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CITY OF RICHMOND v. J.A. CROSON COMPANY: A DISCUSSION OF ITS IMPACT ON AFFIRMATIVE ACTION PROGRAMS

by STEPHEN LICHTENSTEIN* and MARGO E.K. REDER**

INTRODUCTION

The United States Supreme Court’s decision in City of Richmond v. J. A. Croson Company has become a benchmark in affirmative action challenges which began more than a decade ago. The Court, in its clearest pronouncement yet on state and municipal set-aside programs, applied a strict scrutiny standard of review and invalidated a racial preference program as violative of the Equal Protection Clause of the 14th Amendment. While the Court has not precluded state or local entities from rectifying effects of identified discrimination within their jurisdiction, sponsors of such legislation now bear a heavy burden when justifying set-aside programs.

This note will explore the case law leading to Croson and then analyze Croson. The authors will also explore affirmative action programs since Croson in an effort to determine those elements which contribute to the successful operation of municipal and state-sponsored minority business enterprise plans.

I. THE CONSTITUTIONAL BACKGROUND LEADING TO City of Richmond v. J.A. Croson Company

Although the Court decided nine affirmative action cases before Croson, it has yet to establish a bright line for the constitutional

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boundaries of affirmative action. While this area of the law will always contain uncertainties, the Court has made clear that if the affirmative action remedies are carefully crafted, they can withstand even the most searching constitutional challenge.

The first challenge to reach the Court was in Regents of the University of California v. Bakke. Allen Bakke, a white male who had been denied admission to the University of California at Davis Medical School for two consecutive years, contended that the special admissions program violated the equal protection clause. Under the program, 16 of the 100 places in each class were set aside for disadvantaged members of certain minority races. Mr. Bakke was denied admission under the general admissions program, even though applicants with less impressive qualifications were admitted under that set-aside program. Justice Powell, writing for the Court, cautioned that racial distinctions are inherently suspect and thus call for the most exacting judicial examination. In a 5-4 decision, the Court rejected the argument that general societal discrimination alone justifies special treatment of minorities, but agreed with the


438 U.S. 265 (1978). Justice Powell wrote the opinion of the Court. Id. Justices Brennan, White, Marshall, and Blackmun agreed that race could be a factor in admissions programs. Id. Justice Stevens, joined by Chief Justice Burger and Justices Stewart and Rehnquist wrote that the issue of whether race can ever be a factor was not presented here. Id.

Id. at 273-76. He argued that the program operated to exclude him on the basis of his race, in violation of the equal protection clause. Id. at 277-78.

Id. at 274-75. Minorities were deemed to be Blacks, Asians, and American Indians. Id. at 274.

Id. at 276-77 & n.n. 6-7.

Id. at 305-06. See City of Richmond v. J. A. Croson Co., 109 S.Ct. 706, 722 (1989) (Justice Powell applied "heightened scrutiny" under the equal protection clause to this racial classification).

Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 310 (1978). Another purpose of the program, that of improving health care in under-served communities, likewise was rejected where there was no evidence to show that the special admissions program promoted that goal. Id.
Regents that race may properly be a factor in its future admissions program.\textsuperscript{10} As Justice Blackmun stated in a separate opinion, “in order to treat some persons equally, we must treat them differently.”\textsuperscript{11}

With affirmative action programs clearly taking hold, the Court considered the issue on year later in \textit{United Steelworkers of America v. Weber}.\textsuperscript{12} Kaiser Aluminum and Chemical Corporation and United Steelworkers entered into a \textit{private}, voluntary collective bargaining agreement which included an affirmative action plan designed to eliminate conspicuous racial imbalances.\textsuperscript{13} The Court rejected the challenge brought by a nonminority employee, who was passed over in favor of a minority worker, reasoning that Title VII does not prohibit such race-conscious affirmative action plans.\textsuperscript{14} The Court acknowledged that while the literal language of Title VII prohibits discrimination, this race-conscious plan was nevertheless within the spirit of Title VII, especially where it was private, voluntary, and only temporary.\textsuperscript{15} Once again the Court was badly split, declining to

\textsuperscript{10} Id. at 320. The Court concluded that the state has “a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin” such as the Harvard College Admission Program. \textit{Id.} at 320-24.

\textsuperscript{11} Id. at 407. \textit{See generally} Wygant v. Jackson Board of Educ., 476 U.S. 267, 280 (1986) (“in order to remedy ... prior discrimination, it may be necessary to take race into account”). \textit{But see} City of Richmond v. J.A. Croson Co., 109 S.Ct. 706, 735-36 (1989) (Scalia, J., concurring) (use of race, even for the benign purpose of compensating for past wrongs, is discriminatory in itself).


\textsuperscript{12} 443 U.S. 193 (1979). Justice Brennan wrote the opinion for the Court, joined by Justices Stewart, White, Marshall, and Blackmun. \textit{Id.} Chief Justice Burger and Justice Rehnquist each wrote dissenting opinions. \textit{Id.}

\textsuperscript{13} Id. at 197-200 (emphasis added). The plan reserved for black employees 50% of the openings in a training program. \textit{Id.} at 197. The percentage was commensurate with the number of blacks in the local labor market. \textit{Id.} The Court found that since “blacks had long been excluded from craft unions ...” only 1.83% of the craft workers were black. \textit{Id.} at 198.

\textsuperscript{14} Id. at 200, 204, 209. After reviewing the legislative history of Title VII, the Court found that the statute was designed to eradicate employment discrimination. \textit{Id.} at 204. The Court declined to read the anti-discrimination language of Title VII as prohibiting “private voluntary race-conscious affirmative action efforts to hasten the elimination of” discrimination. \textit{Id.} at 204-05.

\textsuperscript{15} Id. at 201-02. The Court characterized Mr. Weber’s reliance on the anti-discrimination language “misplaced.” \textit{Id.} at 201. Rather, the Court looked at the spirit of the statute in an effort to best effectuate the primary goal of Title VII—that of eliminating racial discrimination in employment. \textit{Id.} at 201-02. Apparently the Court felt that the purposes of the plan were within Title VII, even if the methodology was not. \textit{Id.} at 207-08 (emphasis in original).
define in detail "the line of demarcation between permissible and impermissible affirmative action plans."  

One year later the Court was faced with a minority set-aside provision nearly identical to that challenged in Croson. In Fullilove v. Klutznick, the Court heard a challenge to the Congressionally created Public Works Employment Act, which required a 10% set-aside of federal funds for "[b]usinesses owned and controlled by members of statutorily identified minority groups." Petitioners sought to enjoin enforcement of the Minority Business Enterprise (MBE) provision alleging that it violated the equal protection clauses of the Fifth and Fourteenth Amendments. In writing for the Court, Chief Justice Burger observed that as "a threshold matter, we reject the contention that in the remedial context the Congress must act in a wholly "color-blind" fashion." In paying "more deference to the opinion of Congress than to its choice of instrumentalities," the Court in a 6-3 decision upheld the set-aside provision reasoning that the legislation was within Congress's remedial powers under Section 5 of the Fourteenth Amendment.

