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Strict Scrutiny as Applied to Race-Conscious Affirmative Action Programs - City of Richmond v. J.A. Croson

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STRICT SCRUTINY AS APPLIED TO RACE-CONSCIOUS AFFIRMATIVE ACTION PROGRAMS

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

I. INTRODUCTION

With the decision in *City of Richmond v. J.A. Croson Co.*,[1] the Supreme Court has finally reached a consensus on the level of judicial review to be applied to race-conscious affirmative action programs—that of strict scrutiny. The Court, in *Croson,* looked at a 30% set-aside program for Minority Business Enterprises (MBEs) in Richmond, Virginia, and declared the program to be unconstitutional because it violated the equal protection clause of the fourteenth amendment. In reaching this conclusion, the Court applied a strict scrutiny level of review to the program which is different from the level of review applied by the Court in the past. This note analyzes the history of racial classifications and the level of judicial review applied to outright racial classifications and to benign racial classifications. In this regard, there has been great disparity among the opinions of the Court as to what should be the proper level of review, and up to the time of *Croson* no clear majority had surfaced. The outcome of the *Croson* case not only changes dramatically the way in which current race-conscious programs will be judged, but it also affects the types of race-conscious programs that will withstand scrutiny in the future, thus making the strict scrutiny analysis as applied in *Croson* of great importance to understanding future permissible race-conscious programs.

II. FACTS

In *City of Richmond v. J.A. Croson Co.* a Minority Business Utilization Plan (Plan) adopted on April 11, 1983, by the City of Richmond, Virginia, required prime contractors who were awarded city construction contracts to subcontract at least 30% of the dollar amount of each contract to Minority Business Enterprises (MBEs).[2] This 30% set-aside did not apply where the contract was awarded to a minority-owned prime contracting business.[3] Under the Plan, an MBE was defined as a business anywhere in the country of which at least 51% was owned and controlled by Blacks, Spanish-speaking persons, Orientals, Indians, Eskimos, or Aleuts.[4] Intended to be remedial in nature, the Plan was "enacted 'for the purpose of promoting wider participation by minority business enterprises in the construction of public projects.' "[5] The Plan, however, had no geographic limits and was adopted after a public hearing during which no direct evidence of discrimination by the city was presented.[6] The city was not shown to have discriminated against minority prime contractors on the basis of race in letting contracts nor was there a showing that any

1. 109 S. Ct. 706 (1989).
2. *Id.* at 712-13.
3. *Id.* at 713.
4. *Id.*
5. *Id.* (quoting RICHMOND, VA., CODE § 12-156(a) (1985)).
6. *Id.* at 713-14.

prime contractor had discriminated against minority subcontractors.[7] The evidence put forth in support of the Plan, however, did include statistics which showed that the city's population was 50% black while only .67% of its prime construction contracts had been awarded to MBEs. In addition, the record showed that the local contractors' associations had almost no minority members.[8] The city also relied heavily on congressional findings with regard to racial discrimination in the construction industry nationwide which had formed the basis of the set-aside program in *Fullilove v. Klutznick*.[9] The city measured the Plan by the standards set out in *Fullilove* and concluded that it was constitutional.[10]

The Plan did provide for a waiver provision which required individual consideration of each waiver request. A waiver was granted only upon a showing that no qualified MBEs were available or willing to participate.[11] J.A. Croson Co., after being awarded a city construction contract, applied for a waiver because the MBE with which it had subcontracted some of the work was unable to submit a bid due to difficulty in obtaining credit approval. Croson's waiver was denied, and it subsequently lost the contract. Croson then brought suit under 42 U.S.C. § 1983, alleging that the Plan violated the fourteenth amendment's equal protection clause.[12]

The federal district court upheld the Plan,[13] and the Court of Appeals for the Fourth Circuit affirmed, relying on the standard used in *Fullilove*.[14] The Supreme Court vacated and remanded the case for further consideration in light of its recent decision in *Wygant v. Jackson Board of Education*.[15] On remand the court of appeals held that the Plan violated both prongs of the strict scrutiny test which had been applied in *Wygant*.[16] The Supreme Court affirmed this holding, stating that the city failed to show a compelling governmental interest that would justify the Plan and that the Plan was not narrowly tailored to meet its remedial goal.[17]

III. BACKGROUND

Justice Harlan's declaration in his dissenting opinion in *Plessy v. Ferguson*[18] that "[o]ur Constitution is color-blind"[19] appears to be the starting point for a discussion of the level of review to be applied to affirmative action programs. Justice Harlan's idea might work in theory, but in practice the courts have never used the color-blind standard in ascertaining the proper meaning of the equal protection clause.[20] The Court has consistently implied that an "overriding statutory purpose" could justify racial classifications.[21] For example,

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7. *Id.* at 714.
8. *Id.*
9. 448 U.S. 448 (1980).
10. 109 S. Ct. at 714.
11. *Id.* at 713.
12. *Id.* at 715-16.
13. *Id.* at 716.
14. *Id.*
15. 476 U.S. 267 (1986).
16. 109 S. Ct. at 716.
17. *Id.* at 716-17.
18. 163 U.S. 537 (1896).
19. *Id.* at 559.
20. University of Cal. Regents v. Bakke, 438 U.S. 265, 336 (1978).
21. *Id.* at 356 (quoting McLaughlin v. Florida, 379 U.S. 184, 192 (1964)).

