CITY OF RICHMOND V. J.A. CROSON CO.: WHAT DOES IT PORTEND FOR AFFIRMATIVE ACTION?

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The United States Supreme Court has tackled the legality of affirmative action on nine occasions since the 1978 Regents of the University of California v. Bakke decision, most recently in City of Richmond v. J.A. Croson Co. In Croson, the United States Supreme Court struck down as unconstitutional a Richmond, Virginia city ordinance that reserved thirty percent of the subcontracts for city construction work for minority contractors. The immediate significance of Croson is its potential effect on the approximately three dozen states and 190 localities which have adopted similar preferential programs.

This latest in the Court's conundrum of decisions most likely will be widely criticized as making even more difficult any prediction as to what programs will meet constitutional muster. The Court has been accused of having "flip-flopped" on affirmative action plans for the better part of a decade, having approved some quotas and rejected others. The Court has indeed invalidated some plans markedly similar to those it has upheld, causing one commentator to categorize the Court's position as "notoriously murky." The Court is seemingly searching for standards with which to resolve this issue, which many will view as still unsettled even after Croson.

An analysis of the ten most recent statements by the Court, however, does reveal an emerging set of standards from which a fair prognosis of the legality of affirmative action plans might be made. This article offers an historical summary of the origins of affirmative action; briefly discusses each of the ten cases, focusing particularly on Croson; and concludes with the submission of a developing trend perceived from a synthesis of these decisions.

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5. Now We're On Our Own, NEWSWEEK, Feb. 6, 1989, at 64.
Racial parity has been an ideal since the thirteenth, fourteenth, and fifteenth amendments to the United States Constitution were adopted during the Civil War era. Essentially, the thirteenth amendment abolished involuntary servitude, freeing the slaves; the fourteenth amendment recognized former slaves as "persons" and "citizens," assuring them that the states will not deny them due process and equal protection of the laws nor abridge their privileges and immunities; and the fifteenth amendment established their right to vote. Following the war, Congress enacted the Civil Rights Acts of 1866 and 1871. The phrase "affirmative action" was coined by former President Lyndon B. Johnson in his 1965 executive order declaring that the express policy of the federal government would be to provide equal employment opportunity in federal government for all qualified persons and to prohibit discrimination in employment based on sex, race, color, religion, or national origin. This bold goal of the national government grew out of the previous year's legislation applicable to the private sector. Equality in government employment was to be achieved by implementing a "positive, continuing program in each executive department and agency" which would use "affirmative action . . . to ensure that applicants are employed and that employees are treated during employment without regard to the five [attributes] listed in the Civil Rights Act of 1964." "Affirmative action," although facially neutral, actually affords preferential treatment to minorities. This preferential treatment based on race seems to contradict Congress' intent to disregard minority status.

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6. Interestingly, the Constitution was not similarly amended so as to assure this same right to vote to women until ratification of the nineteenth amendment in 1920.
7. 42 U.S.C. §§ 1981, 1982 (1982) (providing for all citizens to have the same right to make and enforce contracts and to inherit, purchase, hold, and convey property as is "enjoyed by white citizens").
9. See Fullilove v. Klutznick, 448 U.S. 448, 506-07 n.8 (1980). The Civil Rights Act and affirmative action plans have been extended to also protect women from discrimination in the workforce.
President Johnson's phrase was later utilized by Congress in the Rehabilitation Act of 1973 and the Vietnam Era Veterans Readjustment Assistance Act. These acts provide, respectively, for affirmative action in the employment of handicapped persons and for veterans of the Vietnam War.

One inevitable result of these affirmative action orders and statutes was an influx of claims of "reverse discrimination." Individuals charging reverse discrimination allege they have been discriminated against by reason of race or sex when a member of a minority has been afforded special treatment by affirmative action. Two early disputes that reached the Supreme Court are not particularly instructive; one because the Court was able to avoid taking a stance and the other because it did not involve an actual affirmative action effort. In DeFunis v. Odegard, a white male sued the University of Washington Law School after he had been denied admission, contending that the overt preference granted to members of racial minorities had denied him equal protection of the laws as assured by the fourteenth amendment. The Court, however, circumvented the issue by declaring that since the plaintiff was then a candidate for graduation the case had become moot.

In the second early case, McDonald v. Santa Fe Trail Transportation Co., two white employees filed suit against their former employer. This suit alleged a violation of Title VII of the 1964 Civil Rights Act, rather than the fourteenth amendment's equal protection clause. The plaintiffs in McDonald were discharged after they were apprehended misappropriating property of the employer. A black colleague who had similarly misappropriated the employer's property, however, was reinstated by the employer. The language of the Court in holding that a claim had been stated under Title VII explic-

\[\text{References:}\]
\[15. See supra notes 13, 14 and accompanying text. The Veterans Adjustment Act also extends a preference to veterans of other wars provided the veteran sustained a war-related disability of 30% or more. Vietnam veterans to receive the preference must have been honorably discharged within 48 months preceding the time when the preference is requested. 38 U.S.C. §§ 2011, 2012 (1982).\]
\[16. 416 U.S. 312 (1974).\]
\[17. Id. at 319-20. The Washington trial court had required that Marco DeFunis, Jr. be admitted to law school. The Washington Supreme Court reversed, but Justice Douglas stayed the judgment of the Washington Supreme Court so DeFunis was able to proceed through law school while his suit progressed through the court system. Id. at 314-15.\]
\[18. 427 U.S. 273 (1976).\]
\[19. McDonald, 427 U.S. at 275. Because the Constitution's proscription is against state action, one employed in the private sector has no fourteenth amendment claim and must rely on common law or statutory grounds, most often Title VII, as the basis of her/his charge.\]
itly warned against racial preferences: “whatever factors the mechanisms of compromise may legitimately take into account in mitigating discipline of some employees, under Title VII race may not be among them.”

One rule from *McDonald* is that an employer cannot, on an arbitrary and *ad hoc* basis, impose different standards of discipline or refuse to hire or promote an applicant or employee on the basis of his race. Lower federal courts have also cited *McDonald* in support of the principle that an employer may not consider only minority applicants for a job opening.

