CONSTITUTIONAL LAW—Race-Conscious Remedies Enacted by States and Their Local Subdivisions Are Subject to a Strict Scrutiny Standard of Equal Protection Review Under Which a Strong Basis in Evidence Must Demonstrate the Need for Racial Classifications in Eliminating the Effects of Identified Prior Discrimination in the Locality—*City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989).

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I. RICHMOND'S MINORITY SET-ASIDE PROGRAM

On April 11, 1983, the city council of Richmond, Virginia adopted a Minority Business Utilization Plan ("Plan") which required the prime contractors on city construction contracts to subcontract at least thirty percent of the contract to minority business enterprises ("MBEs").[1] The Plan de-

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1. Such plans are commonly known as "set-aside" programs. The Richmond Plan was enacted pursuant to two ordinances, Nos. 83-69-59 (Apr. 11, 1983) and 83-127-116 (June 20, 1983), *codified in* RICHMOND, VA., CODE ch. 24.1, art. I(F) (Part B) ¶ 27.10-27.20 and ch. 24.1, art. VIII-A (1983). The relevant provisions read as follows:

THE CITY OF RICHMOND HEREBY ORDAINS:

§ 1. That Article I, General Provisions, F. Part B, definitions, of Chapter 24.1, of the Richmond City Code of 1975, as amended, be and is hereby amended and reordained as follows:

F. *Part B — Definitions*

. . .

27.10 Minority Business Enterprise. A business at least fifty-one per cent of which is owned and controlled or fifty-one per cent minority-owned and operated by minority group members or, in case of a stock corporation, at least fifty-one per cent of the stock which is owned and controlled by minority group members.

27.20 Minority Group Members. Citizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts.

. . .

§ 2. That Chapter 24.1 of the Richmond City Code of 1975, as amended, be amended by adding therein a new article numbered Article VIII-A, entitled "Minority Business Utilization Plan," as follows:

ARTICLE VIII-A

fined an MBE as a business owned and controlled by at least fifty-one percent minority group members. The Plan defined "minority group members" as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts."[2] If the general contractor was a minority business, the thirty percent set-aside requirement was deemed fulfilled.[3] The Plan authorized the Director of General Services to promulgate regulations allowing waivers in those situations where a contractor proved to the director's satisfaction that the requirements of the set-aside could not be achieved.[4] Designating the Plan "remedial," the Richmond City Council enacted the set-aside "for the purpose of promoting wider participation by minority business enterprises in the construction of public projects."[5] The Plan was to be in force for approximately five years.[6]

Minority Business Utilization Plan

A. *Covered Contracts*

All contractors awarded construction contracts by the City shall subcontract at least thirty per cent of the contract to minority business enterprises. Where the general contractor is a minority business enterprise this requirement shall be deemed to be met by the award.

The City of Richmond in awarding contracts to its contractors, including suppliers, for the sale and furnishing of supplies, materials and equipment, for providing contractual services, and for writing and furnishing policies of insurance and surety bonds in which the City of Richmond is the principal insured or party for whom such bond is written and for which policy of insurance or bond the premium charged is billed to the City of Richmond, shall strive to obtain a minimum of twenty per cent of same from minority business enterprises in the annual aggregate expenditure for such contracts and services.

B. *Rules and Regulations*

The Director of the Department of General Services shall be authorized to promulgate rules and regulations to implement the above requirements, which rules and regulations shall allow waivers in those individual situations where a contractor can prove to the satisfaction of the director that the requirements herein cannot be achieved.

C. *Article Remedial: Effective through June 30, 1988*

This article is remedial and is enacted for the purpose of promoting wider participation by minority business enterprises in the construction of public projects, either as general contractors or subcontractors.

This article shall be in force and effect thirty days from adoption, but shall expire and terminate as of the last moment of June 30, 1988.

Reprinted in Appellant's Jurisdictional Statement, Supplemental Appendix H at 233, City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989) (No. 87-998).

2. *See supra* note 1.

3. *See supra* note 1.

4. *Id.*

5. *Id.* In her presentation of the facts of this case, Justice O'Connor noted that "there was no geographic limit to the Plan; an otherwise qualified MBE from anywhere in the United States could avail itself of the 30% set-aside." City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 713 (1989).

6. Although Richmond's Plan expired on June 30, 1988, a controversy remained over whether J. A. Croson Company was entitled to recover damages resulting from Richmond's

On September 6, 1983, the city of Richmond invited bids on a project for the provision and "installation of stainless steel urinals and water closets in the city jail."[7] J.A. Croson Company ("Croson"), a mechanical plumbing and heating contractor, intended to bid on the project and determined that it would need to secure a minority contractor to supply the fixtures in order to meet the thirty percent set-aside requirement.[8] Croson contacted five or six MBEs as potential suppliers, but none expressed interest in the project.[9] The day bids were due, Croson again contacted a group of MBEs in a final attempt to secure minority business participation.[10] This time, a local MBE, Continental Metal Hose ("Continental"), indicated that it wished to participate.[11]

Croson turned out to be the project's only bidder when the sealed bids were opened on October 13, 1983.[12] However, Continental failed to submit a bid to Croson due to difficulties in obtaining credit approval from one of the fixture manufacturers specified by the city.[13] By October 19, 1983 Croson was still without a bid from Continental so it submitted a request to the city for a waiver of the thirty percent set-aside.[14]

After learning of Croson's waiver request, Continental successfully renewed its efforts to obtain a price quotation from the other manufacturer specified by the city.[15] Continental then submitted a bid to Croson and contacted city procurement officials to inform them that an MBE could supply the fixtures for the city jail project.[16] Subsequently, the city denied Croson's waiver request.[17]

In correspondence with the city Croson again requested a waiver.[18] In the alternative Croson detailed the additional costs involved in using Continental to supply the fixtures and asked that the overall contract price be

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refusal to award it the city contract. Brief for Appellant at 7 n.20, City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989) (No. 87-998).

7. City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 715 (1989).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* "Croson's waiver request indicated that Continental was 'unqualified' and that the other MBEs contacted had been unresponsive or unable to quote." *Id.*

15. *Id.*

16. *Id.*

17. *Id.* The city informed Croson that it had ten days to submit an MBE Utilization Commitment Form and that failure to submit the Form could result in its bid being deemed unresponsive. *Id.*

18. *Id.* In a letter sent to the city on November 8, 1983, Croson indicated that Continental was not an authorized supplier for the manufacturer, that the quotation given was subject to credit approval and was substantially higher than other quotations, and that Continental's bid was 21 days late. *Id.*

raised accordingly.[19] The city refused to waive the thirty percent MBE requirement and rejected the suggestion to raise the contract price, informing Croson that it had elected to rebid the city jail project.[20]

Croson brought an action under title 42 of the United States Code section 1983[21] in the United States District Court for the Eastern District of Virginia, attacking the Richmond Minority Business Utilization Plan as a violation of the fourteenth amendment[22] on its face and as applied.[23] The district court upheld the Plan, finding the thirty percent set-aside goal "hardly unreasonable" given that past discrimination had undeniably limited minority participation in the construction industry.[24]

In its first disposition of the case, a divided panel of the Fourth Circuit Court of Appeals affirmed the district court's decision.[25] The court applied what it called a "synthesized *Fullilove* test," a general guideline reflecting "the common concerns articulated by the various Supreme Court opinions" in judging the constitutionality of set-aside plans.[26]

In upholding the Richmond Plan, the court of appeals relied on the Supreme Court's decision in *Fullilove v. Klutznick*[27] which held constitutional

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19. *Id.* "Continental's bid was $6,183.29 higher than the price Croson had included for the fixtures in its bid to the city. This constituted a 7% increase over the market price for the fixtures. With added bonding and insurance, using Continental would have raised the cost of the project by $7,663.16." *Id.*

20. *Id.*

21. Civil Rights Act, 42 U.S.C. § 1983 (1982) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the person injured in an action of law, suit in equity, or other proper proceedings for redress . . . .

22. The fourteenth amendment provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
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> . . . .
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> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV, §§ 1, 5.

