CROSON V. CITY OF RICHMOND
THE EFFECT ON MINORITY BUSINESS UTILIZATION PLANS

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INTRODUCTION

In 1983, the City Council of Richmond instituted the Minority Business Utilization Plan.[1] The council heard testimony both in favor of[2] and opposed to[3] the plan. In opposing the plan, several construction trade associations stated their positions and fielded questions by council members on minority membership in their organizations.[4] Generally, the groups had negligible or non-existent minority membership, but no evidence was presented to demonstrate that minorities had been discriminated against in attempting to enter such trade organizations. One group

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[1] RICHMOND, VA. CITY CODE (1985):
[S]ec. 12-156. Covered contracts.
(a) All contractors awarded construction contracts by the city shall subcontract at least thirty (30) percent of the contract to minority business enterprises [MBEs]. Where the general contractor is a minority business this requirement shall be deemed to be met by the award....
[S]ec. 12-157. Rules and regulations.
The director of the department of general services shall be authorized to promulgate rules and regulations to implement the requirements of this division, which rules and regulations shall allow waivers in those individual situations where a contractor can prove to the satisfaction of the director that the requirements herein cannot be achieved.
[S]ec. 12-158. Division remedial; effective through June 30, 1988.
(a) This division is remedial and is enacted for the purpose of promoting wider participation by minority business enterprises in the construction of public projects, either as general contractors or subcontractors.
(b) This division shall expire and terminate as of the last moment of June 30, 1988.

[2] For example, last year we had the occasion to visit one company five times before we were even allowed to do business with them. On our fifth occasion going there, a vice president said to us , well, the National Football League did... not settle their dispute in one meeting, so you must learn to negotiate four, five, even a dozen times. We are marketing a standard product that is very similar to our competitors.' I'm here speaking for contractors. True, I am not a contractor. I do not hire construction people. But I would not let this opportunity pass without saying that if you can give us access to the enterprise system, we want it. We're not asking to come in as second-rate service folk. We're asking to come in as first-rate service folk, but to allow us access. Thirty percent is not one hundred percent. There is still seventy percent left over. *Adoption of Minority Business Utilization Plan: Hearing before the Richmond City Council*, April 11, 1983 [hereinafter *Hearing*] (testimony of Ms. Cooper, at 17).

[3] *Id.* (testimony of Mr. Watts, at 19; Mr. Beck, at 31; Mr. Murphy, at 35; Mr. Shuman, at 37).

[4] *Id.*

testified that it actively sought to recruit minority members.[5] Proponents of the plan were the only ones to present evidence of discrimination.[6]

The J.A. Croson Company submitted the low bid on a project to install stainless steel urinals in the City Jail of Richmond. Croson experienced difficulty in obtaining minority suppliers to meet the city's thirty percent MBE requirement. The city denied Croson's request for a waiver, and decided to rebid the project. Croson then brought suit against the city.[7]

In overturning the Minority Business Utilization Plan, the *J.A. Croson v. City of Richmond*[8] decision has been regarded by the popular press[9] as well as the dissent[10] as the end to all affirmative action programs. This is an unfair characterization. Though the opinion holds race-based classifications to the strict scrutiny standard, it is still possible for a state or local government to responsibly implement a voluntary affirmative action program. Although the effect on existing affirmative action programs may be dramatic, *Croson* still allows for the development of effective affirmative action programs.

Strict scrutiny analysis requires that the government interest be compelling and that the means chosen are narrowly tailored to achieve that interest.[11] Voluntary affirmative action plans by public employers[12] must be narrowly tailored to remedy identified, prior governmental discrimination.[13] If a public employer is using a statistical approach[14] to prove prior discrimination, then the employer must use a restrictive view of the relevant labor market. A restrictive view would include only those minorities available to do a certain job, whereas a broad view would look to the

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[5] *Id.* at 38 (testimony of Mr. Shuman) ("Nobody that I know of, black, Puerto Rican or any minority, has ever been turned down. They're actually sought after to join, to become part of us.").

[6] *Id.* at 41 (testimony of Mr. Marsh) ("There is some information, however, that I want to make sure we put in the record. I have been practicing law in this community since 1961, and I am familiar with the practices in the construction industry in this area, in the State, and around the nation. And I can say without equivocation, that the general conduct in the construction industry in this area, and the State and the nation, is one in which race discrimination and exclusion on the basis of race is widespread."). *See also Hearings*, at 42 (testimony of Mr. Deese).

