

January 1994

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### Recommended Citation

Janice R. Franke, *Defining the Parameters of Permissible State and Local Affirmative Action Programs*, 24 Golden Gate U. L. Rev. (1994).  
<http://digitalcommons.law.ggu.edu/ggulrev/vol24/iss2/3>

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# DEFINING THE PARAMETERS OF PERMISSIBLE STATE AND LOCAL AFFIRMATIVE ACTION PROGRAMS

JANICE R. FRANKE\*

## I. INTRODUCTION

In the 1989 case of *Richmond v. Croson*,<sup>1</sup> the United States Supreme Court issued a decision<sup>2</sup> which has had a tremendous impact on subsequent judicial evaluations of other public sector affirmative action efforts, and hence also on the adoption and structuring of state and local affirmative action programs.<sup>3</sup> One significant factor about the *Croson* decision was that it was the first time a majority of the Court set strict scrutiny as the standard of review for assessing the constitutionality of state and local race-based affirmative action endeavors.<sup>4</sup> Despite this agreement as to the proper standard of review, however, there was no

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1. 488 U.S. 469 (1989). *Croson* declared invalid a Richmond, Virginia ordinance setting aside 30 percent of the value of public construction contracts for minority owned or controlled business enterprises.

2. There were six separate opinions (including two dissenting opinions) filed in the case. Justice O'Connor wrote a plurality opinion, parts of which were joined by other concurring Justices. A majority of six Justices determined that the Richmond set-aside was unconstitutional. For a more thorough discussion of the case and the various opinions, see J. R. Franke, *Richmond v. Croson: The Setting Aside of Set-Asides?* 34 ST. LOUIS U. L.J. 603 (1990).

3. The remainder of this article reviews the impact of *Croson* on subsequent judicial evaluations of other public sector affirmative action programs. Regarding the impact of *Croson* on states or municipalities trying to justify adoption of such programs, see Dorothy J. Gaiter, *Racial Reviews, Court Ruling Makes Discrimination Studies A Hot New Industry*, WALL ST. J., August 13, 1993, at A1; Barbara Carmen, *Report: Minority Contractors Wronged, City Shows Injustice to Gain Court OK of Corrective Action*, COLUMBUS DISPATCH, Sept. 10, 1992, at C1.

4. Michel Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1731 (1989).

majority agreement as to what exactly is necessary for an affirmative action program to pass muster under the strict scrutiny standard.<sup>5</sup> This uncertainty has produced various apparently inconsistent outcomes in subsequent constitutional challenges of different types of state and local affirmative action programs.

#### A. A SUMMARY REVIEW OF *RICHMOND V. CROSON*

At issue in the *Croson* case was a Richmond, Virginia ordinance requiring nonminority prime contractors to subcontract at least thirty percent of the value of their contracts to minority owned or controlled enterprises (MBEs).<sup>6</sup> The ordinance closely mimicked a set-aside program included by Congress in the Public Works Employment Act of 1977,<sup>7</sup> which earlier had been upheld as a valid affirmative action effort.<sup>8</sup> The Richmond ordinance in *Croson* defined minority group members as Black, Spanish-speaking, Oriental, Indian, Eskimo, or Aleut citizens. It imposed no additional requirement that a business have local ties to be preferred under the ordinance.<sup>9</sup> The ordinance allowed for a waiver of the set-aside requirement if a prime contractor could show that reasonable efforts failed to locate a qualified and willing MBE.<sup>10</sup> The plan included a sunset provision causing it to expire five years after its adoption.<sup>11</sup> The Richmond City Council adopted the plan after a public hearing in which testimony was presented which indicated that there was widespread racial discrimination within the construction industry generally and that less than one percent of the city's construction contracts had been awarded to minority businesses in the past five years.<sup>12</sup> The plan was challenged by a nonminority contractor

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5. *Id.* at 1732; see also Franke, *supra* note 2.

6. For a fuller description of the underlying facts and the history of the *Croson* case, see Franke, *supra* note 2.

7. 42 U.S.C. §§ 6701-6734 (1982).

8. See Fullilove v. Klutznick, 448 U.S. 448 (1980). This act required grantees of federal assistance to expend a minimum of ten percent of each grant on minority business enterprises.

9. *Croson*, 488 U.S. at 478.

10. *Id.*

11. *Id.*

12. *Id.* at 479-80. Testimony offered by representatives of local contractors' associations indicated that they knew of no discrimination experienced or practiced by their members. However, there was almost no minority membership in those associations. *Id.* at 480.

who was denied a waiver of the set-aside requirement.<sup>13</sup>

The lower courts initially upheld the set-aside plan.<sup>14</sup> The Fourth Circuit evaluated the plan under the guidance of the Supreme Court's review of Congress' set-aside program in *Fullilove v. Klutznick*,<sup>15</sup> and found the plan valid since the plan was adopted by a body competent to do so, the Council had adequate justification for concluding that remedial action was necessary, and the plan was reasonably tailored to eliminate the effects of past discrimination.<sup>16</sup> The Supreme Court vacated that decision and remanded the case for reconsideration in light of its intervening decision in *Wygant v. Jackson Board of Education*.<sup>17</sup> On remand, the Fourth Circuit read *Wygant* as requiring a state or local public entity's affirmative action efforts to be based on a showing of past discrimination by the acting entity and the means adopted to be narrowly tailored to remedy the remaining effects of that discrimination, and concluded that the Richmond plan failed to meet either requirement.<sup>18</sup>

The Supreme Court affirmed the Fourth Circuit's judgment.<sup>19</sup> Justice O'Connor wrote a plurality opinion, parts of which gained majority support. Four Justices agreed that Congress' remedial affirmative action powers are broader and thus subject to less stringent judicial review than similar measures

13. *Id.* at 483.

14. *See Croson*, 779 F.2d 181, 184, 188, 190-91 (4th Cir. 1985).

15. *Fullilove*, 448 U.S. 448 (1980). The Fourth Circuit actually borrowed the interpretation of the various opinions in *Fullilove* from the Eleventh Circuit decision in *South Fla. Chapter of the Assoc. Gen. Contractors of Am. v. Metropolitan Dade County, Fla.*, 723 F.2d 846 (11th Cir. 1984), *cert. denied*, 469 U.S. 871 (1984). The constitutional requirements identified for race conscious remedial action were that the action was undertaken by a properly authorized body, that the race conscious action was based on an adequate determination that such remedy was necessary to counteract the lingering effects of past discrimination, and that the mechanism was precisely fitted to that purpose. 448 U.S. at 467, 478, 489, 520-21; *see Franke, supra* note 2, at 606 n.23, 26-28.

16. *Croson*, 779 F.2d at 188, 190-91.

17. 478 U.S. 1016 (1986) (citing *Wygant*, 476 U.S. 267 (1986)). *Wygant* involved a contract provision between a school board and the teachers' union permitting the lay-off of more senior nonminority teachers in order to preserve minority teachers' representation in the workforce. A plurality of the Court asserted that public entities undertaking affirmative action steps must have a firm factual basis for believing that the remedial action is necessary, and a majority of the Court found that the provision at issue unduly burdened the rights of nonminority teachers. *Id.* at 274-78, 283-84, 292, 294-95.

18. *Croson*, 822 F.2d 1355, 1357-62 (4th Cir. 1987).

19. *Richmond v. Croson*, 488 U.S. 469, 486 (1989). For a fuller description of the various Justice's opinions, *see Franke, supra* note 2, at 607-16.

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undertaken by state or local legislative bodies.<sup>20</sup> Five Justices agreed that even remedial race-based classifications employed by state or local governments are subject to strict scrutiny review.<sup>21</sup> However, when attempting to articulate what evidence is necessary to justify the use of affirmative action and the degree of freedom to be allowed the acting entity in implementing a program, no majority could agree on a set rule, and no opinion stated a generally applicable formula. For example, Justice O'Connor, joined by Chief Justice Rehnquist, and Justices White and Kennedy stated that a significant statistical disparity between available qualified minorities and the rate at which minorities participate in the relevant activity could give rise to an inference of discriminatory exclusion, which in extreme cases could justify a narrowly tailored affirmative action program.<sup>22</sup> These Justices also would allow affirmative relief based on a pattern of individual discriminatory acts, "if supported by appropriate statistical proof."<sup>23</sup> The proffered measure of the sufficiency of the evidentiary base for an affirmative action program

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20. *Croson*, 488 U.S. at 490-91, 521. Justice O'Connor, joined by Chief Justice Rehnquist and Justice White, distinguished between Congress' remedial powers and state/local remedial powers based upon Congress' broad powers to legislate for the national welfare and to regulate commerce, and upon the Fourteenth Amendment's positive grant of enforcement authority to Congress, as contrasted with its placement of limits on state and local authority to take race-based action. Justice Scalia believes that Congress' remedial powers are fundamentally different than those of state and local governments — he believes that state and local governments may only use race-based action to undo a discriminatory system endemic to the government's operation. See also Franke, *supra* note 2 at 608, 613. The Supreme Court affirmed this distinction in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990).

Most lower federal courts have applied that distinction in subsequent reviews of state and local affirmative action programs. See, e.g., *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969 (6th Cir. 1991) (affording more leeway to Congress' determination that remedial affirmative action was necessary, applied where state adopted federal set-aside without independent findings of local effects of discrimination under *Fullilove* standard); *Milwaukee County Pavers Ass'n v. Fielder*, 922 F.2d 419 (7th Cir.), *cert. denied*, 111 S. Ct. 2261 (1991). To the extent that the state was acting as an agent of the federal government in granting preferential treatment to MBEs, under *Fullilove*, specific local findings of discrimination are not necessary to sustain the state's adherence to the federal program, though state application of the preference to non-federally funded projects needed independent justification under *Croson*.

21. *Croson*, 488 U.S. at 493, 520. Justice Scalia would not permit state and local governments to engage in race-based affirmative action except where necessary to dismantle a discriminatory system operated by the government entity. *Id.* at 521.

22. *Id.* at 509. The failure of the statistical evidence in the case of the Richmond ordinance lay in the fact there was no appropriate comparison to the number of qualified MBEs available for local contracting work. *Id.* at 510.

