CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—SUPREME COURT ADOPTS STRICT SCRUTINY STANDARD TO REVIEW THE CONSTITUTIONALITY OF AFFIRMATIVE ACTION MEASURES—*Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989).

The fourteenth amendment guarantees "to any person . . . the equal protection of the laws."[1] In early cases, the United States Supreme Court interpreted the equal protection clause to mandate that its "provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . . ."[2] Presumably, supporters and sponsors of the amendment utilized conflicting interpretations of the phrase "equal protection." Legislative history does little to clarify whether any sort of consensus was accomplished at the time the amendment was adopted.[3] While the Supreme Court recognized that blacks were primarily the intended beneficiaries of the adopted protections,[4] the amendment's language was not confined to so limited a class or to so limited a purpose.[5]

The equal protection clause was, however, "[v]irtually strangled in infancy by post-civil-war judicial reactionism."[6] During this dormant stage, the United States became a nation of minorities.[7] "Each had to struggle—and to some extent struggles still—

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[1] U.S. CONST. amend. XIV, § 1. The fourteenth amendment also states that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *Id.* amend. XIV, § 5.

[2] Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). *See also* Graham v. Richardson, 403 U.S. 365, 371 (1971) ("term 'person' in this context encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside").

[3] J. Frank & R. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131 (1950).

[4] Slaughter-House Cases, 83 U.S. 36, 81 (1873). The Supreme Court's initial view of the fourteenth amendment was that its "one pervading purpose" was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppression of those who had formerly exercised unlimited dominion over him." *Id.* at 71.

[5] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 293 (1978) (Powell, J., plurality opinion). "Although many of the Framers of the Fourteenth Amendment conceived of its primary function as bridging the vast distance between members of the Negro race and the white 'majority,' the Amendment itself was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude." *Id.* (quoting Slaughter-House Cases, 83 U.S. 36, 71 (1873)).

[6] J. Tussman & J. TenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 381 (1949).

[7] *Bakke*, 438 U.S. at 292 (Powell, J., plurality opinion) (footnote omitted).

to overcome the prejudices not of a monolithic majority, but of a 'majority' composed of various minority groups of whom it was said—perhaps unfairly in many cases—that a shared characteristic was a willingness to disadvantage other groups."[8] Thus, the clause gradually became applicable to all classifications of minorities by legislative and other bureaucratic sanction, although not with much initial success.[9] Currently, the equal protection clause, in the areas of fundamental liberties and civil rights, affords courts extensive powers of review with regard to differential treatment of persons and classes.[10]

Of critical importance in equal protection litigation is the degree to which government is permitted to take race into account in order to formulate and implement a remedy to overcome the effects of past discrimination against the class.[11] The issue is often framed in terms of reverse discrimination or affirmative action inasmuch as the governmental action deliberately favors the members of the class and may simultaneously impact adversely upon nonmembers of the class.[12] The United States Supreme Court has accepted both the use of race as a valid factor in formulating remedies to overcome discrimination and the according of preferences to class members when the class has previously been the object of discrimination.[13] While in prior cases the Supreme Court gave plenary review to programs that expressly used race as the prime consideration in the awarding of some public benefit, it had never, until recently, definitely settled on a standard for reviewing the constitutionality of race-conscious affirmative action.[14] In *Richmond v. J.A. Croson Co.*,[15] a majority of

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[8] *Id.* (footnotes omitted). "Members of the various religious and ethnic groups, primarily but not exclusively of Eastern, Middle, and Southern European ancestry, such as Jews, Catholics, Italians, Greeks and Slavic groups, continue to be excluded from executive, middle-management, and other job levels because of discrimination based upon their religion and/or national origin." *Id.* at 292 n.32 (Powell, J., plurality opinion) (quoting 41 C.F.R. § 60-50.1(b) (1977)).

[9] In Buck v. Bell, 274 U.S. 200, 208 (1927), the Supreme Court upheld a statute mandating involuntary sterilization of mentally retarded persons.

[10] *See* Fullilove v. Klutznick, 448 U.S. 448 (1980); *Bakke*, 438 U.S. 265.

[11] Richmond v. J.A. Croson Co., 109 S. Ct. 706, 712 (1989).

[12] *See* N. GLAZER, AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY (1975); B. GROSS, REVERSE DISCRIMINATION (1977).

[13] *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448 (1980) (federal public works statute setting aside contracts funds for businesses owned by members of minority races upheld); United Steel Workers of Am. v. Weber, 443 U.S. 193 (1979) (Title VII of Civil Rights Act does not prohibit private employees from voluntarily using an affirmative action employment program).

[14] *Croson*, 109 S. Ct. at 721.

[15] 109 S. Ct. 706 (1989).

the Supreme Court adopted a strict scrutiny standard to review the constitutionality of race-conscious remedial measures.[16]

On April 11, 1983, a public hearing in Richmond, Virginia disclosed that despite the city's 50% black population, only 0.67% of Richmond's construction contracts during the years 1978 through 1983 were awarded to minority businesses.[17] In response to this revelation, the Richmond Council adopted a Minority Business Utilization Plan (Plan) to set aside part of the city's construction expenditures for minority-owned businesses.[18] Generally, the Plan required all non-minority prime contractors awarded construction contracts by the city to subcontract a minimum of 30% of the contract's dollar value to Minority Business Enterprises (MBE)[19] unless the requirement was waived.[20] No geographic limits were imposed; any otherwise eligible MBE, regardless of locale, could utilize the 30% set-aside.[21] The Plan expressed a "remedial" nature and envisioned "wider participation by minority business enterprises in the construction of public projects."[22] The Plan was designed to automatically expire on June 30, 1988, approximately five years after its commencement.[23]

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16 *Id.* at 721. For a discussion of the strict scrutiny standard, *see* J. NOWACK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 448-49 (1983) ("If a law burdens a class of persons because of the 'suspect' traits of race, national origin or status as a resident alien, the justices will subject the law to independent 'strict scrutiny' to determine if it promotes a compelling interest of the government.")

17 *Croson*, 109 S. Ct. at 714.

18 *Id.* at 712-13.

19 *Id.* at 713. The Plan defined an MBE as "[a] business at least fifty-one percent of which is owned and controlled or fifty-one percent minority-owned and operated by minority group members, or in case of a stock corporation, at least fifty-one percent of the stock which is owned and controlled by minority group members." J.A. Croson Co. v. City of Richmond, 779 F.2d 181, 182 n.3 (4th Cir. 1985), *vacated and remanded*, 478 U.S. 1016 (1986), *rev'd*, 822 F.2d 1355 (4th Cir. 1987), *aff'd* 109 S. Ct. 706 (1989). The Richmond Council categorized "minority group members" as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." *Id.*

20 *Croson*, 109 S. Ct. at 712-13. According to the Plan, waivers would be granted only in exceptional circumstances. *See Croson*, 779 F.2d at 197. The Plan allowed waivers only where it was

> shown that every feasible attempt has been made to comply, and it must be demonstrated that sufficient, relevant, qualified Minority Business Enterprises (which can perform subcontracts or furnish supplies specified in the contract bid) are unavailable or are unwilling to participate in the contract to enable meeting the 30% MBE goal.