23. J.A. Croson Co. v. City of Richmond, No. 84-0021-R (E.D. Va. Dec. 3, 1984), *reprinted in* Appellant's Jurisdictional Statement, Appendix G, memorandum of the District Court, at 112-232, City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989) (No. 87-998).

24. *Id.* at 180-81.

25. J.A. Croson Co. v. City of Richmond, 779 F.2d 181 (4th Cir. 1985) (Croson I) *cert. granted, judgment vacated*, 478 U.S. 1016 (1986).

26. *Id.* at 188.

27. Fullilove v. Klutznick, 448 U.S. 448 (1980). *See infra* note 61 and accompanying text.

a ten percent minority set-aside program for certain federal construction grants. Following the example set by the Supreme Court's deferential attitude toward Congressional findings of past discrimination in *Fullilove*, the court of appeals gave similar deference to the findings made by the Richmond City Council.[28]

The court of appeals reviewed the record of the city council's public hearing on the adoption of the Minority Business Utilization Plan.[29] Those at the hearing who spoke in favor of the program pointed to a study which showed that although the general population of Richmond was fifty percent black, minority businesses had been awarded only .67% of the city's prime construction contracts in the years 1978 to 1983.[30] Furthermore, testimony revealed a near absence of minority business membership in a variety of Richmond's construction trade associations.[31] Although participants in the hearing did not present direct evidence of discrimination against minority contractors on the part of the city or its prime contractors,[32] one councilperson stated that he was familiar with practices of the construction industry in the Richmond area, and that exclusion on the basis of race was widespread.[33] The city attorney expressed his opinion that the Richmond Plan was constitutional because it closely conformed to the federal set-aside upheld in *Fullilove v. Klutznick*.[34]

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28. The court of appeals, quoting *Fullilove*, stated:

> Unlike the review we make of a lower court decision, our task is not to determine if there was sufficient evidence to sustain the council majority's position in any traditional sense of weighing evidence. Rather, it is to determine whether "the legislative history . . . demonstrates that [the council] reasonably concluded that . . . private and governmental discrimination had contributed to the negligible percentage of public contracts awarded minority contractors."

J.A. Croson Co. v. City of Richmond, 779 F.2d 181, 190 (4th Cir. 1985) (Croson I) (quoting Fullilove v. Klutznick, 448 U.S. at 503 (Powell, J., concurring)).

29. *Id.* at 189-90. The transcript of the hearing is set out in Appellee and Appellant's Joint Appendix at 9-50, City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989) (No. 87-998) [hereinafter Joint Appendix].

30. *See* Joint Appendix, *supra* note 29, at 41, 43; Brief for Appellant at 3-4, n.1, City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989) (No. 87-998).

31. Joint Appendix, *supra* note 29, at 27-28, 34, 36, 39-40. *See also* Brief for Appellant at 22, City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989) (No. 87-988) (chart of black membership in Richmond's major construction trade associations in 1983).

32. *See* Joint Appendix, *supra* note 29, at 42 (statement of Councilperson Kemp).

33. *Id.* at 41 (statement of Councilperson Marsh).

34. *Id.* at 15. The City Attorney, Mr. Hefty, stated:

> [City Attorney]: No, I don't feel that we're exposing ourselves to liability, but the Supreme Court, when it approved the ten percent minority set-aside, specifically said that the justification was that it was remedial. We've reviewed the statistics of the construction contracts, and it certainly justifies that. We have tried to tailor this ordinance as closely to the federal ordinance, which was—or federal statute, which was upheld by the Supreme Court, as possible. And, yes, it is remedial. I don't think that's exposing us to any liability for prior acts.
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> [Councilperson]: Question. Doesn't the word remedial mean to make special ef-

Opponents of the Richmond set-aside plan disputed the inference of discrimination drawn from the disparity between the percentage of minority population and the percentage of contracts awarded to MBEs. They contended that this disparity had little probative value in establishing discrimination in the Richmond construction industry.[35] Representatives from local contractor associations doubted that enough MBEs existed in the Richmond area to satisfy the thirty percent set-aside requirement, and stated that not only did their organizations not discriminate on the basis of race, but were, in fact, actively seeking out minority members.[36] One council member expressed concern about the legality of the Plan in general and abstained from voting on the ordinance, which was enacted by a vote of six to two.[37]

The court of appeals found the city council's conclusion that past racial discrimination had contributed to low minority participation in public contracts "reasonable" in light of the total information made available to the council—the congressional findings of nationwide discrimination in the industry, the testimony of witnesses at the council meeting, and the statistical study.[38] Croson sought certiorari from the United States Supreme Court.[39] The Court granted the writ, vacated the opinion of the Fourth Circuit Court of Appeals, and remanded[40] the case for further consideration in light of the intervening Supreme Court decision in *Wygant v. Jackson Board of Education*.[41]

On remand, a divided panel of the court of appeals struck down the Richmond Plan as invalid under the equal protection clause of the fourteenth amendment.[42] The majority found that the Richmond City Council had violated the "core" of *Wygant*: that a municipality cannot employ racial preferences merely on the basis of "broad-brush assumptions of historical

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forts at the moment and in the near future to make up for prior deficiencies?

[City Attorney]: Yes. In the term remedial, we're not just implying that the City was intentionally discriminatory in the past. What we're saying is there are statistics about the number of minorities that were awarded contracts in the past which would justify the remedial aspect of the legislation. We're not saying there was intentional discrimination in any particular case. Surprisingly, or maybe not so surprisingly, when the Supreme Court dealt with this issue, they allowed . . . evidence of general discrimination—at least discriminatory effect in the entire industry—construction industry. And they allowed more use of broader statistics than they do in a lot of cases. I'm not saying that we have discriminated in any individual case in the past.

Id.

35. *Id.* at 30 (statement of Councilperson Wake).

36. *Id.* at 20, 31-38 (statements of Mr. Watts, Beck, Singer, Murphy, and Shuman).

37. *Id.* at 45 (statement of Councilperson Gillespie).

38. J.A. Croson Co. v. City of Richmond, 779 F.2d 181, 189-90 (4th Cir. 1985) (Croson I).

39. *See* J.A. Croson Co. v. City of Richmond, 478 U.S. 1016 (1986).

40. *Id.*

41. Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986). *See infra* note 72 and accompanying text.

42. J.A. Croson Co. v. City of Richmond, 822 F.2d 1355, 1356 (4th Cir. 1987) (Croson II).

discrimination."[43] In the court's view the city council must find " 'prior discrimination *by the government* [sic] *unit involved*' " in order to establish a sufficient basis for remedial action through racial preferences.[44] Thus, the court of appeals required a finding of prior discrimination *by the city* in awarding public contracts.[45] The evidence presented to the city council failed to support such a finding.[46]

Showing that only .67% of the dollar value of the city contracts went to minority firms in a city with a fifty percent minority population did not itself establish prior discrimination. The appropriate comparison was "between the number of minority contracts and the number of minority *contractors* . . . ."[47] The court flatly rejected the contention that *Fullilove*'s national findings of discrimination in the construction industry could establish a need for action in Richmond's particular locality.[48]

In addition, the court of appeals found the Richmond Plan not narrowly tailored to remedying past discrimination. The thirty percent set-aside figure and the definition of minority-owned business were overbroad.[49]

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43. *Id.* at 1357.

44. *Id.* at 1358 (emphasis in original) (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986)).

45. *Id.* The Supreme Court's opinion in City of Richmond v. J.A. Croson Co., 109 S. Ct. at 720, found this interpretation of *Wygant*'s holding too restrictive. *See infra* notes 75-80 and accompanying text.

46. J.A. Croson Co. v. City of Richmond, 822 F.2d at 1359. The court of appeals stated:

> In sum, the omissions in this case overshadow the evidence. There has been no showing that qualified minority contractors who submitted low bids were passed over. There has been no showing that minority firms were excluded from the bidding pool . . . . There has been no showing—only the loosest sort of inferences—of past discrimination, without which *Wygant* does not permit a racial preference to stand.

Id.