the Court in *North Carolina State Board of Education v. Swann*[22] declared unconstitutional an anti-busing law which forbade the assignment of students on the basis of race. The statute was invalid because it prevented the implementation of desegregation plans required by the fourteenth amendment.[23] "Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy."[24] Indeed, the Court has ordered the implementation of plans aimed at correcting the effects of prior discrimination.[25] With regard to the use of racial quotas, the Court in *Swann* held that ratios can be a good starting point for shaping a remedy when constitutional violations have been found.[26] It is undeniable that in remedying the effects of past or present discrimination, classifications based on race have been acceptable in accomplishing that goal.

The problem with which the Court has struggled is the judicial standard to be used in addressing the constitutionality of racial classifications. In this regard, the courts have consistently held that classifications based on race are "constitutionally suspect" and thus must be "scrutinized with particular care."[27] In *Strauder v. West Virginia*[28] the Court invalidated a statute which limited jury service to white males because it constituted a classification based solely on race, and such discrimination was forbidden by the fourteenth amendment.[29] In footnote four of *United States v. Carolene Products*,[30] Justice Stone implied that a more stringent level of judicial review than that of rational basis should be applied when the classification is based on a well-defined insular minority.[31] *Korematsu v. United States*[32] and *Hirabayashi v. United States*[33] both dealt with restrictions curtailing the civil liberties of those of Japanese ancestry during World War II. Both decisions emphasized that exigent circumstances made it possible to uphold the racial classifications, but they also stressed the idea that such classifications must be subjected to the most rigid scrutiny.[34] Only the "gravest imminent danger to the public safety can constitutionally justify" a classification based on race.[35] In *Korematsu* the Court noted that while pressing public purposes may sometimes justify use of a racial classification, racial antagonism could never be the basis for such a classification.[36] Thus, the Court approved a classification based on race as early as 1943, but only because of the extreme need for such a classification, and even then only after subjecting it to rigid judicial scrutiny.

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22. 402 U.S. 43 (1971).

23. *Id.* at 45-46.

24. *Id.* at 46.

25. Local 28 of Sheet Metal Workers v. Equal Employment Opportunity Comm'n, 478 U.S. 421, 482-83 (1986) (holding union in contempt and ordering affirmative action program to increase non-white membership); Green v. School Bd. of New Kent County, 391 U.S. 430, 431-32, 441-42 (1968) (requiring that school board adopt a plan to completely remove state-imposed segregation).

26. 402 U.S. at 46.

27. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

28. 100 U.S. 303 (1879).

29. *Id.* at 307-08, 310.

30. 304 U.S. 144 (1938).

31. *Id.* at 152-53 n.4.

32. 323 U.S. 214 (1944).

33. 320 U.S. 81 (1943).

34. *Korematsu*, 323 U.S. at 216; *Hirabayashi*, 320 U.S. at 100.

35. 323 U.S. at 218.

36. *Id.* at 216.

Following its decisions in *Korematsu* and *Hirabayashi*, the Court's strict review of racial classifications began to develop. In *Bolling v. Sharpe*[37] the Court, using a rational basis test, held that because racial segregation in the public schools was not "reasonably related to any proper governmental objective,"[38] such segregation denied black children due process of law guaranteed by the fifth amendment.[39] The Court refined this idea in *McLaughlin v. Florida*,[40] stating that laws based on racial classifications bear a "heavy burden of justification" and "will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy."[41] It is, therefore, "necessity" and not "reasonable relationship" which is the correct test for finding an important governmental purpose.[42] Finally, in *Palmore v. Sidoti*[43] the Court stated that "classifications [based on race] are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of their legitimate purpose."[44]

With these guidelines in place, the Court, in a series of cases dealing with race-conscious affirmative action programs, tried to come to agreement on what level of judicial review should be applied in such situations. The first of these cases was *University of California Regents v. Bakke*,[45] in which the Court failed to achieve a consensus as to the level of judicial review to be applied to a special admissions program at the medical school of the University of California at Davis.[46] The program in question set aside sixteen places in an entering class of one-hundred exclusively for minority students.[47] The Court struck down the program but held that in some situations race could be considered.[48] Justice Powell stated that any type of racial classification was "inherently suspect" and thus called for the "most exacting judicial examination."[49] Under such scrutiny the admission program was not necessary to achieving the goal of creating a more diverse student body.[50] Although the interest in a diversified student body satisfied the requirement of a compelling governmental interest, it failed the second part of the test—being narrowly tailored to achieve the compelling governmental interest.[51] Justices Brennan, White, Marshall, and Blackmun argued that the remedial purpose of the program was "sufficiently important" to justify the

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37. 347 U.S. 497 (1954).

38. *Id.* at 500.

39. *Id.* (analysis was under the fifth amendment rather than the fourteenth because the case was brought in the District of Columbia). *Id.* at 499.

