

The Aftermath of *Croson*: A Blueprint for a Constitutionally Permissible Minority Set-Aside Program

I. INTRODUCTION

African-Americans have suffered mistreatment and discrimination for over three centuries.¹ Although great strides have been made in the last three decades, African-Americans in the United States have not yet reached equality with white Americans.

Today, an eighteen-year-old white male will live 6.7 years longer than an eighteen-year-old black male.² The average African-American family earns \$12,323 less than the average white American family.³ Thirty-one percent of all African-American families have incomes below the poverty level, in contrast to ten percent of all white families.⁴ Moreover, African-Americans suffer from unemployment at a rate of 11.3 percent, whereas the white American unemployment rate is only 4.7 percent.⁵ Probably the most revealing statistic concerns the number of African-American professionals. Although African-Americans represent 12 percent of the total U.S. population, they only account for 6.1 percent of all managers, 2.1 percent of all architects, 3.6 percent of all engineers, 3.3 percent of all physicians, 4.3 percent of all dentists, 4.3 percent of all college and university professors, and 3.2 percent of all lawyers and judges.⁶

These figures clearly indicate that African-Americans have not reached equality with white Americans. Obviously, no single remedy exists to reverse centuries of unequal treatment which has resulted in the current status of African-Americans. Affirmative action,⁷ however, is an inextricable component

¹ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 387-88 (1978) (Marshall, J., concurring). African-Americans were dragged to the United States in chains and sold into slavery three hundred and fifty years ago. *Id.*, cited in J.H. FRANKLIN, *FROM SLAVERY TO FREEDOM* (4th ed. 1974).

² Figures compiled by author using data from STATISTICAL ABSTRACT OF U.S. 74 (111th ed. 1991) (table 107), source U.S. NATIONAL CENTER FOR HEALTH STATISTICS.

³ *Id.* at 449 (table 722), source U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, series P-60, No. 168.

⁴ *Id.* at 464 (table 750).

⁵ *Id.* at 386 (table 635), source U.S. BUREAU OF LABOR STATISTICS, EMPLOYMENT AND EARNINGS.

⁶ *Id.* at 12, 395 (tables 11, 652).

⁷ The term affirmative action will be used to mean a private or governmentally imposed program designed to remedy discriminatory practices and to redress past discrimination in education, employment, and government spending.

of a multifarious solution to the plight of African-Americans.⁸ As Justice Marshall stated in his concurring opinion in *Regents of the University of California v. Bakke*,⁹ bringing African-Americans into the "mainstream of American life should be a state interest of the highest order,"¹⁰ so that all Americans can be afforded "an equal opportunity to buy homes, attend schools, attain government contracts and find jobs."¹¹ Unfortunately, the concept of affirmative action has become one of the most controversial and least understood issues of constitutional law. As a result, affirmative action has come under relentless attack.

The purpose of this Note is not to argue the constitutionality or legitimacy of affirmative action. The Supreme Court and many constitutional scholars have firmly recognized the legality and the importance of affirmative action.¹² Moreover, the current status of African-Americans certainly justifies its need. The recent Supreme Court decision of *City of Richmond v. J.A. Croson Co.*,¹³ however, has cast doubt on the future status of affirmative action in public contracting. This Note will examine the history and constitutional jurisprudence of affirmative action which lead up to *Croson*. It will also describe in detail

⁸ Other solutions include: Providing more positive role models for African-Americans, strengthening the family unit (including family emphasis on the importance of education and providing support for other family members in their pursuit of education), providing quality health care, and providing vocational training, to name a few.

⁹ 438 U.S. 265 (1978) (Marshall, J., concurring).

¹⁰ *Id.* at 396.

¹¹ Joint Statement, *Constitutional Scholars' Statement on Affirmative Action After City of Richmond v. J. A. Croson Co.*, 98 YALE L. J. 1711, 1711 (1989) [hereinafter Joint Statement] (Joint statement released by constitutional scholar conference on the meaning of *City of Richmond v. J. A. Croson Co.*).

¹² See *Johnson v. Transportation Agency*, 480 U.S. 616 (1987) (holding legal a voluntary affirmative action plan designed to increase representation of women in areas traditionally underrepresented); *United States v. Paradise*, 480 U.S. 149 (1987) (holding constitutional, a judicially imposed affirmative action plan which requires 50% of Alabama's state police promotions to go to blacks until a given rank is 25% black or the State implements a promotion plan); *Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986) (holding constitutional, consent decrees allowing affirmative action); *Local 28 of the Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986) (holding that district courts have power to order affirmative action, including numerical quotas, to counteract egregious discrimination); *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (holding constitutional, 10% minority set-aside for federal public works projects); *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979) (holding legal, a voluntary affirmative action plan which reserves 50% of apprenticeship slots to blacks); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (holding constitutional, medical school's use of race as a selection criteria in admissions); Joint Statement, *supra* note 11.

¹³ 488 U.S. 469 (1989).

what municipalities and other local governments must do in order to adopt a constitutionally permissible affirmative action plan.

II. HISTORY OF AFFIRMATIVE ACTION

The idea of a government taking an active role in providing opportunities for minorities because of past discrimination is primarily a phenomenon of the civil rights movement of the 1960s. In fact, President John F. Kennedy coined the term "affirmative action."¹⁴ In 1961 President Kennedy issued Executive Order 10925, requiring federal contractors to take whatever action necessary to "ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color or national origin."¹⁵ Executive Order 10925 also called for the establishment of the President's Committee on Equal Employment Opportunity and for the first time imposed penalties for non-compliance.¹⁶

In 1965, President Lyndon B. Johnson continued President Kennedy's efforts with Executive Order 11246. Executive Order 11246 incorporated the language used in Executive Order 10925 but added the language of Title VII of the Civil Rights Act of 1964 that forbids federal contractors from discriminating against any employee "on the basis of race, color, religion, sex, or national origin."¹⁷ In addition to modifying the language of the order, President Johnson's executive order called for specific affirmative action in employment, recruitment, layoffs, terminations, compensation, and selection for training.¹⁸ It also called for the creation of the Office of Federal Contract Compliance to replace the President's Committee on Equal Employment Opportunity.¹⁹

The Department of Labor's Office of Federal Contract Compliance Programs did not promulgate guidelines for Executive Order 11246 until 1972.²⁰ The guidelines require non-construction contractors with 50 or more employees, and contracts of \$50,000 or more, to develop a detailed written affirmative action plan for their companies in order to receive federal

¹⁴ BUREAU OF NATIONAL AFFAIRS, INC., *AFFIRMATIVE ACTION TODAY: A LEGAL AND PRACTICAL ANALYSIS* 7 (1986) [hereinafter BNA], according to HERBERT HAMMERMAN, *A DECADE OF OPPORTUNITY: AFFIRMATIVE ACTION IN THE 1970S* (1984).

¹⁵ Exec. Order No. 10,925, 3 C.F.R. 448, 450 (1959-1963).

¹⁶ *Id.* Many of the penalties called for cancellation of federal contracts. However, a contractor was determined to be in compliance if it made "good faith efforts" to comply.

¹⁷ BNA, *supra* note 14, at 7.

¹⁸ *Id.* at 8.

¹⁹ *Id.* at 7.

²⁰ *Id.* at 8.

contracts.²¹ Additionally, contrary to common public perception, the guidelines state that any goals a contractor may set pursuant to an affirmative action plan “*may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable, by means of applying every good faith effort to make all aspects of the entire affirmative action program work.*”²²

In addition to early executive commitment to affirmative action under the Kennedy and Johnson Administrations, Congress and other administrative agencies such as the Equal Employment Opportunity Commission (EEOC) have also demonstrated a commitment to affirmative action during the early stages of its inception.²³ In 1972, Congress amended section 706(g) of Title VII of the Civil Rights Act of 1964 to apply to governmental agencies. Section 706(g) states that if there is a finding of discrimination, courts can order affirmative action.²⁴ In 1979, the EEOC promulgated guidelines which permit employers to undertake voluntary affirmative action.²⁵ EEOC guidelines also mandate that Title VII shall apply to private employers with at least fifteen employees and non-federal public employers and unions.²⁶

The executive and legislative branches were not the only branches of the federal government responsible for developing the concept and legality of affirmative action. The judicial branch has played a pivotal role in developing and legally sanctioning affirmative action in education, employment, and public

²¹ *Id.* Construction contractors are covered under Executive Orders 11114 and 11246, and guidelines for federal construction contractors were promulgated in 1980. The Office of Federal Contract Compliance Programs defines an affirmative action plan as a “set of specific and result-oriented procedures to which a contractor commits himself to apply every good faith effort.” *Id.* at 8-9.

²² *Id.* (emphasis added).

²³ Title VII of the Civil Rights Act of 1964 created the EEOC, which became operational on July 2, 1965. The purpose of the EEOC is to end all forms of discrimination in all aspects of employment and to encourage employers to promote equal opportunity for all employees.

²⁴ BNA, *supra* note 14, at 9. Section 706(g) states:

If the court finds that [a governmental agency] has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the [governmental agency] from engaging in such unlawful employment practice, *and order such affirmative action as may be appropriate*, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). . . .

Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(g), 78 Stat. 241 (1964) (amended 1972) (emphasis added).