47. *Id.* (emphasis in original). The court further stated:

> The able judge could not point to any evidence beyond that relied upon by the City Council—namely, the spurious statistical comparison and the nearly weightless testimony. We cannot uphold the plan based on this evidence, nor would it be proper for us to develop a *post hoc* rationale for the city's racial preference.

Id.

48. *Id.* In this regard, the court commented:

> Localities cannot disregard the line between remedial measures and political transfers by adopting the *Fullilove* program as though it were boilerplate . . . . If this plan is supported by a compelling governmental interest, then so is every other plan that has been enacted in the past or that will be enacted in the future.

Id. at 1360. For an eighth circuit case reviewing a set-aside plan decided prior to *Wygant*, see Valentine v. Smith, 654 F.2d 503 (8th Cir. 1981).

49. J.A. Croson v. City of Richmond, 822 F.2d at 1360-61. In particular, the court of appeals made the following criticisms:

> The thirty percent quota was chosen arbitrarily; it was not tied, for example, to a showing that thirty percent of Richmond subcontractors are minority-owned. The figure simply emerged from the mists. The combination of a large set-aside and a small number of actual minority beneficiaries presents a special potential for abuse. As such, it imposes an overbroad competitive burden on non-minority businesses . . . .

Although the waiver provision and five-year limited life of the Plan helped narrow its scope, they could not "salvage an ordinance which otherwise transgresses *Wygant*'s standards."[50]

The City of Richmond appealed[51] and the United States Supreme Court *held*, affirmed.[52] The factual predicate offered by Richmond in support of its thirty percent minority set-aside program failed to sufficiently identify the need for race-conscious remedial action in the awarding of its public construction contracts when examined under the strict scrutiny standard of equal protection review for racial classifications. *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989).

II. The Scope of State and Local Power to Eradicate the Effects of Private Discrimination Through Race-Based Measures[53]

Justice O'Connor, writing the majority opinion,[54] initially addressed the question of power possessed by states and their political subdivisions to identify and remedy the effects of private discrimination through legislation using race as a criterion.[55] On this point, Croson argued that the holding of *Wygant* meant that Richmond's race-based remedial efforts must be limited to eliminating the effects of the city's own prior acts of discrimination.[56] The City of Richmond argued that the decision in *Fullilove* was controlling, and that was, in Justice O'Connor's words, an argument that the city enjoyed "sweeping legislative power to define and attack the effects of prior discrimination in its local construction industry."[57] The Court rejected both of these "rather stark alternatives."[58] The Court's treatment of an act of congressional power in *Fullilove* was not dispositive in this case,[59] and the court of

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> A record of prior discrimination against blacks by a governmental unit would not justify a remedial plan that also favors other minority races.

Id.

50. *Id.* at 1361.

51. *See* City of Richmond v. J.A. Croson Co., 108 S. Ct. 1010 (1988).

52. City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 717 (1989).

53. This issue is addressed in Part II of the opinion written by Justice O'Connor.

54. With respect to Part II of Justice O'Connor's opinion, only Chief Justice Rehnquist and Justice White joined. Justice Stevens, concurring in part and in the judgment, joined Parts II, III-B, and IV of the opinion. Justice Kennedy, concurring in part and in the judgment, joined all but Part II of Justice O'Connor's opinion. Justice Scalia concurred in the judgment. Justice Marshall was joined by Justice Brennan and Justice Blackmun in dissent.

55. City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 717 (1989).

56. *Id.* In essence this was the position taken by the court of appeals in *Croson II*: "[P]roceedings before the City Council failed to establish the basis for remedial action . . . . The debate . . . revealed no record of prior discrimination by the city in awarding public contracts . . . ." J.A. Croson v. City of Richmond, 822 F.2d 1355, 1358 (4th Cir. 1987) (Croson II). *See supra* notes 44-45 and accompanying text.

57. City of Richmond v. J.A. Croson Co., 109 S. Ct. at 717.

58. *Id.*

59. *Id.* at 720.

appeals erred in following *Wygant* "by rote" when the court limited the city's legislative remedial power to addressing its own discriminatory practice.[60]

Justice O'Connor first discussed Richmond's misplaced reliance on *Fullilove*[61] for "the proposition that a city council, like Congress, need not make specific findings of discrimination to engage in race-conscious relief."[62] Jus-

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60. *Id.*

61. In Fullilove v. Klutznick, 448 U.S. 448 (1980), the Court upheld the minority set-aside provisions of the Public Works Employment Act of 1977, Pub. L. No. 94-28, 91 Stat. 116 (codified at 42 U.S.C. §§ 6701-6710, 6721-6736 (1982)). The Act appropriated funds for federal grants to state and local governments for use in public works projects. *Id.* at 453. The petitioners in *Fullilove*, several associations of construction contractors, challenged the Act's ten percent minority set-aside requirement alleging that the provision violated the equal protection clause of the fourteenth amendment. *Id.* at 455.

Section 103(f)(2), the set-aside provision of the Act, requires:

> Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 per centum of which is owned by minority ground members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.

91 Stat. 116, 42 U.S.C. § 6705(f)(2) (1982).

The Economic Development Administration (EDA) issues guidelines supplementing the statute and the regulations promulgated thereunder that provide:

> The primary obligation for carrying out the 10% MBE participation requirement rests with EDA Grantees . . . . The Grantee and those of its contractors which will make subcontracts or purchase substantial supplies from other firms . . . must seek out all available *bona fide* MBE's and make every effort to use as many of them as possible on the project . . . .

U.S. DEPT. OF COMMERCE, ECONOMIC DEVELOPMENT ADMINISTRATION, LOCAL PUBLIC WORKS PROGRAM, ROUND II, GUIDELINES FOR 10% MINORITY BUSINESS PARTICIPATION IN LPW GRANTS, at 2-7 (1977). The guidelines continue:

> Although a provision for waiver is included under this section of the Act, EDA will only approve a waiver under exceptional circumstances. The Grantee must demonstrate that there are not sufficient, relevant, qualified minority business enterprises whose market areas include the project location to justify a waiver. The Grantee must detail in its waiver request the efforts the Grantee and potential contractors have exerted to locate and enlist MBE's. The request must indicate the specific MBE's which were contacted and the reason each MBE was not used . . . .

Id. at 13-15. *See* Fullilove v. Klutznick, 448 U.S. at 492-95 (Appendix to Opinion of Burger, C.J.).

62. City of Richmond v. J.A. Croson Co., 109 S. Ct. at 719. Justice O'Connor was responding to Richmond's contention that "[i]t would be a perversion of federalism to hold that the federal government has a compelling interest in remedying the effects of racial discrimination in its own public works program, but a city government does not." Brief for Appellant at 32, City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989) (No. 87-998).

tice O'Connor noted that the standard of review employed by Chief Justice Burger in *Fullilove* was not strict scrutiny nor any other test traditional to equal protection cases.[63] State and local government compliance with the federal minority set-aside upheld in *Fullilove* could be mandated by Congress pursuant to its section 5 power to enforce the fourteenth amendment.[64] In evaluating Congress' broad power to remedy discrimination with the race-conscious measures of the federal set-aside, Chief Justice Burger stressed two factors: the "unique remedial powers of Congress" under section 5 of the fourteenth amendment and the nature of the ten percent set-aside made flexible by virtue of its waiver provisions.[65]

The principal opinion in *Fullilove* concluded that Congress had before it abundant evidence from which it could reasonably determine that the set-aside was an appropriate remedy to ensure that minority businesses were not denied participation in federal construction grants by traditional procurement practices that perpetuated the effects of prior discrimination.[66]

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63. City of Richmond v. J.A. Croson Co., 109 S. Ct. at 717. The dissent points out that Chief Justice Burger concluded that the federal set-aside would have survived judicial review under either strict or intermediate scrutiny. *Id.* at 741 (Marshall, J., dissenting) (citing Fullilove v. Klutznick, 448 U.S. at 492). In *Fullilove* Chief Justice Burger stated:

> A program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to "provide for the . . . general Welfare of the United States" and "to enforce, by appropriate legislation," the equal protection guarantees of the Fourteenth Amendment. . . .
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> . . . .
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> Our analysis proceeds in two steps. At the outset, we must inquire whether the *objectives* of this legislation are within the power of Congress. If so, we must go on to decide whether the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible *means* for achieving the congressional objectives and does not violate the equal protection component of the Due Process Clause of the Fifth Amendment.