23. *Id.* at 509.

is that the evidence is sufficient to define the scope of the injury and the extent of the remedy needed.<sup>24</sup> At one extreme, Justice Scalia would not permit state and local race-based remedial programs except where race-based classifications are necessary to undo a discriminatory system maintained by the acting entity.<sup>25</sup> On the other hand, Justice Stevens would not necessarily require any evidence of past discrimination to justify affirmative action, because he views the goal of promoting diversity alone as valid in some circumstances.<sup>26</sup>

In the case of the Richmond ordinance, conclusory statements about the existence of discrimination in the construction industry generally and the statistical disparity between the number of contracts awarded to MBEs and the proportionate representation of minorities in the general population were deemed inadequate to establish the existence of discrimination in the Richmond public construction industry sufficient to warrant race-based remedial relief.<sup>27</sup> Furthermore, the absence of any evidence of past discrimination against protected groups other than Blacks, and extension of the preference to MBEs nationwide, the Council's failure to consider race-neutral mechanisms, and use of a rigid quota apparently tied only to minority representation in the general population, were found to undermine the claim of remedial motivation.<sup>28</sup>

From the opinions forging the majority, which applied the strict scrutiny standard to the Richmond ordinance, some guiding principles can be articulated. First, remedial affirmative ac-

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24. *Id.* at 510.

25. *Id.* at 521.

26. *Id.* at 511 n.1. The newly appointed Justice to the Supreme Court, Ruth Bader Ginsburg, agrees with Justice Stevens that remedying past discrimination is not the only basis for affirmative action. See *O'Donnell Constr. Co. v. Dist. of Columbia*, 963 F.2d 420, 429 (D.C. Cir. 1992) (Ginsburg concurring). Justice Marshall, joined by Justices Brennan and Blackmun, (dissenting), would not subject remedial affirmative action programs to strict scrutiny. *Croson*, 488 U.S. at 535.

27. See *id.* at 498-500. Justice O'Connor maintained that a generalized claim of past discrimination in an industry fails to provide appropriate guidance for defining the permissible scope of relief. *Id.* at 505. Furthermore, she refused to permit an inference that racial rather than race-neutral factors accounted for the gross disparity between the percentage of minorities in the Richmond population (50%) and the percentage of public contracts that had been awarded to MBEs over the past five years (0.67%). *Id.* at 501, 503.

28. See *id.* at 506.

tion is allowable only where there is at least some concrete evidence of local or regional discriminatory impact identifiably or inferably tied to past or ongoing private or governmental action. Second, the remedy undertaken must be linked specifically to group(s) suffering the identified discriminatory effects and must not unduly burden members of the majority group.<sup>29</sup>

## B. *CROSON'S* INFLUENCE ON AFFIRMATIVE ACTION REVIEW

Various lower federal courts have purported to apply the *Croson* analysis in reviewing other public sector affirmative action efforts, primarily set-aside programs and minority employment preferences. Adoption of the Richmond ordinance was deemed to produce a constitutionally unacceptable local affirmative action program, though the Court also indicated that state and local use of race-based affirmative action is permissible under appropriate circumstances.<sup>30</sup> In evaluating these other affirmative action programs under *Croson*, the important points for comparison are the factual record supporting the acting entity's determination that present effects of past discrimination persist and the degree of specificity exercised by the entity in formulating a mechanism to address the discriminatory effects. This article examines what passes muster under these points by examining the outcomes in various cases. In conjunction with this, the author seeks to explain the apparent variation in approval rates for the two types of state and local affirmative action programs examined.

## II. FEDERAL COURTS' APPLICATIONS OF THE *CROSON* ANALYSIS: APPLICATION IN OTHER SET-ASIDE CONTEXTS

The *Croson* decision raised some concerns about the viability of state and local set-aside programs, and prompted some very different scholarly opinions about the effects of the decision.<sup>31</sup> However, despite the natural variations between the

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29. See Franke, *supra* note 2, at 626.

30. See, e.g., *Croson*, 488 U.S. at 509, 511, 528; and Franke, *supra* note 2, at n.6.

31. See, e.g., Joint Statement, *Constitutional Scholars' Statement on Affirmative Action After City of Richmond v. J.A. Croson Co.*, 98 YALE L.J. 1711 (1989); Charles Fried, *Affirmative Action After City of Richmond v. J.A. Croson Co.: A Response to the*

records supporting affirmative action plans and the mechanics of the programs themselves, review and comparison of different courts' applications of *Croson* produces some useful insights as to which set-aside programs will survive strict scrutiny under the Constitution.

In *O'Donnell Construction Co. v. District of Columbia*,<sup>32</sup> the U.S. Circuit Court for the District of Columbia reviewed the District's Minority Contracting Act.<sup>33</sup> The act, in its amended version, imposed on all District agencies a goal of awarding thirty-five percent of the value of construction contracts to local MBEs.<sup>34</sup> Minority groups included Black Americans, Native Americans, Asian Americans, Pacific Islander Americans, and Hispanic Americans economically and socially disadvantaged due to membership in these groups because of historical discrimination.<sup>35</sup> The Minority Business Opportunity Commission, charged with implementation of the Act, established a "sheltered market" whereby certain contracts were set-aside for limited bidding competition among MBEs.<sup>36</sup> The Commission also had the discretion to attempt to increase minority participation by other means such as waiver of bonding requirements and division of large contracts into smaller ones.<sup>37</sup>

The evidence of prior discrimination relied upon in enacting the original set-aside included some informal data indicating that approximately three hundred MBEs were operating in the District in 1974, and data for a subset of those MBEs showed that they performed approximately five percent of the total (private and public) local construction contracts.<sup>38</sup> Extrapolating

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*Scholars' Statement*, 99 YALE L.J. 155 (1989); *Scholars' Reply to Professor Fried*, 99 YALE L.J. 163 (1989).

32. *O'Donnell Constr. Co.*, 963 F.2d 420 (D.C. Cir. 1992). This decision reversed a denial of a preliminary injunction by the District Court. See *O'Donnell Constr. Co.*, 762 F. Supp. 354 (D.D.C. 1991).

33. D.C. CODE ANN. §§ 1-1141 to 1-1151 (1992).

34. *O'Donnell Constr. Co.*, 963 F.2d at 422.

35. *Id.* MBEs had to be certified by the Commission in order to participate in the sheltered market bidding. *Id.*

36. *Id.* MBEs were permitted to participate in all regular non-sheltered contracts as well. *Id.*

37. *Id.*

38. *Id.* at 425-26. Additionally, some anecdotal testimony of individual experiences of discrimination were considered in the enactment process. All evidence of discrimination apparently focused on discrimination against Blacks. *Id.* at 427.



from this information on the availability of qualified MBEs, and analyzing MBE usage versus availability for the Department of General Services, it was estimated that MBEs could perform thirty-four percent of that department's construction contracts but that only 3.4 percent of the department's construction expenditures had been going to MBEs.<sup>39</sup> This estimate apparently provided the rationale for concluding that a twenty-five percent goal was reasonable.<sup>40</sup> In 1983, the Act was amended without formal consideration of additional evidence. The definition of minorities favored was narrowed to include only those MBEs with a place of business within the District, and the MBE participation goal was raised to thirty-five percent.<sup>41</sup>

The court found the D.C. set-aside defective under both prongs of *Croson*. The court rejected the statistics proffered as evidence of discrimination, rather than MBEs' focus on other types of contracts, especially in light of the fact that much of the anecdotal testimony related to difficulties encountered by MBEs that were not directly race-related.<sup>42</sup> The fact that no additional evidence was considered in raising the goal to thirty-five percent in 1983, the failure to produce any evidence of discrimination against protected groups other than Blacks, and the reliance on evidence including information relating to MBEs outside of the District, coupled with the failure to include a sunset provision in the amended act, caused the court to conclude that the plan was not narrowly tailored to address identified effects of past discrimination.<sup>43</sup>

A district court within the Second Circuit was faced with a

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39. *Id.* at 426.

40. *Id.* Using the "rule of thumb" that surety bond rating procedures usually permit doubling of the previous year's production, the Council considered that MBEs actually had the capability to perform 68 percent of these construction contracts. *Id.*

41. *Id.* at 427-28. The sunset provision included in the original act was not included in the amended act. *Id.* at 428.

42. Parroting Justice O'Connor's opinion in *Croson*, 488 U.S. at 503, the court asserted that many non-discriminatory reasons could explain the disparity between the percentages of MBEs participating in public construction contracts and the overall percentages of MBEs. The court also pointed to other statistics showing that a much higher percent of some types of non-construction contracts had been awarded to MBEs by the Department of General Services. *O'Donnell Constr. Co.*, 963 F.2d at 426. Finally, the court refused to credit testimony by MBEs regarding such things as difficulty meeting bonding requirements as demonstrating race-specific discrimination. *Id.* at 427.

43. *Id.* at 427-28.

challenge to the renewal of a successful set-aside program in *Associated General Contractors v. New Haven*.<sup>44</sup> That case involved a set-aside program favoring disadvantaged business enterprises (DBEs), where minorities were rebuttably presumed to be disadvantaged.<sup>45</sup> During the time period of the original set-aside program female and minority (combined) participation in city construction contracts rose from less than one percent to twenty-five percent.<sup>46</sup> In 1989, as a basis for renewing the program, the city conducted studies of the local construction industry, finding evidence of long standing discrimination, inability of race-neutral measures to end the discrimination, a substantial lack of MBE participation in commercial contracts without set-asides, and confirmed the effectiveness of the current set-aside program in increasing MBE participation, all based on testimony from representatives of MBEs and WBEs.<sup>47</sup> However, the court found this anecdotal evidence, standing alone, insufficient to support a claim that renewal of the set-aside was necessary to remedy continuing effects of discrimination. The court did indicate that the city might have met that burden by showing that removal of the set-aside would likely significantly decrease MBE participation with evidence showing a statistical disparity between MBE availability and MBE participation in the local private construction arena.<sup>48</sup> Finally, failure to document discrimination against any "disadvantaged" business other than disadvantage based on race was deemed to render the program overinclusive, and thus not appropriately tailored to its asserted remedial purpose.<sup>49</sup>

*In Main Line Paving Co. v. Board of Education*, a district

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44. *Assoc. General Contractors*, 791 F. Supp. 941 (D. Conn. 1992).

45. *Id.* at 942. This program, like those of many of the states and localities with MBE programs also had a set-aside for women-owned or controlled enterprises (WBEs), which typically are also subject to challenge for violation of equal protection principles. See, e.g., *Main Line Paving Co. v. Board of Educ.*, 725 F. Supp. 1349 (E.D. Pa. 1989); *Coral Constr. Co. v. King County*, 941 F.2d 910 (9th Cir. 1991). However, it is beyond the scope of this article to analyze the challenges to WBE programs. Many courts have acknowledged that classifications based on sex have been subject to a lesser, intermediate degree of constitutional scrutiny, and that this intermediate standard would also carry over into review of gender based affirmative action. *Associated Gen. Contractors*, 791 F. Supp. at 942.

46. *Id.* at 943.

47. *Id.* at 945.

48. *Id.* at 945-47.