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16 Id. at 208. The Court emphasized that this plan did not require the discharge of whites in favor of blacks, nor did it create an absolute bar to the advancement of whites since the plan was only temporary. Id.


17 448 U.S. (1980). Chief Justice Burger wrote the opinion, and was joined by Justices White and Powell. Id. Justice Powell wrote a concurring opinion, as did Justice Marshall, who was joined by Justices Brennan and Blackmun. Id. Justices Stewart, Rehnquist, and Stevens dissented. Id.


20 Id. at 482. Congress enacted the statute pursuant to its Spending Power, and as in the past furthered policy objectives by conditioning the receipt of money to the compliance with directives. Id. at 474. The Court has repeatedly upheld the use of this technique. Id.

21 Id. at 479. While the Court did not employ a traditional standard of equal protection review, it was bound to review the set-aside with "appropriate deference to the Congress." Id. at 472.

22 Id. at 491-92. The Court analyzed the constitutionality of the set-aside provision in two steps. Id. at 473. First it concluded that Congress's Commerce Power was sufficiently broad to reach the actions of private prime contractors on federally funded...
based upon racial criteria did not violate the Constitution even after being subjected to a "most searching examination." The next affirmative action challenge to reach the Supreme Court was in Firefighters Local Union No. 1784 v. Stotts. In 1981, the city of Memphis faced deficits requiring a reduction in personnel, and it adopted a "last-hired first-fired" layoff policy. Petitioners challenged the lower court's order to modify the parties' consent decree and enjoin the city from following this system. They argued that the proposed layoffs would disproportionately affect minorities. The Court reversed, concluding that the district court "exceeded its powers in entering an injunction requiring white employees to be laid off, when the otherwise applicable seniority system would have called for the layoff of black employees with less seniority." The Court emphasized that it is inappropriate to deny an "innocent employee the benefit of seniority just to provide another employee a remedy."

projects. Id. at 475-76. Next, the Court turned to Congress's broad remedial power under § 5 of the Fourteenth Amendment to employ race-conscious relief and decided that the MBE provision survived "a most searching examination." Id. at 491-92.

Id. Chief Justice Burger stressed two factors in arriving at this conclusion. Id. First, Congress has unique remedial powers under § 5 of the Fourteenth Amendment such that "in no organ of government ... does there repose a more comprehensive remedial power than in the Congress, expressly charged ... with competence and authority to enforce equal protection guarantees." Id. at 483. Chief Justice Burger also emphasized the flexible nature of the 10% set-aside provision. Id. at 487. It provided for both waiver and exemption from the requirements. Id. Chief Justice Burger indicated that without this "fine-tuning" the statute would not have passed "muster." Id.


467 U.S. 561 (1984). In the first case to invalidate a race-conscious remedy, Justice White delivered the opinion of the Court, and was joined by Chief Justice Burger, and Justices Powell, Rehnquist and O'Connor. Id. Justices O'Connor and Stevens each wrote concurring opinions. Justice Blackmun dissented, and was joined by Justices Brennan and Marshall. Id.

Id. at 566-67. Evidence was presented that 50 percent of the employees hired since 1974 had been black, so that the layoffs affected them in great proportion than the white population. Id. The district court, therefore, ordered that the city not apply this seniority policy, and subsequently approved a modified layoff plan. Id.

Id. at 567-68.

Id. Layoffs pursuant to this modified plan required, in some instances, that non-minority senior employees be laid off in favor of minority employees. Id.

Id. at 572-73.

Id. at 575. The Court recognized that while the district court tried to fashion a remedy, Title VII protects bona fide seniority systems. Id. If plaintiffs prove that they have been "actual victims" of discrimination then they may be awarded compet-
The Court once again considered a preferential layoff provision in *Wygant v. Jackson Board of Education*.30 The teacher's Collective Bargaining Agreement (CBA) provided for protection of minority groups against layoffs.31 When layoffs became necessary, however, the school board retained senior teachers and laid off probationary minority teachers thus failing to maintain the CBA's targeted percentage of minority personnel.32 In a significant decision, four Members of the Court applied heightened scrutiny to the race-based agreement and invalidated it as violative of the equal protection clause.33 The plurality reiterated the view expressed by Justice Powell in *Bakke* that societal discrimination without more, is an insufficient basis for imposing race-conscious remedies.34 The Court now demanded more "particularized findings" when imposing discriminatory legal remedies.35


30 476 U.S. 267 (1986). Justice Powell wrote for the Court, and was joined by Chief Justice Burger and Justice Rehnquist, and in part by Justice O'Connor. Id. Justices O'Connor and White each wrote concurring opinions. Id. Justice Marshall dissented, and was joined by Justices Brennan and Blackmun. Id. Justice Stevens also dissented. Id.

31 Id. at 270-71. The Board and Union agreed to this provision because of racial tensions in the community. Id. at 270.

32 Id. at 271. The Union brought suit, and the Board in its answer, argued that the layoff provision conflicted with the Michigan Teacher Tenure Act. Id.

33 Id. at 276, 283-84. The Court explicitly rejected the court of appeals use of a "reasonableness" test for race-conscious plans. Id. at 279. The Court held that the "Board's layoff plan is not sufficiently narrowly tailored." Id. at 283. A plurality, for the first time urged that the test used for an equal protection challenge should not depend upon the race of those burdened or benefited. See id. at 279-80 (racial classifications require the "most exact connection between justification and classification"—however in remedying discrimination race may be taken into account).

34 Id. at 276. The lower courts upheld the racial preference system under the equal protection clause because it represented an attempt to remedy discrimination by providing "role models" for minority schoolchildren. Id. at 272. The role model theory was explicitly rejected by the Court as not withstanding "a most searching examination." Id. at 273. But see id. at 301-02 (Marshall, J., dissenting) (asserting Court lacks definitive standard of review for such cases and argued intermediate level scrutiny appropriate since plan is remedial in nature).

35 Id. at 276 (emphasis in original). The plurality's test for race-conscious remedies consisted of two prongs: first "any racial classification must be justified by a compelling governmental interest," and second, "the means chosen ... to effectuate its purpose must be narrowly tailored to the achievement of that goal." Id. at 274. After applying the facts to this analysis, the Court invalidated the plan because, *inter alia*, the disparity between percentages of minority teachers and minority students was not...
The next case, Local No. 93, International Association of Firefighters v. City of Cleveland, presented facts remarkably similar to those in Stotts. The Vanguards of Cleveland, an organization of minority firefighters, filed a complaint in district court alleging discrimination in the awarding of promotions. Following lengthy negotiations, the Court approved the parties' consent decree and noted that there was an "historical pattern of racial discrimination in the promotions." After going to great lengths to distinguish the instant case from Stotts, the Court concluded that Title VII was not violated by a consent decree which adopted a race-conscious relief plan that may benefit even nonvictims. The Court cautioned that its conclusions related only to the Title VII challenge and did not pass on the merits of possible claims under the equal protection clause of the Fourteenth Amendment.