Fullilove v. Klutznick, 448 U.S. at 472-73 (emphasis in original).

64. City of Richmond v. J.A. Croson Co., 109 S. Ct. at 718 (citing Fullilove v. Klutznick, 448 U.S. at 476).

65. *Id.* Justice O'Connor found significant the following language from *Fullilove*:

> Here we deal, as we noted earlier, not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that *in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress*, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees. Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to *declare certain conduct unlawful*, it may, as here, authorize and induce state action to avoid such conduct.

Id. (quoting Fullilove v. Klutznick, 448 U.S. at 483-84 (plurality opinion)) (emphasis added).

66. City of Richmond v. J.A. Croson Co., 109 S. Ct. at 718 (citing Fullilove v. Klutznick, 448 U.S. at 477-78).

In particular, the *Fullilove* opinion cited 1975 and 1977 reports by the House Committee

Justice O'Connor also noted that Justice Powell made it clear in his concurring opinion in *Fullilove* that state and local entities may have to make more specific findings of past discrimination than Congress, before enacting race-conscious measures.[67]

The City of Richmond's reliance on *Fullilove* was misguided because it ignored that section 1 of the fourteenth amendment is a *constraint* on state and local power to adopt race-based remedial measures to combat discrimination, while under section 5 of the amendment, Congress has a *positive* constitutional mandate to enforce its dictates. That mandate includes a broad power to identify and remedy the effects of nation-wide discrimination.[68] Justice O'Connor expressed the opinion of three Justices[69] in this regard:

> That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate. Section 1 of the Fourteenth Amendment is an explicit *constraint* on state power, and the States must undertake any remedial efforts in accordance with that provision. To hold otherwise would be to cede control over the content of the Equal Protection Clause to the 50 state legislatures and their myriad political subdivisions. The mere recitation of a benign or compensatory purpose for the use of a racial classification would essentially entitle the States to exercise the full power of Congress under § 5 of the Fourteenth Amendment and insulate any racial classification from judicial scrutiny under § 1. We believe that such a result would be contrary to the intentions of the Framers of the Fourteenth Amendment, who desired to place clear limits on the States' use of race as a criterion for legislative action, and to have the federal courts enforce those limitations.[70]

Thus, *Fullilove*'s treatment of a congressional set-aside program could not

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on Small Business, H.R. REP. No. 468, 94th Cong., 1st Sess. 1-2 (1975); H.R. REP. No. 1791, 94th Cong., 2d Sess. 182 (1977); and a 1975 report submitted to Congress by the United States Commission on Civil Rights, H.R. REP. No. 468, 94th Cong., 1st Sess. 28-30 (1975). *See* Fullilove v. Klutznick, 448 U.S. at 465-67.

Congressman Parren Mitchell of Maryland, introducing the ten percent set-aside provision of the Act on the House floor on February 23, 1977, "cited the marked statistical disparity that in fiscal year 1976 less than 1% of all federal procurement was concluded with minority business enterprises, although minorities comprised 15-18% of the population." Fullilove v. Klutznick, 448 U.S. at 458-59 (citation omitted).

67. City of Richmond v. J.A. Croson Co., 109 S. Ct. at 719. Justice Powell commented in a footnote: "The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of the governmental body." Fullilove v. Klutznick, 448 U.S. at 515-16 n.14.

68. City of Richmond v. J.A. Croson Co., 109 S. Ct. at 719.

69. *Id.* Justice O'Connor was joined by Chief Justice Rehnquist and Justice White.

70. *Id.*

be dispositive in Richmond's case.[71]

It was clear to Justice O'Connor that a state or a local subdivision with authority delegated from the state has the authority to adopt measures designed to remedy private discrimination provided such authority is "exercised within the constraints of § 1 of the Fourteenth Amendment."[72] That is, the state or local governmental entity must identify discriminatory practices "with the particularity required" by the amendment.[73] If the City of Richmond could show that exclusionary practices based on race existed in the local construction industry, and that in awarding contracts the city had become a "passive participant" in the discriminatory system, then Richmond, within constitutional bounds, could exercise its legislative authority over procurement policy to enact a set-aside program.[74]

Justice O'Connor next commented on the court of appeals' application of *Wygant*[75] to the *Richmond* case.[76] The *Wygant* plurality, in striking down a race-based layoff, stated that classifications based on race required "some showing of prior discrimination *by the governmental unit involved.*"[77] The court of appeals erroneously lifted this language out of the context of *Wygant* and applied it literally to the facts in *Richmond*.[78] On the question of Richmond's competence to enact race-conscious remedies, the court of appeals erred to the extent that it limited the city's power to only those instances where it could be found that the city itself had discriminated against minorities in awarding construction contracts.[79] Justice O'Connor distinguished the school board in *Wygant* from the City of Richmond on the basis that the city was "a state entity which ha[d] state-law authority to address

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71. *Id.* at 720.

72. *Id.*

73. *Id.*

74. *Id.*

75. Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986). In *Wygant* the Court struck down, as violative of the equal protection clause of the fourteenth amendment, a provision in a collective bargaining agreement which protected certain minority school teachers against layoffs. *Id.* at 284. The provision resulted in the layoff of nonminority teachers, while minority teachers with less seniority were retained. *Id.* at 271. In a plurality opinion, Justice Powell applied a two-prong test to the racial preference; "First, any racial classification 'must be justified by a compelling governmental interest' . . . . Second, the means chosen by the State to effectuate its purpose must be 'narrowly tailored to the achievement of that goal.' " *Id.* at 274 (citations omitted). The racial preference in this case failed to pass constitutional muster because the Board's layoff plan was not supported by particularized findings of prior discrimination in hiring practices, and the plan was not narrowly tailored to remedy the asserted purpose. *Id.* at 276, 283.

76. City of Richmond v. J.A. Croson Co., 109 S. Ct. at 720.

77. Wygant v. Jackson Bd. of Educ., 476 U.S. at 274 (emphasis added).

78. City of Richmond v. J.A. Croson Co., 109 S. Ct. at 720. Justice O'Connor noted that the plurality opinion of *Wygant* used this language "in the context of addressing the school board's power to adopt a race-based layoff program affecting its own work force." *Id.*

79. *Id.*

discriminatory practices within local commerce under its jurisdiction."[80] The City of Richmond had the authority, then, as a matter of state law, to use its procurement policies to remedy *private* discrimination; it was not limited, as the court of appeals seemed to indicate, to combating the effects of any discrimination practiced by city officials.

Justice Scalia, concurring in the judgment of the Court, agreed with the view taken by the court of appeals and criticized by Justice O'Connor.[81] He would further limit the states' power to enact race-conscious measures to those circumstances where it is "necessary to eliminate their own maintenance of a system of unlawful racial classification."[82] Although in some contexts the Court had approved of federal use of race classification to remedy the effects of past discrimination, Justice Scalia did not believe those holdings should be extended to the states.[83] In his view, the Court should not permit race-conscious remedies to be prescribed by "the precise entities against whose conduct in matters of race [the Fourteenth] Amendment was specifically directed."[84] The preferred alternative available to a state is to eliminate the effects of past discrimination through "race-neutral remediation."[85]

Justice Marshall, joined by Justices Brennan and Blackmun in dissent, profoundly disagreed with the majority's "cramped vision of the Equal Protection Clause."[86] To the extent that section 1 or section 5 of the fourteenth amendment was interpreted as proscribing state and local remedial responses to past racial discrimination, the majority had turned the amendment on its head.[87] According to the dissent, the Court's precedents had

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80. *Id.*

81. *See generally id.* at 735 (Scalia, J., concurring).