²⁵ BNA, *supra* note 14, at 9.

²⁶ *Id.*

contracting. The courts have played an even more important role during the 1980s when the increasingly conservative executive branch cut back on many affirmative action programs.

III. DEVELOPMENT OF AFFIRMATIVE ACTION JURISPRUDENCE

A. Background

It has been firmly established in equal protection jurisprudence that any race-specific classification that expressly *disadvantages* racial minorities is inherently "suspect" and will be subject to "strict scrutiny" and upheld only if necessary to promote a "compelling" state interest.²⁷ Use of "suspect" classifications in racial discrimination cases posed no legal problems until various government agencies during the 1960s and 1970s initiated large-scale programs which gave racial minorities advantages over non-minorities to redress past discrimination. Eventually, opponents of these programs questioned whether the same strict scrutiny test used for suspect classifications also applied to classifications which *advantage* racial minorities, commonly referred to as benign classifications.²⁸ These challenges to benign race-based classifications marked the beginning of the "backlash" era, which began in the early 1980s.²⁹ Today this backlash continues and charges of reverse discrimination are increasing.

The Supreme Court first faced the issue of reverse discrimination, and whether strict scrutiny ought to be applied to benign classifications, in *DeFunis v. Odegaard*.³⁰ *DeFunis* involved an affirmative action program which gave minority applicants preferential treatment in admission to the University of Washington law school. The petitioner, a white male, brought suit against the law school arguing that the school violated his Fourteenth Amendment equal protection rights because less qualified Blacks were admitted over him. The Supreme Court postponed addressing the issue of what level of scrutiny to

²⁷ *Strauder v. West Virginia*, 100 U.S. 303 (1879). See also LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1524 (2d ed. 1988); GEOFFREY R. STONE ET. AL., *CONSTITUTIONAL LAW* 528-43 (1986). The Court will find any use of racial classifications invalid unless there is an overriding interest of the government. The theory is that any classification which burdens racial minorities runs counter to the fundamental concept of equal protection. In order for a racial classification to be upheld, the governmental interest must outweigh the basic purpose of equal protection. As a result of this strict scrutiny analysis, no racial classification which burden minorities have been upheld since 1945. RONALD D. ROTUNDA ET. AL., *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 14.5 (3d ed. 1986).

²⁸ See STONE, *supra* note 27, at 578.

²⁹ See GERALD R. GILL, *MEANNESS MANIA: THE CHANGED MOOD* (1980).

³⁰ 416 U.S. 312 (1974). See also STONE, *supra* note 27, at 581.

apply and instead decided that the issue was rendered moot by an earlier court order allowing the petitioner to attend the law school.³¹ *DeFunis* left the door open for future attacks on preferential treatment in admissions and other affirmative action programs.

The Supreme Court squarely addressed the issue of benign racial classifications in *Regents of the University of California v. Bakke*,³² probably one of the most controversial cases in Supreme Court history. As in *DeFunis*, the *Bakke* case also involved an aggressive affirmative action program which gave preferential treatment to minority students applying to the University of California at Davis medical school. The University of California at Davis Medical School program reserved sixteen seats in the entering class of 100 for minority applicants.³³ Bakke challenged the program, arguing that it violated his fourteenth amendment right to equal protection under the law.³⁴ In a divided opinion, a five to four majority ruled that race could be used as a criterion for admissions if the program is "properly devised."³⁵ The Court, however, struck down the rigid set-aside of sixteen seats for minority applicants, stating that the university failed to show a "substantial state interest."³⁶ Although the Court squarely addressed the issue of benign classifications in admissions policies, the decision left more questions than it answered.³⁷ Most importantly, the divided opinion did not establish what level of scrutiny would be used in affirmative action cases.³⁸

Bakke thus set the stage for the affirmative action battle. This highly controversial case spurred debate and speculation among commentators about

³¹ Justice Douglas argued for the strict scrutiny test even for benign classifications. 416 U.S. at 320-44 (Douglas, J., dissenting).

³² 438 U.S. 265 (1978).

³³ *Id.* at 279.

³⁴ Bakke was a white male who had previously attempted to gain admission but was denied, despite his objectively superior academic credentials. *See id.* at 276-78. Bakke also challenged the program under § 601 of Title VI of the 1964 Civil Rights Act. *See id.* at 278. A minority of four Justices decided the case under Title VI. *See id.* at 412-21 (Stevens, J., concurring in the judgement in part and dissenting in part, joined by Burger, C.J., and Stewart and Rehnquist, JJ.).

³⁵ *Id.* at 320 (Powell, J., joined by White, Brennan, Marshall and Blackmun, JJ.).

³⁶ *Id.* at 320. This analysis is under the fourteenth amendment. Under Title VI Chief Justice Burger and Justices Stevens, Stewart, and Rehnquist would have invalidated the program. *Id.* at 408-21.

³⁷ BNA, *supra* note 14, at 24.

³⁸ Only Justice Powell advocated strict scrutiny while Justices White, Brennan, Marshall, and Blackmun advocated a more intermediate level of scrutiny. 438 U.S. at 359 (opinion of Brennan J., joined by White, Marshall, and Blackmun, JJ.). *See* TRIBE, *supra* note 27, at 1530. Since Chief Justice Burger and Justices Stevens, Stewart, and Rehnquist decided the case on statutory grounds, it is not totally clear what level of scrutiny they would have used.

what the case would mean for the numerous programs adopted by previous governmental entities. Surprisingly, many of the court decisions following *Bakke* supported the legality of affirmative action.

B. *Post-Bakke Cases*

The first affirmative action case after *Bakke* involved a challenge to a private voluntary affirmative action plan which reserved fifty percent of United Steel Workers' apprenticeship positions for Blacks.³⁹ In *United Steelworkers of America v. Weber*,⁴⁰ a white candidate for a craft-training apprenticeship challenged the plan on the grounds that it violated his Title VII right of protection against employer discrimination based on race, color, religion, sex, or national origin.⁴¹ The Court held five to two that the plan did not constitute discrimination,⁴² stating that the plan was voluntary and did not "unnecessarily trammel" the interests of white employees.⁴³ Although *Weber* established the legality of minority set-aside programs by private companies under Title VII,⁴⁴ it was silent on the constitutionality of similar programs by governmental entities. Moreover, two other pressing questions were not answered by *Weber*. First, how much of a statistical disparity was needed to justify an affirmative action plan? Second, would the Court use a strict scrutiny test or a lower level of scrutiny for constitutional challenges?⁴⁵

The constitutional question of whether an affirmative action plan is permissible under the Equal Protection Clause of the Fourteenth Amendment was decisively answered in *Fullilove v. Klutznick*.⁴⁶ *Fullilove* involved a minority set-aside program in which Congress mandated that ten percent of all federal funds granted for public projects be used to procure services or supplies from minority business enterprises (MBEs).⁴⁷ In a six-to-three decision, the

³⁹ *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 197 (1979).

⁴⁰ 443 U.S. 193 (1979).

⁴¹ *Id.* at 199-200.

⁴² *Id.* at 208. See also *TRIBE*, *supra* note 27, at 1531. *Weber* challenged the plan under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) & (d). Justice Brennan, writing for the majority, reasoned that the purpose of the plan was "to break down old patterns of racial segregation and hierarchy" and therefore it was a legitimate means of redressing racial discrimination. *Id.* at 208, *quoted in* *TRIBE*, *supra* note 27, at 1531.

⁴³ *Id.* at 208. Justice Brennan distinguished the United Steelworkers' plan from the U.C. Davis plan by stating that this plan did not "require the discharge of white workers and their replacement with new black hires," nor did it "create an absolute bar to the advancement of white employees." *Id.* at 208, *quoted in* *TRIBE*, *supra* note 27, at 1531.

⁴⁴ The plan was upheld by a 5-2 majority. 443 U.S. at 195.

⁴⁵ See *BNA*, *supra* note 14, at 25.

⁴⁶ 448 U.S. 448 (1980).

⁴⁷ *Id.* at 453. Congress defined minority business enterprise as:

Court erased any doubts about the constitutionality of affirmative action programs by upholding the set-aside program.⁴⁸

Although the Court in *Fullilove* noted that Congress had supplied an abundance of evidence showing past discrimination, in fact there was very little real evidence to justify the minority set-aside program, suggesting that Congress need only summarily conclude that there was past discrimination in order to justify an affirmative action plan.⁴⁹ *Fullilove* also did not clearly establish the level of scrutiny to be applied in affirmative action cases. In Chief Justice Burger's plurality opinion, he used "rational basis" or low level scrutiny language to justify the plan, indicating a willingness to defer to Congress in situations in which the federal government voluntarily decides to initiate a program to redress past discriminatory practices in federal contracting.⁵⁰ On the other hand, Justice Marshall advocated the use of a more intermediate level of scrutiny, using language such as "substantially related" to governmental interests.⁵¹

The Supreme Court further developed the notion that entities, other than Congress, seeking to adopt affirmative action plans must make findings of past discrimination to particular individuals in *Firefighters Local Union No. 1784 v. Stotts*.⁵² *Stotts*, which occurred in Memphis, Tennessee, involved a consent decree that purported to remedy the deficiencies in the fire department's hiring

a business at least 50 [percent] of which is owned by minority group members or, in case of a publicly owned business, at least 51 [percent] of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are [African-American, Hispanic, Asian, Native American], Eskimos, and Aleuts.