40. 379 U.S. 184 (1964) (holding as a violation of the equal protection clause a Florida statute which made it a criminal offense for an unmarried interracial couple to continually live together and occupy the same room at night). *Id.* at 193, 195-96.

41. *Id.* at 196.

42. *Id.* at 197 (Harlan, J., concurring); *see also* Loving v. Virginia, 388 U.S. 1, 11-12 (1967) (holding a statutory scheme adopted by Virginia to prevent interracial marriages violative of the equal protection clause because the distinction was based on nothing more than "invidious racial discrimination").

43. 466 U.S. 429, 430 (1984) (involving a child custody case where custody had been originally awarded to the mother, and the father later filed a motion to modify the judgment based on the fact that the mother was living with a black man).

44. *Id.* at 432-33 (quoting McLaughlin v. Florida, 379 U.S. 184, 196 (1964)).

45. 438 U.S. 265 (1978).

46. *Id.* at 271.

47. *Id.* at 272-75.

48. *Id.* at 320.

49. *Id.* at 291.

50. *Id.* at 315.

51. *Id.* at 314-15.

use of racial classifications.[52] The four remaining justices would not have reached the constitutional issue[53] and concluded that the case should have been decided on the basis of Title VI of the Civil Rights Act of 1964.[54] Because of the four-one-four division in *Bakke*, there was no clear consensus as to the level of review for race-conscious remedial programs.

The next case in which the Supreme Court addressed race-conscious remedial relief was *United Steelworkers of America v. Weber*,[55] a case that the Court decided on the basis of Title VII of the Civil Rights Act of 1964.[56] The Court found that Title VII did not prohibit voluntary race-conscious affirmative action programs adopted by private parties.[57] The Court, therefore, did not find it necessary to discuss the level of judicial review to be applied in such situations. Consequently, *Weber* did not clarify the level of review to be used in affirmative action cases.

In the next two cases, the Supreme Court gave some indication of the direction it would take in reviewing affirmative action, although sharp differences remained among the members of the Court on the level of review to be used. In *Fullilove v. Klutznick*[58] the Court upheld the validity of an act of Congress which required a 10% set-aside for minority business contractors.[59] The six Justices concurring in the judgment were in disagreement as to the level of review to be applied but did agree that the plan was constitutional.[60] Chief Justice Burger wrote the opinion of the Court in which he stated that the objectives of the set-aside provision were within Congress' spending power.[61] He concluded that Congress had an abundance of historical evidence of discrimination from which to conclude that the set-aside met its remedial goal.[62] Justice Powell wrote a concurring opinion in which he applied the rigid level of review he had set forth in *Bakke*, that of the "most stringent level of review."[63] Justices Marshall, Brennan, and Blackmun, however, concluded that the proper level of review for programs with remedial goals was that level of review they had advocated in *Bakke*, which was whether the programs furthered "important governmental objectives and [were] substantially related to achievement of those objectives."[64] *Fullilove*, however, dealt with a congressional plan as opposed to action by a state or local government, leaving open the question of the level of review to be applied when affirmative action plans are enacted by a state or locality.

The Court addressed this issue in *Wygant v. Jackson Board of Education*.[65] In that decision, a clearer picture of the level of review to use in race-conscious plans emerged. It was,

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52. *Id.* at 362 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part).

53. *Id.* at 412-13, 421 (Stevens, J., filed an opinion concurring in the judgment in part and dissenting in part, in which Burger, C.J., Stewart and Rehnquist, J.J., joined in part).

54. 42 U.S.C. § 2000d (1977).

55. 443 U.S. 193 (1979).

56. 42 U.S.C. § 2000e (1977).

57. 443 U.S. 208.

58. 448 U.S. 448 (1980).

59. *Id.* at 453-54, 492.

60. *Id.* at 492 (stating that the set-aside would survive constitutional analysis under either of the tests set out in *Bakke); id.* at 517 (Marshall, Brennan, and Blackmun, J.J., concurring in the judgment).

61. *Id.* at 473-78.

62. *Id.* at 478.

63. *Id.* at 496 (Powell, J., concurring).

64. *Id.* at 519 (Marshall, J., concurring in judgment).

65. 476 U.S. 267 (1986).

however, a plurality opinion, and while five justices joined in the judgment, they could not agree on the level of review to apply to the program.[66] The Court held that a school board's policy of giving preferential protection against layoffs to minorities violated the equal protection clause of the fourteenth amendment.[67] Powell's plurality opinion applied the two-pronged strict scrutiny test to racial classifications designed to remedy the effects of prior discrimination.[68] In using this two-pronged strict scrutiny test, the Court gave guidelines for the analysis under this test. The Court held that societal discrimination alone was not sufficient to show a compelling governmental interest.[69] Instead, there must be a "strong basis in evidence" that prior discrimination existed and that the program was narrowly tailored to achieve its remedial goal.[70]

The *Wygant* decision was the last Supreme Court case dealing with benign racial classifications based on remedial purposes until the Court's most recent decision in *City of Richmond v. J.A. Croson Co.*[71]