During the same term the same members of the Court, again led by Justice Brennan, decided Local 28, Sheet Metal Workers International Association v. EEOC. The United States, and later, the EEOC, brought suit to enjoin the union from engaging in a pattern and probative of employment discrimination. Id. at 294.


36 478 U.S. 501 (1986). Justice Brennan wrote the opinion and was joined by Justices Marshall, Blackmun, Powell, Stevens, and O'Connor. Id. Justice O'Connor also concurred. Id. Justice White dissented, as did Justice Rehnquist, who was joined by Chief Justice Burger. Id.


38 Local No. 93, Int'l Assoc. of Firefighters v. City of Cleveland, 478 U.S. 501, 504-05 (1986). The complaint also averred that the effect of such practices were further exacerbated by the use of "seniority points and by the manipulation of retirement dates so that minorities would not be near the top of promotion lists. Id. at 505.

39 Id. at 511. The judge adopted the decree calling it a "fair, reasonable, and adequate resolution..." Id.

40 Id. at 525, 528. The Court reasoned that the parties' voluntary consent decree was outside the scope of Title VII so that "there is no inconsistency between...[the two] although the court might be barred from ordering the same relief after a trial or, as in Stotts—in disputed proceedings to modify a decree entered upon consent." Id. at 528. But see id. at 536 (Rehnquist, J., dissenting) (City of Cleveland question governed by Stotts—no difference between court entering consent decree as here and modification of consent decree as in Stotts).

41 Id. at 530. For further commentary, see Blair, supra note 29; Affirmative Action After Stotts, Devins, supra note 29.

practice of discriminating against minorities in admission to the union. The district court found the union in violation of Title VII and ordered it to admit a percentage of “nonwhites” to union membership. The issue presented to the Court was whether the remedial provisions of Title VII empowered the Court to order race-conscious remedies that may benefit nonvictims. The Court upheld the district court's order reasoning that neither the equal protection guarantee nor the provisions of Title VII “foreclose a district court from instituting some sorts of racial preferences where necessary...” but cautioned that “such relief is not always proper.” Critical to the Court's holding were the findings that the discrimination was pervasive and egregious, as well as the flexibility and the limited duration of the district court's plan.

In another pattern and practice case, the Court in United States v. Paradise considered the constitutionality of a court order imposing an interim one-black-for-one-white promotion requirement for state troopers. After documenting the department's long-term pervasive

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43 Id. at 426-28. The State Commission found that the union operated an admissions policy largely by nepotism. Id. at 427.

44 Id. at 426.

45 Id. It was unclear whether relief under § 706(g), 42 U.S.C. § 2000e-5(g) (defining remedies) was limited to actual victims of unlawful discrimination, or whether relief could be prospective in nature. Id. at 452-53 (emphasis added). But see id. at 500 (Rehnquist, J., dissenting) (§ 706(g) does not allow Court to grant relief to nonvictims at expense of innocent whites). The Court ruled that the order did not contravene the equal protection guarantee noting that the relief ordered in this case withstood scrutiny under any of the equal protection analyses. Id. at 480.

46 Id. at 475, 480-81. The Court ruled that the order did not contravene the equal protection guarantee noting that the relief ordered in this case withstood scrutiny under any of the equal protection analysis. Id. at 480.

47 Id. at 476-79. The Court concluded that the district court's order fit the nature of the violation it sought to correct. Id. at 476. The membership goal was used as a gauge to check efforts to remedy past discrimination, rather than as a goal in itself. Id. at 478. Furthermore, the remedial measures were set to expire when the percentage of minority members approximated the percentage of minorities in the workforce. Id. at 479. Cf. United Steelworkers of America v. Weber, 443 U.S. 193, 208-09 (1979).

For further discussion of Sheet Metal Workers, see Selzg, Affirmative Action in Employment: The Legacy of a Supreme Court Majority, 63 IND. L.J. 301 (1988); McGrath, Supreme Court Endorses Court Ordered Affirmative Action for Non Victims, 29 B. C. L. REV. 266 (1987).

48 480 U.S. 149 (1987). Justice Brennan announced the Court's judgment which Justices Marshall, Blackmun, and Powell joined. Id. Justice Powell also wrote a concurring opinion, as did Justice Stevens. Id. Justice White dissented, as did Justice O'Connor, who was joined by Chief Justice Rehnquist and Justice Scalia. Id.

49 Id. at 153. The Court order was implemented as an interim measure available for qualified applicants, until the Department formulated an “acceptable promotion procedure.” Id.
discrimination and its unwillingness to change, the Court ordered the one-for-one plan for a period of time if minority candidates were available and qualified. While unable to agree on an opinion, five members of the Court agreed that the equal protection guarantee had not been violated. Justice Brennan, in writing for the plurality reasoned that the promotion requirement passed muster even under a strict scrutiny analysis since there was a compelling governmental interest in eradicating discrimination, and the means used were narrowly tailored to serve the purpose. The plurality emphasized the plan's limited duration and flexibility, while not imposing unacceptable burdens on non-minorities. In a precursor to Croson, the dissent criticized the plurality for adopting a view far less stringent than strict scrutiny requires.

During the same term, the Court in Johnson v. Transportation Agency considered a Title VII challenge in the context of a voluntary affirmative action plan designed to promote women. The plan provided that promotions in jobs traditionally segregated may be based,
in part, on qualified applicants’ gender. 57 A male employee denied promotion sued the agency alleging discrimination on the basis of gender. 58 The Court concluded that the agency appropriately took into account as one factor gender of the applicants as part of a voluntary affirmative action effort. 59 Consideration of gender was justified by the manifest imbalance of women in the industry, and the plan otherwise fell within the criteria established by Weber. 60 In other words, the plan represented a flexible case-by-case approach rather than a rigid set-aside approach, and did not forever bar the promotion of other qualified individuals. 61

II. CITY OF RICHMOND V. J.A. CROSON COMPANY

We have, for the foreseeable future, seen the highwater mark in the judicial protection of race-conscious remedial relief. While the Court does not foreclose the possibility of “narrowly tailored” racial preferences as a way to break down barriers of exclusion, neither does it embrace such plans unconditionally. 62 In a significant decision, the United States Supreme Court finally assembled a majority which found unconstitutional a city-sponsored MBE set-aside program. 63 The MBE plan and opinions of the lower courts are set out, followed by a discussion of the Supreme Court’s opinion.

