THE END OF STATE AND LOCAL SET-ASIDE PLANS, AS WE KNOW THEM: CITY OF RICHMOND V. J.A. CROSON CO.

INTRODUCTION

In 1983, the City Council of Richmond, Virginia passed an ordinance that required thirty percent of all city awarded construction contracts be performed by businesses owned by minorities. This ordinance was challenged by the J.A. Croson Co. In January 1989, the United States Supreme Court issued a decision regarding the challenged ordinance in City of Richmond v. J.A. Croson Co. In this case, the Supreme Court determined that state and local laws which establish minority set-aside programs face a strict scrutiny test to determine whether they violate the equal protection clause of the fourteenth amendment.

This Note discusses the analysis used by the Supreme Court in deciding Croson. The Note also discusses cases which are helpful in understanding the Croson decision and analyzes the Croson ruling with reference to prior precedents. Finally, this Note concludes with a discussion of how the Croson decision impacts set-aside programs.

FACTS AND HOLDING

In City of Richmond v. J.A. Croson Co., the United States Supreme Court confronted the tension between race-based measures to remedy the effects of past discrimination and the guarantee of equal treatment for all citizens enumerated in the fourteenth amendment. In April 1983, the Richmond City Council passed the Minority Business Utilization Plan (the Plan) that required prime contractors to subcontract thirty percent of the city-awarded construction contracts to Minority Business Enterprises (MBE). An

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2. Croson, 109 S. Ct. at 716.
6. See infra notes 291-344 and accompanying text.
7. See infra notes 345-46 and accompanying text.
9. Id. at 712.
10. Id. at 713.
MBE was defined as a "business at least fifty-one (51) percent of which is owned and controlled [by] . . . [c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." The Plan did not delineate a geographic limit. The Richmond City Council declared that the Plan was remedial in nature and that its purpose was to promote wider MBE participation in public construction contracts. The Plan also had directed the Director of the Department of General Services of Richmond to authorize waivers when the thirty percent requirement could not be achieved. The Supreme Court stated that, "[p]roponents of the set-aside provision relied on a study which indicated that, while the general population of Richmond was fifty percent black, only .67% of the city's prime construction contracts had been awarded to minority businesses in the five-year period from 1978 to 1983." The Court also stated a Richmond City Council public hearing also established that there had been no minority membership in various contractors' associations.

The J.A. Croson Company (Croson) was the only bidder on a Richmond city contract which was awarded on October 13, 1983. Croson, after failing to secure the required thirty percent MBE subcontracting participation, petitioned the Richmond Department of General Services for a waiver. Croson's waiver request was denied, and the city decided to re-bid the contract.

Croson brought a lawsuit in the United States District Court for the Eastern District of Virginia under 42 U.S.C. § 1983, arguing the unconstitutionality of the Richmond ordinance. The district court upheld the constitutionality of the Plan and this decision was appealed to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit affirmed the district court and upheld the Plan. Relying on \textit{Fullilove v. Klutznick}, the Fourth Circuit ap-

\begin{itemize}
  \item 11. \textit{Id.} (quoting Richmond, Va. Ordinance 83-69-59 (1985)).
  \item 12. \textit{Id.} The Plan allowed an MBE from anywhere in the country to take advantage of the Plan.
  \item 13. \textit{Croson}, 109 S. Ct. at 713.
  \item 14. \textit{Id.}
  \item 15. \textit{Id.} at 714.
  \item 16. \textit{Id.}
  \item 17. \textit{Id.} at 715.
  \item 18. \textit{Id.}
  \item 19. \textit{Id.} at 715-16.
  \item 21. J.A. Croson Co. v. City of Richmond, 779 F.2d 181, 182 (4th Cir. 1985).
  \item 22. \textit{Id.} at 194.
  \item 23. 448 U.S. 448 (1980).
\end{itemize}
plied a three-part test to determine whether the city unlawfully discriminated against Croson. The first prong of the test indicated that Richmond had the authority to enact minority set-aside programs under federal and Virginia law. The court also determined that the second part of the test was satisfied because the legislative history "was adequate to ensure that the Plan [had been] adopted to remedy the effect of past discrimination rather than [for] advancing one group's interest over another." The third part of the Fullilove test was also satisfied when the Fourth Circuit ruled that the Plan was narrowly tailored to remedy the effect of past discrimination. The Fourth Circuit agreed with the district court's reasoning that the thirty percent set-aside figure was reasonable and that the waiver provision effectively protected the Plan from abuses. The Supreme Court granted certiorari and, in light of Wygant v. Jackson Board of Education vacated and remanded the case to the Fourth Circuit.

On remand, the Fourth Circuit reconsidered its previous holding, reversed the district court's decision, and ruled that the Plan violated the equal protection clause of the fourteenth amendment. The court stated that a municipality cannot rely on findings of broad societal discrimination to enact a set-aside plan. The court concluded that there must be adequate and specific factual findings of prior discrimination by the state or local governmental unit in the awarding of public contracts before enacting the plan. The court also found that the Virginia set-aside provision was not narrowly tailored to accomplish the proposed remedial purpose.

The Supreme Court granted certiorari for the second time and affirmed the Fourth Circuit's decision. Justice O'Connor wrote the principal opinion in the plurality decision. The Court asserted that

24. *Croson*, 779 F.2d at 188. The three-part test applied in *Fullilove* was to determine whether the city had the authority to enact the legislation, whether the legislative history was enacted to remedy past discrimination's effects, and whether the program was narrowly tailored.
25. *Id.*
26. *Id.* at 188-90.
27. *Id.* at 190-91.
28. *Id.* at 191.
32. *Croson*, 822 F.2d at 1357-58.
33. *Id.* at 1358.
34. *Id.* at 1360.
36. *Id.* at 712. Justice O'Connor wrote the principal opinion with Chief Justice Rehnquist and Justices White and Kennedy joining in part. Justices Stevens, Scalia,
a strict scrutiny analysis was necessary to insure that the use of set-aside programs was not an illegitimate use of race.\textsuperscript{37} The plurality examined the factual record to determine whether the Richmond City Council had a compelling local interest, which the district court had found in five pieces of evidence.\textsuperscript{38} The purported compelling local interest was evidenced in: the remedial purpose statement of the ordinance; the testimony of past discrimination by local construction experts; the statistical disparity between the percent of local government contracts being awarded to MBEs and the percent of blacks in the population; the absence of MBE representation in local contractors' associations; and the presence of discrimination in the national construction industry as claimed by Congress.\textsuperscript{39} The Court held that this evidence did not give the city a strong basis to find the necessity for remedial action.\textsuperscript{40} Rather, the Court asserted that the evidence must show discrimination in the particular city's construction industry.\textsuperscript{41} The Court noted that it had "never approved the extrapolation of discrimination in one jurisdiction from the experience of another."\textsuperscript{42} The Court also dismissed the use of past societal discrimination to show a compelling local interest.\textsuperscript{43}

The Court also addressed the question of whether the Plan was narrowly tailored to adequately remedy the effects of past discrimination.\textsuperscript{44} Justice O'Connor stated that it was impossible to determine whether the Plan was narrowly tailored because of Richmond's failure to identify evidence of prior discrimination.\textsuperscript{45} The Court criticized four attributes of the Plan.\textsuperscript{46} First, the city should have considered race-neutral alternatives.\textsuperscript{47} Second, the thirty percent quota could not "be said to be narrowly tailored to any goal, except perhaps outright racial balancing."\textsuperscript{48} Third, the Richmond waiver provision, when contrasted with the \textit{Fullilove} waiver provision, was held to be based on administrative convenience rather than as a procedure for determining the effects past discrimination were having

and Kennedy also delivered separate opinions concurring in the judgment. Justice Marshall filed a dissenting opinion in which Justices Brennan and Blackmun joined. Justice Blackmun also filed a dissenting opinion in which Justice Brennan joined. \textit{Id}. at 706.

\begin{itemize}
  \item \textsuperscript{37} \textit{Id}. at 721.
  \item \textsuperscript{38} \textit{Id}. at 724-26. \textit{See infra} note 39 and accompanying text.
  \item \textsuperscript{39} \textit{Croson}, 109 S. Ct. at 724-26.
  \item \textsuperscript{40} \textit{Id}. at 724.
  \item \textsuperscript{41} \textit{Id}. at 724, 728, 730.
  \item \textsuperscript{42} \textit{Id}. at 727.
  \item \textsuperscript{43} \textit{Id}.
  \item \textsuperscript{44} \textit{Id}. at 728.
  \item \textsuperscript{45} \textit{Id}.
  \item \textsuperscript{46} \textit{Id}. at 728-29. \textit{See infra} notes 47-50 and accompanying text.
  \item \textsuperscript{47} \textit{Croson}, 109 S. Ct. at 728.
  \item \textsuperscript{48} \textit{Id}.
on present MBE's. Fourth, the Plan was overly broad because it allowed non-black and non-Richmond residents to enjoy the benefits of the preferences without having endured any discrimination.