Id. at 454 (quoting Public Works Employment Act of 1977, Pub. L. 95-28, 92 U.S.C. § 6701 *et. seq.*).

⁴⁸ See *TRIBE*, *supra* note 27, at 1533.

⁴⁹ See *id.* at 1534. The evidence which was supplied came from past hearings on other legislation, 448 U.S. at 465-66. Furthermore, none of the evidence was actually mentioned or debated on the House or Senate floors and no specific hearings on the set-aside were ever held, 448 U.S. at 549-50 & n.25 (Stevens, J., dissenting). See Drew S. Days, *Fullilove*, 96 *YALE L. J.* 453, 465 (1987) (stating that "[o]ne can only marvel at the fact that the minority set-aside provision [in *Fullilove*] was enacted into law without hearings or committee reports, and with only token opposition").

⁵⁰ 448 U.S. at 475. Justice Powell, however, employed the rational basis test, citing the Commerce Clause (article I, § 8, cl. 3) as authority for Congress to justify the program.

⁵¹ *Id.* at 519 (Marshall, J., concurring). Justice Marshall's advocacy for the use of an intermediate level of scrutiny for racial classifications which advantage racial minorities served as an early attempt to establish a principled and rational method for dealing with affirmative action cases.

⁵² 467 U.S. 561 (1984).

and promotion policies with respect to the employment of Blacks.⁵³ The city of Memphis adopted a plan to increase the number of Blacks in each job classification within the department until minority representation equalled the proportion of Blacks in the labor force for the surrounding area.⁵⁴ When the city ran into financial difficulties, it began to lay off all nonessential personnel under its seniority scheme of "last-hired, first-fired," including employees in the fire department.⁵⁵ Since the federal district court retained jurisdiction in order to enforce the decree, the court enjoined the city from laying off any black employees. The labor union representing the firefighters appealed, arguing that the district court's actions violated section 706(g) of Title VII of the 1964 Civil Rights Act.

The Supreme Court held that in discharge cases, mere membership in a disadvantaged class is insufficient to warrant a seniority award, stating that each individual must prove that any discriminatory practice by a governmental entity had an impact on him as an individual.⁵⁶ The Court reasoned that since there was no finding that any of the protected blacks had been victims of discrimination personally and since the consent decree failed to identify any specific employee entitled to relief, the district court's injunction protecting newly hired blacks violated section 706(g).⁵⁷

In 1986 the Court handed down a trilogy of cases which addressed the issue of how much statistical under-representation is needed to justify affirmative action and what level of scrutiny should be used in deciding reverse discrimination cases.⁵⁸ *Wygant v. Jackson Board of Education*⁵⁹ was probably the most important case of the trilogy because it provided the fundamental framework from which the Court would analyze future affirmative action cases.

In *Wygant*, white school teachers challenged the constitutionality of a provision in their collective bargaining agreement which extended preferential

⁵³ *Id.* at 565. The consent decree involved two Memphis firefighters who agreed to drop their class action suits after the city agreed to take the necessary steps in order to remedy past discriminatory hiring and promotional practices. The consent decree is binding on both parties and has the full force of law. See BLACK'S LAW DICTIONARY 370 (5th ed. 1979).

⁵⁴ 467 U.S. at 565. The surrounding area included Shelby County. For example, if Shelby County had a minority population of 20%, the department would attempt to increase the number of minority lieutenants in the department until 20% of all lieutenants were minority employees.

⁵⁵ *Id.*

⁵⁶ *Id.* at 579 (citing *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977)).

⁵⁷ *Id.*

⁵⁸ *Local 28 of the Int'l Assoc. of Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986); *Local No. 93, Int'l Assoc. of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

⁵⁹ 476 U.S. 267 (1986).

protection against economic layoffs to certain minority employees.⁶⁰ By a plurality decision, the Supreme Court found that the school board's policy of extending preferential protection against layoffs to minority employees based on race violated the Equal Protection Clause of the Fourteenth Amendment.⁶¹ In support of its judgment, the Court held that racial classifications which advantage minorities must be justified by a compelling state purpose and the means chosen by the state to effectuate that purpose should be "narrowly tailored."⁶² The Court also held that societal discrimination alone is insufficient to justify a benign racial classification. The Court reasoned that there must be convincing evidence of past discrimination before benign racial classifications are allowed.⁶³ Furthermore, the state must make a factual determination to provide the necessary evidence of past discrimination.⁶⁴ The need for a compelling state interest coupled with the requirement of a factual determination showing past discrimination indicates the Court's movement toward using a strict scrutiny analysis in affirmative action cases.

In *Local 28 of the International Association of Sheet Metal Workers v. EEOC*,⁶⁵ the Supreme Court acknowledged the district court's discretion in ordering affirmative action, even numerical quotas, where employers engaged in flagrant and persistent discrimination. *Sheet Metal Workers* involved a union which defiantly resisted numerous orders to accept black apprentices and to admit qualified Blacks as union members.⁶⁶ Responding to the union's determination to discriminate, the Court for the first time ordered an employer to adopt an affirmative action plan which would deny benefits to whites seeking admission into the union yet extend them to minorities who had never been the victims of discrimination. In a divided opinion, the Court held that district courts have the power to order affirmative action in hiring or union membership cases when necessary to counteract "egregious" discrimination.⁶⁷ This power to order affirmative action, however, is tempered by statements that the plan in *Sheet Metal Workers* placed "marginal" and "temporary" burdens on whites and that, because no discharges were involved, it "did not

⁶⁰ *Id.* at 272.

⁶¹ *Id.* at 284.

⁶² *Id.* at 280 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980)).

⁶³ *Id.* at 277.

⁶⁴ *Id.*

⁶⁵ 478 U.S. 421 (1986).

⁶⁶ See also BNA, *supra* note 14, at 30. The union was first cited for discrimination in 1964 by state authorities. In 1975, a federal district court found the union guilty of discrimination and appointed an administrator who proposed an affirmative action plan which set a goal of 29% minority union membership which the court accepted. 478 U.S. at 426-32. The union was then cited for contempt for not complying with the court order in 1982 and 1983. *Id.* at 426.

⁶⁷ *Id.* at 445.

disadvantage *existing* union members.”⁶⁸ The Court placed additional restraints on district courts by indicating that court-ordered affirmative action plans must be flexible in order to allow for “legitimate” excuses and time for reasonable compliance.⁶⁹

Despite the Court’s unwillingness to give district courts the unfettered ability to order affirmative action, it nevertheless reaffirmed this power in *United States v. Paradise*.⁷⁰ Just as the union in *Sheet Metal Workers*⁷¹ defied numerous court orders to discontinue discriminatory hiring practices, the Alabama state police department also continued to discriminate against black state troopers when giving promotions, despite court orders mandating that the department alter its practices.⁷² In response, the district court in Alabama imposed a numerical affirmative action plan which required the Alabama state police to promote one black trooper for every white trooper promoted until a given rank was twenty-five percent black or until the department implemented an acceptable promotion plan.⁷³

In determining the constitutionality of the judicially imposed plan, the Supreme Court looked to five factors: (1) The necessity for the relief; (2) the efficacy of alternative remedies; (3) the flexibility and the duration of the relief; (4) the relationship of the numerical goals to the relevant labor market; and (5) the impact of the relief on the rights of third parties.⁷⁴ After applying these factors, a plurality of the Court found that the court-ordered plan did “not disproportionately harm the interests, or unnecessarily trammel the rights, of innocent individuals.”⁷⁵ Moreover, the plan was flexible in its application, so the Court held that it was constitutionally permissible.⁷⁶

The third case of the 1986 trilogy did no more to shed light on what level of scrutiny the Court would consistently apply in all affirmative action cases.

⁶⁸ *Id.* at 481.

⁶⁹ *Id.* at 478. See *TRIBE*, *supra* note 27, at 1539–40.

⁷⁰ 480 U.S. 149 (1987).

⁷¹ 478 U.S. 421 (1986).

⁷² There was substantial litigation prior to the instant case. In 1972, the district court issued an order enjoining the department to hire one black trooper for each white trooper until blacks constituted 25% of the force. In 1975, the district court found that the “defendants have, for the purpose of frustrating or delaying full relief to the plaintiff[s], . . . artificially restricted the size of the trooper force and the number of new troopers hired.” In 1979 and again in 1981 the department agreed to two consent decrees. Finally, in 1983 the plaintiffs returned to the district court to enforce the 1979 and 1981 decrees. 480 U.S. 154–64 (quoting *Paradise v. Dothard*, Civ. Action No. 3561-N (MD Ala.), Aug. 5, 1975).

⁷³ *Id.* at 155. The plan specified that 50% of all department promotions were to go to Blacks.

⁷⁴ *Id.* at 171.

⁷⁵ *Id.* at 183.

⁷⁶ *Id.* at 185.