Id.

21 *Croson*, 109 S. Ct. at 713.

22 *Id.*

23 *Croson*, 109 S. Ct. at 713. The ordinance's expiration did not render the con-

On September 6, 1983, five months after the Plan's enactment, Richmond invited bids for the installation of fixtures at the city jail.[24] The J.A. Croson Company (Croson), a non-MBE contractor, submitted a bid.[25] Eugene Bonn, Croson's regional manager, determined that a minority contractor had to supply the fixtures in order to comply with the 30% set-aside provision.[26] Although Bonn telephoned several MBE's to obtain quotes on the fixtures, none tendered a quote or indicated any interest in the project.[27] On the last day for bid submission, Melvin Brown, president of a local MBE, expressed to Bonn that Continental Metal Hose (Continental) desired to participate in the project.[28] In response to Brown's subsequent attempts to acquire a price quotation for the fixtures, an agent of Bradley informed him that a credit check was mandatory prior to tendering a quote.[29] Brown was advised that Bradley would require at least thirty days to complete the credit check.[30]

City officials opened the sealed bids on October 13, 1983,[31] at which time Brown informed Croson that his bid submission had been hindered by complications in obtaining credit approval.[32] On October 19, 1983, Croson requested a waiver of the 30% set-aside requirement.[33] Brown subsequently submitted

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troversy between Croson and Richmond moot. *Id.* at 713 n.1. A viable controversy remained as to whether the city's refusal to grant Croson a contract in compliance with the ordinance was unlawful, thus entitling Croson to damages. *Id.*

24 *Id.* at 715. The project involved installing water closets and stainless steel urinals which were manufactured by either Bradley Manufacturing Company (Bradley) or Acorn Engineering Company (Acorn). *Id.*

25 *Id.* at 715.

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.* at 715. Croson was the sole bidder, submitting a bid of $126,530 which included a non-minority firm's quote for the plumbing fixtures. *Id.*

32 *Id.* Croson's request stipulated that Continental was unqualified and that the other contracted MBE's were either unable to quote or were unresponsive. *Id.*

33 *Id.* At this time, Croson still had not received Continental's bid. *Id.* According to the Plan, a prime contractor's waiver request would be referred to Richmond's Human Relations Commission (HRC). *Id.* at 713. The HRC would then make recommendations respecting the 30% set-aside waiver request. *Id.* (citing *Croson*, 779 F.2d 181, 196 (4th Cir. 1985), *vacated and remanded*, 478 U.S. 1016 (1986), *rev'd*, 822 F.2d 1355 (4th Cir. 1987), *aff'd*, 109 S. Ct. 706 (1989)). The Director of General Services would make a plenary and final determination on the appropriateness of granting a waiver. *Id.* (citing *Croson*, 779 F.2d at 196). Once a contract was allotted, a bidder who was denied an award for failing to adhere to the MBE requirements could protest under the city's procurement policies. *Id.* (citing RICHMOND, VA., CITY CODE § 12-126(a) (1985)).

a bid to Croson and informed city officials that Continental could provide the required fixtures.[34] The city therefore denied Croson's waiver request and gave Croson ten days to submit a completed MBE Utilization Commitment Form.[35] Instead of complying with the city's instructions, Croson requested that the contract price be raised.[36] Richmond denied Croson's request and informed Croson that the city decided to rebid the project.[37] Croson requested a review of the waiver denial, but Richmond rejected Croson's request on the ground that the city chose to rebid the project and such decision was not appealable.[38]

Croson subsequently filed a complaint in the Federal District Court for the Eastern District of Virginia, alleging that Richmond's ordinance was unconstitutional.[39] The district court upheld Richmond's Plan in all respects and the Fourth Circuit Court of Appeals affirmed.[40] The United States Supreme Court

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[34] *Id.* at 715. The bid on the fixtures for Continental was $6,183.29 higher than the figure Croson had incorporated in its bid to Richmond. *Id.* Utilizing Continental's bid would have increased the project's cost by $7,663.16. *Id.*

[35] *Id.* Richmond would provide bidders on city construction projects with a "Minority Business Utilization Plan Commitment Form." *Id.* at 713. The lowest bidder would be required to advance a commitment from listing the MBE's slated for the project and the ratio of the contract price awarded to the MBE. *Id.* The city would then refer the form to Richmond's HRC in order to verify the validity of the MBE. *Id. See supra* note 19 and accompanying text. The city warned Croson that its failure to submit a Minority Business Utilization Plan Commitment Form could result in the bid being considered unresponsive. *Croson*, 109 S. Ct. at 715.

[36] *Croson*, 109 S. Ct. at 715. Croson's request was submitted on November 8, 1983. *Id.* Croson argued that Continental was unqualified, that Continental's quotation was offered 21 days after the bid date, and the quotation was markedly higher than the other quotations Croson had received. *Id.* In another letter, Croson documented the additional costs which would result from using Continental to provide the fixtures, and therefore, requested that the contract price be increased by $7,663.16. *Id.*

[37] *Id.*

[38] *Id.* at 715-16. According to the Richmond Code, the appeal procedures are only available after an award is made. *Id. See* J.A. Croson Co. v. City of Richmond, 779 F.2d 181, 184 n.5 (4th Cir. 1985), *vacated and remanded*, 478 U.S. 1016 (1986), *rev'd*, 822 F.2d 1355 (4th Cir. 1987), *aff'd*, 109 S. Ct. 706 (1989) (citing RICHMOND, VA., CITY CODE, Ch. 24.1, Art. VII (c) (1985)). Here, no award was made since the city elected to rebid the project. *Croson*, 109 S. Ct. at 716.

[39] *Id.* Croson originally filed the action pursuant to 42 U.S.C. § 1983 in the circuit court of the City of Richmond. *Croson*, 109 S. Ct. at 716. The action was removed to the Federal District Court for the Eastern District of Virginia under 28 U.S.C. § 1441(a) (1982). J.A. Croson Co. v. City of Richmond, 779 F.2d 181, 182 n.1 (4th Cir. 1985), *vacated and remanded*, 478 U.S. 1016 (1986), *rev'd*, 822 F.2d 1355 (4th Cir. 1987), *aff'd*, 109 S. Ct. 706 (1989). Original jurisdiction over Croson's federal constitutional claims was conferred upon the district court pursuant to 28 U.S.C. § 1331 (1982); the district court also considered pendent state law claims. *Croson*, 779 F.2d at 182 n.1.