Justice O'Connor was joined by Chief Justice Rehnquist and Justice White in determining the scope of the city's authority to enact race-based set-aside programs seeking to correct the effects of past discrimination. The plurality discussed Fullilove in considering the city's authority. The Supreme Court in Fullilove had determined that Congress' power to establish a federal minority set-aside program was based upon section five of the fourteenth amendment. In Fullilove, this section had been determined to give Congress a specific mandate to enforce the fourteenth amendment. However, the Court in Croson found that the power of the state to enact race-based set-aside programs was based upon section one of the fourteenth amendment. Justice O'Connor reaffirmed that the thirteenth and fourteenth amendments were limitations on the power of the state and enlargements on the power of Congress. The opinion in Croson concluded that "a state or local subdivision (if delegated the authority from the state) has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction." In holding that Richmond had this authority, the plurality determined that the court of appeals had erred in holding that a city may only enact race-based affirmative action programs on a showing of prior discrimination by the specific governmental unit involved.

Justice O'Connor, joined by Chief Justice Rehnquist, Justice White and Justice Kennedy, discussed the justification of the city for the plan and available non-set-aside alternatives. The plurality

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49. Id. at 728-29. The waiver system in Fullilove allowed a contractor to avoid the set-aside restrictions when higher contract bids offered by an MBE were not attributable to past discrimination's effects. Fullilove, 448 U.S. at 470-71. The waiver system in Croson only applied when an MBE was not able or willing to participate. Croson, 109 S. Ct. at 713.

50. Croson, 109 S. Ct. at 729.
51. Id. at 717.
52. Id. at 717-19.
53. Fullilove, 448 U.S. at 478. Section five of the fourteenth amendment states that "the Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend XIV, § 5.
54. Id. at 476.
55. Croson, 109 S. Ct. at 719. Section one of the fourteenth amendment states that "no state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1.
56. Id. (citing Ex parte Virginia, 100 U.S. 339, 345 (1880)). Section two of the thirteenth amendment states that "Congress shall have power to enforce this article by appropriate legislation." U.S. Const. amend XIII, § 2. See supra notes 53, 55.
57. Id. at 720.
58. Id.
59. Id. at 721, 729.
held that courts, by using a strict scrutiny analysis, could determine whether state or local set-aside plans were justifiable and whether the means employed fit the desired goals.\(^6\) The plurality recognized that one argument for applying a less restrictive standard to benign race classifications was that dominant racial groups choose to disadvantage themselves.\(^6\) However, because blacks had held five of the nine seats on the Richmond City Council, the plurality reasoned that this argument was inapplicable and necessitated the application of strict scrutiny.\(^6\) The plurality determined that the effort to reduce the effects of past societal discrimination could not "justify a plan that completely eliminated non-minorities from consideration for a specified percentage of opportunities."\(^6\) The Court reaffirmed the determination that evidence of societal discrimination is not a justification for a race-based set-aside program.\(^6\)

Finally, Justice O'Connor joined by Chief Justice Rehnquist, and Justices White and Kennedy, recommended specific alternatives to the set-aside measures used by the City of Richmond.\(^6\) The recommendations included the prosecution of discriminating contractors, the use of race-neutral alternatives to make city contracting opportunities more accessible to small enterprises, and research into the scope of injury and the extent of remedy necessary.\(^6\) The Justices determined that even without evidence of prior discrimination, Richmond had many race-neutral alternatives available to help disadvantaged contractors.\(^6\) The opinion suggested three race-neutral devices that would increase the accessibility of city contracting opportunities.\(^6\) The Court stated that by simplifying the bidding process, lowering the bonding requirements, and giving financial aid and training to all disadvantaged entrepreneurs, the city could ensure that those contractors that had suffered as a result of past societal discrimination could gain access to public contracts.\(^6\) The plurality suggested that the effect of these alternatives "would serve to increase the opportunities available to minority business without classifying individuals on the basis of race."\(^7\)

60. Id. at 721.
61. Id. at 722. A majority group can disadvantage themselves by enacting programs that give preferences to minority groups.
62. Id.
63. Id. (citing Regents of the University of California v. Bakke, 438 U.S. 265, 721-72 (1978) (Powell, J., concurring)).
64. Id. at 723 (citing Wygant, 476 U.S. at 276 (plurality opinion)).
65. Id. at 729-30. See infra notes 66-70 and accompanying text.
67. Id. at 729. See infra notes 69-70 and accompanying text.
68. Croson, 109 S. Ct. at 729.
69. Id.
70. Id. at 730.
Justice Kennedy concurred in the judgment and submitted a separate opinion that discussed the deference Justice O'Connor's opinion gave to racial preferences enacted by Congress. Justice Kennedy disagreed with the plurality's opinion that there was a "process by which a law that [was] an equal protection violation when enacted by a state became transformed [in]to an equal protection guarantee when enacted by Congress." Justice Kennedy's opinion concluded that the fourteenth amendment did not limit the power of a state to reduce the effects of racial discrimination.

Justice Scalia concurred in the judgment and offered stricter guidelines for state racial preference programs. He stated that any use of government categorization based upon race compelled the use of a strict scrutiny analysis. Justice Scalia also maintained that the fourteenth amendment forbade any reparative racial preference by states except "where [it was] necessary to eliminate their own maintenance of a system of unlawful racial classification." Justice Scalia concluded that states could only rectify the effects of prior discrimination through permissible means that did not contemplate racial categories.

Justice Marshall dissented and referred to the majority opinion as "a deliberate and giant step backward in this Court's affirmative action jurisprudence." He disagreed with the majority's narrow view of the factual evidence the city was required to demonstrate. The dissent stated that with both Congressional findings of past discrimination which prevented existing MBE's from obtaining state and local government contracts and specific evidence of limited minority participation in Richmond, the city council had sufficient evidence of discrimination to pass the ordinance. Justice Marshall stated that race-conscious programs that were enacted to further remedial goals must satisfy a two-prong standard. This standard required that the classifications serve important objectives of the

71. Id. at 734, 735 (Kennedy, J., concurring). Justice O'Connor recognized that the thirteenth and fourteenth amendments were enlargements on the power of Congress. See supra note 56.
72. Id. The plurality distinguished between § 1 of the fourteenth amendment which was a limitation on the power of a state from § 5 which was a grant of power to Congress. See supra notes 53-55 and accompanying text.
73. Croson, 109 S. Ct. at 734 (Kennedy, J., concurring).
74. Id. at 735-37 (Scalia, J., concurring).
75. Id. at 735.
76. Id. at 737.
77. Id. at 739.
78. Id. at 740 (Marshall, J., dissenting).
79. Id.
80. Id. at 742-43.
81. Id. at 743 (citing Bakke, 438 U.S. at 359; Wygant, 476 U.S. at 301-02; Fullilove, 448 U.S. at 517-19). See infra notes 82-84 and accompanying text.
governmental unit and be substantially related to the accomplishment of those objectives.\(^8\)

In determining the governmental interest, the dissent reasoned that both the interest of eradicating the consequences of past discrimination and the interest of not reinforcing any exclusionary effects of past racial discrimination were important enough to satisfy the first prong of the test.\(^8\) The dissent next determined that the proof offered by the City Council of past racial discrimination was sufficient to support the interests of the program in remedying past effects of discrimination and in not perpetuating discriminatory practices.\(^8\) In criticizing the controlling opinion, the dissent stated that the evidence provided by the City Council was a sound basis for the legislation.\(^8\) The dissent also disagreed with the plurality’s view as to the evidentiary value of the findings of the executive branch.\(^8\) The dissent stated that to use the executive findings only as a presumption of prior discrimination would force local governments that seek “to eradicate the effects of past discrimination within their borders to reinvent the evidentiary wheel.”\(^8\)

