclusion that "the capacity to assure a performance which complies with anti-discriminatory laws is reasonably a part of the standard of a best or responsible bidder on a contract involving the expenditure of public funds."[234] Denying the benefits of public contract expenditures to contractors unwilling to adhere to anti-discriminatory guidelines was, in the court's opinion, both cost effective in comparison with other methods for securing compliance with equal employment opportunity laws and morally preferable because it did not place the government in the position of indirectly financing discriminatory employment practices by binding only its direct contractor and not the entire contract performance.[235]

Although no New York court has directly addressed this issue, decisions holding that the "moral worth" of the bidder is an appropriate consideration in determining responsibility indicate a willingness to consider qualifications other than those strictly related to the more technical aspects of contract performance.[236] Taking the character of the bidder into account is not equivalent to requiring preferential treatment. Nevertheless, extending the concept of responsibility to include social responsibility does not necessarily attenuate the compet-

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232. 19 Ohio St. 2d 35, 38, 249 N.E.2d 907, 910 (1969), *cert. denied*, 396 U.S. 1004 (1970).

233. Exec. Order No. 11,246, 3 C.F.R. 339 (1964-65), *reprinted in* 42 U.S.C. § 2000e (1981).

234. 19 Ohio St. 2d at 39, 249 N.E.2d at 910.

235. *Id.*

236. *See* Abco Bus Co., Inc. v. Macchiarola, 75 A.D.2d 831, 832, 427 N.Y.S.2d 876, 878 (2d Dep't 1980) (moral character, including prior criminal activities, is valid criterion for determining lowest responsible bidder, but Board of Education acted arbitrarily in refusing to award contract since it had accepted bids from other corporations whose principals had criminal records); Picone v. City of New York, 176 Misc. 967, 969, 29 N.Y.S.2d 539, 541 (upholding determination that firm was not responsible bidder because it was front for individual who had repeatedly come into conflict with criminal law). *See also* Great Neck Electric, Inc. v. City of New York, N.Y.L.J., March 1, 1984, p.12, col.2 (Sup. Ct. N.Y. County) (low bid rejected since bidder failed to complete necessary information concerning women and minorities in workforce, as required by Executive Order No. 50, *supra* note 52; affirming power of municipality to establish strict terms according to which it will contract, court noted that Executive Order No. 50 aimed at ensuring that companies that benefit from government contracts provide employment opportunities on nondiscriminatory basis).

itive bidding process.[237] On the contrary, Executive Order No. 53 establishes an additional qualification for "responsibility."[238] Although the regulations could have been more specific concerning the continued validity of competitive bidding requirements, they do incorporate several provisions designed to preserve competitive bidding among qualified bidders.[239] Moreover, the mere fact that economically and socially disadvantaged persons may be among the successful bidders is not a basis for assuming that standards will be lowered.[240] Were the LBE set-aside to result in the awarding of a contract to the higher of two responsible bidders, it would, of course, violate the competitive bidding statutes; no such violation occurs where the con-

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237. In this respect the LBE set-aside differs significantly from the MBE set-aside under section 8(a) of the Small Business Act, which allows the SBA to award contracts through private negotiation. Because section 8(a) constitutes specific statutory authority to dispense with competition and the purpose of the program made competition impractical, the SBA set-aside was upheld as falling within exceptions contained in federal statutes requiring competition in government procurement. Ray Baillie Trash Hauling, Inc. v. Kleppe, 477 F.2d 696, 708 (5th Cir. 1973), *cert. denied*, 415 U.S. 941 (1974). No similar exceptions are contained in General Municipal Law section 103, which authorizes the waiver of competition only in the case of a public emergency, N.Y. GEN. MUN. LAW § 103(4) (McKinney 1977 & Supp. 1983-84), or under certain, very limited, circumstances, such as the purchase of surplus or second-hand supplies from a governmental body, *id.* § 103(6), purchases by municipal hospitals under Public Health Law § 2803-a, *id.* § 103(8), and purchases by the board of education of food directly from producers. *Id.* § 103(9). The statute, however, does seem to allow for some flexibility with respect to policy considerations. For example, section 103(1-a) allows for the use of stock item specifications of New York manufacturers on the bid, in order to promote the public interest by retaining jobs and attracting new industry to the state.

