NEW JERSEY'S CASINO SET-ASIDE PROGRAM AFTER *CROSON*

*David Overlock Stewart**
*Robert B. Gordon***

I. New Jersey's Casino Set-Aside Act

A. *Purposes Of The Act*

New Jersey casinos are subject to affirmative action obligations in contracting for supplies and services.[1] The casino set-aside program sets goals for contracting with both minority business enterprises (MBEs) and women's business enterprises (WBEs).[2] Although there is no legislative history asserting any factual premises for the statute,[3] the Act does contain a statement of legislative purpose. The Act provides:

> The Legislature declares that the opportunity for full minority and women's business enterprise participation in the casino industry is essential if social and economic parity is to be obtained by minority and women business persons and if the economy of Atlantic City is to be stimulated as contemplated by the 'Casino Control Act.'[4]

The statute thus identifies two principal purposes behind the legislation: the general achievement of social and economic equality for minorities and women and the stimulation of the Atlantic City economy.[5]

In 1988, the Casino Control Commission (Commission) issued

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* B.A., Yale College, 1973; J.D., Yale Law School, 1978; Partner, Ropes & Gray, Washington, D.C.

** B.A., Wesleyan University, 1983; J.D., University of Michigan Law School, 1986; Associate, Ropes & Gray, Boston.

[1] N.J. STAT. ANN. §§ 5:12-184 to -190 (West 1988); N.J. ADMIN. CODE tit. 19, §§ 53-2.1 to -2.12 (1989).

[2] N.J. STAT. ANN. §§ 5:12-186, -187 (West 1988); N.J. ADMIN. CODE tit. 19, §§ 53-2.3, -2.5 (1989).

[3] The original bill was reported out of the legislature's State Government Committee under the sponsorship of Senator Lipman. No public hearing was held. *See* N.J. Legis. Index (1985).

[4] N.J. STAT. ANN. § 5:12-184 (West 1988).

[5] *See id.*

proposed regulations implementing the set-aside statute.[6] The Commission repeatedly referred to the same purposes for the program:

> It is anticipated that the proposed new rules will help to fulfill the legislative policy of creating opportunity for full minority and women business enterprise participation in the casino industry so that social and economic parity may be obtained by minority and women business persons and so that the economy of Atlantic City can be stimulated as contemplated by the Casino Control Act . . . . [T]he primary economic impact of the proposed new rules, namely, the enhancement of casino business opportunities for certified minority and women's business enterprises, is due to the set-aside goals and good faith effort requirements established by Article 13 of the Act.[7]

Neither the Act nor the Commission's rulemaking record states that the statute was intended to remedy ongoing discrimination against minorities and women.[8]

B. *Finding Certified MBEs and WBEs*

The regulations define a minority business enterprise as one which is at least fifty-one percent owned or controlled by persons who are Black, Hispanic, Asian American, American Indian, or Alaskan native.[9] A women's business enterprise is defined as one which is at least fifty-one percent owned or controlled by women.[10]

The Act requires the Department of Commerce and Economic Development to establish a "certification procedure for [MBEs and WBEs] that do business with casino licensees."[11] The Commission has acknowledged, however, that there are not enough certified MBEs and WBEs for casinos to satisfy the set-

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6 20 N.J. Reg. 2446 (1988).

7 *Id.*

8 The authors' research uncovered no study or report suggesting that the casino industry has a history of discrimination in contracting. A recent Commission report notes the disproportionate rate of involuntary discharges among minority workers, but concludes that the statistical disparity is largely due to the concentration of minorities in lower-paying jobs. *See* CASINO CONTROL COMMISSION, AN ANALYSIS OF EMPLOYEE TURNOVER IN THE CASINO HOTEL INDUSTRY 4 (Aug. 1988).

9 N.J. STAT. ANN. § 5:12-185(b)-(c) (West 1988).

10 *Id.* § 5:12-185(d).

11 *Id.* § 5:12-188.

aside goals.[12]

C. *The Set-Aside Goals*

The New Jersey statute provides for a phase-in of the set-aside goals.[13] Beginning in 1988 and continuing through 1990, casino licensees must "make a good faith effort"[14] to spend at least five percent of the dollar value of their contracts for goods and services with certified MBEs and WBEs.[15] In 1991, the set-aside goal rises to ten percent, and in 1994, it increases to fifteen percent.[16] The set-aside goals apply to all goods and services purchased by casinos, with a few specific exceptions: utilities and taxes, financing costs, medical insurance, dues and fees of various sorts, and rents or payments for real property.[17]

Although the set-aside percentages are claimed to be goals, they are coercive. Before each three year compliance period, each casino licensee must submit a plan detailing how it will satisfy the statute's set-aside goals, including: (1) assistance for uncertified MBEs and WBEs in gaining certification;[18] (2) outreach to certified businesses;[19] (3) internal control procedures for documenting good faith efforts to use certified MBEs and WBEs;[20] (4) anticipated purchases from certified businesses;[21] and (5) specific contracts or expenditures anticipated with MBEs and WBEs.[22]

If the Commission approves the plan, the casino licensee must demonstrate continuing good faith efforts toward achieving the set-aside goals.[23] The casino is required to file an annual report with the Commission documenting its purchases during the

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12 21 N.J. Reg. 781-82 (1989).

13 *See* N.J. STAT. ANN. §§ 5:12-186, -187 (West 1988).

14 *Id.* §§ 5:12-186(b), -187(b); N.J. ADMIN. CODE tit. 19, §§ 53-2.3, -2.5 (1989).

15 N.J. STAT. ANN. §§ 5:12-186(a), -187(a) (West 1988); N.J. ADMIN. CODE tit. 19, §§ 53-2.3(a), -2.5(a) (1989).

16 N.J. STAT. ANN. §§ 5:12-186(a), -187(a) (West 1988); N.J. ADMIN. CODE tit. 19, §§ 53-2.3(b)-(c), -2.5(b)-(c) (1989).

17 N.J. STAT. ANN. § 5:12-186(a) (West 1988); N.J. ADMIN. CODE tit. 19, § 53-2.4(a) (1989).

18 N.J. ADMIN. CODE tit. 19, § 53-2.8(a)(1) (1989).

19 *Id.* § 53-2.8(a)(2).