The dissent also determined that the Plan comported with the second prong of the equal protection analysis because the set-aside plan was substantially related to the interests of the city.\(^8\) The dissent criticized the plurality’s requirement of race-neutral measures to help MBEs.\(^8\) The dissent found that these measures were ineffective when utilized by Richmond and the Congress of the United States.\(^8\) The dissent also defended the thirty percent target of minority involvement in contracts because of its small cumulative effect on the city’s contractors.\(^8\)

By differentiating a racist governmental action from a remedial governmental action, the dissent further criticized the controlling opinion’s use of strict scrutiny as the standard of review for set-aside programs.\(^8\) The dissent stated that the plurality “signals that [the

\(^8\) Croson, 109 S. Ct. at 743 (Marshall, J., dissenting).
\(^8\) Id. at 743-44.
\(^8\) Id. at 745, 746.
\(^8\) Id. at 746.
\(^8\) Id. at 749.
\(^8\) Id.
\(^8\) Id. at 750.
\(^8\) Id. at 751.
\(^9\) Id. Since 1975, Richmond, Virginia has passed ordinances that attempted to bar discrimination by both city and public contractors; however, these ordinances have not resulted in an increase in minority participation. Id. The Court in Fullilove noted the inadequacy of past attempts by the federal Office of Minority Business Enterprises to assist in the development of minority business. Fullilove, 448 U.S. at 467.
\(^9\) Croson, 109 S. Ct. at 751 (Marshall, J., dissenting) (stating that the set-aside provisions would have affected only three percent of all city contracts).
\(^9\) Id. at 752.
majority] regards racial discrimination as largely a phenomenon of the past." The dissent concluded that even though blacks had a majority on the Richmond City Council, whites had not become a suspect group. Finally, the dissent stated that the plurality erred when it differentiated between state and federal power in remediing racial discrimination.

BACKGROUND

THE ANALYSIS USED TO DECIDE EQUAL PROTECTION CASES BY THE UNITED STATES SUPREME COURT

In defining the command of the fourteenth amendment to the Constitution that no state shall "deny to any person within its jurisdiction the equal protection of the laws," the United States Supreme Court initially determined that it applied only to laws that classified individuals based upon their race. In the Slaughter-House Cases, the Supreme Court interpreted the equal protection clause of the fourteenth amendment in a series of cases. The Court determined that the clause was to protect exclusively against racial discrimination. Since this initial interpretation, the Court has used a mere rationality standard, a strict scrutiny standard and an intermediate standard for analyzing discriminatory effects.

From the time of the Slaughter-House Cases until the 1960's, equal protection arguments were seldom used. However, when the Court determined whether state statutes complied with the guarantees of the equal protection clause, it used a mere rationality analysis. The Court in Lindsley v. Natural Carbonic Gas Co. considered a New York statute that regulated the drawing of under-
ground mineral water. The majority determined that the classification employed in a New York state statute did not deny equal protection unless it could be shown that the classification did not have a rational basis in the facts presented.

In the case of *New Orleans v. Dukes*, the Court determined the constitutionality of a New Orleans ordinance which regulated pushcart food vendors. The Court determined that the employment classifications must pass the two-tiered test of the mere rationality standard. The Court stated that the "classification challenged [must] be rationally related to [a] legitimate state interest." Under Chief Justice Warren, the Court's application of the equal protection clause incorporated a strict scrutiny analysis. To differentiate from the mere rationality test, the Warren Court applied the strict scrutiny test to a law that affected a suspect group or impacted on a fundamental right. Under the strict scrutiny test, a state had to demonstrate a compelling state interest and any use of a classification had to be necessary for the accomplishment of that compelling interest. In *McLaughlin v. Florida*, the Court proposed this two-tiered analysis and invalidated a law prohibiting interracial cohabitation by declaring that a law must be related to the state goals and narrowly tailored in such a way that general or neutral alternatives would not work. In *Palmore v. Sidoti*, the Court considered a Florida court decision that awarded custody of a child to the child's father because the child's mother was cohabiting with a man of a different race. The Court stated that racial classifications used by the lower court "must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of their

105. *Id.* at 62-64.
106. *Id.* at 78-79.
108. *Id.* at 298.
109. *Id.* at 303. See infra note 110 and accompanying text.
111. *See Loving v. Virginia*, 388 U.S. 1 (1967) (denying the contention of Virginia that a racial classification should be upheld if the classification served a rational purpose).
112. Shapiro v. Thompson, 394 U.S. 618 (1969) (Harlan, J., dissenting) (discussing the application of the strict scrutiny test to laws that affect suspect groups and impact on fundamental rights).
113. Graham v. Richardson, 403 U.S. 365, 375-76 (1971) (holding that the state interest must be compelling to pass constitutional muster). See also *In re Griffiths*, 413 U.S. 717, 721-22 (1973) (stating that “[i]n order to justify the use of a suspect classification, a [s]tate must show [that] . . . the classification is ‘necessary . . . to the accomplishment’ of its purpose”).
115. *Id.* at 196.
117. *Id.* at 430.
legitimate purpose."\textsuperscript{118}

In addition to the mere rationality and strict scrutiny standards, the Court has also employed an intermediate standard.\textsuperscript{119} In \textit{Craig v. Boren},\textsuperscript{120} the Court considered an Oklahoma statute which prohibited the sale of beer to males under the age of 21 and to females under the age of 18.\textsuperscript{121} The Court determined that gender classifications must serve important governmental ends and the means "must be substantially related to the achievement of those objectives."\textsuperscript{122} The mere rationality test determined whether the desired ends were \textit{legitimate} and \textit{rationally related} to the means employed, while the strict scrutiny test determined whether the desired ends were \textit{compelling} and the means chosen were \textit{necessary} for the accomplishment of those objectives, and the intermediate standard determined whether the desired ends were \textit{important} and \textit{substantially related} to the means chosen.\textsuperscript{123}

THE TREATMENT OF MINORITY SET-ASIDE PROGRAMS BY THE UNITED STATES SUPREME COURT

In \textit{Regents of the University of California v. Bakke},\textsuperscript{124} the Court addressed an application of the equal protection clause of the fourteenth amendment to benign racial discrimination.\textsuperscript{125} The University of California at Davis Medical School had a special admission program for members of minority groups.\textsuperscript{126} Candidates for the special admission program did not have to meet the grade point average requirements of the general admission program, and sixteen admission positions were guaranteed to the special admission candidates.\textsuperscript{127} Allan Bakke was a white male who was not accepted under the general admission program; however, special admission applicants were admitted with significantly lower scores than his.\textsuperscript{128} Bakke filed an action in state court alleging that the special admission program was a violation of the equal protection clause of the fourteenth amendment, the California Constitution, and Section 604 of Title VI of the 1964

\textsuperscript{118} Id. at 432-33 (citing \textit{McLaughlin}, 379 U.S. at 196).
\textsuperscript{119} Vlandis v. Kline, 412 U.S. 441, 458 (1973) (White, J., concurring). Justice White stated his support for Justice Marshall's proposition that it was proper to employ a spectrum of standards in analyzing violations of the equal protection clause. \textit{Id.}
\textsuperscript{120} 429 U.S. 190 (1976).
\textsuperscript{121} \textit{Id.}
\textsuperscript{122} \textit{Id.}
\textsuperscript{123} \textit{See supra} notes 102-22 and accompanying text (emphasis added).
\textsuperscript{124} 438 U.S. 265 (1978).
\textsuperscript{125} \textit{Id.} at 320.
\textsuperscript{126} \textit{Id.} at 272-75.
\textsuperscript{127} \textit{Id.} at 275.
\textsuperscript{128} \textit{Id.} at 276.
Civil Rights Act. The state court had determined that the "program operated as a racial quota" because there were sixteen places reserved and the minority applicants were only rated against one another. The California Supreme Court applied a strict scrutiny test to the program. The court concluded that the special admission program was not the least intrusive means available to achieve the compelling state goals of remedying past discrimination and thus violated the equal protection clause of the fourteenth amendment. The United States Supreme Court affirmed the ruling that the admission program was invalid but reversed the California Supreme Court's determination that race could not be a factor in future admission programs. Justices Stevens, Stewart, and Rehnquist and Chief Justice Burger avoided consideration of the constitutional question of whether the use of race could be a factor in an admission program and ruled that the program was prohibited under Title VI of the 1964 Civil Rights Act.

