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Comment

SETTING ASIDE SET ASIDES: THE NEW STANDARD FOR AFFIRMATIVE ACTION PROGRAMS IN THE CONSTRUCTION INDUSTRY

I. INTRODUCTION

Affirmative action is typically defined as an effort to expand opportunities for minority groups that have been the subject of discrimination.¹ Today, affirmative action programs are deeply rooted in society and are an integral part of American public policy.² Over the past thirty years, federal, state and local governments have enacted affirmative action programs in the public works arena to increase participation of minority businesses in public construction projects in an effort to counteract the effects of racial discrimination.³ Although these programs fall under the

1. See MICHAEL ROSENFELD, *AFFIRMATIVE ACTION AND JUSTICE* 42 (1991) (defining affirmative action as “[any] attempts to bring members of underrepresented groups . . . into a higher degree of participation in some beneficial program”); Adam Winkler, *Sounds of Silence: The Supreme Court and Affirmative Action*, 28 *LOV. L.A. L. REV.* 923, 926 (1995) (defining affirmative action as “the use of race consciousness in a preferential manner intended not to stigmatize, but to provide a modicum of equality to members of those groups that historically have been the victims of discrimination and subordination”). Because typical definitions of affirmative action are somewhat simplistic, they disguise the myriad of forms that affirmative action may take. See 141 *CONG. REC.* S3929-01 (1995) (listing over 160 federal executive orders and statutory and regulatory provisions providing for preferential treatment of individuals on basis of race, sex, national origin or ethnic background). These programs are used by virtually every federal government agency. See *id.*

2. See Dinesh D’Souza & Christopher Edley, Jr., *Affirmative Action Debate: Should Race-Based Affirmative Action Be Abandoned as a National Policy?*, 60 *ALB. L. REV.* 425, 425 (1996) (noting that use of race-based affirmative action has become part of national policy); Margery Newman, *Affirmative Action and the Construction Industry*, 25 *PUB. CONT. L.J.* 433, 433 (1996) (recognizing that use of affirmative action is important aspect of American public policy making); see also Proposed Reforms to Affirmative Action in Federal Procurement, 61 *Fed. Reg.* 26,041 (1996) (proposed May 23, 1996) (acknowledging Congress’s long-standing use of race-conscious federal procurement programs); *The Issue and the National Agenda*, (visited Mar. 20, 1997) <<http://marge.emba.uvm.edu:80/wohlson/adarand.htm>> (describing evolution of affirmative action as national policy). For a further discussion on the history of federal race-based affirmative action programs, see *infra* notes 25-56 and accompanying text.

3. See 10 U.S.C. § 2323 (1994) (establishing goal of awarding five percent of Department of Defense procurement, research and development, construction, operation and maintenance contracts to minority businesses and institutions); 12 U.S.C. § 1441(a), (r)-(w) (1994) (providing for various incentives for preservation and expansion of minority- and women-owned banks); 22 U.S.C. § 4852(d) (1994) (mandating that at least 10% of amount of funds appropriated for Department of

(2039)

State and foreign affairs diplomatic construction projects be allocated to American minority contractors); 42 U.S.C. § 2473(b) (1994) (requiring National Aeronautics and Space Administration administrator to establish annual goal of at least eight percent of total value of prime contracts and subcontracts awarded to be made to small disadvantaged businesses and minority educational institutions); 47 U.S.C. § 309(j)(4)(D) (1994) (directing Federal Communications Commission (FCC) to prescribe regulations, including use of bidding preferences, to ensure that minority- and women-owned businesses have opportunity to participate in providing spectrum-based services); National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 3159, 107 Stat. 1547, 1956 (1993) (providing that goal of five percent of combined total funds of Department of Energy used to carry out national security programs be allocated to minority businesses and institutions); Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. No. 102-240, § 1003(b), 105 Stat. 1914, 1919 (1991) (requiring that not less than 10% of funds appropriated under this Act be expended on small and minority businesses); Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 1001, 104 Stat. 2399, 2708 (1990) (requiring administrator of Environmental Protection Agency to allocate no less than 10% of federal funding to minority businesses for research relating to requirements of Clean Air Act Amendments of 1990); Exec. Order No. 11,625, 3 C.F.R. 616 (1971) (directing Secretary of Commerce to develop comprehensive plans and specific goals for minority enterprise program); 24 C.F.R. § 968.110(b) (1997) (requiring Public Housing Authority to meet Housing and Urban Development goals for awarding public housing modernization programs contracts to minority businesses); 28 C.F.R. § 0.18a (1997) (requiring Department of Justice to establish goals for minority businesses in department procurement contracts); 43 C.F.R. § 27.6 (1997) (requiring Department of Interior to set annual goals for awarding contracts to minority- and women-owned businesses); 48 C.F.R. §§ 419.201-71(a), .202-71(a) (1997) (requiring that Department of Agriculture establish yearly minority- and women-owned business contracting goals for procurement preference programs); 48 C.F.R. § 819.202-5(c) (1997) (requiring that acquisition activities within Department of Veterans Affairs submit procurement preference goals for awarding contracts to minority- and women-owned business); 48 C.F.R. pt. 2929, § 1919.202-70 (1997) (requiring that Department of Labor develop annual goals for awarding contracts to minority- and women-owned businesses).

In addition to the numerous federal programs in existence, many state and local governments also have in place a variety of affirmative action programs. *See, e.g.*, ARK. CODE ANN. § 15-4-305 (Michie 1995) (requiring Division of Minority Business Enterprise to develop plans and participation goals for minority businesses); CALIF. PUB. CONT. CODE § 2000 (West 1997) (allowing local agencies to prescribe minority- and women-owned business participation goals in awarding government contracts); CONN. GEN. STAT. ANN. § 4a-60 (West 1996) (mandating that contractors on state public works contracts make good faith efforts to employ minority businesses as subcontractors and suppliers); CONN. GEN. STAT. ANN. § 7-148u (West 1996) (allowing municipalities to set aside up to 25% of dollar amount of construction and supply contracts to award to minority businesses); D.C. CODE ANN. § 1-1146(a) (1981) (requiring District of Columbia agencies to allocate 35% of dollar amount of public construction contracts to minority businesses); FLA. STAT. ANN. § 287.093 (West 1996) (allowing municipalities to set aside up to 10% of dollar amount of contracts for procurement of personal property and services to award to minority businesses); 70 ILL. COMP. STAT. 210/23.1 (West 1996) (requiring Metropolitan Pier and Exposition Authority to establish goals of awarding not less than 25% of dollar amount of contracts to minority contractors and not less than five percent to women contractors); IND. CODE § 5-16-1-7 (1996) (requiring that state agencies establish goal that five percent of all contracts awarded be given to minority businesses); KAN. STAT. ANN. § 68-441 (1995) (allowing Secretary of Transportation to designate certain state highway construction contracts, or portions of

general definition of "affirmative action," they are specifically referred to as "preferences" or, more commonly, "set-aside" programs.⁴ Set-aside pro-

contracts, to be set aside for bidding by disadvantaged businesses only); LA. REV. STAT. ANN. § 1955 (West 1996) (requiring establishment of annual participation goals for awarding contracts for goods and services and public works projects to minority- and women-owned businesses); MD. CODE ANN., EDUC. § 16-408(f) (2) (1996) (requiring Montgomery County Community College to establish minority business utilization program to facilitate participation of minority-owned businesses in contracting with college); MD. CODE ANN., STATE FIN. & PROC. § 14-302 (1996) (requiring that Maryland award 14% of dollar amount of procurement contracts to minority businesses); MICH. COMP. LAWS ANN. § 450.772 (West 1996) (establishing participation goals for awarding of government contracts to minority- and women-owned businesses); N.J. STAT. ANN. § 40A:11-42 (West 1996) (allowing municipalities to set aside certain percentage of dollar value of contracts to award to minority businesses); N.Y. TRANSP. LAW § 428 (McKinney 1996) (requiring that governor of New York establish procedures to ensure adequate participation of minority contractors in transportation infrastructure renewal projects); WASH. ADMIN. CODE § 326-02-020 (1995) (discussing set-aside programs to benefit minority- and women-owned businesses).

While the above programs place various contracting and subcontracting requirements on private employers performing government-funded contracts, nothing in the federal statutes requires a private entity performing a private contract to integrate such programs into its employment practices. *See* 42 U.S.C. § 2000e-5(g)(1) (1994) (providing that private entity may be forced to integrate only when performing private contracts if that private entity engaged in unlawful employment practices). Nevertheless, a court can order private entities to employ an affirmative action program if the private entity has engaged in intentional discrimination. *See id.* ("If the court finds that [a private entity] engaged in or is intentionally engaging in unlawful employment practice, . . . the court may . . . order such affirmative action as may be appropriate . . ."); *see also* *United States v. Paradise*, 480 U.S. 149, 194 (1987) (ordering Alabama Department of Public Safety to promote one African-American trooper for every Caucasian trooper promoted to rank of corporal on finding discriminatory employment and promotion practices toward African-Americans); *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986) (approving consent decree requiring city to promote minority firefighters after Court found intentional discrimination in hiring and promoting practices); *Local 28 of Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421, 481 (1986) (ordering labor union to adopt affirmative action program to increase minority participation after finding that union engaged in racial discriminatory practice); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) (ordering city fire department to adopt affirmative action program to remedy racial discrimination of African-American firefighters).

4. *See* David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 *HASTINGS CONST. L.Q.* 921, 928-29 (1996) (defining and categorizing affirmative action programs in awarding of public construction contracts). Other terms such as "preferential treatment," "quotas" and "hiring goals" are also used to refer to affirmative action programs. *See* ROSENFELD, *supra* note 1, at 42 (noting that "some affirmative action efforts include preferential treatment" and association of affirmative action with imposition of "quotas" and "goals"); *see also* *F. Buddie Contracting Co. v. City of Elyria*, 773 F. Supp. 1018, 1020 (N.D. Ohio 1991) (noting that terms such as "goals," "preference" and "quota" are repeatedly used to describe affirmative action programs). The term "set-aside" is also an immensely popular term used to describe affirmative action programs. *See* Oppenheimer, *supra*, at 928. Nonetheless, although the terms "quotas" and "set-asides" are popular, they are technically incorrect because the government cannot set aside a portion of contracts to be awarded only to women and minorities. *See id.* (explaining

grams attempt to eradicate discriminatory practices within a jurisdiction's construction industry by setting a numerical goal for minority participation in government construction contracts and by attempting to meet that goal through a variety of procedures.⁵ Today, however, because of an or-

that term "set-aside" is misleading because government cannot set aside contracts to be exclusively performed by minority and women); *see also The Equal Opportunity Act of 1995: Hearings on H.R. 2128 Before the Subcomm. on the Const. of the Comm. on the Judiciary*, 104th Cong. (1995) (statement of Deval L. Patrick, Assistant Attorney General for Civil Rights) (noting that federal law makes quotas, or setting aside portions of contracts for minorities and women exclusively, patently illegal). Rather, the government may only set "goals" for minority participation in government contracting. *See Oppenheimer, supra*, at 928 (noting that government may only achieve these goals through lawful procedures).

Nonetheless, the term "set-aside" will be used in this Comment to refer to government programs that seek to establish a participation goal for governments in awarding public works contracts to minority-owned contractors. For a further discussion of the definition of affirmative action programs, *see* Winston Riddick & Patricia Riddick, *Overview of United States Supreme Court Affirmative Action Decisions in Race and Gender Cases: 1980-1995*, 23 S.U. L. REV. 107, 108 (1996) (discussing disagreements over meaning of affirmative action).

5. *See Oppenheimer, supra* note 4, at 928-29 (describing various set-aside programs used by government entities in awarding public construction contracts). There are four basic set-aside strategies used by government agencies to meet participation goals. *See id.* at 928. First, a bid by a minority contractor on a public construction project may be reduced by a certain percentage to make the minority contractor's bid competitive with other nonminority contractor bids. *See id.* For example, a minority contractor may bid on a road resurfacing project for \$1,000,000. *See id.* This bid may be given a two percent minority preference, reducing the bid to \$980,000 and making it more competitive. *See id.* Thus, if a nonminority-owned contractor bid \$985,000 on the resurfacing project, the minority contractor would be awarded the contract, while being paid his or her original bid of \$1,000,000 to perform the contract. *See id.*

Second, a bid by a minority contractor may be accepted, for bidding purposes, at its face value, but if awarded the contract, the contractor will have his or her bid inflated by a certain percentage for purposes of payment. *See id.* Using the previous example, the minority contractor could bid \$980,000, thus underbidding the nonminority contractor's bid of \$985,000. *See id.* At the same time, the minority contractor's bid would be inflated by a little more than two percent for a payment price of \$1,000,000 to perform the contract. *See id.*

Third, nonminority-owned contractors bidding on public construction projects may be given a bidding preference if they use minority subcontractors. *See id.* at 928-29. Using the previous example, if a nonminority contractor submitted a \$1,000,000 bid and agreed to subcontract a portion of work to minority contractors, the nonminority contractor would be given a two percent bidding preference, which would lower his bid to \$980,000 for bidding purposes. *See id.* Nevertheless, the nonminority contractor would be paid the \$1,000,000 to perform the contract. Also, the nonminority contractor may be given a monetary bonus for using minority subcontractors on the project. *See id.* at 929. Thus, the nonminority contractor may submit a bid for \$1,000,000, but would actually be paid \$1,020,000 for using minority subcontractors. *See id.*

Fourth, nonminority contractors who submit bids on public construction projects may be required to use minority subcontractors for a certain amount of the job. *See id.* Under this method, the program may provide that a nonminority contractor could obtain a goal waiver if no qualified minority subcontractors were available or willing to submit competitive bids. *See id.* Again using the above example, the nonminority contractor with a bid of \$1,000,000 would be required to give

ganized movement against set aside programs within the construction industry, criticism of these programs has risen sharply.⁶ There have been many reasons propounded by nonminority-owned contractors for abolish-

minority subcontractors \$100,000 of the work or, alternatively, to obtain a waiver. *See id.* The City of Philadelphia enacted this type of program, which was later challenged and, in part, overturned. *See Contractors Ass'n v. City of Philadelphia*, 91 F.3d 586, 590 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 953 (1997) [hereinafter *Contractors III*].

Aside from these four basic affirmative action strategies, quasi affirmative action programs may also be implemented, taking the form of self-studies, outreach and counseling and antidiscrimination plans. *See Oppenheimer, supra* note 4, at 929. The self-study method mandates that any entity transacting substantial business with the federal government perform "self studies." *See* 41 C.F.R. § 60-2.11 (1997) (requiring self-study to contain workforce analysis in skilled and semiskilled jobs and analysis of all major job groups with explanation of whether minorities and women are critically underutilized). This requires nonminority contractors to keep records on how much work they subcontracted out to minority subcontractors. *See Oppenheimer, supra* note 4, at 930. This is then compared to the number of qualified minority subcontractors seeking work within the geographical region in which the nonminority contractor operates. *See id.* If a significant disparity exists between the available minority subcontractors and the actual selection of minority subcontractors, discriminatory practices may be indicated and goals for minority contracting may be established. *See id.* This self study method of affirmative action also exists at the state and local level. *See, e.g.,* Michael Gebhardt, *Documenting Discrimination*, RECORDER, July 1995, at 1. The outreach and counseling method seeks to expand the available pool of minority subcontractors from which a nonminority contractor might choose. *See Oppenheimer, supra* note 4, at 931. Examples of such methods may include programs to inform minority contractors of the opportunities to bid on government construction projects and the criteria for bidding on such projects. *See id.* The antidiscrimination method simply mandates affirmative commitments from nonminority contractors to avoid discriminatory subcontracting practices. *See id.* at 932.

6. *See* David G. Savage, *Supreme Court Rejects Minority Set-Aside Law*, L.A. TIMES, Feb. 19, 1997, at A1 (discussing how popular opinion is against set-aside programs and subsequent movement away from such programs). Opponents of set-aside programs, such as former Senator Robert Dole, criticize affirmative action programs because "[r]acial-preferential policies, no matter how well intentioned, demean individual accomplishment," "ignore individual character," and "are absolutely poisonous to race relations in our great country." 141 CONG. REC. S3929-01 (1995). Similarly, others criticize affirmative action programs because, while they are aimed at remedying "perceived" discrimination, they are deflecting attention from the problem of a cultural breakdown in America. *See* D'Souza & Edley, *supra* note 2, at 431 ("The effects of this breakdown have been particularly harsh on African-Americans, especially poor African-Americans that are concentrated in the inner City."). Groups such as the Heritage Foundation find fault in judges' and bureaucrats' interpretation of affirmative action programs, rather than with the programs themselves. *See* MICHAEL G. FRANC, ISSUES '96: THE CANDIDATE'S BRIEFING BOOK 22 (1996). In particular, the Heritage Foundation stated:

Over the last three decades . . . federal judges and agency bureaucrats have embarked upon a sustained crusade to twist and distort the original intent of these laws so that race, ethnicity, and sex became the proxy for special, rather than equal, treatment under the law. Race consciousness quickly overtook color blindness as the guiding principle for the application of civil rights laws that Congress explicitly intended to be neutral on these grounds. Today, liberals justify race and sex preferences which have proliferated under the guise of affirmative action as an appropriate

ing set-aside programs.⁷ These contractors argue that set-asides violate the principle of equal protection of the laws by discriminating, in a reverse fashion, against nonminority contractors.⁸ Furthermore, they argue that

and long-overdue response to centuries of discrimination against racial minorities and women.

Id.; see Wayne K. Davis, Note, *Raising The Standard: The Supreme Court Embarks on a New Era of Equal Protection Jurisprudence with the Institution of the Strict Scrutiny Paradigm in Adarand Constructors, Inc. v. Peña*, 40 ST. LOUIS U. L.J. 543, 544 (1996) (discussing "current debate rag[ing] over affirmative action's future and its place in today's society"). Some commentators see this debate over affirmative action programs as stemming from a deep, philosophical tension among competing American values, including a need for racial diversity, the desire for social equality and a demand for the protection of individual freedoms. See *id.*; see also D'Souza & Edley, *supra* note 2, at 427 (identifying fundamental tension over affirmative action programs rooted in principles of "equality of rights for individuals" and "equality of results for groups"); Steven A. Holmes, *U.S. Halts Set-Asides for Women, Minorities*, SAN DIEGO UNION-TRIB., Mar. 8, 1996, at A1 ("Set-aside programs have been the most hotly debated type of affirmative action . . .").

Proponents of affirmative action programs counter that affirmative action programs are necessary to fight the widespread overt and covert discrimination that has plagued America since its foundation. See, e.g., D'Souza & Edley, *supra* note 2, at 434 ("[A]ffirmative action should continue because discrimination continues."). Proponents also assert that the personal preferences that have "remained poisoned by the toxins of our racial differences" have continued to be a hardship on minority groups, and can only be overcome by affirmative action programs. See *id.* at 435. Proponents further argue that the need for cultural diversity in America heavily favors the use of affirmative action programs. See *id.* (asserting that programs that favor diversity enhance organizations by making them more inclusive).

Within the legal community, this debate over affirmative action programs is being carried on between Congress and the American Bar Association (ABA). See Rhonda McMillion, *Affirmative Action Struggle: Congress, ABA at Odds over Government Role in Equality Programs*, A.B.A. J., Jan. 1996, at 93. The ABA maintains that "although equal opportunity is not yet a reality for many minorities and women, the significant gains that have been made during the past 30 years are clearly attributable in large part to effective affirmative action programs at both governmental and private levels." *Id.* The ABA endorses legal remedies and voluntary efforts that would take into account race, national origin or gender to eliminate or prevent discrimination. See *id.* Conversely, members of Congress claim that affirmative action is no longer needed and that these programs have promoted women and minorities at the expense of more qualified Caucasian males. See *id.* In response, the ABA expressed its opposition to legislation to eliminate federal affirmative action programs in a letter sent to all United States congressional committees with jurisdiction over these programs. See *id.* For an interesting discussion of the continuing utility of affirmative action programs in American society, see Daniel A. Faber, *The Outmoded Debate over Affirmative Action*, 82 CAL. L. REV. 893 (1994) (discussing retreat of affirmative action programs in today's society). For a discussion of congressional attempts to dismantle affirmative action programs, see *supra* notes 11-12 and accompanying text.

7. See Newman, *supra* note 2, at 433 (attributing movement away from affirmative action programs to belief that such programs discriminate against nonminority-owned businesses).

8. See Michael Granberry, *San Diego Ordered to End Minority Builder's Program*, L.A. TIMES, Sept. 30, 1993, at 29 (noting abolishment of San Diego set-aside program arose from lawsuit against program "by the predominately white Associated General Contractors, which charged reverse discrimination and argued that the city was in effect freezing out non-minority construction contractors, some of

discrimination in public contracting can be effectively remedied by existing civil rights law.⁹ These nonminority-owned contractors also cite program abuses as a reason to discard such programs.¹⁰ Although the executive branch adamantly opposes program cutbacks, the movement to limit or eliminate set-aside programs on the federal level is drawing popular support from the U.S. Congress. Bills have been introduced by members of Congress to dismantle affirmative action in favor of promoting a "color-blind" society.¹¹ To fill the void left by these programs, alternatives

whom were denied lucrative projects even after filing the lowest bids"); James Kilpatrick, *Equal Protection of the Law: When Do State Set-Asides Become Racial Preferences?*, CHARLESTON DAILY MAIL, Jan. 11, 1997, at P4A ("At the heart of the legal battle [over the constitutionality of set-aside programs] is a clause in the 14th Amendment that forbids every state to deny any person within its jurisdiction the equal protection of the laws."). Groups such as the Pacific Legal Foundation fault set-aside programs and opine that the programs illegally discriminate against nonminority contractors and take away those contractors' right to equal protection under the laws. *See id.* (noting that Supreme Court has frowned on contractual set-asides for equal protection reasons). For instance, in Illinois, the Builders Association of Greater Chicago filed a complaint in federal court against a Cook County set-aside that requires up to 50% of government construction contracts be awarded to minority contractors. *See* John Flynn Rooney, *Invalidate City, County Set-Asides, Builders Ask*, CHI. DAILY L. BULL., Feb. 27, 1996, at 1. The President of the Builders Association of Greater Chicago asserted that these programs are unconstitutional because they discriminate against nonminority-owned contractors on the basis of race. *See id.* For a further discussion regarding the "reverse discrimination" arguments posited by challengers of affirmative action programs and the litigation that has ensued, see Charles S. Mishkind, *Reverse Discrimination/Affirmative Action Litigation Update: Where Is It Going?*, EMPLOYEE REL. L.J., Winter 1996, at 107 (discussing challenges made by opponents of affirmative action).

9. *See* Kilpatrick, *supra* note 8, at P4A (discussing nonminority contractor's argument that set asides are not needed because "in individual cases of racial discrimination . . . a large body of civil rights law will provide remedial action"); *see also* B. Drummond Ayres, Jr., *Foes of Affirmative Action Form a National Group*, N.Y. TIMES, Jan. 16, 1997, at A16 (noting that national anti-affirmative action group opposes racial preferences, asserting enforcement of existing antidiscrimination laws is more efficient alternative).

10. *See* Newman, *supra* note 2, at 434-37 (finding that there is resistance to set-aside programs, in part, because of abuses in administration of such programs). Although set aside programs can be extremely beneficial to the construction industry, their effectiveness is diminished when these programs are abused by those taking "advantage of the process." *Id.* at 434. For instance, in some regions, only a certain few minority-owned contractors are consistently awarded contracts. *See id.* (noting that in Atlanta, same four minority- and women-owned businesses are consistently awarded contracts). Another common problem is the creation of "sham" minority-owned business enterprises that are awarded work because of their minority ownership, but, in reality, are nothing more than shell corporations owned and controlled by a nonminority entity. *See id.* at 434-35.