[40] *Croson*, 779 F.2d at 182. Both courts employed a test derived from Fullilove v.

granted certiorari, vacated the court of appeal's opinion, and remanded the case for consideration in light of *Wygant v. Jackson Board of Education*,[41] an intervening Supreme Court decision.[42] On remand, the court of appeals held that the Richmond ordinance violated the fourteenth amendment's equal protection clause.[43] The United States Supreme Court noted probable jurisdiction on Richmond's appeal[44] and affirmed the judgment.[45]

In *Defunis v. Odegaard*,[46] the Supreme Court, over the vigorous dissent of Justice Douglas,[47] avoided the difficult issue of the constitutionality of benign or reverse discrimination on the grounds that the case before it was moot.[48] The Supreme Court did not address the merits of affirmative action until 1978 in *Regents of the University of California v. Bakke*.[49]

In *Bakke*, the Supreme Court considered the validity of a special minority admissions program at the Medical School of the

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Klutznick, 448 U.S. 448 (1980) and Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). *Croson*, 109 S. Ct. at 716. To demonstrate the constitutionality of a minority set-aside plan, the test requires:

> (1) [that] the governmental body have the authority to pass such legislation; (2) [that] adequate findings have been made to ensure that the governmental body is remedying the present effects of past discrimination rather than advancing one racial or ethnic group's interests over another; (3) [that] the use of such classifications extend no further than the established needs of remedying the effects of past discrimination.

Croson, 779 F.2d at 188 (quoting South Florida Chapter of the Associated Gen. Contractors of Am., Inc. v. Metropolitan Dade County, Fla., 723 F.2d 846, 851-52 (11th Cir.), *cert. denied*, 469 U.S. 871 (1984).

41 476 U.S. 267 (1976).

42 *See* 478 U.S. 1016, *rev'd*, 822 F.2d 1355 (4th Cir. 1987), *aff'd*, 109 S. Ct. 706 (1989)

43 *Croson*, 822 F.2d 1355 (4th Cir. 1987), *aff'd*, 109 S. Ct. 706 (1989). The court of appeals held that the *Wygant* Court's strict scrutiny standard signified that in order to establish "that a plan is justified by a compelling governmental interest, a municipality that wishes to employ a racial preference cannot rest on broad-brush assumptions of historical discrimination." *Id.* at 1357. The court of appeals interpreted the above requirement to mean that "findings of *societal* discrimination will not suffice; the findings must concern 'prior discrimination *by the government unit involved.*'" *Id.* at 1358 (quoting *Wygant*, 476 U.S. at 274) (emphasis in original). The court found no record of prior discrimination and thus held that no compelling governmental interest supported the Plan. *Id.* at 1360. The court further held that the 30% set-aside provision was not narrowly tailored for accomplishing a remedial purpose. *Id.*

44 J.A. Croson Co. v. City of Richmond, 484 U.S. 1058 (1988).

45 *Croson*, 109 S. Ct. 706.

46 416 U.S. 312 (1974).

47 *Id.* at 320 (Douglas, J., dissenting).

48 *Id.* at 318-20.

49 438 U.S. 265 (1978).

University of California at Davis (Medical School).[50] Alan Bakke challenged the plan after he was twice denied admission even though his qualifications outranked many students admitted under the program.[51] Bakke alleged that the Medical School's race-conscious admissions program violated the equal protection clause.[52]

A majority of the Court did not decide whether the Medical School's program was constitutional.[53] While the Court held that the Davis plan could not stand,[54] five Justices accepted the principle that the use of racial considerations would not per se violate equal protection.[55] The Justices could not agree, however, on when a race-based admissions program would pass constitutional muster.[56] Justice Stevens, joined by Chief Justice Burger and Justices Stewart and Rehnquist, posited that Title VII of the Civil Rights Act of 1964[57] outlawed the Medical School's program and made it unnecessary to consider the constitutionality of the program.[58] The remaining five, Justices Powell, Brennan, White, Marshall and Blackmun would have upheld the voluntary use of race-conscious admissions programs, even when those programs set aside a fixed number of admissions for minority group members.[59] These Justices argued that racial classifications designed to further remedial purposes were not foreclosed by the Constitution in appropriate circumstances.[60] They further opined that

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50 *Id.* at 272 (Powell, J., plurality opinion). The medical school admitted 100 students each year. *Id.* at 272. Under Davis' plan, 16 of the 100 seats were set aside solely for minority group applicants. *Id.* at 275 (Powell, J., plurality opinion). Thus, designated minorities could compete for admission even though they may not have been as qualified as those granted admission for the other 84 seats. *Id.*

51 *Id.* at 276-77 (Powell, J., plurality opinion). Student selections were based on personal interviews, "overall grade point average, grade point average in science courses, scores on the Medical College Admissions Test (MCAT), letters of recommendation, extracurricular activities, and other biographical data." *Id.* at 274 (Powell, J., plurality opinion).

52 *Id.* at 277-78 (Powell, J., plurality opinion).

53 *Id.* at 272 (Powell, J., plurality opinion).

54 *Id.* at 271 (Powell, J., plurality opinion).

55 *Id.* at 272 (Powell, J., plurality opinion) (Justices Brennan, White, Marshall and Blackmun joined Justice Powell).

56 *Id.* at 269 (Powell, J., plurality opinion).

57 42 U.S.C. § 2000d-2000d-6 (1982). The Act articulated a color-blind ideal in which factors of race, color, religion, sex and national origin would not be the basis of employment decisions. *Id.* at § 2000a.

58 *Bakke*, 438 U.S. at 421 (Stevens, J., concurring in part & dissenting in part).

59 *Id.* at 356 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part).

60 *Id.*

an intermediate level of scrutiny[61] was appropriate to review benign racial preferences.[62]

Justice Powell provided the swing vote in *Bakke*, embracing a strict scrutiny standard[63] to review the constitutionality of the admissions program under the equal protection clause.[64] Justice

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[61] The intermediate standard of review adopted by the Justices was the standard previously promulgated in gender cases. *See* Califano v. Webster, 430 U.S. 313, 317 (1977); Craig v. Boren, 429 U.S. 190, 197 (1976). In gender cases, an intermediate standard of review "eliminates the strong presumption of constitutionality that exists under the rational basis standard of review but it allows the government to employ a gender-based classification so long as it is a reasonable means of achieving substantial government ends and not merely the arbitrary classifying of people by sexual stereotypes." J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 532 (1983). "Racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to the achievement of those objectives.' " *Bakke*, 438 U.S. at 359 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part) (quoting Craig v. Boren, 429 U.S. 190, 197 (1976)).

[62] *Bakke*, 438 U.S. at 359 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part). The Justices, however, rejected the plurality's strict scrutiny approach. *Id.* at 357 (Brennan, White, Marshall & Blackmun, J.J., concurring in part and dissenting in part).

> Unquestionably we have held that a government practice or statute which restricts "fundamental rights" or which contains "suspect classifications" is to be subjected to "strict scrutiny" and can be justified only if it furthers a compelling interest and, even then only if no less restrictive alternative is available. But no fundamental right is involved here. Nor do whites as a class have any of the "traditional indicia of suspectness; the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."

Id. at 357 (Brennan, White, Marshall & Blackmun, J.J., concurring in part and dissenting in part) (citations omitted).

[63] *Id.* at 291. Strict scrutiny has been used to evaluate the validity of classifications based on race or natural origin. Using strict scrutiny to determine if the classifications are invidious, the court will invalidate the classification unless it is necessary to promote a compelling or overriding interest of government. J. NOWACK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 611 (1983). Further,

> [b]urdening someone because of his national origin or status as a member of a racial minority runs counter to the most fundamental concept of equal protection. To legitimate such a classification the end of the governmental action would have to outweigh the basic values of the [a]mendment. For this reason no such classification has been upheld since 1945 when there was any likelihood that it would burden racial minorities.