20 *Id.* § 53-2.8(a)(3).

21 *Id.* § 53-2.8(a)(4).

22 *Id.* § 53-2.8(a)(5).

23 *Id.* § 53-2.10(a).

compliance period.[24] The report must address compliance with the approved set-aside plan, contracts during the reporting period, the availability of certified MBEs and WBEs, and any contracts which require a prime contractor to set aside subcontracts for certified MBEs and WBEs.[25] Licensees may also submit any other relevant information about their efforts to meet the set-aside goals.[26]

D. *Meeting the Set-Aside Goal*

If a casino licensee achieves the set-aside percentage during its annual reporting period, it is entitled to a prima facie determination of good faith compliance.[27] If the Commission has no "cause to question the actual good faith efforts of [the] casino licensee,"[28] that determination will suspend further inquiry.

In written comments accompanying the regulations, however, the Commission has reserved the power to review the casino's good faith efforts even when the prescribed set-aside goals have been met.[29] Although the statute and regulations provide little guidance as to when this further scrutiny will be triggered, the Commission has claimed broad discretion to do so:

> [T]he primary obligation imposed on casino licensees by [the Act] is the requirement that good faith efforts be made to reach the goals established therein; *mere compliance with the numbers alone may not be sufficient* if a casino licensee has not actually made good faith efforts to provide certified MBEs and WBEs with the opportunity to compete for the business which casino gaming has generated.
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> There are various ways a casino licensee could satisfy the statutory numerical goals yet fail to exercise good faith efforts as required by the Act. For example, a licensee could engage in one large contract with one certified enterprise and make no further efforts to utilize the services of other certified enterprises. Similarly, a record which demonstrated that a casino licensee expended 15 percent of its contracts for goods and

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24 *Id.* § 53-2.10(b).
25 *Id.*
26 *Id.* § 53-2.10(b)(2)(iv) (1989).
27 *Id.* § 53-2.11(a).
28 *Id.* § 53-2.10(c).
29 *Id.* § 53-2.10(c) (1989); 21 N.J. Reg. 784 (1989).

> services with certified MBEs but not a single contract with a certified WBE could legitimately raise questions about the good faith efforts of that licensee to do business with certified WBEs.[30]

Meeting the Act's set-aside goals is only one indicator, albeit an important one, of the casino's good faith.

E. *The Consequences of Failure to Meet Set-Aside Goals*

If the casino does not meet the numerical goals, the Commission will evaluate its efforts based on seven factors: (1) compliance with the casino's approved set-aside plan;[31] (2) the availability of certified MBEs and WBEs;[32] (3) the licensee's willingness to require its prime contractors to subcontract with certified MBEs and WBEs;[33] (4) the gross number of certified MBEs and WBEs engaged by the casino licensee;[34] (5) purchases from certified MBEs compared to certified WBEs;[35] (6) the licensee's participation in conferences, workshops and exhibitions promoting minority and women's businesses;[36] and (7) any other evidence of the licensee's good faith.[37] The regulations do not prescribe how these factors are to be weighed,[38] or when the Commission would conduct such further review of set-aside efforts. The Commission has stated, however, that "no one is in a better position to know the true extent of its good faith efforts than the licensee itself."[39] The Commission noted that it "will identify the basis for further review when the casino licensee is notified of its obligation to file"[40] a report on its good faith efforts, that is, after the period under review has been completed.[41]

After an appropriate hearing,[42] the Commission may impose sanctions if it finds that the casino did not make a good faith ef-

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30 21 N.J. Reg. 783-84 (1989) (emphasis added).
31 N.J. ADMIN. CODE tit. 19, § 53-2.11(b)(1) (1989).
32 *Id.* § 53-2.11(b)(2).
33 *Id.* § 53-2.11(b)(3).
34 *Id.* § 53-2.11(b)(4).
35 *Id.* § 53-2.11(b)(5).
36 *Id.* § 53-2.11(b)(6).
37 *Id.* § 53-2.11(b)(7).
38 *See id.* § 53-2.11(b).
39 21 N.J. Reg. 784 (1989).
40 *Id.*
41 *See id.*
42 N.J. ADMIN CODE tit. 19, § 53-2.10(d) (1989).

fort to meet the set-aside goals.[43] The sanctions may include fines,[44] license conditions,[45] suspension of casino license,[46] or revocation of casino license.[47] The regulations do not specify limits on the amount of fines, the duration of suspensions, or the scope of permissible license conditions.[48] The regulations also fail to indicate which sanction, or combination of sanctions, will be appropriate for which level of infraction.[49] Because the program is in its infancy, there is no history of its implementation.

II. The Constitutional Status of Minority Set-Aside Legislation

The fourteenth amendment's guarantee of equal protection of the laws prohibits governmental discrimination on the basis of race.[50] The Supreme Court has struggled, however, when applying this principle to affirmative action, or preferences to minority or disadvantaged groups.[51] Affirmative action programs present a clash of equal protection interests. The Court has been repeatedly fragmented in balancing the claims of minorities for greater opportunities against the claims of whites who object to their corresponding loss of opportunities.[52]

Of the Supreme Court's ten affirmative action rulings since 1978, four address set-aside preferences of the type enacted by the New Jersey Legislature.[53] The Court has become increas-

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43 *Id.*

44 *Id.* § 53-2.12(a)(1).

45 *Id.* § 53-2.12(a)(2).

46 *Id.* § 53-2.12(a)(3).

47 *Id.* § 53-2.12(a)(4).

48 *See id.* § 53-2.12(a).

49 *See id.*

50 U.S. CONST. amend. XIV, § 1; *see also* Palmore v. Sidoti, 466 U.S. 429 (1984).

51 *See, e.g.*, City of Richmond v. J.A. Croson Co., — U.S. —, 109 S. Ct. 706 (1989); Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Fullilove v. Klutznick, 448 U.S. 448 (1980).