Plaintiffs in affirmative action cases which have reached the Supreme Court have included not only non-minority group members, but also members of a minority group requesting preferential treatment. Plans addressed by the Court have contained goals as well as quotas. Some suits have been filed charging statutory violations. A cursory chronological inspection of each of these decisions reveals an evolving consensus within the Court, indicating which programs or plans are likely to be upheld because of the recurrence of characteristics in those plans which have been approved.

**FROM BAKKE TO CROSON: 1978-1989**

The *Regents of the University of California v. Bakke* decision has been the source of an inordinate quantity of legal comment. In *Bakke*, the Court was presented with the classic reverse discrimination case: the white male plaintiff had been denied admission to the University of California at Davis medical school for two consecutive years. His complaint alleged the school had violated the equal protection clause and Title VI of the Civil Rights Act by expressly reserving sixteen of the one hundred places in each year’s entering class for members of certain minority groups. The California

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21. *Id.* See e.g. Craig v. Alabama State University, 451 F. Supp. 1207 (M.D. Ala. 1978) (holding that the university, which is composed primarily of black employees, may not discriminate against whites in its hiring, promotion or tenure practices).
22. See Butta v. Anne Arundel County, 473 F. Supp. 83 (M.D. Md. 1979) (holding that potential employees may not be discriminated against even if the county has a reasonable, good faith preference towards minorities where such preference forms the basis for rejection of an otherwise qualified white person).
24. 42 U.S.C. § 2000(d) et seq. (1982). This section prohibits discrimination on the basis of race, color, sex, religion or national origin by any program which receives federal financial assistance. *Id.*
Supreme Court found the admission program invalid as violating the fourteenth amendment, Title VI, and a similar provision in the state constitution. The California Supreme Court held that the law prohibited any consideration of race in making admission decisions.\textsuperscript{25} The United States Supreme Court affirmed the holding that the policy was invalid, but reversed the decision insofar as it held race could never be a factor considered in the selection process. The Court's 5-4 decision, far from being a succinct governing principle regarding racial or minority preferential treatment in admission decisions, was made up of six opinions. The \textit{Bakke} decision was at best a dubious victory for proponents or opponents of affirmative action programs. Justice Powell's opinion for a plurality of the Court invalidated the plan on fourteenth amendment grounds. The four justices who concurred would have held the program invalid on Title VI grounds and would not have reached the constitutional question.\textsuperscript{26}

The second issue in \textit{Bakke} concerned the propriety of considering an applicant's race in making admission decisions. Again split 5-4 along the same lines,\textsuperscript{27} the Court held that race could properly be a factor in such decisions, but that any such consideration would be "inherently suspect,"\textsuperscript{28} would have to be "responsive to identified discrimination," and must be supported by proof of compelling governmental justification.\textsuperscript{29} Justice Powell's opinion, however, did not articulate with any clarity a model of a program which would have been constitutionally acceptable. The four dissenters (Justices Blackmun, Brennan, Marshall and White) would have held this plan to have been a valid and constitutional use of race. The dissenters also argued that the "strict scrutiny" standard approved by Justice Powell should not be applied in so-called "reverse discrimination" cases.\textsuperscript{30} This foursome would apply the "strict scrutiny" standard only in those instances where the challenger is a minority attacking a plan which carries the "traditional indicia of suspectness,"\textsuperscript{31} but not in instances where the rigorous test would serve to benefit a non-minority

\textsuperscript{25} Bakke v. Regents of the University of California, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976).
\textsuperscript{26} 438 U.S. 408 (Stevens, J., concurring in part and dissenting in part). The Justices who would have rested a decision solely on Title VI grounds were Justices Rehnquist, Stevens, and Stewart, and Chief Justice Burger. Id.
\textsuperscript{27} Id. at 271-72. Justice Powell provided the decisive vote on both issues, having approved race as one factor appropriately considered, but having viewed its use in this instance as improper. Id.
\textsuperscript{28} Bakke, 438 U.S. at 291.
\textsuperscript{29} Id. at 309.
\textsuperscript{30} Id. at 357 (Brennan, J., dissenting).
\textsuperscript{31} Id. (quoting San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)).
No clear consensus or direction emerged as to what test or standard a post-Bakke court would apply to an affirmative action program. The members of the Court themselves have recognized the considerable confusion produced by Bakke—Justice Marshall remarked to fellow jurists shortly after the opinion was published that "I have seen so many interpretations of our decision now that it's hard for me to distinguish between what we actually wrote and what the press says we wrote."

The case of United Steelworkers v. Weber presented the Court with its first opportunity to consider a reverse discrimination claim based on Title VII. A collectively-bargained affirmative action plan had been agreed on by the employer and the union in an effort to eliminate existing racial imbalances. The contract called for the employer to implement a craft-training program. Trainee employees were to be selected on the basis of seniority, provided, however, that one-half of all new trainees would be black until the black-white skilled worker ratio in the employer's plant approximated the black-white ratio in the local work force. A white employee who had been denied admission to the training program while several blacks with less seniority had been selected challenged the legality of the program. The Supreme Court held the program was valid.

Justice Brennan, writing for the Court in Weber, emphasized Congress' use in section 703(j) of the word "require" instead of "permit." The Court held the legislation did not "require" racial preferences on account of racial inequality in a workforce, but that there was no language saying that such preferences were not "permitted." The Court did not address the proper standard of review for an equal protection claim. Rather, the Court split over the statutory interpretation. Two dissenters regarded the statute as unambiguous, finding the language in sections 703(a) and (d) of the Act as

32. An excellent comment on the several opinions in Bakke regarding the applicability of the stricter standard is Neutrality in the Application of Strict Scrutiny: The Implication of Bakke, 17 AM. BUS. L.J. 230 (1970).


35. Id. at 197-98.

36. Id. at 198.

37. Id. at 199.

38. Id. at 197.

39. Id. at 207.

40. Id. at 207-08.

41. Id. at 220-22 (Rehnquist, J., dissenting). Justice Rehnquist, joined by Chief Justice Burger, strongly dissented. (Justices Powell and Stevens did not participate). Id.