11. *See* Equal Opportunity Act of 1995, S. 1085, 105th Cong. (1997) (prohibiting discrimination and preferential treatment on basis of race, color, national origin or sex with regard to federal employment, contracts and programs); H.R. 2128, 104th Cong. (1996) (same); *see also* H.R. 3994, 104th Cong. (1996) (eliminating many racial preferences used in awarding government contracts). Former Senate Majority Leader Dole and Representative Charles T. Canady, Chairman of the House Judiciary Subcommittee on the Constitution, introduced identical bills that would diffuse federal affirmative action programs. *See* S. 1085; H.R. 2128. These

to racial preferences are offered that focus on economic status rather than skin color.¹² Conversely, the executive branch has announced a continued commitment to federal affirmative action programs, especially in the area of public works projects.¹³ State and local governments are reaffirm-

bills, consolidated and introduced as the Dole-Canady bill, would eradicate the use of goals, set-asides and timetables to remedy discrimination. *See* S. 1085; H.R. 2128. They would also forbid the federal government from either considering race or gender when awarding contracts, or encouraging contractors to use such considerations when awarding subcontracts. *See* S. 1085; H.R. 2128. Representative Jan Meyers introduced legislation that would amend the Small Business Act to discontinue the use of racial preferences when the government awards contracts to private entities. *See* H.R. 3994 (amending Small Business Act, 15 U.S.C. §§ 631-651 (1994)). Instead of racial preferences, this legislation advocates using comprehensive development assistance programs to help small business concerns owned by economically disadvantaged individuals to foster their entrepreneurial potential and market success. *See id.* Two other congressional members, Senator Phil Gramm and Representative Gary Franks, made unsuccessful attempts to attach amendments to appropriation bills which would prohibit preferential treatment for minorities and women in federal contracting. *See id.*

12. *See* McMillion, *supra* note 6, at 93 (discussing proposed alternatives to federal government's use of race-based preferences). The "empowerment" contracting initiative has been proposed as an alternative to affirmative action programs. *See id.* The empowerment contracting initiative focuses on economic status, rather than on race and gender, when giving businesses preferential treatment to help bid competitively on government contracts. *See* BNA, *Clinton Issues Order Seeking To Help Firms in Distressed Areas*, DAILY REP. FOR EXECUTIVES, May 23, 1996, § A, at 100 (discussing empowerment contracting initiative).

The empowerment contracting initiative was implemented on May 21, 1996 by President Clinton through Executive Order 13,005. *See* Exec. Order No. 13,005, 50 Fed. Reg. 26069 (1996). By focusing on economic status rather than race, the Clinton administration hopes to avoid a constitutional challenge to its empowerment contracting policy. *See id.* Although President Clinton backs the empowerment contracting initiative, he sees it as a complement to affirmative action, not an alternative. *See* McMillion, *supra* note 6, at 93. For an in-depth discussion on the empowerment contracting initiative, *see* BNA, *Administration Expected to Propose Empowering Contracting Initiative*, DAILY REP. FOR EXECUTIVES, Sept. 13, 1996, § A, at 178.

Legislation has also been introduced to enact into law the empowerment contracting initiative. *See id.* Senator Christopher Bond, Chair of the United States Senate Small Business Committee, proposed a bill which would make small, disadvantaged businesses located in distressed areas eligible for set-asides and preferences when bidding on government contracts. *See id.*

13. *See, e.g., White House Review Sees Value in Most Affirmative-Action Plans*, CHI. TRIB., May 31, 1995, at 7 (noting that report prepared by Clinton administration reviewing affirmative action programs upholds most types of affirmative action programs for variety of reasons, including that "they increase productivity by reducing discrimination and finding the best candidates for the job").

ing their commitment to continue these programs,¹⁴ although public opinion is set against their continued existence.¹⁵

Heightened political scrutiny of this controversial issue recently prompted a closer judicial examination into the constitutionality of these programs.¹⁶ As a result, the Supreme Court of the United States has held that federal, state and local affirmative action programs, once subject to an intermediate level of scrutiny, are now strictly scrutinized.¹⁷ Application of the strict scrutiny standard has made it extremely difficult for such programs to pass constitutional muster. Capitalizing on this recent development, opponents of affirmative action have successfully challenged many

14. See Rooney, *supra* note 8, at 1 (noting Chicago would "vigorously defend" its set-aside program against court challenge); see also Catherine Brennan, *Contractors Sue over MBE Program*, DAILY REC. (Baltimore), Nov. 30, 1995, at 1 (discussing Maryland's attempts to expand race-based affirmative action programs despite lawsuit over constitutionality of programs); Michelle Dally Johnston & Robert Schwab, *Affirmative Action Fight Could Go to Voters*, DENVER POST, Mar. 15, 1997, at A11 (noting Colorado governor's opposition to and veto of anti-affirmative action bill).

15. See Kilpatrick, *supra* note 8, at A4 (discussing California voter's approval of proposition that prohibits both discrimination against and preferential treatment for any individual or group in employment, education and contracting); see also Ayres, *supra* note 9, at A16 (discussing formation of national organization of voters dissatisfied with affirmative action that would "argue aggressively that . . . the states, as well as Congress, should abolish all race and sex preferences in hiring, contracting and college admissions"). Polls have likewise affirmed that a large number of Americans are opposed to affirmative action programs. See *id.*

16. See Natasha Elmore, Note, *The Supreme Court's Step in the Trend Toward Eliminating Affirmative Action Programs in Adarand Constructors, Inc. v. Pena*, 33 Hous. L. REV. 939, 962 (1996) (suggesting that *Adarand* was decided, in part, in response to negative public sentiment toward affirmative action programs); Donna Thompson-Schneider, Note, *Paved with Good Intentions: Affirmative Action After Adarand*, 31 TULSA L.J. 611, 613 (1996) (discussing how political attitudes over affirmative action issue has influenced Supreme Court decision making); see also ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 23 (1st ed. 1960) ("In truth the Supreme Court has seldom, if ever, flatly and for very long resisted a really unmistakable wave of public sentiment."); cf. JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY* 250-53 (1978) (discussing impact that political and public sentiment had on Supreme Court's decision to constitutionalize women's right to abortion).

17. See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (holding that federal affirmative action programs that use racial and ethnic classifications as basis for decision making are subject to strict scrutiny under Due Process Clause of Fifth Amendment); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (O'Connor, J., concurring in part and concurring in judgment) (holding that state and local affirmative action programs that use racial and ethnic classification as basis for decision making are subject to strict scrutiny under Equal Protection Clause of Fourteenth Amendment).

Many commentators have noted that these cases have fostered a great deal of litigation by those wishing to strike down affirmative action programs. See Davis, *supra* note 6, at 572 ("*Adarand* was the spark that ignited the flame of affirmative action passion and renewed societal interest."); see also Rheba Cecilia Heggs, *Practitioner's Viewpoint: What to Expect After Adarand*, 25 PUB. CONT. L.J. 451, 456 (1996) ("The most probable effect [of the *Adarand* opinion] will be increased work for agency attorneys and private counsel litigating both sides of an unresolved social and legal issue.").

such programs in the courts.¹⁸ As more of these cases find their way into the courtroom, courts are developing a coherent body of law concerning the application of the strict scrutiny standard to construction industry set-aside programs.

18. See *Adarand*, 515 U.S. at 227 (upholding challenge to affirmative action program); *Croson*, 488 U.S. at 493-94 (same); *Contractors III*, 91 F.3d 586, 606 (3d Cir. 1996) (holding provisions of Philadelphia ordinance creating set-asides for African-American subcontractors on city public works contracts unconstitutional), *cert. denied*, 117 S. Ct. 953 (1997); *Concrete Works, Inc. v. City of Denver*, 36 F.3d 1513, 1520 (10th Cir. 1994) (challenging city minority contractor preference ordinance), *cert. denied*, 514 U.S. 1004 (1995); *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 52 (2d Cir. 1992) (challenging New York Department of Transportation's implementation of federal disadvantaged business set-aside program, which set aside 17% of dollar amount of federally funded highway project contracts to disadvantaged and minority contractors); *H.K. Porter Co. v. Metropolitan Dade County*, 975 F.2d 762, 767 (11th Cir. 1992) (striking down local government's set-aside program), *vacated*, 998 F.2d 892 (11th Cir. 1993); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 421 (D.C. Cir. 1992) (ordering district court to enjoin District of Columbia ordinance that provided for set-asides for minority contractors on District of Columbia construction contracts); *Associated Gen. Contractors, Inc. v. Coalition for Econ. Equity*, 950 F.2d 1401, 1403 (9th Cir. 1991) (challenging San Francisco ordinance creating set-asides and bidding preferences for minority and women contractors); *Coral Constr. Co. v. King County*, 941 F.2d 910, 925 (9th Cir. 1991) (finding county's minority set-aside program unconstitutional); *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 424 (7th Cir. 1990) (invalidating state set-aside program); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 911 (11th Cir. 1990) (challenging constitutionality of county's minority business enterprise set-aside program); *Michigan Road Builders Ass'n v. Milliken*, 834 F.2d 583, 586 (6th Cir. 1987) (challenging provisions of Michigan statute requiring set-asides for minority- and women-owned businesses), *aff'd*, 489 U.S. 1061 (1989); *Engineering Contractors Ass'n v. Metropolitan Dade County*, 943 F. Supp. 1546, 1550 (S.D. Fla. 1996) (holding that Dade County ordinance requiring set-asides for African-American, Hispanic and women contractors on city construction projects was unconstitutional), *aff'd*, 122 F.3d 895 (11th Cir. 1997); *Associated Gen. Contractors of Am. v. City of Columbus*, 936 F. Supp. 1363, 1370 (S.D. Ohio 1996) (holding that provisions of city ordinance requiring set asides for minority- and women-owned contractors on city construction projects were unconstitutional); *Associated Gen. Contractors v. City of New Haven*, 791 F. Supp. 941, 943 (D. Conn. 1992) (granting summary judgment for challengers of city set-aside program for disadvantaged business enterprises), *vacated*, 41 F.3d 62 (2d Cir. 1994); *Concrete Gen., Inc. v. Washington Suburban Sanitary Comm'n*, 779 F. Supp. 370, 377 (D. Md. 1991) (striking down municipal set-aside program); *F. Buddie Contracting Co. v. City of Elyria*, 773 F. Supp. 1018 (N.D. Ohio 1991) (invalidating city ordinance that granted racial preferences in awarding city construction contracts); *Main Line Paving Co. v. Board of Educ.*, 725 F. Supp. 1349, 1344 (E.D. Pa. 1989) (finding that municipal set-aside granting bidding preferences to minority contractors violated Fourteenth Amendment); *see also* Brennan, *supra* note 14, at 1 (noting that Public Works Contractors Association of Maryland filed suit against Washington Suburban Sanitary Commission challenging constitutionality of preferences given to racial, ethnic and gender groups in awarding of public contracts); Rooney, *supra* note 8, at 1 (noting Builders Association of Greater Chicago filed lawsuits in federal court against city of Chicago and Cook County, challenging constitutionality of set-aside programs for public construction projects).

This Comment will discuss the body of law developing around the application of the strict scrutiny standard to race-based affirmative action programs within the construction industry. Part II will examine the history of set-aside programs.¹⁹ Part II will also discuss legislative and executive efforts to implement set-asides on both the state and federal levels.²⁰ Finally, Part II will further discuss the Supreme Court's treatment of race-based set asides leading up to and including its recent decisions announcing the application of strict scrutiny to such programs.²¹ Part III will address recent developments in this area of law, concentrating on the lower courts' application of the strict scrutiny standard to race-based set-aside programs.²² In particular, Part III will explain how the lower courts apply the "compelling government interest" and the "narrowly tailored" prongs of the strict scrutiny test to race-based set aside-programs.²³ Finally, Part IV examines the current state of race-based set-aside programs and offers suggestions for bringing a race-based set-aside program into conformity with constitutional principles.²⁴

II. BACKGROUND

A. *Beginnings of Affirmative Action and Set-Aside Programs*

1. *Federal Programs*

For nearly three decades, the federal government has attempted to increase minority participation in the economy as a means to remedy racial discrimination and has focused its efforts in the areas of contracting, employment and federally assisted programs.²⁵ To increase minority participation in these areas, both Congress and the executive branch have implemented a vast array of federal laws and regulations that authorize the use of race conscious strategies.²⁶ One such strategy currently used is the

19. For a discussion of the history of set-aside programs, see *infra* notes 25-168 and accompanying text.

20. For a discussion of prior legislative and executive attempts to introduce affirmative action programs into law, see *infra* notes 25-68 and accompanying text.

21. For a discussion of the Supreme Court's treatment of affirmative action programs, see *infra* notes 69-168 and accompanying text.

22. For a discussion of the recent judicial developments and the emerging legal standards in the area of set-aside programs, see *infra* notes 169-281 and accompanying text.

23. For a discussion of how the lower courts apply strict scrutiny to set-aside programs, see *infra* notes 169-281 and accompanying text.

24. For a discussion of the current state of set-aside programs and how they can conform to constitutional restrictions, see *infra* notes 282-86 and accompanying text.

25. See 141 CONG. REC. S3929-01 (1995) (discussing statutory history of affirmative action programs).

26. See Gilbert J. Ginsburg & Janine S. Benton, *One Year Later: Affirmative Action in Federal Government Contracting After Adarand*, 45 AM. U. L. REV. 1903, 1917-26 (1996) (documenting legislative and executive efforts to implement affirmative action strategies into American national policy). For a discussion on the many af-

establishment of minority participation goals.²⁷ The historical model for federal (and state) laws and regulations establishing these goals dates back to executive orders issued in the 1960s by Presidents Johnson and Kennedy.²⁸ Since their issuance, these executive orders have imposed affirmative minority hiring and employment requirements on federally funded construction projects and other large federal contracts.²⁹ Collectively, these executive orders laid the groundwork for the affirmative action establishment in place today.³⁰

Executive Order No. 10,925, issued by President Kennedy in 1961, requires contractors performing contracts with the federal government to take "affirmative action" to ensure that job applicants are considered for employment without any consideration of race.³¹ In 1965, President John-

firmative action programs currently in place, see *supra* note 3 and accompanying text.

27. See Oppenheimer, *supra* note 4, at 927-29 (discussing use of minority participation "goals" by legislatures to increase minority contractor participation in government contracting).

28. See 141 CONG. REC. S3929-01 (1995) ("The historical model for federal laws and regulations establishing minority participation 'goals' may be found in Executive Orders . . .").

29. See *id.* For a discussion of the executive order issued by President Kennedy, see *infra* note 31 and accompanying text. For a discussion of the executive order issued by President Johnson, see *infra* notes 32-36 and accompanying text.

30. See Stanley Bryan Malos, *Legal Issues in Affirmative Action: Recent Developments on Executive, Judicial, and Legislative Fronts* (visited Mar. 13, 1997) <<http://cmit.unomaha.edu:80/TIP/TIPApr96/malos.htm>> ("Aside from individual court orders and consent decrees, Executive Order 11,246 [issued by President Johnson] and related provisions of federal law remain the primary sources of specific affirmative action obligations."). Executive orders subsequent to those issued by Presidents Kennedy and Johnson contributed to the evolution of affirmative action programs during the late 1960s and early 1970s. See Exec. Order No. 12,250, 3 C.F.R. 298 (1981), *reprinted in* 42 U.S.C. § 2000e (1994) (delegating authority to approve agency rules and issue directives to enforce Title VI of Civil Rights Act to Attorney General and Assistant Attorney General, Civil Rights Division); Exec. Order No. 12,086, 3 C.F.R. 230 (1978), *reprinted in* 42 U.S.C. § 2000e (providing that Secretary of Labor is responsible for enforcing nondiscrimination provisions in government contracts); Exec. Order No. 12,067, 43 Fed. Reg. 28,967 (1978), *reprinted in* 42 U.S.C. § 2000e (granting Equal Employment Opportunity Commission authority to formulate standards and guidelines to assist federal agencies in complying with equal employment opportunity laws); Exec. Order No. 11,478, 34 Fed. Reg. 12,985 (1969), *reprinted in* 42 U.S.C. § 2000e (requiring all federal agencies and departments to establish "affirmative programs" to further implement prohibition of discrimination and to provide equal employment opportunity for minorities).

31. See Exec. Order No. 10,925, 3 C.F.R. 448 (1961) (mandating that employers take "affirmative action" to design measures to achieve nondiscrimination in workplace). Later in 1961, Executive Order 10,925 was incorporated into Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. § 2000d, and Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000a to 2000h-6. See Carl E. Brody Jr., *A Historical Review of Affirmative Action and the Interpretation of Its Legislative Intent by the Supreme Court*, 29 AKRON L. REV. 29, 303 (1996) ("Congress strengthened Executive order 10,925 by incorporating it into Titles VI and VII of the Civil Rights Act of 1964, thereby providing the legislative basis for equal employment

son went further by issuing Executive Order No. 11,246, which contained three measures aimed at eradicating racial discrimination in the workplace.³² First, contractors performing government contracts in excess of \$10,000 must include a written affirmation in their contract that states the contractor will not discriminate on the basis of race.³³ Second, contractors who perform contracts in excess of \$50,000 and who employ more than fifty employees are required to prepare a written affirmative action plan and maintain a compliance program that precludes employment discrimination based on race, color, sex, national origin or religion.³⁴ This plan

opportunity laws and affirmative action programs.”). In particular, Title VI prohibited federally funded programs from discriminating on the basis of race, color or national origin. *See* 42 U.S.C. § 2000d (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”). Under Title VI, each federal agency is required to formulate its own rules concerning the beneficiary’s compliance with the nondiscriminatory provision of Title VI. *Id.* § 2001d-1. If a beneficiary of a federal contract is found to violate the nondiscriminatory provision, the contracting agency or department may sanction the beneficiary, including a termination of the contract. *See id.* Title VII makes it an unlawful employment practice for employers to discriminate on the basis of race, sex, national origin or religion. *Id.* § 2000e-2. “Unlawful employment practices” are defined as “fail[ure] or refus[al] to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual’s race, color, religion, sex or national origin.” *Id.* § 2000e-2(a)(1). Title VII also makes it unlawful for an employer to classify employees in such a way, including on the basis of race, color, sex, religion or national origin, that would tend to deny equal employment opportunities to individuals. *Id.* § 2000e-2(a)(2). This section of the Civil Rights Act of 1964 renders invalid any affirmative action provisions that mandate racial or gender quotas, contrary to public perception. *See Brody, supra*, at 304-08 (stating that “claims that federal affirmative action provisions repeated here require racial or gender quotas are untrue” because such quotas would be in violation of Title VII); *see also* Oppenheimer, *supra* note 4, at 928 (explaining that use of quotas is public misperception of affirmative action programs because federal government may not create quotas for women and minorities).

32. *See* Exec. Order No. 11,246, 3 C.F.R. 339 (1965), *reprinted in* 42 U.S.C. § 2000e.

33. *See id.*; *see also* 41 C.F.R. §§ 1.5(a), 60-1.4(a) (1997) (noting that there is exemption provided for all contracts with transaction value of less than \$10,000). Executive Order No. 11,246 also requires an employer to (1) take affirmative action to protect applicants and employees from discrimination on the basis of race, color, sex, national origin or religion; (2) post notices containing the provisions of the clause in a conspicuous place; (3) mention in all advertising for positions that the employer will consider applicants without regard to race, color, sex, national origin or religion; (4) communicate to appropriate labor unions that the contractor is committed under the executive order and have notices of this posted; (5) provide any material required under the executive order and allow access to records if the employer is under investigation with regard to compliance of the executive order. *See* Exec. Order No. 11,246, 3 C.F.R. 339. In addition, cancellation or suspension of the contract is permitted if the employer does not comply with the executive order. *See id.*

34. *See* Exec. Order No. 11,246, 3 C.F.R. 339; *see also* 41 C.F.R. § 60-1.7(a) (discussing agreement to provide written affirmative action plan).

must include minority and female hiring goals along with timetables for satisfying these goals.³⁵ Third, state agencies awarding contracts that are federally funded must comply with the provisions of Title VI.³⁶ Since the enactment of Executive Order No. 10,925 and Executive Order No. 11,246, the scope of affirmative action has greatly expanded. Currently, over 160 programs on the federal level use some form of racial classification to assist minorities in obtaining opportunities with the federal government.³⁷ Many of these race-based affirmative action programs are found in sections 8(a)³⁸ and 8(d)³⁹ of the Small Business Act.⁴⁰ Programs under section 8(a) seek to increase minority and female participation in prime contracting.⁴¹ To carry out this aim, the Small Business Administration (SBA) enters into construction, supply and service contracts with various federal departments and agencies.⁴² In turn, the SBA enters into contracts with businesses owned by minorities and females who, in essence, become prime contractors for these contracts.⁴³ Alternatively, section 8(d) programs seek to increase minority and female participation in the area of subcontracting. Under section 8(d), prime contractors on major federal contracts must formulate a "subcontracting plan," which contains a proposed minority and female subcontractor participation goal.⁴⁴

35. See 41 C.F.R. § 60-1.7(a) (noting that these requirements are enforced by Office of Federal Contract Compliance Programs).

36. See Exec. Order No. 11,246, 3 C.F.R. 339; see also 42 C.F.R. § 410 (1997) (noting that state compliance program must have someone in charge of enforcement and this enforcement must adhere to federal minimum standards). This requirement provides an injured party with a local outlet to seek relief, as well as allowing for local regulation of state and local entities. See Brody, *supra* note 31, at 312 (describing state compliance procedures with Title VI).

37. See Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781, 1822 (1996) (discussing how former Senator Dole requested "comprehensive list" from Congressional Research Service of all federal affirmative action programs).

38. 15 U.S.C. § 637(a) (1994). It is estimated that the Small Business Administration's (SBA) program under Section 8(a) of the Small Business Act, which is one of the biggest federal government affirmative action programs and which allows federal agencies to place contracts in a special pool where only disadvantaged businesses may bid on them, minority companies received \$4.5 billion in contracts last year. See Steven A. Holmes, *Moratorium Called on Minority Contract Program*, N.Y. TIMES, Mar. 8, 1996, at A1.

39. 15 U.S.C. § 637(d).

40. *Id.* §§ 631-651.

41. See *id.* § 637(a)(1)(C) (allowing SBA to enter into contracts with government department or agency to provide goods, equipment and services to those government agencies).

42. See *id.*

43. See *id.* § 637(a)(1)(B) (empowering SBA to "arrange for the performance of such procurement contracts by negotiating or otherwise letting subcontracts to socially and economically disadvantaged small business concerns . . . as may be necessary to enable the Administration to perform such contracts").

44. See *id.* § 637(d).

The prime contractor must then employ minorities and female subcontractors in accordance with the stated goals.⁴⁵

A number of federal programs outside of the SBA exist to provide minority contractors with the opportunity to participate in federal contracts. Examples are found in the Federal Acquisition Regulations (FAR),⁴⁶ as well as in programs enacted by the Department of Transportation and the Department of Defense.⁴⁷ Under the FAR, if a government contract exceeds \$500,000 (\$1,000,000 for construction contracts), prime contractors are required to submit a subcontracting plan setting forth subcontracting goals for the inclusion of minority contractors.⁴⁸ The Department of Transportation has similar programs such as the Minority Business Enterprise (MBE) program⁴⁹ and programs under the Intermodal Surface Transportation Efficiency Act (ISTEA)⁵⁰ and the Airport and Airways Improvement Act.⁵¹ Under the MBE program, compensatory bonuses are awarded to prime contractors who subcontract work to minority contractors.⁵² The ISTEA requires ten percent of transportation contracts to be allocated to minority contractors.⁵³ The Airport and Airways Improvement Act establishes requirements similar to those in the ISTEA.⁵⁴ Similarly, the Department of Defense adheres to a five percent per year minority participation goal when it awards its contracts.⁵⁵ Furthermore, under the Defense Department's small disadvantaged business "rule of two" program, the Defense Department may give a bid preference of up to ten percent to minority contractors who bid on Defense Department contracts.⁵⁶

45. *See id.*

46. 48 C.F.R. § 52.219-8(a) (1997) ("It is the policy of the United States that small business concerns, small business concerns owned by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women shall have the maximum practicable opportunity to participate in [federal contracting].").