IV. INSTANT CASE

The Supreme Court in *Croson* applied a strict scrutiny level of review to the Richmond Plan. Application of this two-pronged strict scrutiny test required inquiry into whether the governmental entity had shown a compelling interest in eradicating the effects of past or present discrimination and whether the plan was narrowly tailored to accomplish its remedial goal.[72] Justice O'Connor, writing for the Court, stated that the purpose of the two-pronged test was "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," and to ensure "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."[73]

Applying the first prong of the strict scrutiny test—whether the governmental entity had shown a compelling interest—O'Connor stated that the city of Richmond had failed to show any such governmental interest in enacting a plan which employed racial classifications.[74] The city offered no direct evidence of present or past discrimination to support its claim that the Plan eradicated such discrimination.[75] The city simply made generalizations about prior discrimination by alluding to the city's history of racial conflict. Without specific identification of racial discrimination in the construction industry, the Court held the city's generalized assertions could not suffice to show a compelling governmental interest.[76] Such a "generalized assertion . . . provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy."[77] The Court also noted that

66. *Id.* at 269, 279 (opinion of Powell, J.); *id.* at 293-94 (O'Connor, J., concurring); *id.* at 295 (White, J., concurring in the judgment).

67. *Id.* at 283-84.

68. *Id.* at 274.

69. *Id.*

70. *Id.* at 268.

71. 109 S. Ct. 706 (1989).

72. *Id.* at 727-28.

73. *Id.* at 721.

74. *Id.* at 723-24.

75. *Id.* at 724-26.

76. *Id.* at 727.

77. *Id.* at 723.

the city had relied on a number of nonracial factors such as "deficiencies in working capital, inability to meet bonding requirements, unfamiliarity with bidding procedures, and disability caused by an inadequate track record" to show racial discrimination in the construction industry.[78] These problems, however, are faced by any new business, not just minority contractors. In this regard, the Court concluded that when suspect classifications are used, the governmental unit cannot simply rely on "a generalized assertion as to the classification's relevance to its goals."[79]

In looking at the basis for the city of Richmond's conclusion that such a plan was constitutional, the Court stated that such a conclusion was "misplaced."[80] The city had compared the percentage of contracts awarded to minority contractors with the total minority population of Richmond and concluded that the great disparity in the two figures demonstrated discrimination in the construction industry.[81] The Court stated that the correct comparison to be used when the job involved specialized qualifications was not comparison with the minority population, but with the number of minorities in the qualified workforce.[82] Not only had the city failed to make the appropriate comparison, it had not even stated how many MBEs were in this qualified pool, nor had the city given the Court the percentage of construction dollars that minority firms were receiving for subcontracting jobs.[83] Without this relevant information the Court was unable to assess the problem of minority underrepresentation in the construction industry.[84] The city had pointed to the fact that there were hardly any MBEs in construction associations.[85] The Court, however, stated that without knowledge of the number of MBEs eligible for membership, this factor was insufficient to provide proof of discrimination in the construction industry.[86]

The city relied heavily on Congress' findings in *Fullilove*[87] to support its contention of past discrimination in the construction business.[88] The Court distinguished *Fullilove* because of the unique powers possessed by Congress under section 5 of the fourteenth amendment.[89] The Court distinguished Congressional powers to enact remedial measures to correct prior discrimination from the powers the states possess to do the same.[90] "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."[91]

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78. *Id.* at 723-24.
79. *Id.* at 724-25.
80. *Id.* at 725.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 725-26.
85. *Id.* at 726.
86. *Id.*
87. 448 U.S. 448 (1980).
88. 109 S. Ct. at 726.
89. *Id.* at 726-27.
90. *Id.*
91. *Id.* at 727.

The Court concluded its analysis of the first prong of the strict scrutiny test by pointing to the over-inclusive aspect of this particular set-aside.[92] The Plan included not only Blacks, but Spanish-speaking persons, Orientals, Indians, Eskimos, and Aleuts.[93] This random choice of racial groups, some of whom might never have been discriminated against in Richmond or for that matter have even resided in Richmond, was evidence that the city's goal was not remedial in its nature.[94]

The Court then turned to the second prong of the strict scrutiny test – whether the plan was narrowly tailored to achieve its remedial goal – and concluded that it was almost impossible to judge this prong because of the city's failure to identify any specific prior or present discrimination.[95] The Court did, however, note that Richmond had not taken any alternative race-neutral steps to increase minority participation in the construction business other than the use of an absolute racial preference.[96] In addition, the 30% set-aside was not narrowly tailored to any particular goal except "outright racial balancing."[97] The city had presumptively assumed that "minorities [would] choose a particular trade in lockstep proportion to their representation in the local population."[98]

