

COMMENT

The Sunset of Affirmative Action?: *City of Richmond v. J.A. Croson Co.*

INTRODUCTION

For better or worse, the course of affirmative action took a turn on January 23, 1989. On that day, the Supreme Court made a shocking decision in the case of *City of Richmond v. J.A. Croson Co.*,¹ ruling 6 to 3 against a Richmond, Virginia construction contracting program.² This program called for 30 percent of any Richmond construction contract to be awarded to minority businesses unless certain conditions were proven. In this Comment, we attempt to analyze the *Croson* case and explore how the Court's decision will effect existing and future affirmative action programs.

A. *The Media*

The Washington Post interpreted the Courts decision in *Croson* as "sharply limit[ing] the ability of state and local governments to reserve a fixed percentage of contracts for minority businesses without clear proof of past discrimination"³ The limitation the Supreme Court placed on state and local governments would become a hotly debated issue. The Washington Post aptly predicted that "[t]he ruling means that many, if not virtually all, state and local governments with similar programs may be required to reconsider them or to justify them against renewed legal challenges"⁴

With 36 of the 50 states (and 190 local governments) having implemented such legislation,⁵ the *Croson* case has serious national implications. The intense feelings surrounding the case would only be increased by the fact that Justice Sandra Day O'Connor, the Supreme Court's first female justice, wrote the central opinion for the majority: Justice Thurgood Marshall, the Supreme Court's first Black justice, wrote a scathing dissent.

Opinions about the *Croson* decision ranged from those who felt "*Richmond v. Croson* marked the beginning of the end of affirmative action"⁶ to those who sensed that the "[h]igh Court decision on set-asides may actually help minority contractors."⁷ But most opponents *and* supporters of affirmative action saw the case "as a virtual death knell for set-aside programs at the

1. — U.S. —, 109 S. Ct. 706 (1989).

2. Ironically, this decision was reported on the same day as another headline read, "Report Says S&Ls Show Loan Bias: Blacks Rejected More Often, Analysis Finds" and just days before a lawsuit was brought against the Holiday Spa health club chain alleging that they violated the civil rights of prospective Black members by trying to discourage them from joining and by denying them more favorable financial terms offered to Whites. See Washington Post, January 24, 1989, at C1, col. 6.

3. Washington Post, January 29, 1989, at A1, col. 3.

4. Washington Post, Jan. 24, 1989, at A1, col. 5.

5. *Id.*

6. *Id.*

7. Washington Post, Feb. 3, 1989, at A25, col. 5.

7. Washington Post, Feb. 2, 1989, at E3, col. 1.

state and local level."⁸

Former assistant Attorney General Charles Cooper proclaimed, "[t]his is a big victory for the Reagan administration and the Justice Department."⁹ On the other hand, Rudolph A. Pyatt, Jr., a member of the Reagan administration, stated, "[m]inority business owners would be doing themselves a disservice . . . by calling the ruling a major civil rights setback. It is at worst a symbolic gesture toward the opponents of affirmative action."¹⁰ He felt:

Those jurisdictions with set-aside programs similar to Richmond's need only to strengthen them by following the [C]ourt's guidelines. It can't be that difficult to document years of deliberate exclusion. Indeed local government officials — some of them in the Washington area — have acknowledged that contracting procedures were deliberately structured to exclude minorities. Where the record clearly shows a pattern of such exclusionary tactics, there obviously is ground for attack and remedy.¹¹

The most rational interpretation of the decision, however, appears to be that of Koteles Alexander who co-authored an *amicus curiae* brief on behalf of the Maryland Legislative Black Caucus. Alexander stated, "[the] burden on local and state officials to prove past discrimination will be a disincentive to either enforce or enact programs that assist minorities."¹² Alexander also ". . . expects state and local governments to start avoiding set-aside programs for fear that they will be taken to court by [W]hite business owners who want the work"¹³

Thankfully, many of the governments that have created their own affirmative action programs intend to keep their programs despite the Court's ruling. In the nation's capital, where a program nearly identical to the Richmond program has been employed, Mayor Marion Barry said, "[w]e believe minority businesses deserve a piece of the American dream."¹⁴ However, the optimism shown by Mayor Barry regarding Washington, D.C.'s affirmative action program was quickly negated. Within days, lawyers and former District of Columbia officials had "concluded that the city's 13-year old law, under which the amount of D.C. government business awarded minority firms has increased from 5 percent to about 40 percent, probably cannot meet the strict standards"¹⁵ of the *Croson* decision. To many observers, this strengthened the belief that *Croson* would spell the demise of minority run businesses in various sectors. As Anthony W. Robinson, president of the Washington-based Minority Business Enterprise Legal Defense and Education Fund Inc., stated, "[t]he old-boy network will come right back in there, there's no question about it The only means by which minorities have been able to get access to these markets is through contracting programs such as the

8. Washington Post, Jan. 24, 1989, at A5, col. 2.

9. *Id.* During the Reagan administration, the Justice Department strongly opposed virtually all forms of affirmative action and set aside programs. It filed a friend-of-the-court brief opposing the Richmond plan. The Reagan administrations attitude is further evidenced by the fact that during his eight years in office, former president Reagan's total number of appointments to the United States District and Appeals Courts was 379, of which only 7 were Black. See Washington Post, Jan. 29, 1989, at A6, col.4.