47. *See* Intermodal Surface Transportation Efficiency Act, Pub. L. No. 102-240, § 1003(b), 105 Stat. 1914, 1919 (1991) (requiring 10% of Department of Transportation contracts to be allocated to minority contractors); *see also* 48 C.F.R. § 219.000 (1997) (setting goal of five percent per year minority participation in contract awards by Department of Defense).

48. *See* 15 U.S.C. § 637(d)(4)(A).

49. *See* 49 C.F.R. §§ 23.41-55 (1997).

50. Pub. L. No. 102-240, 105 Stat. 1914 (1991) (codified in scattered sections of 16 U.S.C., 23 U.S.C., 26 U.S.C. and 49 U.S.C.).

51. 49 U.S.C. § 2201 (1994).

52. *See* 49 C.F.R. §§ 23.41-55.

53. *See* § 1003(b), 105 Stat. at 1919.

54. *See* 49 C.F.R. § 23.61(a).

55. *See* 48 C.F.R. § 219.000 (1997) (setting participation goals for small and disadvantaged businesses for Department of Defense wash appropriations for fiscal years 1987 through 2000).

56. *See* Neil Munro, *Clinton's 8(a) Two-Step*, WASH. TECH., Mar. 21, 1996, at 1 (discussing that, under "rule of two" program, federal government awarded about

2. State Programs

Municipalities employ race-based programs, many of which are modeled after their federal counterparts.⁵⁷ These programs typically provide for a numerical participation goal expressed as a percentage of the total dollar amount of contracts awarded by the municipality.⁵⁸ Once the goal is established, the municipality attempts to allocate the stated percentage of contract dollars only to the groups eligible under the program.⁵⁹ Such programs ensure that the eligible groups, typically racial and ethnic minority-owned businesses, have an opportunity to participate in government construction contracts.

One such program is an ordinance enacted by the City of Philadelphia which creates set asides for "disadvantaged business enterprises" (DBEs).⁶⁰ The ordinance sets goals for participation of DBEs in city contracts: fifteen percent of city contract dollars are awarded to minority-owned businesses; ten percent to women-owned businesses; and two percent to businesses owned by individuals with disabilities.⁶¹ These goals

one billion dollars in contracts to minority businesses per year before it was discontinued by court decree in 1995).

57. For a listing of numerous state and municipal affirmative action programs, see *supra* note 3 and accompanying text.

58. See, e.g., PHILA., PA., CODE § 17-503(1) (1987) (providing set-aside participation goal as percentage of dollar amount of contracts awarded).

59. See *id.*

60. See *id.* § 17-500. As originally enacted, this Philadelphia ordinance included set-aside goals only for minority- and women-owned businesses. See *id.* In 1987 and 1988, the ordinance was amended to include a set-aside goal for businesses owned by people with disabilities, in addition to disadvantaged business enterprises (DBEs). See *id.* The ordinance defines DBEs as any enterprise at least 51% owned by those individuals who have been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group or who have been subjected to differential treatment because of their handicap without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired because of diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. See *id.* § 17-501(11).

The portion of the Philadelphia ordinance granting a set-aside for minority businesses was recently struck down. See *Contractors III*, 91 F.3d 586, 606 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 953 (1997). The United States Court of Appeals for the Third Circuit found that the portion of the ordinance violated both prongs of the strict scrutiny standard. See *id.* at 608-10. Although the City of Philadelphia sought a petition of certiorari, the Supreme Court denied the petition. See *City of Philadelphia v. Contractors Ass'n* 117 S. Ct. 953 (1997). For a further discussion of *Contractors III* and other recent lower court decisions that have forged current law guiding the application of state and federal set-aside programs, see *infra* notes 169-281 and accompanying text.

61. See PHILA., PA., CODE § 17-503(1) (setting goals for participation of DBEs). Although the 15% set aside for minority-owned businesses was later challenged in *Contractors III*, the set-aside program for women-owned or businesses owned by people with disabilities was not challenged. See *Contractors III*, 91 F.3d at 594 (noting that trial and appeal only concerned constitutionality of preferences for African-American contractors). As a result, the court, while ultimately striking down the challenged minority-owned business set-aside portion of Philadelphia's pro-

apply to city contracts concerning vending, construction and personal and professional services.⁶² The participation goals relate to the total dollar amount of city contracts and are calculated separately under each contract category and for each city agency.⁶³ The Philadelphia ordinance creates an agency to implement this program.⁶⁴ The agency is given authority to promulgate regulations to ensure that the participation goals are met both by city agencies (who award prime contracts for public construction projects) and prime contractors (who award subcontracts on city prime contracts).⁶⁵ When developing these regulations, the agency must (1) consider including DBEs on solicitation lists; (2) ensure that DBEs are solicited where they are potential contractors; (3) structure contract requirements to permit maximum participation by DBEs; and (4) "investigat[e] and mak[e] recommendations concerning the use of the Sheltered Market process, under which contracts would be set aside so that only DBEs could bid for them."⁶⁶ The ordinance also directs the agency to waive its stated goals when there is an insufficient number of DBEs to bid on a prime contract⁶⁷ or when contractors are unable to meet the participation goals after a good faith effort to obtain the requisite number of DBE subcontractors.⁶⁸

B. *Judicial Scrutiny of Affirmative Action Programs*

Although a vast system of federal and state set-aside programs exists, they are quickly disappearing as nonminority contractors challenge these programs in court.⁶⁹ Primarily, the contractors argue that affirmative action programs are a form of "reverse discrimination" and, as such, violate the equal protection guarantees found in the Fifth and Fourteenth

gram, severed the portion of the program granting preferences for woman-owned and businesses owned by people with disabilities and did not rule on their constitutionality. *See id.*

62. *See* PHILA., PA., CODE § 17-501(6) (1987).

63. *See id.* § 17-503(1).

64. *See id.* § 17-504(2)(e), (f), (i).

65. *See id.*

66. *Id.* § 17-504(2)(f).

67. *See id.* § 17-505(1).

68. *See id.* § 17-505(3). It is also noteworthy to point out that the ordinance further directs the agency to (1) develop a certification procedure to prevent fraudulent DBEs from abusing the program in section 17-504(2)(a); (2) recommend contractual language which provides that a contractor's compliance with the ordinance is material to the city contract in section 17-504(2)(h); and (3) develop and recommend remedies, including termination of the contract, when a contractor fails to comply with the program in section 17-506(a). *See id.*

69. *See, e.g., Another Agency Gives Up Goals for Minority Contracting*, ENGINEERING NEWS-REC., Dec. 9, 1996, at 1 ("The ripple effect continues from the Supreme Court's 1989 *Croson* decision [as] a Maryland wastewater utility has ended its 18-year-old minority construction contracting plan after officials grew uncomfortable with the [impending legal challenge facing the program].").

Amendments.⁷⁰ Initially, courts were reluctant to rule on the constitutionality of these programs, dismissing many of them for lack of standing.⁷¹ Eventually, however, when courts found that the contractors had standing and reached the merits of the underlying claim, they upheld the programs under an intermediate level of scrutiny.⁷² Not until the recent Supreme Court decisions of *City of Richmond v. J.A. Croson Co.*⁷³ and *Adarand Constructors, Inc. v. Peña*⁷⁴ did the Court determine that the use of racial classifications were constitutionally suspect and call for the application of strict scrutiny to such classifications.⁷⁵

1. Fullilove v. Klutznick

In 1980, the Supreme Court ruled for the first time on the constitutionality of a federal set-aside program in *Fullilove v. Klutznick*.⁷⁶ In *Fullilove*, the Court upheld a provision of the Public Works Employment Act of 1977,⁷⁷ which provided for set-asides.⁷⁸ This set-aside provision required that minority contractors receive at least ten percent of federal grant money given to states and localities for public construction projects.⁷⁹ This provision was challenged by white construction contractors, subcontractors and their associations who were denied contracting opportunities under the ten-percent set-aside provision.⁸⁰ The challengers argued that

70. See Newman, *supra* note 2, at 433 (noting that movement away from affirmative action programs exists in part on belief that such programs discriminate against nonminority-owned businesses). For a discussion of the arguments posited against affirmative action plans, see *supra* notes 6-10 and accompanying text.

71. See, e.g., Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656 (1993) (discussing obstacles that issues of standing present to challenging affirmative action program). For a discussion of the use of standing by courts to avoid ruling on the constitutionality of affirmative action programs, see David J. Antczak, Note, *Bras v. California Public Utilities Commission: Using "Economic Realities" to Establish Standing and Challenge "Goal"-Based Affirmative Action*, 41 VILL. L. REV. 1445 (1996).

72. See *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 551 (1990) (holding that intermediate scrutiny standard applies to racial preferences), *overruled by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

73. 488 U.S. 469 (1989).

74. 515 U.S. 200 (1995).

75. *Id.* at 224; *Croson*, 488 U.S. at 470. For a further discussion of the Supreme Court's decision in *Croson*, see *infra* notes 92-129 and accompanying text. For a further discussion of the Court's decision in *Adarand*, see *infra* notes 139-68 and accompanying text.

76. 448 U.S. 448 (1980).

77. 42 U.S.C. §§ 6701-6736 (1994).

78. *Fullilove*, 448 U.S. at 492 (stating that MBE provision in Public Works Employment Act of 1977 "does not violate the Constitution").

79. See *id.* at 454 (citing to language of MBE provision establishing 10% requirement and defining MBE).

80. See *id.* at 455 (noting that petitioners sought declaratory and injunctive relief to enjoin enforcement of MBE provision).

this provision violated their right to equal protection under the Fifth Amendment.⁸¹

The Court applied a two-part test to determine the constitutionality of the racial classifications used in the set-aside provision.⁸² First, the Court inquired whether the objectives of the challenged legislation were within Congress's power.⁸³ The Court observed that the congressional objective for the set-aside provision was to involve minority contractors in federally funded construction projects when such participation had previously been thwarted by discrimination.⁸⁴ According to the Court, Congress had the power to satisfy this objective under the Spending Clause because the Public Works Employment Act was a congressional exercise to provide for the general welfare.⁸⁵ Thus, Congress could condition the receipt of federal funds under the Public Works Employment Act upon compliance with the

81. *See id.* (stating that challengers "alleged that they had sustained economic injury due to enforcement of the 10% MBE requirement").

82. *See id.* at 473. The *Fullilove* Court stated:

Our analysis proceeds in two steps. At the outset, we must inquire whether the *objectives* of this legislation are within the power of Congress. If so, we must go on to decide whether the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible *means* for achieving the congressional objectives and does not violate the equal protection component of the Due Process Clause of the Fifth Amendment.

Id. The test described above is best compared with the Court's current application of the intermediate scrutiny test. *See Adarand Constructors, Inc. v. Peña*, 16 F.3d 1537, 1544 (10th Cir. 1994) (characterizing *Fullilove* test as resembling intermediate scrutiny test), *vacated*, 515 U.S. 200 (1995). For a statute to pass this test, the statute must serve an important government interest and be substantially related to furthering that interest. *See Metro Broad. Inc. v. FCC*, 497 U.S. 547, 564 (1990), *overruled by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

83. *See Fullilove*, 448 U.S. at 473-80 (discussing objectives of regulation in context of congressional power).

84. *See id.* at 477-78 ("Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated . . . effects of prior discrimination.").

85. *See id.* at 473 (observing that Public Works Employment Act of 1977 is "by its very nature, . . . primarily an exercise of the [congressional] Spending Power"); *see also Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937) (finding that Congress, under spending power, can further broad policy objectives by conditioning receipt of funds on recipient's compliance with federal statutory and administrative directives, specifically, by imposing social security tax on earnings). The Court found in the instant case that Congress was doing nothing more than conditioning receipt of public works money upon compliance with the state or local government recipient that they would devote at least 10% of the federal funds to contracts with minority businesses. *See Fullilove*, 448 U.S. at 474 (stating that Supreme Court has repeatedly upheld "technique" of conditioning receipt of federal grants upon compliance by recipient of grant with federal statutory and administrative directives). As such, Congress was within their power to include the MBE program in the Public Works Act of 1977. *See id.* at 475 ("If . . . Congress could have achieved the objectives of the MBE program, then it may do so under the Spending Power.").

set-aside provision.⁸⁶ Second, the Court inquired into whether the racial and ethnic criteria incorporated by the provision was a constitutionally permissible means for achieving the congressional objective and whether the provision was violative of the Due Process Clause of the Fifth Amendment.⁸⁷ Under this inquiry, the Court recognized Congress's authority to use broad remedial powers to enforce constitutional equal protection guarantees.⁸⁸ Accordingly, the Court found the set-aside provision fell

86. See *Fullilove*, 448 U.S. at 479 (determining that Court need not explore "the outermost limitations on the objectives attainable through such an application of the Spending Power"). Because the "reach of the Spending Power is at least as broad as the regulatory powers of Congress," the Court analyzed whether Congress could regulate the practices of prime contractors on federally funded public works projects. See *id.* at 474 (noting that obligation to assure minority participation rests upon private contracting party instead of recipient of federal grant when recipient awards contract to general or prime contractor). After determining that there was no limitation on Congress to use the Commerce Clause in this case, the Court determined that Congress could regulate contractors working on federal construction contracts through the MBE provision. See *id.* at 475-78 (stating that Congress could have relied on Commerce Clause "to regulate . . . practices of prime contractors on federally funded public works projects").

87. See *id.* at 480-84 (setting out second prong of intermediate scrutiny test as applied in *Fullilove* and emphasizing that scope of inquiry into congressional use of racial criteria as condition to federal grant was limited because petitioners challenged facial constitutionality of MBE provision). The Court stressed that the petitioners in this case did not seek damages or other specific relief for an alleged injury flowing from an application of the MBE provision, nor did they attempt to show that the MBE provision, as applied in specific situations, violated their constitutional or statutory rights, which might have prompted closer scrutiny. See *id.* at 480-81 & n.71 ("Petitioners requested only declaratory and injunctive relief against continued enforcement of . . . MBE provision; they did not seek any remedy for . . . specific instances of assertedly unlawful discrimination.").

88. See *id.* at 482-84. The Court rejected the contention that Congress, when acting in the remedial context, must act in a "wholly 'color-blind' fashion." *Id.* at 482. The Court found that if a federal court, which has limited remedial powers, could use racial criteria in administering relief, then Congress could certainly use racial criteria in the remedial context. See *id.* at 483 (stating that Court was not dealing with "limited remedial powers of a federal court, . . . but with . . . broad remedial powers of Congress"). The Court went on to emphasize this point, stating that "[i]t is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." *Id.* The Court grounded its ability to use race-based remedial relief in a string of school desegregation cases, which allowed for court-formulated school desegregation remedies based on race. See *id.* at 482; see also *North Carolina Bd. of Educ. v. Swann*, 402 U.S. 43, 46 (1971) (holding that use of racial ratios in desegregating schools is acceptable when past or continuing discrimination is found); *McDaniel v. Barresi*, 402 U.S. 39, 41-42 (1971) (holding that bus transportation to correct racial segregation was proper remedial relief); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 29-30 (1971) (same). The Court in *Fullilove* also pointed out that it could use racial criteria in a remedial decree when statutory violations were committed. See *Fullilove*, 448 U.S. at 483 ("Where federal anti-discrimination laws have been violated, an equitable remedy may in the appropriate case include a racial or ethnic factor."); see also *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 775 (1976).

within that power and that Congress was within its authority to implement the set-aside provision.⁸⁹

The *Fullilove* Court rejected the challenger's arguments that the provision was both under and over inclusive, finding the MBE provision both limited in scope and adequately tailored to remedy the effects of prior discrimination in the awarding of government construction contracts.⁹⁰ The Court further rebuffed the challenger's arguments by concluding that "Congress has [the] necessary latitude to try new techniques such as the limited use of racial and ethnic criteria to accomplish remedial objectives; this is especially so in programs where voluntary cooperation with remedial measures is induced by placing conditions on federal expenditures."⁹¹

2. City of Richmond v. J.A. Croson Co.

The Supreme Court again examined the constitutionality of set-aside programs in *Croson*.⁹² The plaintiff, J.A. Croson Company, bid on the installation of plumbing into a city jail in Richmond, Virginia.⁹³ At that time, Richmond was operating under a Minority Business Utilization Plan ("Plan"), which required contractors who were awarded public construction contracts to subcontract at least thirty percent of the total dollar amount of the contract to MBEs.⁹⁴ Under the Plan, if a contractor could

89. See *Fullilove*, 448 U.S. at 486 ("[W]e find no basis to hold that Congress is without authority to undertake the limited remedial effort represented by the MBE program.").

90. *Id.* at 485-89. The challengers attacked the provision as under inclusive because it limited its benefits to specific minority groups rather than to any business "whose access to government contracting is impaired by the effects of disadvantage or discrimination." *Id.* at 485. The Court pointed out that the provision did not grant preferential treatment to specific minority groups, but rather it allowed specific minority groups to attain a more equal footing with respect to public contracting. See *id.* at 485-86. The Court found Congress operated well within its bounds when it conferred benefits of a remedial nature on specific groups without conferring those same benefits on other groups. See *id.* The Court held that offering remedial benefits to selected disadvantaged groups merely comported with "the well-established concept that a legislature may take one step at a time to remedy only part of a broader problem." *Id.* at 485.

The challengers also attacked the provision as over inclusive because it "bestow[ed] a benefit on businesses identified by racial or ethnic criteria which cannot be justified on the basis of competitive criteria or as a remedy for the present effects of identified prior discrimination." *Id.* at 486. The Court sidestepped this issue, to a degree, by stating that "the peculiarities of specific applications" were not before the Court in the present case. *Id.* Nevertheless, the Court noted that the provision was not over inclusive because it provided for both a waiver and an exemption of the provision's "goal" which, in turn, assured that the provision would be limited to accomplishing Congress's remedial objectives. *Id.* at 487.

91. *Id.* at 490.

92. 488 U.S. 469, 481-83 (1989).

93. See *id.*

94. See *id.* at 477-80. The Minority Business Utilization Plan ("Plan") was adopted by the Richmond City Council on April 11, 1983. See *id.* at 477 (citing RICHMOND, VA., CODE § 12-156(a) (1985)). Under the Plan, prime contractors awarded city construction contracts were to subcontract at least 30% of the dollar

show a lack of sufficient MBEs to satisfy the thirty percent requirement, the contractor could obtain a waiver.⁹⁵ Croson, apparently unable to satisfy the thirty percent MBE requirement, applied for a waiver and was denied.⁹⁶ Although it was the only bidder for this particular contract, Croson lost the contract, which was later resubmitted by the city for new bids.⁹⁷ Croson subsequently brought suit under 42 U.S.C. § 1983, alleging the Plan violated the Fourteenth Amendment both on its face and in its application.⁹⁸

The United States District Court for the Eastern District of Virginia upheld the Plan.⁹⁹ J.A. Croson Co. appealed and the United States Court of Appeals for the Fourth Circuit affirmed.¹⁰⁰ The United States Supreme

amount of the contract to MBEs. *See id.* MBEs were defined as “[a] business at least fifty-one (51) percent of which is owned and controlled . . . by . . . Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts.” *Id.* The Plan was not limited to Richmond; a prime contractor could fulfill the 30% set-aside by subcontracting to an MBE that was located anywhere in the United States. *See id.* Furthermore, the 30% set-aside did not apply to city contracts awarded to minority-owned prime contractors. *See id.* at 477-78.

95. *See id.* at 478-79. The Plan provided:

No partial or complete waiver of the [30% set aside] requirement shall be granted by the City other than in exceptional circumstances. To justify a waiver, it must be shown that every feasible attempt has been made to comply, and it must be demonstrated that sufficient, relevant, qualified Minority Business Enterprises . . . are unavailable or unwilling to participate in the contract to enable meeting the 30% MBE goal.

Id. at 478-79.

96. *See id.* at 481-83. Eugene Bonn, J.A. Croson’s regional manager, contacted about six MBE’s to subcontract work to them in an attempt to satisfy the 30% set-aside requirement. *See id.* at 482. None of these MBEs expressed interest or tendered a bid price. *See id.* On the day Croson’s bid was due for the city contract, Bonn again phoned several MBEs for a solicitation of a bid. *See id.* This time Continental, a local MBE, indicated a willingness to participate in the project, but later had trouble procuring the necessary supplies for the project. *See id.* Therefore, Continental did not supply a bid in time, and Bonn requested a waiver of the 30% set aside. *See id.* Continental later submitted a bid to Croson that was over \$7500 higher than the price Croson included in its bid to the city. *See id.* After the city learned that Continental was an available MBE for inclusion on Croson’s bid, it denied the waiver and Croson lost the bid. *See id.* at 483.

97. *See id.* at 482-83.

98. *See id.* at 483.

99. *See id.* The district court applied the test derived from *Fullilove* and *Regents of University of California v. Bakke*, 438 U.S. 265 (1978) (plurality opinion). *See Croson*, 488 U.S. at 484. For a further discussion on the two-part *Fullilove* test, see *supra* notes 76-91 and accompanying text.

100. *See J.A. Croson Co. v. City of Richmond*, 779 F.2d 181, 194 (4th Cir. 1985), *vacated*, 478 U.S. 1016 (1986). The Fourth Circuit applied the same tests that the district court had derived from *Fullilove* and *Bakke*. *See id.* at 186-93. For the most part, the Fourth Circuit determined that the great deference given to Congress’s findings of past discrimination in *Fullilove* was the guiding standard in the present case. *See id.* at 190 & n.12. Accordingly, the Fourth Circuit deferred to the city of Richmond’s generalized findings of societal discrimination, determining that such conclusions were reasonable. *See id.* The Fourth Circuit also determined, under the second part of the *Fullilove* test, that the Plan was narrowly

Court granted certiorari and vacated and remanded the case to be decided in light of its intervening decision in *Wygant v. Jackson Board of Education*,¹⁰¹ which applied the strict scrutiny standard to a race-based layoff program.¹⁰² On remand, the Plan was struck down as the court of appeals found that it failed to satisfy both the “compelling government interest”

tailored to meet Richmond’s legislative goals. *See id.* It did so by comparing the 30% set-aside number to the minority population in Richmond, about 50%. *See id.* The Fourth Circuit held that the 30% set-aside number would remedy prior discrimination by raising the current number of minorities receiving government contracts, which was around 0.67%. *See id.*

101. 476 U.S. 267 (1986) (plurality opinion).

102. *Id.* at 270 (Powell, J., plurality opinion). In *Wygant*, at issue was a provision in a collective bargaining agreement made between the teacher’s union and the local board of education. *Id.* at 270-71 (Powell, J., plurality opinion). This provision provided preferential protection for some minority employees in the event of a layoff. *See id.* (Powell, J., plurality opinion). Later, a layoff occurred and nonminority teachers were laid off, while minority teachers with less seniority were retained. *See id.* at 272 (Powell, J., plurality opinion). Subsequently, the nonminority teachers challenged the layoff provision under the Equal Protection Clause of the Fourteenth Amendment. *See id.* (Powell, J., plurality opinion).