49. *Id.* at 948.

court in Pennsylvania reviewed a facial challenge to the Philadelphia School Board's MBE set-aside for construction contracts.<sup>50</sup> The set-aside policy required contractors to subcontract at least fifteen percent of the contract value to MBEs, or provide a written request for waiver reciting the reasons that a MBE could not be found or used on the particular contract.<sup>51</sup> Adoption of the policy was prompted by investigation of MBE complaints which showed that nonminority contractors had failed to subcontract to low bidding MBEs for pretextual reasons.<sup>52</sup> Additionally, the Board found that its use of "bidders lists" which included very few MBEs, a poor attitude of its employees toward disseminating bidding information to new participants, and practices such as imposition of high bonding requirements, limited minority participation, accounting for the award of only 0.5 percent of contracts to MBEs in 1982-83.<sup>53</sup> Here, the court found the evidentiary basis for the program too general, since it related largely to race-neutral practices, and the remedy overbroad in that it did not provide for an individualized determination that those benefiting under the plan were victims of past discrimination and it failed to consider race-neutral alternative measures.<sup>54</sup>

A district court in Maryland overturned the Minority Procurement Policy implemented by a state administrative agency in *Concrete General v. Washington Suburban Sanitary Commission*.<sup>55</sup> The policy, adopted by legislative resolution, set a twenty-five percent goal for minority participation in agency

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50. *Main Line Paving Co.*, 725 F. Supp. 1349 (E.D. Pa. 1989). This program also involved a WBE set-aside. See *supra* note 45.

51. *Id.* at 1352 (stipulation of facts). A MBE prime contractor could fulfill this requirement by performing at least 15 percent of the contract itself. *Id.*

52. *Id.* at 1354.

53. *Id.* at 1354-55. The Board had previously adopted a small scale set-aside policy, and MBEs complained that they were not able to effectively participate in the program because they were not getting necessary bidding information from Board employees. *Id.* The Board was also aware of findings by the City Council relied upon to enact a city set-aside program. *Id.*

54. *Id.* at 1361-62. The court reasoned that race-neutral alternatives, such as abandonment of bidders lists and lowering of bonding requirements, must be considered first to minimize the burden on nonminorities. The court also noted that few waiver requests had been granted. *Id.* at 1362.

55. *Concrete General*, 779 F. Supp. 370 (D. Md. 1991). The policy was challenged as applied to impose MBE restricted bidding on a particular contract, thus denying nonminority contractors any chance to participate. *Id.* at 373, 382.

contracts.<sup>56</sup> Revised in 1987, the policy listed six mechanisms available to be used to increase MBE participation: 1) require contractors to subcontract at least 10 percent of the value of the contract to MBEs; 2) accept MBE bids that are within 10 percent of the lowest overall bid; 3) employ MBE restricted bidding; 4) negotiate contracts directly with MBEs; 5) waive bonding and insurance requirements for MBEs; and 6) waive experience requirements for MBEs.<sup>57</sup> Under the policy Blacks, Hispanics, American Indians, Alaskan natives, Asians, Pacific Islanders, women, and physically or mentally disabled persons, without geographical limitation, were recognized as minorities.<sup>58</sup> The policy did not include a sunset provision, though it did provide for annual review.<sup>59</sup>

The underlying record supporting adoption of the policy was not well developed. The department had noted that it had a list of contracting firms, 6.54 percent of which were MBEs, but that only 3 percent of its contract dollars were granted to MBEs.<sup>60</sup> There was some other statistical and anecdotal evidence of discrimination in the award of state contracts, but the court deemed the record incomplete for resolution by summary judgment.<sup>61</sup> However, the court did resolve the complaint on the basis of the policy's overinclusiveness: the policy benefitted groups against which no evidence of past discrimination had been offered. It imposed no local geographic limits for the preference,<sup>62</sup> and the Commission offered no evidence that it considered the least intrusive means for achieving its goal.<sup>63</sup> In addition, the policy had no individual waiver or general termination

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56. *Id.* at 371. The court concluded that the Washington Suburban Sanitary Commission exceeded the scope of its legislative authority in adopting the Minority Procurement Policy, though it went on to evaluate the constitutional issues. *Id.* at 374-77.

57. *Id.* at 371-72. The mechanism to be used was to be selected in order to maximize present awards to MBEs and future participation of MBEs, minimize interference with the efficient operation of the agency, and generally maximize the goals of the policy. *Id.* at 372.

58. *Id.*

59. *Id.*

60. *Concrete General*, 779 F. Supp. at 378.

61. *Id.*

62. *Id.* at 379. Even though the policy, as applied here, benefitted a local Black business, the court found the overinclusiveness contrary to the permissible intention of remedying identified effects of past discrimination. *Id.*

63. *Id.* at 380-81. The Commission offered no justification for its decision to use restricted bidding rather than the less intrusive alternatives such as waiver of bonding, insurance, or experience requirements for MBEs. *Id.*

provisions,<sup>64</sup> and the overall MBE participation goal set at 25 percent was focused on general population figures and substantially exceeded the percentage of available qualified MBEs.<sup>65</sup>

*F. Buddie Contracting Co. v. City of Elyria, Ohio*<sup>66</sup> involved a challenge to a municipal MBE set-aside adopted for the purposes of granting more meaningful and representative participation in city contracts for minorities and women. The set-aside sought to avoid future discrimination against these groups, to promote the city's general welfare by encouraging the establishment and expansion of MBEs, to stabilize the economy, and to preserve employment opportunities.<sup>67</sup> Pre-enactment hearings conducted by the city had not disclosed past discrimination against MBEs in the award of city contracts.<sup>68</sup> The program benefitted MBEs certified by the city, primarily on the basis of membership in one of the following groups: Blacks, Hispanics, Asians, and American Indians.<sup>69</sup> Percentage MBE subcontracting goals were set by type of contract and ranged from three to fourteen percent, though a partial or total waiver was available if sufficient qualified MBEs could not be located.<sup>70</sup> Failure to base the program on a finding of past or present discrimination in the award of city contracts, as well as failure to consider race-neutral means to pursue the city's goal were fatal to this program.<sup>71</sup>

The Seventh Circuit reviewed a challenge<sup>72</sup> to a state program setting aside certain state funded highway contracts for DBEs,<sup>73</sup> which was merely an extension of the federally man-

64. *Id.* at 381. The court deemed this evidence that the policy was not intended to help MBEs overcome the effects of past discrimination. *Id.*

65. *Id.* at 382.

66. *F. Buddie Contracting Co.*, 773 F. Supp. 1018 (N.D. Ohio 1991).

67. *Id.* at 1022. The challenge was brought by a contractor whose bid was rejected for failure to comply with the MBE requirement. The city program also included a WBE set-aside. *Id.* at 1020.

68. *Id.* at 1022.

69. *Id.* at 1022-23.

70. *Id.* at 1023. There was a right to appeal the denial of a waiver. *Id.*

71. *F. Buddie Contracting Co.*, 773 F. Supp. at 1031-32. The availability of a waiver did not save the program. *Id.*

72. *Milwaukee County Pavers Ass'n v. Fielder*, 922 F.2d 419 (7th Cir.), *cert. denied* 111 S.Ct. 2261 (1991).

73. Even though the program benefitted disadvantaged businesses as opposed to minority businesses, the rebuttable presumption that minorities are disadvantaged was deemed to render this a race-based preference, subject to strict scrutiny review. *Milwau-*

dated highway set-aside under the Surface Transportation Uniform Relocation Assistance Act<sup>74</sup> to non-federally funded contracts. Here, absent an independent evidentiary basis for the state's conclusion that the set-aside was needed to remedy the effects of past discrimination regarding the construction industry within the state, the state's independent application of the federal program could not withstand constitutional scrutiny.<sup>75</sup>

The Ninth Circuit has reviewed two local set-aside programs since the announcement of the *Croson* decision. In the first case, *Coral Construction Co. v. King County*,<sup>76</sup> the plan was amended after the *Croson* decision. Minority businesses included under the plan were those certified by the state as owned or controlled by Blacks, Hispanics, Asians, American Indians, and Alaskan natives.<sup>77</sup> The plan provided for a percentage preference for bidders using MBEs on small contracts,<sup>78</sup> and set contract-specific MBE subcontracting set-asides for larger contracts.<sup>79</sup> A reduction in set-aside levels or complete waiver of the set-aside requirement was available where it was demonstrated that it was not feasible to find MBEs or that use of MBEs would unreasonably increase costs.<sup>80</sup> The evidence initially relied upon

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*see Pavers Ass'n*, 922 F.2d at 421.

74. Pub. L. No. 100-17, 101 Stat. 132 (1987).

75. *Milwaukee Pavers Ass'n*, 922 F.2d at 421. *See also supra* note 20 and accompanying text. The same issue and outcome was involved in the Eleventh Circuit case, *H.K. Porter Co. v. Metropolitan Dade County*, 975 F.2d 762 (11th Cir. 1992).

76. *Coral Constr. Co.*, 941 F.2d 910, 914 (9th Cir. 1991). There were some further amendments to the plan in 1990, which were not relevant to this review. *Id.* at 915.

77. *Id.* at 914. The 1989 amendments required the County Office of Civil Rights and Compliance to monitor implementation of the plan to ensure that no particular group was unfairly or disproportionately favored, and that the plan was not in effect any longer than necessary. The plan also had a set-aside for similarly certified female owned or controlled businesses. *Id.*

78. This provision allowed a preference for a contractor who was within five percent of the lowest overall bid, if that contractor was using an MBE, for contracts up to \$10,000. The 1989 amendments to the plan provided for a flexible percentage MBE subcontracting figure to be set on a case by case basis. *Id.* at 914-15.

79. The program also permitted use of the percentage preference method for large contracts if it was deemed the best way to get increased MBE participation. In this case, the percentage preference method had been used to award a contract involving more than \$10,000 to the second lowest bidder, a minority contractor. The 1989 amendments applied the MBE subcontracting set-aside to all contractors, including MBEs, unless the MBE contractor was performing at least 25 percent of the contract work itself. *Coral*, 941 F.2d at 914. The plan also included some race-neutral mechanisms such as provision of training and information access for businesses wishing to bid on county contracts. *Id.* at 923.