52 *See supra* note 51.

53 The other affirmative action rulings concern the legality of privately adopted and/or judicially ordered racial preferences in employment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(a) - (e) (1982). *See generally* United Steelworkers v. Weber, 443 U.S. 193 (1979) (racial quota for training program contained in private collective bargaining agreement did not violate Title VII); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) (district court order mandating affirmative action in company layoffs disregarded bona fide seniority system and thus violated Title VII); Local 28 of Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986) (court ordered racial preferences for union member-

ingly skeptical of such programs, questioning whether they truly remedy past discrimination, or instead represent social engineering that is impermissibly based on race. A developing majority on the Court is now prepared to strike down minority set-asides under the equal protection clause in all but unusual circumstances.

A. *Minority Set-Asides From 1978 Through 1989*

1. *Bakke*: Justice Powell's Influential Opinion

The Supreme Court first examined minority set-asides in *University of California Regents v. Bakke*[54] wherein the Court struck down a special admissions program of the University of California at Davis Medical School.[55] A white male complained that he had been denied admission because the medical school reserved sixteen of the one hundred seats in each entering class for minorities.[56] The divided Supreme Court found the set-asides unconstitutional, but ruled that race could be a consideration in the admission process.[57]

The divisions among the Justices sharply limit *Bakke*'s clarity as a precedent. Four Justices, Stevens, Burger, Stewart and Rehnquist, would have held the program invalid under Title VI of the 1964 Civil Rights Act, without reaching the constitutional question.[58] In his pivotal opinion, however, Justice Powell stated that all racial classifications must be regarded as "inherently sus-

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ship, as a remedy for egregious past discrimination by union, did not violate Title VII); Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) (Title VII did not prohibit voluntary consent decree mandating affirmative action in minority promotion); Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987) (Title VII did not bar employer's voluntary hiring/promotion preference for women in order to achieve more balanced work force); Martin v. Wilks, — U.S. —, 109 S. Ct. 2180 (1989) (employer not insulated from Title VII liability by consent decree to which new plaintiffs were not a party). The aforesaid cases arose in the private employment setting, and were thus primarily subject to statutory restrictions. These Title VII decisions do not appear to be influencing the constitutional scrutiny applied to legislatively enacted minority set-asides.

54 438 U.S. 265 (1978).

55 *Id.*

56 *Id.* at 277-79.

57 *Id.* at 271-72.

58 *Id.* at 408-21 (Stevens, J., concurring in part and dissenting in part).

pect and thus call for the most exacting judicial examination."[59] Powell applied the strict scrutiny test, requiring the state to "show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary. . . ."[60] Powell's opinion merits close attention because of its influence since *Bakke*.[61]

Powell analyzed the four justifications offered for the set-aside plan: (1) "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession;"[62] (2) "countering the effects of societal discrimination;"[63] (3) "increasing the number of physicians who will practice in communities currently underserved;"[64] and (4) "obtaining the educational benefits that flow from an ethnically diverse student body."[65] Powell held that these interests could not justify removing innocent non-minorities from consideration for public opportunities solely on grounds of race.[66] Applying the strict scrutiny analysis, he concluded that the program amounted to "discrimination for its own sake."[67]

Of particular relevance to the fate of the casino set-aside program, Justice Powell declared in *Bakke* that a racial preference could not be justified as a means of redressing historical or "societal discrimination . . . in the absence of judicial, legislative, or administrative findings"[68] of *specific* past discrimination against those whom the preference would benefit.[69]

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59 *Id.* at 291.

60 *Id.* at 305 (quotations omitted).

61 Ironically, the four dissenting Justices, Brennan, White, Marshall, and Blackmun, concluded that the admissions program did not violate the fourteenth amendment. *Id.* at 324-421. Thus, of the five members of the Court who opined on the constitutionality of the set-aside plan, only one, the swing Justice who announced the judgment of the Court, found that the plan violated equal protection. *Id.* at 269-324.

62 *Id.* at 306.

63 *Id.*

64 *Id.*

65 *Id.*

66 *Id.* at 307-10.

67 *Id.* at 307.

68 *Id.*

69 *Id.* at 307-10.

2. *Fullilove*: Congress's Special Powers

Fullilove v. Klutznick[70] concerned a federal set-aside program under the Public Works Employment Act of 1977.[71] The statute required ten percent of local public works grants to be spent on purchases from MBEs, although such requirement could be waived.[72] Chief Justice Burger's plurality opinion held that Congress may employ racial classifications if such legislation is "a limited and properly tailored remedy to cure the effects of prior discrimination."[73] The Chief Justice emphasized two points. First, Congress, as opposed to state and local governments, has broad powers under both the commerce clause and the enforcement clause of the fourteenth amendment, to assure state compliance with the fourteenth amendment.[74]

Second, Congress's affirmative action plan was both remedial in nature and flexible in application. The legislative history disclosed "a rational basis for Congress to conclude that"[75] inequities existed in prime contracting opportunities for minority businesses.[76] Accordingly, Congress's broad remedial powers could address these inequities through legislation.[77] Moreover, the set-aside provision was sufficiently tailored because the ten percent requirement could be waived if no minority businesses were available, or if a minority business sought to "exploit the remedial aspects of the program by charging an unreasonable price, *i.e.*, a price not attributable to the present effects of past discrimination."[78]

Chief Justice Burger's opinion announced no legal standard,

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70 448 U.S. 448 (1980).

71 *Id.*; 42 U.S.C. §§ 6701-6736 (1982).

72 *Fullilove*, 448 U.S. at 453.

73 *Id.* at 484.

74 *Id.* at 476.

> Here we deal . . . not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power that in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees.

Id. at 483.

75 *Id.* at 475.