42. 42 U.S.C. § 2000(e)-2(a)(d) (1982). Section 703(d) provides that "[i]t shall be an unlawful employment practice for any employer . . . to discriminate against any indi-
clearly prohibited any discrimination on the basis of race. Justice Rehnquist's strong dissent considered the majority's interpretative reading of the act's literal language as having "sown the wind. Later courts will face the impossible task of reaping the whirlwind." The *Weber* decision did go somewhat further than the *Bakke* decision in two respects: (1) the *Weber* Court approved a use of racial quotas, and (2) there now appeared to be six Justices supporting the principle of voluntary affirmative action.

In 1980, the Court decided the constitutionality of the Public Works Employment Act of 1977 (PWEA) which required recipients of certain federal grants to expend at least ten percent of the amount of the grant to hire minority business enterprises (MBEs). The case of *Fullilove v. Klutznick* presented a fourteenth amendment challenge to this congressional set-aside program. Chief Justice Burger's opinion upholding the statute avoided a definitive statement as to when "strict scrutiny" should be applied, relying instead on the power of Congress to enact such legislation under its "spending power" under the commerce clause; and under section five of the fourteenth amendment, the enforcement clause. Declaring the statute's purpose to be remedial and compensatory to counter the effects of past discrimination, the Court explicitly rejected any of the analysis from *Bakke*, but added that the MBE provision in the PWEA would "survive judicial review under any 'test' articulated in the several *Bakke* decisions."

Justice Powell concurred in *Fullilove*, insisting that his analysis in *Bakke* was appropriate to test the propriety of any racial preference, adding that he "would place greater emphasis than the Chief Justice on the need to articulate judicial standards of review in con-
ventional terms." The three approaches posited in Fullilove were: (1) the neutrally applied "strict scrutiny" standard advocated by Justice Powell, (2) Chief Justice Burger's flexible approach which refused to adhere to a particular standard, but which would apply a "most searching examination to make sure [the preference] does not conflict with Constitutional guarantees," and (3) the "middle" test between "strict scrutiny" and "rational basis," which would be adopted by the "Brennan group" (Justices Brennan, Blackmun, and Marshall). The Brennan group would reserve the use of heightened, or "strict scrutiny," for those racially discriminatory classifications that bear the "traditional indicia of suspectness."

The Court in the mid-1980's indicated at least a small retreat from the Weber/Fullilove approval of affirmative action. In Firefighters Local Union No. 1784 v. Stotts, a seniority system implemented by the city of Memphis, Tennessee that provided for layoffs to be made on the basis of seniority was held to have precluded a modification by a federal trial court of an earlier consent decree in a Title VII action. The federal district court injunction had required white employees to be laid off in violation of the seniority system, because not to do so would have an adverse effect on minority firemen contrary to the consent decree. The United States Court of Appeals for the Sixth Circuit affirmed, and appeals were filed by the union on behalf of white employees who had been laid off while less senior black employees had been retained by the city. A divided Supreme Court (6-3) reversed, holding that the federal district court had exceeded its powers in disregarding a bona fide seniority system inasmuch as no individual members of the minority class had demonstrated that they had been actual victims of a discriminatory practice by the city. The only distinctive feature of the dissent by Justice Blackmun (joined by his frequent companions in such cases, Justices Marshall and Brennan) was that it did not attack the majority for having overturned a federal district court order which the dissenters considered substantively correct. Rather, the dissent charged that the majority had decided an issue the dissenters considered moot.

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52. Id at 495-96; (Powell, J., concurring).
53. Id. at 491.
54. Id. at 518 (Marshall, J., concurring).
56. 42 U.S.C. § 2000e-2(h) (Title VII) (allowing different treatment to employees if based on a bona fide seniority system).
57. See Stotts, 467 U.S. at 590 (Stevens, J., concurring), 593 (Blackmun, J., dissenting). All white employees who had been laid off had since been reinstated with back pay. Also, the federal district court order had been a preliminary injunction rather than a final decree.
In 1986, the Court addressed another challenge to a seniority system in *Wygant v. Jackson Board of Education*. The collective bargaining agreement between the teachers' union and the school board at issue in *Wygant* provided that, in the event a layoff became necessary, those with the most seniority would be retained *except* that at no time would there be a greater percentage of minority personnel laid off than the then current percentage of minority personnel employed. When non-minority teachers were laid off despite having more seniority than some minority teachers who were retained, the non-minority teachers challenged the layoff plan on fourteenth amendment grounds. The federal district court and the United States Court of Appeals for the Sixth Circuit upheld the layoff provision, not requiring a showing of prior discrimination as long as societal discrimination was present, but the Supreme Court reversed. The Supreme Court in *Wygant* held that racial classifications must be justified by a "compelling governmental interest," and that the means chosen by the state to carry out that purpose must be "narrowly tailored."*59*

The Court in *Wygant* reinforced the requirement that evidence of prior discrimination was a prerequisite for any racially-based state remedial action.*60* The Supreme Court viewed societal discrimination alone as insufficient to justify classifications based on race, at least where the actor was a state entity. One critic of the *Stotts* decision had hoped that the Court would use *Wygant* as an "opportunity . . . to make plain that the *Stotts* opinion neither drowned affirmative action nor placed it in immediate peril of suffering a premature death."*61* The Court's holding in *Wygant* that the attempt to preserve the school system's racial and ethnic ratios violated the fourteenth amendment, however, marked the first time the fourteenth amendment had been extended to benefit plaintiffs who were white.

However, three later decisions appeared to indicate the Court might view affirmative action programs as acceptable.*62* In *Sheet Metal Workers*, a union challenged the appropriateness of a court order that mandated 29.23% non-white union membership (based on

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the percentage of non-whites in the relevant labor pool) by a designated date. The Court intended this goal to extend race-conscious preferences to individuals who were not identified victims of unlawful discrimination. The Supreme Court affirmed, holding that section 706(g) of Title VII did not prohibit a court from ordering affirmative race-conscious relief to remedy past discrimination in "appropriate circumstances." Characteristically, the Court did not suggest what might constitute "appropriate circumstances." Justice White's dissent also shed no light on what circumstances were contemplated. Justice White agreed that section 706(g) did not prohibit relief for non-victims in all circumstances, but he objected to the particular remedy, i.e., ordering a preference based on race. Justice Rehnquist, also dissenting, argued that section 706(g) barred a court from ordering racial preferences which "effectively displace non-minorities except to minority individuals who have been the actual victims of a particular employer's racial discrimination."