80. *Id.* at 914.

to demonstrate the need for remedial relief consisted of more than 700 pages of affidavits from fifty-seven women and minorities documenting specific instances of discrimination in the local construction industry, covering a broad spectrum of the covered groups and including experiences of discrimination on public projects.<sup>81</sup> Though anecdotal evidence alone was deemed insufficient to support a finding that affirmative action was necessary, the court asserted that statistical evidence gathered during the 1990 amendment process also could be considered under strict scrutiny analysis.<sup>82</sup> Design of the remedy here seemed to be appropriately narrowed. Some race-neutral activities included with the set-aside provisions and individual contract set-aside determinations, together with the availability of the waiver, made the plan flexible.<sup>83</sup> However, further analysis of the record was deemed necessary to determine whether the benefits of the plan were defined by MBEs experiences of discrimination specifically in King County.<sup>84</sup>

*Associated General Contractors of California v. Coalition* involved an MBE bidding preference on city contracts.<sup>85</sup> After an earlier MBE bid preference had been overturned, the city undertook an investigation regarding continued discrimination in city contracting, receiving testimony from forty-two witnesses and written submissions from 127 others, and additionally held ten public hearings on the matter.<sup>86</sup> A study commissioned by

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81. *Id.* at 917-19.

82. *Id.* at 919-20. There must be some evidence of prior discrimination at the time of enactment to provide some support for the remedy and to ensure that the remedy is narrowly tailored to address that discrimination. *Id.* at 920. Here, the Ninth Circuit reversed the district court's grant of summary judgment for the challengers and remanded that portion of the case for full consideration of the issue of whether the county had, in light of all the evidence, a compelling interest in addressing the lingering effects of past discrimination. *Id.* at 921-22.

83. *Id.* at 923-24.

84. *Id.* at 925. The plan appeared to be overbroad in that it allowed for certification of MBEs if the business suffered from discrimination in its locale (not necessarily King County). The appropriate issue was defined not as the location of the business, but whether it has suffered discrimination in King County. If the benefits are defined by findings that a business, local or not, has suffered the effects of discrimination when it tried to do business in King County, the plan would not be overbroad. *Id.* The summary judgment granted to challengers on the issue of the plan's overbreadth also was reversed. *Id.* at 926.

85. *Assoc. General Contractors of California*, 950 F.2d 1401 (9th Cir. 1991). The program also granted a preference to WBEs and locally owned businesses (LBEs).

86. *Id.* at 1404. The investigation was begun before the *Croson* decision, and the public hearings were held after *Croson*. *Id.*

the city showed large statistical disparities between the availability of MBEs and the amount of city contracting awarded to MBEs.<sup>87</sup> The 1989 ordinance granted bid preferences to prime contractors who are members of groups found to be disadvantaged by previous bid practices, specifically granting a 5 percent bid preference for MBEs, defined as disadvantaged businesses owned by Blacks, Latinos and Asians.<sup>88</sup> Local businesses were granted an additional (and cumulative) five percent preference.<sup>89</sup> The benefits of the bid preference were extended to other enterprises engaged in a joint venture with an MBE, where MBE participation was at least thirty-five percent.<sup>90</sup> Here, the court found that the city had made the requisite detailed findings of prior discrimination within its borders to justify a race-based remedy, and that the program was narrowly tailored because it was sufficiently flexible, focused on identified prior discrimination and economically disadvantaged businesses, and imposed only a slight burden on others.<sup>91</sup>

The Eleventh Circuit visited the post-*Croson* set-aside issue in *Cone Corp. v. Florida Department of Transportation*.<sup>92</sup> In that case, Hillsborough County enacted an MBE program establishing a goal of awarding twenty-five percent of the value of county construction contracts to economically disadvantaged MBEs.<sup>93</sup> MBE goals for individual projects, up to fifty percent, were to be set based on the number of available eligible MBEs.<sup>94</sup> The plan provided for a pre-bid conference for discussion of MBE requirements, and waiver of the goal prior to advertise-

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87. *Id.* at 1414. The study showed MBE availability at 49.5 percent, but contract dollar participation by MBEs at only 11.1 percent.

88. *Id.* at 1404. Economically disadvantaged businesses were defined as those having average gross receipts that did not exceed fourteen million for the prior three years. *Id.*

89. *Assoc. General Contractors of California*, 950 F.2d at 1404. Thus, local MBEs received a 10 percent bid preference.

90. *Id.* at 1404.

91. *Id.* at 1416-18. Specifically, the use of a bid preference rather than a quota, the definition of beneficiaries on the basis of experience of prior bid discrimination, the ability of nonminority contractors to participate via the joint venture option, and the limited geographic scope of the preference were noted by the court. *Id.*

92. *Cone Corp.*, 908 F.2d 908 (11th Cir. 1990). In a later review of this case, the Eleventh Circuit determined that the challenger did not have standing. *Cone Corp.*, 921 F.2d 1190 (11th Cir. 1991). The U.S. Supreme Court has since reversed the Eleventh Circuit's position on standing. See *Northeastern Fla. Ch. of the Assoc. Gen. Contractors of Am. v. Jacksonville, Florida*, 61 U.S.L.W. 4626 (June 15, 1993).

93. *Id.* at 910.

94. *Id.*



ment if deemed to be injurious to health, safety, or welfare (including financial concerns.)<sup>95</sup> Enactment of this plan followed a long term, but unsuccessful, attempt by the county to increase MBE participation in public contracts under a voluntary affirmative action program.<sup>96</sup> At the time, statistics compiled over a six year period in the local area showed that though MBEs made up twelve percent of the local contractor population, only 6.3 percent of county contracts (6.6 percent of contract value) went to MBEs, and most of that was accounted for in one contract.<sup>97</sup> Supplemented by numerous individual complaints of discrimination in county procurement, the court deemed this record sufficient to indicate a prima facie case of discrimination, thus justifying the race-specific remedy.<sup>98</sup> Furthermore, the county's attempt to use a voluntary program, the individual and flexible setting of goals, the availability of waiver, and the targeting of groups locally represented and most likely still suffering the effects of past discrimination were found to adequately tailor the remedy to redress the identified problem.<sup>99</sup>

### III. LESSONS REGARDING SET-ASIDE PROGRAMS

In general, state and local set-aside programs have not fared well under judicial application of the *Croson* standards. Part of the problem is due to the fact that the factual record underlying adoption of the Richmond ordinance was poorly defined,<sup>100</sup> lead-

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95. *Id.* at 910-11. Working with the three lowest bids, the County Administrator was to check compliance with the MBE goal and/or the contractor's good faith efforts to comply with the goal. If the low bidder was deemed not responsive to the MBE goal, s/he was permitted to protest that finding. If still deemed not responsive, and the next lowest bid was either \$100,000 or fifteen percent higher than the low bid, the MBE goal was to be waived. Otherwise, the County Administrator had discretion to make a final decision. *Id.* at 911.

96. *Id.* at 909-10. After initial adoption of the voluntary program in 1978, studies in 1981 and 1984 indicated that minorities still were significantly underrepresented in awards of county contracts. *Id.* at 910.

97. *Cone Corp.*, 908 F.2d at 915. 7.89 percent of purchase orders and 1.22 percent of total county expenditures went to MBEs. *Id.*

98. *Id.*

99. *Id.* at 916-17.

100. Because Richmond City Council adopted the ordinance at a time when *Fullilove* was considered to define the standard under which public sector affirmative action programs could be adopted, and because the ordinance mimicked the Congressional set-aside upheld under constitutional challenge in *Fullilove*, the Council apparently referred loosely or by inference to evidence of discrimination justifying the remedial program, without assembling a clear record of how that "general" discrimination specifically im-

ing to very different interpretations of its breadth and depth. For instance, the majority supporting Justice O'Connor's analysis of the evidence in *Croson* eschewed the references to Richmond's well-documented and extensive history of racial discrimination in general because of the Council's failure to document a direct link between that history and the current experiences of local minority contractors.<sup>101</sup> On that basis, O'Connor refused to infer that discrimination accounted for the gross underrepresentation of minorities in the construction industry and in local contractors' associations, despite an overwhelming statistical disparity.<sup>102</sup> In contrast, Justice Marshall, joined by two others in his dissent, decried the majority's failure to evaluate the record in its proper historical context.<sup>103</sup> He criticized the majority's notion that discrimination and its effects could be separated out into discrete actions with discrete, easily identifiable reactions.<sup>104</sup> Marshall's evaluation of the record accepted evidence of discrimination in the construction industry nationally and a general pattern of racial discrimination locally as sufficiently probative of a problem in the local industry to justify a race-specific remedy. Because the evidentiary basis for adoption of the Richmond ordinance was at least arguably much stronger than it was credited to be by the majority, other courts evaluating similar records, even where the acting body has gone farther in establishing a link between the "general discrimination" and the current status of minorities, may devalue those records, declining to fully credit the strength of evidence of discrimination having a tangential link to present experiences of local minorities.

Compounded by the *Croson* majority's viewpoint, courts have been reluctant to approve race-specific remedies that have not been specifically linked to direct effects of racial discrimination.<sup>105</sup> For example, courts have declined to recognize bonding

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pacted on MBEs within the local construction industry.

101. *Croson*, 488 U.S. at 505.

102. *Id.* at 501, 503.

103. *Id.* at 529-30.

104. *Id.* at 530-32. Marshall also pointed out that where discriminatory exclusion from a given area is alleged, comparison of minority participation in that area to minority representation in the general (local) population is the only relevant comparison to be made. *Id.* at 529.

105. See, e.g., *O'Donnell Constr. Co. v. Dist. of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992).

and insurance requirements, experience requirements and other "race-neutral" factors in the contracting trade as having greater adverse impact on minorities because of historic discrimination.<sup>106</sup> Thus, set-aside programs have been overturned because the acting entity drafted its program on the presumption that particular groups have suffered from general opportunity barriers because of membership in a minority group rather than focusing on documentation of the disparate impact evident on the basis of apparently race-neutral factors.<sup>107</sup>

Another recurrent problem with state and local set-asides is linked to the inclusion of racial groups other than Blacks. Again, in drafting the Richmond ordinance, the Council adopted Congress' definition of minorities, probably without much thought about its inclusion of groups not represented locally.<sup>108</sup> Generally, in adoption of non-discrimination or affirmative action policies, there is a tendency to include all groups of arguably marginal representation or status — most bodies acting on such policies do not want to be accused of favoring one group over another. However, while the experience of discrimination for Blacks in the United States was/is pervasive and largely consistent across the nation, and fairly well acknowledged, experiences of discrimination by other racial groups are often perceived as more regional and less prevalent. Thus, in assembling the evidence of past discrimination, policymakers have tended to focus on evidence relating to the experience of Blacks.<sup>109</sup> Set-asides including other racial groups are then subject to charges of overbreadth.<sup>110</sup>

Examination of the unique features of those set-aside programs which have passed muster under strict scrutiny analysis,

106. *See, e.g.*, *Main Line Paving Co. v. Bd. of Educ.*, 725 F. Supp. 1349, 1354, 1361-62 (E.D. Pa. 1989).