57 Id.
58 Id. at 625. The plaintiff asserted only a violation of Title VII. Id.
59 Id. at 41-42. The plaintiff did not allege an equal protection violation. Id.
60 Id. at 627-39. At the outset the Court noted that the “legality of the Agency Plan must be guided by our decision in Weber.” See supra notes 12-16 and accompanying text (discussing Weber Plan). First, a plan may not unnecessarily trammel interests of nonminority employees. Johnson v. Transportation Agency, 480 U.S. 616, 630 (1987). Nor may a plan create an absolute bar to advancement. Id. Further a plan that is temporary in duration and flexible rather than rigid in application is far more likely to pass muster under Title VII. Id.
61 Id. at 642. For further discussion, see Meyer, supra note 16.
A. The Minority Business Utilization Plan (Plan)

Following a public hearing the Richmond, Virginia City Council on April 11, 1983 adopted the five-year Plan, declaring that it was "remedial in nature" and promulgated "for the purpose of promoting" wider minority participation. The Plan required prime contractors of city work to subcontract "at least 30%" of the contract to MBE's. The Plan defined minority group members as United States citizens who are "Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." An MBE was defined as a business at least 51% owned and controlled by minority group members. The Plan authorized waivers of compliance in exceptional circumstances where: (1) every attempt has been made to comply and (2) it is shown that qualified MBE's are unavailable to participate. This Plan, of course, is quite similar to the one challenged in Fullilove.

B. United States District Court for the Eastern District of Virginia

On September 6, 1983, the city of Richmond requested bids on a plumbing project at the city jail. The J.A. Croson Company, a nonminority contracting firm, received bid forms and contracted MBE's. Without the MBE subcontracts in place, Croson submitted the only bid for the City contract. Croson eventually requested a waiver from the Plan's requirements, stating that it was unable to recruit qualified MBE's. The City denied Croson's request and

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64 City of Richmond v. J.A. Croson Co., 109 S.Ct. 706, 712-14 (1989). The Plan expired on June 30, 1988, calling into question the jurisdiction of the Supreme Court which granted certiorari in 1988 and heard the case after the Plan's expiration date. Id. at 713, 717. The decision was handed down on January 23, 1989. Id. at 706.
65 Id. at 713.
66 Id. at 713. Justice O'Connor wrote that since the district court took judicial notice of the fact that the vast majority of minority persons in Richmond were Black, the Plan suffered from inter alia, gross overinclusiveness. Id. at 728. Justice O'Connor was apparently determined to push the point and even wrote that it "may well be that Richmond has never had an Aleut or Eskimo citizen." Id. at 728.
67 Id. at 713.
68 Id. The Plan allowed for a partial or complete waiver depending upon the circumstances. Id.
69 Id. at 717-20, 739 (Marshall, J., dissenting) (Richmond's set-aside program indistinguishable from program unsuccessfully challenged in Fullilove). See supra notes 17-23 and accompanying text (discussing Fullilove).
70 See City of Richmond v. J.A. Croson Co., 779 F.2d 181 (4th Cir. 1985). Apparently, the district court opinion was not published.
71 Id. at 183.
72 Id.
73 Id. at 183-84.
decided to rebid the project. The district court upheld, in all respects, the City of Richmond's Plan, concluding that it was constitutional on its face and as applied.

C. Court of Appeals for the Fourth Circuit

In 1985, a divided court of appeals affirmed the district court's decisions upholding the Plan in all respects. Relying mainly upon Fullilove and Bakke, the Court first found that the Plan was reasonable in light of past widespread discrimination, and then concluded that the racial quota was narrowly tailored to the goals of the Plan.

Croson sought review of this decision, which the United States Supreme Court granted whereupon it vacated the opinion of the court of appeals and remanded it for further consideration in light of the intervening decision of Wygant. The Court in Wygant declared that a municipality employing a racial preference plan cannot "rest on broad-brush assumptions" of discrimination. On remand, the court of appeals employed the strict scrutiny level of review and invalidated the Richmond Plan concluding that even if the city justified a compelling interest in a race-conscious plan, the 30% set-aside was not narrowly tailored enough to accomplish its goal. It reasoned that generalized societal discrimination will not suffice and that there must have been "prior discrimination by the government unit involved."

D. United States Supreme Court

In a controversial decision, the badly split Court struck down as unconstitutional the 30% set-aside program for MBE's concluding that it violated the equal protection clause of the Fourteenth Amend-

74 Id. at 184.
75 Id. at 182.
76 Id.
77 Id. (Croson I).
78 Id. at 188-90 (Court should accord deference to Richmond City Council's findings as in Fullilove where Court deferred to Congressional findings). See supra notes 4-11 and 17-23 and accompanying text (discussing Bakke and Fullilove).
81 822 F.2d 1355 (4th Cir. 1987) (Croson II). The Court found that the plan violated both prongs of the strict scrutiny test for equal protection challenges. Id. at 1359-60. It found that the 30% figure was arbitrarily chosen rather than being correlated to the number of minority contractors in Richmond. Id.
82 Id. at 1358 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986)) (emphasis in original).
In *Croson*, a majority of the Court for the first time applied the strict scrutiny analysis to a race-conscious plan intended to benefit minorities. Heretofore the Court limited this most exacting analysis to race-conscious plans which worked to harm minorities. The author will discuss each part of the *Croson* decision, and the significance of the case.

Justice O'Connor announced the judgment of the Court. In Part I, Justice O'Connor set forth the facts and case history. In Part II, which Chief Justice Rehnquist and Justice White joined, the arguments were set forth: Croson argued that Richmond's race-conscious remedial efforts must be limited to eradicating its own prior discrimination, while the city argued that *Fullilove* controlled. The Court decision lies between the two suggested alternatives. Justice O'Connor distinguished *Fullilove*, declaring that Congress had the power to legislate a set-aside based upon its broad constitutional remedial powers under Section 5 of the Fourteenth Amendment. *Croson*, however, involved a set-aside plan developed by a local governmental entity, subject to the constraints of Section 1 of the Fourteenth Amendment which places constraints on state action. Justice O'Connor distinguished *Croson* and *Fullilove* by reasoning that Congress need "not make specific findings of discrimination in order to engage in race-conscious relief," although states do.

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83 109 S.Ct. 706, 727 (1989). See generally Rosenfeld, supra note 2, at 1731 (*Croson* declared unconstitutional MBE set-aside program designed to assist minorities); Hoagland & McGlothin, supra note 61, at 5 (*Croson* makes clear that racial preferences are invalid unless based on specific findings of past discrimination); Wermiel, *Justices Limit State Contracts Based On Race*, Wall St. J., Jan. 24, 1989, at A1, col. 1 (Court said state and local governments "must almost always avoid racial quotas and may take affirmative actions steps only to correct well-documented discrimination").


85 See Korematsu v. United States, 323 U.S. 214 (1944); cf. N.Y. Times, Jan. 24, 1989, at A1, col. 6 & A19, col. 6 (Reagan Administration considered *Croson* a victory since it had long tried to persuade Court to set high threshold for justification of set-asides).