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

[8] *Id.*

[9] The Washington Post, Jan. 24, 1989, at A1, col. 5; Sacks, *A Blow to Affirmative Action*, TIME, Feb. 6, 1989, at 60.

[10] *Croson*, 109 S. Ct. at 706, 739 (Brennan, J., dissenting).

[11] Regents of Univ. of California v. Bakke, 438 U.S. 265, 299 (1977).

[12] Title VII includes in its definition of employers, "governments, governmental agencies, [and] political subdivisions." 42 U.S.C. Sec. 2000e(a) (1982).

[13] *Bakke*, 438 U.S. at 291.

[14] Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

percentage of minorities in the general population. In Richmond, the percentage of available MBEs was unknown. The Court in *Croson* clarified the Supreme Court's standard in affirmative action cases by employing a restrictive view of the relevant labor market.

A public employer who chooses to use racial classification in a remedial program may only correct identifiable past wrongs; otherwise the scope of affirmative action would be unbounded. These wrongs may include passive participation by the city in the discriminatory process.[15] The use of racial classifications should be limited for several reasons. First, often the burden of racial classifications falls on non-minorities who have never discriminated against minorities. Even benign racial classifications violate the anti-discrimination principle which holds that race is never to be used in the decision making process. Secondly, racial classifications are a dangerous tool; it is difficult to determine whether a plan is remedial or motivated by stereotypes and favoritism. Identifying past wrongs ensures a remedial nature. Finally, affirmative action should be limited because such race-based decision making may well reinforce the very stereotypes that lead to a need for remedial measures.

THE TWO-PRONGED STRICT SCRUTINY TEST FOR VOLUNTARY AFFIRMATIVE ACTION PROGRAMS

Under strict scrutiny, the compelling interest requirement must be established by a substantial, factual showing of prior governmental discrimination.[16] The means chosen must be "narrowly tailored" to remedy the identified discrimination.[17] Justice O'Connor has stated that only a statutory violation, not a constitutional violation,[18] is sufficient to establish prior discrimination.[19] Further, it is sufficient to show that the government entity involved had a firm basis to believe that it had violated such a statute. Discrimination in fact is not required.[20]

CASE LAW

In *Regents of the University of California v. Bakke*, a plurality of the Supreme Court held that a sixteen percent set-aside for minority medical school applicants was

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[15] *Croson*, 109 S. Ct. at 720.

[16] *Bakke*, 438 U.S. at 309.

[17] Fullilove v. Klutznick, 448 U.S. 448, 480 (1980).

[18] A constitutional violation requires the intent to discriminate, whereas a statutory violation does not. Washington v. Davis, 426 U.S. 229 (1976).

[19] *Wygant*, 476 U.S. at 284 (O'Connor, J., concurring).

[20] *Id.*

unlawful.[21] Justice Powell used strict scrutiny because even a supposedly benign racial classification is still suspect. Because the medical school made no showing of prior discrimination, the school failed to establish the compelling interest required by strict scrutiny review. Of the plurality in *Bakke*, only Justices Rehnquist and Stevens remain on the Court. Justice White applied a mid-tier review stipulating that the means must be reasonably related to an important governmental interest.[22]

Fullilove v. Klutznick[23] concerned a facial challenge to a federal program which sought to remedy societal discrimination[24] in the construction industry with the Public Works Employment Act of 1977.[25] This was a temporary, ten percent set-aside program for minority business enterprises (MBEs).[26] Congress was acting under the special authority of the enforcement clause of the Fourteenth Amendment.[27] Despite the lack of showing that Congress ever discriminated against MBE's, another plurality of the Supreme Court approved the set-aside plan in *Fullilove*, deferring to Congress as a co-equal branch of government.[28]

The district and appellate courts that first heard *Croson* deferred to the City Council of Richmond as the Supreme Court had deferred to Congress in *Fullilove*. The rationale for this deference is that Congress delegated its fact-finding authority to localities under the 1964 Civil Rights Act.[29] However, it does not necessarily follow that congressional deference is imputed to localities merely because ease-of-administration concerns warrant localized fact-finding. Congress merely delegated the fact-finding process to the localities, which are better able to discover evidence of localized discrimination. However, the localities must still do a responsible job, which is measured by the standard commensurate with their resources.

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[21] 438 U.S. 265 (1978) (four of the justices held the plan unlawful on Title VII grounds, four justices held the plan lawful under Title VII, and Justice Powell held the plan unconstitutional).

[22] Justice White held that a private right of action under Title VI does not exist. *Bakke*, 438 U.S. at 379 (White, J., concurring).