Id.

[64] *Bakke*, 438 U.S. at 291 (Powell, J., plurality opinion). The *Bakke* plurality rejected the University's contention that strict scrutiny should not be applied to white applicants who are not a discrete and insular minority. *Id.* at 290 (Powell, J., plurality opinion) (citations omitted). The plurality stated that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." *Id.* at 289-90 (Powell, J., plurality

Powell argued that all racial classifications are inherently suspect and call for strict scrutiny review.[65] He also argued for a principle of individualized justice, whereby an individual would be judged on the basis of worth and merit and not on the basis of class membership.[66] While Justice Powell conceded that promoting diversity in the student body is a compelling interest for a university, he posited that the Davis system, in which access to 16 seats was based solely on race, was not a necessary means for promoting diversity.[67] Accordingly, Justice Powell joined Justices Stevens, Burger, Stewart, and Rehnquist in determining that the Medical School's program violated the fourteenth amendment's equal protection clause and joined the plurality in concluding that Bakke should be admitted.[68] Justice Powell, however, joined Justices Brennan, White, Marshall, and Blackmun in their position that colleges may give some consideration to race in admissions.[69] Although the issue was squarely before the Court in *Bakke*,[70] the Supreme Court's decision in that case left unsettled the constitutional debate over reverse discrimination.[71]

The Supreme Court did not rule directly on an affirmative action program until 1979, in *United Steelworkers of America v. Weber*.[72] While the *Weber* Court upheld an affirmative action plan on statutory grounds,[73] the Court's opinion addressed some of the intricacies of affirmative action programs.[74] At issue in *Weber* was a private employer's apprenticeship program which required that fifty percent of the training positions be reserved for blacks.[75] A white production worker, who was passed over when black employees were admitted into the training program,

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opinion). The plurality further noted that classifications based on race have always been subjected "to the most rigid scrutiny." *Id.* at 291 (Powell, J., plurality opinion) (citing Korematsu v. United States, 323 U.S. 214, 216 (1944)).

65 *Id.*

66 *Id.* at 298 (Powell, J., plurality opinion).

67 *Id.* at 314-15 (Powell, J., plurality opinion).

68 *Id.* at 319-20 (Powell, J., plurality opinion).

69 *Id.* at 320 (Powell, J., plurality opinion).

70 *Id.* at 269-70 (Powell, J., plurality opinion).

71 *Id.* at 320 (Powell, J., plurality opinion).

72 443 U.S. 193 (1979).

73 *Id.* at 209. The majority held that the language of Title VII was "intended as a spur or catalyst to cause 'employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.' " *Id.* at 204 (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)).

74 *Id.*

75 *Id.* at 198. The measure was temporary and was to be terminated upon

claimed discrimination in violation of Title VII of the Civil Rights Act of 1964.[76] A majority of the Court explained that the plan passed statutory muster because its "purposes . . . mirror[ed] those of the statute," and did not "unnecessarily trammel the interests of the white employees."[77] In a dissenting opinion, Justice Rehnquist and Justice Burger posited that Title VII prohibited all racial discrimination in employment.[78] While the *Weber* Court held that benign discrimination was permissible under Title VII,[79] the Court left unanswered the question of whether Congress could prohibit affirmative action and mandate adherence to a color-blind standard.[80]

Finally, in *Fullilove v. Klutznick*,[81] all nine Justices addressed the issue of the constitutionality of race-conscious affirmative action.[82] Several construction contracting and subcontracting associations challenged the validity of the set-aside provision of the Public Works Employment Act.[83] The Act was designed to pro-

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achieving a proportional percentage of black skilled craftworkers equal to the percentage of blacks in the local work force. *Id.* at 199.

76 *Id.* Title VII of the Civil Rights Act of 1964 makes it unlawful to "discriminate . . . because of . . . race" in hiring and in selecting apprentices for training programs. 42 U.S.C. § 2000e-2(a) (1982). Specifically, section 703(a) provides:

> (a) It shall be an unlawful employment practice for an employer —
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> (1) to fail or refuse to hire or to discharge to any individual, or otherwise to discriminate against any individual with respect to his compensation, terms conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

Id. Furthermore, section 703(d) provides:

> It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

Id.

77 *Weber*, 443 U.S. at 208.

78 *Id.* at 220 (Rehnquist, J., dissenting).

79 *Id.* at 208.

80 *Id.*

81 448 U.S. 448 (1980).

82 *Id.* at 455, 472 (Burger, C.J., plurality opinion).

83 *Id.* at 453. The set-aside provision as contained in 42 U.S.C. §§ 6705(e)-6707(j) (1982). The Act was challenged by a firm engaged in ventilation, air conditioning, and heating work, and several associations of construction contractors and

vide four billion dollars of federal funds for various programs in an attempt to revive a flagging economy.[84] The challenged provision ensured that ten percent of the funds would be allocated to business enterprises owned by United States Citizens who were "Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."[85] By a six to three vote, the Supreme Court rejected the constitutional challenge to the Public Works Employment Act.[86]

In his plurality opinion in *Fullilove*, Chief Justice Burger, joined by Justices White and Powell, concluded that the program would satisfy either the strict scrutiny or intermediate review tests.[87] Stressing Congress' broad remedial powers under the commerce clause and the fourteenth amendment, Chief Justice Burger found that Congress was empowered to identify the existence of past discrimination and implement race-conscious remedies to cure those effects.[88] The Chief Justice further held that the Public Works Employment Act's burden on nonminority firms was relatively light,[89] and the program was not overinclusive because it provided for waiver and exemption of its provisions in special circumstances.[90]

The principal concurring opinion in *Fullilove* by Justice Mar-

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subcontractors, who alleged that they sustained economic injury due to enforcement of the set-aside requirement. *Fullilove*, 448 U.S. at 455 (Burger, C.J., plurality opinion). The plaintiffs also alleged that the provision, on its face, violated the equal protection clause of the fourteenth amendment, the equal protection clause of the fifth amendment and antidiscrimination provisions of the Civil Rights Act. *Id.*

84 *Id.* at 453 (Burger, C.J., plurality opinion).

85 *Id.* at 454 (Burger, C.J., plurality opinion) (quoting 42 U.S.C. § 6705(f)(2) (1982). The provision at issue stated:

> Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, 'minority business enterprise' means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.

Id.

86 *Fullilove*, 448 U.S. at 492 (Burger, C.J., plurality opinion).

87 *Id.*

88 *Id.* at 472-73 (Burger, C.J., plurality opinion).

89 *Id.* at 484 (Burger, C.J., plurality opinion).