82. *Id.* at 737 (Scalia, J., concurring). Justice Scalia explained:

> If, for example, a state agency has a discriminatory pay scale compensating black employees in all positions at 20% less than their nonblack counterparts, it may assuredly promulgate an order raising the salaries of 'all black employees' by 20%. Cf. *Bazemore v. Friday*, 478 U.S. 385, 395-96 (1986). This distinction explains our school desegregation cases, in which we have made plain that States and localities sometimes have an obligation to adopt race-conscious remedies.

Id.

83. *Id.* at 736 (Scalia, J., concurring).

84. *Id.* (Scalia, J., concurring).

85. *Id.* at 738 (Scalia, J., concurring). Race-neutral remediation could include a program according preferences to "identified victims of discrimination":

> [A State could] for example, giv[e] to a previously rejected black applicant a job that, by reason of discrimination, had been awarded to a white applicant, even if this means terminating the latter's employment. In such a context, the white job-holder is not being selected for disadvantageous treatment because of his race, but because he was wrongfully awarded a job to which another is entitled. That is worlds apart from the system here, in which those to be disadvantaged are identified solely by race.

Id.

86. *Id.* at 757 (Marshall, J., dissenting).

87. *Id.* at 756 (Marshall, J., dissenting).

never suggested that section 5 was meant to "pre-empt or limit state police power to undertake race-conscious remedial measures."[88] Because the Court's school desegregation, voting rights, and affirmative action cases have repeatedly demonstrated that "race is constitutionally germane," the dissent believed it "too late in the day" for the majority to seriously assert that section 1 prohibited states from adopting race-conscious remedies.[89] The dissent concluded that there was simply nothing in the fourteenth amendment or in Court precedent which suggests that states "exercising their police power, are in any way constitutionally inhibited from working alongside the Federal Government in the fight against discrimination and its effects."[90]

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88. *Id.* at 755 (Marshall, J., dissenting). Justice Marshall continued:

> Certainly *Fullilove* did not view section 5 either as limiting the traditionally broad police powers of the States to fight discrimination, or as mandating a zero-sum game in which state power wanes as federal power waxes. On the contrary, the *Fullilove* plurality invoked section 5 only because it provided specific and certain authorization for the Federal Government's attempt to impose a race-conscious condition on the dispensation of federal funds by state and local grantees.

Id.

Justice O'Connor responded to the dissent:

> We do not, as Justice Marshall's dissent suggests . . . find in section 5 of the Fourteenth Amendment some form of federal pre-emption in matters of race. We simply note what should be apparent to all—section 1 of the Fourteenth Amendment stemmed from a distrust of state legislative enactments based on race; section 5 is, as the dissent notes, " 'a positive grant of legislative power' " to Congress.

Id. at 720.

89. *Id.* at 755 (Marshall, J., dissenting). In the dissent's view, by restricting the use of race-based remedial measures to those situations in which the state or locality can make a prima facie showing of a constitutional or statutory violation, the majority was closing its eyes to "constitutional history and social reality." *Id.* (Marshall, J., dissenting). Justice Marshall criticized Justice Scalia's attempt to further limit states' power in this area and to distinguish the school desegregation cases:

> [T]his Court's remedy-stage school desegregation decisions cannot so conveniently be cordoned off. These decisions (like those involving voting rights and affirmative action) stand for the same broad principles of equal protection which Richmond seeks to vindicate in this case: all persons have equal worth, and it is permissible, given a sufficient factual predicate and appropriate tailoring, for government to take account of race to eradicate the present effects of race-based subjugation denying that basic equality. Justice Scalia's artful distinction allows him to avoid having to repudiate 'our school desegregation cases,' . . . but, like the arbitrary limitation on race-conscious relief adopted by the majority, his approach 'would freeze the status quo that is the very target' of the remedial actions of States and localities.

Id. at 755-56 (Marshall, J., dissenting) (citations omitted). *See supra* notes 82-83 and accompanying text.

90. *Id.* at 757 (Marshall, J., dissenting). *See* University of California Regents v. Bakke, 438 U.S. 265, 368 (1978) ("[There is] no reason to conclude that the States cannot voluntarily accomplish under § 1 of the Fourteenth Amendment what Congress under § 5 of the Fourteenth Amendment validly may authorize or compel either the States or private persons to do.").

Justice Kennedy declined to join Justice O'Connor's opinion only on this question of the scope of state power under the fourteenth amendment. He had difficulty accepting a "process by which a law that is an equal protection violation when enacted by a State becomes transformed to an equal protection guarantee when enacted by Congress . . . ."[91] Justice Kennedy did not, however, believe this issue was before the Court.[92]

Thus, five members of the Court agreed that a local subdivision, if delegated the authority from the state, has the power to employ race-based measures to eradicate not only the effects of its own prior discriminatory practices, but that of private discrimination within its legislative jurisdiction as well.[93] Of course, this assumes that the local subdivision has identified the prior discrimination with enough specificity to satisfy the requirements of the fourteenth amendment. It is precisely on this issue of sufficient identification of past discrimination that Richmond's set-aside program failed to satisfy a majority of the Court.

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91. City of Richmond v. J.A. Croson Co., 109 S. Ct. at 734 (Kennedy, J., concurring).

92. *Id.* (Kennedy, J., concurring). Justice Kennedy further commented:

> For purposes of the ordinance challenged here, it suffices to say that the State has the power to eradicate racial discrimination and its effects in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself. The Fourteenth Amendment ought not to be interpreted to reduce a State's authority in this regard, unless, of course, there is a conflict with federal law or a state remedy is itself a violation of equal protection. The latter is the case presented here.

Id.

Justice Stevens also declined to join Part II of Justice O'Connor's opinion; however, he did not directly address the federalism issue:

> [I] do not agree with the premise that seems to underlie today's decision, as well as the decision in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), that a government decision that rests on a racial classification is never permissible except as a remedy for a past wrong . . . I do, however, agree with the Court's explanation of why the Richmond ordinance cannot be justified as a remedy for past discrimination, and therefore join Parts I, III-B, and IV of its opinion.

Id. at 730-31 (Stevens, J., concurring).

93. Chief Justice Rehnquist and Justice White joined the opinion authored by Justice O'Connor. Justice Kennedy agreed with much of Justice O'Connor's opinion in Part II. *See supra* note 92. Justice Stevens stated he would broaden state and local power in this regard and also acknowledge that some race-based policy decisions may serve legitimate public purposes other than purely remedial goals. See supra note 92 and City of Richmond v. J.A. Croson Co., 109 S. Ct. at 730, n.1 (Stevens, J., concurring).

Justice Scalia was in disagreement on this point, preferring to limit state and local enactment of race-conscious measures to remedying their own governmental maintenance of discriminatory practices. *See supra* notes 82-83 and accompanying text.

III. The Appropriate Level of Judicial Scrutiny for Racial Classifications Designed to Further Remedial Goals and Its Application to the Richmond Plan[94]

For the first time[95] a majority of the Supreme Court has adopted strict

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94. In Part III-A of her opinion, Justice O'Connor addressed the question of strict scrutiny as the level of review appropriate for affirmative action programs. *See* City of Richmond v. J.A. Croson Co., 109 S. Ct. at 720. Chief Justice Rehnquist, Justice White, and Justice Kennedy joined. *Id.* at 712.

Justice Stevens did not join Part III-A of the opinion; "[I]nstead of engaging in a debate over the proper standard of review to apply in affirmative-action litigation, . . . I believe it is more constructive to try to identify the characteristics of the advantaged and disadvantaged classes that may justify their disparate treatment." *Id.* at 732 (Stevens, J., concurring) (citations omitted).

Parts III-B and IV reviewed the factual predicate offered in support of the Richmond Plan and the city's failure to demonstrate a compelling interest and a narrowly tailored program. *Id.* at 723, 728. Chief Justice Rehnquist and Justices White, Kennedy, and Stevens joined. *Id.* at 712.

Justice Scalia, concurring in the judgment, agreed "with much of the Court's opinion, and, in particular, with its conclusion that strict scrutiny must be applied to all governmental classification by race . . . ." *Id.* at 735 (Scalia, J., concurring).