Justices Stevens, Kennedy, and Scalia each wrote concurring opinions. Stevens agreed with the Court in its explanation of why the Plan could not be justified as a remedy for past discrimination but disagreed with the premise that a racial classification by a governmental entity can only be justified if it is a remedy for past discrimination.[99] He stated that "the Constitution requires us to evaluate our policy decisions . . . primarily by studying their probable impact on the future."[100] In Stevens' opinion, *Croson* was completely different from *Wygant*,[101] in which he dissented, because in the latter he found race was relevant when dealing with the public's "interest in educating children for the future."[102] To the contrary, the construction business, without a showing of past discrimination, could not justify a race-conscious program.[103] Stevens also stated that it was the judicial system, not the legislative branch, that was best able to decide if prior discrimination existed and, if so, to set forth the remedy for such discrimination.[104] Finally, Stevens concluded that it was more important to "try to identify the characteristics of the advantaged and disadvantaged classes that may justify their disparate treatment"[105] than to argue over the level of judicial review to give such programs.[106]

In his concurring opinion, Kennedy expressed his disagreement with Part II of the Court's opinion which stated that Congress had the power to enact certain remedial mea-

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92. *Id.* at 727-28.
93. *Id.* at 728.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 730-31 (Stevens, J., concurring).
100. *Id.* at 730 (Stevens, J., concurring).
101. 476 U.S. 267 (1986).
102. 109 S. Ct. at 731 n.2 (Stevens, J., concurring).
103. 109 S. Ct. at 731 & n.2 (Stevens, J., concurring in part and concurring in the judgment).
104. *Id.* at 731-32 (Stevens, J., concurring in part and concurring in the judgment).
105. *Id.* at 732 (Stevens, J., concurring in part and concurring in the judgment).
106. *Id.*

sures that would be foreclosed to the states.[107] He did not believe that the fourteenth amendment restricts the states from acting to remedy effects of prior discrimination when the state itself was involved in such discrimination unless the state remedy violated some federal law which would be controlling.[108]

Scalia, on the other hand, stated that the fourteenth amendment was designed to be a limitation on the states' power to use racial classifications whether "remedial" or "benign."[109] Therefore, the federal government may use such remedial measures as it did in *Fullilove*,[110] but the states are prohibited from using racial classifications unless it is "necessary to eliminate their own maintenance of a system of unlawful racial classification,"[111] thus justifying the school desegregation cases.[112] Scalia argued that racial preferences were the source of past discrimination so that, as a result, they only prolonged and reinforced the ideas of the past.[113]

The dissenting opinion, written by Justice Marshall,[114] took issue with the majority's finding that Richmond had not provided sufficient evidence to support a compelling governmental interest.[115] Marshall stated that a less stringent standard of review should be applied.[116] The test calls for a less exacting and detailed showing of prior discrimination than that required under strict scrutiny. According to Marshall, two powerful governmental interests were shown by Richmond: the city's interest in remedying the effects of prior discrimination and the city's interest in preventing the effects from continuing through the city's spending for construction.[117] In looking at whether Richmond offered satisfactory proof of past discrimination to support its compelling interests, Marshall stated that "to suggest that the facts on which Richmond has relied do not provide a sound basis for its finding of past racial discrimination simply blinks credibility."[118]

Marshall pointed out that when present discrimination is not at issue, but the present effect of past discrimination on a particular industry or field is at issue, the correct comparison is between the number of minorities in the population and the number of minorities in the workforce.[119] Marshall also noted that local officials were in a better position than the Court to recognize local prejudice and to make determinations with regard to such local matters.[120]

In looking at the second prong, Marshall concluded that the set-aside program involved in *Croson* was "substantially related to the interests it [sought] to serve in remedying past discrimination and in ensuring that municipal contract procurement does not perpetuate

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107. *Id.* at 734 (Kennedy, J., concurring in part and concurring in the judgment); *see id.* at 719-20.

108. *Id.* at 734 (Kennedy, J., concurring).

109. *Id.* at 735 (Scalia, J., concurring).

110. 448 U.S. 448 (1980).

111. 109 S. Ct. at 737 (Scalia, J., concurring).

112. *Id.*

113. *Id.* at 739 (Scalia, J., concurring).

114. Justices Brennan and Blackmun joined Justice Marshall in the dissent.

115. 109 S. Ct. at 740 (Marshall, J., dissenting).

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

117. *Id.* at 743-44 (Marshall, J., dissenting).

118. *Id.* at 746 (Marshall, J., dissenting).

119. *Id.* at 747 (Marshall, J., dissenting).

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

that discrimination."[121] The Plan was "appropriately limited" just as the set-aside provision in *Fullilove* was limited.[122]

V. ANALYSIS

The *Croson* decision is a marked change with regard to the level of judicial review to be applied to affirmative action plans. For the first time there is a consensus on the Court as to the level of review to be used when benign racial classifications are involved. In the past, strict scrutiny had never been consistently or uniformly applied.[123] Although all the Justices did agree that some higher level of scrutiny was necessary when benign racial classifications were involved, the Court could not agree on what that level of judicial review should be,[124] as evidenced by the Court's decision in *Bakke*.[125] Immediately following *Bakke*, the Court decided *United Steel Workers of America v. Weber*[126] in which the majority avoided the constitutional issue by finding that there was no state action by a private employer who voluntarily adopted a race-conscious plan in its training program.[127] The Court instead looked at the program in light of Title VII of the Civil Rights Act of 1964[128] and concluded that the program was not in violation of the Act.[129] The factors which the Court used, however, were unclear and murky at best. The Court simply stated that "[t]he purposes of the plan mirror those of the statute" and did not "unnecessarily trammel the interests of the white employees."[130]

Fullilove[131] addressed the question left open in *Weber*[132] of whether Congress could require race-conscious programs.[133] Even though the Court answered this question affirmatively,[134] in reality the Court applied a somewhat less strict standard than it purported to apply.[135] The Court did not rely on any significant legislative history apart from congressional reports, hearings, and legislation which related to general societal discrimination against MBEs.[136] The Court thus accepted the fact that Congress had the power to enact

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121. *Id.* at 750 (Marshall, J., dissenting).