[23] 448 U.S. 448 (1980).

[24] The societal discrimination was detailed in legislative fact-finding committee reports. *Id.* at 459.

[25] 42 U.S.C.S. Secs. 6701-6736.

[26] An MBE is defined as a company with fifty-one percent or greater minority ownership. 42 U.S.C.S. Sec. 6705(f)(2).

[27] U.S. CONST. art. XIV, sec. 5.

[28] *Fullilove*, 448 U.S. 448.

[29] *Fullilove*, 448 U.S. at 492. *See also* Adelman, *Voluntary Affirmative Action Plans by Public Employers: The Disparity in Standards Between Title VII and the Equal Protection Clause*, 56 FORDHAM L. REV. 403 (1987).

Chief Justice Rehnquist and Justice Stevens held that the *Fullilove* plan violated the Equal Protection Clause.[30] This is significant because Congress was the actor, and challenge was only facial. Justices Brennan, Marshall, and Blackmun predictably upheld the MBE set-aside.[31] Justice White also upheld the set-aside provision.[32]

In *Wygant v. Jackson Board of Education*,[33] a plurality struck down a race-based layoff system in a public school which maintained racial mix at the expense of the seniority of non-minority teachers. The school board relied on the student-teacher racial imbalance to justify their plan. However, the school board failed to show that it had ever discriminated against the teachers.

A plurality, including Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor, required a finding of prior governmental discrimination[34] to initiate a voluntary affirmative action set-aside plan. Justices Marshall, Brennan, and Blackmun believed that societal discrimination was a sufficient basis for race-conscious relief. Justice White voted against the plan in *Wygant* because he applied the anti-discrimination principle reasoning that race-based layoffs were never appropriate. Justice Stevens used a process approach; he offered no opinion on the issue of requiring prior governmental discrimination for race-based relief. Justice Stevens stated in *United States v. Paradise*[35] that if the prior governmental discrimination is outrageous or gross, then a district court judge has broad authority to issue race-conscious relief.

To summarize, after *Wygant*, there are four members of the court who require a finding of prior governmental discrimination, three justices who do not require such a finding, one who allows affirmative action if the process is fair and one who has not addressed the issue.[36]

In *Johnson v. Transportation Agency, Santa Clara County, Cal.*,[37] Justice Brennan wrote for a five-member majority[38] that prior governmental discrimination is not required for the government agency to be able to implement remedial preferential relief. The majority held that remedying job classifications which have been traditionally segregated is a sufficiently important interest to warrant racial

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[30] *Fullilove*, 448 U.S. at 527, 552-53 (Stevens, J., dissenting).

[31] *Id.* at 517 (Marshall, J., concurring).

[32] *Id.* at 492.

[33] 476 U.S. 267 (1986).

[34] *Id.* at 286 (Justice O'Connor's threshold was a "firm basis for belief that remedial action is required.").

[35] 480 U.S. 149 (1987).

[36] Two of the four votes for a requirement of governmental discrimination have been replaced on the Court by Justices Scalia and Kennedy.

[37] 480 U.S. 616 (1987).

[38] Justices Brennan, Marshall, Blackmun, Powell, and Stevens were the majority. Justice O'Connor concurred separately. Justice Powell is no longer on the Court.

classifications. Stevens concurred separately to emphasize that one may use race-based relief to remedy not only prior governmental discrimination, but also to increase services to ethnic groups, to ease racial tension, and to promote diversity.[39]

In *Milliken*,[40] the Supreme Court affirmed, without an opinion, the view that strict scrutiny is appropriate. Thus, a state must make a material, factual finding of prior discrimination before the state may use racial classifications.

COMPELLING STATE INTEREST IN *CROSON*

Chief Justice Rehnquist and Justices O'Connor, White, Kennedy, and Scalia require a showing of prior governmental discrimination.[41] In *Croson*, Kennedy is squarely aligned with O'Connor and Rehnquist. Kennedy decided that strict scrutiny is the appropriate standard of review in lieu of an absolute ban on preferences to non-victims.[42] White also has reaffirmed his opinion that a finding of prior governmental discrimination is required.[43] Thus, after *Croson*, there are five Justices who require a finding of prior governmental discrimination.