107. *See, e.g.*, *O'Donnell Constr. Co. v. Dist. of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992). This is reminiscent of the Supreme Court's treatment of the disparate impact claim in the *Wards Cove* case, where it denied relief to disparate impact claimants because they failed to identify the specific employment practice(s) that operated to disproportionately exclude minorities. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

108. *See Croson*, 488 U.S. at 528.

109. *See, e.g.*, *O'Donnell Constr. Co. v. Dist. of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992); *Associated Gen. Contractors v. New Haven*, 791 F. Supp. 941, 948 (D. Conn. 1992).

110. *Id.*

and contrasting them with features of unsuccessful programs, offers refinement to the lessons of *Croson* in defining the perimeter within which constitutionally permissible set-aside programs fall. First, the acting entity must be concerned with development of the record to support the conclusion that race-based affirmative action is a necessary response to continuing effects of discrimination. A statistical record of significant disparities between local minority representation in a particular arena and minorities instantly available<sup>111</sup> to participate in the field is required.<sup>112</sup> Even a strong statistical record will generally need supplementation with anecdotal evidence of individual experiences of discrimination.<sup>113</sup> This type of evidence should provide the link between membership in a particular racial group and an experience of discrimination on what appears to be a race-neutral factor, such as obtaining insurance, price quotes, etc.<sup>114</sup> To the extent that the set-aside covers racial groups other than Blacks, at least some documentation, both statistical and anecdotal, must relate to discrimination against those groups.<sup>115</sup>

Second, the statistical record must be the basis for the determination of goals for minority representation; goals must be set in reasonable relation to the number of locally available qualified minorities, and thus should also be flexible and variable in different contexts.<sup>116</sup> Furthermore, the benefits of the program should be limited to those minority entities which have ex-

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111. This defines minority entities currently in existence and locally available to participate in the subject activity.

112. See, e.g., *Coral Constr. Co. v. King County*, 941 F.2d 910, 917-19 (9th Cir. 1991) (holding that even a large, specific anecdotal record of local discrimination in public contracting deemed insufficient to support need for remedial program without subsequent statistical substantiation).

113. Failure of the Richmond ordinance lay, in part, in the failure to document individual experiences of discrimination in the local construction industry. In fact, representatives of the local contractors' associations, all of which had virtually no minority membership, testified that they were not aware of discrimination practiced locally. However, no testimony was obtained from local MBEs. See *Croson*, 488 U.S. at 479-80.

114. See, e.g., *Associated Gen. Contractors v. New Haven*, 791 F. Supp. 941, 945-47 (D. Conn. 1992) (inferring that proffered anecdotal evidence, together with related statistical disparity (lacking in the record) would have been enough to justify renewal of the set-aside program).

115. See *supra* notes 108-109 and accompanying text.

116. Cf. *Concrete Gen. v. Washington Suburban Sanitary Comm'n*, 779 F. Supp. 370, 382 (D. Md. 1991) (striking down MBE participation goals set in relation to general population figures), and *Associated Gen. Contractors of Cal. v. Coalition*, 950 F.2d 1401, 1414, 1416-17 (9th Cir. 1991) (upholding flexible MBE preference, tied to those MBEs having previously received a lower than expected percentage of contracts).

perienced the effects of local discrimination.<sup>117</sup> In this vein also, the acting body must evaluate race-neutral alternatives to a set-aside, and explain a conclusion that such alternatives would not be effective in eliminating the continuing effects of discrimination.<sup>118</sup> Waiver of the set-aside must be available upon a showing that qualified minorities are not available, that adherence to the set-aside is too costly, or that use of a particular minority entity is not justified on the basis of experiences of discrimination.<sup>119</sup> Some mechanism for ensuring that the set-aside is abandoned when its goals have been reached must be included.<sup>120</sup> Finally, the set-aside must limit its negative impact on nonminorities.<sup>121</sup>

#### IV. APPLICATION IN EMPLOYMENT SETTINGS

In public employment settings, affirmative action programs are often, though not always, linked to settlements of individual or class discrimination lawsuits. In such cases, there is at least some allegation of misconduct by the acting entity, although a formal record substantiating those allegations may be lacking or incomplete, depending upon the point in the proceedings where settlement occurs. Where there have been underlying judicial findings of discrimination, some courts offer more deference to such a record as support for affirmative action efforts.<sup>122</sup> Simi-

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117. *See, e.g., Coral Constr. Co. v. King County*, 941 F.2d 910, 925 (9th Cir. 1991) (remanding for determination of whether MBEs benefitted were limited to those who had suffered to effects of past discrimination within King County).

118. *See, e.g., Main Line Paving Co. v. Board of Educ.*, 725 F. Supp. 1349, 1361-62 (E.D. Pa. 1989) (overturning program, in part, because of school board's failure to attempt race-neutral means to overcome the effects of discrimination).

119. *Id.* (finding program overbroad because it did not provide for individualized determination that MBEs included in the preference were victims of past discrimination and virtually no waivers of set-aside had ever been granted); *cf. Cone Corp. v. Florida Dep't of Transp.*, 908 F.2d 908, 916-17 (11th Cir. 1990) (finding program appropriately narrowed because, *inter alia*, waiver available and benefit targeted to groups most likely still suffering the effects of discrimination).

120. *See, e.g., O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 428 (D.C. Cir. 1992) (finding program flawed for failure to include sunset provision).

121. *Cf. Associated Gen. Contractors of Cal. v. Coalition*, 950 F.2d 1401, 1417-18 (9th Cir. 1991) (finding burden on nonminorities is slight, especially where their participation in preference is possible via joint ventures with MBEs); *Concrete Gen. v. Washington Suburban Sanitary Comm'n*, 779 F. Supp. 370, 380-81 (D. Md. 1991) (finding program not appropriately tailored where failure to justify the use of the more intrusive means of restricted bidding for MBEs over less intrusive means, such as waiver of bonding and experience requirements for MBEs).

122. *See, e.g., Billish v. City of Chicago*, 962 F.2d 1269, 1282 (7th Cir. 1992), *reargued en banc, opinion vacated*, 989 F.2d 890 (7th Cir. 1993) (finding heightened judicial

larly, to the extent there is judicial involvement in fashioning or approving an affirmative action remedy, more deference may be accorded by a reviewing court regarding the tailoring of the remedy.<sup>123</sup> Of course, where there has been no underlying litigation prompting adoption of an affirmative action hiring or promotion plan, review of the plan should be like the review accorded set-aside plans, as explored above.

The First Circuit reviewed a challenge to affirmative action measures undertaken pursuant to a consent decree in *Stuart v. Roache*,<sup>124</sup> where nonminority police officers challenged the continued adherence to a pre-*Croson* consent decree favoring promotion of minority officers on the basis of race. The consent decree had been entered in 1980, settling a claim that previous discrimination in hiring and use of a racially biased promotional exam resulted in an almost entirely white force at the sergeant level.<sup>125</sup> The decree required the department to adopt validated non-discriminatory promotional tools and to make appointments to overcome the underutilization of minorities as sergeants, setting an ultimate goal of having nine percent Black sergeants by 1985.<sup>126</sup> By 1985, a validated fair exam had not been adopted, and the decree was extended to 1990.<sup>127</sup> In 1990, only one validated fair exam had been administered and the nine percent goal had not been reached, so the decree was extended until one more fair exam could be administered and the goal for minority

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oversight of consent decree not dispositive, but helpful to ensure that action is based on an appropriate remedial purpose and that the means are narrowly tailored); *Freeman v. City of Philadelphia*, 751 F. Supp. 509, 518 (E.D. Pa. 1990), *aff'd. mem.*, 947 F.2d 935 (3d Cir. 1991) (holding that in context of approval of a consent decree implementing a preferential hiring policy, the court did not require as strong a showing of a statistical imbalance as would be needed to establish a prima facie case of discrimination).

123. *See, e.g.*, *Mackin v. City of Boston*, 969 F.2d 1273 (1st Cir. 1992) (reviewing a challenge to continued adherence to a 1974 consent decree requiring an eligibility preference for minority firefighters, the First Circuit deferred to the district court's determination that, although a race-neutral exam was adopted in 1987 and 1989 hiring of minorities was in greater proportion than their 1974 representation in the general population, continued affirmative action was necessary and the decree was sufficiently tailored in that it provided only a limited advantage to only qualified minorities for a limited period of time, with little disturbance to the expectations of nonminorities).

124. *Stuart*, 951 F.2d 446 (1st Cir. 1991).

125. *Id.* At that point, only one of 222 sergeants (0.45 percent) was Black, though Blacks represented 5.5 percent of the police force and 20 percent of the general population. In 1971, there had been a court determination that the city discriminated against Blacks at the entry level for the police force. *Id.*

126. *Id.*

127. *Id.*

representation was raised to 15.5 percent since it was estimated that twenty percent of the promotion eligible force would be Black.<sup>128</sup> The court upheld use of the plan, finding that the appropriate statistical comparison<sup>129</sup> yielded a prima facie case of discrimination, augmented by the earlier findings that discrimination in the entry level exam had further lowered the pool of Blacks eligible for promotion.<sup>130</sup> Likewise, the court found the plan narrowly tailored since it benefitted only the pool of qualified minorities, the goals were linked to the size of that pool, the advantage was limited and of small impact on nonminorities, the duration was limited, and race-neutral alternatives would not be effective.<sup>131</sup>

In *Crumpton v. Bridgeport Education Association*, the Second Circuit had to address the much thornier issue involved in an attempt to add a preferential lay-off policy to an existing affirmative action hiring policy developed pursuant to a consent decree.<sup>132</sup> The underlying class action suit, alleging segregation in the Bridgeport school system, was never litigated; the parties entered into a consent decree requiring, *inter alia*, an affirmative minority teacher recruitment program.<sup>133</sup> The court then approved a hiring plan that required the city to use its best efforts to hire minority teachers at a rate at least equal to that for nonminority teachers until the percentage of Black and Hispanic teachers was equal to the proportionate representation of those groups in the area workforce.<sup>134</sup> When lay-offs of teachers later became necessary, the city sought and obtained district court approval of an interpretation of the hiring plan to impose an absolute preference for the retention of minority teachers.<sup>135</sup> On review, the Second Circuit refused to accept the parties' stipulations as to prior discrimination in the school system as providing

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128. *Id.*

129. The court noted that this comparison between the numbers of minorities promoted and the numbers of minorities eligible for promotion was appropriate, contrasting it with the statistical comparison made in *Croson*. The court specifically noted that it would not be appropriate to compare the number of minority promotions to the number of minorities who passed the test since the problem was that the test unfairly disqualified minorities. *Id.* at 450-51.

130. *Id.* at 452.

131. *Id.* at 453-55.