*Local Number 93, International Association of Firefighters v. City of Cleveland*⁷⁷ involved the constitutionality of a consent decree to an affirmative action plan which provided black and Hispanic firefighters hiring, assignment, and promotion preferences over white firefighters.⁷⁸ Since the city of Cleveland had previously been sued for discrimination in its police and fire departments, and lost, the city decided to consent to an affirmative action plan rather than risk the real possibility of losing in further litigation. The firefighters' union challenged the consent decree on the grounds that it was an impermissible remedy under section 706(g) of Title VII.⁷⁹ In a narrow decision, the Court held that section 706(g) did not prohibit an employer from voluntarily entering into a consent decree to adopt an affirmative action plan.

In 1987, the Court reaffirmed its willingness to approve voluntary affirmative action plans in *Johnson v. Transportation Agency*.⁸⁰ *Johnson* involved a female county transportation agency road dispatcher who was promoted over a subjectively more qualified male applicant under the county's voluntary affirmative action plan.⁸¹ Recognizing that women have historically been excluded from many technical and skilled craft jobs, the county adopted a hiring and promotion plan which had a work force goal in which the number of women, minority, and handicapped employees in the county would mirror the proportional representation of each group in the county labor market.⁸² The petitioner, a white male competing for the same dispatcher position, sued the county, arguing that he had been unlawfully discriminated against under Title VII of the 1964 Civil Rights Act.

The Supreme Court upheld the plan, supporting the county's justification for the plan. The Court held that Title VII is no bar to the promotion of a female applicant over a male who scored two points higher on a subjective interview if the employer decides that such a promotion is justified, given the fact that all of the 238 positions had previously been held by men.⁸³ The Court stated that in order to justify an affirmative action plan, an employer need only

⁷⁷ 478 U.S. 501 (1986).

⁷⁸ Just as in *Sheet Metal Workers*, the black and hispanic firefighters themselves were not actual victims of discrimination.

⁷⁹ See *supra* note 24.

⁸⁰ 480 U.S. 616 (1987).

⁸¹ Out of a total of twelve applicants, nine were deemed qualified for the job. *Id.* at 623. An interview was conducted, and seven out of the nine qualified applicants were certified as eligible. *Id.* As a result of the first interview, the petitioner Johnson scored seventy-five and the female applicant scored seventy-three. After a second interview, Johnson was recommended for the job, but the director of the agency chose the female applicant over Johnson, citing the affirmative action goals as a major consideration. *Id.* at 624-25.

⁸² See BNA, *supra* note 14, at 75.

⁸³ 480 U.S. at 641-42.

point to a “‘manifest imbalance’ that reflected under-representation of women in ‘traditionally segregated job categories.’”⁸⁴ The Court further stated that a “manifest imbalance” in an employer’s labor force can be shown by comparing the percentages of women and minorities in skilled job categories with their percentages in the qualified labor force.⁸⁵ Although the county’s plan did not actually show that it, as an agency, had discriminated against women, it did show traditional under-representation in certain job classifications and the difficulty in increasing female representation. The county felt, and the Court agreed, that traditional under-representation dictated the need for such a plan, thereby satisfying the Court’s requirement of a showing of “manifest imbalance.”⁸⁶

C. Status of Affirmative Action Before Croson—What Level of Review?

Affirmative action jurisprudence from the 1970s until 1987 developed along two major lines of cases.⁸⁷ One line of cases involved Title VII discrimination challenges to affirmative action programs adopted by private-sector employers and unions.⁸⁸ The other involved constitutional equal protection challenges to affirmative action programs initiated by governmental entities.⁸⁹ The two lines of cases developed different standards of evaluation.⁹⁰

⁸⁴ *Id.* at 631 (quoting *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 197 (1979)).

⁸⁵ *Id.* at 631–32. If the job does not require any special skills, then the relevant comparison is with the percentage of minorities or women in the area labor market or in the general population. *TRIBE*, *supra* note 27, at 1542 n.109.

⁸⁶ 480 U.S. at 637.

⁸⁷ See Jill B. Scott, Note, *Will the Supreme Court Continue To Put Aside Local Government Set-Asides as Unconstitutional?: The Search for an Answer in City of Richmond v. J.A. Croson Co.*, 42 *BAYLOR L. REV.* 197, 199–200 (1990).

⁸⁸ See, e.g. *Johnson v. Transportation Agency*, 480 U.S. 616 (1987); *United States v. Paradise*, 480 U.S. 149 (1987); *Local Number 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986); *Local 28 of the Sheet Metal Workers’ Int’l Ass’n v. EEOC*, 478 U.S. 421 (1986); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979); *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

⁸⁹ See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

⁹⁰ See Michel Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 *MICH. L. REV.* 1729, 1737 n.40 (1989) (Rosenfeld suggests there is substantial overlap between the relevant statutory and constitutional criteria in the case of public employers). See also *Johnson v. Transportation Agency*, 480 U.S. 616, 649 (1987) (O’Connor, J., concurring in judgment) (Justice O’Connor rejects the

On the one hand, the Fourteenth Amendment cases used a strict scrutiny analysis under which the governmental entity's use of racial classifications in affirmative action programs must be justified by a "compelling governmental interest"⁹¹ and the means chosen by that governmental entity to effectuate that purpose must be "narrowly tailored."⁹² In other words, under the Fourteenth Amendment, the governmental entity must make a factual determination providing statistical evidence of past discrimination and impose a remedy which is specifically tied to the past discrimination. Under Title VII, however, the private employer must show a "manifest imbalance" resulting in an underrepresentation.⁹³ The strict scrutiny standard carries a higher burden of proof than simply showing a "manifest imbalance."

Under strict scrutiny, plaintiffs must provide clear and convincing evidence of past discrimination in order to adopt a constitutionally permissible affirmative action program; whereas, in order to show a manifest imbalance, plaintiffs have to prove discrimination by a preponderance of the evidence. Therefore, plaintiffs must prove more when arguing under the Fourteenth Amendment's Equal Protection Clause than under Title VII. The Court did not decide the level of scrutiny required in all equal protection cases until *Croson*.

Although the level of scrutiny the Court required for equal protection cases had not been definitively established prior to *Croson*, two distinct positions had emerged.⁹⁴ The first position advocates the use of strict scrutiny for equal protection analysis of all affirmative action cases. This position was first advanced by Justice Powell in *Bakke*⁹⁵ and gained considerable momentum during the latter part of the 1980s.⁹⁶ The second position calls for a lower or

proposition of any divergence between statutory and constitutional analysis of affirmative action cases). Cf. David D. Meyer, Note, *Finding a "Manifest Imbalance": The Case for a Unified Statistical Test for Voluntary Affirmative Action Under Title VII*, 87 MICH. L. REV. 1986, 1992-94 (1989) (author suggests that the evidentiary standards for Title VII are lower than those for the Fourteenth Amendment).

⁹¹ *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (quoting *Palmora v. Sidoti*, 466 U.S. 429, 432 (1984)).

⁹² *Id.* at 274 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980)).

⁹³ *Johnson v. Transportation Agency*, 480 U.S. 616, 637 (1987). See *supra* notes 83-86 and accompanying text.

⁹⁴ See Rosenfeld, *supra* note 90, at 1735.

⁹⁵ 438 U.S. 265 (1978).

⁹⁶ Justice Powell interpreted equal protection as requiring that the same protection be given to every person regardless of race. *Id.* at 269-320. See *Johnson v. Transportation Agency*, 480 U.S. 616 (1987); *United States v. Paradise*, 480 U.S. 149 (1987); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984). See also Rosenfeld, *supra* note 90, at 1735, 1738.

intermediate level of scrutiny.⁹⁷ Cases such as *Wygant*, *Johnson*, and *Paradise* forecast the inevitable adoption of the more stringent strict scrutiny analysis for governmental agencies other than Congress.

IV. CITY OF RICHMOND V. J.A. CROSON CO.

In 1983, the Richmond City Council enacted an ordinance known as the Minority Business Utilization Plan (Richmond Plan), which required prime contractors who were awarded city contracts to set aside thirty percent of those contracts to Minority Business Enterprises (MBEs).⁹⁸ The Richmond Plan was identical to the plan adopted by the Federal Government in *Fullilove*, which authorized the director of the Department of General Services to promulgate rules permitting the director to waive the set-aside requirements if the prime contractor demonstrated that the requirement could not be satisfied.⁹⁹

Under Richmond's purchasing procedures, the plan required lowest bid contractors to submit forms on which the contractor identified MBEs they intended to hire and indicated the total percentage of the contract price that would be paid to each MBE.¹⁰⁰ Once these forms were completed, contractors forwarded them to the city's Human Resources Commission, which verified the MBE information.¹⁰¹ The director made the final determination concerning compliance.¹⁰²

The city of Richmond adopted the plan after a public hearing revealed a pattern of discrimination in the Richmond construction industry. The city relied on a number of factors to support the plan. First, the hearing revealed that fewer than one percent of the city's prime construction contracts had been awarded to MBEs from 1978 to 1983, although Richmond's population is fifty

⁹⁷ Although no cases state the intermediate level as the appropriate standard of review, a minority of Justices, Blackmun, Brennan, and Marshall, appeared to have held this view. See *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (Marshall, J, concurring).