238. That this was the intended impact of the LBE program is indicated by a provision in the 1981 Rules and Regulations that failure of a proposed contractor to furnish information concerning the identity of each LBE to be awarded a subcontract and the dollar amount and percentage of work to be subcontracted will render that contractor's bid unresponsible. 1981 Rules & Regulations, *supra* note 57, § 53.42(6). *See* Central Alabama Paving, Inc. v. James, 499 F. Supp. 629, 633 (1980). Although the court sustained a constitutional challenge to an MBE program instituted pursuant to Department of Transportation regulations, it rejected the contention that the regulation violated the federal competitive bid statute. The court held that the Department of Transportation was, through its regulations, merely establishing an additional qualification for responsiveness. *Id.*

239. The most important provisions, in this respect, are the detailed eligibility requirements, *see* 1981 Rules & Regulations, *supra* note 57, § 53.21, and the waiver of the set-aside where no LBE subcontractor is reasonably available, willing, and qualified. *See* 1981 Rules & Regulations, *supra* note 57, § 53.44. The former provision eliminates the possibility of fraud or collusion, while the latter implies that normal contract considerations of cost and quality are not to be ignored.

240. *Subcontractors Trade Ass'n v. Koch*, 96 A.D.2d at 775, 465 N.Y.S.2d at 827 (Alexander, J., dissenting).

tracting agency determines, according to standards clearly defined and uniformly applied, that only one of the bidders is responsible.[241]

The concept of "responsibility" will not support the indiscriminate addition of qualifications to the bidding process. However, including provisions for an LBE set-aside is neither an arbitrary nor an unwarranted extension of the term "lowest responsible bidder." The condition being imposed is no more than one aspect of a legitimate exercise of the mayor's power to set the terms of and enforce city contracts.[242] Aside from the important policy goals served by the program, it can be justified on a cost basis, since money spent at the contracting stage to increase the participation of the disadvantaged renders other, potentially more burdensome, aid unnecessary.[243] There is, accordingly, nothing to suggest that the implementation of Executive Order No. 53 will disserve the public either by unnecessarily increasing costs or encouraging favoritism, fraud or corruption. Thus, no basis exists for finding the LBE program to be inconsistent with state and local competitive bidding statutes.

VIII. Conclusion

Executive Order No. 53 has effectively increased the participation in city contracts of small businesses and residents from economically underdeveloped areas.[244] Although similar in format to set-asides em-

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241. Picone v. City of New York, 176 Misc. 967, 969, 29 N.Y.S.2d 539, 541 (Sup. Ct. N.Y. County 1941). *See also* Pilot Mechanical Corp. v. Carroll, 94 Misc. 2d 437, 441, 404 N.Y.S.2d 839, 841 (Sup. Ct. Queens County 1978)(city validly did not award contract, even though complainant was lowest responsible bidder, because of lack of compliance with Executive Order No. 89, requiring contractors to offer employees health and welfare programs as well as pension plans).

242. *See supra* notes 205-07 and accompanying text. Conversely, where a set-aside program is adopted without specific authorization, an attempt to expand the term "responsible" to include compliance with a social policy is much more likely to be regarded as suspect. *See* Associated Gen. Contractors of Cal. v. San Francisco Unified Sch. Dist., 431 F. Supp. 854 (N.D. Cal. 1977), *aff'd*, 616 F.2d 1381 (9th Cir.), *cert. denied*, 449 U.S. 1061 (1980). Here, the board of education was not merely attempting to show that its 25 percent MBE set-aside was consistent with the state competitive bidding statute, but rather was using the concept of "lowest responsible bidder" to justify its affirmative action plan. The court held that the board could not rely on the competitive bidding statute to require compliance with a policy which, because of the lack of legislative authority, it was powerless to impose. 431 F. Supp. at 857-58.

243. *See* Weiner v. Cuyahoga Community College Dist., 19 Ohio St. 2d 35, 37, 249 N.E.2d 907, 910 (any increase in cost resulting from inclusion of affirmative action requirements in public contracts is offset by costs of securing like degree of compliance by means of public prosecutions and administrative proceedings).

244. *See supra* note 64 and accompanying text.

ployed in other affirmative action programs, it avoids many of their adverse consequences. In particular, the utilization of social and economic classifications enables the LBE set-aside to withstand equal protection scrutiny.[245] Even the most beneficent of objectives, of course, cannot support mayoral action taken without proper authority. New York City mayors, however, have used executive orders on a number of occasions to further policy goals.[246] The mayor should also have the use of this tool to aid locally based enterprises, especially since the conditions imposed reflect generally accepted policy considerations, the procedures to be followed are clearly articulated, and the criteria used are neutral, offending neither constitutional nor statutory provisions.

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245. *See supra* notes 169-84 and accompanying text.
246. *See supra* note 18.