Justices Brennan, White, Marshall, and Blackmun concluded that the race-based admission scheme did not violate Title VI or the fourteenth amendment. These Justices concluded that racially atoning measures did not preclude the "preferential treatment of racial minorities as a means of remedying past societal discrimination" and that the standard of review should be the intermediate standard employed in gender discrimination cases. The Justices stated that this level of review was appropriate because no fundamental right was involved and whites were not a suspect class. The intermediate standard of review was selected for benign discrimination to prevent the reinforcement of existing stereotypes. In applying this standard, the Justices found the admission procedure constitutional.

129. Id. at 277-78. See supra note 4. The California Constitution provides: "a person may not be . . . denied equal protection of the laws." CAL. CONST. art. I § 7. The Civil Rights Act, Title VI, § 604 provides: "Nothing contained in this title shall be construed to authorize action under this title by any department or agency with respect to any employment practice of any employer . . . except where a primary objective of the Federal financial assistance is to provide employment." Civil Rights Act of 1964, Pub. L. No. 88-532, 78 Stat. 241, 253.

130. Bakke, 438 U.S. at 278-79.
131. Id. at 279.
132. Id. at 279-80.
133. Id. at 320.
134. Id. at 325, 411, 421 (Stevens, J., concurring in part and dissenting in part).
135. Id. at 355, 378 (Brennan, J., concurring in part and dissenting in part).
136. Id. at 328, 359. See supra notes 118, 123 and accompanying text.
137. Id. at 357 (Brennan, J., concurring in part and dissenting in part). See San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (applying a strict scrutiny analysis to a statute that involved the right to education and affected aliens as a class).
because it was substantially related to the important state goal of ameliorating the effects of past discrimination.\textsuperscript{139} Justice Powell's opinion decided the dead-lock between the eight Justices by stating that the program violated the fourteenth amend-
ment.\textsuperscript{140} In applying a strict scrutiny standard to all discrimination cases, Justice Powell stated that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."\textsuperscript{141} However, Justice Powell did recognize that race could be one of many legitimate consider-
ations in a facially neutral program to promote diversity.\textsuperscript{142} Ad-
ditionally, Justice Powell stated that any governmental interest in remedying past discrimination had to disclose "judicial, legislative, or administrative findings of constitutional or statutory violations."\textsuperscript{143}

In 1977, the United States Congress passed the Public Works Employment Act.\textsuperscript{144} This act required that ten percent of federal funds given for state or local public projects had to be used by busi-
nesses owned by minorities, absent an administrative waiver.\textsuperscript{145} Mi-
orities were defined as United States citizens who were Negroes, Spanish-speaking, Indians, Orientals, Eskimos, and Aleuts.\textsuperscript{146} The in-
tent of the Act was to direct money into minority business communi-
ties that, based on past experience, had not significantly benefited from past public work programs.\textsuperscript{147}

In \textit{Fullilove v. Klutznick},\textsuperscript{148} the Public Works Employment Act was upheld by a plurality of the Court.\textsuperscript{149} Chief Justice Burger's opinion concluded that the MBE provisions of the Act were not faci-
ally unconstitutional.\textsuperscript{150} The Court held that Congress had the power to enact the legislation under the spending powers of the Constitu-
tion.\textsuperscript{151} The Court also held that Congress could have enacted the statute under the commerce clause.\textsuperscript{152} Having established the power of Congress to enact the law, the Court turned to whether the means selected violated the equal protection component of the due

\textsuperscript{139} Id. at 369.
\textsuperscript{140} Id. at 320.
\textsuperscript{141} Id. at 289-90.
\textsuperscript{142} Id. at 307. 314.
\textsuperscript{143} Id. at 307.
\textsuperscript{145} Id. at 117.
\textsuperscript{146} Id.
\textsuperscript{148} 448 U.S. 448 (1980).
\textsuperscript{149} Id. at 492 (Burger, C.J., plurality opinion).
\textsuperscript{150} Id.
\textsuperscript{151} Id. at 473. The spending power provides Congress the power "to provide for the . . . general Welfare." U.S. CONST. art. I, § 8, cl. 1.
\textsuperscript{152} Fullilove, 448 U.S. at 475. The commerce clause provides Congress the power "to regulate Commerce . . . among the several States." U.S. CONST. art I, § 8, cl. 3.
process clause of the fifth amendment.\textsuperscript{153} The Court stated that when there had been a violation of federal anti-discrimination laws, "an equitable remedy [could] in the appropriate case include a racial or ethnic factor."\textsuperscript{154} In concluding that the means were properly tailored in \textit{Fullilove}, the Court indicated that the Act was neither overinclusive nor underinclusive.\textsuperscript{155} The Court decided that Congress had latitude in trying new techniques to achieve the goals of economic opportunity and equality.\textsuperscript{156} Although Chief Justice Burger determined that racial classifications required a searching examination, the Court did not employ a strict scrutiny standard which would have required that the desired ends be compelling and the chosen means be necessary.\textsuperscript{157}

Nine years after the \textit{Fullilove} decision, the Court in \textit{Wygant v. Jackson Board of Education},\textsuperscript{158} addressed the issue of findings of past discrimination.\textsuperscript{159} A collective bargaining agreement between a teachers' union and the Board of Education of Jackson, Michigan provided that any layoffs would be on a seniority basis; however, the percentage of minority teachers would not fall below its level at the time of the layoffs.\textsuperscript{160} The United States District Court for the Eastern District of Michigan had upheld the constitutionality of subsequent non-minority layoffs by holding that any racial preferences by the Board did not need to be grounded on findings of past discrimination but were permissible as attempts to remedy societal discrimination under the equal protection clause.\textsuperscript{161} A plurality of the Supreme Court reversed the district court's ruling.\textsuperscript{162} The plurality opinion, written by Justice Powell, stated that a compelling state purpose had to justify racial classifications and that the state's chosen means to effectuate that purpose had to be narrowly tailored.\textsuperscript{163} Although this standard was not in the exact form of the strict scrutiny analysis delineated for past racial classification cases, the plurality's test was an approximate form of those strict scrutiny examinations.\textsuperscript{164}

In considering proper justification, the plan's attempt to remedy
societal discrimination was not narrowly defined. The plurality held that the state had to show convincing evidence of past discrimination by the unit of government involved. The Court determined that there had to be a strong factual basis in evidence to justify the conclusion that remedial action had been necessary. Through the Bakke, Fullilove, and Wygant decisions, a majority of the Court never established a clear standard of review for minority set-aside programs.

THE TREATMENT OF MINORITY SET-ASIDE PROGRAMS BY THE UNITED STATES CIRCUIT COURTS

In Ohio Contractors Association v. Keip, the United States Court of Appeals for the Sixth Circuit applied the rationale of Fullilove to a state set-aside program. The court reviewed an Ohio statute that, like the statute in Fullilove, required that a percentage of all subcontracted work from a major contractor be given to minority businesses. The Ohio General Assembly based the set-aside statute on various findings from Ohio executive department investigations, Ohio courts, and studies by legislative committees of race discrimination on state construction contracts. The Sixth Circuit stated that the Ohio General Assembly could use the findings from various sources and that formal findings of specific evidence of past discrimination were not required. The court ruled that the “unique” power of Congress to make race remedial legislation was “notable” and “unequaled” but this did not mean that the power was “sole” or “exclusive.” The court further stated that, “[w]hen a state legislature t[ook] steps in compliance with the equal protection clause it [was] acting in the same capacity as that of Congress in adopting legislation to implement the equal protection component of the fifth amendment’s due process clause.” Having affirmed the right of the state legislature to enact the remedial program, the court next addressed the means selected to eliminate the present effects of