Justice Marshall, joined by Justices Brennan and Blackmun, dissented. *Id.* at 739.

95. In Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265 (1978), a medical school's admissions program set aside a certain number of positions for minority students in each entering class. *Id.* at 275. The program was struck down in a five-to-four decision. *Id.* at 320. Four members of the Court concluded that an intermediate level of scrutiny of racial classification is appropriate when the state objective is to eliminate the effects of past discrimination. *Id.* at 359 (opinion of Brennan, White, Marshall and Blackmun, JJ.). A fifth Justice suggested that, regardless of remedial purpose, all racial distinctions called for the most rigorous judicial examination. *Id.* at 291 (opinion of Powell, J.).

The question of the appropriate level of scrutiny in affirmative action cases was similarly left unresolved by the Court in Fullilove v. Klutznick, 448 U.S. 448 (1980). Chief Justice Burger, writing for himself and Justices Powell and White, expressly declined to adopt the traditional formulas of analysis such as strict scrutiny or intermediate scrutiny, but recognized that the ten percent federal set-aside would have survived judicial review under either standard. *Id.* at 492. In a separate concurrence, Justice Powell invoked a strict scrutiny test. *Id.* at 507 (Powell, J., concurring). Justices Marshall, Brennan and Blackmun, as in *Bakke*, called for an intermediate level of scrutiny under which racial classifications would pass constitutional muster if they served "important governmental objectives" and the means chosen were "substantially related" to the articulated remedial purpose. *Id.* at 520-21 (Marshall, J., concurring).

In Wygant v. Jackson Board of Education, 476 U.S. 267 (1986), five Justices concurred in the judgment that the school board's preferential layoff program was unconstitutional. Justice Powell was joined by Chief Justice Burger, Justices Rehnquist and O'Connor in applying strict scrutiny. "[A]ny racial classification 'must be justified by a compelling governmental interest' . . . . [T]he means chosen by the State to effectuate its purpose must be 'narrowly tailored to the achievement of that goal.'" *Id.* at 274 (citations omitted). Justice White, concurring in the judgment only, expressed no opinion on the appropriate level of scrutiny and simply stated that none of the interests asserted by the board justified the discriminatory layoff policy. *Id.* at 295 (White, J., concurring in the judgment).

According to Justice O'Connor, the Court may not be as intractably fragmented on this question as it seems:

scrutiny as the standard of review of race-conscious remedial measures under the equal protection clause of the fourteenth amendment.[96]

According to the Court, the justification for such measures must be subjected to "searching judicial inquiry" in order to distinguish the classifications that are truly "benign" or "remedial" from those that "are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."[97] Because the Richmond Plan, solely upon the basis of race, denied certain contractors the opportunity to bid on a fixed percentage of public contracts, it was subject to strict scrutiny by the Court.[98] Justice O'Connor noted that in adopting this standard, the Court reaffirmed the view articulated by the plurality in *Wygant*: that the level of scrutiny does not depend on the race of the group burdened.[99] The majority opinion could not accept the dissent's "watered-down version of equal protection review" which would effectively frustrate the ultimate goal of eliminating race as a factor in governmental decision making.[100]

Justice O'Connor's analysis in this case relied heavily on Justice Pow-

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> Although Justice Powell's formulation may be viewed as more stringent than that suggested by Justices Brennan, White, Marshall, and Blackmun, the disparities between the two tests do not preclude a fair measure of consensus. In particular, as regards certain state interests commonly relied upon in formulating affirmative action programs, the distinction between a "compelling" and an "important" governmental purpose may be a negligible one. The Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program. This remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required . . . . It appears, then that the true source of disagreement on the Court lies not so much in defining the state interests which may support affirmative action efforts as in defining the degree to which the means employed must "fit" the ends pursued to meet constitutional standards . . . . Yet even here the Court has forged a degree of unanimity; it is agreed that a plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently "narrowly tailored," or "substantially related," to the correction of prior discrimination by the state actor.

Id. at 286-87 (O'Connor, J., concurring).

96. City of Richmond v. J.A. Croson Co., 109 S. Ct. at 752 (Marshall, J., dissenting).

97. *Id.* at 721.

98. *Id.* The purpose of strict scrutiny is to:

> 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

Id.

99. *Id.* at 721. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. at 279-80.

100. City of Richmond v. J.A. Croson Co., 109 S. Ct. at 722. *See infra* note 136 and accompanying text.

ell's opinions in *Bakke* and *Wygant*.[101] In *Bakke* proponents of the racial quota cited the need to reduce the historic deficit of minorities in the medical profession and the need to counter the effects of societal discrimination as justifications for the admissions plan.[102] Justice Powell, applying "heightened scrutiny,"[103] rejected these reasons as insufficiently compelling to justify a racial classification.[104] He drew a distinction between the " 'focused' " goal of correcting " 'wrongs worked by specific instances of racial discrimination' " and attempts to remedy " 'the effects of societal discrimination, an amorphous concept of injury that may be ageless in its reach into the past.' "[105]

In *Wygant* a plurality of four Justices applied strict scrutiny to the race-conscious layoff system and reiterated Justice Powell's view that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."[106] The school board's interest in providing its minority students with role models to alleviate the effects of past discrimination failed to justify the racial classification for two reasons.[107] First, the disparity between the percentage of minority students and the percentage of minority faculty had little probative value in establishing the existence of past discriminatory hiring practices which would justify race-conscious remedies.[108] Second, the "role model theory," because it bore no relationship to past discriminatory practices, could be used to justify a race-based layoff program unlimited in scope and duration.[109]

According to Justice O'Connor, the Richmond set-aside plan suffered from the same defects fatal to the layoff program in *Wygant*. First, the city's assertion that there had been past discrimination in the construction industry in general provided no guidance in determining the precise scope of

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101. *See supra* note 95.

102. City of Richmond v. J.A. Croson Co., 109 S. Ct. at 722 (citing Regents of the Univ. of Calif. v. Bakke, 438 U.S. at 306).

103. *Id.*

104. *Id.* (citing Regents of the Univ. of Calif. v. Bakke, 438 U.S. at 307 (Powell, J., concurring)).

105. *Id.* at 722-23 (quoting in part Regents of the Univ. of Calif. v. Bakke, 438 U.S. at 307 (Powell, J., concurring)).

106. *Id.* at 723 (citing Wygant v. Jackson Bd. of Educ., 476 U.S. at 276 (plurality opinion)).

107. *Id.*

108. *Id.* (citing Wygant v. Jackson Bd. of Educ., 476 U.S. at 276 (plurality opinion)). The Court in *Wygant* suggested that "the proper comparison for determining the existence of actual discrimination by the school board was 'between the racial composition of [the school's] teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market.' " Wygant v. Jackson Bd. of Educ., 476 U.S. at 275 (citing Hazelwood School Dist. v. United States, 433 U.S. 299, 308 (1977)).

109. City of Richmond v. J.A. Croson Co., 109 S. Ct. at 723 (citing Wygant v. Jackson Bd. of Educ., 476 U.S. at 276 (plurality opinion)).

the injury to be remedied in Richmond.[110] Second, the relief for such an "ill-defined wrong" could extend until the percentage of minority business participation on public contracts equaled the percentage of minorities in the population as a whole, resulting in "no logical stopping point."[111] The Court did not doubt that black entrepreneurs have experienced a lack of opportunities due to the nation's history of private and public discrimination.[112] However, the use of an unyielding racial quota in the awarding of public contracts in Richmond, Virginia, could not be justified on the basis of "an amorphous claim that there has been past discrimination in a particular industry."[113] The Court refused to give statistical generalizations the status of " 'identified discrimination' " for a particular locality.[114]

Turning to the factual predicate offered in support of the thirty percent quota required by the Richmond set-aside, the Court concluded that "none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry."[115] The fact that the city council had designated the Plan as "remedial" was entitled to little or no weight.[116] The Court regarded statements by proponents of the Plan that racial discrimination existed in Richmond's construction industry as "highly conclusionary" and of "little probative value."[117]

The city similarly erred in relying on statistics showing the disparity between the number of prime contracts awarded to minority firms and the size of the minority population of Richmond.[118] The "relevant statistical pool for purposes of demonstrating discriminatory exclusion" was the number of MBEs in the Richmond market qualified to perform prime or subcontracting work in public construction projects.[119] The city did not make such

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110. *Id.*

111. *Id.*

112. *Id.* at 724.