In the case of Local 93, decided the same day as Sheet Metal Workers, the Court addressed the issue of whether Title VII section 706(g) precluded a consent decree which benefited persons not actually victims of the defendant's discriminatory practices. An organization of black and Hispanic firefighters, Vanguard, had sued Cleveland, Ohio in a fourteenth amendment and Title VII suit, alleging discrimination based on race and national origin in the hiring, assignment, and promotion of firefighters. Local 93 of the firefighters' union was later allowed to intervene as a party plaintiff, but the union opposed any form of affirmative action. When Vanguard and the city presented to the court a consent decree with certain minority promotional goals, the union still objected but gave no legal basis. The federal district court approved the decree over the union's objections, finding the decree neither unreasonable nor unfair. The union appealed. After oral argument had been held before the United States Court of Appeals for the Sixth Circuit, but before the Sixth Circuit had rendered a decision, the Supreme Court decided Stotts.

The Sixth Circuit distinguished Stotts and stated that it was inapplicable to Local 93 because the City of Memphis in Stotts had objected to the court modification of the earlier consent decree, while in Local 93 the City of Cleveland had agreed to the plan. The Sixth  

64. 42 U.S.C. § 2000e-5(g) (defining remedies available).  
65. Sheet Metal Workers, 478 U.S. at 482.  
66. Id. at 499 (White, J., dissenting).  
67. Id. (White, J., dissenting).  
68. Id. at 500 (Rehnquist, J., dissenting) (Burger, C.J., joined in Renquist's dissent).
Circuit also found that the trial court’s order in *Stotts* had abrogated a valid seniority system to the detriment of minority workers, while in *Local 93* the consent decree assured the integrity of the seniority system. Justice Brennan, writing for the Court, agreed with the Sixth Circuit, holding that despite any limits section 706(g) might place on the courts’ power to compel actions, section 706(g) simply did not apply to voluntary agreements.69 Chief Justice Burger and Justices Rehnquist and White dissented again. Justice White stated it was “wholly untenable to permit a court to enter a consent decree requiring conduct that would violate Title VII.”70 Clearly, Justices White and Rehnquist cannot be expected to approve any affirmative action program which would require an employer to discriminate against either blacks or whites, in hiring or promotion. The affirmative action preferences allowed for non-victims of actual discrimination in *Sheet Metal Workers* and *Local 93* were intended as a penalty for prior discrimination. These decisions have been criticized as “keep[ing] alive protests about windfalls to nonvictims and injustice to innocents.”71

An analysis of the holdings in *Stotts, Wygant, Sheet Metal Workers* and *Local 93* indicates that layoffs are more difficult to characterize as “narrowly tailored” than are hiring goals. These decisions also demonstrate, however, that affirmative action as an appropriate remedy is not limited to make-whole relief.72

The culmination of this series of victories for affirmative action was *United States v. Paradise*73 in which a closely divided Court (5-4) upheld temporary racial quotas imposed by the United States District Court for the Northern District of Alabama on the governmental unit employing Alabama state troopers. The Alabama Department of Public Safety was ordered to assure that fifty percent of those troopers promoted to the rank of corporal, as well as fifty percent promoted in the upper ranks, must be black. The plan, instituted after protracted litigation resulting from the absence of blacks in the upper ranks of the Department, required only that qualified black candidates were available. Writing for the majority of the Court, Justice Brennan concluded that the one-black-for-one-white promotion requirement met even the strictest scrutiny under the equal pro-

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70. *Id.*
tection clause of the fourteenth amendment and that the order was justified by a compelling governmental interest in eradicating the Department’s “pervasive, systematic, and obstinate discriminatory” exclusion of blacks.\textsuperscript{74} Further, the Court found that the promotion requirement was narrowly tailored to serve its purpose, was temporary, and did not impose an unacceptable burden on innocent white applicants because it merely postponed and did not prohibit the advancement of some whites. The plan also did not require layoff or discharge of whites nor the promotion of unqualified black employees over qualified white employees.

In \textit{Johnson v. Transportation Agency, Santa Clara County},\textsuperscript{75} the Court addressed for the first time the question of whether or not an affirmative action plan for women would be legal under Title VII. The Court approved a special “preference” an employer gave to women in hiring and promotion to create a more balanced work force. Voting 6-3, the Justices sanctioned this plan without proof of any past discrimination against women by the employer. The white male plaintiff had been denied a promotion to the position of road dispatcher by the county transportation agency even though he had scored higher on a qualification test than had the white female who received the promotion. Recognizing that there was no quota and that the plan of the county was only temporary, the Court emphasized that the plan did not unnecessarily trammel the rights of male employees, nor create an absolute bar to their advancement. Again writing for the majority, Justice Brennan wrote that “sex is but one of several factors that may be taken into account in evaluating qualified applicants for a position.”\textsuperscript{76} The dissenters described the ruling as perverting Title VII “into a powerful engine of racism and sexism.”\textsuperscript{77} Justice White and Chief Justice Rehnquist, joining Justice Scalia, remained consistent in their disapproval of any affirmative action plan which infringes upon the rights of a non-minority employee in any manner.

\textbf{CROSON}

The \textit{City of Richmond v. J.A. Croson Co.}\textsuperscript{78} suit originated in the fall of 1983 when the J.A. Croson Company (Croson), a plumbing contractor, sued Richmond, Virginia after Crosen was denied a job installing stainless steel urinals and water closets in the municipal

\begin{itemize}
\item \textsuperscript{74} \textit{id.} at 1065.
\item \textsuperscript{75} 107 S. Ct. 1442 (1987).
\item \textsuperscript{76} \textit{id.} at 1457.
\item \textsuperscript{77} \textit{id.} at 677 (Scalia, J., dissenting).
\item \textsuperscript{78} City of Richmond v. J.A. Croson Co., \_ U.S. \_, 109 S. Ct. 706 (1989).
\end{itemize}
jail. A city ordinance required prime contractors with city contracts to award at least thirty percent of the dollar amount of the contract to subcontractors who were a Minority Business Enterprise (MBE). This minority set-aside provision required that Croson purchase fixtures from a minority business. The only interested minority contractor charged Croson approximately $7600 more than it had included in the bid for fixtures. After Croson's request for a waiver of the minority subcontractor requirement was denied, and its request to raise its bid to cover the increased cost was also denied, the city decided to rebid the project. Croson then filed a section 1983 action in federal district court, contending that the ordinance was unconstitutional on its face.