The Court, in a plurality opinion, ruled that the layoff provision violated the Equal Protection Clause by applying the strict scrutiny standard. *See id.* at 273-74, 284 (Powell, J., plurality opinion). Under the first prong, the board needed to show that it had previously discriminated before it could use racial classifications in its layoff provision. *See id.* at 274 (Powell, J., plurality opinion). Nonetheless, the board offered only findings of generalized discrimination in society, which it used to support two arguments. *See id.* at 274-75 (Powell, J., plurality opinion). First, the board argued that the layoff provision kept minority teachers in the school who, in turn, were able to act as role models for minority students in an attempt to alleviate the effects of societal discrimination. *See id.* at 274 (Powell, J., plurality opinion). Second, the board argued that the layoff provision was a remedy for prior discrimination against the hiring of minorities within the school district. *See id.* at 277 (Powell, J., plurality opinion). The Court rejected the board’s arguments, finding the board’s evidence of societal discrimination inadequate to support the layoff provision under the teacher’s equal protection challenge. *See id.* at 274-76 (Powell, J., plurality opinion). According to the Court, such findings of societal discrimination were too amorphous and simply did not evidence any prior discrimination on the part of the board with regard to minority teachers. *See id.* at 276 (Powell, J., plurality opinion). Speaking to the “role model” theory argument, the Court stated that such a theory has “no logical stopping point” and would allow the board to hire and layoff teachers, using race as the determining factor, “past the point required by any legitimate remedial purpose.” *Id.* at 275 (Powell, J., plurality opinion).

Under the second prong of the strict scrutiny standard, the board needed to show that the layoff plan was “narrowly tailored” to fulfill a compelling government interest. *See id.* at 279-80 (Powell, J., plurality opinion). The Court held the layoff provision was not narrowly tailored to achieve racial equality. *See id.* at 283 (Powell, J., plurality opinion). According to the Court, the layoff provision imposed the entire burden of racial equality on nonminorities by laying them off first, which was a serious disruption of their lives and too heavy a burden for them to bear. *See id.* at 283 (Powell, J., plurality opinion). The Court determined that layoff provision was also too intrusive, considering that other means were available to achieve racial equality such as hiring goals. *See id.* at 283-84 (Powell, J., plurality opinion).

and the “narrowly tailored” prongs of the strict scrutiny standard.¹⁰³ Richmond appealed and the Supreme Court affirmed the court of appeals’ holding, redefined affirmative action analysis and announced that the strict scrutiny standard would be applied to all state and local affirmative action programs that employed racial classifications.¹⁰⁴

Justice O’Connor, writing for the majority, found that the Plan failed to satisfy either prong of the strict scrutiny standard.¹⁰⁵ First, the Plan failed the compelling government interest prong because the city could not specifically show that it had previously discriminated when it awarded government construction contracts.¹⁰⁶ Second, the Plan was not narrowly tailored to remedy past discrimination because it allowed members of particular minority groups located anywhere in the country an absolute preference over other bidders solely on the basis of race.¹⁰⁷

In examining the first prong, the majority observed that a compelling government interest is served when a public entity engages in activity to eradicate the effects of past or present racial discrimination in which the city participated.¹⁰⁸ Therefore, if the city could show that it had in any way participated in discrimination against minority contractors in connection with the administration of public works contracts, the city could validly enact legislation to remedy the effects of that discrimination.¹⁰⁹ The city could not simply rely on a finding of “societal discrimination” to show that the city participated in discrimination against minority contractors.¹¹⁰ Instead, the city had to offer particularized findings that could raise an

103. See *J.A. Croson Co. v. City of Richmond*, 822 F.2d 1355, 1358-60 (4th Cir. 1987), *aff’d*, 488 U.S. 469 (1989). With regard to the first prong of the strict scrutiny standard, the court found no compelling government interest existed because the record revealed no prior discrimination by the city in the awarding of contracts. See *id.* With regard to the second prong, the court stated that even if prior discrimination was shown, the 30% set aside was not narrowly tailored to achieve a remedial purpose. See *id.* at 1360. Instead, the court found that the 30% figure was arbitrarily chosen and was not tied to any relevant number. See *id.*

104. See *Croson*, 488 U.S. at 469-70.

105. See *id.* at 470-72.

106. See *id.* at 498-506.

107. See *id.* at 507-08.

108. See *id.* at 492.

109. See *id.* The Court recognized a state or local subdivision’s ability to eradicate effects of private discrimination through remedial measures within its legislative jurisdiction. See *id.* at 491-92. Nevertheless, the Court observed that such remedial legislation must come within the constraints of Section 1 of the Fourteenth Amendment. See *id.* To use a racial classification in its Plan, Richmond had to show that it engaged in prior discrimination, either actively or as a “passive participant.” See *id.*; see also *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (Powell, J., plurality opinion) (stating that government unit involved must show it engaged in prior discrimination to satisfy “compelling government interest” prong under Equal Protection Clause challenge). The city failed to sustain this burden. See *Croson*, 488 U.S. at 505-06.

110. See *Croson*, 488 U.S. at 492.

inference that they had indeed, either passively or actively, participated in discrimination in connection with public construction contracts.¹¹¹

To show prior racial discrimination, Richmond relied on (1) conclusory statements of racial discrimination in the construction industry "in [Richmond], in the State, and around the Nation";¹¹² (2) statistical evidence that minority businesses received 0.67% of prime contracts from the city, while minorities constituted 50% of the city's population;¹¹³ and (3) the fact that membership of minority contractors in local and state contractors' associations was very low.¹¹⁴ The Court found this evidence insufficient to raise an inference that the city had participated in racial discrimination within its construction industry.¹¹⁵ The Court instead

111. *See id.* at 492, 497-99. The Court noted that rights created by Section 1 of the Fourteenth Amendment are personal rights, guaranteed to the individual. *See id.* at 493 (citing *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)). Because the Plan denied certain citizens the opportunity to bid on city contracts based solely on racial classifications, the Equal Protection Clause of the Fourteenth Amendment was implicated. *See id.* Applying the strict scrutiny standard, the Court held that the city needed to identify prior racial discrimination with "particularity" to sustain the use of racial classifications under the Plan. *See id.* at 492. The Court differentiated between a showing of "'societal discrimination,' an amorphous concept of injury" and a "'focused' goal of remedying 'wrongs worked by specific instances of racial discrimination.'" *Id.* at 496-97 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (Powell, J., plurality opinion)). The Court stated that "'[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.'" *Id.* at 497 (quoting *Wygant*, 476 U.S. at 276 (Powell, J., plurality opinion)). Therefore, in *Croson*, an amorphous claim of past discrimination in Richmond's construction industry would not suffice to justify the Plan's use of a racial classification, but rather the city needed to identify prior discrimination with specificity. *See id.* at 498-99.

112. *Id.* at 500. This statement was made by Councilperson Marsh, a member of the city council that voted for the Plan. *See id.* The City Manager, Mr. Deese, also made known his view to the city council that racial discrimination still pervaded the construction industry in his hometown of Pittsburgh. *See id.* Additionally, Richmond also relied on Congress's finding in *Fullilove* of nationwide discrimination in the construction industry. *See id.* at 504. The Court in *Croson*, however, noted that in *Fullilove* Congress included a waiver in the challenged set-aside program, therefore explicitly recognizing that the problem would vary between different market areas. *Id.*

Additionally, the district court, in validating the Plan, gave great weight to the fact that the ordinance declared itself to be "remedial." *See id.* at 500. The Court admonished the lower court, stating that the "mere recitation" by the city that the racial classification was used for a legitimate purpose "is entitled to little or no weight." *Id.* Because racial classifications are suspect, "simple legislative assurances of good intention cannot suffice." *Id.*; *see Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975) ("This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation.").

113. *See Croson*, 488 U.S. at 499, 501-03.

114. *See id.* at 499, 503-04.

115. *See id.* at 500. The Court held that none of the city's findings, alone or taken together, provided Richmond with a "strong basis in evidence for its conclusion that remedial action was necessary." *Id.* (quoting *Wygant*, 476 U.S. at 277 (Powell, J., plurality opinion)).

found the city's conclusory findings of racial discrimination of little probative value in establishing identifiable discrimination against minority contractors in Richmond.¹¹⁶ First, the Court reiterated that generalized findings of discrimination in society will not suffice to show the necessary specific discrimination.¹¹⁷ Second, the Court found the disparity between minority businesses receiving contracts and the minority population of the city likewise insufficient to prove discrimination because such a comparison was misplaced.¹¹⁸ The Court found the proper comparison was the number of minority contractors qualified to undertake contracting work on city construction projects compared to the number of those minority contractors actually awarded contracts.¹¹⁹ According to the Court, "where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task."¹²⁰ Third, the Court found that low black membership in state and local contractor associations

116. *See id.* The Court noted that fact-finding by legislative bodies is usually entitled to a deferential view by the Court. *See id.*; *see also* *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 487-89 (1955) ("But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new [laws]."). Nevertheless, the Court also recognized that when a legislative body uses a suspect classification in a statutory scheme, a more probing inquiry must be made by the Court and that "blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *Croson*, 488 U.S. at 501; *see* *Korematsu v. United States*, 323 U.S. 214, 233-42 (1944) (Murphy, J., dissenting) (criticizing legislative justification for evacuation of Japanese and Americans of Japanese descent during World War II); *see also* *Wygant*, 476 U.S. at 277 (Powell, J., plurality opinion) (asserting that government cannot use race to remedy particular condition merely by stating that condition exists); *McLaughlin v. Florida*, 379 U.S. 184, 190-92 (1964) (stating that use of suspect classifications cannot rest on generalized assertions by legislature that such classifications are relevant to legislature's goal).

117. *See Croson*, 488 U.S. at 500.

118. *See id.* at 501-03.

119. *See id.* (noting that it is impossible to evaluate minority participation in city expenditures without other findings of fact). The Court recognized that gross statistical disparities might, in a proper case, alone suffice as prima facie proof of discrimination. *See id.* at 501; *see also* *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977) (noting that statistics can be "important source of proof" in employment discrimination case). Similarly, in the employment context, for certain entry level positions, statistical comparisons may indicate a pattern of discrimination when the racial composition of the employer's workforce is compared to the racial composition of the relevant population. *See Croson*, 488 U.S. at 501; *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 337-38 (1977) (holding that statistical comparison between minority truck drivers and relevant population is indicative of discriminatory exclusion). According to the Court, however, "where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task." *Croson*, 488 U.S. at 501-02; *see Hazelwood*, 433 U.S. at 308 ("When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.").

120. *Croson*, 488 U.S. at 501-02.

could not establish identifiable racial discrimination because many possibilities exist for this lack of participation that go beyond racial discrimination.¹²¹

Under the second prong, the Court found it “almost impossible” to determine whether the Plan was narrowly tailored to rectify past racial discrimination because the Plan failed to satisfy the compelling government interest prong.¹²² While the Court found it unnecessary to go into an in-depth analysis under the narrowly tailored prong, it did make two important observations.¹²³ First, the Court noted that the city had previously identified a number of race-neutral factors that created barriers to minority participation in the city’s construction industry.¹²⁴ Accordingly, a “narrowly tailored” Plan could exist only if the city first addressed the race-neutral barriers by considering the use of race-neutral alternatives to increase minority contractor participation.¹²⁵ In *Croson*, the Court noted

121. *See id.* at 503. Rejecting the evidence of low black membership in local contractor associations, the Court gave numerous explanations for the “dearth” of minority participation, including past societal discrimination against minorities in education and economic opportunities and career and entrepreneurial choices of both African-American and Caucasian individuals. *See id.* The Court also noted that African-Americans are attracted to industries other than construction. *See id.* The Court concluded that low African-American membership in the relevant trade organizations alone could not establish a prima facie case for discrimination. *See id.*; *cf. Bazemore v. Friday*, 478 U.S. 385 (1986) (per curiam) (holding that existence of single race clubs did not impose duty to integrate absent evidence of discriminatory exclusion).

Nevertheless, the Court indicated that a showing of low minority membership in trade organizations would be relevant if it was linked to the number of minority contractors eligible for membership. *See Croson*, 488 U.S. at 503-04. Therefore, if a great number of eligible minority contractors existed locally, yet minority contractor membership remained extremely low, an inference of discriminatory exclusion would arise. *See id.* at 503. In that case, the city would have a compelling interest to prevent tax dollars from assisting these organizations in perpetuating racial discrimination in the local construction industry. *See id.*; *see also Ohio Contractors Ass’n v. Keip*, 713 F.2d 167, 172, 174 (6th Cir. 1983) (upholding minority set aside based on lower court finding of state participation with trade unions in excluding African-American laborers from work on government construction projects); *cf. Norwood v. Harrison*, 413 U.S. 455, 471 (1973) (invalidating statutory program that financed textbooks for schools which practiced racially discriminatory policies regarding student enrollment).

122. *Croson*, 488 U.S. at 507.

123. *See id.*

124. *See id.* The city cited a number of nonracial barriers that constrained minority and nonminority contractors in acquiring government construction contracts. *See id.* These included deficiencies in working capital, inability to satisfy bonding requirements, unfamiliarity with bidding procedures and hardship caused by a contractor’s inadequate track record. *See id.*

125. *See id.* The Court indicated that the efficacy of alternative remedies was a factor the Court looks to in determining whether race-based set asides are narrowly tailored to remedy prior discrimination. *See id.*; *see also United States v. Paradise*, 480 U.S. 149, 171 (1987) (“In determining whether race conscious remedies are appropriate, we look to several factors including the efficacy of alternative remedies.”). For example, in *Fullilove*, where the challenged set aside was upheld, the Court discussed how Congress first considered the efficacy of alternative, race-neu-

that Richmond had not considered using any alternatives to its race-based Plan.¹²⁶ Second, the Court rejected the Plan's use of a rigid thirty percent quota to remedy past discrimination.¹²⁷ The thirty percent set-aside figure was used because minorities in Richmond comprised thirty percent of the population.¹²⁸ The Court stated such a quota rested "upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population."¹²⁹

3. Metro Broadcasting, Inc. v. FCC

Although *Croson* established that state and local set-aside programs would henceforth be subject to the strict scrutiny standard, it did not provide the appropriate standard to be applied to federal set-aside programs.¹³⁰ That issue was addressed the following year in *Metro*

tral remedies targeting small businesses and the socially and economically disadvantaged to eradicate the effects of racial discrimination in the construction industry before enacting the set aside provision. *Fullilove v. Klutznick*, 448 U.S. 448, 463-67 (1980). In *Croson*, the Court noted that a race-neutral program of city financing might lead to greater minority participation in government contracts because a race-neutral barrier, lack of working capital, was a factor precluding minority contractors from procuring construction contracts. *Croson*, 488 U.S. at 507.

126. *Croson*, 488 U.S. at 507.

127. *See id.* at 507-08. The Court noted that, although the Plan included a waiver provision which allowed contractors to avoid the 30% quota, it focused solely on the availability of minority contractors, not on whether the minority contractor had suffered prior discrimination. *See id.* at 508. Because the city did not investigate the need for remedial action on an case-by-case basis, but simply mandated a flat 30% quota, the Court concluded that the Plan was not "narrowly tailored" to remedy any prior discrimination suffered by minority contractors. *See id.* The Court compared this situation with that present in *Fullilove*. *See id.* In *Fullilove*, a federal set-aside provision mandated a 10% minority participation goal in government construction contracts made pursuant to the Public Works Act of 1977. *Fullilove*, 448 U.S. at 453-54. Under the provision, a contractor could reject a minority subcontractor's lofty bid price and have the 10% target for minority participation waived. *See id.* This waiver would be allowed if the minority contractor's high bid price was the result of factors other than prior discrimination. *See id.* Thus, the waiver mechanism acted to ensure that the 10% goal was enforced only to assist minority contractors that suffered prior discrimination. *See id.* According to the *Croson* Court, such programs are less problematic under equal protection analysis because all minority contractors are treated individually rather than having race be the sole relevant consideration for their inclusion under the Plan. *Croson*, 488 U.S. at 508.

128. *See Croson*, 488 U.S. at 508.

129. *Id.* (quoting *Local 28 of Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421, 494 (1986) (O'Connor, J., concurring in part and dissenting in part) ("[I]t is completely unrealistic to assume that individuals of one race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination.")).

130. *Id.* at 509 (discussing implications of court's holding on only state or local entities and not federal entities).

*Broadcasting, Inc. v. FCC*¹³¹ when the Court adopted an intermediate scrutiny standard for analyzing racial classifications used in federal affirmative action programs.¹³² In *Metro Broadcasting*, the Court upheld the constitutionality of two race-based policies used by the Federal Communications Commission (FCC) that were challenged under the Equal Protection Clause of the Fifth Amendment.¹³³ The FCC policies required that race be taken into account when new station licenses were granted and when distress sales of existing stations were reviewed.¹³⁴ Under the intermediate scrutiny standard, these FCC policies would be constitutional if they served an important government interest and were substantially related to

131. 497 U.S. 547 (1990), *overruled by* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

132. *Id.* at 564-65. The *Metro Broadcasting* Court relied on *Fullilove*, which did not apply strict scrutiny to determine the constitutionality of a federal set-aside program under the Fifth Amendment. *Id.*; *Fullilove*, 448 U.S. at 473. Instead, in *Fullilove*, three members of the majority inquired "whether the objectives of th[e] legislation are within the power of Congress" and "whether the limited use of racial and ethnic criteria . . . is a constitutionally permissible means for achieving the congressional objectives." *Fullilove*, 448 U.S. at 473. Three other members of the majority would have upheld the use of racial classifications that "serve important governmental objectives and are substantially related to achievement of those objectives." *Id.* at 519 (Marshall, J., concurring in the judgment). The *Metro Broadcasting* Court applied the "intermediate standard" of review to the Equal Protection Clause challenge. *Metro Broadcasting*, 497 U.S. at 564-65.

The *Metro Broadcasting* Court declined to apply the strict scrutiny standard used in *Croson* where the Court held a municipality's set-aside program violated the Fourteenth Amendment's Equal Protection Clause. *Id.*; *Croson*, 488 U.S. at 486. The Court explained that in *Croson* a municipal set-aside program was challenged under the Fourteenth Amendment, while in *Metro Broadcasting*, a Fifth Amendment challenge was made against a congressional mandate. *Metro Broadcasting*, 497 U.S. at 565-66. Therefore, *Fullilove*, which decided the constitutionality of a congressional set-aside program, rather than *Croson*, prescribed the appropriate test to apply in *Metro Broadcasting*. *Id.* In fact, the Court in *Metro Broadcasting* noted that *Croson* "reaffirmed the lesson of *Fullilove* that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments." *Id.* at 565.

133. *Metro Broadcasting*, 497 U.S. at 566 ("We hold that the FCC minority ownership policies pass muster under the test we announce today.")

134. *See id.* at 556-58. Under the first plan, the FCC was to consider the characteristics of the applicant when it applied for a new radio or television broadcast station. *See id.* at 556-57. The FCC defined the term "minority" to include "those of Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction." Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 980 n.8 (1978). If the putative owner was a minority and participated in day-to-day management, and there would be minority participation in management, a "plus" would be awarded to the minority applicant during the application process. *See Metro Broadcasting*, 497 U.S. at 557.

Under the second plan, the FCC sought to increase minority participation in radio and television broadcast stations through the use of a "distress sale" plan. *See id.* Under this plan, if a current licensee's ability to hold a broadcast license was called into question, the licensee could avoid a revocation hearing by assigning the license to an FCC-approved minority business. *See id.*

achieving that interest.¹³⁵ Rather perfunctorily, the Court held that the policies achieved an important governmental interest by attempting to diversify broadcast programming.¹³⁶ Further, the Court, deferring to the findings of the FCC and Congress, recognized that the FCC's policies were substantially related to achieving that goal.¹³⁷ In rendering its decision, the Court noted that it must defer to the FCC because, in promulgating the two race-based policies at issue, the FCC was acting as an agent of Congress in the exercise of its constitutional powers.¹³⁸

4. Adarand Constructors, Inc. v. Pena

Not until 1995 did the Supreme Court, in *Adarand Constructors, Inc. v. Pena*, rule that strict scrutiny was the appropriate level of scrutiny for federal affirmative action programs.¹³⁹ This holding explicitly overruled *Metro Broadcasting's* application of an intermediate standard and implicitly overruled *Fullilove's* application of its lenient two-prong standard in reviewing federal race-based affirmative action programs.¹⁴⁰

In *Adarand*, the Court was presented with a Department of Transportation affirmative action program that awarded financial bonuses to prime contractors if minority subcontractors were employed.¹⁴¹ A division of the

135. See *Metro Broadcasting*, 497 U.S. at 564.

136. See *id.* at 566. The Court gave great deference to Congress's finding that both minorities and the public benefit from a diverse ownership of broadcasting stations. See *id.* at 567-78.

137. See *id.* at 569. Again, the Court gave great deference to Congress and the FCC. See *id.* The Court relied on the fact that both the FCC and Congress had determined that broadcast diversity could be achieved through greater minority participation in broadcast station ownership. See *id.* The Court stated it "must pay close attention to the expertise of the [FCC] and the fact-finding of Congress when analyzing the nexus between minority ownership and programming diversity." *Id.* The Court went on to explain, "[w]ith respect to this 'complex' empirical question, we are required to give 'great weight to the decisions of Congress and the experience of the [FCC].'" *Id.* (quoting *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973)).

138. See *id.* at 547. The Court explained that it was appropriate to give deference to the congressional will for a number of reasons. See *id.* Those reasons included (1) Congress's "institutional competence as the National Legislature"; (2) Congress's power under the Commerce Clause; (3) Congress's power under the Spending Clause; and (4) Congress's power under the Civil War Amendments. See *id.* at 563.

139. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224-28 (1995) (stating that *Metro Broadcasting* undermined essential constitutional principals).

140. See *id.* at 227 ("To the extent that *Metro Broadcasting* is inconsistent with [the holding in *Adarand* that racial classifications imposed by a federal government actor are to be strictly scrutinized], it is overruled."); see also *id.* at 285 ("[T]o the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling"); *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537, 1544 (10th Cir. 1994) (understanding *Fullilove* to have adopted "a lenient standard, resembling intermediate scrutiny, in assessing" constitutionality of federal race-based affirmative action programs), *vacated*, 515 U.S. 200 (1995).

141. *Adarand*, 515 U.S. at 206. The program at issue was a Department of Transportation appropriations measure titled the Surface Transportation and Uni-

Department of Transportation awarded a prime contract for a Colorado highway construction project to Mountain Gravel & Construction Co.¹⁴² Under the contract, Mountain Gravel would receive additional compensation if it subcontracted work to minority-owned subcontractors.¹⁴³ Subsequently, Mountain Gravel solicited bids from subcontractors for work on a portion of the contract.¹⁴⁴ Both the plaintiff, Adarand Constructors, and Gonzales Construction Co., a minority subcontractor, solicited bids, with Adarand's bid being the lowest.¹⁴⁵ Despite Adarand's low bid, Mountain Gravel awarded the subcontract to Gonzales Construction so that Mountain Gravel would receive the additional compensation under the prime contract.¹⁴⁶ Adarand brought suit against the Department of Transportation, claiming the race-based contractual provision in Mountain Gravel's prime contract was a violation of the Fifth Amendment's Equal Protection Clause.¹⁴⁷ The United States District Court for the District of Colorado granted summary judgment in favor of the Department of Transportation, applying the intermediate scrutiny standard as required under *Metro Broadcasting*.¹⁴⁸ Although the United States Court of Appeals for the Tenth Circuit affirmed, the Supreme Court reversed and remanded the circuit court's decision.¹⁴⁹

form Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 132, 145 (1987).

142. See *Adarand*, 515 U.S. at 205.

143. See *id.* The relevant clause in the contract read:

"Subcontracting. This subsection is supplemented to include a Disadvantaged Business Enterprise (DBE) Development and Subcontracting Provision as follows:

Monetary compensation is offered for awarding subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals

. . . .
The Contractor will be paid an amount computed as follows:

1. If a subcontract is awarded to one DBE, 10 percent of the final amount of the approved DBE subcontract, not to exceed 1.5 percent of the original contract amount.