76 *Id.*

77 *Id.*

78 *Id.* at 488.

stating only that "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees."[79] In a separate concurrence, however, Justice Powell repeated his view that strict scrutiny should apply, and offered a two-tier test for the constitutionality of minority set-asides: (1) the legislative body must make adequate findings of past discrimination to ensure that the program actually remedies the present effects of past discrimination; and (2) the program must extend no further than necessary to benefit victims of identified discrimination.[80]

Powell thus emphasized the single principle which now dominates the law of affirmative action: any race-conscious remedy must be limited to repairing the effects of past discrimination in a specific area.[81] This principle has its roots in school desegregation cases, which dictate that the busing remedy could extend geographically no further than the original segregation that was to be remedied.[82] In recent years, the Supreme Court has become more demanding in this matter. When enacting a set-aside, the legislative body must clearly find that the past discrimination has occurred in a specific area of activity and will be remedied by the set-aside program.[83]

3. *Wygant*: Powell Triumphant

In *Wygant v. Jackson Board of Education*,[84] the Supreme Court essentially adopted Powell's *Bakke/Fullilove* test.[85] *Wygant* involved a collective bargaining agreement that permitted a preference for minorities in the event of layoffs.[86] Several non-minority teachers were laid off, even though they had greater seniority

79 *Id.* at 491.

80 *Id.* at 510 (Powell, J., concurring).

81 *Id.*

82 *See* Milliken v. Bradley, 418 U.S. 717 (1974).

83 In *Fullilove v. Klutznick*, the Court's majority included Justices Marshall, Brennan, and Blackmun, who in their concurring opinion restated their view in *Bakke* that strict scrutiny should not apply to racial classifications designed to remedy historic discrimination. Fullilove v. Klutznick, 448 U.S. 448, 517-19 (1980) (Marshall, J., concurring). Justices Stewart, Rehnquist and Stevens dissented, arguing that the congressional set-aside was not constitutional. *Id.* at 552 (Stevens, J., dissenting).

84 476 U.S. 267 (1986).

85 *See id.*

86 *Id.* at 270.

than minority teachers who were retained.[87] The white teachers challenged the preference, claiming it was a violation of equal protection; the Supreme Court agreed.[88]

Writing for the plurality, Justice Powell, joined by Chief Justice Burger, Justice Rehnquist, and Justice O'Connor in part, reiterated his view that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."[89] The opinion then described the analysis:

> There are two prongs to this examination. First, any racial classification must be justified by a compelling governmental interest. Second, the means chosen by the State to effectuate its purpose must be narrowly tailored to the achievement of that goal.[90]

The *Wygant* set-aside program failed to meet the compelling governmental interest requirement.[91] Justice Powell noted that the "Court never has held that societal discrimination alone is sufficient to justify a racial classification," and that "the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination."[92] He also noted that the state must have "convincing evidence . . . to justify the conclusion that there has been prior discrimination."[93] Statistical disparities between the percentage of minorities employed and those residing in the general population were not sufficient, for "there are numerous explanations for a disparity . . . many of them completely unrelated to discrimination of any kind."[94] The plurality emphasized the lack of "particularized findings"[95] of discrimination that would justify a race-based remedy, and that the layoff preference also was not "narrowly tailored."[96]

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87 *Id.* at 271.

88 *Id.* at 284.

89 University of California Regents v. Bakke, 438 U.S. 265, 291 (1978), *quoted in* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273 (1986).

90 Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986) (quotations and citations omitted).

91 *Id.* at 274-78.

92 *Id.* at 274.

93 *Id.* at 277.

94 *Id.* at 276.

95 *Id.*

96 *Id.* at 283. Justice White concurred separately in the Court's judgment, and

4. *City of Richmond v. J.A. Croson Co.:* Sunset for Set-Asides

In *City of Richmond v. J.A. Croson Co.*,[97] the Supreme Court struck down a municipal requirement that prime construction contractors had to subcontract at least thirty percent of the dollar amount of each project to minority-owned businesses.[98] A minority business was defined as one which was at least fifty-one percent owned and/or controlled by "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts."[99]

Although the City of Richmond claimed the plan was remedial,[100] it was enacted after a city council meeting during which no evidence was adduced to show that the city had discriminated on the basis of race in awarding construction contracts.[101] There was also no evidence that the city's prime contractors had discriminated against minority-owned subcontractors.[102] Instead, the city council heard and relied upon general testimony about discrimination against minorities in the construction industry in Richmond and across the nation.[103] The Richmond set-aside plan permitted waivers of the thirty percent requirement only in exceptional circumstances, and did not provide for review of waiver denials or of rulings that a business was not minority-owned.[104] A non-minority contractor challenged the Richmond plan under the equal protection clause.[105]

For the first time in a set-aside case, the Supreme Court straggled onto a majority opinion and struck down the Richmond program.[106] Justice O'Connor wrote the lead opinion, which was joined in material respects by Chief Justice Rehnquist and Justices White, Stevens, and Kennedy.[107] Justice Scalia provided a

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offered no substantive explanation for his vote. *Id.* at 294-95 (White, J., concurring).

97 — U.S. —, 109 S. Ct. 706 (1989).

98 *Id.* at 712-13.

99 *Id.* at 713.

100 *Id.*

101 *Id.* at 714.

102 *Id.*

103 *Id.*

104 *Id.* at 713.

105 *Id.* at 715-16.

106 *Id.* at 730.

107 *Id.* at 712-30.

sixth vote in a separate concurrence. His opinion is even more skeptical of set-aside programs than the majority opinion.[108] Accordingly, the law on minority set-asides has finally begun to be resolved, and it is generally hostile to such programs.

A majority of the Court now holds that all racial classifications, including affirmative action programs, are subject to strict scrutiny. Justice O'Connor, joined by Chief Justice Rehnquist, Justice White, Justice Kennedy, and in substance by Justice Scalia wrote:

> The Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. To whatever racial group these citizens belong, their 'personal rights' to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking. Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.[109]

Under the strict scrutiny test, a compelling governmental interest justifying a racial set-aside requires a strong and specific showing of past discrimination.[110] *Croson* carefully reviewed the factual findings cited to justify the plan as necessary to remedy past discrimination in the construction industry, and held that none of these elements, taken "singly or together,"[111] was sufficient.[112]

Specifically, the Court rejected the statute's own recitation of its

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108 *Id.* at 735-39 (Scalia, J., concurring).