⁹⁸ *City of Richmond v. J.A. Croson Co.*, 488 U.S. at 477-78. The Court noted that the Richmond Plan defined MBEs as businesses that were at least 51% owned or controlled by Blacks, Spanish-speaking persons, Orientals, Indians, Eskimos, or Aleuts. *Id.* at 478. This definition mirrored the definition contained in the Federal Government's set-aside program in *Fullilove*. The Court also noted that there was no geographic limit to the Richmond Plan and an otherwise qualified MBE from anywhere in the United States could avail itself of the Richmond set aside. *Id.*

⁹⁹ *Id.* at 478.

¹⁰⁰ *Id.* at 479.

¹⁰¹ *Id.* If a contractor requested a waiver, then this request would also be forwarded to the Commission, which in turn made a recommendation concerning the request.

¹⁰² *Id.* The director's decision was unappealable. However, if a contract was awarded to another bidder after a finding of non-compliance, the unsuccessful bidder could protest under Richmond's procurement regulations. *Id.*

percent black.¹⁰³ Second, statistical evidence indicated that minorities had negligible representation in state and local trade associations.¹⁰⁴ Third, Congress had made nationwide findings of discrimination in the construction industry. Finally, two persons testified to the existence of discrimination in the construction industry.¹⁰⁵ No direct evidence of discrimination was offered by the city.¹⁰⁶

During September of 1983, the J.A. Croson Company submitted a bid for the installation of stainless steel urinals and water closets for the city jail.¹⁰⁷ Croson determined that compliance required subcontracting the installation of the fixtures, thus it attempted to locate an eligible MBE.¹⁰⁸ After failing to locate a MBE who could install the fixtures at a reasonable price, Croson applied for a waiver to the set-aside requirement, which was denied.¹⁰⁹ After being denied a waiver and subsequently losing its bid for the city jail project, Croson sued the city of Richmond, alleging that the Richmond Plan violated its Fourteenth Amendment right to equal protection under the laws.

The U.S. District Court upheld the plan, and the U.S. Court of Appeals affirmed the district court's decision. The Supreme Court granted Croson's writ of certiorari and vacated and remanded the decision to the court of appeals for further consideration using *Wygant's* more stringent strict scrutiny standard of review.¹¹⁰ On remand, the court of appeals found that the Richmond Plan violated the Equal Protection Clause, holding that the plan was not justified by a "compelling governmental interest" since the record showed no prior discrimination by the city and since the thirty percent set-aside was not "narrowly tailored to accomplish a remedial purpose."¹¹¹

In a deeply divided opinion, the Supreme Court affirmed the court of appeals decision, thereby striking down the Richmond Plan. Although the Justices disagreed on what level of review to impose, six agreed that the plan was unconstitutional.¹¹² On the crucial question of what level of scrutiny to apply, Justice O'Connor wrote for a plurality of four to five in Part three A of

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 480.

¹⁰⁵ *Id.* at 479.

¹⁰⁶ *Id.* at 480.

¹⁰⁷ *Id.* at 481.

¹⁰⁸ *Id.* at 481-82.

¹⁰⁹ *Id.* at 483.

¹¹⁰ *Id.* at 485. See *supra* notes 60-64 and accompanying text.

¹¹¹ *Id.* at 485-86.

¹¹² Justice O'Connor wrote the opinion with Justices Rehnquist and White joining in all parts and with Justices Stevens and Kennedy joining in parts I, III B, and IV. *Id.* at 475. Justice Kennedy joined O'Connor, Rehnquist, and White in parts III A and V. *Id.* Justices Stevens, Kennedy, and Scalia wrote concurring opinions while Justice Marshall wrote the dissenting opinion joined by Justices Brennan and Blackmun. *Id.* at 511, 518, 520, 528.

her opinion, calling for strict scrutiny in equal protection challenges to all affirmative action cases.¹¹³

A. Justice O'Connor's Opinion

Justice O'Connor's opinion contains six parts to which various justices joined. She only received a majority, however, in Parts one, three B, and four and a plurality in Parts three A and five. The persistent questions pertaining to what level of scrutiny the Supreme Court will employ and what must be proven in order to adopt a permissible affirmative action plan are answered in Parts three A and three B, respectively.

1. Proper Level of Scrutiny

In Part three A, Justice O'Connor clearly establishes the strict scrutiny test as the appropriate level of review for race-conscious classifications adopted by governmental entities in affirmative action cases.¹¹⁴ The strict scrutiny test is a two-pronged test. The first prong requires affirmative action programs based on racial classifications to be justified by a "compelling governmental interest."¹¹⁵ The second prong requires that the governmental entity choose a means to effectuate its purpose which is narrowly tailored to achieve that goal.¹¹⁶ Justice O'Connor cited Justice Powell from both *Bakke* and *Wygant*, which reject societal discrimination as a basis for showing a compelling interest.¹¹⁷ Therefore, under the first prong of the test, governmental entities that wish to adopt minority set-aside programs, or any other types of affirmative action, must make factual showings of prior discrimination in order to show a compelling state interest.¹¹⁸ Moreover, the second prong of the test requires that the means chosen to redress the past discrimination must not be "chosen arbitrarily,"¹¹⁹ but must be "tied to the number of minority subcontractors in Richmond or to any other relevant number."¹²⁰ Justice O'Connor describes in Part three B what types of factual determinations are sufficient to show a compelling state interest.

¹¹³ *Id.* at 493. Justice O'Connor wrote part IIIA, which applies strict scrutiny, with Justices Rehnquist, White, and Kennedy joining.

¹¹⁴ *Id.* at 493-98.

¹¹⁵ *See id.* at 485. *See also supra* notes 60-64 and accompanying text.

¹¹⁶ *See id.* at 485. *See also supra* notes 60-64 and accompanying text.

¹¹⁷ 488 U.S. at 496-97.

¹¹⁸ *See supra* notes 60-64 and accompanying text.

¹¹⁹ *J.A. Croson Co. v. Richmond*, 822 F.2d 1355, 1360 (4th Cir. 1987), *cert. granted*, 488 U.S. 469 (1989) (*Croson II*).

¹²⁰ *Id.*

2. Proper Statistical Comparisons

In Part three B, Justice O'Connor rejects the district court's basis for upholding the Richmond set-aside program, stating that, "[n]one of these 'findings,' singly or together, provide the City of Richmond with a 'strong basis in evidence for its conclusion that remedial action was necessary.'"¹²¹ Justice O'Connor firmly rejects the following justifications for upholding minority set-asides: (1) Mere fact that the program *advantages* rather than disadvantages racial minorities;¹²² (2) generalized assertions of past discriminatory practices;¹²³ (3) statistical comparisons between the number of prime contracts awarded to minority firms and minority populations within the governmental entity's jurisdiction;¹²⁴ (4) low membership of minority firms in local contractors' associations;¹²⁵ and (5) congressional findings of past discrimination.¹²⁶ More importantly, however, Justice O'Connor suggests the types of statistical comparisons which the Court would approve. In particular, she points to the types of statistical comparisons used in employment discrimination cases such as *Hazelwood School District v. United States*¹²⁷ and in public contracting cases such as *Ohio Contractors Association v. Keip*.¹²⁸ Although Justice O'Connor did not specifically endorse any particular statistical method for showing prior discrimination, her reference to the methods used in *Hazelwood* and *Ohio Contractors* suggest at least one acceptable method.

¹²¹ 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277). The district court relied on five factors in upholding the set-aside:

1) the ordinance declares itself to be remedial; 2) several proponents of the measure stated their views that there had been past discrimination in the construction industry; 3) minority businesses received .67% of prime contracts from the city while minorities constituted 50% of the city's population; 4) there were very few minority contractors in local and state contractors' associations; and 5) in 1977, Congress made a determination that the effects of past discrimination had stifled minority participation in the construction industry nationally.

488 U.S. at 499.

¹²² *Id.* at 500.

¹²³ *Id.*

¹²⁴ *Id.* at 501.

¹²⁵ *Id.* at 503.

¹²⁶ *Id.* at 504.

¹²⁷ 433 U.S. 299 (1977) (proper comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market).

¹²⁸ 713 F.2d 167 (6th Cir. 1983) (comparing percentage of minority businesses in the state to percentage of contracts awarded to minority contractors).

In *Hazelwood*, the United States Government brought an action against the Hazelwood, Missouri School District,¹²⁹ alleging that it had engaged in a "pattern or practice" of teacher employment discrimination in violation of Title VII of the Civil Rights Act of 1964.¹³⁰ The government sought to prove a "pattern or practice" of discrimination by adducing evidence of: (1) A history of discrimination; (2) statistical disparities in hiring; (3) very subjective hiring procedures; and (4) specific instances of alleged discrimination against fifty-five unsuccessful black applicants for teaching jobs.¹³¹ The district court found that the above evidence submitted by the government failed to establish a pattern or practice of discrimination. The court of appeals, however, reversed in part on the grounds that the district court's statistical analysis of hiring data rested on an "irrelevant comparison of [black] teachers to [black] pupils in Hazelwood."¹³² The court of appeals stated that the proper comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market.¹³³

From 1972 to 1973, only 1.4 percent of Hazelwood's teachers were Black. During the following school year only 1.8 percent of the teachers were Black while 15.4 percent of St. Louis' metropolitan area teachers were Black. The court of appeals held that this statistical disparity constituted, *prima facie*, a pattern or practice of racial discrimination.¹³⁴ The Supreme Court agreed with the court of appeals' statistical comparisons, but held that it erred in disregarding the possibility that the *prima facie* statistical proof in the record might, at the trial court level, be rebutted by pre-amendment hiring statistics.¹³⁵ The Supreme Court explained that once a *prima facie* case has been established by statistical workforce disparities, the employer must be given an opportunity to show that the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination.¹³⁶ Since the court of appeals did not give the Hazelwood school district an

¹²⁹ The Hazelwood school district is located in northern St. Louis County, Missouri and covers 78 square miles. 433 U.S. at 301.