The United States District Court for the Eastern District of Virginia upheld the minority set-aside requirement and a divided United States Court of Appeals for the Fourth Circuit affirmed. The Supreme Court remanded the case for reconsideration under the principles espoused in the intervening Wygant v. Jackson Board of Education decision and the Fourth Circuit struck down the ordinance as violating the equal protection clause of the fourteenth amendment. The Supreme Court affirmed 6-3, on January 23, 1989.

The Richmond ordinance had not been adopted without controversy. One councilman (who abstained from voting) questioned the constitutionality of the plan and voiced his fear that the only result of the ordinance would be large legal bills when the plan was inevitably challenged. The measure passed 6-2, partly because of pressure from two of the five black members on the 9-member city council. Proponents of the set-aside ordinance based their support on a study that showed only .67% of the city's prime construction contracts from 1978-1983 had been awarded to MBEs, while the city's population was

79. Id. at 715. The dollar amount of the contract was $126,530. Id.
82. J.A. Croson Co. v. City of Richmond, 779 F.2d 181, 182 (4th Cir. 1985).
84. 476 U.S. 267 (1986).
85. J.A. Croson Co. v. City of Richmond, 822 F.2d 1355 (4th Cir. 1987) (2-1 decision).
87. Smith, When Government Set-Asides Set Aside the Constitution, Richmond Times-Dispatch, Jan. 29, 1989, at F-6, col. 1. The ordinance was adopted by the Richmond City Council on April 11, 1983. Id.
88. Id.
89. Id. at col. 1-2.
fifty percent black.\textsuperscript{90} Additionally, there was only token minority membership in area construction industry associations.\textsuperscript{91}

The Court’s six opinions in Croson are reminiscent of the fractious nature of Regents of the University of California v. Bakke.\textsuperscript{92} Writing for the six member plurality, Justice O’Connor distinguished the invalid Richmond ordinance from the congressional set-aside program approved by the Court in Fullilove v. Klutznick.\textsuperscript{93} In Fullilove, the Court had specifically recognized the unique enforcement powers granted to the Congress by section five of the fourteenth amendment.\textsuperscript{94} The Fullilove Court had deferred to the federal legislature once it had determined that the ten percent set-aside for MBEs was within Congress’ powers under section five and that a limited use of racial and ethnic criteria was a permissible means to execute these powers.\textsuperscript{95} Further, the ten percent set-aside figure approved in Fullilove was flexible in two respects: (1) the assumptions that prior discrimination had adversely impacted the competitive position of minority businessmen and that the allocation of ten percent of the subject federal funds would adjust these effects were both rebuttable, and (2) the MBE requirement could be waived upon a showing that a sufficient number of MBEs were not available to fill the stated quota or that an MBE was attempting to exploit the program by charging an excessive price.\textsuperscript{96}

The Richmond ordinance, on the other hand, was enacted by a political subdivision of a state whose powers are limited by section one of the fourteenth amendment. Thus, while section five confers upon Congress a “specific Constitutional mandate” to enforce the fourteenth amendment’s guarantees, section one imposes “clear limits on the [s]tates’ use of race as a criterion” for statutory action.\textsuperscript{97} Citing Wygant, the Court held that the ability of a state or city to use legislation based on racial distinctions requires “‘some showing of prior discrimination by the governmental unit involved.’”\textsuperscript{98} The City of Richmond had not made this showing.\textsuperscript{99} The Croson Court held, however, that the Fourth Circuit erred in viewing Wygant as requir-
ing a showing of past discrimination by the governmental entity. According to the Court's analysis, the state's powers are sufficiently broad to address discriminatory activity within any arm of commerce which is under its jurisdiction.\(^{100}\)

Discounting the probative value of comparing the percentage of blacks living in Richmond to the meager percentage of minorities awarded prime contracts by the city, the Court disputed the assumption that "minorities will choose a particular trade in lockstep proportion to their representation in the local population."\(^ {101}\) The Court stated, however, that if a significant statistical disparity could be shown between the actual number of qualified MBEs and the number of MBEs the locality actually has engaged, an inference of discrimination would arise.\(^ {102}\) Justice O'Connor stated that there was a distinction between situations where statistical contrasts between minorities employed in a given context and minorities in the local population were probative evidence of discrimination—(e.g., entry-level positions in an employment setting)—and situations where they were not relevant.\(^ {103}\) According to O'Connor, the contrasts are inapplicable in the instant case, which requires the base of comparison to be those qualified to perform. The Court suggested that the relatively low MBE membership in local contractors' associations could be attributed to a disproportionate attraction of blacks to industries other than construction. The Court stated that to prove discrimination minority membership in contractors' associations was only relevant when compared to data showing the number of MBEs eligible for membership.\(^ {104}\)

Perhaps the most significant feature of *Croson* is that a majority of the Court agreed for the first time that "strict scrutiny" must be applied to all race-based classifications, including those classifications that could be considered "benign" or "remedial."\(^ {105}\) Despite the argument that a less exacting standard should be applicable to these classifications because they involve a voluntary decision by a dominant group to disadvantage its own members rather than a charge by a minority group that it is being disadvantaged, the Court affirmed

\(^ {100}\) *Id.*

\(^ {101}\) *Id.* at 728, (citing Local 28, Sheet Metal Workers Int'l Assoc. v. EEOC, 478 U.S. 421, 494 (1986) (O'Connor, J., concurring in part and dissenting in part)) Justice O'Connor deemed it "completely unrealistic to assume that individuals of each race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination." *Id.*

\(^ {102}\) *Id.* (citing Bazemore v. Friday, 478 U.S. 385, 398 (1986); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 337-39 (1977)).