10. Washington Post, Feb. 2, 1989, at E3, col. 3.

11. *Id.*, at col. 2.

12. Washington Post: Washington Business, January 30, 1989, at 16, col. 1.

13. *Id.*

14. Washington Post, Jan. 24, 1989, at A5, col. 5.

15. Washington Post, Jan. 29, 1989, at A21, col. 4.

District's."¹⁶

District officials hope to keep the set-aside program alive by obtaining additional supporting data and by changing their definition of minorities to include only groups that actually suffered discrimination.¹⁷ Apparently, the Court desires identifiable victims."¹⁸

As William Raspberry proclaimed, the Supreme Court's need for identifiable victims and their rejection of evidence showing that only .67% of the city's construction contracts to the city's minority residents (who make up 52% of the city's population) demonstrates "... a lack of understanding of the nature and effect of discrimination"¹⁹

The Court, knowing that public records of "identifiable" racism were rarely kept in the past, may have succeeded in what the Reagan administration began; as Dorothy Gilliam, a Washington Post columnist stated, "this is potentially the kiss of death for the cause of minority economic progress. The dissenting justices were right when they called the decision 'a deliberate and giant step backward'."²⁰

B. *The Purpose of Minority Set-Asides*

The purpose of minority set-asides was discussed by Courtland Cox, an early director of the Minority Business Opportunity Commission. Cox stated, "[i]f we had a level playing field, I would not object to ending such programs But [B]lacks and minority businesses don't have a level playing field. They have a ladder."²¹ It is apparent that six of the Supreme Court are igno-

16. *Id.*

17. *Id.*, at A22, col. 1.

18. *Id.*

19. Those numbers, on their face, justify a "general assertion" of discrimination. Nor should it be necessary that specific firms were victims of that discrimination. Put yourself in the situation of a [B]lack would-be entrepreneur who, looking at that 1 percent figure, decided to take a job at the post office rather than risk bankruptcy in what must have seemed a fixed game.

How could you ever hope to prove that the business you were discouraged from launching was a victim of discrimination? And yet how could you doubt that discrimination had dictated your decision to find a safer line of work?

Washington Post, January 30, 1989, at A9, col. 1.

Raspberry then took the role of the analytical, "middle-of-the-road," third-party by stating: Nobody likes quotas, and given a choice between quotas and an open market, hardly anyone would chose quotas.

The problem is how to demonstrate that the markets are truly open. Theoretically, it should be possible to show market bias. All it takes is to show that two firms, equally qualified, fail of equal access. That is the proof that the Supreme Court's recent decision calls for.

But in practical terms, the most obvious proof is in the results. Given clear evidence of race-specific outcomes, it makes sense to place on the alleged discriminator the burden of either proving that the process is fair or establishing a procedure that will produce fairer results.

. . . The recent decision, which can be read as requiring agencies to submit proof of their own bias before they can take corrective action, threatens a whole range of affirmative-action initiatives.

Id.

20. Washington Post, January 26, 1989, at B3, col. 4. Gilliam later went on to show the positive gains accomplished through set-aside programs. Gilliam stated that the programs "... despite their problems had been a ray of hope for minority entrepreneurs, freeing many from the widespread negative belief that [B]lack businessmen just couldn't make it." Gilliam followed by providing specific examples of entrepreneurs and researchers who proved the value of set-aside programs. *Id.*

21. Washington Post, Jan. 29, 1989, at A22, col. 2.

rant of the difficulties faced by minorities; the Court apparently "seeks to withdraw the few too-little, too-late remedies it reluctantly conceded in recent years."²²

Minority set aside programs were also implemented to help eliminate discrimination in the construction industry and bring minority firms, which had been systematically excluded from the industry, into the mainstream.²³ There is little doubt that set-aside programs could remedy this great disproportion of construction contracts given to minority businesses. The severe lack of minority participation within the construction industry implores assistance from such set-aside programs. But, although the figures are in need of a positive change, the *Croson* decision will severely hamper the ability of any state or local government to eliminate racial discrimination within the construction industry.

II. FACT SUMMARY

A. "The Plan"

The Richmond City Council's Minority Business Utilization Plan (The Plan), was adopted on April 11, 1983. The Plan required prime contractors who were awarded city construction contracts to subcontract at least thirty percent of the dollar amount of the contract to one or more Minority Business Enterprises (MBEs).²⁴ MBEs, as defined by the Plan, are businesses that are at least fifty-one percent owned and controlled by minority group members.²⁵ The Richmond City Council declared that the Plan was "remedial" in nature, and was enacted "for the purpose of promoting wider participation by minority business enterprises in the construction of public projects."²⁶

The City Council relied on statistics showing that virtually no city construction money was going to minority firms, even though Richmond's population was over fifty percent Black.²⁷ Although the Plan required White

22. *Id.*, at B3, col. 5.