90 *Id.* at 486-87 (Burger, C.J., plurality opinion).

shall applied intermediate scrutiny[91] to hold that the race-conscious set-aside was "substantially related to the achievement of the important and congressionally articulated goal of remedying the present effects of past discrimination."[92] Justice Powell filed a separate concurrence in which he reaffirmed his position in *Bakke* that all racial classifications should be subject to a strict scrutiny analysis.[93] Justice Stewart, joined by Justice Rehnquist, took the flat position that "the government may never act to the detriment of a person solely because of that person's race."[94] Justice Stevens dissented, supporting a standard beyond strict scrutiny, a flat prohibition of racial classifications.[95]

The *Fullilove* Court directly upheld Congress' power to use race-conscious remedies in an effort to eradicate the effects of past and present racial discrimination and to prevent the recurrence of that discrimination.[96] The Court repudiated claims that affirmative action was merely "reverse discrimination" and that the Constitution prohibits any governmental practices that violate the principles of color-blindness.[97]

In 1986, in *Wygant v. Jackson Board of Education*,[98] eight members of the Court firmly rejected the notion that only color-blind, not race-conscious, measures are constitutional in hiring and layoff decisions.[99] Once again, however, the Justices failed to agree upon a standard of review for the race-based layoff program in question.[100] Justice Powell, joined by Justices Rehnquist, O'Connor, White and Chief Justice Burger, held that, even where a race-conscious statute operated against a group that has not historically been the victim of discrimination, strict scrutiny must be applied.[101] According to the plurality, the fact that society as a whole had historically discriminated against blacks did not furnish a sufficiently compelling governmental interest.[102] Accord-

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91 For a discussion of intermediate level scrutiny, *see supra* note 61.

92 *Id.* at 521 (Marshall, J., concurring in the judgment).

93 *Id.* at 496 (Powell, J., concurring opinion).

94 *Id.* at 525 (Stewart, J., dissenting).

95 *Id.* at 523 (Stewart, J., dissenting).

96 *Id.* at 490 (Burger, C.J., plurality opinion).

97 *Id.* at 482 (Burger, C.J., plurality opinion).

98 476 U.S. 267 (1986).

99 *Id.* at 280 (Powell, J., plurality opinion).

100 *Id.* at 269. The challenged scheme granted black teachers greater protection from lay-offs than white teachers. *Id.* at 270-71 (Powell, J., plurality opinion).

101 *Id.* at 273-74 (Powell, J., plurality opinion).

102 *Id.* at 274 (Powell, J., plurality opinion). The plurality commented that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Id.* at 276 (Powell, J., plurality opinion). The Court,

ingly, the Court posited that the plan contravened the equal protection clause.[103]

In *Richmond v. J.A. Croson Co.*,[104] the Supreme Court alleviated tension between the fourteenth amendment's equal protection guarantee and the enactment of race-conscious measures to rectify the effects of past discrimination.[105] Justice O'Connor, writing for the majority, explicitly stated that all programs sponsoring racial preferences, whether favoring whites or blacks, would be tested by the same standard of equal protection review.[106] Reaffirming the plurality opinion in *Wygant*, the *Croson* court applied a strict scrutiny standard to assess the constitutionality of Richmond's minority set-aside program.[107]

The Court began its analysis by determining the scope of Richmond's power to enact legislation intended to ameliorate the effects of past discrimination.[108] The majority stipulated that *Fullilove* was not dispositive in the Court's assessment of Richmond's power to enact race-conscious programs.[109] The Court based its decision upon the determination that in *Fullilove* Congress acted pursuant to section five of the fourteenth amendment[110] in an attempt to enforce the dictates of the equal protection clause.[111]

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however, did not impose a requirement that the public body make official findings of discrimination. *Id.* at 277 (Powell, J., plurality opinion). Rather, the court determined that there must be "sufficient evidence to justify the conclusion that there has been prior discrimination." *Id.*

103 *Id.* at 284 (Powell, J., plurality opinion).

104 109 S. Ct. 706 (1989).

105 *Id.* at 712, 730.

106 *Id.* at 721. For purposes of clarity, the opinion authored by Justice O'Connor is referred to as the majority, although Parts II, III-A and V of the opinion have been joined only by a plurality of the Court. *See id.* at 712. Justice O'Connor delivered the opinion and announced the judgment of the Court with respect to sections I, III-B and IV. *Id.* Justice O'Connor was joined by Chief Justice Rehnquist and Justice White on section II. *Id.* On sections III-A and V, Justice O'Connor delivered an opinion which was joined by Chief Justice Rehnquist and Justices White and Kennedy. *Id.*

107 *Id.* at 722-23.

108 *Id.* at 717.

109 *Id.* The Court differentiated *Fullilove* from *Croson* on the basis that the former dealt with an exercise of congressional power while the latter involved an exercise of state power. *Id.* at 719.

110 *See supra* note 1.

111 *Croson*, 109 S. Ct. at 719. The *Croson* Court explained that "[c]orrectly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Id.* (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)). *See also* South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966) (Congress may enforce constitutional prohibitions); Note, *Fullilove*, 96 YALE L.J. 453, 474 (1987) ("*Fullilove* clearly focused on the constitutionality of a *congressionally*

Conversely, the *Croson* majority determined that states are constrained in their remedial efforts by section one of the fourteenth amendment.[112] The Court stated that a state, however, may possess the authority to remedy the effects of private discrimination within its own legislative domain, provided that the state identifies the discrimination with particularity as prescribed in the fourteenth amendment.[113] Consequently, the *Croson* majority held that the court of appeals erred insofar as it followed by rote *Wygant*'s ruling that the equal protection clause mandated a showing of prior discrimination by the government entity involved.[114]

In explaining its adherence to a heightened standard of review, the *Croson* majority emphasized that section one of the fourteenth amendment guarantees personal rights.[115] The Court interpreted section one in accordance with Justice Powell's opinion in *Bakke*, finding that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."[116] Considering that Richmond's Plan denied individuals, solely on a racial basis, the opportunity to compete for a percentage of public contracts, the majority opined that an in-depth inquiry into Richmond's justification for the Plan was necessary to ensure that Richmond was pursuing a remedial goal sufficiently important to warrant its use of a highly suspect tool. Further, the Court stressed that the means chosen must have been narrowly tailored to the compelling goal so that there was little possibility that the classification was motivated by racial politics or illegitimate no-

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mandated set-aside program") (emphasis in the original). *See generally* Comment, *Bakke, Weber, and Fullilove: Benign Discrimination and Congressional Power to Enforce the Fourteenth Amendment*, 56 IND. L.J. 473 (1981) (analyzing Congress' authority pursuant to section five of the fourteenth amendment).

112 *Croson*, 109 S. Ct. at 719-20. *See supra* note 92. In *Ex parte* Virginia, 100 U.S. 339, 345 (1880), the Supreme Court stated that the fourteenth amendment was intended to limit state powers and enlarge congressional powers. *See infra* note 152 and accompanying text.

113 *Croson*, 109 S. Ct. at 720. The court of appeals held that Virginia law vested authority in Richmond to enact the Plan. *See* J.A. Croson v. City of Richmond, 779 F.2d 181, 187 (4th Cir. 1985); *vacated and remanded*, 478 U.S. 1016 (1986), *rev'd*, 822 F.2d 1355 (4th Cir. 1987); *aff'd* 109 S. Ct. 706 (1989). The court of appeals' determination was not disturbed by the Court's subsequent conclusion that the set-aside program violated the equal protection clause. *Croson*, 109 S. Ct. at 720.