122. *Id.* (quoting *Fullilove*, 448 U.S. at 489).

123. *See Wygant*, 476 U.S. at 273-74, 286-87, 294-95 (no clear majority with regard to the level of judicial review to be applied to a lay-off program); *Fullilove*, 448 U.S. at 475-76, 519 (majority of six split as to the level of judicial review to be applied to the set-aside plan); *Bakke*, 438 U.S. at 291, 359 (no agreement reached by the Court as to the level of judicial review to be applied to the program).

124. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-22, at 1523 (2d ed. 1988).

125. 438 U.S. 291, 320 (Justice Powell using a strict scrutiny level of review, yet holding that race could be considered); *id.* at 337, 357 (Justices Brennan, Blackmun, White, and Marshall agreeing with Powell that race can be considered, but disagreeing that strict scrutiny is the proper level of review for affirmative action programs); *id.* at 411, 421 (Justice Stevens, Chief Justice Burger, Justices Rehnquist and Stewart, not reaching the constitutional issue, but instead finding that the plan violates the literal language of Title VI of the Civil Rights Act of 1964).

126. 443 U.S. 193 (1979).

127. *Id.* at 200.

128. *Id.* at 197 (referring to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1977)).

129. *Id.*

130. *Id.* at 208.

131. 448 U.S. 448 (1980).

132. 443 U.S. 193 (1979).

133. Bohrer, *Bakke, Weber and Fullilove: Benign Discrimination and Congressional Power to Enforce the Fourteenth Amendment*, 56 IND. L.J. 473, 507 (1981).

134. *Id.*

135. Days, *Fullilove*, 96 YALE L.J. 453, 467 (1987).

136. *Id.* at 467-68.

such legislation and, therefore, failed to judge it with the strict scrutiny which was later to be applied in *Wygant* and *Croson*.

Justice Stevens' dissent in *Fullilove* addressed the issue of Congress' broad powers and concluded that the fifth amendment due process clause imposes a "special obligation to scrutinize any governmental decisionmaking process that draws nationwide distinctions between citizens on the basis of their race . . . ."[137] In response to Stevens' dissent, the distinction between the fifth amendment due process clause and the fourteenth amendment equal protection clause should be noted. The two concepts are not interchangeable or mutually exclusive. "The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law' . . . [b]ut . . . discrimination may be so unjustifiable as to be violative of due process."[138] It can therefore be argued that the fifth amendment is not a limitation of Congress' powers under section 5 of the fourteenth amendment unless the racial classification was for some purpose other than remediation, such as outright racial balancing.

Finally, the Court in *Wygant* actually applied the two-pronged test of strict scrutiny in looking at benign racial classifications.[139] The Court's holding regarding the specificity of evidence of prior discrimination was crucial to the outcome in *Croson*. For the first time the Court placed considerable emphasis on the evidence requirement needed to support a compelling governmental interest. Influenced by this decision, the Court in *Croson* found it crucial that Richmond had failed to provide any independent showing of prior discrimination in the construction industry.[140]

In *Fullilove* the Court upheld the validity of a 10% set-aside program enacted by Congress.[141] Based on this holding many states and local governments patterned programs after the *Fullilove* set-aside,[142] including the city of Richmond which adopted the program challenged in *Croson*. The fact that Richmond's set-aside program mirrored the one upheld in *Fullilove* is of no probative value when it comes to the level of review to be used. The difference between the two cases was Congress' unique authority to enact legislation pursuant to section 5 of the fourteenth amendment. This authority was absent in *Croson*.[143] While Congress has the power under section 5 of the fourteenth amendment to fashion race-conscious remedies for prior discrimination, section 1 of the fourteenth amendment subjects the states to a strict color-blind standard; section 1 does not carry an affirmative grant of power to the states, rather it prohibits them from abridging the due process and equal protection guarantees. Thus, congressional action, such as *Fullilove* in-

137. 448 U.S. at 548 (Stevens, J., dissenting).

138. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

139. *Wygant*, 476 U.S. at 273-74.

140. 109 S. Ct. at 723-28.

141. 448 U.S. 492, 521.