2. If subcontracts are awarded to two or more DBEs, 10 percent of the final amount of the approved DBE subcontracts, not to exceed 2 percent of the original contract amount."

Id. at 209.

144. See *id.* at 205. (noting that Mountain Gravel solicited bids from subcontractors for guardrail portion of contract).

145. See *id.*

146. See *id.*

147. See *id.* at 205-06.

148. See *id.* at 210.

149. See *id.* With regard to the race-based provision, the appellate court applied the *Fullilove* test, which it characterized as "a lenient standard, resembling intermediate scrutiny." *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537, 1547 (10th Cir. 1994), *vacated*, 515 U.S. 200 (1995). Under this test, the appellate court upheld the subcontractor compensation clause. See *id.*

Initially, in examining the issue, the Court addressed whether Adarand had standing to seek declaratory and injunctive relief against any future use of a subcontractor compensation clause.¹⁵⁰ The Court applied the standards enumerated in *Lujan v. Defenders of Wildlife*¹⁵¹ and determined that Adarand could seek forward-looking relief.¹⁵² Then, the Court sought out the proper standard to apply to federal race-based affirmative action programs.¹⁵³ After canvassing its pre-*Metro Broadcasting* race-based affirmative action decisions, the Court extrapolated three general propositions that supported the application of the strict scrutiny standard: (1) skepticism of all racial classifications; (2) consistency in application of equal protection analysis regardless of the race of the benefitted or burdened group; and (3) congruence between equal protection analysis under the Fifth and Fourteenth Amendments.¹⁵⁴ The Court found the intermediate scrutiny standard as previously applied in *Metro Broadcasting* violated all three propositions.¹⁵⁵

First, the Court determined that all racial classifications should be looked upon with "skepticism."¹⁵⁶ Drawing on prior affirmative action jurisprudence, the Court recognized the need to analyze all classifications using racial criteria under a heightened level of scrutiny.¹⁵⁷ Citing the plurality opinion in *Wygant*, the Court affirmed that "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching

150. *See Adarand*, 515 U.S. at 210-11.

151. 504 U.S. 555 (1992).

152. *See Adarand*, 515 U.S. at 211-12. The Court stated that Adarand Constructors could bring a claim for forward-looking relief only if the challenged future use of the subcontractor compensation clause constituted "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 211 (quoting *Lujan*, 504 U.S. at 560). The Court found that Adarand satisfied this test. *See id.* at 211-12. First, Adarand's claim that the subcontracting clause denies equal protection of the laws alleged an invasion of a legally protected interest. *See id.* at 211. Second, such a claim was particular as to Adarand. *See id.* Third, the future use of the subcontractor compensation clause would cause Adarand imminent injury because it was anticipated with a fair degree of certainty that a good deal of guardrail work would be offered by the Department of Transportation on which Adarand would bid. *See id.* at 211-12. These contracts offered by the Department of Transportation would invariably include the disputed subcontractor compensation clause, which would consequently injure Adarand. *See id.* at 212.

153. *See id.* at 212-13.

154. *See id.* at 225.

155. *See id.* at 226-27.

156. *See id.* at 223.

157. *See id.* at 224; *see also* *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 284 (1986) (Powell, J., plurality opinion) (holding that race-based layoffs did not satisfy demands of Equal Protection Clause); *Fullilove v. Klutznick*, 448 U.S. 448, 492 (1979) (upholding constitutionality of MBE provision of Public Works Employment Act of 1977); *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964) (striking down Florida law prohibiting interracial couples from cohabitating); *Hirabayashi v. United States*, 320 U.S. 81, 104-05 (1943) (holding that legislation authorizing curfew for Japanese-Americans during World War II was constitutional).

examination.’”¹⁵⁸ The Court explained that *Metro Broadcasting*, which applied an intermediate standard of review to a race-based federal affirmative action program, undermined this principle because it treated “benign” racial classifications less skeptically than other types of racial classifications.¹⁵⁹ Second, the Court emphasized the need for consistency in equal protection analysis of race-based affirmative action programs.¹⁶⁰ The Court determined that the same standard of review under equal protection analysis should apply to racial classifications irrespective of what race the classification is benefitting or burdening.¹⁶¹ Conversely, the Court noted that in *Metro Broadcasting*, the race of the group benefitting under the race-based program was critical to determining which standard of review should apply.¹⁶² The Court regarded *Metro Broadcasting*’s use of race when determining which standard to apply as a “significant departure” from such prior decisions as *Regents of University of California v. Bakke*¹⁶³ and *Croson*, as well as a deviation from consistency.¹⁶⁴

158. See *Adarand*, 515 U.S. at 223 (quoting *Wygant*, 476 U.S. at 284 (Powell, J., plurality opinion)).

159. See *id.* at 224-25. *Metro Broadcasting* held that racial classifications that were “benign” need only satisfy an intermediate scrutiny standard. See *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 564-65 (1990), *overruled by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). The *Adarand* Court rejected this application of an intermediate scrutiny standard because “‘absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are “benign” or “remedial” and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.’” *Adarand*, 515 U.S. at 226 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)). The Court reasoned that without treating all racial classifications with skepticism, it would be impossible to tell when a racial preference was benign or when it was an illegitimate use of a racial classification. See *id.*

160. See *Adarand*, 515 U.S. at 224.

161. See *id.* In reaching this conclusion, the Court relied on *Croson*, which held that “the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.” *Croson*, 488 U.S. at 494. The Court also looked to Justice Powell’s opinion in *Bakke* which determined that all racial classifications should be subject to the same equal protection analysis, notwithstanding the race which the racial classification burdened or benefited. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289-91 (1978) (Powell, J., plurality opinion).

162. See *Adarand*, 515 U.S. at 225. Under *Metro Broadcasting*, the race burdened and benefited by the racial classification was determinative of whether an intermediate or strict scrutiny standard would apply. *Metro Broadcasting*, 497 U.S. at 563-66. The *Adarand* Court rejected the use of any kind of racial burdening or benefitting analysis when scrutinizing racial classifications. *Adarand*, 515 U.S. at 225-27. The Court found that because *Metro Broadcasting* “squarely rejected” the proposition of congruency established by earlier equal protection cases, it followed that the proposition of “consistency” was necessarily compromised. *Id.* at 226-27. Thus, the *Metro Broadcasting* decision was a “significant departure” from prior Supreme Court decisions on this issue. *Id.* at 227.

163. 438 U.S. 265 (1978) (plurality opinion).

164. *Adarand*, 515 U.S. at 227. In *Bakke*, Justice Powell’s plurality opinion held that if an individual is entitled to “judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge

Third, the Court stressed the need for congruence between application of the Equal Protection Clauses of the Fifth and Fourteenth Amendments.¹⁶⁵ The Court rejected *Metro Broadcasting's* application of an intermediate standard of review to equal protection analysis under the Fifth Amendment and applied the strict scrutiny standard under Fourteenth Amendment equal protection analysis.¹⁶⁶ According to the *Adarand* Court, "the [*Metro Broadcasting*] Court repudiated the long-held notion that 'it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government' than it does on a State to afford equal protection of the laws."¹⁶⁷ In its conclusion, the Supreme Court affirmed that "these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that [the use of] any racial classification subjecting that person to unequal treatment [be justified] under the strictest judicial scrutiny."¹⁶⁸

III. APPLYING STRICT SCRUTINY TO SET-ASIDE PROGRAMS

As previously noted, *Croson* ruled that state and local set-aside programs are analyzed under the strict scrutiny standard when challenged under the Equal Protection Clause of the Fourteenth Amendment,¹⁶⁹ while *Adarand* made this same standard of review applicable to federal set-

upon personal rights . . . then constitutional standards may be applied consistently." *Bakke*, 438 U.S. at 299 (Powell, J., plurality opinion). Similarly, *Croson* held that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification." *Croson*, 488 U.S. at 494.

165. See *Adarand*, 515 U.S. at 224.

166. See *id.* at 224-27. In particular, the *Adarand* Court seemed to be at a loss over why the *Metro Broadcasting* Court applied an intermediate scrutiny standard to a Fifth Amendment equal protection challenge, when only a year earlier in *Croson*, the Court applied strict scrutiny to a Fourteenth Amendment equal protection challenge. *Id.* The Court found that the *Metro Broadcasting* decision completely ignored the Court's prior affirmation that equal protection analysis should be the same under both the Fifth and Fourteenth Amendments. See *id.*; see also *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (holding that it is "unthinkable" that Constitution would impose lesser duty on federal government than on states in affording equal protection of laws).

167. *Adarand*, 515 U.S. at 225 (quoting *Bolling*, 347 U.S. at 500).

168. *Id.* at 224. Despite the application of the strict scrutiny standard, the Court explained that strict scrutiny did not necessarily mean "strict in theory, fatal in fact." *Id.* at 237. Thus, the Court noted affirmative action programs may survive application of the strict scrutiny standard. See *id.* The Court cited one case in which every Justice of the Supreme Court agreed that the Alabama Department of Public Safety's "pervasive, systematic, and obstinate discriminatory conduct" justified the implementation of a race-based remedy. See *Adarand*, 515 U.S. at 237 (citing *United States v. Paradise*, 480 U.S. at 149, 167 (1987)).

169. *Croson*, 488 U.S. at 491-93 (adopting strict scrutiny test as applied to state and local entities). For further discussion of *Croson*, see *supra* notes 92-129 and accompanying text.

aside programs.¹⁷⁰ A set-aside program is justifiable under the strict scrutiny standard if it satisfies a “compelling state interest” and is “narrowly tailored” to further that interest.¹⁷¹ Although *Adarand* and *Croscon* collectively determined that this standard applies to race-based affirmative action programs, they failed to offer much guidance as to how a court should go about applying this test.¹⁷² Rather, the application of this test is best understood by examining a handful of circuit and district courts’ decisions that have applied this test to such race-based affirmative action programs.¹⁷³

A. *Compelling State Interest*

Under the first prong of the strict scrutiny test, the government must show it had a “compelling state interest” for using racial classifications in its set-aside program.¹⁷⁴ This compelling state interest is satisfied when a government attempts to remedy the identifiable effects of past or present racial discrimination in its local construction industry.¹⁷⁵ The discrimination that a government may remedy roughly falls into three categories.

170. *Adarand*, 515 U.S. at 227. Assistant Attorney General Walter Dellinger, however, suggests that *Adarand* may entitle greater deference to congressional findings of discrimination than to that of state and local governments. See Memorandum from Walter Dellinger, Assistant Attorney General to General Counsels (June 28, 1995) (on file with U.S. Justice Department). Mr. Dellinger notes that *Adarand* did not preclude this possibility, and that this theme had been explored by some of the Justices in prior cases. See *id.* For example, he cites a portion of Justice O’Connor’s opinion in *Croscon*, joined by Chief Justice Rehnquist and Justice White, which indicates that Congress may have more latitude in using affirmative action programs than state and local governments. See *id.* He also cites Justice Powell’s concurrence in *Fullilove*, which noted that Congress retains broad powers to remedy nationwide discrimination. See *id.* Such an argument, however, has not been raised in any challenge to an affirmative action program as of yet.

171. See *Croscon*, 488 U.S. at 493-94; see also *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (Powell, J., plurality opinion) (applying strict scrutiny to lay-off provision).

172. *Adarand*, 515 U.S. at 237 (noting only that affirmative action programs may survive application of strict scrutiny standard and application of this standard does not necessarily mean “strict in theory, fatal in fact”).

173. See *id.* at 227.

174. See *Croscon*, 488 U.S. at 492 (discussing application of compelling state interest test); see also *Wygant*, 476 U.S. at 274-78 (Powell, J., plurality opinion) (applying compelling state interest standard to layoff provision).

175. See *Croscon*, 488 U.S. at 492; see also *id.* at 509 (Scalia, J., concurring) (describing situations in which state or local entity may try to rectify effects of discrimination); *Contractors III*, 91 F.3d 586, 596 (3d Cir. 1996) (“The municipality has a compelling state interest that can justify race-based preferences only when it has acted to remedy identified present or past discrimination in which it engaged or was a ‘passive participant’ . . .”), *cert. denied*, 117 S. Ct. 953 (1997); *Contractors Ass’n v. City of Phila.*, 6 F.3d 990, 995 (3d Cir. 1993) [hereinafter *Contractors II*] (recognizing that combating racial discrimination is compelling government interest); *Coral Constr. Co., Inc. v. King County*, 941 F.2d 910, 916 (9th Cir. 1991) (finding that active or passive discrimination by municipality in local construction industry was sufficient to satisfy compelling government interest); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 913 (11th Cir. 1990) (finding that municipal-

The first type of discrimination occurs when a prime contractor awards subcontracts on a government-funded construction project in a racially discriminatory manner.¹⁷⁶ The second type of discrimination occurs when a trade association admits members in a racially discriminatory fashion and the government participates in such discrimination by requiring

ity could enact race-conscious legislation, in part, if such legislation was necessary to remedy clear instances of discrimination).

Although the Court's decisions in *Croson* and *Adarand* determined that remedial measures could serve a compelling state interest, they did not explicitly address if and when set-aside programs used for nonremedial objectives, such as racial diversity, could satisfy that same compelling state interest. *Adarand*, 515 U.S. at 257-59 (Stevens, J., dissenting) (noting that majority's silence on issue leaves open possibility of use of affirmative action to further nonremedial objectives). The only Supreme Court decision that comes close to addressing this question is Justice Powell's opinion in *Bakke*. *Regents of the Univ. of Cal., v. Bakke*, 438 U.S. 265, 265-320 (1978) (Powell, J., plurality opinion). There, Justice Powell found that a university which considered an applicant's race in the admission process to foster racial diversity among the student body served a compelling state interest. *See id.* at 311-14 (Powell, J., plurality opinion). Aside from the *Bakke* decision, Justice Stevens has advocated, in several dissenting and concurring opinions, the use of affirmative action programs to further nonremedial objectives. *See Adarand*, 515 U.S. at 257-59 (Stevens, J., dissenting) (discussing how FCC program in overruled *Metro Broadcasting* served legitimate nonremedial purposes); *Croson*, 488 U.S. at 511-12 & n.1 (Stevens, J., concurring) (citing examples of cases in which nonremedial action should be employed); *Johnson v. Transportation Agency*, 480 U.S. 616, 646-47 (1987) (Stevens, J., concurring) (noting that in some cases employers may find legitimate reasons to give preferences to underrepresented persons); *Wygant*, 476 U.S. at 313-15 (Stevens, J., dissenting) (arguing that defendant's action in retaining minority teachers served "completely sound educational purpose").

Notwithstanding this support for the use of nonremedial objectives, Justice O'Connor's opinion in *Croson* implicitly casts doubt on the validity of nonremedial set-aside programs. *Croson*, 488 U.S. at 493. In *Croson*, Justice O'Connor states that set-aside programs should be "strictly reserved for the remedial setting." *Id.* Nevertheless, nowhere in her opinion in *Croson* does she discard Justice Powell's opinion in *Bakke*. *Cf.* *United States v. Board of Educ.*, 832 F. Supp. 836, 847-48 (D.N.J. 1993) (finding that diversity in higher education is compelling state interest under constitutional standards controlling affirmative action decisions).

176. *See Croson*, 488 U.S. at 492. *Croson* determined that remedial race-based programs could be employed when a municipality could show that "it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry." *Id.* Thus, to the extent that the city "passively" took part in discrimination toward minority contractors through private contractors on government-funded construction projects, it could seek to remedy such discrimination through the use of a set-aside program. *See id.* It is less clear at this point whether evidence of discrimination by private contractors on private construction contracts would give rise to the inference of discrimination needed to support a municipality's set-aside program. *See Concrete Works, Inc. v. City of Denver*, 36 F.3d 1513, 1529 (10th Cir. 1994) (noting that there is uncertainty after *Croson* regarding whether discrimination by private contractors on private construction projects is sufficient evidence of discrimination to justify affirmative action program); *cf. Contractors III*, 91 F.3d at 602 (explaining that government can remedy racial discrimination only if it somehow participated in or supported racial discrimination).

bidders on its contracts to be members of that trade association.¹⁷⁷ The third and most overt type of discrimination occurs when the government itself awards contracts in a racially discriminatory manner.¹⁷⁸ The remedial action may be aimed at either ongoing discriminatory practices, or the lingering effects of past discrimination in any of the three categories above.¹⁷⁹

The government must identify discrimination in the local construction market under one of these three categories with precision and within the proper geographical scope.¹⁸⁰ Precision requires that a particularized showing of discrimination be made.¹⁸¹ Findings of general, historical dis-

177. See *Croson*, 488 U.S. at 503; *Ohio Contractors Ass'n v. Keip*, 713 F.2d 167, 171 (6th Cir. 1983) (sustaining set-aside program based on district court finding that "state had become 'a joint participant' with private industry and certain craft unions in a pattern of racially discriminatory conduct which excluded black laborers from work on public construction projects"). Although *Croson* determined that a "[c]ity would have a compelling interest in preventing its tax dollars from assisting [local trade] organizations in maintaining a racially segregated construction market," the city may not justify its program based on discrimination by such associations when these associations do not benefit from government construction funding. *Croson*, 488 U.S. at 503. This statement in *Croson* was best explained by the court in *Contractors III*. *Contractors III*, 91 F.3d at 602. In that case, the city awarded contracts under a competitive bidding scheme, but did not require contractors to bid those contracts to local trade association members. See *id.* The court rejected the city's assertion that discrimination by these local trade associations could support an inference of discrimination in which the city was a passive participant. See *id.* The court explained that because the city neither required bidders to be association members nor favored these associations or their members in any way, the city could not have passively participated in discrimination perpetrated by these associations as required by *Croson*. See *id.* The court stated that

While City dollars went to low bidding contractors who, in many instances, paid dues to the Associations, this would not appear to us to [evidence government] support for the membership practices of associations any more than the payment of City dollars to low bidding contractors who do business with discriminatory labor unions constitutes support for those unions. We know from *Croson* that the latter situation does not involve "passive participation" that will support a system of race-based preferences.

Id. (footnote omitted) (citing *Croson*, 488 U.S. at 498-99).

178. See *Croson*, 488 U.S. at 500-01 (adding that "blind deference to legislative or executive pronouncements of necessity has no place in equal protection analysis").

179. See *Adarand*, 515 U.S. at 237 (declaring that federal government has compelling interest to remedy "persistence of both the practice and lingering effects of racial discrimination against minority groups"); *Contractors III*, 91 F.3d at 596 (recognizing that past or present discrimination may be remedied); *Concrete Works*, 36 F.3d at 1519 (finding that local governments have compelling interest in remedying past and present discrimination); *Contractors II*, 6 F.3d at 1002 (finding that municipality may enact set-aside program to remedy past or present racial discrimination).

180. See *Croson*, 488 U.S. at 504.

181. See *id.* The *Croson* Court recognized that a municipality could implement set-aside programs if they identified, with specificity, public or private racial discrimination. *Id.*

crimination and amorphous claims of discrimination in certain industries within the local economy are insufficient.¹⁸² Moreover, the evidence of discrimination must come from the proper geographical region.¹⁸³ *Croson* initially determined that the relevant area in which to measure discrimination is the “local construction market” in which the set-aside program operates.¹⁸⁴ This “local construction market” does not need to conform to jurisdictional boundaries; rather, it may extend beyond a municipality’s boundaries where the municipality’s contracting activity similarly extends those boundaries.¹⁸⁵

182. *See id.* at 499 (“[A]n amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.”). According to the *Croson* Court, “[w]hile there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts.” *Id.* The Court went on to explain that “[t]o accept [a] claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for ‘remedial relief’ for every disadvantaged group.” *Id.* at 505. The Court reasoned that such claims provide no guidance to a legislature attempting to determine the precise scope of the discrimination which it seeks to remedy. *See id.* at 498. Without such guidance, the enacted set-aside program would have “no logical stopping point.” *Id.* Relying on these amorphous claims, race-based decision making by a legislature would be essentially limitless in scope and duration, while a court could uphold such remedies “that are ageless in their reach into the past, and timeless in their ability to affect the future.” *Id.* at 497.

183. *See id.* at 504 (“[I]t is essential that state and local agencies also establish the presence of discrimination in their own bailiwicks, based either upon their own fact-finding processes or upon determinations made by other competent institutions.”). The Court observed that discrimination varies from market area to market area and, thus, state and local governments could accurately rely only on discriminatory findings from within their own jurisdiction. *See id.*

184. *Id.* at 492, 504. The Court stated that state or local subdivisions have authority to eradicate racial discrimination “within [their] own legislative jurisdiction[s].” *Id.* at 492.

185. *See Concrete Works, Inc. v. City of Denver*, 36 F.3d 1513, 1520 (10th Cir. 1994). In *Concrete Works*, to justify the use of its set-aside program, Denver relied on statistical findings taken from the six-county Denver Metropolitan Statistical Area (MSA), which was larger than the jurisdictional boundaries of Denver. *Id.* The plaintiff objected to this, contending that *Croson* precluded a court from considering statistical evidence of discrimination outside the defendant-municipality’s jurisdictional borders. *See id.* The court rejected the plaintiff’s argument, finding that *Croson* allowed consideration of data “sufficiently geographically targeted to the relevant market area.” *Id.* The court then determined that, because a large part of Denver’s contracting activity took place within the Denver MSA, data obtained from the Denver MSA was “adequately particularized for strict scrutiny purposes.” *Id.* Similarly, in *Contractors II*, the court allowed the City of Philadelphia to rely on statistical data obtained from the Philadelphia MSA. *Contractors II*, 6 F.3d 990, 1003-09 (3d Cir. 1993).

The proposition that data may be taken from areas sufficiently geographically targeted to the relevant market area was used by the Ninth Circuit in *Coral* to exclude data obtained from an adjacent jurisdiction located within the defendant-jurisdiction’s metropolitan area. *Coral Constr. Co. v. King County*, 941 F.2d 910, 917 (9th Cir. 1991). The challenger, Coral Construction, contested the State of Washington’s King County from relying on data compiled by the city of Seattle, the

While the government must present evidence identifying discrimination with the requisite precision and scope, the evidence need not persuade the court to make an ultimate determination that discrimination exists in the local construction market.¹⁸⁶ Rather, the government must show only that it had a “strong basis in evidence” for concluding that discrimination exists in its local construction industry which warrants remedial measures.¹⁸⁷ In other words, the evidence need only raise an inference of discrimination, not prove discrimination actually exists.¹⁸⁸ Such an inference of discrimination can arise only from statistical evi-

Port of Seattle and the Municipality of Metropolitan Seattle (“Metro”). *See id.* Coral relied on the *Croscon* Court’s declaration that “[w]e have never approved the extrapolation of discrimination in one jurisdiction from the experience of the other” to prohibit any sharing of data between the jurisdictions. *Id.* (citing *Croscon*, 488 U.S. at 505). Rejecting this argument, the *Coral* court explored the underlying reasons of this statement in *Croscon*. *Id.* The *Coral* court first observed that data sharing presented a risk that data of societal discrimination would become the factual basis for a set-aside program, which was impermissible. *Id.*; *see also Croscon*, 488 U.S. at 496-97 (holding that societal discrimination alone cannot justify use of racial classifications). Second, the *Coral* court observed that data sharing increased the chance that innocent third parties—residents covered by the set-aside, but not shown to have engaged in discriminatory activity—might be unnecessarily burdened. *Coral*, 941 F.2d at 917; *see United States v. Paradise*, 480 U.S. 149, 183 (1987) (suggesting that racial classifications that “disproportionately harm the interests, or unnecessarily trammel the rights, of innocent individuals” are impermissible). The court noted that neither risk was present in *Coral*. *Coral*, 941 F.2d at 917. First, because Seattle, the Port of Seattle and Metro were either completely within or coterminous with the boundaries of King County, the data from these jurisdictions was relevant to the question of discrimination in King County. *See id.* Second, there was no risk of an unfair burden on innocent third parties. *See id.*

The *Coral* court did not, however, allow King County to rely on data obtained from Pierce County, a completely separate jurisdiction that is both adjacent to King County and part of the same metropolitan area. *Id.* The court did observe that “the world of contracting does not conform itself neatly to jurisdictional boundaries,” distinguishing it from situations involving racial discrimination in a school system in which each school system is relatively isolated from other school systems. *Id.* (citing *Milliken v. Bradley*, 418 U.S. 717 (1974)). Nevertheless, the court felt that many of the Pierce County contractors and developers would not seek business in King County. *See id.* The court held that overbreadth should be prevented by limiting the enacting jurisdiction from relying on data obtained within its own boundaries and precluded King County from relying on statistical data obtained from the adjacent Pierce County. *See id.*

186. *See Contractors III*, 91 F.3d 586, 596 (3d. Cir. 1996) (noting that courts need not be convinced of accuracy of municipality’s conclusion that discrimination exists, but rather that conclusion must be based on strong evidentiary basis), *cert. denied*, 117 S. Ct. 953 (1997).