132. *Crumpton*, 993 F.2d 1023 (2d Cir. 1993).

133. *Id.* at 1025. The consent decree was entered in 1979. *Id.*

134. *Id.* at 1026.

135. *Id.* at 1027.

an adequate basis upon which the city could deem the preferential lay-off policy as necessary to remedy the identified effects of past discrimination.<sup>136</sup> The court went on to conclude that the proposed modification to the plan also failed in that the absolute preference imposed far too harsh a burden on nonminorities.<sup>137</sup>

The Third Circuit summarily affirmed the district court's approval of a consent decree allowing for out of rank order hiring of minority police officers, pending adoption of a valid exam, in *Freeman v. City of Philadelphia*.<sup>138</sup> The decree settled an underlying claim that the written exam administered for police recruits discriminated against Blacks, and capped a series of lawsuits charging discrimination in various parts of the police recruitment process.<sup>139</sup> The test results did show a disparate impact on Blacks, particularly when those passing the test were rank ordered.<sup>140</sup> There was no evidence that the test had been validated and, in fact, anecdotal evidence indicated that the test was not an effective predictor of job performance.<sup>141</sup> The order forbade the certification of an eligibility list based on test results if Blacks had a pass rate significantly lower than that of other racial groups or if the percentage of Blacks in the top 1000 names on the list was significantly less than the percentage of Blacks who passed the test, unless the court certified that the test was a valid indicator of job performance, or the city appointed Blacks from the list in proportion to their pass rate on the test.<sup>142</sup> The district court found that manifest racial imbalance, sufficient to establish a disparate impact, warranted the approval of the affirmative action measure, particularly since the

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136. *Id.* at 1028. The court specifically noted that the stipulation of facts was not equivalent to a judicial determination that prior discrimination existed in the school system. *Id.*

137. *Id.* at 1030-31. Because of a provision in the contract between the city and the teachers' union agreeing that lay-off policies should be modified to preserve gains made under the affirmative action hiring plan, the Second Circuit intimated that a less drastic lay-off preference, such as one maintaining the proportional representation of minorities, could pass muster. *Id.* at 1026, 1031.

138. *Freeman*, 751 F. Supp. 509 (E.D. Pa. 1990), *aff'd. mem.*, 947 F.2d 935 (3rd Cir. 1991).

139. *Id.* at 511.

140. *Id.* at 513-14. White applicants were significantly disproportionately represented in the highest ranks. *Id.*

141. *Id.* at 515.

142. *Freeman*, 751 F. Supp. at 512. The city was also charged with soliciting alternative valid testing ideas. *Id.*



measure addressed the problem, imposing little hardship on nonminorities, and would be temporary pending adoption of a validated exam.<sup>143</sup>

*Maryland Troopers Association, Inc. v. Evans* involved a challenge to a consent decree under which the Maryland State Police agreed to hire and promote Black troopers in specified percentages.<sup>144</sup> The decree at issue settled a lawsuit alleging ongoing racial discrimination in the hiring and promotion of troopers.<sup>145</sup> The evidentiary basis for the design and approval of the decree consisted of a report citing cronyism within the Maryland State Police as a culprit in the low representation of Blacks in the upper ranks of the force and a statistical comparison showing a disparity between the percentage of Blacks in the various ranks of the force and the representation of Black Maryland residents working in jobs with equivalent job skills.<sup>146</sup> The Fourth Circuit found this evidence void of any showing that the state had engaged in discrimination justifying the race-based preference. It rejected the attempt to equate cronyism with racism and it refused to infer that discrimination, rather than a preference among Blacks for non-police work, accounted for disparities in the proffered statistical comparisons of numbers of Blacks in various ranks and numbers of Blacks in “equivalent”

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143. *Id.* at 516-19. The court actually treated this as a voluntary affirmative action undertaking, distinguishing between the discretion permitted for volitional behavior of an employer and need for a finding of misconduct to support the coercive power of a court. *Id.* at 516. The court also noted that the plan at issue here did not interfere with nonminorities' interests since no-one has a vested interest in being hired on the basis of performance on an unvalidated exam. *Id.* at 518.

144. *Maryland Troopers Assoc.*, 993 F.2d 1072 (4th Cir. 1993). The overall goal was 22 percent representation for Blacks. The decree did not require the hiring or promotion of anyone not otherwise qualified. *Id.* at 1075.

145. In an earlier case, the United States had sued Maryland for racial discrimination in the hiring of state troopers. That litigation was resolved by a consent decree setting a goal of achieving overall representation of 16 percent Black troopers in five years. Later changes in the terms of the decree led to adoption of a plan setting numerical hiring and promotion goals to be effective until a non-biased process was implemented. Under that plan, the percentage of Black troopers hired and promoted increased. *Id.* at 1072-75. The decree at issue in the instant case arose from a suit filed later.

146. *Id.* at 1073-76. Census data was used to identify the percentage of Blacks employed in jobs deemed by the Coalition of Black Maryland State Troopers (plaintiffs in the underlying lawsuit) and the Maryland State Police to have equivalent skills to particular positions within the force. At the entry level, the comparison was made to the percentage of Black Maryland residents who met the minimum qualifications for a state trooper, i.e. 20-58 years old, with a high school diploma. *Id.* at 1075-76.

jobs, absent some individual complaints of discriminatory treatment.<sup>147</sup>

The Sixth Circuit has had several occasions to address the constitutional requirements for public sector affirmative action. In *Long v. City of Saginaw*, former police officers challenged an amendment to the city's affirmative action plan that authorized hiring of new minority officers at the expense of recalling furloughed officers.<sup>148</sup> The underlying affirmative action plan was adopted in 1974 in response to a report by the Human Relations Commission that minorities were underutilized in various city departments, including the police department, and imposed an 80 percent minority hiring goal for the police department.<sup>149</sup> Due to a lack of hiring and unsuccessful efforts to recruit minorities, the percentage of Blacks on the force remained very low. Facing first a moratorium on new hiring, and later lay-offs, the city and the police officers' union entered into an agreement overriding vested seniority rights in order to supplant recalls with new minority hires.<sup>150</sup> This court focused on the second prong of strict scrutiny analysis and found the burden here imposed on nonminorities too burdensome.<sup>151</sup> Especially in view of the fact that there was no evidence of discrimination-based complaints or litigation justifying the remedial relief, less intrusive means, such as preferential hiring, were all that the court would permit to meet the city's goals of increasing minority representation on the police force.<sup>152</sup>

*Vogel v. City of Cincinnati* involved another affirmative action plan adopted to increase minority representation in the police force, although this plan was adopted pursuant to entry of a consent decree settling a discrimination claim brought against the city by the Justice Department.<sup>153</sup> At that time, 33.7 percent

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147. *Id.* at 1077-78. The court discounted the proffered statistics because it found no gross disparity, thus leaving open the possibility that qualified Blacks simply preferred non-police work, and because there was no corroboration of the statistical disparity with anecdotal evidence of individual experiences of discrimination. *Id.* at 1077. Because of its conclusion that the affirmative action plan was not justified by the record, the court never reached the issue of whether the plan was narrowly tailored.

148. *Long*, 911 F.2d 1192 (6th Cir. 1990).

149. *Id.* at 1194.

150. *Id.* at 1195.

151. *Id.* at 1196-97.

152. *Id.* at 1197.

153. *Vogel*, 959 F.2d 594 (6th Cir. 1992), *cert. denied*, 113 S.Ct. 86 (1992). The de-

of the applicants for positions on the force were Black, though only 20.4 percent of the appointments made were Blacks, and only 9.9 percent of officers on the force were Black while the city population was twenty-four percent Black.<sup>154</sup> The ultimate goal of the decree was minority representation on the force proportionate to minority representation in the qualified labor pool, and an interim goal was set to hire minorities in at least the percentage they represented in the current recruit class.<sup>155</sup> The decree required no unnecessary hiring and no hiring of less qualified persons as evaluated according to properly validated selection devices, and would terminate when the ultimate goal was reached.<sup>156</sup> The court accepted the statistical comparisons relating specifically to the Cincinnati police force and to the applicant pool rather than general population figures as giving the city a strong basis for concluding that remedial action was necessary.<sup>157</sup> It also found the goals, set according to the minority representation achieved after affirmative recruitment efforts, provided a sufficient link between the remedy and the identified discrimination.<sup>158</sup>

The dissolution of a consent decree implementing an affirmative action plan was appealed in *Jansen v. City of Cincinnati*.<sup>159</sup> In the decree, resolving claims of racial discrimination in hiring for firefighter positions, the city agreed to pursue a goal of achieving 18 percent minority representation in its overall workforce,<sup>160</sup> subject to the availability of qualified minorities, with one measure of effort requiring at least 40 percent minorities in the firefighters recruit class.<sup>161</sup> The city implemented the decree by using dual hiring lists, by race, for all recruits success-

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cree also covered women, but that aspect of the plan is omitted from the discussion here.

154. *Id.* at 600.

155. *Id.* at 596. The 1980 recruit class was 34 percent minorities as the result of recent recruiting efforts. *Id.*

156. *Id.*

157. *Id.* at 600-01.

158. *Id.*

159. *Jansen*, 977 F.2d 238 (6th Cir. 1992), *reh'g. en banc denied*, 1992 U.S. App. LEXIS 34153 (6th Cir. Dec. 29, 1992), *cert. denied*, 124 L.Ed.2d 254, 1993 U.S. LEXIS 3262 (1993).

160. The 18 percent minority representation was reached in 1986. *Jansen*, 977 F.2d at 241.

161. *Id.* at 240. The decree set out hiring goals by percentage goals and target dates (1974-1980). *Id.*

fully completing all phases of the recruitment process.<sup>162</sup> The Sixth Circuit found that a manifest racial imbalance justified the 1974 decree, and that changes in the city's racial composition, together with new claims of discrimination brought in 1990 prevented the challengers from carrying their burden of negating the inference of discrimination.<sup>163</sup> The use of dual hiring lists passed the "narrowly tailored" test since the written exams used by the department had never been validated, except as ensuring minimum qualifications, the exam was only one of five qualification factors, and failure to use dual lists would have resulted in a significant underrepresentation of minorities.<sup>164</sup>

The Seventh Circuit case of *Billish v. City of Chicago* consolidated review of two cases involving affirmative action hiring and promotion programs adopted in conjunction with consent decrees settling claims of racial discrimination in the city's fire department.<sup>165</sup> A 1974 consent decree established an interim 50 percent minority hiring goal and a long range goal of increasing minority representation in the fire department to approximate minority representation in the general population.<sup>166</sup> The other decree capped a series of challenges to the city's promotional exam, and imposed an interim one minority to four nonminority hiring ratio in mid-rank positions, with a long term goal of bringing minority representation in higher ranks into parity with minority representation in lower ranks.<sup>167</sup> Minority promotions

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162. *Id.* Civil service rules also permitted hiring by the "rule of three," allowing any one of the top three candidates to be hired. *Id.* at 240-41.