165. Id. at 276.
166. Id. at 277. See supra notes 57-58 and accompanying text.
167. Wygant, 476 U.S. at 277-78.
168. See supra notes 140, 157, 163 and accompanying text.
169. 713 F.2d at 167 (6th Cir. 1983).
170. Id. at 169.
171. Id. In November 1980, the Governor signed a minority business enterprise act. See also General Contractors of America, Inc. v. Metropolitan Dade County, 723 F.2d 846 (11th Cir. 1984) (upholding county race-conscious affirmative action plan of the South Florida Chapter of the Contractors’ Ass’n based upon the Fullilove analysis).
172. Ohio Contractors, 713 F.2d at 171.
173. Id.
174. Id. at 172.
175. Id.
past discrimination. The court ruled that the plan was not overinclusive even though it included provisions for remedying discrimination against non-black minorities. The court held that the Ohio General Assembly had evidence which showed that the less restrictive alternative means set by administrative regulations and executive orders had been unsuccessful. The court cited Fullilove in stating "that there was no requirement to choose the least restrictive means." The plan was also held to be flexible, and accordingly, did not constitute a Bakke-type quota. The Sixth Circuit summarily held that the Ohio General Assembly followed the lead of Congress in adopting the set-aside requirements. The court recognized that although there were functional differences between the Ohio statute and the federal provision, "the Ohio M.B.E. act is sufficiently narrow in scope to satisfy the constitutional requirements found controlling in Fullilove." In *Associated General Contractors of California, Inc. v. City & County of San Francisco*, the United States Court of Appeals for the Ninth Circuit used the analysis proposed in *Wygant* to strike down a local ordinance that gave preference to minorities in violation of the equal protection clause. The city and county of San Francisco gave various preferential treatment to minority-owned, locally-owned, and woman-owned business enterprises (MBE, LBE, and WBE respectively). The ordinance was intended to increase MBE, LBE, and WBE participation in municipal contracting, and thereby help alleviate the historic discrimination against women and minorities which had been enforced and officially sanctioned by the government. The Ninth Circuit ruled that the standard of review for racial and ethnic preferences was strict scrutiny. The court subjected the ordinance to a three-prong test which focused on whether

176. Id. at 173.
177. Id. at 173-74.
178. Id. at 174. The court found that executive orders and administrative regulations which attempted to establish minority participation goals had failed to produce the desired results. Id.
179. Id. at 174 (citing Fullilove, 448 U.S. at 508).
180. Id. at 174.
181. Id.
182. Id. at 176. The Sixth Circuit distinguished the unlimited duration of the Ohio plan from the program in Fullilove which was limited in duration and extent. Id. at 175.
183. 813 F.2d 922 (9th Cir. 1987).
184. Id. at 944. Chapter 1217 of the San Francisco Administrative Code was enacted by the Board of Supervisors on April 2, 1984 after considerable debate and numerous hearings. Id. at 924.
185. Id. at 923.
186. Id. at 924.
187. Id. at 928.
(1) the city had the authority to act, (2) the findings of the city were adequate, and (3) the means that the city selected were appropriate. Concerning the city's authority, the court ruled that state and local governments had a compelling interest to remedy past and present discrimination. Concerning the findings of the city, the court differentiated those needed by the city from those of the federal government. The Ninth Circuit held that "[u]nlike Congress, state or local governments d[id] not have the power to discriminate on the basis of race simply to dispel the lingering effects of societal discrimination." The court ruled that some showing of past discrimination by the involved governmental unit was required. The ordinance, while defining Indians, Asians, Blacks, Filipinos, and Hispanics as minorities, was not based on evidence showing that all of these groups had been the victims of discrimination. Concerning the means used by the city, the court suggested that the means had to be narrowly tailored, had to fit with more precision than any other alternative means, and could not subject a few individuals to a disproportionate burden. The court stated that in an area of city contracting where MBEs had a large market share, the non-MBE could be destroyed by the plan. Because there were no provisions in the administration of the plan to prevent this from occurring, the plan ultimately could result in a disproportionate burden on a few businesses. The court also held that there was a lack of administrative provisions that could prevent abuse of the program by MBEs. In addition to the undue burden on a few individuals, the plan was not narrowly tailored in that other neutral alternatives were available. The court held that the findings of the ordinance, demonstrating that the government officially enforced and sanctioned race and gender discrimination, could be corrected by several neutral alternatives that were suggested by the court.

The Wygant analysis was also applied in Michigan Road Build-
This case concerned a 1980 Michigan statute which set aside at least seventy percent of state contracts for minority-owned businesses and at least five percent of state contracts for women-owned businesses. The Michigan Road Builders Association challenged the set-aside provision as a violation of the equal protection clause of the fourteenth amendment. The United States Court of Appeals for the Sixth Circuit noted that courts must first determine in equal protection claims whether the governmental unit had the authority to impose the classification. Citing Wygant, the court held that the state legislature had the right and in fact a duty to use affirmative measures to remedy the effects of past discrimination.

After establishing the state legislature's authority, the court next determined the standard of review for equal protection claims. The Court cited the plurality opinion of Bakke in holding that racial distinctions were inherently suspect and called for a strict scrutiny examination. The court also cited Justice Powell's concurring opinion in Fullilove which stated that racial classifications had to be reviewed through the most stringent test. The Sixth Circuit referred to Bakke and Fullilove in defining "strict scrutiny" as it applied to affirmative action cases. The Court recognized that in the past a governmental body had to establish the need for the remedial measures, and after this was established, the court would then determine if the remedial measures used were reasonable. The court stated that in previous Sixth Circuit decisions this circuit had essentially relaxed the standard of strict scrutiny and had required affirmative action plans to be "'reasonable' means of furthering a 'significant' governmental interest rather than a 'narrowly tailored' or 'necessary' means of furthering a 'compelling' governmental interest." In Wygant, the Supreme Court had rejected the relaxed

200. 834 F.2d 583 (6th Cir. 1987).
201. Id. at 584. The 1980 act was recorded in Mich. Comp. Laws §§ 450.771, 450.772.
202. Id. at 585.
203. Id. at 586 n.4.
204. Id. (citing Wygant, 476 U.S. at 267).
205. Id. at 586.
206. Id. (citing Bakke, 438 U.S. at 265, 291).
207. Id. at 587 (citing Fullilove, 448 U.S. at 496).
208. Id. at 589. The court determined that there must be a compelling state interest which supports the use of the racial classification and that this classification must be necessary or narrowly tailored to further that compelling interest. Id.
209. Id. (emphasis added). See Bratton v. City of Detroit, 704 F.2d 878 (6th Cir. 1983) (upholding an affirmative action plan by determining whether there was some governmental interest and whether the plan was directed toward that interest); Detroit Police Officers' Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979) (illustrating an example of an application of a reasonable test).
210. Michigan Road Builders, 834 F.2d at 587.
standard of the Sixth Circuit by stating that the circuit's standard of "reasonableness" for examining the affirmative action layoff plan was not supported by other Supreme Court decisions. 211 The Wygant decision therefore made the Sixth Circuit apply strict scrutiny as the standard of review. 212

After establishing the strict scrutiny standard of review, the Sixth Circuit next determined whether the racial classification was justified by a finding of factual evidence showing a compelling state interest. 213 The Sixth Circuit determined that the governmental unit must show evidence of prior discrimination by that same governmental unit. 214 The Sixth Circuit considered whether the Michigan legislature, based upon the evidence in the record, had a sufficient basis to conclude that the affirmative action was required because of the state's prior discrimination. 215 The court held that the Michigan legislature had not presented specific evidence of prior discrimination by the state. 216 The Court found that the mere showing of societal discrimination was insufficient to satisfy the court's test. 217 The federal appellate courts' consideration of minority set-aside programs has varied according to the precedents established in various United States Supreme Court decisions. 218

THE TREATMENT OF VARIOUS PROOFS OFFERED TO SHOW COMPELLING INTERESTS BY THE UNITED STATES SUPREME COURT

The two aspects of a strict scrutiny analysis are that a statute must be enacted to achieve a compelling interest and the means chosen must be necessary for the accomplishment of that interest. 219 Various proofs of a compelling state interest have been advanced by legislative bodies and considered by the Supreme Court. 220 The Court has rejected the remedial declaration of an ordinance as evidence of a city's interest in remedying past discrimination. 221 In Eisenstadt v. Baird, 222 the Court considered a Massachusetts statute that prevented single persons from obtaining contraceptives, but per-

211. *Id.* at 588.
212. *Id.*
213. *Id.* at 589.
214. *Id.* (citing *Wygant*, 476 U.S. at 274).
215. *Id.* at 590 (citing J.A. Croson Co. v. City of Richmond, 822 F.2d 1356, 1360 (4th Cir. 1987)).
216. *Id.*
217. *Id.* at 592.
218. See supra notes 175, 182, 188, 212, 213 and accompanying text.
219. See supra note 113 and accompanying text.
220. See supra note 113 and accompanying text.
221. See infra notes 222-24 and accompanying text.
222. 405 U.S 438 (1972).
mitted married persons to obtain them. The statute stated on its face that it was intended to be a health measure. The Court stated that it did not have to accept the assertions of legislative purpose at face value and, therefore, disregarded this evidence as proof of a compelling interest.