87 Compare U.S. Const. amend. XIV, § 1 (placing constraints on state action) with U.S. Const. amend. XIV, § 5 (granting Congress remedial powers to enforce guarantees of the amendment) (emphasis added).

88 City of Richmond v. J.A. Croson Co., 109 S.Ct. 706, 719-20 (1989) (Congress under § 5 has broader powers than States do under § 1).
In Part III-A Justice O'Connor made perhaps the most significant pronouncement of *Croson*, in declaring that the strict scrutiny analysis applies to all race-conscious plans: "the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification." Therefore, for future plans to withstand an equal protection challenge, the use of racial classifications must serve a compelling purpose, and the means used must be narrowly tailored to achieve the objectives. The plurality therefore rejected Justice Marshall's proposal to employ a lowered standard of review for plans designed to benefit those groups which have historically been disenfranchised. Justice O'Connor felt that this rigorous review would "smoke out" illegitimate uses of race and assure that the means chosen would closely fit the compelling goal.

In Part III-B a majority concluded that the plan failed under strict scrutiny analysis because: (1) the city failed to demonstrate a compelling interest in apportioning contracts on the basis of race, and (2) the 30% set-aside was not narrowly tailored to compensate MBE's for past discrimination. As to the first point, the Court refused to grant relief for an "ill-defined wrong," suggesting the legislative body needed to document in detail the problem rather than rely upon generalizations. The Court was looking for evidence that remedial action was necessary such as a constitutional or statutory violation by anyone in the construction industry. Second, any set-aside must be justified by evidence of past discrimination, rather than by vague estimates. The Court rejected statistical evidence of generalized discrimination as lacking in probative value. Instead it was looking for the existence of discrimination in the Richmond construction industry.

In Part IV, a majority criticized the set-aside remedy on two points. First, the City failed to consider alternatives to a race-conscious plan in an effort to promote minority participation. Justice O'Connor

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* Id. at 721 (emphasis added). The Court reasoned that any use of race "is highly suspect." Id.
* Id. (emphasis added) (dissent's standard "singularly deferential and lacking in analysis"); cf. id. at 743 (Marshall, J., dissenting) (program withstands Constitutional challenges if race-conscious classifications serve important governmental objectives and are substantially related to achieving objectives).
* Id. at 721.
* Id. at 723-28.
* Id. at 723-24.
* Id. at 725-28.
* Id. at 728-29. This point is of particular importance to future plans. The Court is clearly interested in seeing the use of race-neutral means to increase minority participation. Id. at 728.
pointed out that relaxed bonding requirements on municipal financing for small firms would promote greater minority participation. Second, the Court found the Plan inflexible in its waiver procedure and rigid in its numerical quota system.

In a conciliatory conclusion, the plurality emphasized that state and local entities may enact race-conscious affirmative action plans in an effort to "rectify the effects of identified discrimination within its jurisdiction." The plurality warned, however, that detailed findings of discrimination "are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects."

Justice Stevens, in a concurring opinion disagreed with the premise in Croson "that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong." Justice Stevens agreed, however, that the Plan in this case failed the equal protection challenge.

Justice Kennedy also concurred in the judgment except as to Justice O'Connor's statement on the power of states under the Fourteenth Amendment. Justice Kennedy argued that the Court should not interpret the Amendment to reduce a state's power when it is attempting to eradicate racial discrimination.

Justice Scalia, in a concurring opinion, stated that even "benign" racial quotas have victims, such that racial preferences ought to be impermissible, and that only a race-neutral program to benefit the disadvantaged comports with the Constitution.

Justices Marshall and Blackmun each wrote stinging dissents strongly critical of the decision on virtually every point. The dissenters declared that the Richmond Plan "is indistinguishable" in all respects from Fullilove. Justice Marshall asserted that the intermediate level of review sufficiently tested the validity of any affirmative action program. Justice Marshall further argued that the

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Footnotes:

96 Id.
97 Id. at 728-29. The Court compared the more flexible system in Fullilove which allowed a waiver for the set-aside where "an MBE's higher price was not attributable to the effects of past discrimination." Id. at 728.
98 Id. at 729. See generally N.Y. Times, supra note 85 (decision should not affect private race-conscious affirmative action programs) (emphasis added).
100 Id. at 730-34 (Stevens, J., concurring in part and concurring in the judgment).
101 Id. at 732-33.
102 Id. at 734-35 (Kennedy, J., concurring in part and concurring in the judgment).
103 Id. at 734.
104 Id. at 735-39 (Scalia, J., concurring).
105 Id. at 739 (Marshall, J., dissenting) and id. at 757 (Blackmun, J., dissenting).
106 Id. at 743.
evidence overwhelmingly showed the pervasive pattern of past discrimination. Justice Blackmun also wrote separately to lament the fact that the Court struck down an affirmative action program sponsored by a city which was the "cradle of the Old Confederacy."¹⁰⁷

III. POST-CROSON AFFIRMATIVE ACTION CHALLENGES

A. Challenges to MBE Programs

At the time of Croson, minority set-aside programs existed in 36 states and nearly 200 local governments.¹⁰⁸ Challenges to these programs, of course, are well under way.

A federal district court in Wisconsin cited Croson with approval when it preliminarily enjoined a state program reserving $4 million in construction contracts for "disadvantaged" businesses.¹⁰⁹ The Court reviewed the Milwaukee program using the Croson analysis, and found that the state failed to show that the use of race-based classifications were based on "specific evidence of discrimination in the state."¹¹⁰ The Court concluded, therefore, that the contractors' "likelihood of success on the merits of their constitutional claim is better than negligible."¹¹¹ The injunction was later modified in light of new evidence and arguments demonstrating that the state program was simply implementing federal law and thus fell under the protection of Fullilove.¹¹² The Court noted that Croson did not apply to federal programs or to "state programs which are subsidiary to them."¹¹³ The Court compared the state statute to the federal program and declared the former to be "fully integrated" into the latter so that the state could rely upon the Congressional findings underlying the federal legislation.¹¹⁴

The Supreme Court of Georgia cited Croson throughout its opinion in deciding a challenge to an affirmative action program sponsored by the city of Atlanta.¹¹⁵ The subcontractors challenged as violative of the state's equal protection clause, the Minority and Female

¹⁰⁷ Id. at 757 (Blackmun, J., dissenting).
¹⁰⁸ See N.Y. Times, supra note 85 (federal and private programs were not technically affected by Croson); Newsweek, Feb. 6, 1989, at 64-65 (Croson imperiled more than 255 programs).
¹¹⁰ Id. at 1031.
¹¹¹ Id.
¹¹² Milwaukee County Pavers Ass'n v. Fiedler, 710 F. Supp. 1532, 1539 (W.D. Wis. 1989) (emphasis added).
¹¹³ Id.
¹¹⁴ Id. at 1543, 1546.
Business Enterprises Ordinance which lacked both an expiration date and a geographic limit. Applying the strict scrutiny standard of review, the Court concluded that the set-aside program failed to pass constitutional muster under both prongs of the test. First, the city failed to provide any evidence of prior discrimination within the industry, and second, that the program was not narrowly tailored to remedy prior discrimination. The Court noted that the city could have used less intrusive means to accomplish the goals of the program (but then failed to point out any).