\(^ {103}\) *Croson*, 109 S. Ct. at 725, (citing Teamsters, 431 U.S. at 337-38).

\(^ {104}\) *Id.* at 726.

\(^ {105}\) *Id.* at 721.
the plurality view of the Wygant Court that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification." Justice O'Connor concluded in her reading of the perhaps unique facts in Croson that, even if varying levels of scrutiny might be appropriate in some contexts, strict scrutiny would be required here, since blacks comprised approximately fifty percent of Richmond's population, and the majority of the nine council seats were held by blacks. Indeed, the case is significant because it presents the Court's first confrontation with the legality of racial preferences "when minorities have become majorities."

The Croson Court required that a state (or, as here, a political subdivision of the state) demonstrate a "compelling interest" in using such racial classifications and to "narrowly tailor" any remedies to address prior discrimination. According to the Court, the lack of specific evidence of past discrimination in this case negated the state's "compelling interest." The Court further found that the thirty percent set-aside for randomly selected groups indicated a "gross overinclusiveness" which "strongly impugns the city's claim of remedial motivation." The Court held that the plan did not satisfy the "narrowly tailored" requirement for an additional reason: the city had made no attempt to pursue alternate remedies, such as offering racially-neutral financial assistance to small businesses, employing those minority contractors who had been victims of actual discrimination on an individual basis, simplifying the bidding proce-

106. Id. (citing Wygant, 476 U.S. at 279-80).
107. Id. at 722. The Court states that "[t]he concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case." Id. Justice O'Connor quoted Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. CHI. L. Rev. 723, 739 n.58 (1974) stating: "Of course it works both ways; a law that favors Blacks over Whites would be suspect if it were enacted by a predominately Black legislature." Croson, 109 S. Ct. at 722. Justice Marshall's dissent voiced difficulty with this position, noting that "this Court has never held that numerical inferiority, standing alone, makes a group 'suspect' and thus entitled to strict scrutiny review." Id. at 739, 753 (Marshall, J., dissenting). He refers to other "traditional indicia of suspectness," such as whether a group has been "saddled with such disabilities" or has been subject to a history of intentional unequal treatment or relegated to a politically powerless position, as being significant. Id. (quoting San Antonio Indep. School District v. Rodriguez, 411 U.S. 1, 28 (1973)).
110. Id. at 728. The Court noted that the city's evidence attempted to show past discrimination against only blacks, adding that the record was devoid of any evidence of discrimination against Spanish-speaking persons, Orientals, Indians, Eskimos, or Aleuts in Richmond's construction industry. Id. at 727-28.
dures, or relaxing the city's bonding requirements.\footnote{Id. at 728.}

Justice Kennedy's concurring opinion argued that "strict scrutiny" was applicable to all racial classifications because this standard (1) operated in a racially neutral manner; (2) avoided the absolute position of Justice Scalia;\footnote{See supra notes 101-03 and accompanying text.} and (3) was in accord with precedent.\footnote{Croson, 109 S. Ct. at 734, 735 (Kennedy, J., concurring).} He disagreed with the majority only on whether the same act that when practiced by a state violates the Constitution, "becomes transformed to an equal protection guarantee when enacted by Congress."\footnote{Id. at 734 (Kennedy, J., concurring).} Justice Kennedy preferred to hold the ordinance invalid solely because of a violation of equal protection by the state without reference or comparison to Congress' powers.

Justice Scalia's concurring opinion emphasized that strict scrutiny should apply to all governmental racial classifications. Justice Scalia would restrict the use of state action based on race to "only one circumstance: . . . where that is necessary to eliminate [the state's] own maintenance of a system of unlawful racial classification."\footnote{Id. at 735, 737 (Scalia, J., concurring).} Justice Scalia would not allow the state to extend a racial classification beyond remedying actual past discrimination practiced by the state itself.\footnote{Id.} Even though Justice Scalia accepted the proposition that blacks in American society have suffered discrimination "immeasurably greater" than have other racial groups, Justice Scalia abhored the use of racial preferences to "even the score."\footnote{Id. at 739 (Scalia, J., concurring).} Instead, he advocated race-neutral remedies for actual victims of discrimination. Justice Scalia believed that because of the disproportionate disadvantage of blacks the beneficial impact of race-neutral remedies would also be disproportionately greater for blacks.\footnote{Id.

Justice Stevens' concurring opinion disagreed that a governmental classification, in order to meet constitutional muster, had to be an attempt to remedy an actual wrong. Justice Stevens concluded that societal discrimination alone might suffice to justify such a program. Justice Stevens preferred, however, that legislatures defer attempts to rectify prior discrimination to the courts and limit legislative policy-making to the regulation of future conduct.\footnote{Id. at 730, 731 (Stevens, J., concurring).} Justice Stevens was reluctant to approve a standard, stating it was "more constructive to try to identify the characteristics of the advantaged and disad-

\begin{footnotes}
\item[111.] Id. at 728.
\item[112.] See supra notes 101-03 and accompanying text.
\item[113.] Croson, 109 S. Ct. at 734, 735 (Kennedy, J., concurring).
\item[114.] Id. at 734 (Kennedy, J., concurring).
\item[115.] Id. at 735, 737 (Scalia, J., concurring).
\item[116.] Id.
\item[117.] Id. at 739 (Scalia, J., concurring).
\item[118.] Id.
\item[119.] Id. at 730, 731 (Stevens, J., concurring).
\end{footnotes}
vantaged classes that might justify their disparate treatment." Justice Stevens had thus not acknowledged the "strict scrutiny" standard as always appropriate. One concern of Justice Stevens about the effect of affirmative action plans was the negative stigma that affirmative action might attach to a minority race, particularly when such plans benefit non-victims as well as past victims of discrimination. Justice Stevens feared such programs further an assumption that those who are granted a preference are less qualified.121