187. *See Croscon*, 488 U.S. at 500. The *Croscon* Court relied on Justice Powell’s plurality opinion in *Wygant*, which stated that a government must have a “strong basis in evidence for its conclusion that remedial action was necessary.” *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (Powell, J., plurality opinion). The Court intimated that such evidence should approach a prima facie case of a constitutional or statutory violation of the rights of minorities. *See Croscon*, 488 U.S. at 500.

188. *See Croscon*, 488 U.S. at 500.

dence.¹⁸⁹ In particular, the statistical evidence must draw a comparison between minority participation in a particular area and the percentage of qualified minorities in the relevant applicant pool.¹⁹⁰ This comparison, in turn, must indicate the existence of significant statistical disparities.¹⁹¹ Although statistical findings are necessary, anecdotal evidence of discrimination may bolster these empirical findings.¹⁹² Furthermore, such statistical and anecdotal evidence may be derived from findings made either before or after the set-aside program was implemented.¹⁹³

189. *See id.* (placing strong emphasis on importance of statistical evidence to support implementation of set-aside program).

190. *See id.*

191. *See id.* at 501, 503-04. The *Croson* Court recognized that statistical evidence may constitute prima facie proof of government discrimination in its awarding of government construction contracts. *See id.* at 501 (citing *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977)). Similarly, the Court found that statistical evidence could invoke an inference of discriminatory exclusion regarding minority membership in trade associations. *See id.* at 503-04; *see also Contractors II*, 6 F.3d 990, 1003 (3d Cir. 1993) (noting importance of *Croson's* emphasis on statistical evidence to support implementation of set-aside program). The Supreme Court, however, has stated that

[o]ur cases make it unmistakably clear that statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue. We have repeatedly approved the use of statistical proof, where it reached proportions comparable to those in this case, to establish a prima facie case of racial discrimination in jury selection cases. Statistics are equally competent in proving employment discrimination.

International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977) (footnote omitted). *Croson* likewise affirmed the use of statistics in proving discrimination to sustain a set-aside program. *See Croson*, 488 U.S. at 501 ("There is no doubt that where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination . . ."). Similarly, the Court has held that for purposes of violations under Title VII, "[w]here gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." *Hazelwood*, 433 U.S. at 307-08.

192. *See, e.g., Contractors II*, 6 F.3d at 1002 (describing anecdotal testimony of 14 minority contractors regarding their experiences with racial discrimination in local construction market). Anecdotal evidence is testimonial evidence usually given by a minority contractor or subcontractor that generally consists of personal accounts of actual discrimination or the effects of discriminatory practices in the relevant construction market. *See id.*

193. *See id.* at 1003 (relying on statistical evidence derived from before and after set-aside program was implemented). Evidence consisting of findings made prior to the government's adoption of its set-aside program is referred to as "pre-enactment" evidence. *See id.* Evidence compiled after the government adopted its program is referred to as "postenactment" evidence. *See id.* While the use of pre-enactment evidence has never been challenged, plaintiffs have consistently challenged the government's use of postenactment evidence. *See Concrete Works, Inc. v. City of Denver*, 36 F.3d 1513, 1521 (10th Cir. 1994) ("*Concrete Works* . . . admonishes us to consider only evidence of discrimination that existed prior to Denver's enactment of the Ordinance."); *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 60 (2d Cir. 1992) (discussing plaintiff's argument that constitutionality of program should be examined at time of its enactment); *Coral Constr.*

Co. v. King County, 941 F.2d 910, 919-20 (9th Cir. 1991) (noting plaintiff's argument that postenactment studies of MBE program should be excluded).

For example, the plaintiff in *Coral* argued that postenactment data was irrelevant because "before a City may embark on an affirmative action program, it must have convincing evidence that remedial action is warranted." *Id.* at 920 (quoting *Associated Gen. Contractors v. City of S.F.*, 813 F.2d 922, 932 (9th Cir. 1987)). The plaintiff also relied on the *Croson* Court's statement that a municipality must have some concrete evidence of discrimination before it can properly enact a set-aside program. *See id.* ("It is true that a municipality must have some concrete evidence of discrimination in a particular industry before it may adopt a remedial program."); *see also Croson*, 488 U.S. at 509 ("If the city of Richmond had evidence before it that non-minority contracts were systematically excluding minority businesses from subcontracting opportunities, it could act to end the discriminatory exclusion."); *Associated General Contractors*, 813 F.2d at 932 ("Before [a] city [may] embark[] on an affirmative action program, it must have convincing evidence that remedial action is unwarranted."). The court did not interpret this statement to mandate that a set-aside program be automatically invalid if there was no pre-enactment evidence to sustain it. *See Coral*, 941 F.2d at 920. Rather, according to the court "the factual predicate for the program should be evaluated based upon all evidence presented . . . whether such evidence was adduced before or after enactment of the [program]." *Id.* According to the court in *Coral*, allowing postenactment evidence seems to comport with the Supreme Court's analysis set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270 n.21 (1977) and *Mount Healthy City School District v. Doyle*, 429 U.S. 274, 285-86 (1977). *Coral*, 941 F.2d at 921. According to the *Coral* court,

[i]n *Arlington Heights*, the Court concluded that proof that a zoning ordinance was motivated in part by a racially-discriminatory purpose would not necessarily require invalidation of the ordinance. Rather, such proof merely shifted the burden to the municipality to show that it would have enacted the ordinance in the absence of the improper purpose.

Id. (citation omitted). The court went on to explain that, likewise, in *Mount Healthy*, "the Court held that a public employee fired for, inter alia, exercising his first amendment rights did not have a cause of action for damages where the employer proved that the employee would have been terminated anyway." *Id.* (citation omitted). The *Coral* court concluded that its postenactment analysis was similar: "[W]e will not invalidate [a set aside] program due to an inadequate record where an adequate factual predicate is subsequently proven." *Id.*

The use of pre-enactment evidence was also challenged in *Concrete Works*. *Concrete Works*, 36 F.3d at 1521. There, the plaintiff contended that any reports or studies that were published subsequent to the adoption of the set-aside program were "devoid of probative value" in assessing the validity of the set-aside program. *Id.* Like the plaintiff in *Coral*, *Concrete Works* relied on *Croson's* insistence that a municipality must identify discrimination before it enacts a set-aside program. *See id.* The *Concrete Works* court did acknowledge that without pre-enactment statistical evidence a government would not be able to satisfy *Croson*. *Id.* Nevertheless, like the *Coral* court, it did not read *Croson's* evidentiary requirement to preclude the use of postenactment evidence. *See id.* Instead, the court reasoned that "post-enactment evidence, if carefully scrutinized for its accuracy, will often prove quite useful in evaluating the remedial effects or shortcomings of the race-conscious program." *Id.*

Similarly, the court in *Contractors II* upheld the use of postenactment evidence, explaining that if postenactment evidence were inadmissible, "a municipality having [some] evidence would face the dilemma of deciding whether to wait the months necessary for further development of the record, risking constitutional culpability [to African-Americans] due to its inaction, or to act and to risk liability [to Caucasians] for acting prematurely but otherwise justifiable." *Contractors II*, 6 F.3d at 1004 (quoting *Coral*, 941 F.2d at 921).

Although the government bears the initial burden of demonstrating by a "strong basis in evidence" that discrimination exists, the ultimate burden rests with the challenging party.¹⁹⁴ When the set-aside program is challenged, the proponents of the program must initially come forward with evidence that provides a firm basis for inferring that the legislatively identified discrimination exists or existed and that the race-based classifications are necessary to remedy the effects of such discrimination.¹⁹⁵ Once the government satisfies this initial burden, the challengers of the program are given an opportunity to attack any proffered evidence and offer their own evidence, showing that the identified discrimination did not or does not exist or that the program is not narrowly tailored to fit the

Despite these challenges, the strong weight of authority seems to indicate that postenactment statistical evidence may be used by the government to support its conclusion that discrimination warranting remedial action does exist. See *Concrete Works*, 36 F.3d at 1521 (finding that use of postenactment statistical evidence is admissible to show discrimination); *Contractors II*, 6 F.3d at 1004 (holding that post-enactment statistical evidence is admissible); *Harrison & Burrows Bridge*, 981 F.2d at 60 (ruling that constitutionality of set-aside program should be assessed on evidence obtained either prior to or subsequent to program's implementation); *Coral*, 941 F.3d 920-21 (finding that set-aside program may be justified on basis of postenactment statistical evidence); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 913 (11th Cir. 1990) (upholding set-aside program based, in part, on postenactment statistical evidence).

194. *Contractors III*, 91 F.3d 586, 597 (3d Cir. 1996) ("Ultimately, however, the plaintiffs challenging the program retain the burden of persuading the district court that a violation of the Equal Protection Clause has occurred."), *cert. denied*, 117 S. Ct. 953 (1997); *Concrete Works*, 36 F.3d at 1522 (stating that although burden of initial production rests with municipality, challenging party retains ultimate burden of proof to show affirmative action plan is unconstitutional); *Contractors II*, 6 F.3d at 1005 (affirming that challenging party retains ultimate burden of proof); see also *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277-78 (1986) (Powell, J., plurality opinion) ("The ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program."). Justice O'Connor's concurring opinion in *Wygant* observed that

[w]hen [the government] introduces its statistical proof as evidence of its remedial purpose, thereby supplying the court with the means for determining that the [government] had a firm basis for concluding that remedial action was appropriate, it is incumbent upon the nonminority [challengers] to prove their case; they continue to bear the ultimate burden of persuading the court that the [government's] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently "narrowly tailored."

Id. at 293 (O'Connor, J., concurring); cf. *Johnson v. Transportation Agency*, 480 U.S. 616, 626 (1987) (noting that, in Title VII context, challengers bear ultimate burden of proving unconstitutionality of affirmative action program).

195. See *Contractors III*, 91 F.3d at 597 (stating that proponents of affirmative action plan "have the burden of coming forward with evidence providing a firm basis for inferring that the legislatively identified discrimination in fact exists or existed and that the race-based classifications are necessary to remedy the effects of the identified discrimination"); *Concrete Works*, 36 F.3d at 1522 (noting that *Crosnon* places initial burden of production of evidence demonstrating "strong basis in evidence" on government); *Contractors II*, 6 F.3d at 1005 (finding that initial burden of proof is on government, while ultimate burden of proof lies with challenger).

identified discrimination.¹⁹⁶ Ultimately, however, the challengers bear the ultimate burden of proving that the government's evidence cannot support an inference of discrimination or that the program implemented is not sufficiently "narrowly tailored" based on the evidence proffered.¹⁹⁷

1. *Statistical Evidence*

Although the government must present statistical evidence to satisfy the "strong basis in evidence" test, no court has yet crafted any "precise mathematical formula to assess the quantum of evidence that rises to the *Croson* 'strong basis in evidence' benchmark."¹⁹⁸ Therefore, the sufficiency of statistical evidence presented by the government to satisfy that benchmark must be evaluated on a case-by-case basis.¹⁹⁹

In general, statistical evidence can give rise to an inference of discrimination if the evidence demonstrates a significant statistical disparity between the number of qualified minority contractors and the number of such contractors participating in government prime contracts or subcontracts or enrolled as members in the local trade associations.²⁰⁰ When considering whether the statistical evidence supports an inference of discrimination, courts generally rely on a statistical device known as a "dispar-

196. See *Contractors III*, 91 F.3d at 597 ("Once the proponents of the program meet this burden of production, the opponents of the program must be permitted to attack the tendered evidence and offer evidence of their own tending to show that the identified discrimination did or does not exist and/or that the means chosen as a remedy do not 'fit' the identified discrimination."); *Concrete Works*, 36 F.3d at 1523 (recognizing that challengers bear ultimate burden of persuading court that evidence does not support inference of prior discrimination, and thus, plan was not sufficiently narrowly tailored.).

197. See *Wygant*, 476 U.S. at 277-78 (Powell, J., plurality opinion) (stating that challengers carry burden of proving that no discrimination existed to justify remedial action or if discrimination did or does not exist, plan is not sufficiently tailored); *Contractors III*, 91 F.3d at 597 (noting that challengers have burden of persuasion that race-based preferences did not serve compelling interest or that there was no discrimination necessitating remedial action); *Concrete Works*, 36 F.3d at 1522 (stating that challengers carry burden of proving that no discrimination existed to justify remedial action or if discrimination did or does not exist, plan is not sufficiently tailored); *Contractors II*, 6 F.3d at 1005 (concluding that challengers retain ultimate burden of demonstrating unconstitutionality of plan).

198. *Concrete Works*, 36 F.3d at 1522.

199. See *id.*

200. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989) (holding that "significant statistical disparity" may give rise to inference of discriminatory exclusion); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 915-16 (11th Cir. 1990) (recognizing that statistical disparities may give rise to prima facie showing of discrimination); cf. *Bazemore v. Friday*, 478 U.S. 385, 400 (1986) (stating that regression analysis may serve to prove plaintiff's segregation case); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977) (holding that "gross statistical disparities" may constitute prima facie proof of discrimination in school district); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 337-39 (1977) (finding that statistical proof of discrimination may establish prima facie case of discrimination in employment context).

ity index."²⁰¹ The courts calculate this index by dividing the percentage of minority contractors participating in city construction contracts by the percentage of minority contractors in the relevant population of local construction firms.²⁰² A disparity index of one demonstrates full minority contractor utilization, while an index of zero indicates full minority contractor underutilization.²⁰³ Most courts multiply the disparity index by 100 to create a scale of zero to 100.²⁰⁴

The Third Circuit's decision in *Contractors Ass'n of Eastern Pennsylvania v. City of Philadelphia* ("*Contractors III*"),²⁰⁵ considered whether such disparity indices could give rise to an inference of discrimination.²⁰⁶ In that case, the City of Philadelphia offered a disparity index of 22.5 with which to gauge the disparity of black subcontractors participating in city construction contracts.²⁰⁷ The court noted that an index of 22.5 could consti-

201. See *Concrete Works*, 36 F.3d at 1523 n.10 (acknowledging that United States Courts of Appeals for the First, Third, Ninth and Eleventh Circuits rely on disparity indices to determine whether government's statistical data satisfies *Croson's* evidentiary burden); see also *Contractors III*, 91 F.3d. at 594-95 (finding that disparity index is probative of discrimination in local construction market); *Contractors II*, 6 F.3d at 1005 (using disparity index to analyze whether discrimination exists in local construction market); *Stuart v. Roache*, 951 F.2d 446, 451 (1st Cir. 1991) (relying on disparity index to validate affirmative action promotion program); *Associated Gen. Contractors v. Coalition for Econ. Equity*, 950 F.2d at 1401, 1414 (9th Cir. 1991) (relying on disparity index for determination of discrimination in local construction market); *Cone* 908 F.2d at 915-16 (finding that disparity index is probative of discrimination in local construction market); cf. *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991) (finding that set-aside program could not satisfy compelling interest prong without statistical analysis). It should be noted, that although not all of these cases explicitly compute a disparity index, they do rely on a percentage disparity to find discrimination. See *Contractors II*, 6 F.3d at 1005 n.14 (recognizing that various courts have relied on either disparity indices or percentage disparities).

202. See *Concrete Works*, 36 F.3d at 1523 n.10 ("The disparity index is calculated by dividing the percentage of [MBEs] and [woman-owned business enterprises] participation in city contracts by the percentage of [MBEs] and [woman-owned business enterprises] in the relevant population of local construction firms."); see also *Contractors III*, 91 F.3d at 594 n.9 (calculating disparity indices by dividing percentage participation in dollars of minority groups in public works contracts awarded by Philadelphia by their percentage availability or composition in population of Philadelphia area construction firms and multiplying results by 100).

203. See *Concrete Works*, 36 F.3d at 1523 n.10 ("A disparity index of 1 demonstrates full MBE and [woman-owned business enterprise] participation, whereas the closer the index is to 0, the greater the MBE and [woman-owned business enterprise] underutilization.").

204. See *id.* ("Some courts multiply the disparity index by 100, thereby creating a scale of between 0 and 100, with 100 representing full MBE and [woman-owned business enterprise] utilization.").

205. 91 F.3d 586 (1996).

206. *Id.* at 602.

207. See *id.* In addition, the city also attempted to show evidence of discrimination by private prime contractors in subcontracting and by contractor associations in admitting members. See *id.* To show discrimination by private prime contractors, the city offered evidence that prime contractors failed to award a single subcontract to minority subcontractors in connection with city-financed con-

tute a strong basis in evidence for inferring the existence of discrimination when the record, as a whole, did not undermine the probative value of that index.²⁰⁸ The court relied on related decisions of the United States Courts of Appeals for the Ninth and Eleventh Circuits. In *Associated General Contractors v. Coalition for Economic Equity*,²⁰⁹ the Ninth Circuit held that a disparity equivalent to 22.4 was sufficient to raise an inference of discrimination by the city in awarding construction contracts.²¹⁰ In *Cone Corp. v. Hillsborough County*,²¹¹ the Eleventh Circuit found that a disparity index of approximately 10.8 sufficiently established a prima facie case of discrimination against the county in relation to its method for awarding prime construction contracts.²¹² Similarly, in *Concrete Works, Inc. v. City of Denver*,²¹³ disparity indices of 9, 14, 19, 43, 48 and 63 could, "in the ab-

struction contracts during the years 1979 through 1981. *See id.* at 600. The evidence was obtained from a city official's sampling of 25% to 30% of city-funded construction projects on file, when the official sought to identify the names of possible minority subcontractors used on those projects from personal memory. *See id.* The district court deemed this evidence "cursory," finding it provided no firm basis for inferring discrimination by prime contractors existed in the subcontracting market. *See id.* The district court also noted that an individual who testified that African-American contractors were being discriminated against in the private construction industry could not point to any instance where a minority contractor's low bid on a subcontract was denied by a prime contractor. *See id.* at 600-01. Further, the district court found it significant that the city could not identify any allegations of a prime contractor discriminating in the awarding of subcontracts to minorities. *See id.* at 601.

The city also attempted to show that contractor associations discriminated against minority contractors through their hiring practices. *See id.* The crux of the city's evidence here was a "statistically low representation" of eligible minority contractors in the local trade associations. *See id.* This assertion was based on a city official's "unexplained opinion" that minority contractors were eligible for these associations, but were not members. *See id.* The court rejected this evidence because it did not provide a strong evidentiary basis for inferring discrimination by contractor associations. *See id.* In rejecting this evidence, the court also pointed out that the city failed to identify a single eligible African-American contractor who applied for and was denied membership. *See id.*

208. *See id.* at 602 ("There are circumstances in which a disparity index of 22.5 can constitute a strong basis in evidence for inferring the existence of discrimination.").

209. 950 F.2d 1401 (9th Cir. 1991).

210. *Id.* at 1414 (finding that, although minority business enterprise availability was 49.5%, only 11.1% of dollar participation was comprised of such enterprises); *see also Contractors II*, 6 F.3d 990, 1005 (3d Cir. 1993) (recognizing that disparity index of four percent sufficient to satisfy evidentiary burden of showing discrimination in market).

211. 908 F.2d 908 (11th Cir. 1990).

212. *See id.* at 916 (noting that there was "10.78% disparity between the percentage of minority contractors in the County and the percentage of County construction dollars awarded to minorities").

213. 36 F.3d 1513 (10th Cir. 1994).

tract,” raise an inference of race-based public discrimination on selected public works projects.²¹⁴

Although these numbers represent disparity indices that, standing alone, potentially establish an inference of discrimination, the challenging party may rebut these findings.²¹⁵ Such rebuttal comes in two forms. First, the challenger may present evidence that consists of some neutral explanation for the statistical disparities.²¹⁶ For instance, the challengers in *Contractors III* attempted to rebut statistical data that indicated a lack of minority participation in government construction projects which, by itself, may have raised an inference of discrimination by the city.²¹⁷ The challengers advanced statistics indicating that the low minority-contractor participation rate on city-funded projects resulted from these contractors’ preoccupation with federally assisted projects and not discrimination by the City of Philadelphia.²¹⁸ The court found this rebuttal to be problematic for the city’s case.²¹⁹

Second, the challenger may attack the statistical disparities themselves by showing that the statistics are flawed, demonstrating that the statistical disparities are not significant or presenting contrasting empirical evidence.²²⁰ To show the disparity study is flawed, a challenger must present evidence demonstrating that the number of minority contractors within the relevant population or the number of minority contractors participating on government contracts included in the disparity study was incorrect.²²¹ Furthermore, the challenger may attempt to demonstrate that the disparity index does not rise to a level sufficient to establish an inference of discrimination.²²² Third, the challenger might offer additional statistical evidence indicating that minority contractors were utilized on govern-

214. *See id.* (discussing decision from various federal circuit courts that held similar disparity indices to be probative of discrimination and noting that evidence of disparity index may give rise to inference of discrimination).

215. *See Coral Constr. Co. v. King County*, 941 F.2d 910, 921 (9th Cir. 1991) (recognizing that challenger has opportunity to rebut government’s statistical evidence that raised inference of discrimination).

216. *See id.* (“As previously noted, statistics are not irrefutable and may be rebutted . . . [by] a neutral explanation . . .”); *Penk v. Oregon State Bd. of Higher Educ.*, 816 F.2d 458, 464 (9th Cir. 1987) (recognizing that statistical evidence may be rebutted by explaining away statistical disparities through neutral factors).

217. *Contractors III*, 91 F.3d 586, 604-05 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 953 (1997). The challengers asserted that the small number of African-American firms seeking to prequalify for city-funded projects was evidence of African-American firms’ unwillingness to work on contracts funded solely by the city. *See id.*

218. *See id.* at 605 (recognizing challengers’ contention that larger and more experienced African-American firms may favor bigger, federally funded projects).

219. *See id.*

220. *See International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339-40 (1977) (noting that statistics can be rebutted and “their usefulness depends on all of the surrounding facts and circumstances”); *Coral*, 941 F.2d at 921 (outlining ways to rebut statistical showing of discrimination); *Penk*, 816 F.2d at 464 (same).

221. *See Teamsters*, 431 U.S. at 339.