¹³⁰ 433 U.S. at 301. Title VII was amended on March 24, 1972, making it applicable to public employers.

¹³¹ 433 U.S. at 303.

¹³² *Id.* at 305.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 309. In other words, the school district might be able to show that the 1972-1974 statistical disparities might be a result of discrimination not prohibited by Title VII until it was applicable to public employers in 1972.

¹³⁶ *Id.* at 309-10. Since Title VII did not apply to public employers before 1972, any discrimination which occurred prior to 1972 would have to be challenged on equal protection grounds.

opportunity to show whether the disparities were due to pre- or post-Act hiring practices, the Supreme Court remanded the case to the district court to determine the origins of the statistical disparities. Despite remanding the case for further determinations, however, the Court agreed with the Eighth Circuit's holding that the proper comparison was between the racial composition of the teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market.¹³⁷

The Eighth Circuit's statistical comparison was also adopted by the Sixth Circuit in *Ohio Contractors Association v. Keip*,¹³⁸ which Justice O'Connor also cited as an appropriate comparison.¹³⁹ In *Ohio Contractors*, an association of contractors and several individual white contractors sought a declaratory judgment that Ohio's minority set-aside statute was unconstitutional. The U.S. District Court found that the statute violated the Equal Protection Clause. On appeal, the Sixth Circuit reversed, holding that the statute did not violate the Equal Protection Clause. The Sixth Circuit found that the set-aside statute was adopted against a "backdrop" from which members of the Ohio legislature were informed of discriminatory practices against minority contractors.¹⁴⁰ A primary factor in this "backdrop" was a report submitted by a special task force established by the Ohio Attorney General which found severe numerical imbalances in the number of contracts awarded to minority firms. The report stated that during the years 1975 to 1977, minority firms constituted seven percent of all Ohio businesses but received fewer than one half of one percent of state contracts.¹⁴¹ This comparison between the total number of contracts awarded to minority firms and the total number of eligible minority firms in Ohio was an appropriate and proper comparison to show statistical disparities according to the Sixth Circuit in *Ohio Contractors*.

The lesson from *Hazelwood* and *Ohio Contractors* is that an inference of discriminatory exclusion can arise when there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors that the locality, directly or indirectly, actually engages.¹⁴² Moreover, both of these cases unequivocally demonstrate that the proper statistical comparison in showing imbalances or disparities is the total percentage of contracting dollars going to minority firms compared to the total percentage of available minority firms in the market.¹⁴³

¹³⁷ *Id.*

¹³⁸ 713 F.2d 167 (6th Cir. 1983).

¹³⁹ 488 U.S. at 502.

¹⁴⁰ 713 F.2d at 171.

¹⁴¹ *Id.*

¹⁴² *Croson*, 488 U.S. at 509.

¹⁴³ See Columbus, Ohio Disparity Study and Recommendations by law firm of Beatty & Roseboro (233 South High Street, Columbus, Ohio 43215) [hereinafter Beatty &

3. State and Municipal Remedies for Identified Discrimination

In Part Five of her opinion, Justice O'Connor emphasizes that *Croson* does not preclude state and local entities from taking various forms of action to rectify "identified" discrimination within its jurisdiction.¹⁴⁴ In fact, Justice O'Connor states that "[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion *could* arise."¹⁴⁵ In such circumstances, governmental entities seem to have a number of ordered options to remedy the discriminatory practice. First, Justice O'Connor suggests that local governmental entities always have at their disposal "a whole array of race-neutral devices to increase the accessibility of city contracting opportunities" to minority contractors when they are unable to show past discrimination.¹⁴⁶ For example, in the absence of direct evidence of discrimination, cities and states could: (1) Simplify bidding procedures; (2) relax bonding requirements; (3) provide training and financial aid for disadvantaged entrepreneurs; and (4) enact ordinances and statutes prohibiting discrimination in providing credit or bonding by local suppliers and banks to minority contractors.¹⁴⁷ According to Justice O'Connor, the theory behind these types of "race-neutral" remedies is that many of the barriers to minority contractors entering the government contracting process are products of bureaucracy rather than discrimination, and by tearing down the barriers with race-neutral remedies, new entrants, such as minority contractors, will gain access to government contracts without relying on racial classifications.¹⁴⁸

Second, governmental entities have the power to penalize individual discriminators and provide appropriate relief to the victim of such discrimination.¹⁴⁹ Thus, if the governmental entity can identify individual instances of discrimination, they can remedy those instances without resorting to racial classifications. Moreover, Justice O'Connor states, "evidence of a pattern of individual discriminatory acts can, if supported by appropriate

Roseboro] (Beatty & Roseboro was commissioned to review the City of Columbus' minority set-aside program and to provide the City with the evidence of past discrimination needed to justify their program).

¹⁴⁴ 488 U.S. at 509.

¹⁴⁵ *Id.* at 509 (emphasis added).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 509-10.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 509.

statistical proof, lend support to a local government's determination that *broader remedial relief is justified*."¹⁵⁰

The third level of remedial relief is reserved for those situations where gross statistical disparities are shown. In these "extreme case[s]," Justice O'Connor authorizes the use of "some form of narrowly tailored racial preference . . . to break down patterns of deliberate exclusion."¹⁵¹ Although Justice O'Connor did not indicate what she meant by a "narrowly tailored racial preference," certainly numerical quotas of public contracts for minority contractors tied to identified statistical disparities would fit this description. Therefore, if governmental entities can show gross statistical disparities using proper findings,¹⁵² and the relief is narrowly tailored to remedying the disparity, then race-based minority set-asides should be constitutional. Justice O'Connor suggests, however, that governmental entities must first determine that race-neutral remedies would not succeed in remedying the identified gross statistical disparities before adopting race-based remedies such as minority set-asides.

V. ESTABLISHING THE REQUISITE EVIDENTIARY REQUIREMENTS FOR A CONSTITUTIONAL MINORITY SET-ASIDE PROGRAM

A. *Statistical Evidence*

City of Richmond v. J.A. Croson firmly established that proper statistical evidence can be used by a legislative body to draw a prima facie inference of discriminatory intent.¹⁵³ The Supreme Court has stated that if governmental entities compare the total percentage of contracting dollars going to minority contractors to the total percentage of eligible minority contractors in the market and if a significant disparity can be shown from these comparisons, then such an inference can be drawn. In order for local governments to draw an inference of discrimination, they must first determine whether any discrimination is occurring within its contract awarding apparatus. Local governments can determine if discrimination is occurring by comparing the amount of contracts awarded to minority contractors with the amount that would be expected if awards were randomly awarded to both minority and non-minority contractors.¹⁵⁴ If the amount of contracts awarded to minority contractors is

¹⁵⁰ *Id.* at 509 (emphasis added).

¹⁵¹ *Id.*

¹⁵² See *supra* Part IV(a)(2).

¹⁵³ See *supra* Part IV(a)(2) and (3).

¹⁵⁴ Statistical formulations were gathered from numerous interviews held Jan.-Feb. 1992 with Robert Leighty, statistician and manager of the Statistical Consulting Service at

less than the amount that would be expected, provided the contracts were randomly awarded, then local governments are presented with a prima facie inference of discrimination. This theory can be expressed as follows:

If $y < (n)(p_0)$ then prima facie inference of discrimination

Where:

1. y = amount received by minority contractors;
2. n = the total amount of government payments awarded in contracts over the time period: $n = \sum n_i$;
3. n_i = the dollar amount of the i 'th contract, $i = 1, 2, \dots k$;
4. p_0 = MBE F / CITY F;
5. MBE F = number of eligible minority firms within the governmental jurisdiction;
6. CITY F = total number of minority and non-minority firms within the government's jurisdiction.¹⁵⁵

Realistically, governmental entities do not randomly award contracts. In fact, a certain amount of bias in the selection process can be expected.¹⁵⁶ For example, suppose a public servant is presented with bids from contractors A and B to build a new fire station. Both A and B have submitted comparable bids, and both are capable of building a safe and aesthetic fire station on time. The public servant might choose A over B simply because the servant thinks A is a better contractor. The decision was made purely from a subjective belief that A is a better contractor than B. In order to distinguish between situations when public servants select contractors based on normal subjective bias or other non-discriminatory factors and outright racial discrimination, governmental entities need to know at what point any inference of discrimination becomes statistically significant.

In *Castaneda v. Partida*,¹⁵⁷ the Supreme Court provided cities and states with a rational method for determining when evidence of discrimination is

the Ohio State University, 131 Cockins Hall, 1958 Neil Avenue, Columbus, Ohio 43210 [hereinafter Leighty].