23. The extent to which minority firms have been excluded from these industries in the past is illustrated by data from the 1972 Census of Construction Industries and the 1972 Survey of Minority-Owned Businesses.

These reports reveal that minorities owned only 4.3 percent of the construction firms in operation in 1972. Furthermore, minorities received only one percent of the \$164.5 billion earned by all construction firms in 1972. The figures are similar with respect to those industries that provide supplies and equipment for construction firms. Minority firms represented only 1.9 percent of the total number of establishments in the wholesale trade industry in 1972 and received only 0.3 percent of the gross receipts. Minority firms' participation in Federal construction procurement in 1977 was also disproportionately low, with such enterprises performing only 1.2 percent of Federal contracts. In addition, minority and female-owned firms received less than seven tenths of one percent of all contracting dollars spent by those state and local governments that responded to a 1973 U.S. Civil Rights Commission survey.

Brief of The Maryland Legislative Black Caucus as Amicus Curiae in support of Appellant at 4, *City of Richmond v. Croson Co.*, — U.S. —, 109 S. Ct. 706 (1989)(No. 87-998) (quoting EDA, U.S. Dept. of Commerce, Local Public Works Program Interim Report: *Fostering the Development and Expansion of Minority Firms in Construction and Related Industries*, at 1 (Sept. 1978)).

24. Ordinance No. 83-69-59, codified in Richmond, Virginia, City Code, § 12-156(a) (1985). The thirty percent set-aside did not apply to minority owned prime contractors.

25. *Id.* at § 12-23. Minority group members are defined as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts."

26. *Id.* at § 12-158(a).

27. *Croson Co.*, — U.S. —, 109 S. Ct. at 714.

contractors to subcontract at least thirty percent of city contracts to minority businesses, a waiver was possible if no minority companies were available to do the work.²⁸ Richmond's Director of the Department of General Services elaborated on the waiver requirements in its Minority Business Utilization Plan:

No partial or complete waiver of the foregoing [30% set-aside] requirement shall be granted by the [C]ity other than in exceptional circumstances. To justify a waiver, it must be shown that every feasible attempt has been made to comply, and it must be demonstrated that sufficient, relevant, qualified Minority Business Enterprises . . . are unavailable or unwilling to participate in the contract to enable meeting the 30% MBE goal.²⁹

Along with the "waiver rules", the Director of the Department of General Services developed "purchasing procedures" to be followed in the granting of city contracts according to the Plan.³⁰ Bidders on city construction contracts were provided with a "Minority Business Utilization Plan Commitment Form." Within ten days of the opening of the bids, the lowest bidder was required to submit a commitment form naming the MBEs to be used on the contract and the percentage of the total contract price awarded to the minority firm or firms. The prime contractor's commitment form or request for a waiver of the set-aside was then referred to the city Human Relations Commission (HRC). The HRC verified that the MBEs named in the commitment form were actually minority owned and controlled, and either approved the commitment form or made a recommendation regarding the prime contractor's request for partial or complete waiver of the set-aside."³¹ The Department of General Services then made the final determination.³²

B. *Croson's Involvement*

On September 30, 1983, Eugene Bonn, the regional manager of J.A. Croson Company, a mechanical plumbing and heating contractor, submitted a bid on a city project for the provision and installation of certain plumbing fixtures at the Richmond city jail. The contract specified the use of products manufactured by Acorn Engineering Company or Bradley Manufacturing Company. In order to satisfy the set-aside requirement, Bonn determined that a minority contractor would have to supply the fixtures.

Bonn contacted five or six MBEs that were potential suppliers of the fixtures. Initially, no MBE expressed interest in the project or tendered a quote. On October 12, 1983, the day the bids were due, Bonn again telephoned a group of MBEs. This time, Melvin Brown, president of Continental Metal Hose (Continental), a local MBE, indicated that he wanted to participate in the project. Brown subsequently contacted two sources of the specified fixtures in order to obtain a price quotation. One supplier, Ferguson Plumbing Supply (which is not an MBE), had already made a quote directly to Croson, and refused to quote the same fixtures to Continental. Brown also contacted an agent of Bradley, one of the two manufacturers of the specified fixtures.

28. Ordinance No. 83-69-59, § 12-157.

29. *J.A. Croson Co. v. City of Richmond*, 779 F.2d 181, 197 (4th. Cir. 1985), *vacated*, 478 U.S. 1016 (1986).

30. *Id.* at 192, 194.

31. *Id.* at 196.

32. *Id.*

The agent was not familiar with Brown or Continental, and indicated that a credit check was required which would take at least 30 days to complete.