The United States Supreme Court recently passed on the validity of set-aside programs in two instances where the circuit courts handed down decisions before Croson. In H.K. Porter Co. v. Metropolitan Dade County, the Court granted certiorari, and then immediately vacated the judgment of the court of appeals and remanded the case for further consideration in light of Croson. The court of appeals, in 1987, upheld the set-aside plan, concluding that where the federal agency financed 80% of the project with the state financing the remainder, the state was acting pursuant to Congress's compelling interests notwithstanding the fact that set-aside percentages lacked substantiation.

The Court, in a memorandum decision, affirmed another 1987 court of appeals decision invalidating a Michigan law requiring a set-aside in state contracts for minority and women business enterprises. The lower court historically used an intermediate level test since the challenged classification was enacted for "benign" purposes, but concluded that the intervening decision in Wygant controlled, which used the strict scrutiny standard. Under this review, the court of appeals

116 Id. at 15-16, 376 S.E. 2d at 663-64.
117 Id. at 18-20, 376 S.E. 2d at 664-67.
118 Id. at 20-21, 376 S.E. 2d at 665-66.
119 Id. at 23-25, 376 S.E.2d at 666-67. See generally Wall St. J., Mar. 6, 1989, at B6, col. 1 (Atlanta officials vow to replace invalidated plan); N.Y. Times, June 20, 1989, at A18, col. 1 (Atlanta authorized study to seek alternatives to overturned program).
120 825 F.2d 324 (11th Cir. 1987) (per curiam).
122 H.K. Porter v. Metropolitan Dade County, 825 F.2d 324, 325, 330, 332 (11th Cir. 1987) (per curiam). See generally, Wall St. J., Mar. 7, 1989, at B11, col. 1; N.Y. Times, supra note 85 (it was widely expected that Court would invalidate 5% minority set-aside in Dade County).
123 109 S.Ct. 1333 (1989), affg, 834 F.2d 583 (6th Cir. 1987). See generally Comment, supra note 61, at 1078 & n. 48; Wall St. J., supra note 122 (Court relied on its decision in Croson and struck down Michigan law requiring set-asides).
124 Michigan Road Builders Ass'n v. Milliken, 834 F.2d 583, 587-90 (6th Cir. 1987) (reviewing reasons for adopting heightened level for review of benign racial classifications).
found that the plan lacked evidence of a compelling interest or of past identified discrimination against MBE's by the State.\footnote{Id. at 591-95.}

\section*{B. Challenges to Other Affirmative Action Programs}

The principles enunciated in \textit{City of Richmond v. J.A. Croson Co.} have been applied to challenges beyond the realm of minority set-aside programs. Indeed, nothing in the Court's opinion suggests that it is limited to construction contracting challenges, as evidenced by its use of statistical data normally reserved for employment discrimination challenges.\footnote{See \textit{City of Richmond v. J.A. Croson Co.}, 109 S.Ct. 706, 723-27 (1989); Comment, \textit{supra} note 61, at 1080-81; Hoaglund & McGlothlen, \textit{supra} note 61, at 13 (Croson expressly incorporates Title VII analysis into Fourteenth Amendment doctrine).} The impact of \textit{Croson} on contracting set-asides has been great as seen above in Part IIIA. This section explores the impact of \textit{Croson} on other race-conscious affirmative action programs.\footnote{See generally Panel Discussion, \textit{Who Gets the Jobs? Minority Set-Aside Programs in the Wake of City of Richmond v. Croson}, B. B.J., Nov./Dec. 1989, at 6; Scholar's Reply to Professor Fried, 99 YALE L.J. 163, 165-66 (1989) (Affirmative action programs found in government contracts, educational institutions, and business).}

\subsection*{i. Education Programs}

The leading case in the use of affirmative action in education, of course, is \textit{Bakke}.\footnote{See \textit{supra} notes 4-11 (discussing \textit{Bakke}).} The reader might also recall the history of racial segregation in American schools, as well as the integration of many school systems in the 1970s.

In August, 1989, a federal district court heard a challenge relating to the court-ordered integration of two law schools through the use of an admissions program.\footnote{U.S. v. State of Louisiana, 718 F.Supp. 525, 530 (E.D. La. 1989).} Where one school was virtually all minority, and the other nonminority, the plan required each school to admit at least 10\% of other-race students.\footnote{\textit{Id.}} The Court upheld the program, despite the Justice Department's assertion that it was contrary to the mandate of \textit{Croson}.\footnote{\textit{Id.}} It reasoned that the program was not an "overreaching remedy" and was flexible in its application.\footnote{\textit{Id.}} Moreover, alternative measures had been considered before being rejected.\footnote{\textit{Id.}} The Court relied heavily on its conclusion on the

\footnote{\textit{Id. at 530-31}. The Court found that the program was tailored enough so that there was no "over-correction." \textit{Id. at 531}.}\footnote{\textit{Id.}}
fact that there were previous findings of discrimination by the district court.

ii. Employment Programs

Many of the constitutional challenges to affirmative action programs have involved charges of employment discrimination. It seems that the challenges will continue, and resolutions will be based upon a Croson analysis.

The Court of Appeals for the Eleventh Circuit recently decided a case where a nonminority applicant claimed reverse discrimination based on a city promotion of a minority applicant purportedly in accordance with a court decree. 134 The district court granted summary judgment in favor of the City. 135 This Court, however, remanded the case "in light of Croson," to consider its "applicability" to this case. 136 The Court further ordered the district court to determine "what standard of review is suited to the particular circumstances presented." 137

Another employment case receiving wide coverage involved a Texas school district which reassigned nonminority football coaches to junior positions and replaced them with minority coaches "solely for the purpose of including black coaches on West Brook High's varsity football staff." 138 Relying on the strict scrutiny test, the district court held that the reassignment because of race violated the equal protection clause, because the school district advanced no "compelling interest" in its actions. 139 Finding no justification for the program, the Court declined to comment on whether the program was narrowly tailored. 140

iii. Housing and Lending Programs

The history of racial discrimination in both housing and lending is notorious. A recent series of reports indicate clear patterns and practices every bit as egregious as in the business and employment setting. 141

134 Mann v. City of Albany, 883 F.2d 999, 1000 (11th Cir. 1989).
135 Id. at 1002.
136 Id. at 1005. See supra notes 83-107 and accompanying text (discussing Croson).
137 Mann v. City of Albany, 883 F.2d 999, 1006 (11th Cir. 1989).
139 Id. at 1409-13.
140 Id. at 1413.
141 See B.J., supra note 127, at 7 (Federal Reserve reports point to discrimination in lending industry); The Boston Globe, Feb. 10, 1990, at 25, col. 3 (citing plan to eliminate regulations which discourage investment in impoverished areas).
Recently, a race-conscious tenant assignment plan intended to integrate a neighborhood was challenged in Virginia. The federal district court employed the strict scrutiny test and found that the plan failed because generalized discrimination is not a sufficient justification in view of Croson. The Court warned that "[t]he Supreme Court has demanded something more than the amorphous or diffuse claims of generalized, background discrimination in order to justify rigid discrimination quotas." Further flaws in the plan were that it was not temporary, nor was there evidence that the remedial plan would right the past wrongs.

iv. Federal Programs

Challenges to federal programs which include affirmative action guidelines, are in theory governed by the precedent set in Fullilove v. Klutznick. It appears, though, that Fullilove has limited applicability currently, and that the Croson approach governs.