109 *Id.* at 721. In his concurring opinion, Justice Scalia stated, "I agree with much of the Court's opinion, and, in particular, with its conclusion that strict scrutiny must be applied to all governmental classification by race, whether or not its asserted purpose is 'remedial' or 'benign.' " *Id.* at 735 (Scalia, J., concurring).

110 *Id.* at 723.

111 *Id.* at 724.

112 *Id.* at 723-28.

remedial purpose as being "entitled to little or no weight," observing "that simple legislative assurances of good intention cannot suffice."[113] *Croson* also held that general assertions of past discrimination in the construction industry "are of little probative value in establishing identified discrimination in the Richmond construction industry. . . . [W]hen a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification's relevance to its goals."[114]

On the factual issues, *Croson* held that a compelling government interest is not established by proof that minority businesses received less than one percent of the city's prime contracts while minorities comprised fifty percent of the city's population.[115] Although such a disparity might reflect a pattern of discrimination, "where special qualifications are necessary [to perform a contract], the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task."[116] The Court added that low minority membership in local contractors' associations did not prove discrimination in the local construction industry without a showing of how many minority businesses were eligible to join.[117] "There are numerous explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial choices."[118]

Croson held that a finding of discrimination in the national construction industry, as was found by Congress in *Fullilove*,[119] was not evidence of discrimination in Richmond.[120] The Court stated that "[i]t is essential that state and local agencies . . . establish the presence of discrimination in their own bailiwicks, based either upon their own fact-finding processes or upon determinations made by other competent institutions."[121]

Finally, *Croson* identified three factors that demonstrated that

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113 *Id.* at 724.

114 *Id.* at 724-25. "A governmental actor cannot render race a legitimate proxy for a particular condition merely by declaring that the condition exists." *Id.* at 725.

115 *See id.* at 725.

116 *Id.*

117 *Id.* at 726.

118 *Id.*

119 Fullilove v. Klutznick, 448 U.S. 448 (1980).

120 City of Richmond v. J.A. Croson Co., — U.S. —, 109 S.Ct. 706, 726 (1989).

121 *Id.* at 727 (quotations omitted).

the Richmond set-aside was not narrowly tailored to accomplish its remedial purpose.[122] First, the city council had not considered race-neutral alternatives.[123] Second, the thirty percent set-aside total was arbitrary and not "narrowly tailored to any goal, except perhaps outright racial balancing."[124] That specific goal, the Court said, "rests upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population."[125] Third, the Richmond plan was apparently over-inclusive. Its preference for "racial groups [for example, Aleuts] that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond . . . strongly impugns the city's claim of remedial motivation."[126]

Accordingly, *Croson* established that a narrowly tailored minority set-aside plan should include: (1) documented consideration of race-neutral alternatives; (2) a rational relationship between the designated set-aside percentage and minority involvement in the particular field or fields; and (3) a preferred class including only those groups that in fact have been subject to discrimination in the given industry and geographic area.[127]

B. *Minority Set-Asides After Croson*

Several minority set-aside programs have been struck down since the *Croson* decision. There is now a clear trend against state and local set-asides.[128]

In *Michigan Road Builders Association v. Milliken*,[129] for exam-

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122 *Id.* at 728.

123 *Id.*

124 *Id.*

125 *Id.*

126 *Id.*

127 *See id.* at 727-29.

128 Justice O'Connor's plurality opinion in *Croson* explained the divergent results in *Wygant* and *Fullilove* on the basis of Congress's expansive powers to enforce the fourteenth amendment against states. *See* City of Richmond v. J.A. Croson Co., — U.S. —, 109 S.Ct. 706, 719-20 (1989). As a consequence, *Fullilove* still controls the constitutionality of congressionally authorized minority set-asides. *See* Winter Park Communications, Inc. v. FCC, 873 F.2d 347 (D.C. Cir. 1989) (upholding FCC license preferences); Milwaukee County Pavers Ass'n v. Fiedler, 710 F. Supp. 1532 (W.D. Wis. 1989) (upholding state construction contract set-asides enacted pursuant to federal transportation legislation). The *Fiedler* court stated that "[t]he standards articulated in *Croson* do not apply to federal affirmative action programs or to state programs which are subsidiary to them." *Id.* at 1539.

129 57 U.S.L.W. 3587 (U.S. Mar. 6, 1989) (No. 87-1860).

ple, the Supreme Court summarily affirmed the invalidation of a Michigan set-aside of state procurement contracts for minority and women's businesses.[130] After reviewing the legislative history, the Sixth Circuit held that the statute lacked adequate findings of past discrimination in Michigan's awarding of government contracts.[131] Although the legislature had considered evidence demonstrating that minority businesses were disadvantaged, that is, less successful in securing state contracts, the court of appeals found the evidence insufficient to justify a race-based remedy.

> [T]he Michigan legislature had little, if any, probative evidence before it that would warrant a finding that the State of Michigan had discriminated against MBEs in awarding state contracts for the purchase of goods and services. At best, the evidence suggested that societal discrimination had afforded the obstacle to the development of MBEs in their business relationship with the State of Michigan. Consequently, relatively few MBEs exist, and those that do are generally small in size and have difficulty in competing for state contracts as *a result of their size*. The evidence does not prove that the State of Michigan invidiously discriminated against racial and ethnic minorities in awarding state contracts. Accordingly, this court concludes that the state has not supported its conclusion that it had a compelling interest in establishing the racial and ethnic classifications contained in Public Act 428, and those classifications are, therefore, constitutionally invalid.[132]

In *Janowiak v. City of South Bend*,[133] the Supreme Court declined to review the Seventh Circuit's decision overturning a city plan mandating preferential hiring of minorities in its police and fire departments.[134] Relying on *Wygant*, the Seventh Circuit held that the affirmative action remedy improperly rested on statistics comparing minority percentages in the police and fire departments with those in the city population.[135] The court of appeals wrote:

> [The] holding of *Wygant* is that a statistical comparison upon which an affirmative action plan is based must compare the

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130 *Id.*

131 Michigan Road Builders Ass'n v. Milliken, 834 F.2d 583, 594 (6th Cir. 1987).

132 *Id.* (emphasis in original).