142. Days, *supra* note 135, at 454.

143. It is apparent from a reading of past cases involving racial classifications that different levels of judicial review have been applied by the Court, depending on the nature of the party adopting the program and depending on whether it was a court-ordered program. *See* United States v. Paradise, 480 U.S. 149 (1987); Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986); Local No. 93 Int'l Ass'n of Firefighters v. Cleveland, 478 U.S. 501 (1986). Because of the distinction between Congress' power to remedy violations of the equal protection clause under § 5 of the fourteenth amendment and the prohibition against state action under § 1 of the fourteenth amendment, it is necessary to look at the authority for the discrimination when dealing with race-conscious affirmative action programs. Bohrer, *supra* note 133, at 505. With regard to voluntary programs, the Court has at times maintained a strict requirement that a remedial purpose be shown which would only seem appropriate in a court ordered program. L. TRIBE, *supra* note 124, § 16-22, at 1537.

volved, would be subject only to the standard of judicial review in *McCulloch v. Maryland*[144] and the due process standard of the fifth amendment.[145] The Richmond Plan, on the other hand, received a more rigorous standard of review.

It follows from this distinction that the evidence necessary to show a compelling governmental interest in each case will not be the same since under the foregoing analysis they would not be judged under the same level of judicial scrutiny. It is not surprising then that the set-aside program in *Fullilove* was found to be valid even absent specific findings of prior discrimination in the construction business.[146] The Court found that the legislative history of the MBE provision provided Congress with a "rational basis" for concluding that prior discrimination caused the exclusion of minorities from the construction business.[147] Therefore, the minority set-aside in *Fullilove* was enacted "without hearings or committee reports and with only token opposition."[148] Likewise, the Richmond city council relied on such congressional findings as evidence of prior discrimination in the construction business to support its showing of a compelling governmental interest.[149] The Court in *Croson*, however, stressed that while states and localities may act to remedy prior discrimination, they must specifically identify their own discriminatory practices before they can use race-conscious measures.[150] They cannot, however, rely on Congress' findings in this area.[151] It is, therefore, apparent that something more than societal discrimination is needed in order to justify race-conscious measures when a governmental entity other than Congress is enacting such measures.

From this discussion of previous cases dealing with the level of judicial review to be accorded race-conscious affirmative action programs, it becomes evident that until *Wygant*[152] there was no uniformity among the members of the Court as to the proper level of review. *Wygant*, however, stands out as distinctive for forming a more definitive analysis for such programs under that Court's adoption of the two-pronged strict scrutiny test for affirmative action programs.[153] There still remained some disagreement as to the application of the two-pronged test, as the decision reflects.[154] What *Wygant* did was pave the way for strict scrutiny as the standard to be used in affirmative action, thus laying the groundwork for the decision in *Croson*. When the Court reached *Croson*, each prong of the judicial analysis was fully defined and discussed, and the Court had guidelines to use: A "compelling governmental interest" means having convincing evidence that remedial action is necessary,[155] and "being narrowly tailored to meet a remedial purpose" means other less intrusive methods of accomplishing that purpose have been tried and were un-

144. 17 U.S. (4 Wheat.) 316 (1819) (adopting a flexible standard of judicial review as long as there is no express prohibition against such action in the Constitution).

145. Bohrer, *supra* note 133, at 478.

146. Days, *supra* note 135, at 465.

147. 448 U.S. at 475.

148. Days, *supra* note 135, at 465.

149. *Croson*, 109 S. Ct. at 726.

150. *Id.* at 729.

151. *Id.* at 727.

152. 476 U.S. 267 (1986).

153. *Id.* at 273-74.

154. *Id.* at 301-02 (Marshall, J., dissenting) (dissent stated that intermediate level of review is proper when racial classifications are used to remedy the effects of past discrimination).

155. *Id.* at 277.

successful or were not available.[156] The Court in *Wygant* never reached the second prong of the test because there was not a showing of a compelling governmental interest to support the first prong of the test.[157]

With the six-three decision in *Croson*, the Court's position regarding the level of judicial review to be applied to affirmative action programs is firmly stated. The dissent,[158] however, continued to favor the intermediate level of review in benign race-conscious affirmative action plans.[159] Regardless of this view and due to the fact that there was a clear majority on the level of judicial review to be applied, the decision managed to give a clearer picture of the strict scrutiny test than the cases before it had.[160] *Croson* took the *Wygant* opinion a step further by defining what will be considered a "strong basis in evidence."[161] *Croson* also reiterated that societal discrimination would not be enough: "[A] generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy."[162] The Court also stated that a state or locality cannot rely on the findings of Congress[163] but must come up with its own evidence of past discrimination in the particular area with some degree of specificity. For the city to rely on statistical disparities, it would have to know how many MBEs were in the local construction industry and what percentage of the total city construction dollars were going to MBEs for subcontracting jobs let by the city.[164] The city would also have to show that it had tried race-neutral measures and that those measures had failed to eradicate the problem.[165] Finally, the quota used by the city must be tied to some identified injury suffered by the minority group.[166]

The problem remaining after the *Croson* decision is that the Court, under the strict scrutiny analysis, has made it more difficult for states and localities to show a compelling governmental interest. It can be argued that the requirement of specificity in identifying past discrimination makes it virtually impossible to pass the scrutiny of the first prong unless the program is directed at a particular, identified victim of past discrimination.[167] The need, however, for such race-conscious programs to be legitimate in their goals of remedying past discrimination and narrowly tailored toward accomplishing that goal is a strong argument for the application of strict scrutiny to affirmative action programs. This type of scrutiny is necessary in order to distinguish a program that is truly remedial in nature from one that has no remedying effect.[168] The remedies these programs set forth are unlikely to

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156. *Id.* at 283-84.