Justice Blackmun's dissent primarily emphasized what he considered the irony of the Court's decision.122 Justice Marshall's lengthy dissent, however, (joined by Justices Blackmun and Brennan) took issue with virtually every point set forth in the majority opinion. Justice Marshall insisted that the "compelling interests" shown by the city were two-fold: (1) eradicating the effects of past racial discrimination123 and (2) "preventing the city's own spending decisions from reinforcing and perpetuating the exclusionary effects of past discrimination."124 Justice Marshall found the Richmond plan indistinguishable from the congressional plan approved by the Court in Fullilove,125 especially because the city's plan was patterned after the congressional set-aside.126 Justice Marshall emphatically rejected the view that section one of the fourteenth amendment was restrictive upon the states, and argued that this view made the "meaning of 'equal protection of the laws'... turn[ ] on the happenstance of whether a State or local body has previously defined illegal discrimination."127 Justice Marshall categorically denied that the

120. Id. at 732 (Stevens, J., concurring).
121. Id. at 733 (Stevens, J., concurring). He quotes from his dissent in Fullilove: "[E]ven though it is not the actual predicate for this legislation, a statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race." 448 U.S. at 532, 545 (Stevens, J., concurring).
122. Croson, 109 S. Ct. at 757 (Blackmun, J., dissenting). Justice Blackmun stated that "I never thought that I would live to see the day when the city of Richmond, Virginia, the cradle of the Old Confederacy, sought on its own, within a narrow confine, to lessen the stark impact of persistent discrimination. But Richmond, to its great credit, acted. Yet this Court, the supposed bastion of equality, strikes down Richmond's efforts as though discrimination had never existed or was not demonstrated in this particular litigation." Id.
123. Id. at 739, 740 (Marshall, J., dissenting). Justice Marshall felt the city had adequately catalogued its past discrimination. Id.
124. Id. at 744 (Marshall, J., dissenting) (citing Fullilove, 448 U.S. at 475). "The more government bestows its rewards on those persons or businesses that were positioned to thrive during a period of private racial discrimination, the tighter the dead-hand grip of prior discrimination becomes on the present and future." Id. at 739, 745 (Marshall, J., dissenting).
125. Id. at 739-41 (Marshall, J., dissenting).
126. Id. at 751 (Marshall, J., dissenting).
127. Id. at 754 (Marshall, J., dissenting) (quoting U.S. CONST. amend. XIV, § 1).
Fullilove decision found section five a limitation of the states' broad police powers. According to Justice Marshall, the Fullilove decision only found section five an express authorization for Congress to act. Referring to the school desegregation decisions, Justice Marshall considered it to be "too late in the day to assert seriously that the equal protection clause" was a restraint on state power to enact race-conscious remedies. Justice Marshall quoted from the Slaughterhouse Cases to support his premise that the framers of the fourteenth amendment never intended "'to transfer the security and protection of all the civil rights . . . from the [s]tates to the [f]ederal government.'"

Finally, Justice Marshall objected strenuously to the adoption of strict scrutiny as a standard for remedial affirmative action programs, citing a "'profound difference . . . [between] governmental actions that themselves are racist and governmental actions that seek to remedy the effects of prior racism or to prevent neutral governmental activity from perpetuating the effects of such racism.'"

The various Justices' positions on affirmative action programs carried out by a state or its political subdivisions as expressed in Croson might be placed on a triangle, with the most restrictive view at the apex (Justice Scalia's), and the most broadly based views (the dissenters') at the base:

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128. Id. at 755 (Marshall, J., dissenting).
129. 16 Wall. 36, 77-78 (1873).
130. Croson, 109 S. Ct. at 756 (Marshall, J., dissenting) (quoting The Slaughter House Cases, 16 Wall. 36, 77-78 (1873)).
131. Id. at 752 (Marshall, J., dissenting).
*Justice Scalia would approve only those racial classifications by a state that are necessary to remedy its own prior discrimination.

**(1) Justices O'Connor and Kennedy and Chief Justice Rehnquist would apply strict scrutiny for all classifications based on race, (2) would require a showing of actual prior discrimination to sustain such government action, and (3) would require narrowly tailored means.***

***Justice Stevens would not necessarily require a showing of actual prior discrimination but would judge programs according to their probable future impact. Further, he would leave such affirmative action directives to the courts, not to the legislatures. And, finally, Justice Stevens has not gone on record as endorsing the strict scrutiny standard adopted by the majority.

****Justices Blackmun, Brennan and Marshall (1) do not subscribe to the majority view that section one of the fourteenth amendment limits powers of states in this regard, (2) would hold that a state has sufficiently proved a compelling interest to justify a racial classification upon a showing of a generalized past pattern of discrimination, or societal discrimination, rather than require specific proof of discriminatory acts, and would regard a state's interest in non-perpetuation or continuation of any such discrimination as sufficient, and (3) would apply strict scrutiny only to those governmental acts which favor a dominant (or majority) group, not to those governmental acts which are benign, or designed to remedy past discrimination.

The Croson holding can be reduced to a three-step review process to test the constitutionality of a state affirmative action plan: (1) the plan must be based on identified past discrimination as opposed to mere societal discrimination to demonstrate the state's compelling interest in using race as a criterion; (2) the remedy must be narrowly tailored to achieve the objective underlying the state's interest; (3) the decision as to whether the interest of the state is compelling and whether the means chosen are sufficiently narrow will be subjected to the strict scrutiny test, irrespective of the benign or remedial nature of the challenged program.

SYNTHESIZING BAKKE-CROSON

To reconcile Supreme Court approval of some affirmative action programs with the disapproval of other plans, it is helpful to analyze

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132. *Id.* at 734 (Kennedy, J., concurring). Justice Kennedy did not, however, accept the majority's position that the powers of the federal government are greater than those of the states in directing preferential treatment. Presumably, he might not have voted with the majority which approved the Congressional set-aside in *Fullilove.* *Id.*
AFFIRMATIVE ACTION

each plan with respect to five criteria: (1) whether it was voluntarily assumed or was required by a court (i.e., after being challenged through a reverse discrimination claim) or legislative body; (2) whether the program is of a temporary or permanent nature; (3) whether the suit challenging the program was filed under Title VII or the fourteenth amendment; (4) whether the entity instituting the plan is a state or a private employer; and (5) whether the plan involved decisions to hire and/or promote, or was one which would result in the loss of existing employment.