222. *See id.*

ment construction projects to an extent that refutes an inference of discrimination.²²³

2. *Anecdotal Evidence*

Anecdotal evidence of discrimination in the construction industry alone is insufficient to satisfy *Croson's* "strong basis in evidence" requirement.²²⁴ Nevertheless, a minority subcontractor's personal accounts of discrimination or claims concerning the devastating effects of a city official's discriminatory practices will buttress empirical evidence of discrimination.²²⁵ Anecdotal evidence of how a government entity's practices exacerbate existing discriminatory practices in the local construction market also become "particularly probative."²²⁶ In *Cone*, for instance, the

223. See *id.* at 340.

224. See *Concrete Works, Inc. v. City of Denver*, 36 F.3d 1513, 1520 (10th Cir. 1994) (recognizing that anecdotal evidence alone does not provide strong basis in evidence to demonstrate racial discrimination sufficient to pass constitutional muster under *Croson*); *Coral*, 941 F.2d at 919 (stating that "[w]hile anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan" and finding that 57 minority and woman contractors' testimony regarding perceived discriminatory practices insufficient to establish discrimination where no statistical evidence was offered); *Penk*, 816 F.2d at 464-65 (noting that anecdotal evidence may not suffice to establish pattern or practice of discrimination even though it may establish individual claims of discrimination). *But see Contractors II*, 6 F.3d 990, 1003 (3d Cir. 1993) (recognizing that anecdotal evidence alone may, in exceptional case, be so dominant or pervasive that it would satisfy standard established by *Croson*). *Croson* did not speak to the issue of anecdotal evidence because there was none, and instead placed a heavy emphasis on the sufficiency of empirical data. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-504 (1989).

225. See *Teamsters*, 431 U.S. at 339 (acknowledging that individual testimony of discriminatory experiences "brought the cold numbers [of empirical studies] convincingly to life"); *Concrete Works*, 36 F.3d at 1520 (finding that personal accounts of discrimination or effects of discrimination could vividly complement empirical evidence); *Contractors II*, 6 F.3d at 1003 (recognizing that combination of anecdotal and statistical evidence showing discrimination carries great weight); *Associated Gen. Contractors of Cal. v. Coalition for Econ. Equity*, 950 F.2d 1401, 1415 (9th Cir. 1990) (identifying anecdotal evidence as useful to support empirical evidence of discrimination); *Coral*, 941 F.2d at 919 ("[T]he combination of convincing anecdotal and statistical evidence is potent."); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir. 1990) (supplementing municipality's statistical evidence with minority contractor complaints about prime contractors' discriminatory practices).

Although the *Croson* Court did not explicitly address how much weight should be given to anecdotal evidence, it impliedly endorsed the inclusion of such evidence by the municipality. *Croson*, 488 U.S. at 480. The Court noted, as a weakness in Richmond's case, that the city council heard "no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors." *Id.*; see *Concrete Works*, 36 F.3d at 1521 (recognizing *Croson* as impliedly endorsing use of anecdotal evidence).

226. See *Concrete Works*, 36 F.3d at 1520 (concluding that government may include anecdotal evidence in trying to prove discrimination).

court denied Cone's motion for summary judgment partly on the basis of complaints by minority contractors regarding discriminatory practices by prime contractors.²²⁷ Similarly, in *Associated General Contractors*, the court found the state was likely to demonstrate a strong evidentiary basis of discrimination through a combination of both statistical and anecdotal evidence.²²⁸ In that case, San Francisco relied on a large number of individual accounts of discrimination to substantiate its claim that discriminatory practices were employed in both the city's contract procurement process and in its construction industry.²²⁹ The court recognized that a "combination of convincing anecdotal and statistical evidence is po-

227. *Cone*, 908 F.2d at 916. The plaintiff in *Cone*, referred to by the court as the "Cone Group," was a consortium of present and potential future bidders on Hillsborough County, Florida construction contracts. *Id.* at 911. At that time, Hillsborough County operated under a set-aside program that established an annual minority contractor participation goal of 25%. *See id.* at 910. The Cone Group challenged this program, asserting that it created an unconstitutional racial preference which violated the Equal Protection Clause of the Fourteenth Amendment. *See id.* at 911. Although the lower court granted summary judgment in favor of the Cone Group, the Eleventh Circuit reversed and remanded the case. *See id.* at 912, 917-18. The Eleventh Circuit found the city could show racial discrimination through its proffered combination of statistical and anecdotal evidence. *See id.* at 916. The anecdotal evidence consisted of numerous complaints by minority contractors to the county alleging discrimination by prime contractors. *See id.* According to those complaints, (1) some prime contractors either refused to speak to minority contractors or were unavailable to them; (2) other prime contractors would accept minority subcontract bids, but not submit those bids with the prime contract bid; and (3) still other prime contractors would take a minority subcontractor's bid to other nonminority subcontractors until a nonminority contractor was found that could underbid the minority subcontractor. *See id.* There was also testimony that nonminority contractors and subcontractors received special prices and discounts from suppliers which were unavailable to minority contractors. *See id.*

228. *Associated Gen. Contractors v. Coalition for Econ. Equity*, 950 F.2d 1401, 1415 (9th Cir. 1991). In this case, an organization of construction contractors challenged a San Francisco set-aside program. *See id.* at 1406. The Ninth Circuit affirmed a lower court's denial of a preliminary injunction on behalf of the contractors. *See id.* The court found that the contractors failed to rebut the inference of discrimination in the local construction market raised by the overwhelming amount of anecdotal and statistical evidence to the contrary. *See id.* at 1414.

229. *See id.* Aside from statistical disparities that evidenced discrimination, anecdotal evidence included (1) numerous reports of minority contractors being denied contracts despite being the low bidder; (2) minority contractors being told they were not qualified although they were later found to be qualified after evaluation by outside parties; (3) minority contractors were refused work even after they were awarded contracts as the low bidder; and (4) minority contractors being harassed by city personnel to discourage them from bidding on city contracts. *See id.* at 1415. The court recognized that this evidence lent substantial credibility to the city's statistical reports, which indicated discrimination. *See id.* The court stated that the city's combination of anecdotal and statistical evidence was "potent" and denied the contractor's motion for a preliminary injunction. *See id.* at 1415, 1418.

tent.”²³⁰ The court relied on the *Croson* Court’s finding that “evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified.”²³¹ Thus, although courts generally declare that anecdotal evidence alone is insufficient to justify relief, such evidence is useful to personalize raw statistical data and will go far in providing a complete picture of discrimination to the court.²³²

B. *Narrowly Tailored*

In addition to satisfying a compelling state interest, any use of racial classifications in a set-aside program must also be “narrowly tailored” to satisfy that interest.²³³ Courts have identified six factors to consider when making such a determination: (1) whether the government implementing

230. *Id.* at 1415 (quoting *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991)). The city pointed to numerous individual accounts of discrimination in findings that discrimination existed. *See id.*

231. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989). To substantiate its position, the *Croson* Court cited *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). *Croson*, 488 U.S. at 509. In *Teamsters*, an employment discrimination action was brought by the United States against an employer and the Teamsters union, alleging both were practicing discrimination against African-Americans and Spanish-surnamed persons. *Teamsters*, 431 U.S. at 334. The Court held that the United States carried its burden of proof by identifying discrimination through the use of both statistical and anecdotal evidence. *See id.* The Court found that statistical evidence of racial discrimination alone may not have sufficed, but the inclusion of testimony of over 40 specific instances of discrimination tipped the balance in favor of the United States, bringing the statistical evidence “convincingly” to life. *See id.*

232. *See Concrete Works, Inc. v. City of Denver*, 36 F.3d 1513, 1521 (10th Cir. 1994) (“We deem anecdotal evidence of public and private race . . . discrimination appropriate supplementary evidence in our strict scrutiny calculus.”).

233. *See Croson*, 488 U.S. at 507-08 (stating that quota at issue “cannot be said to be narrowly tailored to any goal except perhaps outright racial balancing”); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (Powell, J., plurality opinion) (same). Relying on *Croson*, the court in *Contractors III* identified three reasons why the degree of fit between the identified discrimination and the program chosen to remedy that discrimination is important. *Contractors III*, 91 F.3d 586, 605 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 953 (1997). First, without a close fit, the legislature’s claim that its objectives for enacting a measure to remedy identifiable discrimination is suspect. *See id.* Second, the burden imposed on nonminority contractors by the set-aside program can be justified only if the set aside is close to the minimum necessary to remedy the identified discrimination. *See id.* at 606. Third, racial classifications carry a risk of stigmatic harm to the favored class where the set aside extends beyond the bounds for its justification. *See id.*; *see also* Julie Stacy, *Affirmative Action: The Public Reaction*, USA TODAY, Mar. 24, 1995, at 3A (noting that 19% of African-American men and 28% of African-American women believe their colleagues “privately questioned [their] abilities or qualifications because of affirmative action” and 32% of Caucasians thought “a racial minority where [they] worked got an undeserved job or promotion as a result of affirmative action programs”). To avoid this stigmatic harm, the set aside must be narrowly tailored to include only those who have been the target of discrimination. *See Contractors III*, 91 F.3d at 606.

the racial classification first considered race-neutral alternatives;²³⁴ (2) the flexibility of the program, including the availability of a waiver provision to waive the set-aside requirements;²³⁵ (3) the duration of the relief; (4) the geographical scope of the set-aside program;²³⁶ (5) the comparison of any numerical goal to the number of qualified minorities in the relevant market;²³⁷ and (6) the impact of the relief on third parties.²³⁸ It is important

234. See *Contractors III*, 91 F.3d at 608 (concluding that plan was not narrowly tailored because, among other things, city did not consider use of race-neutral means to increase participation of MBEs); *Contractors II*, 6 F.3d 990, 1008 (3d Cir. 1993) (holding that race-neutral alternatives were not satisfactorily considered); *Associated General Contractors*, 950 F.2d at 1416 (holding that race-neutral alternatives to set-aside plan were not adequately considered); *Coral*, 941 F.2d at 922 (finding that race-neutral alternatives were not considered); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir. 1990) (same); *Engineering Contractors Ass'n v. Metropolitan Dade County*, 943 F. Supp. 1546, 1580 (S.D. Fla. 1996) (holding that set-aside plan should be considered after consideration of other alternatives that are race neutral), *aff'd*, 122 F.3d 895 (11th Cir. 1997); *Associated Gen. Contractors of Am. v. City of Columbus*, 936 F. Supp. 1363, 1369 (S.D. Ohio 1996) (same); *Concrete Gen., Inc. v. Washington Suburban Sanitary Comm'n*, 779 F. Supp. 370, 379 (D. Md. 1991) (same).

235. See *Contractors II*, 6 F.3d at 1008 (recognizing importance of whether plan provides individualized treatment to contractors); *Associated General Contractors*, 950 F.2d at 1416 (“[The] plan should avoid the use of rigid numerical quotas.”); *Coral*, 941 F.2d at 922 (noting “use of minority utilization goals [should be] set on a case-by-case basis, rather than upon a system of rigid numerical quotas”); *Cone*, 908 F.2d at 916 (finding imposition of “rigid numerical quota” invalid (quoting *Croson*, 488 U.S. at 508)); *Engineering Contractors*, 943 F. Supp. at 1580 (recognizing importance of “flexibility and duration of the relief including availability of waiver provisions”); *Associated General Contractors of America*, 936 F. Supp. at 1436 (emphasizing importance of waiver provisions); *Concrete General*, 779 F. Supp. at 379 (same).

236. See *Associated General Contractors of America*, 936 F. Supp. at 1438 (recognizing that “number of qualified [minority and female business enterprises] that are present in the local construction market and the level of their participation in city construction projects are necessary to determine extent of injury and requisite remedy”); see also *Contractors II*, 6 F.3d at 1008 (noting that inquiry turns on four factors including whether plan “applies only to minority businesses who operate in the geographic jurisdiction”); *Associated General Contractors*, 950 F.2d at 1416 (requiring that program’s effect be limited to boundaries of jurisdiction); *Coral*, 941 F.2d at 925 (“A[] . . . program must also be limited in its geographical scope to the boundaries of the enacting jurisdiction.”).

237. See *Contractors II*, 6 F.3d at 1008 (recognizing that “the basis offered for the percentage selected” is one factor to consider); *Engineering Contractors*, 943 F. Supp. at 1580 (stating that one factor is “the relationship of numerical goals to the relevant labor market”); *Associated General Contractors of America*, 936 F. Supp. at 1438 (finding that there is no relationship between goals of challenged code and availability of minority- and female-owned business enterprises); *Concrete General*, 779 F. Supp. at 379 (stating that one factor is relationship between numerical goals and relevant labor market).

238. See *Engineering Contractors*, 943 F. Supp. at 1580 (stating that court should consider “impact of the relief on the rights of innocent third parties”); *Associated General Contractors of America*, 936 F. Supp. at 1439 (“Another factor germane to narrow tailoring is the impact of the relief on the rights of third parties.”); *Concrete General*, 779 F. Supp. at 379 (noting that courts should consider “the impact of relief on the rights of third parties”); see also Memorandum from Walter Dellinger,

to note that these factors merely aid the court in making its determination and no factor alone is controlling.²³⁹

1. *Race-Neutral Alternatives*

The first indicator of whether a program is narrowly tailored is whether race-neutral alternatives were considered prior to enacting the racial classification.²⁴⁰ The ultimate goal of any set-aside program is to eradicate discriminatory effects on minority contractors by increasing their participation as prime and subcontractors on government construction projects.²⁴¹ Race-neutral programs that attempt to remove administrative and other nondiscriminatory barriers to minority contractor participation achieve this goal.²⁴² Before enacting a racial preference to deal with discrimination in a local construction market, a government should identify these nondiscriminatory barriers and consider the viability of race-neutral alternatives to address such barriers.²⁴³ When the government fails to consider these race-neutral alternatives to a racial classification, the court will probably find that the racial preference is not narrowly tailored.²⁴⁴

supra note 170 (extracting six factors that courts consider when applying narrowly tailored test to racial classifications in set-aside programs).

239. See Memorandum from Walter Dellinger, *supra* note 170.

240. See *Coral*, 941 F.2d at 923 (holding that county satisfactorily considered race-neutral alternatives).

241. See, e.g., *Associated Gen. Contractors v. City of New Haven*, 791 F. Supp. 941, 947 (D. Conn. 1992) (recognizing that primary purpose of all set-aside programs is to facilitate entry of minority contractors into local construction market and to ensure their stabilization in that market), *vacated*, 41 F.3d 62 (2d Cir. 1994).

242. See *Coral*, 941 F.2d at 923 (discussing county's attempt to hold training sessions covering topics such as how to do business with government).

243. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989) (finding that set-aside plan was not narrowly tailored, in part, because city had not first considered race-neutral means to increase minority participation). Some courts identify the consideration of race-neutral alternatives as among the most important considerations as to whether a set-aside is narrowly tailored. See *Coral*, 941 F.2d at 922 (identifying increases in minority participation without stigma and prevention of windfall to previously established minority firms as reasons why consideration of race-neutral alternatives is among most important considerations under narrowly tailored prong).

Although it is incumbent on a city to consider race-neutral programs before enacting its set-aside program, it need not exhaust every race-neutral program that could possibly increase minority contractor participation to satisfy this factor under the narrowly tailored prong. See *id.* at 923 (“[W]hile strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative.”). Where race-neutral alternatives would be “irrational, costly, unreasonable, and unlikely to succeed,” it does not appear that the city must consider such alternatives before considering a racial preference. See *id.*

244. See *Contractors III*, 91 F.3d 586, 609 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 953 (1997) (finding that set-aside program was not narrowly tailored, in part, because race-neutral alternatives such as lowering administrative barriers to entry and implementing training and financial assistance programs were not considered);

Because several nondiscriminatory barriers to minority contractor participation exist in any jurisdiction, there are several concomitant race-neutral means available to eradicate these barriers and increase minority contractor participation without using a racial preference.²⁴⁵ The government could develop programs to inform minority contractors of public construction contracting opportunities and provide information on “how to do business” with the city.²⁴⁶ A race-neutral program of government financing for these contractors could address barriers such as capital and bonding requirements.²⁴⁷ Alternatively, the government might relax administrative contract procurement requirements to make it easier for minority contractors to successfully bid on government construction contracts.²⁴⁸ The establishment of training and financial assistance programs would assist minority contractors in becoming more effective and more competitive in the local construction industry.²⁴⁹ Furthermore, the

Coral, 941 F.2d at 923 (finding that county sufficiently considered use of race-neutral alternatives because county sponsored one or two training sessions per year for small businesses which covered topics of doing business with government, small business management and accounting techniques); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir. 1990) (finding that county properly considered race-neutral alternatives after it integrated race-neutral alternatives into set-aside program and adopted set-aside program only after race-neutral program failed).

245. *See Coral*, 941 F.2d at 922-23 & n.12. Because minority contractors tend to be relatively small and not established, many barriers to participation that these contractors face are the products of factors other than race that any fledgling company would similarly face. *See id.* Therefore, courts recognize that “many of the problems caused by the relative youth of minority-owned firms can be resolved without resorting to stigmatizing and fractionalizing racial classifications.” *Id.* at 923.

246. *See Contractors III*, 91 F.3d at 608 (recognizing that several race-neutral programs could increase minority contractor participation in local construction industry).

247. *See id.* (discussing district court’s finding that relaxation of prequalification and bonding requirements was available as race-neutral alternative).

248. *See id.* (noting that district court found government’s contract procurement requirements presented “significant barriers” for minority contractors to overcome before entering market of government-awarded construction projects). The *Contractors III* court found that relaxing those requirements, such as prequalification and bonding requirements, was a race-neutral alternative that would probably lead to an increase of minority contractor participation in government construction contracting. *See id.* The Third Circuit relied, in part, on this finding to rule that Philadelphia’s set-aside program was not narrowly tailored. *See id.* at 609.

249. *See id.* at 608 (finding that city’s set-aside program was not narrowly tailored and relying on, in part, lower court’s finding that government could have implemented training and financial assistance programs to assist minority contractors in procuring government construction projects.). In *Contractors III*, the court relied on prior government sponsored race-neutral programs that effectively increased minority contractor participation, but were abandoned by the city prior to implementation of its set-aside program. *See id.* In particular, the court pointed to the Philadelphia Urban Coalition Minority Contractors Training and Assistance Program that was substantially successful in training and helping minority contractors succeed in the construction industry. *See id.* It also pointed to a government

government could enact legislation prohibiting discrimination in the provision of credit or bonding by local suppliers and banks.²⁵⁰

2. Flexibility of Numerical Goals

Another indicator of a program's narrow tailoring is its flexibility.²⁵¹ The program's flexibility becomes an important factor because it allows the government to adjust the program to ensure that only those minority contractors who suffered discrimination are compensated.²⁵² Two attributes are needed to make a program permissively flexible. First, the program should set minority participation goals on a case-by-case basis instead of rigid numerical quotas or goals.²⁵³ Setting goals on a contract-by-con-

certification program for minority contractors that successfully assisted these contractors in obtaining federally funded construction projects in the Philadelphia area, but was abandoned after the set aside was adopted. *See id.*

250. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989) ("The City may also act to prohibit discrimination in the provision of credit or bonding by local suppliers and banks.").

251. *See, e.g., Associated Gen. Contractors of Am. v. City of Columbus*, 936 F. Supp. 1363, 1436 (S.D. Ohio 1996) ("A second prong of *Croson's* narrowly tailored requirement is flexibility.").

252. *See Croson*, 488 U.S. at 508 (finding that Richmond's set-aside plan was not narrowly tailored, in part, for its failure to inquire into whether minority contractors seeking relief under plan had suffered from effects of racial discrimination). The Ninth Circuit in *Coral* recognized that inflexible programs that imposed an unyielding quota or a "rigid numerical goal" ran the risk of granting impressive "windfalls" to successful minority contractors "who have either overcome or otherwise not felt the sting of discrimination in the relevant locality." *Coral Constr. Co. v. King County*, 941 F.2d 910, 924 (9th Cir. 1991); *see also Croson*, 488 U.S. at 508 (finding that set-aside programs that allow successful African-American, Hispanic or Asian-American entrepreneurs to enjoy preferences based solely on race are not tailored to remedy effects of prior discrimination).

253. *See Croson*, 488 U.S. at 507-08 (finding Richmond's plan was not narrowly tailored, in part, because of its imposition of "rigid numerical quota"); *Coral*, 941 F.2d at 924 ("An important means of achieving . . . flexibility is through use of case-by-case utilization goals, rather than rigid numerical quotas or goals."); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir. 1990) (recognizing *Croson* Court's rejection of Richmond's program, which imposed "rigid numerical quota" because such program fails to consider whether particular minority contractor had suffered from discrimination). In finding that a challenged set-aside program satisfied *Croson's* flexibility requirement, the Ninth Circuit pointed out that the program remedied only "specifically identified discrimination." *See Associated Gen. Contractors of Cal. v. Coalition for Econ. Equity*, 950 F.2d 1401, 1417 (9th Cir. 1991). In that case, the set aside provided preferences only to those minority groups "found to have previously received a lower percentage of specific types of contracts than their availability to perform such work would suggest." *Id.* For instance, African-American-owned medical services and Asian- and Latino-owned architectural, engineering and computer firms did not receive preferences under the program because they were not shown to be disadvantaged with respect to the award of those contracts. *See id.* Similarly, a program is likely to be found sufficiently flexible when it requires minority participation goals be established on a contract-by-contract basis. *See Cone*, 908 F.2d at 916-17 (finding that program was flexible when goals were set on individual projects in accordance with number of qualified minority contractors available for each area to be subcontracted); *Associ-*

tract basis is necessary to allow the program to be tailored to benefit only those minority contractors who have suffered from discrimination.²⁵⁴ Second, the program should contain a waiver provision giving the government authority to waive the goal when, for example, qualified minority contractors are unavailable to bid on a project or when minority bids are not competitive for reasons other than discrimination.²⁵⁵ A waiver provision protects against a situation in which the government is forced to fill a rigid thirty-percent quota by hiring minority contractors for a project when no minority contractors are available, willing or qualified to bid on that project.²⁵⁶ A court may find a program not narrowly tailored when the lack of a waiver provision constrains the government from preventing this situation.²⁵⁷

3. *Duration of Relief*

A racial classification is more likely to pass the narrowly tailored test if it contains a provision that terminates the program when the discrimina-

ated General Contractors of America, 936 F. Supp. at 1436 (finding that program was flexible partly because it established participation goals on case-by-case basis); *see also* *Engineering Contractors Ass'n v. Metropolitan Dade County*, 943 F. Supp. 1546, 1582 (S.D. Fla. 1996) (finding that program "appeared to have the requisite flexibility required under *Croson*" because it required application of participation goals on case-by-case basis and individual review of each contract before any remedial measures could be invoked), *aff'd*, 122 F.3d 895 (11th Cir. 1997).

254. *See* *Concrete Gen., Inc. v. Washington Suburban Sanitary Comm'n*, 779 F. Supp. 370, 381 (D. Md. 1991) (recognizing that *Croson* "noted its constitutional preference for programs that provide for an individualized inquiry, i.e., an inquiry into whether a particular minority-owned firm has suffered and continues to suffer from the effects of discrimination, before classifying the firm as eligible to receive benefits").

255. *See* *Contractors II*, 6 F.3d 990, 1008 (3d Cir. 1993) (recognizing that narrowly tailored inquiry should take into account whether program provides for waivers of preference); *Coral*, 941 F.2d at 917 (finding that program was flexible in part because it provided for waiver of set-aside goal); *Concrete General*, 779 F. Supp. at 381 (finding that set-aside was not flexible because it failed to include "individualized waiver provisions"). In *Coral*, the court stated that "a valid [set-aside] program should include a waiver system that accounts for both the availability of qualified [minority contractors] and whether the qualified [minority contractors] have suffered from the effects of past discrimination by the County or prime [nonminority] contractors." *Coral*, 941 F.2d at 924. The program in that case satisfied both because waivers were available if (1) minority contractor's were unavailable to bid on a project and (2) minority contractor's unreasonably high bid could not be attributable to discrimination. *See id.*; *see also* *Croson*, 488 U.S. at 508 (finding that provisions similar to those in *Coral* were "less problematic from an equal protection standpoint because they treat all candidates individually, rather than making the color of an applicant's skin the sole relevant consideration.").