The sufficiency of expert testimony regarding discrimination in the legislated subject-matter has also been considered by the Court. In Korematsu v. United States, the Court addressed the probative value of this type of testimony. The majority upheld a military order which had imposed a curfew on Japanese-Americans. While the majority did not discuss the evidence offered to prove the disloyalty of the Japanese-Americans, Justice Murphy's dissenting opinion specifically analyzed the probative value of the expert testimony offered by the United States. Justice Murphy stated that the reasons for the forced evacuation of Japanese-Americans were based upon "misinformation, half-truths, and insinuations." The application of evidence concerning individual wrongs to the entire group was determined by Justice Murphy to be of low probative value because "to infer that examples of individual disloyalty prove[d] group disloyalty and justif[ied] discriminatory action against the entire group [was] to deny that under our system of law individual guilt [was] the sole basis for deprivation of rights."

Another method of proving a compelling interest has been advanced in the form of a statistical disparity between the percent of public opportunities being given to minorities and the percent of minorities in the population of the local government population. In Hazelwood School District v. United States, the Court addressed the issue of gross statistical disparities. In this case, the federal government brought an action against a Hazelwood, Missouri school district alleging that the district had engaged in employment discrimination that had violated the Civil Rights Act of 1964. The govern-

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223. Id. at 442.
224. Id. at 448. Compiled in Massachusetts General Laws Ann., c. 272, § 21.
225. Id. at 452.
226. See infra notes 227-32 and accompanying text.
228. Id. at 241 n.15 (Murphy, J., dissenting). The expert's testified that "the very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken." Id.
229. Id. at 219.
230. Id. at 241 (Murphy, J., dissenting).
231. Id. at 239.
232. Id. at 240.
233. See infra notes 234-46 and accompanying text.
235. Id. at 304-05.
236. Id. at 301.
ment's case was based on four sources of evidence. The government alleged a history of racially discriminatory practices, statistical disparities in teacher hiring, standardless and subjective hiring procedures, and specific instances of racial discrimination. The government asserted that the statistical disparity was between the number of black teachers and the number of black students. The Court agreed with the United States Court of Appeals for the Eighth Circuit "that a proper comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market."

In Mayor of Philadelphia v. Educational Equality League, the statistical evidence approach of the Court was further supported. In Mayor of Philadelphia, the Educational Equality League requested that the number of black school board candidates be in proportion to the racial representation of the school community. The Court held that candidates for the school board were required to have special employment training qualifications. The Court stated that "this [was] not a case in which it could be assumed that all citizens [were] fungible for purposes of determining whether members of a particular class had been unlawfully excluded." The Court suggested that the proper comparison was the number of high ranking officers of city organizations and institutions available to serve on an education nominating panel and not the percentage of blacks in the population at large.

Another proof that has been suggested to show a compelling interest for remedial legislation has been the percent of minority membership in local associations. In Bazemore v. Friday, the Court

\[\text{(References omitted for brevity)}\]
questioned whether limited participation of a particular racial group or groups in a private organization was evidence of discrimination.\textsuperscript{249} The North Carolina Agricultural Extension Service was accused of supporting a pattern and practice of racial discrimination.\textsuperscript{250} One method of discrimination was the support of the service of private organizations that were traditionally not integrated.\textsuperscript{251} Justice White, in his concurring opinion, wrote that the continued existence of private single-race clubs did not indicate a constitutional violation.\textsuperscript{252}

The Court also considered whether the findings of Congress as to a national discrimination problem constituted adequate proof of a compelling state interest.\textsuperscript{253} The sufficiency of state or local governmental units relying on Congressional findings of nationwide discrimination has been a subject of discussion.\textsuperscript{254} One commentator, in an analysis of \textit{Fullilove}, asserted that "it is essential that state and local agencies also establish the presence of discrimination in their own bailiwicks, based either upon their own fact-finding processes or upon determinations made by other competent institutions, such as courts and administrative agencies."\textsuperscript{255}

Due to the national scope of Congressional findings, a state or city's application of these findings to its local industry would result in a geographical transfer of discrimination findings.\textsuperscript{256} The Supreme Court in \textit{Milliken v. Bradley}\textsuperscript{257} discussed the ability to transfer findings of discrimination.\textsuperscript{258} This case alleged racial segregation in the Detroit public school system.\textsuperscript{259} The Court of Appeals for the Sixth Circuit held that due to geographical limitations and multi-district desegregation, the imposition of a court ordered desegregation plan on the outlying districts would be "a wholly impermissible remedy."\textsuperscript{260} The Supreme Court stated that a showing of discrimination by the Detroit school system had to be limited to that system and

\textsuperscript{249} Id. at 408 (White, J., concurring).
\textsuperscript{250} Id. at 391.
\textsuperscript{251} Id. at 407 (White, J., concurring). The district court did not find evidence of discrimination. \textit{Id}.
\textsuperscript{252} Id. at 408. The opinion was distinguished from the case of \textit{Green v. School Bd. of New Kent County}, 391 U.S. 430 (1968) that dealt with a statutory obligation to join clubs. \textit{Bazemore}, 478 U.S. at 408 (White, J., concurring).
\textsuperscript{253} See infra notes 254-61 and accompanying text.
\textsuperscript{255} \textit{Fullilove}, 96 \textit{Yale L.J.} at 480-81.
\textsuperscript{256} See infra notes 257-61 and accompanying text.
\textsuperscript{257} 418 U.S. 717 (1974).
\textsuperscript{258} Id. at 721-22.
\textsuperscript{259} Id. at 723.
\textsuperscript{260} Id. at 745.
could not be shared by surrounding school systems.\textsuperscript{261} From declarations of remedial intent to sharing findings of discrimination, the Court has closely reviewed many proofs offered to show a compelling interest.\textsuperscript{262}

\textbf{THE TREATMENT OF VARIOUS NON-SET-ASIDE ALTERNATIVES OFFERED TO SHOW NARROW TAILORING BY THE UNITED STATES SUPREME COURT}

The second aspect of the strict scrutiny analysis is that the means chosen to accomplish the purpose must be necessary to accomplish the compelling interest.\textsuperscript{263} The Supreme Court has discussed various non-set-aside alternatives that a state or local government must use to satisfy the narrow tailoring aspect of the strict scrutiny analysis.\textsuperscript{264} In \textit{United States v. Paradise},\textsuperscript{265} the availability of race-neutral alternatives was considered by the Court.\textsuperscript{266} The Court considered the constitutionality of a court order that required the Alabama Department of Public Safety to give fifty percent of all promotions to blacks until the level of black officers was conforming with prior court orders and decrees.\textsuperscript{267} Before addressing the appropriateness of the race-conscious remedies, the Court considered many factors including the efficacy of race-neutral remedies.\textsuperscript{268} After analyzing the available alternatives to the race conscious remedies, the Court determined that the remedies would not have been able to adequately accomplish the purpose of correcting the effects of past discrimination.\textsuperscript{269} Because of the potential for harm in race-conscious remedies, the Court emphasized that race-neutral alternatives must be considered first.\textsuperscript{270}

In addition to the availability of race-neutral alternatives, the Court has also analyzed the establishment of set-aside quotas.\textsuperscript{271} In