It was the stated purpose of the Richmond set-aside plan to be remedial.[44] The Court found that the city's reliance on Congressional findings, statements of council members, the lack of participation of minorities in trade associations, and the level of participation of MBE's in the public contracting industry[45] was insufficient to show that Richmond had discriminated against MBEs. There was no direct evidence that the City of Richmond had ever discriminated against a minority contractor.[46] Societal discrimination cannot be said to proximately cause the few number of MBE's because of the pervasive non-racial factors. Thus, a statistical disparity is insufficient to establish a remedial purpose in light of pervasive neutral explanations for the disparity.

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[39] *Johnson*, 480 U.S. at 647 (Justice Scalia favored a requirement of prior governmental discrimination. Justice White is no longer aligned with Brennan, Marshall and Blackmun, but rather now requires a material, factual finding of prior governmental discrimination. Rehnquist, O'Connor, Scalia and White are now opposed by Brennan, Marshall, Blackmun and Stevens. Justice Kennedy's position is critical.).

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

[41] *Croson*, 109 S. Ct. at 706.

[42] *Id.* at 734.

[43] *Id.* at 706.

[44] RICHMOND, VA. CITY CODE Sec. 12-158(a) (1985).

[45] *See Hearing*, *supra* note 2, at 9.

[46] *Croson*, 109 S. Ct. at 707.

LEAST RESTRICTIVE MEANS IN *CROSON*

The second prong of the strict scrutiny test asks if the classification is the least restrictive means available.[47] Several components of the set-aside plan in *Croson* fail this test. The city council could have taken less restrictive steps to achieve the same goals. The plan could have been more narrowly tailored in several respects: if nonracial means had been utilized; if stricter measures had been used to define eligible minorities and only minorities from the Richmond area had been eligible; if the MBE participation percentage had conformed with previous Court opinions; and if a waiver provision had been incorporated to ensure that only MBEs from disadvantaged groups benefitted from the program. The city of Richmond seems to have been aware of the barriers MBEs face when attempting to enter the construction industry. Such barriers include inability to meet bonding requirements, lack of capital, unfamiliarity with bidding procedures and problems resulting from the lack of a track record.[48] Instituting a race-neutral program to ease these requirements for fledgling construction contractors would have most likely resulted in a disparate impact benefiting black construction companies. Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination or neglect.[49]

Thus, such a plan would enable MBEs to compete with established, non-minority companies and develop the capital, experience and business skills necessary to remain competitive. However, the City Council of Richmond does not appear to have considered such a race-neutral plan.[50] Instead, the council opted for an affirmative action program, centered on explicit racial classifications. If a non-racial solution to the problem was ignored, the city of Richmond did not take the "least restrictive" route to achieve its aims. Had it attempted a non-racial approach and failed, then perhaps an explicit racial classification may have been appropriate.

The city of Richmond's plan specified minority groups that were eligible to participate in the set-aside program. The list was identical to the one used by Congress in the Public Works Employment Act of 1977,[51] the federal set-aside legislation validated in *Fullilove*. Congress was creating a program which was national in scope; it appropriately included various minority groups such as Hispanics, Aleut, and Eskimos. In Richmond, though, the Eskimo and Aleutian populations are negligible, if they exist at all; it is quite unlikely that the city government or the local construction

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[47] *Fullilove*, 448 U.S. at 480.

[48] *Croson*, 109 S. Ct. at 708.

[49] *Id.* at 729.

[50] *See Hearing*, *supra* note 2, at 1.

[51] *Fullilove*, 448 U.S. at 455 (The list included citizens who are: "... Negroes, Spanish-speaking, Oriental, Indians, Eskimos, and Aleuts.").

trade associations discriminated against either one of these groups. By including groups that were never victimized by the local government or even Richmond society in general, the ordinance's remedial purpose is impugned.[52] This gives an unfair preference to those groups based solely on race.

Additionally, the Richmond plan lacks any type of geographical limitation. Thus, minorities from anywhere else in the country receive an advantage over local non-minority contractors, even though they had never been discriminated against in the Richmond area. Over-inclusion of groups that are not the victims of discrimination negates the remedial character of the set-aside.

The third reason that the plan failed the "least restrictive means" criterion is that the ordinance set a thirty percent requirement for minority participation in city construction contracts.[53] The plan roughly split the difference between the percentage of blacks in the city population, about fifty percent, and the percentage of MBEs who received city contracts, less than one percent, to achieve a figure of thirty percent. This is the formula used by Congress in the Public Works Employment Act of 1977.[54] Despite the holding in *Fullilove*, the Court has said that this is not the proper formula to determine a percentage set-aside: "But where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task."[55] Because construction contractors possess special qualifications, the total percentage of minorities in the general population seems to be irrelevant in determining percentages for set-aside programs.[56]

Though the city council followed the congressional set-aside plan validated in *Fullilove* in many respects, it did not do so completely. The city provided a waiver in the event minority contractors were unavailable to fulfill a city contract.[57] Unlike Congress' plan however, "...there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the

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[52] *Croson*, 109 S. Ct. at 728.