On October 13, 1983, the sealed bids were opened. Croson turned out to be the only bidder, with a bid of \$126,530. Brown and Bonn met personally at the bid opening, and Brown informed Bonn that his difficulty in obtaining credit approval had hindered his submission of a bid. By October 19, Croson still had not received a bid from Continental due to Continental's continued difficulty in obtaining quoted prices. Croson then submitted a request for a waiver of the thirty percent set-aside stating that Continental was "unqualified" and that the other MBEs contacted had been unresponsive or unable to quote. Upon learning of Croson's waiver request, Brown contacted an agent of Acorn, the other fixture manufacturer specified by the city. Based on his dealings with Acorn, Brown subsequently submitted a bid on the fixtures to Croson. On the same day that Brown contacted Acorn, he also called city procurement officials and told them that Continental could supply the fixtures specified in the city jail contract. However, Continental's bid was \$6,183.29 higher than the price Croson had included for the fixtures in its initial bid to the city. Including bonding and insurance, using Continental would have raised the cost of the project by \$7,663.16.

On November 2, 1983, the city denied Croson's waiver request, and indicated that Croson had ten days to submit an MBE Utilization Commitment Form, and warned that failure to do so could result in his bid being considered unresponsive. Croson wrote the city on November 8, stating that Continental was not an authorized supplier for either Acorn or Bradley fixtures. It also noted that Acorn's quotation to Brown was subject to credit approval and in any case was substantially higher than any other quotation Croson had received. Finally, Bonn noted that Continental's bid had been submitted some twenty-one days after the prime bids were due. In a second letter, Croson showed the additional costs to supply the fixtures if it used Continental, and it asked to raise the overall contract price accordingly.

The city denied both of Croson's requests. The city informed Croson that it had decided to rebid the project. On December 9, 1983, counsel for Croson wrote the city to request a review of the waiver denial. The city's attorney responded that the city had elected to rebid the project and that there is no appeal of such a decision. Croson then brought the action in the Federal District Court for the Eastern District of Virginia,³³ arguing that the Richmond ordinance was unconstitutional, and the District court upheld the Plan.

C. *The Court of Appeals Decision*

The Fourth Circuit Court of Appeals affirmed the lower court's decision.³⁴ In reaching its decision, the court applied a test³⁵ derived from the

33. Under 42 U.S.C. § 1983.

34. *Croson*, 779 F.2d 181 (4th Cir. 1985).

35. *Id.* at 188. For a minority set-aside plan to be constitutional, this 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 need of remedying the effects of past discrimination.

Supreme Court cases of *Fullilove v. Klutznick*³⁶ and *Regents of the University of California v. Bakke*.³⁷ The majority found that national findings of discrimination in the construction industry, when considered in conjunction with the statistical study concerning the awarding of prime contracts in Richmond, supported the city council's conclusion that low minority participation in city contracts was due to past discrimination.³⁸ The court then examined whether the racial quota was "narrowly tailored to the legislative goals of the Plan."³⁹ To remedy the effects of past discrimination, the court stated that "[a] set-aside program for a period of five years obviously must require more than a 0.67% set-aside to encourage minorities to enter the contracting industry and to allow existing minority contractors to grow."⁴⁰ Thus, in the court's view, the thirty percent figure was reasonable in light of the fact that minorities constitute fifty percent of Richmond's population.⁴¹

Croson appealed the court's decision to the United States Supreme Court. The Court vacated the Court of Appeals' decision and remanded the case for further consideration in light of the Supreme Court's earlier decision in *Wygant v. Jackson Board of Education*.⁴² In *Wygant*, the Court held that societal discrimination alone was insufficient to justify race conscious remedies.⁴³

After examining how the Richmond City Council conducted its findings, the Court of Appeals decided that societal discrimination was the only basis for enacting the Richmond Plan. Thus, on remand, the Court of Appeals struck down the Richmond set-aside program as a violation of the Equal Protection Clause of the fourteenth amendment.⁴⁴ The majority reasoned that in this case, the Supreme Court's reasoning in *Wygant* should apply. In *Wygant*, the Court said that "[t]o show 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."⁴⁵ The Court of Appeals used the *Wygant* rationale when it commented that "[f]indings of *societal* discrimination will not suffice; the findings must concern 'prior discrimination by the government unit involved'."⁴⁶ In further reevaluating its prior decision, the court determined that the Richmond city council "revealed no record of prior discrimination by the city in awarding public contracts"⁴⁷ In addition to this "revelation," the court found that the statistics comparing the minority population of Richmond to the percentage of prime contracts awarded to minority firms had little or no probative value in establishing prior discrimination in the relevant market. The court actually suggested that the city council's Plan emerged from "more of a political than a

36. 448 U.S. 448 (1980).

37. 438 U.S. 265 (1978).

38. *Croson*, 779 F.2d at 190, note 12.

39. *Id.* at 190-191.

40. *Id.*

41. *Id.*

42. 476 U.S. 267 (1986).