¹⁵⁵ *Id.* See also Beatty & Roseboro, *supra* note 144, at 15. See also Disparity in Public Contracting, Columbus, Ohio, Economic Evidence and Recommendations by William D. Bradford (Professor of Finance, College of Business and Management, University of Maryland, College Park) at 2-4 (Jan. 18, 1991) [hereinafter Professor Bradford] (Report given to Beatty & Roseboro on the methodology of economic evidence needed to justify a minority set-aside program); Andrew F. Brimmer & Ray Marshall, Racial Discrimination and business Enterprise Activity: Measurement of Participation and Utilization 2 (June 29, 1990) [hereinafter Brimmer & Marshall] (Report given to City of Atlanta to justify its minority set-aside program).

¹⁵⁶ Professor Bradford, *supra* note 155, at 8.

¹⁵⁷ 430 U.S. 482 (1977).

statistically significant.¹⁵⁸ As a general rule, if there are more than three standard deviations for the binomial distribution¹⁵⁹ between the amount of contract dollars that minority firms should be expected to receive and the actual amount of contract dollars they received, then the disparity is a result of something other than the expected fluctuation due to normal bias.¹⁶⁰

Once a local government has a prima facie inference of discrimination, it could develop a Standard Deviation Quotient which would help governments determine whether any inference of discrimination is statistically significant, *i.e.*, whether it has a prima facie case of discrimination. The Standard Deviation Quotient can be expressed as:

$$\text{Standard Deviation Quotient} = - (Y - (n)(p_0)) / SE(Y)^{161}$$

Where:

1. Y = the amount received by minority contractors;
2. n = the total amount of government payments awarded in contracts over the time period: $n = \sum n_i$
3. n_i = the dollar amount of the *i*'th contract, $i = 1, 2, \dots k$;
4. p_0 = MBE F / CITY F;
5. MBE F = number of eligible minority firms within the governmental jurisdiction;
6. CITY F = total number of minority and non-minority firms within the government's jurisdiction;
7. $SE(Y) = (p_0 (1-p_0) \sum n_i^2)^{1/2}$

By comparing the Standard Deviation Quotient with the value three, local governments can test whether they have a prima facie case of discrimination. The Standard Deviation Quotient test suggests that the probability of a minority contractor receiving a contract award is very small if the Standard Deviation Quotient exceeds the value three.¹⁶² If the probability of a minority contractor

¹⁵⁸ *Id.* at 496-97 n.17 (binomial distribution method used by Court to show racial disparity in jury selection). See *Hazelwood*, 433 U.S. 309, 311 nn.14, 17.

¹⁵⁹ See Michel O. Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 HARV. L. REV. 338, 353-56 (1966); Professor Bradford, *supra* note 155, at 4-8.

¹⁶⁰ 430 U.S. 482, 496-97 n.17. See also Professor Bradford, *supra* note 154, at 3-4.

¹⁶¹ Leighty, *supra* note 154.

¹⁶² The comparison of the Standard Deviation Quotient with the value 3 is actually an hypothesis test on the parameter p , the probability that a minority contractor is awarded a contract. This statistical test is designed to determine if the probability p is less than the probability p_0 , the proportion of eligible minority contractors. Local governments are

receiving a contract award is less than the eligibility ratio, defined to be the proportion of eligible minority contractors, then local governments are presented with prima facie evidence of discrimination which is statistically significant. This hypothesis test can be expressed as:

If the Standard Deviation Quotient > 3 then p will be very small

If $p = p_0$ then city is awarding contracts impartially

If $p < p_0$ then city is awarding contracts discriminatorally

Where:

1. Standard Deviation Quotient = $-(Y - (n)(p_0)) / SE(Y)$;¹⁶³

2. p = probability that a minority contractor is awarded a contract;

3. p_0 = MBE F / CITY F;

4. MBE F = number of eligible minority firms within the government's jurisdiction;

5. CITY F = total number of minority and non-minority firms within the government's jurisdiction.¹⁶⁴

A Standard Deviation Quotient that exceeds three suggests that discrimination is being practiced, but it does not shed any insight into the severity of the discrimination being practiced.¹⁶⁵ For example, an instance in which p (the probability that a minority contractor is awarded a contract) is 20 percent smaller than p_0 (the proportion of eligible minority contractors) would presumably be considered more serious than an instance in which p is only 5 percent smaller than p_0 . In order to determine the severity of discrimination, a confidence interval could be constructed which would allow courts to measure the severity of a city's prima facie case of discrimination. This confidence interval can be expressed as:

$$\left[\frac{2\hat{p} + c^2 - c(c^2 + 4\hat{p}\hat{q})^{1/2}}{2(1 + c^2)}, \frac{2\hat{p} + c^2 + c(c^2 + 4\hat{p}\hat{q})^{1/2}}{2(1 + c^2)} \right]$$

alternative hypothesis of a possible discriminatory policy in awarding contracts, $H_1:p = p_0$. Leighty, *supra* note 134.

¹⁶³ For a detailed description of all variables which make up the Standard Deviation Quotient equation, see *supra* Standard Deviation Quotient note 156 and accompanying text.

¹⁶⁴ Leighty, *supra* note 154.

¹⁶⁵ *Id.*

Where:

1. \hat{p} = the proportion of dollars awarded to minority contractors over the time period: $\hat{p} = Y/n$;
2. Y = the amount received by minority contractors;
3. n = the total amount of government payments awarded in contracts over the time period: $n = \sum n_i$;
4. n_i = the dollar amount of the i 'th contract, $i = 1, 2, \dots k$;
5. $\hat{q} = 1 - \hat{p}$;
6. $c = z_{\alpha/2} (\sum n_i^2/n)^{1/2}$;
7. $z_{\alpha/2}$ = the upper $\alpha/2$ percentile of the standard normal distribution.¹⁶⁶

For example, in Case 1, if a city awards 500 contracts each amounting to \$10,000 and the proportion of dollars awarded to minority contractors over a time period is .23 ($\hat{p} = .23$), the confidence interval equation gives an interval of (.18, .29) or 18 percent to 29 percent. If p (the probability that a minority contractor is awarded a contract) is 30 percent, then the city is not presented with a very serious case of discrimination. If in Case 2, however, given the same facts as in Case 1 except \hat{p} equals .07, then the confidence interval equation gives an interval of (.04, .11) or 4 percent to 11 percent, which is nowhere near 30 percent. Therefore, the city in Case 2 is presented with a very egregious prima facie case of discrimination.

The only major criticism of this confidence interval is that it gives a very large confidence interval for small numbers of contracts. In such instances a city may not have an accurate indication of the severity of the discrimination which is occurring. In order to obtain a more accurate confidence interval, a city must have a substantial history of awarding contracts. The more contracts a city awards, the more reliable the confidence interval will be.¹⁶⁷

Challengers who attack state and local governments who institute minority set-aside programs based on statistical disparities and the Standard Deviation Quotient¹⁶⁸ may argue that this methodology does not account for the many variables that go into deciding whether to award a contract or not. They may argue that lack of bonding or lack of experience in contracting may be the cause of the disparity rather than discrimination. Such an argument is a powerful one, particularly when the Standard Deviation Quotient is close to three. In cases in which the Standard Deviation Quotient is rather high, it is unlikely that factors such as lack of bonding or experience alone account for

¹⁶⁶ *Id.*, THOMAS J. SANTER & DIANE E. DUFFY, *THE STATISTICAL ANALYSIS OF DISCRETE DATA* 41 (1989).

¹⁶⁷ Leighty, *supra* note 154.

¹⁶⁸ See *supra* notes 161-67 and accompanying text.

such a large disparity. In cases in which the Standard Deviation Quotient is close to three, state and local governments could adopt other statistical methodologies which account for explanatory variables such as bonding and experience. For example, local governments could use chi-square testing¹⁶⁹ or multiple regression as a method to infer discrimination.¹⁷⁰

Multiple regression is a technique that has increasingly been used by courts to infer discrimination because of its ability to determine what factors are involved in a particular setting and the weight of their involvement.¹⁷¹ Multiple Regression allows one to compare the influence of many variables on the awarding of contracts. By holding these factors constant, multiple regression allows a local government to determine whether bonding or some other influencing factor is a significant factor in awarding contracts.¹⁷² A major limitation of this technique is that the dependent variable against which other factors are judged must be a continuous variable.¹⁷³

The dependent variable in public contracting cases could be a function of the probability that a contract is awarded given several explanatory variables, such as bonding and years of experience. This function could be expressed as follows:

$$\log \left[\frac{p(x)}{(1-p(x))} \right] = K + ax_1 + bx_2 + cx_3 + dx_4 + \dots + ux_m$$

¹⁶⁹ See DAVID W. BARNES & JOHN M. CONLEY, *STATISTICAL EVIDENCE IN LITIGATION* 200-47 (1986); RICHARD A. WEHMHOEFER, *STATISTICS IN LITIGATION* 72-85 (1985); DAVID W. BARNES, *STATISTICS AS PROOF* 163-98 (1983).