163. *Id.* at 244-45. Though the goal of 18 percent minority representation in the department overall had been reached, the decree had not set a maximum goal, and the court refused to interpret the decree as inferring that minority representation beyond 18 percent would not raise an inference of discrimination in hiring. *Id.* at 244.

164. *Id.* at 243-44.

165. *Billish*, 962 F.2d 1269 (7th Cir. 1992), *reargued en banc and opinion vacated*, 989 F.2d 890 (7th Cir. 1993).

166. *Billish*, 962 F.2d at 1273. At the time the decree was entered, there was only five percent minority representation in the fire department. General population figures were used for comparison because entering firefighters needed no special training or academic achievement. Since little hiring had been done through 1978, and minority representation was only nine percent, the order was extended to 1980. In 1979, a new eligibility list was adopted. If the list was used for more than two years or 500 hires, 50 percent of further hiring was to be minority hires. *Id.*

167. *Id.* at 1273-74. The decree authorized expansion of the candidate pool by lowering the passing grade cut-off, and included goals of redesigning the promotion procedure to eliminate disparate impact and providing training to those seeking promotions. These goals were included in the collective bargaining agreement between the city and the firefighters. *Id.* at 1274-75.

were made out of rank order on the basis of this affirmative action plan.<sup>168</sup> The Seventh Circuit panel found that the statistical evidence of discrimination underlying the consent decrees helped establish the need for remedial relief,<sup>169</sup> and that the city was justified in concluding that affirmative action was still necessary to comply with the underlying decree because of continuing problems attaining increased minority representation in the upper ranks of the department.<sup>170</sup> In the aggregate, the panel concluded that the city had a strong basis for concluding that its hiring and promotion policies were necessary.<sup>171</sup> It similarly found the more recent promotion plan narrowly tailored in that promotions out of rank order were only made where no alternative would work.<sup>172</sup> The goals were flexible, limited, and reasonably related to the relevant labor market,<sup>173</sup> and the impact on nonminorities was minimal.<sup>174</sup> Subsequently, the Seventh Cir-

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168. *Id.* at 1275-76. Regarding 1986 promotions made on the basis of the 1979 eligibility list, the first eighteen promotions of lieutenants to captains, made in rank order, went to white firefighters. Two minority firefighters were promoted after the cut-off score was lowered. The personnel department certified the lower ranked minorities as qualified based on additional experience. The test had not been validated, and expert testimony indicated that it would not be possible to validate the test. *Id.* at 1275. Regarding 1987 promotions to the rank of engineer, made on the basis of the newer eligibility list, the last eight of fifty-six promotions were minorities out of rank order. *Id.* at 1276. Later promotions to captain, based on the new captain eligibility list, included one out of rank order promotion based on race. *Id.*

169. *Id.* at 1283-84. The court noted that the heightened judicial oversight involved in a consent decree helps to ensure that race-conscious action is based on an appropriate remedial purpose and that the action is narrowly tailored to further that purpose. *Id.* at 1282. The court also approved of the statistical comparison relied upon, comparing minority representation in each rank against minority representation in the rank below, from which promotions are drawn. *Id.* at 1284.

170. *Jansen*, 977 F.2d at 1282-83.

171. *Id.* at 1289.

172. Since promotions to a higher rank were only made from the rank below, other mechanisms, such as increasing recruitment efforts, were not available. *Id.* at 1290.

173. Firefighters had to meet minimum qualifications to get a job, the preferential promotional scheme was limited to three years or a shorter duration during which the goals were attained, and it was realistic to tie the goals to the percentage of minorities in the ranks below, from which promotions were to be drawn. *Id.*

174. *Id.* at 1291. Nonminorities have no vested right to rank order promotions, and *Croson* merely requires that those benefitted by affirmative action be members of the group(s) who suffered the effects of prior discrimination. *Id.* at 1291-92. The court remanded the *Billish* case (involving the claim based on out of rank hiring from the 1979 captain eligibility list). *Cf.* *Chicago Fire Fighters Union Local No. 2 v. Washington*, 736 F. Supp. 923 (N.D. Ill. 1990) (involving out of rank order promotions from the 1986 engineer eligibility list and the 1987 captain eligibility list, here approved by the Seventh Circuit) for reconsideration of the equal protection claim because the district court had not applied strict scrutiny in deciding that issue. *Id.* at 1302. Since the evidence justify-

cuit, *en banc*, vacated the panel opinion and remanded the case for development of the record and trial of the issues of whether the affirmative action efforts were justified on the basis of past discrimination and necessary because of continuing discriminatory effect.<sup>175</sup>

A consent decree settling extensive, long term litigation concerning discrimination on the basis of sex and race in the city's fire department was subject to challenge in *Davis v. City & County of San Francisco*.<sup>176</sup> Several earlier lawsuits involved disparate impact claims regarding the department's entry-level and promotional exams, which had never been validated.<sup>177</sup> Litigation underlying the consent decree at issue alleged continued adverse impact on minorities regarding the city's most recently adopted entrance and promotional exams.<sup>178</sup> The Ninth Circuit found that the statistical disparities, sufficient to establish a *prima facie* case of discrimination under Title VII, were sufficiently probative of discrimination in the context of non-skilled entry-level employment, and that the department workforce, from which promotions were drawn, was the appropriate comparison group for targeting minority representation goals for promotion.<sup>179</sup> Likewise, except for needing addition of a sunset provision, the court deemed the program narrowed to permit flexible goals,<sup>180</sup> reasonably related to the relevant labor force,<sup>181</sup>

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ing the city's remedial action would parallel that approved in the *Chicago Fire Fighters* case, the focus on review was to be whether the granting of out of rank promotions from the earlier eligibility list was also narrowly tailored to the city's remedial purpose. *Id.* at 1301.

175. *Billish*, 989 F.2d 890 (7th Cir. 1993). One issue prompting the remand was focused on whether the department should have delayed making the out of rank order hires until the results of a new, validated exam, expected to be available within months, were indeed available.

176. *Davis*, 890 F.2d 1438 (9th Cir. 1989). On the union's subsequent appeal of this case, the court determined that the union lacked standing to appeal since no member it represented had suffered an injury in fact. *See United States v. City and County of San Francisco*, 979 F.2d 169 (9th Cir. 1992).

177. *Davis*, 890 F.2d at 1442-43. This case refers to the district court case, 696 F. Supp. 1287 (N.D. Cal. 1988), for a complete history of the underlying litigation. What becomes obvious from a quick review of this history is that continued attempts to adopt a valid, non-discriminatory exam were unsuccessful.

178. 890 F.2d at 1443-44.

179. *Id.* at 1447.

180. *Id.* Referring to the district court's analysis of the tailoring of the remedy, *see United States v. City & County of San Francisco*, 696 F. Supp. 1287, 1309 (N.D. Cal. 1988) (holding only qualified minorities were to be hired or promoted, adjustment of goals was contemplated for changes in circumstances, and a waiver was included).

and not unduly burdensome to nonminorities.<sup>182</sup>

In *Officers for Justice v. Civil Service Commission*, the Ninth Circuit approved of the practice of banding scores from a police department promotional exam in order to increase the number of minorities promoted.<sup>183</sup> A prior consent decree settling race and sex discrimination claims had set target minority appointment goals based on minority representation in the qualified applicant pool, with an ultimate goal of 45 percent minority representation within the department.<sup>184</sup> The court deemed the evidence of past discrimination supporting the original consent decree, augmented by a continued adverse impact in the most recent exam, enough to provide a strong basis for concluding that the effects of discrimination continued to exist, and that use of banding, with consideration of selection factors in addition to race, was an allowable mechanism to address that discrimination.<sup>185</sup>

On remand from the Eleventh Circuit, a district court in Florida reconsidered a constitutional challenge to an affirmative action program permitting preferential hiring of women and minorities in light of *Croson*.<sup>186</sup> In 1983, the fire department found that its workforce had a significant underrepresentation of minorities and women as compared with representation of those

181. *Davis*, 890 F.2d at 1447, referring to 696 F. Supp. at 1310. The goals for minority representation at the unskilled, entry level were far below the percentage representation of these groups in the local population, and the figures for promotion were not out of line with the numbers of minorities in the force, from which promotions would be drawn.

182. *Davis*, 890 F.2d at 1447, referring to 696 F. Supp. at 1310. Nonminorities still had ample opportunity to be hired and promoted.

183. *Officers for Justice*, 979 F.2d 721 (9th Cir. 1992). Banding of scores allows the city/county to treat scores within a set range as substantially equivalent. In this case, race would be a factor of selection from within a particular band. *Id.* at 724.

184. *Id.* at 723. The Ninth Circuit noted that the earlier case was based on an undisputed history of discrimination. The decree also prohibited the use of unvalidated discriminatory selection procedures. *Id.* In an earlier decision, the court had disapproved of a scoring system that changed the relative weight given different components of the exam in order to minimize disparate impact. *San Francisco Police Officer's Ass'n*, 869 F.2d 1182 (9th Cir. 1988), cert. denied, 493 U.S. 816 (1989).

185. *Officers for Justice*, 979 F.2d at 726-27. The court found that the evidence was enough to constitute a prima facie case of discrimination, and that the commission need not first prove the exam invalid in order to justify the use of race as a plus factor in an affirmative action program. *Id.*

186. *Peightal v. Metropolitan Dade County*, 815 F. Supp. 1454 (S.D. Fla. 1993).

groups in the local population.<sup>187</sup> In response, the department began ranking applicant groups separately based on race and sex, and hired in accordance with numerical goals calculated on the basis of the number of openings expected, the expected number of qualified applicants in each race/sex grouping, and the extent of underrepresentation in each category.<sup>188</sup> At trial on remand, the department augmented the evidentiary basis for the program by showing that it had made race-neutral attempts to increase minority representation with only limited success, that evaluation of test scores of applicants still showed that of those passing the entry-level test, nonminorities were significantly overrepresented in the top scorers, and that several of the selection procedures had an adverse impact on minorities but could not be validated to predict future job performance.<sup>189</sup> The court found this evidence, sufficient to establish a prima facie case of discrimination because comparison to general population figures was appropriate for these entry-level firefighter positions, a strong basis for the remedial action.<sup>190</sup> Because the department

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187. In 1983, the fire department workforce of 921 was seventy-five percent white, though whites represented only forty-seven percent of the population, twelve percent Black, though Blacks represented seventeen percent of the population, fourteen percent Hispanic, though Hispanics represented thirty-six percent of the population, and one percent female, though females represented fifty-two percent of the population. The disparities in prior years were similar or more magnified. *Id.* at 1458.