133 57 U.S.L.W. 3570 (U.S. Feb. 28, 1989) (No. 87-1754).

134 *Id.*

135 Janowiak v. City of South Bend, 836 F.2d 1034, 1041-42 (7th Cir. 1988).

> percentage of minorities . . . in the relevant qualified area labor pool before it can establish the predicate past discrimination required to justify an affirmative action remedy under the fourteenth amendment. We therefore hold that the City's plan here runs afoul of the fourteenth amendment's equal protection clause. . . .[136]

In *H.K. Porter Co. v. Metropolitan Dade County*,[137] the Supreme Court vacated an Eleventh Circuit decision upholding a Florida plan that contained coercive set-aside goals for minority contracting in federal construction projects.[138] Much like the New Jersey regulations, the Florida goals required bidders either to involve MBEs in five percent of the project work, or demonstrate that they had made reasonable efforts to achieve the goal.[139] In a per curiam opinion, the court of appeals relied upon *Fullilove* to sustain the plan,[140] while admitting that it was "troubled by [the county's] decision to use the 5% figure without supporting or substantiating the figure with some sort of consideration of the 5% goal to the relevant labor market of MBE's available to participate in [the] contract."[141] In vacating the decision below, the Supreme Court evidently shared that concern.[142]

In *American Subcontractors Association v. City of Atlanta*,[143] the Georgia Supreme Court applied *Croson*'s analysis almost verbatim to strike down favored treatment for minority and women-owned businesses in municipal contracts.[144] The Atlanta plan authorized the mayor to set annual minority and women's participation goals in public contracting, and provided that bidders who failed to identify how they would meet these goals would not be awarded contracts.[145] The set-aside provisions could be waived if the bidder demonstrated a good faith effort to comply.[146]

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136 *Id.*

137 — U.S. —, 109 S. Ct. 1333 (1989).

138 *Id.*; *see also* H.K. Porter v. Metropolitan Dade County, 825 F.2d 324 (11th Cir. 1987).

139 *H.K. Porter Co.*, 825 F.2d at 326; *cf.* N.J. STAT. ANN. §§ 5:12-186, -187 (West 1988) (New Jersey's set-aside goals).

140 *H.K. Porter Co.*, 825 F.2d at 329.

141 *Id.* at 332.

142 *Id.*

143 259 Ga. 14, 376 S.E.2d 662 (1989).

144 *Id.* at 20, 376 S.E.2d at 667.

145 *Id.* at 15, 376 S.E.2d at 663.

146 *Id.* at 16, 376 S.E.2d at 663.

In reviewing the plan's legislative history, the Georgia court found, at most, "under-utilization of black contractors"[147] in the Atlanta area, but no discrimination sufficient to warrant a race-based study.[148] The court held that the Atlanta plan was not narrowly tailored to remedy effects of prior discrimination, and that there was no evidence the city considered race-neutral alternatives.[149] In addition, and clearly helpful for a challenge to the New Jersey regulations, the court rejected the suggestion that the Atlanta set-aside was appropriately tailored to its remedial objective because it imposed goals other than fixed quotas.[150] The court stated:

> [T]he annual 'goal' to be set by the mayor for MBE's cannot be said to be narrowly tailored. We note first that the semantic distinction between 'goal' and 'quota' is 'beside the point.' To the extent there exist enough minority contractors to meet the 'goals' set by the mayor for city contracts, non-minority and non-female contractors can only compete for the remaining percentage of the available work, rather than for 100 percent of the work. '[W]hether this limitation is described as a quota or a goal, it is a line drawn on the base of race and ethnic status.'[151]

At least two unpublished rulings of lower state courts also relied upon *Croson* to invalidate minority set-aside legislation. The court in *Associated General Contractors v. City of Birmingham*,[152] struck down Birmingham's minority set-aside: "In this case as in [*Croson*], the City points to no evidence that qualified minority contractors have been passed over for City contracts or subcontracts, either as a group or in any individual case. There is then no basis for the City's conclusion that remedial action was necessary."[153] In *Main Line Paving Co. v. Board of Education*,[154] the court entered a temporary restraining order against minority set-aside goals: "The United States Supreme Court has told us that most of the set-aside programs as we have come to know them must be considered

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147 *Id.* at 19, 376 S.E. 2d at 666.

148 *Id.*

149 *Id.* at 19-20, 376 S.E.2d at 666.

150 *Id.* at 20, 376 S.E.2d at 666-67.

151 *Id.* (citation omitted).

152 No. 77-506-014-WAT (Ala. Cir. Ct., Mar. 31, 1989).

153 *Id.* at 24.

154 No. 0622 (Phila. Ct. Common Pleas, Feb. 17, 1989).

unconstitutional."[155]

III. The Constitutionality of New Jersey's Casino Set-Aside Regulations

Based on the limited legislative history and on the precedents discussed above, the New Jersey Casino Set-Aside Act is vulnerable to constitutional attack for two reasons. First, there is no real basis for finding a compelling governmental interest justifying the New Jersey set-aside. Furthermore, the New Jersey plan does not appear to qualify as a narrowly tailored remedy.

A. *No Compelling Governmental Interest*

The New Jersey program presents a weak claim that it is designed to serve compelling governmental interests. Other set-aside programs focus exclusively on the spending of public money. As *Croson* noted, "any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice."[156] All of the reported decisions striking down minority set-asides involved public funds.[157]

The New Jersey set-aside is uniquely overreaching in imposing a set-aside obligation on the spending of private money. The New Jersey regulations do not concern public contracts, but rather dictate to private parties how to spend private dollars. There is no case where such an overreaching remedy was even imposed on private parties, much less where such a remedy was upheld by the courts.