\textsuperscript{261} Id. at 746 (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971)).
\textsuperscript{262} See supra notes 221, 228, 235, 246, 249, 255 and accompanying text.
\textsuperscript{263} See supra note 118 and accompanying text.
\textsuperscript{264} See infra notes 265-70 and accompanying text.
\textsuperscript{266} Id. at 1067.
\textsuperscript{267} Id. at 1058-64.
\textsuperscript{268} Id. at 1067. The Department recommended a stop-gap measure to immediately promote eleven whites and four blacks and the government suggested that heavy fines be imposed upon the Department until compliance is reached. Id. at 1067-69.
\textsuperscript{269} Id. at 1067. The Court determined that the alternatives either failed to address the plan's purposes or were never proposed at the District Court level. Id. at 1067-69.
\textsuperscript{270} Id. at 1067-69. The Court considered that outright racial balancing that may result from a race-conscious remedy could have an adverse impact due to its lack of flexibility. Id. at 1067-71.
\textsuperscript{271} See infra notes 272-80 and accompanying text.
Local 28, Sheet Metal Workers’ International Association v. EEOC, the Court affirmed a district court ordered affirmative action plan. The Court upheld a court-imposed fine and minority employment plan against the Sheet Metal Workers’ union. The plurality determined that the 29% non-white membership goal in the affirmative action plan was a means by which the courts could measure the union’s compliance and was not a strict racial quota. Justice O’Connor dissented from the plurality’s approval of the membership goal. Justice O’Connor’s dissent was based upon the difficulty in distinguishing whether the 29% membership drive was a permissible goal or an impermissible quota. She stated that the use of this rigid quota turned the intention of a remedial program into a racial balance requirement. In concluding, Justice O’Connor contrasted the EEOC quota with a permissible goal by using the following standard:

[t]o hold an employer or union to achievement of a particular percentage of minority employment or membership, and to do so regardless of circumstances such as economic conditions or the number of available qualified minority applicants, is to impose an impermissible quota. By contrast, a permissible goal should require only a good-faith effort on the employer’s or union’s part to come within a range demarcated by the goal itself.

The Court has also considered whether a proposed administrative system was narrowly tailored by differentiating between those systems that attempt to accomplish a legitimate state purpose and those systems based solely on administrative convenience. The Court in Frontiero v. Richardson addressed the use of administrative convenience in matters of “strict judicial scrutiny.” This case dealt with the interpretation of the term “dependent” contained in the Career Compensation Act of 1949 and the Dependent’s Medical

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273. Id. at 483.
274. Id.
275. Id. at 475-78.
276. Id. at 489 (O’Connor, J., dissenting).
277. Id. at 494.
278. Id.
279. Id. at 495.
280. Id.
281. See infra notes 282-89 and accompanying text.
283. Id. at 690.
284. Ch. 681, § 102, 63 Stat. 802, 804. Section 102(g) provides that with respect to a
Care Act of 1956,285 two Acts which offered definitions of the term dependent.286 These Acts provided for the administration of compensation for members of the United States Armed Forces in a way which resulted in differential treatment between male and female service members.287 Although recognizing the importance of administrative convenience to efficiently run governmental programs, the Court held that when using "strict judicial scrutiny" merely reciting that the plan was administratively convenient would not make it constitutional.288 The Court reasoned that any statute which drew a sharp distinction "between the sexes, solely for the purpose of achieving administrative convenience," commanded dissimilar treatment among the sexes and therefore resulted in the "very kind of arbitrary legislative choice forbidden by the [Constitution]."289

ANALYSIS

THE CROSON OPINION

In Richmond v. J.A. Croson Co.,290 the United States Supreme Court analyzed a city ordinance that required a successful city construction contract bidder to subcontract at least thirty percent of the work to a minority contractor.291 In addressing the constitutionality of the ordinance, the majority of the Court considered the validity of the ordinance using a strict scrutiny analysis.292 In declaring the ordinance unconstitutional, Justice O'Connor concluded that the five proofs offered by the Richmond, Virginia City Council had failed to establish a compelling local interest.293 Justice O'Connor also determined that if the council had established the compelling interest, it would have failed the narrow tailoring prong of the strict scrutiny test.294

Justices O'Connor and White, along with Chief Justice Rehnquist, established that the scope of the city's authority to enact the law was based on section one of the fourteenth amendment.295 These

285. Pub. L. No. 569, 70 Stat. 250, 250 provides that "Dependent" with respect to a member of an uniformed service means, "(A) the wife . . . (C) the husband, if he is in fact dependent on the member . . . for over one-half of his support." Id.
286. Frontiero, 411 U.S. at 678.
287. Id. at 678-79.
288. Id. at 690.
289. Id. (citing Reed v. Reed, 404 U.S. 71, 76-77 (1971)).
291. Id. at 713. See supra notes 8-16 and accompanying text.
292. See supra notes 37, 71, 75 and accompanying text.
293. See supra notes 38-43 and accompanying text.
294. See supra notes 44-50 and accompanying text.
295. See supra notes 4 and 51-58 and accompanying text.
three Justices, joined by Justice Kennedy recommended race-neutral alternatives to the plan.\textsuperscript{296}

Justice Kennedy’s concurrence disagreed with the plurality’s opinion giving deference to Congress’ findings for national set-aside programs.\textsuperscript{297} Justice Scalia’s concurrence stated his desire to expand the number of situations in which strict scrutiny analysis could be applied.\textsuperscript{298} Justice Scalia also determined that state racial preferences should only be allowed as a remedy for eliminating the state’s own system of discrimination.\textsuperscript{299}

Justice Marshall’s dissent disagreed with using strict scrutiny as the proper analysis for a race-based remedial measure.\textsuperscript{300} In the absence of strict scrutiny, he offered a two-prong test in which (1) the governmental body would have to show an important objective and that (2) the means were substantially related to the accomplishment of those objectives.\textsuperscript{301} He criticized the majority’s “narrow view” of the facts needed to demonstrate a compelling state interest, and he also defended the tailoring of the plan.\textsuperscript{302}

\section*{The Decision to Apply Strict Scrutiny}

The decision in \textit{Croson} was the result of the defining and distinguishing of many minority preference cases.\textsuperscript{303} The \textit{Croson} decision results in a determination that strict scrutiny should be the standard of review in state and local set-aside cases.\textsuperscript{304} This standard forces the state or local entity to show a compelling local interest and a narrowly tailored plan.\textsuperscript{305} The question of the proper standard of review for racially preferential schemes has been problematic for the Court for years.\textsuperscript{306} Because whites were not considered to be a suspect class and employment was not a fundamental right, the Court under Chief Justice Warren would not have submitted the affirmative action set-aside employment schemes to a strict scrutiny review.\textsuperscript{307} Although Justice Marshall’s dissent attempts to resurrect this standard in

\begin{itemize}
  \item \textsuperscript{296} See \textit{supra} notes 65-70 and accompanying text.
  \item \textsuperscript{297} See \textit{supra} notes 71-73 and accompanying text.
  \item \textsuperscript{298} See \textit{supra} notes 74, 75 and accompanying text.
  \item \textsuperscript{299} \textit{Croson}, 109 S. Ct. at 737 (Scalia, J., concurring).
  \item \textsuperscript{300} Id. at 740 (Marshall, J., dissenting).
  \item \textsuperscript{301} See \textit{supra} notes 81-82 and accompanying text.
  \item \textsuperscript{302} See \textit{supra} notes 83-87 and accompanying text.
  \item \textsuperscript{303} \textit{Croson}, 109 S. Ct. at 370. See Regents of University of California v. Bakke, 438 U.S. 265 (considering a special minority admission program); Fullilove v. Klutznick, 448 U.S. 448 (considering a federal minority set-aside program); \textit{Wygant} v. Jackson Bd. of Ed., 476 U.S. 267 (considering a state minority set-aside program).
  \item \textsuperscript{304} See \textit{supra} notes 37, 71, 75 and accompanying text.
  \item \textsuperscript{305} \textit{Palmore} v. Sidoti, 466 U.S. 429, 432-33 (1984).
  \item \textsuperscript{306} See \textit{supra} notes 96-122 and accompanying text.
  \item \textsuperscript{307} \textit{New Orleans} v. Dukes, 427 U.S. 297, 303 (1976).
\end{itemize}
Croson, the Court has foregone these criteria in its decisions concerning equal protection claims against minority set-aside programs. Although the Croson majority was the first to declare that these programs should be subjected to a strict scrutiny analysis, the majority's view was the conclusion of an evolution that began with Justice Powell's opinion in Regents of the University of California v. Bakke which stressed that the guarantees of the equal protection clause could not be applied differently to people of different colors. The evolution ended with the plurality in Wygant v. Jackson Board of Education which had determined that minority-favoring racial classifications had to be subjected to a "more stringent standard." The evolution of the decisions of the Court in equal protection cases and the growing conservatism of the Court rendered the Croson decision consistent with past precedents and its result predictable.