188. *Id.* at 1458. A particular race/sex group was deemed to be significantly underrepresented if representation of members of the group in the fire department was less than 70 percent of the group's representation in the general (local) population. The long term goal of the program was to relieve underrepresentation of these groups in the department. The preferential hiring was to end when a significant disparity no longer existed. *Id.*

189. *Id.* at 1458-60. The department produced testimony about active minority recruitment efforts prior to adoption of the program, statistics showing that representation of minorities in the top 100 scorers on the test were 4.8 standard deviations from expected, different pass rates for whites, Blacks, Hispanics, and women (85%, 56%, 23%, 42%, respectively) on the written test, and physical test components unrelated to firefighting (i.e. swimming). The department also pointed to settlement of earlier litigation which required it to validate its selection procedures and to recruit Blacks. *Id.* at 1460-61.

190. *Id.* at 1462-64. The court acknowledged that entry-level firefighters had to meet some other qualifications, such as passing a vision test, but found that these specifics would be impossible to account for statistically. Absent challengers' ability to show that consideration of such factors would be possible and would significantly change the statistical comparison, comparison to general population figures would be allowed here. *Id.* at 1464. The court noted that settlement of the past litigation and anecdotal evidence of discrimination, alone, would not be enough to justify this affirmative action program, but are useful in supporting the justification based on statistical disparities. *Id.* at 1465. The court also specifically allowed consideration of evidence produced after implementation of the program to subsequently justify adoption of the program. *Id.* at 1466.



had attempted some race-neutral alternative, set flexible goals linked to the relevant labor market, limited benefits of the program to qualified minorities, incorporated a provision for termination upon achievement of its goals, and was of limited impact on the rights of nonminorities, its program was sufficiently tailored to the allowable remedial purpose.<sup>191</sup>

## V. A PATTERN OF BETTER SUCCESS?

It is clear that state and local affirmative action programs in employment settings have been far less vulnerable to successful attack under the strict scrutiny standard. Part of the explanation, as noted earlier, is rooted in the fact that the genesis for many of these programs is a consent decree settling charges of discrimination against the acting entity. This provides a direct link between the existence and effects of the alleged discrimination. In those cases where the underlying allegations of discrimination have been substantiated by a court, or at least subjected to some judicial scrutiny, other courts have been willing to accept that discrimination as sufficient evidence to support the entity's resort to race-specific remedial action.<sup>192</sup> However, where proceedings have not progressed to the point where there has been judicial analysis of the underlying claims, courts reviewing the resultant programs have been unwilling to condone establishment of affirmative action programs based on mere assertions of discrimination.<sup>193</sup>

Whatever record has been produced to substantiate the charges of discrimination in the underlying suit also serves to provide the link between the challenged conduct and the race-specific effect, particularly where the conduct may appear to be race-neutral. The record, containing allegations of individual experiences of discrimination and/or patterns of discriminatory impact, is then available to support the choice of remedy as nec-

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191. *Id.* at 1466-71.

192. *See supra* note 122 and accompanying text. Not only can judicial review give independent credence to allegations of discrimination, where the record relating to charges of discrimination is developed, a pattern of disparate impact may also be substantiated. *Id.*

193. *See, e.g.,* *Crumpton v. Bridgeport Educ. Ass'n.*, 993 F.2d 1023 (2nd Cir. 1993) (refusing to equate parties' stipulations as to existence of discrimination with judicial determination that such discrimination existed.)

essary to counter the identified discriminatory effects.

Another problem associated with many set-aside programs, which tends to be eliminated in the context of affirmative action programs adopted pursuant to consent decrees, is the problem of overinclusiveness. While set-aside programs are generally adopted in a proactive attempt to address discrimination, they tend to expand coverage to include all "marginal" groups. Affirmative action programs adopted in response to particular charges of discrimination tend to focus reaction on the specific group(s) making the charges. Thus, they are not often vulnerable to charges of overbreadth.

In this light, the apparent increased approval for state and local affirmative action programs in employment is not really inconsistent with the results of challenges to set-aside programs.<sup>194</sup> Thus, examination and comparison of the features of various state and local affirmative action employment plans yields a similar measure of constitutional soundness. Again, a strong and relevant statistical showing of underrepresentation of minorities, augmented by experiences of the individuals alleging discrimination, is a requisite to success.<sup>195</sup> Affirmative action goals extending beyond the remedy justified on the basis of the underlying lawsuit must be independently justified.<sup>196</sup> Goals must

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194. This statement is not intended to contradict the difference in burdens of proof for those challenging a program adopted by a legislative body versus a court approved consent decree. *Croson* clearly imposed the burden of proving the existence of local effects of discrimination justifying race-conscious action upon the entity undertaking such action. In contrast, challengers bear the burden of disproving underlying claims of discrimination relied upon by a court in approving remedial action based thereon. This difference may account for some difference in the strength of statistical data necessary to meet the required justification for race-conscious relief.

195. *Cf. Peightal v. Metropolitan Dade County*, 815 F. Supp. 1454, 1457-58 (S.D. Fla. 1993) (finding program justified by significant statistical disparities between representation of various groups in unskilled entry-level firefighter positions and representation of those groups in general population, documented over a seven year period); *Maryland Troopers Ass'n v. Evans*, 993 F.2d 1072, 1077-78 (4th Cir. 1993) (rejecting statistical comparison of numbers of Blacks at various levels on police force with numbers of Blacks in "equivalent skilled jobs" in the absence of reference to specific complaints of discriminatory treatment).

196. *Cf. Stuart v. Roache*, 951 F.2d 446, 448 (1st Cir. 1991) (allowing extension of decree, and modification of minority promotion goal, based on evidence of change in racial composition of relevant labor pool); *Long v. City of Saginaw*, 911 F.2d 1192, 1197 (6th Cir. 1990) (adopting agreement calling for new minority hires to displace furloughed nonminority officers subject to recall impermissible not justified by evidence of department's discrimination).

reasonably relate to dismantling the identified discrimination and must be limited by the availability of qualified minority group members.<sup>197</sup> Goals must also avoid placing undue burdens on nonminorities.<sup>198</sup> Finally, the program must provide for its termination upon achievement of its goals.<sup>199</sup>

## VI. CONCLUSION

Despite an apparent variation in the federal courts' willingness to approve state and local affirmative action plans in employment settings versus state and local minority set-aside programs, this review of cases indicates that the same basic parameters define a constitutionally acceptable program of either type.<sup>200</sup> Lower federal courts applying *Croson* are closely scrutinizing the evidence relied upon to justify state and local resort to race-based affirmative action, as well as the design of the affirmative action program in relation to that evidence. Courts are requiring the acting entity to establish the existence of an underrepresentation of minorities in a given arena based upon a statistical disparity between the local availability of qualified minorities and the rate of their participation in the arena. Courts are further requiring substantiation of a discriminatory reason for the underrepresentation with individual accounts of experiences of discrimination. This record then provides the measure for the scope of permissible action. The program and goals adopted must relate directly to overcoming the documented underrepresentation in the manner least intrusive to nonminority interests. Clearing these rather high hurdles has proven more difficult for entities undertaking proactive at-

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197. *Cf. Stuart v. Roache*, 951 F.2d 446, 454 (1st Cir. 1991) (finding minority promotion goals appropriately linked to pool of qualified minorities); *Maryland Troopers Ass'n v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993) (holding that goal must be reasonably related to minority representation in qualified labor pool, not to representation in general population).

198. *Cf. Crumpton v. Bridgeport Educ. Ass'n*, 993 F.2d 1023, 1031 (2nd Cir. 1993) (finding preferential lay-off policy too burdensome on nonminorities); *Freeman v. City of Philadelphia*, 751 F. Supp. 509, 518 (E.D. Pa. 1990), *aff'd mem.* 947 F.2d 935 (3d Cir. 1991) (holding out of rank order hiring does not unnecessarily trammel rights/expectations of nonminorities).

199. *See, e.g., Davis v. City & County of San Francisco*, 890 F.2d 1438, 1447 (9th Cir. 1989) (finding program was tailored to its authorized remedial purpose, but required addition of sunset provision). Of course, consent decrees are subject to continued judicial oversight during their life.

200. *See supra* notes 111-121, 192-199 and accompanying text.

tempts to address local discrimination than for entities adopting affirmative action in response to legal claims of discrimination.

However, this review additionally shows that, in spite of the increasing hostility toward race-based affirmative action,<sup>201</sup> affirmative action programs carefully crafted in response to specific local experiences of discrimination will pass muster under challenge.<sup>202</sup> Although one may take issue with the motivation for imposition of the more restrictive analysis regarding these programs, the consequent imposition of requirements that a specific, local factual study of existing effects of discrimination support adoption of the program, and that the design of the program effectively addresses the findings of such a study, may at least help alter general attitudes toward affirmative action. At least one widely held belief, that affirmative action programs merely grant gratuitous benefits to (often unqualified) minorities, fails in the face of the strict scrutiny standard as announced and applied under *Croson* and subsequent cases. Under this analytic framework, though, the next and perhaps more important step, permitting affirmative action efforts based on the goal of achieving diversity, remains elusive.<sup>203</sup>

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201. See, e.g., Sylvester Monroe, *Does Affirmative Action Help or Hurt?*, TIME, May 27, 1991, at 23.

202. See also Joint Statement, *Constitutional Scholars' Statement of Affirmative Action After City of Richmond v. J.A. Croson Co.*, 98 YALE L.J. 1711 (1989).

203. The *Croson* focus on past discrimination as justification for race-conscious action has been adopted without exception by the lower courts. See, e.g., *F. Buddie Contracting Co. v. City of Elyria*, 773 F. Supp. 1018 (N.D. Ohio 1991) (finding set-aside adopted for purposes of promoting general welfare and avoiding future discrimination failed because it was not adopted in response to findings of past or present discrimination); see also *supra* notes 66-71 and accompanying text. This narrow focus ignores the compelling societal interest in some circumstances to legislate to achieve equal results rather than merely equal opportunity. This interest may stem from a simple need for diversity to achieve equality, such as a need to have teacher/role models representing the student constituencies of a school, or may arise from the awareness that the substantive values pervading the "procedural" mechanisms of equal opportunity are too far ingrained to be fully eradicated. See, e.g., Michel Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1735-45 (1989). Justice Stevens, and now Justice Ginsburg, have specifically recognized the potential of justifying public sector affirmative action programs with a goal of achieving diversity. See *supra* note 26 and accompanying text.