In Shurberg Broadcasting v. FCC, a nonminority applicant for a broadcasting license challenged the constitutionality of the FCC's distress sale policy insofar as it favored minority applicants. The FCC granted the license to a minority applicant giving greater weight to its distress sale policy favoring minorities than to federal statutory policy which favors competition in licensing. The District of Columbia Circuit Court concluded that the FCC's policy violated the non-minority's equal protection rights under the Fifth Amendment in that it imposed a direct, and possibly permanent burden solely because of race. Characterizing the FCC plan as a "policy in search of a justification," the Court found no compelling interest in the plan, nor was it sufficiently tailored to remedy past discrimination. The Court was badly divided in this decision, yet each opinion relied in

143 Id. at 469-70.
144 Id. at 470.
145 Id. at 471.
146 See supra notes 17-23 and accompanying text (discussing Fullilove).
147 876 F.2d 902 (D.C. Cir. 1989).
148 Id. at 903.
149 Id. at 903-04.
150 Id. at 917. The Court relied primarily upon Bakke, Fullilove, Wygant, and Croson. Id. at 910.
151 Id. at 926. The Court used the strict scrutiny test and could not find that the FCC had a "compelling interest" in fostering programming diversity, nor could it find a "nexus between minority ownership and diversity of program content. Id. See generally The Wash. Post, Apr. 22, 1989, at A5, col. 1; Wall St. J., Apr. 3, 1989, at A16, col. 1.
part on Croson. It seems certain that the case will be appealed further.\textsuperscript{152}

In a case decided one month later in the same circuit but with a different panel of judges, the Court in Winter Park Communications \textit{v. FCC} considered the constitutionality of an FCC policy which accorded minority applicants some preference in awarding new licenses.\textsuperscript{153} In a 2-1 vote, the Court upheld the FCC’s use of an enhancement for minority status relying in large part on the fact that the FCC’s policy was expressly approved by Congress under its Section 5 powers.\textsuperscript{154} The Court contrasted this remedial power with the Section 1 limits on state action, and found \textit{Fullilove} to be more controlling than \textit{Croson}.\textsuperscript{155}

The two rulings essentially conflict with each other and it may take a Supreme Court pronouncement to reconcile them.\textsuperscript{156} Shurberg more closely followed \textit{Croson} when it applied the strict scrutiny test; Winter Park, however, declared that an earlier District of Columbia opinion relating to an FCC Plan controlled notwithstanding the intervening \textit{Croson} decision which ruled on state and local set-asides.\textsuperscript{157} Furthermore, Winter Park ducked the constitutional issues and which level of scrutiny was appropriate for such cases. Rather it relied on precedent, and Congress’s broad remedial powers to eradicate discrimination.\textsuperscript{158}

\textbf{C. Current Litigation Involving Set-Aside Programs}

This section examines MBE set-aside programs of the cities of Philadelphia, and Washington, D.C. Both cities are currently involved in challenges to their minority business enterprise programs.

The authors selected the city of Philadelphia because its plan typifies those currently being challenged elsewhere. Demographically,
minorities in Philadelphia constitute forty-six percent of its population of which thirty-eight percent are blacks, five percent are Spanish, and two percent and one percent, respectively, are orientals and Indians.\footnote{159}

The Philadelphia Ordinance and resultant set-aside plan were originally adopted in 1982\footnote{160} and amended several times most recently in October, 1988.\footnote{161} The plan called for participation by disadvantaged business enterprises (DBE) and further categorized as follows: fifteen percent set-asides for participation by minority owned disadvantaged business enterprises (MBE), ten percent for female owned businesses (FBE), and two percent for those owned by the handicapped (HBE).\footnote{162} The city formulated these percentages as initial goals for the fiscal year following passage of the ordinance\footnote{163} and stated that they were not to be construed as \textit{absolute} upper limits on the percentage of minority participation in city contracts.\footnote{164}

It is useful to distinguish between an MBE and DBE as defined by Philadelphia. Although Philadelphia uses the term MBE, its plan is more inclusive than the Richmond plan as to its criteria for defining a socially and economically disadvantaged individual.\footnote{165} \textit{All} minorities and \textit{all} women are rebuttably presumed to fall within the classification.\footnote{166} Like the Richmond plan, Philadelphia provides for waivers in cases where there are insufficient numbers of qualified MBEs or FBEs to meet a contract's requirements.\footnote{167} Additionally, where a business has received more than five million dollars of contract work with the city, a rebuttable presumption shall be made that the business is not a DBE.\footnote{168}

Of further interest is the fact that the Philadelphia ordinance authorizes the establishment of a "sheltered market" whereby certain


\footnote{160} Id.

\footnote{161} Approved by Mayor William J. Green, October 28, 1988.

\footnote{162} Philadelphia, Pa., Code, Section 17-503 § 1(a)-(c), 1988.

\footnote{163} Id.

\footnote{164} Id.

\footnote{165} See Section 17-501 § 11. This section defines such individuals as persons who have been the victims of racial, sexual, or ethnic prejudice, and whose ability to compete in the free enterprise system has been impaired due to diminished capacity and credit opportunities.

\footnote{166} Id., § 11(a).

\footnote{167} See section 17-505 § 2(a).

\footnote{168} See section 17-501 § 10(b).
covered contracts are selected and set-aside for participation only by MBEs, FBEs, and or HBEs.\textsuperscript{169}

In \textit{Associated General Contractors, Inc., v. City of Philadelphia},\textsuperscript{170} the plaintiffs are nine incorporated associations of construction contractors, general and subcontractors, who have done business with the city. In their complaint, they alleged that because of their status as non-MBEs and non-FBEs they have been excluded from bidding on city contracts and have been disqualified from, or lost awards on city contracts despite having submitted the lowest bids, both as a direct result of the city's set-aside program. Further, in support of their allegations, they claim that there exists no evidence, on the legislative record surrounding the passage of the ordinance, that indicates MBEs, FBEs, or HBEs have been selectively and systematically excluded from participating in city contracts because of their race, ethnicity, gender or handicap.\textsuperscript{171}

Accordingly, the plaintiffs claim that their equal protection rights under both state and federal law have been violated and ask the set-aside program be declared unconstitutional for failure to meet the "strict scrutiny" test set forth in \textit{Croson}.