THE CITY'S POWER TO ENACT RACIALLY PREFERENTIAL PROGRAMS

The Croson plurality also discussed the power of the state or local government to enact set-aside laws. The plurality made two determinations. First, Richmond had the authority to enact the program to eradicate the effects of private discrimination. This decision may appear to be in conflict with the statement of the Court in Wygant that "some showing of prior discrimination by the governmental unit involved" was necessary. The statements from Wygant and Croson are consistent because the Wygant case involved alleged discrimination by the school board, a governmental unit, while the Croson case involved alleged discrimination by private contractors.

Second, while Congress' authority to enact the racial preference programs was based on section five of the fourteenth amendment's equal protection clause, the states' power was instead based on sec-

310. Id. at 289-90.
312. Id. at 279.
313. See supra notes 124-67 and accompanying text. Since the Fullilove decision, President Reagan appointed Justices O'Connor, Scalia, and Kennedy to the Court. These Justices held that the Richmond City ordinance violated the equal protection clause. Croson, 109 S. Ct. at 706.
314. See supra notes 46, 47.
316. Id.
318. See Wygant, 476 U.S. at 270 (discussing governmental status of the school board); Croson, 109 S. Ct. at 720 (differentiating between public and private discrimination).
tion one of the amendment. This determination was criticized in Justice Kennedy's concurring opinion. Justice Kennedy's disagreement did not recognize that although states may feel a greater responsibility to remedy the effects of past discrimination today as opposed to when the fourteenth amendment was enacted in 1868, the history of equal protection cases has consistently recognized this clause as a grant of power to the federal government and a restraint on the power of state governments.

THE APPLICATION OF THE REQUIREMENTS OF STRICT SCRUTINY

The Richmond City Council offered five proofs of evidence of discrimination against MBEs. These five proofs were: (1) the ordinance stated on its face that it was remedial; (2) the testimony of industry experts; (3) the statistical disparity between the percentage of MBEs receiving public construction contracts and the percentage of blacks in the population; (4) the low MBE membership in local contractor's associations; and (5) the findings of national discrimination in the construction industry. The Court has discussed and criticized the first four of these proofs in its decisions. However, the findings of Congress were what the Richmond City Council and Justice Marshall relied on to show a valid state interest. As pointed out by a commentator on Fullilove v. Klutznick, there was an inherent error in applying national findings to a showing of a compelling local interest. Alternatively, the concurrence of Justice Scalia erred in the opposite direction by concluding that the fourteenth amendment forbids all state reparative racial preferences except when they were used to eliminate the state's own system of discrimination. Justice Scalia's concurrence disregarded the state's power to remedy past discrimination through classifications. Justice Scalia's conclusion also disregarded the power of the compelling interest test to exclude illegitimate uses of race classifications. Fi-

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319. Croson, 109 S. Ct. at 717. See supra notes 53-57 and accompanying text.
320. Id. at 718 (Kennedy, J., concurring).
321. See supra notes 98-100 and accompanying text.
322. Croson, 109 S. Ct. at 724. See infra note 323 and accompanying text.
323. Croson, 109 S. Ct. at 724.
324. See supra notes 222-22 and accompanying text.
326. 448 U.S. 448 (1980).
328. Croson, 109 S. Ct. at 737 (Scalia, J., concurring).
329. Id. at 719. This point was discussed in the plurality opinion when Justice O'Connor determined the states had the power "to eradicate the effects of private discrimination within [their] own legislative jurisdiction." Id.
330. Id. at 712. The plurality opinion held that a strict scrutiny analysis would prevent illegitimate uses of race. Id.
nally, although the Croson decision did not expressly hold that a governmental unit had to show a relationship between past discrimination and its present day effects, this causation factor may be a consideration in analyzing the evidence.\textsuperscript{331} If a governmental entity is bound to show past discrimination and a compelling interest in racial equality, it would only be reasonable for a court to require proof that the past discrimination is now affecting any present inequality.\textsuperscript{332}

The Court also discussed the tailoring of the plan to the compelling local interest.\textsuperscript{333} In the discussion of race neutral alternatives, the plurality failed to suggest the effectiveness of these alternatives or why Congress adopted the Public Works Employment Act of 1977\textsuperscript{334} instead of these alternatives.\textsuperscript{335} The plurality suggested that by simplifying the bidding process, lowering bond requirements, and giving training and financial aid to MBEs, the city could increase the accessibility of minority opportunities.\textsuperscript{336} This suggestion was made without the direction of any state or federal research or any court decisions that found these alternatives effective.\textsuperscript{337} Because Congress found these alternatives ineffective prior to passing the Public Works Employment Act, the plurality's suggestions lack evidentiary reality.\textsuperscript{338} Additionally, the Court, although criticizing the thirty percent quota provision of the Richmond plan, failed to suggest a workable system that would satisfy the narrowly tailored tier of strict scrutiny.\textsuperscript{339} Because the plurality's recommendations to narrowly tailor Richmond's plan lack evidentiary support, this may suggest that the race-conscious remedies were the only viable alternative in the city's attempt to remedy the effects of past discrimination.\textsuperscript{340}

In the final analysis, the decision in Croson proves to be a minor expansion on the Wygant decision and almost a restatement of the United States Courts of Appeals for the Sixth and Ninth Circuits application of the Wygant decision.\textsuperscript{341} The Croson majority carried forward the analysis used by the Wygant plurality which called for a compelling state purpose and narrowly tailored means and finally

\begin{footnotes}
\footnote{331.} Id. at 730.
\footnote{332.} Id. at 723.
\footnote{333.} Id. at 728.
\footnote{335.} See supra notes 65-74 and accompanying text.
\footnote{336.} Croson, 109 S. Ct. at 729.
\footnote{337.} See supra notes 65-70 and accompanying text.
\footnote{338.} Fullilove, 448 U.S. at 467.
\footnote{339.} See Croson, 109 S. Ct. at 728.
\footnote{340.} See supra notes 65-70, 336, 338 and accompanying text.
\footnote{341.} See Wygant, 476 U.S. at 274, Croson, 109 S. Ct. at 720; see also Associated General Contractors of California, Inc. v. City and County of San Francisco, 813 F.2d 922 (applying Wygant in the Ninth Circuit); and Michigan Road Builders Assoc., Inc. v. Milliken, 834 F.2d 583 (applying Wygant in the Sixth Circuit).
\end{footnotes}
adopted strict scrutiny as the level of review for state or local minority set-aside laws. The Croson plurality also corrected the application of the United States Court of Appeals for the Fourth Circuit of Wygant by stating that set-aside laws can be used to remedy private discrimination. This decision should put an end to the questions of the courts of appeals as to which tests have to be applied to race-based remedial classifications.

CONCLUSION

The result of City of Richmond v. J.A. Croson Co. is that all state and local set-aside programs will be judged on a strict scrutiny standard and subjected to an exacting demonstration of prior discrimination. Ideally, this will result in a well-defined, appropriate means of establishing racial equality. Practically, this will eliminate most all non-federal set-aside programs because of their failure to meet the Croson guidelines. This may ultimately result in the almost complete dependence on various race-neutral alternatives to create an equal opportunity for minorities. The future of race-based set-aside programs will be in the hands of the United States Congress. Because Congress is still empowered by the Fullilove v. Klutznick decision, future federal set-aside programs may be enacted to take the place of the soon-to-be, or already repealed, state and local set-aside programs.

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342. See supra notes 37, 163 and accompanying text.
343. See Croson, 109 S. Ct. at 720 (correcting the application of Wygant made in J.A. Croson Co. v. City of Richmond, 822 F.2d 1356 (4th Cir. 1987)); see supra notes 33, 58 and accompanying text.
344. See supra notes 169-217 and accompanying text.