113. *Id.*

114. *Id.*

115. *Id.* at 727. "None of these 'findings,' singly or together, provide the city of Richmond with a 'strong basis in evidence for its conclusion that remedial action was necessary.' . . . There is nothing approaching a prima facie case of a constitutional or statutory violation by *anyone* in the Richmond construction industry." *Id.* at 724 (emphasis in original) (quoting in part Wygant v. Jackson Bd. of Educ., 476 U.S. at 274-75, 277 (plurality opinion)).

116. *Id.* "Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice." *Id.*

117. *Id.* "[W]hen a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification's relevance to its goals." *Id.* at 725.

118. *Id.* at 725.

119. *Id.* In the employment context,

> [w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination . . . . But where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task.

Id. (citing Hazelwood School Dist. v. United States, 433 U.S. 299, 307-08 (1977)).

findings nor did it know the percentage of total public construction dollars going to minority *subcontractors*.[120] In the Court's view Richmond's set-aside of subcontracting dollars seemed to "rest on the unsupported assumption that white prime contractors simply will not hire minority firms."[121]

The evidence of low MBE membership in local contractor associations, standing alone, failed to "establish a prima facie case of discrimination."[122] Congressional findings of nationwide discrimination in the construction industry were of "extremely limited" probative value for showing the existence of exclusionary discrimination in Richmond.[123] The fact that the extent of discriminatory practices would vary by locality was explicitly recognized by Congress when it included the waiver provision in the federal set-aside involved in *Fullilove*.[124] State and local entities must specifically identify discrimination before enacting race-based remedies.[125] In order to adopt a set-aside program, if local governments merely had to find a related report out of the many congressional reports on societal discrimination in various fields, "the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity."[126] Finally, the Court noted that the city's claim of remedial purpose was "strongly impugne[d]" by the overinclusiveness of the preference extended to Spanish-speaking, Orientals, Indian, Eskimo, and Aleut minorities where there was "absolutely no evidence" of past discrimination against those groups.[127] The majority therefore concluded that Richmond had "failed to demonstrate a compelling interest in appor-

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120. *Id.* "Without any information on minority participation in subcontracting, it is quite simply impossible to evaluate overall minority representation in the city's construction expenditures." *Id.* at 726.

121. *Id.* at 725.

122. *Id.* at 726.

> For low minority membership in these associations to be relevant, the city would have to link it to the number of local MBEs eligible for membership. If the statistical disparity between eligible MBEs and MBE membership were great enough, an inference of discriminatory exclusion could arise. In such a case, the city would have a compelling interest in preventing its tax dollars from assisting these organizations in maintaining a racially segregated construction market.

Id.

123. *Id.*

124. *Id.*

125. *Id.* at 727.

> [A]s noted above, Congress was exercising its powers under § 5 of the Fourteenth Amendment in making a finding that past discrimination would cause federal funds to be distributed in a manner which reinforced prior patterns of discrimination. While the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief.

Id. at 726-27.

126. *Id.* at 727.

127. *Id.* at 727-28.

tioning public contracting opportunities on the basis of race."[128]

The Court was brief in its discussion of the second prong of strict scrutiny: whether Richmond's program was narrowly tailored to remedy the effects of prior discrimination.[129] Because the Court had determined that the Plan was "not linked to identified discrimination in any way," Justice O'Connor found it difficult to assess whether it was narrowly tailored.[130] In concluding that the Richmond set-aside failed this prong of strict scrutiny, she noted that the Richmond City Council apparently failed to consider alternative, race-neutral means to increase MBE participation in city contracting.[131]

Absent proper findings of past discrimination, the Court believed there was the danger that a racial classification may be "merely the product of unthinking stereotypes or a form of racial politics."[132] The Court concluded:

> Nothing we say today precludes a state or local entity from taking action to rectify the effects of *identified discrimination* within its jurisdiction. If the city of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion. Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise . . . . Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria . . . . In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.[133]

Justice Marshall, writing for the dissent, vehemently opposed the majority's adoption of strict scrutiny as the standard for review of equal protection challenges to race-conscious remedial measures.[134] In his view a "profound difference" separated racial classifications based on racial hatred and separatism, and those drawn to remedy the effects of prior racism or to prevent passive governmental participation by perpetrating such effects.[135]

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128. *Id.* at 727.

129. *See generally id.* at 728.

130. *Id.* at 728. "[T]he 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing. It rests upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." *Id.*

131. *Id.*

132. *Id.* at 730.

133. *Id.* at 729.

134. *See generally id.* at 739-40.

135. *Id.* at 752 (Marshall, J., dissenting).

Justice Marshall called for "race-conscious classifications designed to further remedial goals" to be analyzed under an intermediate level of review such that they "must serve important governmental objectives and must be substantially related to achievement of those objectives."[136] Under this standard Richmond's set-aside was clearly constitutional.[137]

Applying its intermediate level of scrutiny, the dissent believed Richmond had "two powerful interests" in adopting the thirty percent set-aside: eliminating the effects of prior discrimination and preventing the city's spending decisions from perpetuating those effects.[138] On the question of sufficient proof of the existence of past racial discrimination, the dissent criticized the majority for its "exceedingly myopic view" of the facts on which the city council relied when it enacted Richmond's set-aside plan.[139] In particular, the dissent objected to the "majority's refusal to recognize that Richmond has proven itself no exception to the dismaying pattern of national exclusion which Congress so painstakingly identified. . . ."[140] The testimony of local officials deserved some judicial deference by virtue of their proximity to and familiarity with racial discrimination in Richmond.[141] In finding the Richmond Plan substantially related to its purpose of remedying past discrimination, the dissent considered it significant that the thirty percent set-aside figure was "patterned directly on the *Fullilove* precedent."[142]

The majority opinion left the dissenters—Justices Marshall, Brennan, and Blackmun—decidedly troubled about the future of affirmative action in this country:

> In concluding that remedial classifications warrant no different standard of review under the Constitution than the most brute and repugnant forms of state-sponsored racism, a majority of this Court signals that it regards racial discrimination as largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice. I, however, do not believe this Nation is anywhere close to eradicating racial discrimination or its vestiges. In constitutionalizing its wishful thinking, the majority today does a grave disservice not

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136. *Id.* at 743 (citations omitted) (Marshall, J., dissenting). Justice O'Connor questioned how the dissent arrive[d] at the legal conclusion that a racial classification is designed to further remedial goals, without first engaging in an examination of the factual basis for its enactment and the nexus between its scope and that factual basis . . . . [O]nce the 'remedial' conclusion is reached, the dissent's standard is singularly deferential, and bears little resemblance to the close examination of legislative purpose we have engaged in when reviewing classifications based either on race or gender. *Id.* at 721-22.

137. *Id.* at 743 (Marshall, J., dissenting).

138. *Id.* at 740-43 (Marshall, J., dissenting).

139. *Id.* at 740 (Marshall, J., dissenting).

140. *Id.* (Marshall, J., dissenting).

141. *Id.* at 747-48 (Marshall, J., dissenting).

142. *Id.* at 751 (Marshall, J., dissenting).

> only to those victims of past and present racial discrimination in this Nation whom government has sought to assist, but also to this Court's long tradition of approaching issues of race with the utmost sensitivity.[143]

IV. Conclusion

The Supreme Court's decision in *City of Richmond v. J.A. Croson Co.*, striking down the Richmond, Virginia, program which set aside thirty percent of public construction contracts for minority businesses, significantly affects equal protection jurisprudence at several levels.