[53] RICHMOND, VA. CITY CODE Sec. 12-156(a) (1985).

[54] *Fullilove*, 448 U.S. at 465.

[55] *Croson*, 109 S. Ct. at 725 (citing Hazelwood School District v. U.S., 433 U.S. 299 (1977) and Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616 (1987)).

[56] The dissent makes a very compelling argument to the contrary. If Blacks have been excluded from the construction industry then the applicable figure to examine in calculating a quota is the percentage of blacks in the general population. This assumes that if there had not been discrimination, then blacks would have a market share approximately equal to their percentage in the general population. *Croson*, 109 S. Ct. at 746.

[57] RICHMOND, VA. CITY CODE Sec. 12-157 (1985).

city or prime contractors."[58] Such a flexible waiver provision would have safeguarded the remedial goals of the plan and innocent parties would not have been required to shoulder unnecessary burdens. Furthermore, such a waiver would have minimized the over-inclusion of groups that were never the victims of discrimination in Richmond.

Finally, the Richmond ordinance had a significantly longer duration, five years,[59] than the plan in *Fullilove*. Though the Court has not set a specific limit on the duration of affirmative action programs, the more brief the program the less restrictive it appears. However, the duration of set-aside plans does not appear to be a major component in the least restrictive means segment of the strict scrutiny test.

AN ALTERNATIVE MBE UTILIZATION PLAN

A state or local government should first consider the use of facially neutral means.[60] A facially neutral law, on the *Croson* facts, could be designed to have a disparate impact on minorities and thus would address the bonding problem, working capital deficiencies, unfamiliarity with bidding procedures, and the lack of a track record often facing new minority firms. A facially neutral approach additionally has the advantage of not being over-inclusive. Furthermore, because no racial classification is used, the plan does not need to pass strict scrutiny tests and the legislation is less likely to be challenged.

To increase the level of MBE participation in municipal contracts, a city should determine if there is a firm basis for belief that there was local governmental discrimination. The Court has held that if there has been governmental discrimination, then race specific measures are permissible.[61] If no governmental discrimination exists, then nonracial measures must be used.[62]

The first step to ameliorating the discrimination is identification of the wrong that is to be remedied. Then remedial measures should be narrowly tailored so as not to unnecessarily trammel the interests of non-minorities. In a set-aside program with goals similar to those in *Croson*, the plan should be limited to those groups who have been victims of discrimination.

The percentages in a model plan would reflect the percentage of available MBEs in the relevant market and not the percentage of minorities in the general population. The number of available MBEs should increase as new MBEs enter the market to compete with existing MBEs. If the MBEs are not working at full capacity, there will always be more available MBEs than participating MBEs. As the percentage of available

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[58] *Croson*, 109 S. Ct. at 729.

[59] RICHMOND, VA. CITY CODE Sec. 12-158(b) (1985).

[60] *See Croson*, 109 S. Ct. at 728.

[61] *See Bakke*, 438 U.S. at 265; *Milliken*, 834 F.2d at 583.

[62] *See supra*, note 63.

MBEs increases, their statutory share of the market could rise with them. This increase could continue to a reasonable level such as half way between the current level of MBE participation and the percentage of minorities in the population, as long as the level was predetermined. The minority percentage in the population would provide an upper limit. After this maximum point has been reached or the statutory time limit[63] has expired, the statutory percentages would symmetrically[64] decrease. The MBEs would gradually lose their government preference and thus compete in the general construction market.

The model plan would also be limited to a geographic area equivalent to the relevant market. This geographic limitation serves a fairness function; it is patently unfair for remote, non-victims to have a preference over non-minority, non-discriminatory contractors.

CONCLUSION

The Supreme Court has established that strict scrutiny is the appropriate standard of review in affirmative action cases. Even though set-aside programs are subject to strict review, they are still viable. By responsibly establishing a firm basis for belief of prior governmental discrimination and by narrowly tailoring the steps to remedy that discrimination, a city or state government may still implement an effective affirmative action program.

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[63] The model plan should have a time limit at which the predetermined point will be considered to have been reached, whereupon the set-aside is decreased.

[64] "Symmetrically" means that the percentage will decrease by the same amounts and over the same time periods as it was increased.