¹⁷⁰ The Standard Deviation Quotient is not the only method to infer discrimination, however, it is the only method that Justice O'Connor alluded to in *Croson*. The literature is filled with various statistical methods to infer discrimination. See e.g. BARNES & CONLEY, *supra* note 169; WEHMHOEFER, *supra* note 169; BARNES, *supra* note 169; DAVID C. BALDUS & J. COLE, *STATISTICAL PROOF OF DISCRIMINATION* (1980).

¹⁷¹ MICHAEL J. ZIMMER, ET. AL., *EMPLOYMENT DISCRIMINATION* 122-29 (1988). Multiple regression was first suggested in employment discrimination contexts in Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal*, 89 HARV. L. REV 387 (1975). Since 1975, a number of federal courts, including the Supreme Court, have considered multiple regression analysis. See, e.g. *Bazemore v. Friday*, 478 U.S. 385 (1986); *Hanson v. Veteran's Admin.*, 800 F.2d 1381 (5th Cir. 1986); *Griffin v. Board of Regents*, 795 F.2d 1281 (7th Cir. 1986); *Lewis v. Bloomsburg Mills, Inc.*, 773 F.2d 561 (4th Cir. 1985); *Coates v. Johnson & Johnson*, 756 F.2d 524 (7th Cir. 1985).

¹⁷² ZIMMER, *supra* note 171 at 130.

¹⁷³ *Id.* Multiple regression is mostly used in pay discrimination cases in which salary is the dependent variable. *Bazemore*, 478 U.S. 385; *Hanson*, 800 F.2d 1381; *Griffin*, 795 F.2d 1281; *Lewis*, 773 F.2d 561; *Coates*, 756 F.2d 524.

in which the left side of the equation represents the probability or odds of awarding a contract and the right side represents the various factors such as bonding or years of experience which will influence the awarding of contracts.¹⁷⁴ The most difficult part of this methodology is determining which variables should be included in the equation. If a local government is convinced that it has included all of the relevant variables into the model, it will have to gather the relevant data and apply it to the model. There are widely available software packages that will allow for computer computations of the data.¹⁷⁵ Once this is done, local governments will be able to determine what variables have a statistically significant influence on public contracting. If race is the significant factor, then the local government has raised an inference of discrimination.

Statistical models such as Standard Deviation Quotient and Multiple Regression allow state and local governments to identify discrimination in their public contracting apparatus. Governmental entities, however, should not rely on statistical evidence alone. They should supplement statistical proof with actual testimony of discrimination that will bring "cold numbers convincingly to life."¹⁷⁶

B. Anecdotal Evidence

Anecdotal evidence is needed to corroborate the inference drawn from any statistical disparities which are shown. If minority contractors testify that they have been personally discriminated against while attempting to obtain contracts, and other forms of proof are presented showing that minorities have been discriminated against, it provides courts with the support needed to dispel any notion that the disparity is due to anything but discrimination.

State and local governments have three methods to choose from to present anecdotal evidence.¹⁷⁷ The first, and probably the best, requires governmental entities to conduct public hearings in which minority and other contractors testify to individual instances of discrimination that they have encountered with the governmental entity. The second requires the entity to produce written statements and affidavits of past discriminatory practices. Finally, local governments could search the public record for vestiges of discrimination.¹⁷⁸ Past law suits, complaints, and newspaper articles alleging discrimination could all be used to show that the governmental entity engaged in discrimination.

¹⁷⁴ See DAVID R. COX & E.J. SNELL, ANALYSIS OF BINARY DATA 104-06 (1970); BARNES & CONLEY, *supra* note 169, at 412.

¹⁷⁵ A typical software package is Statistical Package for the Social Sciences (SPSS) which will include regression programs that can be adapted for public contracting cases.

¹⁷⁶ *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 338 (1977).

¹⁷⁷ *Beatty & Roseboro*, *supra* note 143, at 17-25.

¹⁷⁸ See *Washington v. Davis*, 426 U.S. 229 (1976).

Once local governments have collected statistical evidence indicating a statistically significant disparity and they present anecdotal evidence supporting the economic evidence, *Croson* permits government entities to adopt a minority set-aside program. *Croson* also requires, however, that the set-aside be narrowly tailored to correcting the disparity. This additional burden presents local governments with the problem of determining exactly how narrowly tailored the set-aside must be in order to be constitutionally permissible.

VI. HOW "NARROWLY TAILORED"?

Although the Court in *Croson* required that any race-based remedy be "narrowly tailored,"¹⁷⁹ the Court does not provide any concrete examples of what a narrowly tailored minority set-aside would look like. The *Croson* case does, however, indicate that an acceptable set-aside program would not "arbitrarily" choose goals or quotas.¹⁸⁰ Justice O'Connor also states that the purpose for the "narrowly tailored" element of strict scrutiny is designed to "ensur[e] that the means chosen 'fit' [the] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."¹⁸¹ Unfortunately, *Croson* provides local governments with no objective standard to determine what is meant by "narrowly tailored." One viable and reliable source is other equal protection cases.

Basically, the Court has upheld race-based statutes which achieve the purpose that they intend without providing remedies to individuals who were not victims of discrimination and without providing victims with a windfall.¹⁸² Given this framework, local governments would have a narrowly tailored set-aside if the quotas were: (1) Limited to the class which has been discriminated against; and (2) limited to providing minority firms with the contracts they would have received but for discrimination. Therefore, in order for numerical quotas to be narrowly tailored, they should be tied to the amount that eligible minority firms would expect to receive if no discrimination existed.¹⁸³

From a practical point of view, local governments should set their numerical quotas based on the gap between what minority firms would be

¹⁷⁹ 488 U.S. at 509.

¹⁸⁰ *Id.* at 486.

¹⁸¹ *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 110 S. Ct. 2997, 3037 (1990) (quoting *Croson*, 488 U.S. at 493).

¹⁸² *Johnson v. Transportation Agency*, 480 U.S. 616 (1987); *United States v. Paradise*, 480 U.S. 149 (1987); *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986).

¹⁸³ See Professor Bradford, *supra* note 154, at 8.

receiving if no discrimination existed, adjusted for explanatory factors,¹⁸⁴ and the actual amount of contract dollars minority firms receive. For example, in year one, it is determined that minority firms should be receiving ten percent of the government's contract dollars based on the Standard Deviation Quotient; however, due to discrimination, they are only receiving two percent of the contract dollars. In this situation, the governmental entity should set a numerical quota at eight percent in order to close the gap. If, in year two, the amount minority firms should receive remains at ten percent but the amount they actually receive increases from two percent to six percent, as a result of the set-aside, then year three's numerical quota should be four percent. Each year the government entity should set the numerical quotas based on the gap between what minority firms should be receiving and what they actually receive. Such a scheme allows for flexibility in the set-aside to allow for improvements in contracting process and should be tailored narrowly enough to satisfy *Croson*.

VII. CONCLUSION

Although *City of Richmond v. J.A. Croson* may have made it more difficult for state and local governments to enact statutes and ordinances establishing minority set-aside programs, nothing in the decision suggests that all set-asides are unconstitutional. Moreover, nothing in the decision suggests that affirmative action is dead. In fact, the concept of affirmative action is alive and well in the eyes of the Supreme Court.¹⁸⁵ In order for local governments to adopt a constitutional minority set-aside program, they must follow the guidelines set by *Croson*. If state and local governments wish to adopt minority set-aside programs, they should take four steps to ensure their program complies with the mandates of *Croson*.

First, they should establish that race-neutral remedies will not correct discrimination in contract awarding. Second, they should provide legislatures and city councils with concrete statistical evidence using the standard deviation statistical method, or any other proven statistical method, to show that an unexplained disparity exists between the amount of contract dollars non-minority firms receive and what minority firms should be receiving if no discrimination existed. Third, they should provide anecdotal evidence corroborating the inference drawn from the results of the statistical evidence. Finally, state and local governments should take care to set numerical goals in a

¹⁸⁴ For example, if a disparity is greater than 3 standard deviations, then discrimination is inferred.

¹⁸⁵ See, e.g., *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 110 S. Ct. 2997 (1990) (FCC policy designed to enhance minority participation and ownership of radio and television stations held constitutional).

manner which allows for flexibility but also reduces the disparity between the amount of contract dollars minority firms actually receive and what they ought to be receiving. If local governments take great care to follow these steps, they will have a blueprint for a constitutionally permissible minority set-aside program.

These steps may seem easy enough to accomplish, but in reality the Supreme Court has saddled many local governments with a tremendous burden of proof, particularly given this country's historical treatment of African-Americans. Local governments that wish to adopt minority set-aside programs will face numerous practical problems which many governments will find insurmountable. Some of these obstacles will include: Problems in defining realistic geographic markets when determining eligible minority firms; problems in figuring cost-effective ways to ascertain exactly how many contract dollars are awarded to minority firms since most state and cities do not routinely track such expenditures; and problems in persuading public officials to admit that they have been discriminating against minority firms.

In the end, the Supreme Court may have deterred local governments that are not determined and dedicated to rectifying the past ills of society, but those governments that are committed, and which will provide the necessary resources required to adopt permissible minority set-aside programs, should not be deterred. Hope is still alive for those governments that desire to give minority businesses their fair share of the economic pie and attempt to affect the current status of African-Americans in the United States.

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