43. *Id.*

44. *J.A. Croson Co. v. City of Richmond*, 822 F.2d 1355 (4th Cir. 1987) (*Croson II*) *aff'd*, — U.S. —, 109 S. Ct. 706 (1989).

45. 822 F.2d.

46. *Id.* at 1358 (quoting *Wygant*, 476 U.S. at 274).

47. *Id.* at 1358.

remedial basis for the racial preference."⁴⁸

In its conclusion, the Court of Appeals reasoned that even if Richmond had demonstrated a compelling interest in the use of a race-based quota, the thirty percent set-aside was not narrowly tailored to accomplish a remedial purpose. In other words, the court believed that the thirty percent was arbitrary.⁴⁹ The Court of Appeals' "renewed" decision was appealed by the city of Richmond and brought before the United States Supreme Court.

III. CRITICAL ANALYSIS

A. Introduction

The judiciary has historically been the sole place Blacks could turn to in search of equality. The decision in *Croson* is a signal that this "safe house" may no longer fulfill this role for Blacks. Once again, we are reminded that the only body sensitive to the plight of the Black race is the Black race. It is increasingly apparent that the "level playing field"⁵⁰ sought by Blacks will only be found when economic leverage is obtained and maximally used. Justice O'Connor's opinion must awaken us to the reality that many of the conservative courts of today do not feel "modern racism" is as extreme a problem as "historical racism."

The theory behind the set-aside program and affirmative action programs is largely misunderstood. Many opponents of affirmative action base their position on a belief that such programs only work to reinforce the idea that Blacks and other minorities are inferior to Whites. As Justice O'Connor stated, "[c]lassifications based on race . . . may in fact promote notions of racial inferiority and lead to a politics of racial hostility."⁵¹ Justice Marshall noted the false concepts associated with affirmative action by readily agreeing that if such programs were based on a presumption that one race was inferior to another, then they should be subject to the strictest judicial scrutiny. But Justice Marshall distinguished that form of affirmative action from "true" affirmative action.

By contrast, racial classifications drawn for the purpose of remedying the effects of discrimination that itself was race-based have a highly pertinent basis: the tragic and indelible fact that discrimination against [B]lacks and other racial minorities in this Nation has pervaded our Nation's history and continues to scar our society.⁵²

By demonstrating that the proper use of affirmative action plans is to *remedy* past discriminatory actions, Justice Marshall dispelled the notion that affirmative action programs breed or result in inferiority.

Apparently, Justice Marshall's distinctions were not enough to satisfy the majority. The majority opinion was based upon an unrealistic impression of this nation. This fantasy nation appears to be one in which either no racism exists or racism exists in such a blatant form that it is easily viewable and subject to proof. Neither is a modern day reality.

In order to reconcile the majority's normative values with its decision,

48. *Id.* at 1359.

49. *Id.*

50. See *supra* note 21, and accompanying text.

51. *City of Richmond v. Croson Co.*, — U.S. —, 109 S. Ct. 706, 721 (1989).

52. 109 S. Ct. at 752.

O'Connor focused on the "cracks" in the set-aside program and magnified them. Many of the problems the majority found within the Richmond program are trivial and/or unwarranted. The four key themes that form the basis for the majority decision are: the constitutionality of Richmond's set-aside program; the application of the strict scrutiny test; a rigidly defined group which has been discriminated against; and a narrowly tailored, remedial program.

B. *The Constitutionality of Richmond's Set-Aside Program*

In section II of the majority opinion, after discussing *Fullilove v. Klutznick*,⁵³ Justice O'Connor, writing for the majority, attacked the constitutionality of the Richmond Plan as compared with the federal plan upheld in *Fullilove*. She stated, "[w]hat appellant ignores is that Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment."⁵⁴ Justice O'Connor continued:

That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate. Section 1 of the Fourteenth Amendment is an explicit *constraint* on state power, and the States must undertake any remedial efforts in accordance with that provision.⁵⁵

The majority opinion fell just short of implying that states can not work in conjunction with the national government in eradicating the effects of past discrimination. Justice O'Connor neither provided any precedent to support this part of the opinion nor appears to give any credence to the argument that federalism allows for a State's active participation in affirmative action.

However, Justice Marshall's dissent took the opposite approach. He looked deep within the Supreme Court's history to find "there is simply no credible evidence that the Framers of the Fourteenth Amendment sought 'to transfer the security and protection of all the civil rights . . . from the States to the Federal government'."⁵⁶ Apparently, Justice O'Connor's constitutional attack upon the program deeply troubled Justice Marshall for he ended his penultimate paragraph by stating that:

. . . nothing in the Amendments themselves, or in our long history of interpreting or applying those momentous charters, suggests that States, exercising their police power, are in any way constitutionally inhibited from working alongside the Federal Government in the fight against discrimination and its effects.⁵⁷

Due to the extreme similarities between the Richmond set-aside program and the federal set-aside program upheld in *Fullilove*, it is readily apparent that Richmond was making a justified attempt to participate alongside the federal government in the fight against discrimination. One cannot find, in even the strictest reading of the fourteenth amendment, a basis for Justice O'Connor's interpretation that allowing Richmond the power necessary to enact their program ". . . would be contrary to the intentions of the Framers of

53. 448 U.S. 448 (1980).