114 *Id.*

115 *Id.* at 720-21 (citing Shelly v. Kraemer, 334 U.S. 1, 22 (1948)). *See also supra* note 1 (constitutional foundation for congressional enforcement).

116 *Croson*, 109 S. Ct. at 721 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289-90 1978)).

tions of racial inferiority.[117] Such findings, the majority explained, would serve to define the scope of the injury as well as the remedy necessary to cure its effects.[118] The Court indicated that a proper determination of remedial necessity also operates to assure all citizens that the deviation from the customary equal treatment of all ethnic and racial groups is only a temporary measure taken to effectuate equality itself.[119]

Justice O'Connor inquired into whether Richmond had presented evidence which identified discrimination in the city's construction industry sufficient to demonstrate a compelling interest in apportioning public contracting opportunities on a racial basis.[120] The Court held that the city failed to establish a compelling governmental interest justifying the ordinance.[121] According to the majority, Richmond's goal of ameliorating the effects of societal discrimination, as compared to remedying wrongs caused by specific instances of discrimination, was an inadequate basis for race-conscious classifications.[122] The Court reasoned that Richmond's generalized assertion of past discrimination in the construction industry was flawed because it did not provide guidance for Richmond's legislature to determine the exact scope of the injury it intended to remedy.[123]

Similarly, the majority rejected Richmond's argument that it was attempting to remedy various past discriminatory practices including the exclusion of blacks from construction training programs and trade unions.[124] The Court repudiated the city's justification for the program on the grounds that several nonracial factors were included in Richmond's analysis of past discrimination despite the fact that these factors burdened all races who might try to build a new business enterprise.[125] The majority held that Richmond could only establish a compelling interest in remedying the effects of past discrimination upon a showing of "judicial, legislative, or administrative findings of constitutional

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117 *Id.*

118 *Id.*

119 *Id.* at 730.

120 *Id.* at 723.

121 *Id.*

122 *Id.* at 722-23 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978)).

123 *Id.* at 723. *See also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 275 (1986).

124 *Croson*, 109 S. Ct. at 723.

125 *Id.* at 723-24. The factors considered were deficiencies in working capital, inability to meet bonding requisites, and unfamiliarity with bidding procedures. *Id.*

or statutory violations."[126]

Furthermore, the *Croson* majority rejected the district court's justification for concluding that Richmond's Plan was warranted by past incidents of discrimination.[127] The Court determined that the Plan's proclaimed remedial intention was insufficient to justify the Plan;[128] the mere assertion of a legitimate or benign purpose for the racial classification was not probative.[129] The Court also determined that opinions of Plan proponents regarding the existence of discrimination in the construction industry were entitled to little or no weight.[130]

Additionally, the majority noted that Richmond misplaced dependence on the disparity between the city's minority population and the number of contracts granted to minority firms.[131] Finding numerous explanations for the dearth of minority participation in local contractors' associations,[132] the Court also discredited the lower court's reliance on this disparity to establish discrimination.[133] Lastly, a majority of the Justices remarked that congressional findings of discrimination in connection with the approved *Fullilove* set-aside provision did not demonstrate the presence of discrimination in Richmond.[134]

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126 *Id.* at 723 (quoting Regents of the Univ. of Cal. Regents v. Bakke, 438 U.S. 265, 307 (1978)).

127 *Id.* at 724.

128 *Id.*

129 *Id. See also* Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n. 16 (1975) ("This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation.") (citations omitted).

130 *Croson*, 109 S. Ct. at 724. *See also* Korematsu v. United States, 323 U.S. 214, 235-40 (1944) (Murphy, J., dissenting) (no reasonable relation to public danger supported constitutional deprivation).

131 *Croson*, 109 S. Ct. at 725. The majority unequivocally stated that "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population rather than to the small groups of individuals who possess the necessary qualifications may have little probative value." *Id.* at 725 (quoting Hazelwood School Dist. v. United States, 433 U.S. 299, 308 n.13 (1977)). *Accord* Johnson v. Transportation Agency, 480 U.S. 616, 651-52 (1987) (O'Connor, J., concurring). *See also* Mayor v. Educ. Equality League, 415 U.S. 605, 620 (1974) ("[T]his is not a case in which it can be assumed that all citizens are fungible for purposes of determining whether members of a particular class have been unlawfully excluded.").

132 *Croson*, 109 S. Ct. at 726. The Supreme Court set forth several reasons for low MBE membership in Richmond's contractors' associations. *Id.* The reasons included past societal discrimination in economic and educational opportunities as well as differences in white and black entrepreneurial and career choices. *Id.*

133 *Id.*

134 *Id.* at 727. The court noted that by including a waiver provision in the national program, Congress expressly recognized that the problem's scope would

In addition to rejecting the factual predicate which Richmond offered to support the Plan, the majority noted that Richmond proffered "*absolutely no evidence*" of past discrimination against Oriental, Eskimo, Aleut, Indian, or Spanish-speaking people in any aspect of Richmond's construction industry.[135] The majority held that Richmond failed to identify any discrimination in the city's construction industry.[136] The Court therefore decided that Richmond lacked a compelling interest to apportion public contracts on a racial basis.[137] The Court posited that the Plan's overinclusion of racial groups strongly impugned Richmond's claim of remedial motivation.[138]

After determining that the Richmond Plan was not linked to identified discrimination, the Court considered whether the ordinance was narrowly tailored to rectify the effects of past discrimination.[139] Acknowledging that a determination of whether the Plan was narrowly tailored was virtually impossible without linking the Plan to any identified discrimination, the Court limited its discussion to two observations in concluding that the program was not properly tailored.[140] First, the Court recognized that even though Richmond justified its scheme by suggesting nonracial barriers to minority involvement in the construction industry,[141] the city council failed to consider utilizing race-neutral means to increase participation.[142] Second, the Court did not view the Plan's thirty percent quota as being narrowly tailored to any legitimate goal.[143] According to the majority, the quota rested upon the assumption that minorities will choose certain trades in direct proportion to their ratio in the population.[144]

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vary from one market area to another. *Id.* at 726 (citing Fullilove v. Klutznick, 448 U.S. 448, 487 (1980)). Moreover, the majority explained that, in *Fullilove*, Congress acted pursuant to its enforcement powers under section five of the fourteenth amendment. *Id.* at 726-27. *See supra* note 1.

135 *Croson*, 109 S. Ct. at 727-28 (emphasis in original).

136 *Id.* at 727.

137 *Id.*

138 *Id.* at 728-29.

139 *Id.* at 728.

140 *Id.*

141 *Id.* at 723-24. *See supra* note 125 and accompanying text.

142 *Id.* at 728. The Supreme Court listed several race-neutral devices, such as relaxation of bonding requirements, financial aid and training for disadvantaged entrepreneurs, and simplification of bidding procedures, which Richmond could have employed to increase overall participation in the city's construction industry. *Id.* at 729.

143 *Id.* at 728.