The City of Richmond v. J.A. Croson Co. decision closes the gap between plans approved by the Court and those struck down. The Justices' individual positions remain relatively consistent. Justices Brennan, Marshall, and Blackmun favor affirmative action programs, while Chief Justice Rehnquist and Justices White, O'Connor, Scalia, and now Kennedy generally oppose such plans. Justice Stevens is the most unpredictable; although he has approved affirmative action plans more often than he has found them unacceptable.

The programs found acceptable by the Court share certain characteristics: temporary plans are more likely to be approved than are permanent plans, or those expected to be in place indefinitely; and a voluntary, non-judicially mandated plan is often acceptable.

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134. To date the court has approved plans in six cases (Weber, Fullilove, Sheet Metal Workers, Local 93, Paradise, and Johnson); and struck down plans in four (Bakke, Stotts, Wygant, and Croson).
135. Justice White did, however, agree with the “Brennan group” on both issues in Bakke.
136. One might characterize Justice O'Connor as a qualified foe of affirmative action. She did concur in Johnson, stating that an employer who voluntarily implements an affirmative action plan must first have a “firm basis for believing that remedial action was required.” Johnson, 480 U.S. at 649 (O'Connor, J., concurring). And her concurrence/dissent respectively, in Local 93 and Sheet Metal Workers are clearly indicative of her antipathy for the use of quotas.
137. Justice Scalia has participated only in Paradise and Johnson, dissenting in both, and in Croson, in which he concurred.
138. Justice Kennedy has been on the Court only for the Croson decision, but his separate concurring opinion suggests that he would have dissented in Fullilove, where the Court upheld the Congressional minority set-aside.
139. Justice Stevens has affirmed plans in Bakke, Weber, Stotts, Wygant, Sheet Metal Workers, Local 93, Paradise, and Johnson.
140. Justice Stevens found the plans in Fullilove and Croson unacceptable.
141. Examples of plans for an indefinite period of time are Weber, Paradise, and Johnson.
142. Examples of voluntary plans are Weber and Local 93. The Croson decision resulted in a contrary result when attempted by a local subdivision (or state). See Martin v. Wilks, 109 S. Ct. 2180 (1989), where the Court allowed non-minority white plaintiffs to challenge a consent order between black firefighters and the City of Birmingham, Alabama. This order included hiring and promotion quotas. Id.
Plans found unacceptable also share certain attributes: The Court has yet to approve a plan resulting in loss of employment.\textsuperscript{143} and intrusion upon a \textit{bona fide} seniority system will likely be rejected.\textsuperscript{144} The impact of some other plan characteristics is not so clear. Apparently, a plan will not be disfavored if non-victims are benefited along with actual victims of past discrimination.\textsuperscript{145} Quotas have been accepted when used solely to eradicate a racial imbalance.\textsuperscript{146} Affirmative action seems to be acceptable as a general remedy, and the need for make-whole relief will not always need to be demonstrated.\textsuperscript{147} All plans using race as a determinant factor however, including those intended to remedy prior discriminations, will be subjected to strict scrutiny.\textsuperscript{148} Under this standard of review, a state must demonstrate a compelling interest to justify a racial preference and must narrowly tailor the plan by which it implements affirmative action. To show a compelling interest the state must show some evidence of actual prior discrimination.\textsuperscript{149}

The Court in \textit{Martin v. Wilks}\textsuperscript{150} addressed the issue of affirm-
ative action once more in the term following Croson. As the result of a Title VII class action suit filed by black firefighters, the City of Birmingham, Alabama had entered into a consent decree that provided hiring and promotion goals for blacks. White firefighters challenged the consent decree, also on Title VII grounds. The federal district court granted the defendants' motion to dismiss the white firefighters' suit because the city was merely acting pursuant to the earlier court order, but the United States Court of Appeals for the Eleventh Circuit and the Supreme Court both refused to bind the white plaintiffs to an earlier decree. The Court held that because the challenging firefighters were not parties to the earlier suit, they could collaterally attack the consent decree.

Some critics contend the Court's decision in Wilks renders all consent decrees tentative, and opens the door for continual attack by those who regard themselves as being disadvantaged by the plan. One commentator, however, views the Wilks decision only as an indication that the "political tide" has turned against reverse discrimination, a practice he labeled a "disreputable idea that rarely is defended outright." The truth probably lies somewhere in between. The Court decided Wilks on procedural grounds applicable to all cases, not just affirmative action suits. Further, the consent decree would not have been subject to collateral attack if the minority firefighters or the city had joined the non-minority firefighters as parties in the original suit.

CONCLUSION

Are the Court's affirmative action decisions, when compared and contrasted, really as cryptic as their critics insist? And has City of
Richmond v. J.A. Croson Co. dealt a death blow to racial preferences, and does Croson preclude any race-conscious governmental programs at the state or local level?

The Court has not mandated an end to all such efforts. In fact, Croson arguably is a clarification of the Court's view of affirmative action. Documentation of prior discrimination would have salvaged the Richmond ordinance in Croson. Justice Scalia's proposal for alternative methods to provide colorblind economic set-aside programs which would prove beneficial to black businesses has already been implemented by New York City, New York.

Reaction to Croson has run the gamut from a Richmond editorial extolling the decision and encouraging city officials to scrap efforts to meet the Court's guidelines with a new ordinance to a syndicated columnist's characterizing the decision as "drawing a narrower and narrower circle—a noose—around any government action that is race-conscious." Perhaps the most incisive and provocative view is the one which advocates that Congress delegate its broad section five powers of the fourteenth amendment to the states so that states, counties, and other entities might impose set-asides as Congress did in the PWEA which was upheld in Fullilove v. Klutznick. If Congress chooses to extend its power to the states the extension would demonstrate the lawmakers' intent that this power should be exercised by states and localities.

Perhaps the era where "some are more equally protected than
others" will eventually be history, and the law may finally have reached a plateau where minorities are assured an inviolable right to equal opportunity, without requiring special regard for the adverse effect of this equal opportunity on innocent non-minorities. What Croson has provided is a decisive standard—strict scrutiny—to be uniformly applied to all race-based directives. By adding yet another essential component to the test of whether equal opportunity and equal protection have been afforded by affirmative action plans, the Court ironically has adopted the same standard of review for reverse discrimination that it earlier applied to invalidate laws discriminating against minorities.