157. *Id.* at 278.

158. Justices Marshall, Brennan, and Blackmun dissented.

159. 109 S. Ct. at 743 (Marshall, Brennan, and Blackmun, J.J., dissenting).

160. *See* Fullilove v. Klutznick, 448 U.S. 448 (1980); United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979); University of Cal. Regents v. Bakke, 438 U.S. 265 (1978).

161. *Wygant*, 476 U.S. at 277.

162. 109 S. Ct. at 723.

163. *Id.* at 727.

164. *Id.* at 725. *See* Ohio Contractors Ass'n v. Keip, 713 F.2d 167, 171 (6th Cir. 1983).

165. 109 S. Ct. 728.

166. *Id.* at 724. *See generally* Comment, *An Analysis of the New Legal Model for Establishing Set-Aside Programs for Minority Business Enterprise: The Case of City of Richmond v. J.A. Croson Co.*, 25 GONZ. L. REV. 141, 153 (1989).

167. Days, *supra* note 135, at 457 (citing Geier v. Alexander, 593 F. Supp. 1263 (M.D. Tenn. 1984) (the narrow definition of "identified victim" would seem to leave out blacks as a class), *aff'd*, 801 F.2d 799 (6th Cir. 1986)).

168. Days, *supra* note 135, at 458-60.

have any lasting success unless they are "properly designed and implemented."[169] The strict scrutiny evaluation ensures that the program has been well-structured, thought out, and is based on relevant and specific evidence of prior or present discrimination against the minority group involved. This view is evidenced by Justice Stevens in his dissent in *Fullilove:* "[B]ecause classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate."[170]

When looking at minority set-aside programs like the one employed in *Croson*, it should be noted that many such programs, when not well-structured to accomplish their remedial purpose, do nothing to help those minorities who have actually suffered from discrimination in the industry. This occurs when one or a few MBEs end up getting all or a significant portion of the set-aside work. The MBEs that are receiving more of the work continue to get the experience and capital necessary to compete on the same level with non-minorities, yet they are still given the preferential treatment, while the MBEs that do not get the majority of the work remain in the same position. Also, with such an all-encompassing definition of an MBE such as the one used in the Richmond Plan, there is no way to ensure that those MBEs truly deserving of the preferential treatment will get it. "Ironically, minority firms that have survived in the competitive struggle, rather than those that have perished, are [the] most likely to benefit from an ordinance of this kind."[171]

VI. CONCLUSION

With the *Croson* decision, the Supreme Court has held that strict scrutiny is the test for race-conscious affirmative action programs under the fourteenth amendment, and in so doing it has set limits and guidelines for others who intend to employ racial classifications in set-aside programs. The Court, however, has clearly not precluded states or localities from acting to remedy the effects of "identified discrimination within [their] own jurisdiction[s]," or to deal with discrimination against particular individuals.[172] While the Court stated emphatically its belief that racial classifications should be subjected to the most exacting judicial scrutiny, it still recognized that there are situations which will warrant such drastic measures as race-conscious relief provides. What the Court has tried to do is ensure that these drastic measures will not be taken unless the circumstances legitimately call for them so that those who are truly entitled to the remedial relief will be sure to receive it.

The importance of the Court's decision in *Croson* will be seen in future cases where it will become evident what is acceptable as evidence of prior discrimination and what types of affirmative action programs will pass the strict scrutiny level of review.[173] This information will be of great consequence to cities and municipalities wishing to employ a race-

169. *Id.* at 456.

170. 448 U.S. at 534-35 (Stevens, J., dissenting).

171. 109 S. Ct. at 733 (Stevens, J., concurring in part and concurring in the judgment).

172. *Id.* at 729.

173. Recent Developments, *Constitutional Law: Equal Protection and Affirmative Action in Local Government Contracting – City of Richmond v. J.A. Croson Co., 121* HARV. J.L. & PUB. POL'Y 1069, 1078 (1989) (citing recent decisions in this area). *See* Michigan Road Builders Ass'n, Inc. v. Milliken, 834 F.2d 583, 594-95 (6th Cir. 1987), (striking down a Michigan law requiring that certain percentages of state contracts go to businesses owned by minorities and women), *aff'd* mem., 109 S. Ct. 1333 (1989); Milwaukee County Pavers Ass'n v. Feidler, 707 F. Supp. 1016, 1018-19, 1034 (W.D. Wis.) (preliminarily enjoining state program that set aside four million dollars in state highway contracting funds for "socially and economically disadvantaged" businesses), *modified*, 710 F. Supp. 1532 (W.D. Wis. 1989); American Subcontractors Ass'n, Ga. Chapter v. City of Atlanta, 376 S.E.2d 662 (Ga. 1989) (striking down the city of Atlanta's minority contractor set-aside program).

conscious affirmative action program. With the decision in *Croson* the Court has set the stage for the future of affirmative action.

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