54. *City of Richmond v. Croson Co.*, — U.S. —, 109 S. Ct. 706, 719 (1989).

55. *Id.*

56. *Id.* at 757 (quoting *The Slaughter House Cases*, 16 Wall. 36, 77-78 (1873)).

57. *Id.* at 757.

the Fourteenth Amendment”⁵⁸ The fourteenth amendment empowered the Federal Government with the power to right the wrong of discrimination. It did not, in any sense or by any reading, take away the power of the States to right that wrong.

C. *Strict Scrutiny*

According to Justice O’Connor, “. . . the purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.”⁵⁹ Such a “highly suspect tool,” according to Justice O’Connor, warrants a strict scrutiny review. In support, Justice O’Connor cites to the *University of California Regents v. Bakke*⁶⁰ and *Wygant v. Jackson Board of Education*⁶¹ opinions. However, each of these opinions employed *heightened scrutiny*.⁶² Justice Marshall, in turn, cited to the most recent of the cases on this point. From *Fullilove*, he notes:

Because the consideration of race is relevant to remedying the continuing effects of past racial discrimination, and because governmental programs employing racial classifications for remedial purposes can be crafted to avoid stigmatization . . . such programs *should not be subjected to conventional ‘strict scrutiny’-scrutiny that is strict in theory, but brutal in fact.*(emphasis added)⁶³

Justice O’Connor apparently viewed affirmative action programs as a “highly suspect tool.” This may be due to a misunderstanding of the uses of affirmative action as previously discussed. Such a misunderstanding is manifested in Justice O’Connor’s statement, “The Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race.”⁶⁴ However, it is difficult to agree that Whites were being denied anything when 99.33% of the city’s prime construction contracts had been awarded to White owned businesses during the five year study conducted.⁶⁵ Instead, the more rational view may have been to see the Richmond Plan as an attempt to mix together a group that had truly been denied opportunities for centuries with the group that had received almost all of the opportunities.

Justice O’Connor sought solace in referring to Justice Powell’s statement in *Bakke* 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.”⁶⁶ For equal protection to have true meaning, one must also find equal opportunity. This, Justice O’Connor failed to address. Equal opportunity has not existed, and continues to elude a vast majority of the Black population. Until this inequity has been eliminated, to speak of what equal protection can and can not mean is abstraction rather than reality.

58. *Id.* at 719.

59. *Id.* at 721.

60. 438 U.S. 265 (1989).

61. 476 U.S. 267 (1986).

62. *See Croson*, 109 S. Ct. at 722-723.

63. *Id.* at 752.

64. *Id.* at 721.

65. *See id.* at 714.

66. *Id.* at 721 (quoting from 438 U.S. 265, 289-290).

Justice O'Connor attacked Justice Marshall's dissenting opinion by stating:

The dissent's watered-down version of equal protection review effectively assures that race will always be 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 never be achieved.⁶⁷

Yet how realistic is it to believe that this is the aspiration of Justice Marshall. Of all the members on the Court, Justice Marshall is most likely to hope that one day race becomes irrelevant. But Justice Marshall did not deal with the race factor as he hopes it will be one day, he dealt with the race factor as it is right now. This is the reality that escapes Justice O'Connor.⁶⁸

D. *A Rigidly Defined Discriminated Group*

The majority of the Court appeared intent on creating an insurmountable burden of proof to show that a group has been discriminated against. Justice O'Connor stated that ". . . a generalized assertion that there has been past discrimination in an entire industry *provides no guidance* for a legislative body to determine the precise scope of the injury it seeks to remedy."⁶⁹ She further states that "[t]hese defects are readily apparent in this case. The 30% quota cannot in any realistic sense be tied to any injury suffered by anyone."⁷⁰ Apparently, though, Justice O'Connor looked no further than the instant case because as Justice Marshall points out:

. . . the majority ignored the fact that Richmond's 30% figure was patterned directly on the *Fullilove* precedent. Congress' 10% figure fell 'roughly halfway between the present percentage of minority contractors and the percentage of minority group members in the Nation. (Citations omitted). The Richmond City Council's 30% figure similarly falls roughly halfway between the present percentage of Richmond-based minority contracts (almost zero) and the percentage of minorities in Richmond (50%).⁷¹

Justice O'Connor then related the myriad of factors used to justify the Richmond Plan. These included Congressional findings of discrimination in the construction industry, Richmond's desire to remedy past discrimination in the construction industry, testimony about the existence of racial discrimination and data revealing that minority businesses received only .67% of the prime construction contracts in a city whose population was 50% Black. Notwithstanding this barrage of proof, Justice O'Connor continually main-

67. *Croson*, 109 S. Ct. at 722.