144 *Id.* The *Croson* Court reiterated that "[i]t is completely unrealistic to assume that individuals of one race will gravitate with mathematical exactitude to each em-

Considering that the Plan entitled any Hispanic, Oriental, or Black entrepreneur from anywhere in the country to an absolute preference over another individual solely because of race, the Court posited that Richmond's Plan was obviously not narrowly tailored.[145]

In his concurrence, Justice Stevens opined that the fourteenth amendment requires that courts evaluate race-based governmental decisions principally by studying their likely impact on the future.[146] Accordingly, Justice Stevens disagreed with the underlying premise of the majority's decision that permissible race-based classifications are limited to those which remedy past wrongs.[147] Justice Stevens did agree, however, that Richmond's ordinance could not be justified as a remedy for past discrimination.[148]

The Justice grounded his compliance on three particular aspects of the case.[149] First, Justice Stevens noted that racial diversity is not necessary for the efficient performance of construction contracts.[150] Second, according to the Justice, Richmond's city council, a policymaking entity which promulgated rules governing future conduct, was ill-suited and ill-equipped to enact legislation fashioned to remedy a past wrong.[151] Third, Justice Stevens postulated that Richmond should have specifically identified characteristics of the city's favored and disfavored contractors which justified their disparate treatment.[152]

Justice Kennedy authored a separate opinion in which he concurred in the judgment, but articulated that the fourteenth amendment should not be interpreted to reduce a state's power to eradicate racial discrimination unless a conflict with federal law exists or the state remedy, like Richmond's, violates equal protection.[153] Justice Kennedy agreed with Justice Scalia's observation that a rule which automatically invalidates racial prefer-

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ployer or union absent unlawful discrimination." *Id.* at 728 (quoting Sheet Metal Workers v. EEOC, 478 U.S. 421, 494 (1986) (O'Connor, J., concurring in part and dissenting in part)).

145 *Id.* at 729.

146 *Id.* at 730 (Stevens, J., concurring).

147 *Id.*

148 *Id.* at 730-31 (Stevens, J., concurring).

149 *Id.* at 731 (Stevens, J., concurring).

150 *Id. Contra* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 313-15 (1986) (Stevens, J., dissenting).

151 *Croson*, 109 S. Ct. at 731-32 (Stevens, J., concurring).

152 *Id.* at 732 (Stevens, J., concurring) (citing Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 452-53 (1985) (Stevens, J., concurring)).

153 *Croson*, 109 S. Ct. at 734 (Kennedy, J., concurring).

ences would abandon the precedential requirement of a case-by-case analysis.[154] Therefore, Justice Kennedy accepted the majority's less absolute strict scrutiny standard[155] and found that Richmond's ordinance could not survive such rigorous review.[156]

In his concurring opinion, Justice Scalia vehemently agreed with the majority's conclusion that all racial classifications must survive a strict scrutiny test, whether the proposed purpose is benign or remedial.[157] The Justice refrained from concurring, however, with the majority's indication that in certain circumstances state and local governments may enact race-based classifications to remedy the effects of previous discrimination.[158] According to Justice Scalia, a state may mandate racial preferences to ameliorate the effects of past discrimination only when, as in school desegregation cases, such action is necessary to eradicate the state's own maintenance of a scheme of unlawful racial classifications.[159] The Justice stipulated that in such circumstances the state's remedial authority extends only as far as the scope of the constitutional violation[160] and ceases once the unlawful system has been rectified.[161] In the absence of such remediation, the Justice argued that only a social emergency which threatens imminent peril to life and limb may justify an exception to the fourteenth amendment's principle that "[o]ur Constitution is color-blind,

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154 *Id.*

155 *Id.* The Justice supported such a rigorous rule because the standard commands race neutrality by permitting the use of all classifications, even those narrowly drawn, only as a last resort. *Id.* Justice Kennedy also noted that the rule is not absolute because race-conscious relief may be the only adequate remedy in instances of equal protection violations, and such a rule is consistent with prior decisions. *Id.*

156 *Id.* at 735 (Kennedy, J., concurring).

157 *Id.* (Scalia, J., concurring).

158 *Id.* Justice Scalia expressed agreement with the views of Alexander Bickel who stated that "[t]he lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society." *Id.* (quoting A. BICKEL, THE MORALITY OF CONSENT 133 (1975)).

159 *Id.* at 737 (Scalia, J., concurring). Justice Scalia also used the example that a state agency which compensated all black employees at a rate 20% less than nonblack employees may promulgate an order increasing the black employees' salaries by 20%. *Id.* (citing Bazemore v. Friday, 478 U.S. 385, 395-96 (1986)).

160 *Id.* at 738 (Scalia, J., concurring) (citing Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 465 (1979); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1977); Milliken v. Bradley, 418 U.S. 717, 744 (1974); Keyes v. School Dist. No. 1, Denver, Colorado, 413 U.S. 189, 213 (1973)).

161 *Id.*

and neither knows nor tolerates classes among citizens."[162] Justice Scalia noted that states remain free to utilize race-neutral means to remedy the effects of past discrimination.[163]

In a fervent dissent, Justice Marshall, joined by Justice Brennan and Justice Blackmun, opined that Richmond's set-aside Plan was indistinguishable from the federal program upheld in *Fullilove* and was similarly constitutional.[164] Justice Marshall criticized the majority's position that Richmond had failed to prove the existence of discrimination in the city's construction contracting industry.[165] According to the dissent, Richmond catalogued adequate findings to establish that minorities had been wrongly excluded from public contracting.[166] Justice Marshall posited that the *Croson* decision was a departure from the Constitution's fourteenth amendment demands and that the *Croson* decision would unnecessarily deter states and localities from attempting to rectify past discrimination through race-conscious remedies.[167]

Initially, the dissent attacked the majority's restrictive view of the factual predicate which influenced Richmond's enactment of the Plan.[168] Justice Marshall argued that the majority should have analyzed Richmond's initiative against the backdrop of evidence which documented nationwide racial discrimination in the construction industry.[169] The Justice stated that the necessity for Richmond's Plan would have been readily apparent to the majority if the majority had considered the incidence of discrimination nationwide.[170]

Furthermore, Justice Marshall advocated a lesser standard

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162 *Id.* at 735 (Scalia, J., concurring) (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). Justice Scalia noted that "the Civil War Amendments were designed to 'take away all possibility of oppression by law because of race and color' and 'to be . . . limitations on the power of the States and enlargements of the power of Congress.' " *Id.* at 736 (Scalia, J., concurring) (quoting *Ex parte* Virginia, 100 U.S. 339, 345 (1880)).

163 *Id.* at 738 (Scalia, J., concurring).

164 *Id.* at 739 (Marshall, J., dissenting) (citing Fullilove v. Klutznick, 448 U.S. 448 (1980)).

165 *Id.* at 740 (Marshall, J., dissenting).

166 *Id.* The proof referred to by Justice Marshall included: testimony by Richmond's officials that discrimination had been widespread in the city's construction industry; the federal studies relied on in the *Fullilove* decision which showed that minorities were excluded nationally from the construction contracting industry; and statistics establishing that minority-owned businesses have received little, if any, city contracting dollars and seldom belong to area trade associations. *Id.*

167 *Id.*

168 *Id.*

169 *Id.* at 740 (Marshall, J., dissenting).