256. *See* *Cone*, 908 F.2d at 917 (finding that set-aside program was valid and distinguishing it from invalid Richmond plan in *Croson* where "in order to fill a rigid quota [Richmond] is required to hire [minority contractors] for a job that no [minority contractors] are available, willing, or qualified to do").

257. *See id.*

tory effects are no longer present.²⁵⁸ For example, such a provision might require the government to reevaluate the program on a periodic basis to determine its ongoing effectiveness and applicability. Also, the provision may mandate that the program expire when data gathered by the government objectively indicates that racial discrimination no longer exists.²⁵⁹ Alternatively, the program could terminate relief to minority contractors on an individual basis when minority contractors “graduate” from the program or are no longer suffering from the effects of discrimination.²⁶⁰

4. *Geographical Scope of Program*

A government has authority to eradicate the effects of racial discrimination only within its own legislative jurisdiction.²⁶¹ This requires the enacting jurisdiction to geographically limit its program to within its jurisdictional boundaries.²⁶² To limit the program in this fashion, the gov-

258. See *Adarand Constructors v. Pena*, 515 U.S. 200, 215 (1995) (stating that duration of set-aside program must be considered in determining “whether the program was appropriately limited such that it ‘will not last longer than the discriminatory effects it is designed to eliminate’” (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 513 (1980))); *Engineering Contractors*, 943 F. Supp. at 1582 (considering duration of program in determining whether program was narrowly tailored); *Concrete General*, 779 F. Supp. at 381 (finding that set-aside plan was not narrowly tailored partly because it did not contain termination provision that would end the program once it served its purpose); see also *United States v. Paradise*, 480 U.S. 149, 189 (1987) (assessing duration of program to promote more minorities to Alabama troopers in determining whether it was narrowly tailored); *Local 28 of Sheet Metal Workers Int’l Ass’n v. EEOC*, 478 U.S. 421, 481 (1986) (examining duration in determining whether union’s affirmative action plan was narrowly tailored).

259. See *Concrete General*, 779 F. Supp. at 381-82 (finding that re-evaluation provisions in set-aside program were important in determining whether program is narrowly tailored); see also *Associated General Contractors of Am.*, 936 F. Supp. at 1436-37 (noting that requirement mandating annual review of set-aside program is important in determining whether program is narrowly tailored); cf. *Engineering Contractors*, 943 F. Supp. at 1582 (considering whether program required re-evaluation by government on periodic basis in determining whether program is narrowly tailored).

260. See *Concrete General*, 779 F. Supp. at 381 (indicating that graduation provision would weigh in favor of set-aside program to satisfy narrowly tailored prong).

261. See *Croson*, 488 U.S. at 491-92 (“[A] state or local subdivision (if delegated the authority from the State) has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction.”). Similarly, in *Croson*, Justice Scalia recognized that “there is only one circumstance in which the States may act by race to ‘undo the effects of past discrimination’: where that is necessary to eliminate their own maintenance of a system of unlawful racial classification.” *Id.* at 524 (Scalia, J., concurring). Where society-wide discrimination exists, that may be properly remedied only by Congress, not the states. See *Coral Constr. Co. v. King County*, 941 F.2d 910, 925 (9th Cir. 1991) (“The task of remedying society-wide discrimination rests exclusively with Congress.”); *Milwaukee County Pavers Assoc. v. Fiedler*, 922 F.2d 419, 423-24 (7th Cir. 1991) (“The joint lesson of *Fullilove* and *Croson* is that the federal government can, by virtue of the enforcement clause of the Fourteenth Amendment, engage in affirmative action with a freer hand than states and municipalities can do.”).

262. See *Contractors II*, 6 F.3d 990, 1008 (3d Cir. 1993) (noting that courts should consider whether plan is limited in its geographic scope); *Associated Gen.*

ernment must restrict participation in the program to only those contractors who have been discriminated against within that government's borders.²⁶³ When the government identifies discriminatory activity within its borders under the "compelling interest prong," a presumption arises that minority contractors, once victims of racial discrimination, have become or have attempted to become active participants in the enacting jurisdiction's construction market.²⁶⁴ Such contractors are eligible participants in the set-aside program.²⁶⁵ Conversely, minority contractors that are newcomers to the government's construction market or otherwise "untarnished by the systemic discriminatory practices" are not eligible to participate in the set-aside program.²⁶⁶ A program should allow only minority contractors of the former group to participate in order to prevent the program from becoming overbroad and negating a finding that the program is narrowly tailored.²⁶⁷

Contractors v. Coalition for Econ. Equity, 950 F.2d 1401, 1416 (9th Cir. 1991) (noting that set aside plan must be limited to its "enacting jurisdiction"); *Associated General Contractors of America*, 936 F. Supp. at 1438 ("Under *Croson*, race- and gender-specific remedies must be limited in their geographical scope.").

263. See *Coral*, 941 F.2d at 925 (considering what is proper geographical scope of county's set-aside program). This requirement does not require a minority contractor to identify specific instances of discrimination before participating in the program. See *id.*; see also *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 287 (1986) (O'Connor, J., concurring) (finding that affirmative action plan "need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently 'narrowly tailored'"); *Associated General Contractors*, 950 F.2d at 1417 n.12 (rejecting argument that program must provide relief to only those specific individuals who have been identified as victims of discrimination); *Associated Gen. Contractors v. City of S.F.*, 748 F. Supp. 1443, 1455 (N.D. Cal. 1990) ("[A]n iron clad requirement limiting any remedy to individuals personally proven to have suffered prior discrimination would render any race conscious remedy superfluous."), *aff'd*, 950 F.2d 1401 (9th Cir. 1991). Rather, where a government successfully demonstrates an inference of racial discrimination within its local construction market under the compelling interest prong, a presumption arises that all minority contractors participating within that market have been victims of that racial discrimination. See *Coral*, 941 F.2d at 925.

264. See *Coral*, 941 F.2d at 925. The court qualified this presumption by noting that it might be overcome in a proper case. See *id.* at 925 n.14.

265. See *id.* at 925 (stating that county would not have to show specific instances of discrimination, rather, simply proving discrimination existed within business community was enough).

266. See *id.* It is reasonable to presume a MBE suffered discrimination if there was systematic discrimination in the jurisdiction. See *id.* A MBE must establish that it is, or attempted to become, a participant in the jurisdiction's business community, however, for the presumption to attach. See *id.*

267. Compare *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508 (1989) (invalidating set-aside program, in part, when government failed to inquire whether minority contractor's participation in program had suffered discriminatory effects of discrimination within government's jurisdiction), and *Coral*, 941 F.2d at 925 ("Since King County's program permits [minority contractor] participation even by [minority contractors] who have no prior contact with King County, the program is overbroad to that extent."), with *Associated General Contractors*, 950 F.2d at 1417 (finding program comports with geographical limitations set out in *Croson* when program "provides preferences only to those minority groups found to have

5. *Comparison of Program's Goal to Relevant Market*

Another indicia of a narrowly tailored set-aside program is the relation of the numerical participation goal stated in the program to the relevant market.²⁶⁸ A set-aside goal should be based on the number of qualified minority contractors in the local construction market, as goals based on an arbitrary number or on a percentage of the minority population will not suffice.²⁶⁹ For example, if minority contractors comprise

previously received a lower percentage of specific types of contracts than their availability to perform such work would suggest").

268. See *Contractors III*, 91 F.3d 586, 606-08 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 953 (1997) (determining whether set aside was narrowly tailored based, in part, on whether 15% goal was based on number of qualified minority contractors in local market); *Contractors II*, 6 F.3d 990, 1008 (3d Cir. 1993) (considering statistics on which stated numerical participation goal is based in determining whether set aside is narrowly tailored); *Concrete Gen., Inc. v. Washington Suburban Sanitary Comm'n*, 779 F. Supp. 370, 382 (D. Md. 1991) ("[I]n this case, the [set-aside plan]'s numerical goal, although not a rigid numerical quota, substantially exceeding the percentage of qualified minority-owned firms in the marketplace."); *Associated Gen. Contractors of Am. v. City of Columbus*, 936 F. Supp. 1363, 1438 (S.D. Ohio 1996) ("The numerical goals of the [set-aside plan] are not narrowly tailored to the goal of remedying past discrimination.").

It is necessary that findings of this nature be made regarding the number of qualified minority contractors and their level of participation in the local construction industry, with the participation goal related to those findings. See *Croson*, 488 U.S. at 510. When the remedy is instead based on the percentage of minorities residing in the local market, that goal "cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing." *Id.* at 507.

269. See *Croson*, 488 U.S. at 501-02, 507 (determining that percentage of contracting dollars set aside for minority contractors must be related to goal of remedying effects of prior discrimination on minority contractors); see also *Associated General Contractors of America*, 936 F. Supp. at 1438 (recognizing *Croson's* consideration that "percentage of contracting dollars set aside for [minority contractors] must be related to the goal of remedying prior discrimination"). The Court in *Croson* rejected the idea that the percentage of minority contractors receiving contracts should approximate the percentage of minorities in the general population, stating that the 30% set-aside quota tied to the percentage of minority population was not narrowly tailored to any goal because "it rests upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." *Croson*, 488 U.S. at 501-02. The Court, therefore, made it necessary that a minority participation goal be based on findings made regarding the number of qualified minority contractors and their level of participation in the local construction industry. See *id.* at 510. When the remedy is instead based on the percentage of minorities residing in the local market, that goal "cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing." *Id.* at 507. For example, in *Contractors III*, the court affirmed the lower court's ruling that a 15% minority participation goal was not narrowly tailored, stating:

The record supports the district court's findings that the [government's] attention at the time of the original enactment [of the goal] was focused solely on the percentage of minorities and women in the general population and that the [government] made no effort . . . to determine how the [set-aside program] might be drafted to remedy particular discrimination—to achieve, for example, the appropriate market share for black contractors that would have existed, had the purported discrimination not occurred. . . . [T]he goal was either arbitrarily chosen or, at least, the

6.5% of all contractors in a given construction market, but minorities make up 25% to 30% of the population, the set-aside goal should be based on the 6.5% figure because the 25% to 30% figure is not an accurate indicator of the number of minority contractors in the relevant market.²⁷⁰ Although this connection must play a role in the enacting jurisdiction's boundaries, it is not required that the goal correspond exactly to the percentage of available minority contractors.²⁷¹ Nonetheless, if the goal significantly exceeds the percentage of available minority contractors in the local market, the program may fail the narrowly tailored prong.²⁷²

Council's sole reference point was the minority percentage in the population.

Contractors III, 91 F.3d at 606-08. Similarly, the district court in *Concrete General* found the stated 25% goal not narrowly tailored because "the goal of the [set aside], like the minority set aside provision in Richmond, is designed to achieve the award of contracts to minority-owned firms in proportion to the percentage of minorities in the general population, rather than to remedy past discrimination within the specific workplace." *Concrete General*, 779 F. Supp. at 382. Because the goal's 25% was related to the 25% to 30% minority population, not to the 6.54% qualified minority contractor population, the court found the goal to be unconstitutionally overbroad. *See id.*

270. *See, e.g., Concrete General*, 779 F. Supp. at 382 (finding that goal of set aside was not narrowly tailored because it was based on minority population, not population of qualified minority contractors). This demonstration is based on the situation presented in *Concrete General*. *Id.* There, the government set a goal of 25% minority participation. *See id.* The minority population was approximately 20% to 25% of the general population. *See id.* The number of minority contractors in the local labor market was 6.54%. *See id.* Because the government gave no justification for its 25% goal, the court reasoned that the goal was based on the 20% to 25% minority population and not related to the 6.54% minority contractors population in the local labor market. *See id.* This goal, the court found, was overbroad and failed to be narrowly tailored to remedy discrimination felt by local minority contractors. *See id.*

271. *See Contractors III*, 91 F.3d at 608 (suggesting that percentage of minority contractors in local market is not necessarily ceiling for set-aside goal and that it is possible that "some premium could be justified under some circumstances"); *Contractors II*, 6 F.3d at 1009 (determining that *Croson* does not impose requirement that participation goal must precisely correspond to percentage of available minority contractors).

272. *See Contractors III*, 91 F.3d at 607 (finding that goal of 15%, when qualified minority contractors made up only 0.7% of local labor market, was not narrowly tailored); *Engineering Contractors Ass'n v. Metropolitan Dade County*, 943 F. Supp. 1546, 1583 (S.D. Fla. 1996) (holding that goals of 19% and 15%, when minority contractors made up only between 3.4% and 5.2% of local labor market, were not narrowly tailored), *aff'd*, 122 F.3d 895 (11th Cir. 1997); *Associated General Contractors of America*, 936 F. Supp. at 1438 (finding that goal of 10%, when qualified minority contractors made up only 2.25% of local labor market, was not narrowly tailored); *Concrete General*, 779 F. Supp. at 382 (finding that goal of 25% was not narrowly tailored because it "substantially exceed[ed]" 6.54% minority contractor population in local labor market).

6. *Burden of Program on Nonminority Contractors*

Finally, a set-aside program that places a heavy burden on nonminority contractors will not be considered narrowly tailored.²⁷³ When determining the appropriate burden that nonminority contractors should bear, courts look to the extent that the provided relief disrupts the “settled rights and expectations” of nonminority contractors.²⁷⁴ A set-aside program could upset such settled rights and expectations if it impairs existing contracts between nonminority contractors and the government.²⁷⁵ This rarely occurs, however, because set-aside programs administer relief during the bidding process, before the contract is formed between the contractor and the state.²⁷⁶ A program could also impair these settled rights and expectations when the program has a profound exclusionary effect on

273. See *Associated Gen. Contractors v. Coalition for Econ. Equity*, 950 F.2d 1401, 1417 (9th Cir. 1991) (considering extent set-aside program burdens nonminority contractors in determining whether program was narrowly tailored); *Associated General Contractors of America*, 936 F. Supp. at 1439 (“Another factor germane to [the] narrow tailoring [of a set-aside program] is the impact of the relief on the rights of third parties [and nonminority contractors].”); *Concrete General*, 779 F. Supp. at 382-83 (analyzing burden set-aside program imposes on nonminority contractors in determining whether program is narrowly tailored); *Main Line Paving Co. v. Board of Educ.*, 725 F. Supp. 1349, 1362 (E.D. Pa. 1989) (finding that program is narrowly tailored, in part, if it is “structured in a way that minimizes the burden on nonminorit[y] contractors, so that [they] are not asked to shoulder an undue share of the cost of remedying discrimination”).

274. See *Associated General Contractors of America*, 936 F. Supp. at 1439 (“In determining the appropriate burden to be shouldered by non-minorities, courts must look to the extent to which the relief disrupts settled ‘rights and expectations.’” (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (Powell, J., plurality opinion))). In *Wygant*, a nonminority school teacher challenged a race-preferential layoff scheme under which she was laid off. *Wygant*, 476 U.S. at 270-72 (Powell, J., plurality opinion). The Court determined that the loss of an existing job was too high a burden to place on innocent parties and, thus, found it to be not sufficiently narrowly tailored. See *id.* at 283 (Powell, J., plurality opinion). The Court reasoned that this burden was too high partly because this teacher had an expectation of continued employment. See *id.* (Powell, J., plurality opinion). Carrying this analysis over into the realm of government construction contracting, the burden placed on nonminority contractors under a set-aside program could similarly be viewed as disrupting the settled rights and expectations of nonminority contractors when contractors are low bidders for a job, but lose the contract on account of the set-aside program. See *Main Line Paving Co.*, 725 F. Supp. at 1362 (“When a remedy is limited and properly tailored, some sharing of the burden by innocent third parties may be unavoidable and does not render a remedial program unconstitutional. But the government’s compelling need to employ a race-conscious remedy must outweigh the unfairness to innocent nonminorities.”). Although the issue has not been raised, one might argue that there is no unfairness to nonminority contractors in the local market when these contractors are responsible for creating the discriminatory practices, that the set-aside program is attempting to remedy.

275. See Memorandum from Walter Dellinger, *supra* note 170 (“In the contracting area, a racial or ethnic classification would upset settled expectations if it impaired an existing contract that had been awarded to a person who is not included in the classification.”).

276. See *id.*

nonminority contractors.²⁷⁷ Determining whether a program has such an exclusionary effect, however, is not always clear.²⁷⁸ Nevertheless, it is suggested that this impermissible exclusionary effect may exist when a nonminority contractor makes a “substantial effort” to win a public construction contract only to be denied because the contractor failed to employ the required number of minority subcontractors.²⁷⁹ More significantly, one court has implicitly found that set-aside programs, by their very nature, have significant impact on the rights and responsibilities of nonminority contractors who attempt to bid on government construction contracts.²⁸⁰

277. *See id.*

278. *See* *Engineering Contractors Ass’n v. Metropolitan Dade County*, 943 F. Supp. 1546, 1583 (S.D. Fla. 1996) (determining how severe set-aside program infringed on nonminority contractor’s settled rights and expectations and taking note that in employment setting, denial of future employment opportunity was not as intrusive burden as loss of existing contract), *aff’d*, 122 F.3d 895 (11th Cir. 1997); *see also* *Wygant*, 476 U.S. at 282-83 (finding that “denial of a future employment opportunity is not as intrusive as loss of an existing job” for purposes of analyzing burden that racially preferential layoff scheme imposed on innocent parties). *But see* *Local 28 of Sheet Metal Workers Int’l Ass’n v. EEOC*, 478 U.S. 421, 488 n.3 (1986) (“[I]t is too simplistic to conclude . . . that hiring [or other employment] goals withstand constitutional muster whereas layoffs do not. . . . The proper constitutional inquiry focuses on the effect, if any, and the diffuseness of the burden imposed on innocent nonminorities, not on the label applied to the particular employment plan at issue.”). Adapting that observation, however, to the situation in which a contractor expends considerable time and money to win a bid only to lose out because the contractor failed to adhere to the set-aside provisions proved to be difficult. *See* *Engineering Contractors*, 943 F. Supp. at 1583 (“When it comes to winning or losing contracting or subcontracting bid proposals the analysis is not so clear-cut.”). Notwithstanding the difficulty in ascertaining the infringement that a set-aside program could have on a nonminority contractor, the court in *Engineering Contractors* seriously questioned whether nonminority contractors were being asked to bear a permissible burden under the Metro Dade County set-aside program. *Id.*

279. *See* *Engineering Contractors*, 943 F. Supp. at 1583 (stating that district court in *Engineering Contractors* did not establish any standard by which to judge burden that set-aside programs impose on nonminority contractors). Nevertheless, the court indicated that the burden was considerable when a set-aside program could cause a nonminority contractor to lose a contract because of failure to adhere to the requirements of the set-aside program. *See id.* The court explained the effort involved in making a bid:

[P]utting together a bid for a subcontracting job of approximately \$1 million and [sic] can take up to a week to prepare and as much as two to three weeks for a \$3-4 million project. This is a significant time and resource commitment. Because Dade County awards contracts to the lowest bidder, it is fair to assume that firms make a substantial effort to develop the lowest bid possible. The Court seriously questions whether it is an appropriate burden for a nonminority firm to expend this level of effort in developing what turns out to be the low bid, but is then denied the contract award because the contractor was not able to hire the required number of [minority subcontractors] under a participation goal requirement.

Id.

280. *See* *Associated Gen. Contractors of Am. v. City of Columbus*, 936 F. Supp. 1363, 1439 (S.D. Ohio 1996) (determining that set-aside program had “significant

The same court also acknowledged that this fact alone should not invalidate a set-aside program; rather it should merely weigh against the program being found narrowly tailored.²⁸¹

IV. IMPACT OF STRICT SCRUTINY STANDARD

Recent Supreme Court decisions that apply strict scrutiny to affirmative action programs granting preferential treatment to minority contractors have had a profoundly detrimental effect on those programs.²⁸² Collectively, these decisions have affected minority businesses, the executive branch of the federal government (especially administrative agencies), Congress, state legislatures and lower federal and state courts. Application of strict scrutiny in this arena has forced federal and state governments to suspend, reformulate or terminate existing programs in large numbers in response to the new constitutional test being applied to these programs.²⁸³ Programs surviving the legislative chopping block have been the subject of litigation, and many of these programs have been judicially invalidated.²⁸⁴ This trend is likely to continue, in light of the fact that most of these programs were originally enacted to conform with the lesser standard of intermediate scrutiny, not the higher level of scrutiny imposed by *Croson* and *Adarand*.²⁸⁵ Inevitably, most affirmative action programs in their current state will fail to pass constitutional muster.

Adarand and *Croson* appear to have a similarly detrimental impact on both racial- and gender-based affirmative action programs existing outside the realm of government construction contracts. Courts and legislatures are currently questioning racial preferences in civil employment and layoffs, higher education admissions, housing and the military. Additionally, gender-based preferences are not immune from attack, as some commentators advocate abolishing the intermediate scrutiny standard under which

impact on the rights and responsibilities of majority contractors and non African-American minorities seeking to bid on City contracts" that "may be considered in weighing the total impact of the other factors which make up the narrow tailoring analysis").

281. *See id.* ("While this fact alone would not provide a basis in this case for holding the [set-aside plan] invalid, it nonetheless may be considered in weighing the total impact of the other factors which make up the narrow tailoring analysis.").

282. For a discussion of recent Supreme Court decisions ruling on set-aside programs providing preferential treatment to minority contractors, see *supra* notes 69-168 and accompanying text.

283. For a discussion of how strict scrutiny has affected the treatment of set-aside programs in the lower courts, see *supra* notes 169-281 and accompanying text.

284. For a discussion of set-aside programs that have been invalidated under the strict scrutiny standard, see *supra* notes 169-281 and accompanying text.

285. For a discussion of *Croson*, see *supra* notes 92-129 and accompanying text. For a discussion of *Adarand*, see *supra* notes 139-68 and accompanying text.

such preferences are currently judged, in favor of the more stringent strict scrutiny standard now applied to racial preferences.²⁸⁶

Nonetheless, with regard to construction contracting, governments may take steps to ensure that their set-aside programs will withstand a constitutional attack. In light of the prior holdings of the Supreme Court and circuit and district court decisions, it seems that a constitutional set aside program would include these features: (1) substantial statistical evidence, preferably in the form of a disparity study, from which an inference of racial discrimination can be inferred; (2) anecdotal evidence of discrimination by minority contractors, city officials or members of trade associations who can offer testimony of racial discrimination occurring within the jurisdiction; (3) consideration and implementation, if possible, of race-neutral means to increase minority contractor participation including training and financial assistance programs; (4) inclusion of waiver provisions that would allow the government to waive the set-aside requirements in appropriate circumstances; (5) termination, reevaluation or graduation provisions that allow for the set-aside program to cease when remedial relief is no longer needed; (6) limiting application of the set-aside program to minority contractors who have participated in the enacting jurisdiction's construction market; (7) formulation of minority contractor participation goals based on the number of qualified minority contractors in the local construction industry; and (8) administering the set aside's remedial action in the bidding stage to lessen the program's impact on nonminority contractor's rights.

The impending legal challenge that most set-aside statutes will inevitably face is formidable, yet potentially surmountable. By taking steps now, governments can ensure that set-aside statutes will continue to provide remedies to minority contractors in need of protection from racial discrimination that occurs within their local construction industry.

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286. See Eric C. Milby, *Adarand Constructors, Inc. v. Peña: Signaling the End of Affirmative Action*, 6 WIDENER J. PUB. L. 263, 319-20 (1996) (discussing effect *Adarand* will have on gender-biased preferences and suggesting that Supreme Court may hold that strict scrutiny applies to gender-based preferences as well as race-based preferences).