68. Justice O'Connor did have a valid concern regarding the possible overbreadth of the Plan. The Plan was ostensibly intended to remedy the past discrimination against Blacks in Richmond. However, the Plan included also such minority groups as Aleuts and Eskimo's. Thus, the Plan could have been more narrowly tailored to the city's goal of remedying past discrimination against Blacks. But the inclusion of other minorities, alone, did not justify revoking the Richmond Plan. In his dissent Justice Marshall points out that:

This is, of course, precisely the same definition Congress adopted in its set-aside legislation. *Fullilove* (citation omitted). Even accepting the majority's view that Richmond's ordinance is overbroad because it includes groups, such as Eskimos or Aleuts, about whom no evidence of local discrimination has been proffered, it does not necessarily follow that the balance of Richmond's ordinance should be invalidated.

Croson, 109 S. Ct. at 751 note 11.

69. *Id.* at 723 (emphasis added).

70. *Id.* at 724.

71. *Id.* at 751.

tained that, individually or together, these factors were not enough to provide Richmond with a "strong basis in evidence for its conclusion that remedial action was necessary."⁷² One must wonder if any array of factors would be enough to satisfy Justice O'Connor's standards.

The extreme irony behind Justice O'Connor's rejection of all the *Croson* factors presented to prove discrimination is shown by her separate opinion in *Wygant*. There she discusses the chilling effect that would result in requiring a governmental body to admit specifically that it had engaged in discriminatory practices:

[A] requirement that public employers make findings that they have engaged in illegal discrimination . . . would severely undermine public employers' incentive to meet voluntarily their civil rights obligations . . .⁷³

Since Justice O'Connor expressed such views in *Wygant*, what is the justification for the contrary view in *Croson*? The inconsistency of Justice O'Connor's decision in *Croson* is further exhibited by her separate opinion in *Johnson v. Transportation Agency* when she stated that in order to implement a voluntary remedial plan:

[n]either *Wygant* nor *Weber* places a burden on employers to prove that they actually discriminated against women or minorities . . . [because] this Court has long emphasized the importance of voluntary efforts to eliminate discrimination . . . a contemporaneous finding of discrimination should not be required.⁷⁴

In *Croson*, Justice O'Connor's standards of discrimination continually climbed as she went on to state that ". . . the city does not even know how many MBEs in the relevant market are qualified to undertake prime or subcontracting work in public construction projects."⁷⁵ She added, "Nor does the city know what percentage of total city construction dollars minority firms now receive as subcontractors on prime contracts let by the city."⁷⁶ Yet both points miss the mark.

The first point speaks to the issue of qualified minorities, one of the main intentions behind the plan. By enacting the Plan, Richmond hoped to give minorities the opportunity to train and grow within the construction industry. The bulk of the Plan led to minorities being awarded subcontracting positions where they could learn the "valuables" of the trade. This would, in turn, lead to a strengthening of the minority sector to the point where assistance would become unnecessary. Such achievements are nearly impossible when one is attempting to compete from "outside the circle."

The second point addresses the city's knowledge of the percentage of minority contracts before the implementation of the Richmond Plan. But this totally misses another of the intentions of the plan, to create a desired level of minority business. It was not intended that Richmond know how many minority contracts existed. Richmond would need only conceptualize the amount of minority contracts they felt should exist. If the number already existed, then no further actions would have to be taken and the Plan would still be complied with in all aspects.

72. *Id.* at 724.

73. *Wygant v. Jackson Board of Education*, 476 U.S. 267, 290 (1986).

74. *Johnson v. Transportation Agency*, 480 U.S. 616, 652 (1987).

75. *Croson*, 109 S. Ct. at 725.

76. *Id.* at 725.

Lastly, Justice O'Connor summarized by stating, "[w]e, therefore, hold that the city has failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race."⁷⁷ In the same paragraph, Justice O'Connor supports her holding by stating that: "[t]he dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently nonmeasurable claims of past wrongs."⁷⁸

Again, Justice O'Connor fails to consider the plight of Blacks today, choosing instead to base her decision on a hope for tomorrow. Additionally, Justice O'Connor's decision trades off on all of her attempts to keep the focus of this point of the case away from national discriminatory findings and solely on the City of Richmond's findings.⁷⁹ In spite of maintaining that national discrimination should not have influenced the Richmond Plan, national discrimination must have influenced Justice O'Connor as she chose to use it to support her holding.