170 *Id.* at 743 (Marshall, J., dissenting).

for testing affirmative action programs against the dictates of the equal protection clause.[171] In the Justice's opinion, race-conscious classifications furthering remedial objectives will withstand scrutiny if they are proven to serve important governmental objectives and if they substantially relate to the achievement of those objectives.[172] Justice Marshall opined that Richmond's set-aside provision clearly satisfied this two-prong standard, and therefore, was constitutional.[173]

Justice Marshall proceeded to illustrate how Richmond's conduct satisfied both prongs of the equal protection inquiry.[174] According to Justice Marshall, Richmond satisfied two important governmental interests by setting aside a portion of its public contracting dollars for minority-owned businesses.[175] First, the Justice deemed that the city's motive in alleviating the effects of past discrimination was an important, even a compelling, interest.[176] Justice Marshall found that Richmond's second justifiable interest entailed preventing the city's spending decisions from tacitly encouraging, adopting, or furthering racial discrimination.[177] The Justice further determined that Richmond had proffered sufficient evidence of prior racial discrimination to support remediation and governmental nonperpetuation interests.[178] In assimilating Richmond's ordinance to the federal set-aside provision upheld in *Fullilove*, Justice Marshall further argued that Richmond's Plan comported with the substantial relationship prong of the equal protection clause analysis.[179]

Justice Marshall expanded his dissent in an attempt to undermine the majority's adoption of a strict scrutiny standard.[180] The Justice found the adoption of a strict scrutiny standard unwelcomed.[181] Justice Marshall distinguished between inherently racist governmental actions and those actions seeking to eradi-

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171 *Id.* (Marshall, J., dissenting).

172 *Id.* (citing Regents of the Univ. of California v. Bakke, 438 U.S. 265, 369 (1978) (joint separate opinion of Brennan, White, Marshall, and Blackmun, JJ.); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 301-02 (1986) (Marshall, J., dissenting); Fullilove v. Klutznick, 448 U.S. 448, 517-19 (1980) (Marshall, J., concurring in the judgment)).

173 *Id.* (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980)).

174 *Id.*

175 *Id.*

176 *Id.*

177 *Id.* at 744 (Marshall, J., dissenting).

178 *Id.* at 745 (Marshall, J., dissenting).

179 *Id.* at 750 (Marshall, J., dissenting).

180 *Id.* at 752 (Marshall, J., dissenting).

181 *Id.*

cate the effects of past racism or to prevent governmental perpetuation of such racism.[182] While the Justice believed that the former classifications warrant strict judicial scrutiny, the Justice posited that the latter should not be subjected to such a fatal standard.[183] Justice Marshall also attacked the majority's contention that strict scrutiny was especially warranted in this case because the blacks were a dominant racial group in Richmond.[184] While the Justice agreed that the political and numerical supremacy of a racial group is one factor to consider in determining the applicable level of scrutiny, he indicated that numerical inferiority was an insufficient basis for imposing strict scrutiny.[185] Finally, Justice Marshall expressed dissatisfaction with the Court's restriction of the use of remedial measures by a state or locality absent a prima facie showing of statutory or constitutional violation.[186]

Justice Blackmun, joined by Justice Brennan, filed a separate dissent, in which he depicted the Court's decision as a regressive and insensitive approach towards victims of past discrimination in the construction industry.[187]

Croson casts constitutional doubt on programs throughout the nation which resemble Richmond's Plan.[188] The Court has finally explicitly found that laws favoring blacks over whites will be judged by the same constitutional standard that is applied to laws favoring whites over blacks.[189] Justice O'Connor clearly stated that *Croson* was not the death knell for affirmative action programs.[190] Justice O'Connor did, however, articulate that judi-

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182 *Id.* (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 301-02 (1986) (Marshall, J., dissenting); Fullilove v. Klutznick, 448 U.S. 448, 517-19 (1980) (Marshall, J., concurring in the judgment); Regents of the Univ. of California v. Bakke, 438 U.S. 265, 355-62 (1978) (joint separate opinion of Brennan, White, Marshall and Blackmun, JJ.)).

183 *Id.*

184 *Id.* at 752-53 (Marshall, J., dissenting).

185 *Id.* at 753 (Marshall, J., dissenting).

186 *Id.* at 754 (Marshall, J., dissenting).

187 *Id.* at 757 (Blackmun, J., dissenting).

188 *See* Ohio Contractors Ass'n v. Kelp, 713 F.2d 167 (6th Cir. 1983); Michigan Road Builders Ass'n v. Milliken, 571 F. Supp. 173 (E.D. Mich. 1983); South Fla. Chapter of the Associated Gen. Contractors of Am., Inc. v. Metropolitan Dade County, Fla., 723 F.2d 846 (11th Cir. 1984), *cert. denied*, 469 U.S. 71 (1984); Arrington Associated Gen. Contractors of Am., 403 So.2d 893 (Ala. 1981), *cert. denied*, 455 U.S. 913 (1982); Associated Gen. Contractors v. City & County of San Francisco, 619 F. Supp. 334, 335 (N.D. Cal. 1985); Schmidt v. Oakland Unified School Dist., 662 F.2d 550 (9th Cir. 1981), *vacated and remanded*, 457 U.S. 594 (1982).

189 *Croson*, 109 S. Ct. 706, 721 (1989).

190 *Id.* at 729.

cial approval will be the exception and not the rule.[191] "In the extreme case," she stated, "some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion."[192]

The dissenting Justices reiterated the arguments that Justice Blackmun advanced in *Bakke*, finding that "[i]n order to get beyond racism, we must first take account of race."[193] While Justice Blackmun's argument may have carried some weight eleven years ago, it has lost its appeal. Justice O'Connor's decision in *Croson* assures that race will become less relevant in American life, and that the ultimate goal of "eliminat[ing] entirely from governmental decisionmaking such irrelevant factors as a human being's race" will someday be achieved.[194]

Affirmative action has a certain superficial appeal—somewhat akin to frontier justice. Reduced to simplest terms, it would fight discrimination with discrimination. The laudable purpose of remedying past discrimination does not, however, diminish the basic tenet that discrimination is intrinsically wrong.

As proclaimed in *Bakke*, "preferential programs reinforce common stereotypes that certain groups are incapable of achieving success without special protection based on a factor being no relation to individual worth."[195] Affirmative action may well bring an individual to an opportunity; however, the danger persists that he or she will be perceived as neither fairly deserving the position nor possessing the competence to perform. In the final analysis then, are we really removing the stigma or replacing it with a new one? "A solution to the first problem that aggravates the second is no solution at all."[196]

Is it possible that the cure is worse than the disease?

Tammy J. Spivack

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191 *Id.*

192 *Id.*

193 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., separate dissenting opinion).

194 Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 320 (1986) (Stevens, J., dissenting).

195 *Bakke*, 438 U.S. at 298 (1978).

196 *Croson*, 109 S. Ct. at 735 (Scalia, J., concurring).