New Jersey's extensive licensing and regulation of the casino industry should provide no compelling governmental interest for a race-based burden. The Supreme Court has expressly held that

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[155] *Id.* at 4. Before *Croson*, two federal court of appeals invalidated municipal set-aside preferences for minority businesses on the equal protection grounds articulated in *Wygant*. Associated Gen. Contractors v. City and County of San Francisco, 813 F.2d 922 (9th Cir. 1987) (cited with approval in City of Richmond v. J.A. Croson Co., — U.S. —, 109 S. Ct. 706, 725-26 (1989)); J. Edinger & Son, Inc. v. City of Louisville, 802 F.2d 213 (6th Cir. 1986). These precedents have been strengthened by the *Croson* decision.

[156] City of Richmond v. J.A. Croson Co., — U.S. —, 109 S. Ct. 706, 720 (1989).

[157] *See, e.g.*, Janowiak v. City of South Bend, 836 F.2d 1034 (7th Cir. 1987); Michigan Road Builders Ass'n v. Milliken, 834 F.2d 583 (6th Cir. 1987); American Subcontractors Ass'n v. City of Atlanta, 259 Ga. 14, 376 S.E.2d 662 (1989).

state licensing does not create state action under the fourteenth amendment if the licensee then engages in race discrimination.[158] Accordingly, any interest the State of New Jersey may have in the private purchase of goods and services by casinos is even more attenuated than the governmental interests that were constitutionally insufficient in *Croson* and *Wygant*.

Even if New Jersey could impose a set-aside on private parties, there is no apparent justification for doing so. *Croson* holds that the governmental interest in redressing discrimination is not compelling if it rests on nothing more than a general desire to promote minority opportunity.[159] Affirmative action is simple "racial politics"[160] in the absence of specific evidence of discrimination in the particular industry and locale.[161] A suspect racial classification cannot be justified on the basis of a statute's self-avowed remedial purpose, or anecdotal assertions of discrimination, or even significant statistical disparities between minority business participation and minority population.[162] Nothing in the New Jersey statute, its available legislative history, or the rulemaking record suggests that historical discrimination in the New Jersey casino industry, or any other specific industry, justifies the racial set-aside.

The Act's own declaration of purpose identifies two legislative goals: (1) social and economic parity for women and minority businesses, and (2) "[stimulation of] the economy of Atlantic City."[163] These goals do not concern specific past discrimination. Indeed, a compelling state interest in remedying discrimination in the casino industry would be especially implausible in view of the relative youth of the New Jersey casinos. When the set-aside statute was enacted in 1986,[164] the oldest casino had been operating for eight years. When dealing with the centuries-old problem of race discrimination, it would be difficult to take seriously a general claim that the industry has a pattern of historical discrimination.

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158 Moose Lodge v. Irvis, 407 U.S. 163 (1972).
159 *Croson*, 109 S. Ct. at 725.
160 *Id.* at 730.
161 *Id.*
162 *Id.* at 724-26.
163 N.J. STAT. ANN. § 5:12-184 (West 1988); *see also* 20 N.J. Reg. 2446 (1988).
164 N.J. STAT. ANN. §§ 5:12-184 to -190 (West 1988).

B. *The New Jersey Set-Aside Is Not Narrowly Tailored*

The New Jersey set-aside appears to be too broad to satisfy *Croson*. The statute is not directed to any one industry, such as construction, banking, or food services.[165] Rather, the regulations apply to most commercial entities selling goods and services to casinos such as food and beverages, gaming equipment, legal and accounting services, linen and uniforms.[166] Unless the legislature documented that every business sector in the state has a history of race and sex discrimination, the regulations cannot be deemed narrowly remedial under *Croson*.

Similarly, there is no recorded justification for the set-aside percentages that have been selected by the state.[167] There is no evidence indicating how many MBEs and WBEs in the relevant geographic market can supply the needed goods and services. In *Croson*, the Court objected to the thirty percent set-aside as arbitrarily based on the minority population in Richmond, not on the number of available minority suppliers.[168] There is no indication that New Jersey had any factual basis for the selection of the five, ten, and fifteen percent set-aside goals.[169]

Also, there is no evidence that the legislature considered race-neutral means of achieving its goals. Failure to exhaust nondiscriminatory alternatives has been held fatal under the narrowly tailored prong of the strict scrutiny test.[170] The New Jersey set-aside, as the set-aside in *Croson*, favors groups that have undoubtedly not been subject to past discrimination, such as Alaskan natives.[171] Historical discrimination against Alaskan-owned businesses in New Jersey, if any, surely has been modest. Regulations that draw no distinction between minority businesses that have and those that have not been subject to discrimination are too broad to survive strict scrutiny.[172]

Finally, the New Jersey statute imposes set-aside goals that

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165 *See id.*

166 *Id.*

167 *Id.* §§ 5:12-186, -187.

168 City of Richmond v. J.A. Croson Co., — U.S. —, 109 S. Ct. 706, 725-26 (1989).

169 *See* N.J. STAT. ANN. §§ 5:12-186(a), -187(a) (West 1988).

170 *Croson*, 109 S. Ct. at 728.

171 N.J. STAT. ANN. § 5:12-185(c)(4) (West 1988).

172 *Croson*, 109 S. Ct. at 728.

are both unattainable and illusory. The goals are unattainable because, as the Casino Control Commission has acknowledged, there are not nearly enough certified businesses to meet the demand dictated by the statute.[173] In addition, the goals are illusory because even complete satisfaction of the set-aside percentages may well not prove the casino's good faith or protect it from further scrutiny and penalty.[174] The casinos must achieve the impossible, yet are cautioned that even achieving the impossible may not be enough. Such a set-aside program certainly is not narrowly tailored to a rational remedial objective.