E. *A Narrowly Tailored, Remedial Program*

In the briefest section of the O'Connor opinion, her assessment declares that the Richmond Plan is too broadly tailored on two principles. First, Justice O'Connor faulted Richmond's inability to find a race-neutral solution. Secondly, she criticized the 30% quota, set by Richmond, as not taking into account whether or not Blacks would go into the construction industry.⁸⁰

Justice O'Connor's first point insinuated that Richmond's Black majority City Council would rather turn to a race-based, quota system than initiate less race oriented plans. As Justice Marshall points out, though:

First, the majority overlooks the fact that since 1975, Richmond has barred both discrimination by the city in awarding public contracts and discrimination by public contractors The virtual absence of minority businesses from the city's contracting rolls . . . strongly suggests that this ban has not succeeded Second, the majority's suggestion that Richmond should have first undertaken such race-neutral measures . . . ignores the fact that such measures, while theoretically appealing, have been discredited by Congress as ineffectual in eradicating the effects of past racism in this very industry. For this reason, the Court in *Fullilove* refused to fault Congress for not undertaking race-neutral measures as precursors to its race-conscious set-aside The Equal Protection Clause does not require Richmond to retrace Congress' steps when Congress has found that those steps lead nowhere.⁸¹

Justice O'Connor's second point has already been partially addressed. The 30% quota was derived from the exact federal plan the Court upheld in *Fullilove*. And, with regards to the insurmountable burden Justice O'Connor would have minorities overcome in order to prove discrimination, it is easily

77. *Id.* at 727.

78. *Id.*

79. *See id.* at 724 (While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for [B]lack entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia).

80. ". . . 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 city or prime contractors." *Id.* at 729.

81. *Id.* at 751.

imaginable that those born in the upcoming decade would never be able to prove to Justice O'Connor that discrimination effected their lives. While many know that the effects of discrimination will continue to affect our children's lives for generations to come, none of these generations will have been born early enough to raise the instances of overt racism from our past that Justice O'Connor indicates as the only "sufficient" forms of racism to warrant remedies.

IV. FUTURE IMPACT OF *CROSON*

Opponents of affirmative action approvingly see the *Croson* decision as a virtual death sentence for set-aside programs at the state and local level because it will make it difficult for cities to establish the increased proof required.⁸² Ironically, proponents of affirmative action see the ruling as having the same effect. Such supporters will now wonder about the extreme requirements state and local governments must follow to design and implement policies to help minority groups gain an opportunity to overcome the barriers of discrimination.⁸³

The majority in *Croson* unfortunately failed to recognize that requiring a state or local government to produce detailed findings prior to enacting legislation is inappropriate, since state and local legislatures are not courts. The *Croson* decision will force legislatures to focus their attention and financial resources on the preparation of legislative findings rather than giving more careful consideration of the circumstances surrounding the pending legislation. Equally unfortunate, the Supreme Court rarely, if at all, focused on the cases of *Fullilove* and *Johnson*⁸⁴ in rendering its decision. Both cases clearly establish that neither a public nor private entity need admit to past discrimination as a condition to establishing race conscious remedies. In those cases, the Court acknowledged that to establish such requirements would have a chilling effect on the purposes the Equal Protection Clause and Title VII, but amazingly these decisions are of no consequence to the Court's ruling in *Croson*.

V. CONCLUSION

Justice O'Connor either closed her eyes to the forms of racism that exist today or she endeavored to create a standard bordering on uselessness. Her lack of understanding toward both the set-aside program and to affirmative action as a whole is most evident in her concluding section which states that when certain forms of racism occur ". . . a city would be justified in penalizing the discriminator and providing appropriate relief to the victim of such discrimination."⁸⁵ While this form of action in conjunction with other programs may bring about the desired goals of affirmative action, alone it does nothing. Neither penalizing the discriminator nor providing relief, alone, will help mi-

82. Washington Post, Jan. 24, 1989, at A5, col. 2.

83. *Id.*

84. See *Johnson v. Transportation Agency*, 480 U.S. 616 (1987). The Court held that a public employer does not have to show that it had discriminated as a predicate to implementing an affirmative action plan when challenged under Title VII of the Civil Rights Act of 1964. Note that while a different standard of scrutiny is imposed under the Equal Protection Clause, the objective of both is the same — to put an end to racial discrimination.

85. *Croson*, 109 S. Ct. at 729.

norities achieve the goals of affirmative action to secure jobs in the future. The desire is for minority businesses to *become* self-supportive. Justice O'Connor's proposition, alone, would help little in this direction.

Justice O'Connor's comments about abandoning the concepts of a race-distinguished Nation are wonderfully utopian in origin and intent. The problem lies in her inability to deal with a critical situation as it exists today. While overt discrimination, as characterized by the events of the 1960's, may not exist to the same extent today, racism — whether economic, covert, or otherwise — is still an often dealt with reality in Black Americans' lives.⁸⁶

Perhaps Justice O'Connor's aim was true. She believed the target was a "visible" entity that could be pierced by anyone guided by truth and justice. But the target has never been that obvious and Justice O'Connor has never had to look at it from the other side. Per Dorothy Gilliam, "Why, oh why, does this not feel like a 'kinder, gentler nation'?"⁸⁷

CHRISTOPHER H. DAVIS
DARRELL D. JACKSON

86. For those who wish to be more sensitized to the forms of covert discrimination, a good fictional short story is: Coles, *The Proud Rooster*, *Ebony*, Feb. 1989, at 188.

87. *Washington Post*, January 26, 1989, at B3, col. 5.