Philadelphia's principal assertion is that the plaintiffs lack standing to sue in that they fail to establish that they or any of their members have suffered an injury of sufficient immediacy and ripeness, \textit{i.e.} a specific city contract was lost as a result of Philadelphia's set-aside program.

It is the authors' opinion that unless Philadelphia can establish sufficient evidence of discrimination in the award of city contracts, the plan, notwithstanding its remedial purpose, will fail to survive the "strict scrutiny" analysis mandated by \textit{Croson}.\textsuperscript{172}

Washington, D.C. was selected since it is governed by federal law, and seemingly the interpretation of \textit{Croson} if it applies could yield a different result.

Demographically, minorities constitute seventy-two percent of Washington's population. At issue are two set-aside programs directed at those minorities. The first program is controlled by the laws of the District of Columbia Minority Contracting Act (hereinafter the "Act").\textsuperscript{173} This statute applies to the award of city construction

\textsuperscript{169} See section 17-501 § 5.
\textsuperscript{170} No. 89-2737 (E.D. Pa., filed April 14, 1989).
\textsuperscript{171} See Plaintiff's Cross Motion for Summary Judgment at p. 9.
\textsuperscript{172} This paper went to press prior to the decision of the Court. That decision has now been rendered in favor of the plaintiff's contention that the set-aside was unconstitutional under \textit{Croson}. (Confirmed by telephone conversation, May 16, 1990, with Attorney Tom Wamsler, Deputy City Solicitor, Philadelphia, Pa.)
contracts which are funded by the District of Columbia. The Act sets a goal for all city agencies to award 35% of their contracts to certified MBEs.\textsuperscript{174} This quota is more flexible than the quota in \textit{Croson}. Under the statute, the Minority Business Opportunity Commission has authority to set other goals based on its review of reports it receives from various city agencies concerning the degree to which the statutory goals have been met.

The second program is the D.C. Department of Public Works ("DPW") Disadvantaged Business Enterprise ("DBE") Program. This program is mandated by Congress in order for the District to receive federal funds for road construction projects. It was approved by the Federal Highway Administration.\textsuperscript{175}

All federally funded DPW construction contracts provided through the Surface Transportation and Uniform Relocation Assistance Act of 1987 ("STURAA") must comply with the provisions of the DBE program which sets a goal of 37% participation by certified DBEs.

In \textit{O'Donnell Construction Company v. District of Columbia},\textsuperscript{176} the plaintiff, a Virginia corporation with a principal place of business in the District of Columbia, claims that both set-aside programs violate its equal protection rights under the Fourteenth and Fifth Amendments of the U.S. Constitution. It alleges that since it is a nonminority road construction firm, it has been deprived of participation in certain construction contracts.\textsuperscript{177} Further, the plaintiff alleges that neither program is based on evidence of past discrimination, and that neither is sufficiently narrowly tailored to achieve their stated goals, to wit, to remedy "racial discrimination in our society," and, "to overcome the effects of past discrimination in the allocation of contracts."\textsuperscript{178}

The defendant attacks the plaintiff's complaint on the following basis. First, it argues that the Equal Protection Clause does not require absolute equality among all persons or classes of persons, nor does it deny legislatures of the power of classification. Classifi-

\textsuperscript{174} See D.C. Code, § 1-1146(a)(1) (providing "that each agency of the District of Columbia shall allocate its construction contracts in order to reach the goal of thirty-five percent of the dollar volume of all construction contracts to be let to local minority business enterprises").

\textsuperscript{175} See D.C. Code, §§ 1-1141-1-1146 (1980).

\textsuperscript{176} No. 89-1867 (D.D.C., filed July 3, 1989).

\textsuperscript{177} In plaintiff's complaint, it alleges that in the years 1987 and 1988, under the "Act," the D.C. Dept. of Public Works (DPW) solicited bids for construction contracts valued at forty million dollars, one hundred percent of which were set aside for MBEs. Under the DPW DBE program, plaintiff alleges that in the years 1987 and 1988 approximately eighty-two percent of all federally assisted construction work was given to DBE.

\textsuperscript{178} See D.C. Code, § 1-1141(1) (1980).
cation is an essential element of all legislation. Only those classifications that are invidious, arbitrary, or irrational offend the Equal Protection Clause. Further, the defendant argues that its classification is rationally related to a compelling and legitimate interest, i.e., to remedy the effect of past discrimination and therefore its programs pass Constitutional muster under the lowered, intermediate standard of review in *Fullilove*. Therefore, the strict scrutiny of *Croson* is not required.

Second, the defendant argues that its set-aside programs do not set forth a rigid and unyielding racial quota for the award of city contracts to MBE's, but rather it sets forth a *goal* that under the provision of the D.C. Code is not rigid. Therefore, the elements of its programs do not mirror those upon which *Croson* was predicated. Additionally, the defendant alleges that its programs' waiver provisions are broader and more flexible than those in *Croson*. Further, its programs are designed to aid local MBEs, whereas the Richmond plan had no geographic limit. Third, the defendant argues that there is sufficient evidence of past discrimination against MBEs in the award of city contracts to meet the standards for such established by *Croson*.

In evaluating the arguments of both sides in order to reach some conclusion as to the outcome of the litigation, one must remember that the government of the District of Columbia is unique. Its status as a federally created municipal corporation indicates that its set-aside programs might be governed by *Fullilove* rather than *Croson*. However, in light of the conflict precipitated by *Shurberg* and *Winter Park*, and the decisions concerning those cases now pending in the U.S. Supreme Court which will settle the question of which standard of review the Court will apply when passing on set-aside programs enacted by the federal government, the authors hesitate to predict the outcome of the litigation.

**CONCLUSION**

It becomes clear upon reading the foregoing discussion of constitutional challenges to race-conscious affirmative action programs, that the effect of *Croson* reaches well beyond the area of state affirmative action programs although the courts are in disagreement as to its application. The question which remains in many states and cities, is

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179 See Defendants Motion for Summary Judgment, at p. 9.
181 See Report of the Employment and Economic Development Committee on Bill 1-124 (April 12, 1976). The report indicated that qualified minority contracting firms received between three and five percent of the construction work dollars in D.C.
whether their program is immune to challenge, and if not what features of their program are fatal and whether the fatal flaws are severable from the valid provisions within a program.

The *Croson* Court set a new standard for challenges to state and local MBE programs which will require sponsors to review their legislation carefully in order to avoid a result like the City of Richmond's. Affirmative action legislation, if it is to survive challenge, must be carefully crafted, and its rationale must be exhaustively documented. The strict scrutiny level of review, it appears, applies to all race-based programs enacted by state and local entities, which now face very tough choices indeed.