Justice O'Connor's opinion,[144] suggesting that section one of the fourteenth amendment is an explicit constraint on state power to decide the appropriateness of remedial racial classifications, may have adverse implications for federalism values in the affirmative action area.[145] Under many federal grant programs, state and local governments wishing to secure funds are subject to federal mandates requiring them to enact set-asides as a condition of receipt of such funding.[146] As a result of the Court's pronouncements on state power under the fourteenth amendment, state and local governments may be put in the incongruous position of carrying out federally mandated set-asides while they are prohibited from imposing similar remedial programs on private contractors—programs better tailored to local conditions.[147] The National League of Cities organization believes this result "inverts important principles of federalism."[148]

In addition, the Court's opinion gives lower courts little guidance regarding what weight, if any, should be given the fact that a set-aside favoring an historically disadvantaged group has been imposed in a jurisdiction where that group had become a majority.[149] In *Richmond* blacks comprised approximately fifty percent of the city's population. Five of the nine seats

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143. *Id.* at 752 (Marshall, J., dissenting).

144. Three other justices agreed with the view of federalism expressed by Justice O'Connor in Part II of the opinion: Chief Justice Rehnquist and Justice White joined; Justice Scalia agreed in a separate opinion concurring in the judgment.

145. *See* Brief for Appellant at 32, City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989) (No. 87-998).

146. The Public Works Employment Act of 1976, 42 U.S.C. § 6705 (1983), upheld in *Fullilove* is one example; for others see the Motion for Leave to File Brief for the National League of Cities as Amici Curiae, at n.4-5 and accompanying text, City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989) (No. 87-998).

147. Motion for Leave to File Brief for the National League of Cities as Amici Curiae, at no.4-5 and accompanying text, City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989) (No. 87-998).

148. *Id.* Joining the National League of Cities in filing its brief as amici curiae in support of appellant were: the U.S. Conference of Mayors, the National Association of Counties, and the International City Management Association.

149. Scanlan, *Striking Down Set-Aside System, Court Tackles a Complex Issue*, Nat. L.J., Mar. 6, 1989, at 40.

on the Richmond City Council were held by blacks. The Council enacted the set-aside ordinance in 1983 by a six to three vote with all five blacks voting in favor of the program, two of the four white members voting against, and a third abstaining.[150] Justice O'Connor noted that one of the central arguments for applying the less-than-strict scrutiny standard to "benign" racial classifications urged by the dissent, is that such measures are choices made by dominant racial groups to disadvantage themselves.[151] In her view[152] this argument did not apply here because blacks had a majority on the Richmond City Council. Indeed, the concern that a political majority will act capriciously to the disadvantage of a minority seemed to militate for, not against, a strict scrutiny standard.[153] The Court, however, did not give a clear indication of the weight to be given the existence of "minority-majorities"[154] when scrutinizing the legality of racial preferences. One commentator warned that courts might give this factor such weight that few set-asides benefitting local racial majorities would survive—an ironic consequence of historically disadvantaged groups finally acquiring political power.[155]

Finally, the majority decision striking down the Richmond Minority Business Utilization Plan as violative of the equal protection clause "calls into question the validity of the dozens of business set-asides which municipalities across this Nation have adopted on the authority of *Fullilove*."[156] At least thirty-two states and 160 localities currently have some sort of affirmative action initiative including set-asides, contracting goals, good-faith efforts, and bid preferences.[157] According to the chief counsel for several orga-

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150. *See* Appellant and Appellee's Joint Appendix, *supra* note 29, at 9-50.

151. City of Richmond v. J.A. Croson Co., 109 S. Ct. at 722. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (equal protection as protecting "discrete and insular minorities" from majoritarian prejudices).

152. Justice O'Connor addressed this question in Part III-A of the opinion; Chief Justice Rehnquist and Justices White and Kennedy joined.

153. City of Richmond v. J.A. Croson Co., 109 S. Ct. at 722.

154. Scanlan, *supra* note 149, at 41.

155. *Id.*

156. City of Richmond v. J.A. Croson Co., 109 S. Ct. at 754 (Marshall, J., dissenting). The Court voted six-to-three to strike down the Plan.

157. Report of the Minority Business Enterprise Legal Defense and Education Fund (Jan. 1988); *see* Brief for the National League of Cities at apps. I, II, City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989) (No. 87-998).

Minority Business Enterprise Programs of State Municipal and County Governments
State Citation Coverage Goals

. . . .

Iowa IOWA CODE § 314.14 Highway construction 10%
(West 1985)

. . . .

Cedar Rapids Res. Nos. 532-4-84; All Federally funded 5%
1373-9-85; 76-1-86 projects 10%
Des Moines Contract Compliance Public works contracts 7-9%
Program and Policy Professional services 4%

nizations of cities and counties, all these programs will have to be examined to determine whether the evidence supporting them meets the stringent standard set out in *Richmond*.[158] The standard articulated by the Court requires that a jurisdiction implementing racial preferences demonstrate a "strong basis in evidence" for its determination that remedial measures are necessary; proper findings must "define both the scope of the injury and the extent of the remedy necessary to cure its effects."[159]

For some, in light of Reagan Court appointees Justices Scalia and Kennedy, the *Richmond* decision signals the existence of a new conservative majority on affirmative action issues.[160] A pessimistic reading of the opinion suggests it is a thinly disguised attack on affirmative action, gutting set-aside programs with an evidentiary standard which is impossible to meet.[161] The ruling will undoubtedly slow state and local governments' adoption of set-asides as they strain to produce data sufficient to justify the use of remedial racial classifications.[162]

Statement (1986)
Iowa City Res. No. 83-417 All 3%
Contracts over Contractor
$25,000 must have affirmative
action program
Mason City Human Rights Code, All 2%
tit. II Federally funded 10%
projects
Waterloo Res. No. 1986-58 Construction projects 5%
over $100,000
Construction funded all 10%
or in part by federal
funds

. . . .
Id.

158. Comments of Benna Ruth Solomon of the State and Local Legal Center, Washington, D.C.; *see High Court Strikes Down Racial Quota*, Des Moines Reg., Jan. 24, 1989, at 1A, col. 6.

159. City of Richmond v. J.A. Croson Co., 109 S. Ct. at 730.

160. *See High Court Strikes Down Racial Quota*, Des Moines Reg., Jan. 24, 1989, at 1A, col. 6. Others criticized the Court's insensitivity to minority concerns. Professor Charles Abernathy of Georgetown University Law Center observed, "The [C]ourt is saying that it won't stand for black leaders using power to reward their friends at the expense of others." Sachs, *A Blow to Affirmative Action*, TIME, Feb. 6, 1989, at 60. Atlanta City Mayor James Usry, president of the National Conference of Black Mayors, commented, "We think the majority opinion . . . shows not only a lack of regard but total disdain for minorities." *Black Mayors Hit Ruling on Racial Quota*, Des Moines Reg., Feb. 5, 1989, at 3A, col. 1.

161. *See* Wickham, *How Minority Programs Benefit Whites*, Des Moines Reg., Jan. 27, 1989, at 12A, col. 3; *Slowing Racial Progress*, Des Moines Reg., Jan. 28, 1989, at 10A, col. 1.

162. The Iowa Attorney General has recently published an opinion stating that *Croson* and subsequent decisions compel the suspension of Iowa Code section 73.16(2) which mandates a set-aside of state contracts for targeted small businesses. Op. Att'y Gen. #89-6-3 (Osenbaugh and Brick to Cavanaugh, June 9, 1989). The opinion also recommends the suspension of Iowa

A more optimistic view of the ruling, however, may be appropriate. Federal set-aside programs and plans by private companies to increase minority hiring were left untouched. It is unclear how the decision will affect affirmative action programs in the public employment and education areas. State and local governments may be able to identify evidence of past discrimination to the satisfaction of *Richmond*'s requirements and lobbying efforts could induce Congress to enact legislation lessening *Richmond*'s impact. The implementation of flexible targets for minority participation, rather than rigid quotas, might be a way to avoid invalidation of race-based remedial measures.

Donna M. Somsky

Code section 73.19 to the extent it permits agencies to provide a bidding preference to small businesses based solely on racial status. *Id.*