C. *Unconstitutionally Vague?*

The set-aside statute also might be challenged as unconstitutionally vague. A statute or regulation violates the due process clause of the fifth and fourteenth amendments if the conduct it forbids or requires is so murkily defined that "[persons] of common intelligence must necessarily guess at its meaning and differ as to its application."[175] The rationale for this doctrine rests on two principles. First, people should have fair notice of what conduct will render them liable to penalties.[176] Second, public authorities and administrators should not be given excessive discretion in their application of the law.[177]

In this case, two factors suggest statutory vagueness. First, both the Act and its regulations indicate that even if a casino were to fulfill the prescribed set-aside goals, it might still be sanctioned for not showing good faith.[178] Thus, the industry could argue that the statute fails to afford casinos "fair warning of what is proscribed,"[179] and at the same time abrogates "basic policy matters to [an agency] for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."[180]

In addition, the casinos could argue that the language of sec-

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173 *See* 21 N.J. Reg. 781-82 (1989).
174 N.J. ADMIN. CODE tit. 19, § 53-2.10(c); 21 N.J. Reg. 784 (1989).
175 Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).
176 Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).
177 *Id.* at 108-09.
178 *See* N.J. STAT. ANN. §§ 5:12-186(b), -187(b) (West 1988); N.J. ADMIN. CODE tit. 19, § 53-2.10 (1989); 21 N.J. Reg. 783-84 (1989).
179 Village of Hoffman Estates v. Flipside, 455 U.S. 489, 503 (1982).
180 *Grayned*, 408 U.S. at 109.

tions 186 and 187 of the New Jersey set-aside statute is itself impermissibly vague. The court in *Application of Playboy-Elsinore Associations*[181] considered the Commission's imposition of a condition on licensees to "make a meaningful contribution"[182] to a training program designed to increase minority and female participation in the construction workforce.[183] The court held that this condition provided no adequate standard for measurement, and that "[w]ithout a standard, the condition is subject to arbitrary and inconsistent enforcement. Behind the quoted phrase is a quantitative thought which deserves expression. As it is now worded, [the condition] is too vague to enforce and must be invalidated."[184] Given that the Act's numerical goals are merely precatory, according to the Commission, the Act's good faith standard might be subject to a similar challenge.

D. *Possible Defense of the New Jersey Set-Aside*

The most likely defense of the New Jersey set-aside would involve the assertion that New Jersey has announced flexible goals rather than rigid quotas. This argument should not prevail. In *Bakke*, Justice Powell characterized the distinction between a goal and quota as "semantic" and "beside the point."[185] *American Subcontractors Association v. City of Atlanta*[186] also rejected the distinction, rightly noting that, to the extent there are enough minority enterprises to meet the goal, non-minority businesses compete for a smaller universe of available work.[187] Regardless of how the set-aside is described, "it is a line drawn on the base of race and ethnic status."[188] The distinction between a goal and a quota seems particularly hollow here, since casinos failing to meet the numerical goals must then meet rigorous criteria to demonstrate good faith. The New Jersey casinos must effectively satisfy quotas for minority contracting, with a heavy burden placed upon them to justify non-compliance. Accordingly, there

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181 203 N.J. Super. 470, 497 A.2d 526 (App. Div. 1985).
182 *Id.* at 473, 497 A.2d 528.
183 *Id.*
184 *Id.* at 476, 497 A.2d at 529.
185 University of California Regents v. Bakke, 438 U.S. 265, 289 (1978).
186 259 Ga. 14, 376 S.E.2d 662 (1989).
187 *Id.* at 20, 376 S.E.2d at 666-67.
188 *Id.* at 20, 376 S.E.2d at 667.

is little to distinguish the New Jersey set-aside from the legislation the Supreme Court has held to be unconstitutional.

IV. Conclusion

The casino industry has at least three options on the set-aside statute: initiating federal litigation, seeking state legislation, or waiting.

A. *Litigation*

A constitutional challenge would raise a federal question conferring federal jurisdiction. Any non-minority supplier of goods or services would have standing to bring such an action. The casinos should also have standing to assert these rights on behalf of non-minority businesses.[189] The advantages of litigation include a reasonably prompt resolution and, if an injunction were granted, immediate relief from the set-aside regulations. The obvious drawbacks of litigation include delicate public relations issues and expense.

B. *Legislation*

Assemblyman Bryant has introduced a bill to rewrite sections 186 and 187 of the New Jersey set-aside statute completely.[190] The legislation concedes that "New Jersey's minority and women's public contract set-aside programs are of dubious constitutionality,"[191] and would replace the preference for women and minority businesses with a preference for disadvantaged

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189 For example, in Craig v. Boren, 429 U.S. 190 (1976), a beer vendor challenged a statute prohibiting beer sales to males under twenty-one, but allowing sales to females over age eighteen. *Id.* at 192. Recognizing the vendor's standing to challenge this statute under the fourteenth amendment, the Court stated she was "entitled to assert those concomitant rights of third parties that would be 'diluted or adversely affected' should her constitutional challenge fail and the statute remain in force." *Id.* at 195 (quoting Griswold v. Connecticut, 381 U.S. 479, 481 (1965)). The Court stated that vendors and those similarly situated "have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function." *Id.* at 195. The Court further stated that where a statute "impose[s] legal duties and disabilities upon the claimant . . . the Court fully recognize[s] his standing to defend the . . . interests of third parties." *Id.* at 196.

190 A. 4515, 203d Leg., 2d Sess. (May 15, 1989).

191 *Id.* (statement to A. 4515).

businesses located in disadvantaged areas of the state.[192] This legislative response and other alternatives should be reviewed carefully, and the casino industry should participate in any effort to rewrite this very flawed statutory scheme.

C. *Waiting.*

The industry could also attempt to comply with the set-aside program, but be prepared to use the constitutional vulnerability of the statute as leverage if the Commission's enforcement efforts became unreasonable.

This strategic choice is a complex one; therefore, purely legal considerations must be tempered with practical concerns. The constitutional objections to the casino set-aside are, however, very strong.

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192 *Id.*