

WRITINGS

BY

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**REDRESSING THE EXCLUSION...
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bargain in reference to such issues.²⁰⁹ In a recent NLRB decision,²¹⁰ an employee union in the chemical industry was allowed to obtain a broad range of information from the employer concerning the health and safety of employees in the bargaining unit, the employer's use of caustic substances known to cause genetic damage, and other relevant information relating to the safety of the work environment.²¹¹ The collective bargaining process affords labor unions the opportunity to prevent or curtail employer abuses resulting from genetic testing and similar practices.²¹²

Congress has manifested its intent to provide equal employment opportunities to all individuals.²¹³ Employer use of genetic testing in the hiring process strikes at the very heart of this notion. Mandatory genetic screening should be prohibited. Only advisory, voluntary genetic testing is appropriate within the context of non-discriminatory equal employment. Permitting genetic screening in the selection process potentially permits covert racial discrimination in hiring. Such practices cannot be reconciled with the intent of Title VII and other applicable employment law.²¹⁴ A republic committed to equality of opportunity cannot permit special interests to speculatively stigmatize individuals, thereby denying them access to equal employment opportunity, merely because of their inherited genetic composition.

209. *Id.*

210. *Minnesota Mining and Mfg. Co.*, 261 NLRB No. 2 (1982).

211. *Id.* at 8-23.

212. *Id.* See generally Bartosic & Hartley, *The Employer's Duty to Supply Information to the Union—A Study of the Interplay of Administrative and Judicial Rationalization*, 58 CORNELL L. REV. 23 (1972); Fanning, *The Obligation to Furnish Information During The Contract Term*, 9 GA. L. REV. 375 (1975); Huston, *Furnishing Information as an Element of an Employer's Good Faith Bargaining*, 35 U. DET. L.J. 741 (1958).

213. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-17 (1976 & Supp. II 1978). "Equal employment opportunity is the law of the land." Uniform Guidelines on Employee Selection, 29 U.S.C. § 1607.17(1) (1976 & Supp. V).

214. "Industrial genetic screening should only take place in a society that has created a system of screening within neutral community structures that protect the individual and his family during the counseling process. It must not take place in the coercive milieu of the typical industrial setting." *Hearings, supra* note 6, at 32 (statement of Sheldon Samuels, AFL-CIO).

Payton - 1984

WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

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Introduction*

The Washington Lawyers' Committee for Civil Rights Under Law was established in 1968 by a number of leading local attorneys as part of a larger national effort to mobilize the energies of the private bar to address serious issues of discrimination and poverty in our cities. The urgent need for this special effort grew directly from a series of racial disturbances which had erupted in numerous American cities during the late 1960's.

Since its inception, the Committee has focused its attention primarily on the basic issues of racial discrimination which had been identified by the Report of the President's Commission on Urban Civil Disorders. The Committee has also sought to develop new programs designed to respond to changing problems and client needs. As a result, in addition to long-standing efforts in the fields of equal employment opportunity, fair housing and criminal justice reform, the Committee's work has been expanded to include a number of special programs in the areas of civil legal services support, alien rights, and veterans' rights. Most recently, the Lawyers' Committee developed new programs to address the vital issues in the field of public education in our inner city and the enormous legal needs of migrant workers in this region.

The breadth of the Committee's work is equaled by the magnitude of the services which have been contributed by the private bar in our community. Over the years more than 1,000 lawyers from approximately 100 law firms have provided vast amounts of pro bono services in cases ranging from relatively simple lawsuits on behalf of individual plaintiffs to the most complicated of nation-wide class actions.

The Committee's 15th Anniversary was considered an appropriate focal point to examine carefully the past accomplishments of the Committee and, more importantly, to plan for an appropriate future agenda. In implementing this goal, the Committee enlisted the assistance of a substantial number of energetic and dedicated volun-

* Roderic V.O. Boggs, Executive Director, Washington Lawyers' Committee for Civil Rights Under Law.

teer attorneys from many of the law firms which have been most active in its work. These volunteers were given a clear and challenging assignment: (1) to take a hard and objective look at the basic civil rights issues which the Committee had sought to address; (2) to assess critically, the efforts which the Committee has undertaken; and (3) to suggest an appropriate agenda for Committee action in the future.

The papers which follow were presented at the Committee's Anniversary Program on September 27, 1983. The papers, limited to major areas of activity which are a part of current programs or which have extended over a lengthy period of time,** reflect efforts directed at area problems. However, the issues represent national concerns. Although governmental response to these problems has been helpful and remains necessary, the support of the private sector is essential in the continuing struggle against discrimination and its resultant inequities.

** The papers do not reflect the Committee's extensive efforts: to provide an introductory legal reasoning course for entering minority law students; on behalf of veterans seeking to upgrade their less than honorable military discharges and; to provide private bar support for local legal services programs. The Committee's successful challenge to school closings and boundary changes in Montgomery County and its Supreme Court victory assuring rights of black children to attend commercially operated private schools are also not included.

ADDRESS

The Private Bar and Public Confusion: A New Civil Rights Challenge

ELEANOR HOLMES NORTON*

The celebration of the fifteenth year of the Washington Lawyer's Committee for Civil Rights under Law comes at a moment as propitious for the profession as for the mission to which you have so ably and resourcefully dedicated yourselves. The profession has increasingly come under criticism for everything from litigiousness and overregulation to fee structures and crowded dockets. I confess that while I love both the practice and the teaching of the craft, the law has never been for me a totem. I count myself a critic of, rather than an apologist for, the profession which, it seems to me, needs the most serious self-criticism and reevaluation of its place in a society undergoing profound structural changes at its foundations—in the nature of work, in the family, and in a fiercely competitive international economy in which we are increasingly no longer first.

But criticism of the profession must make room for praise and pride today. The work of the Washington Lawyer's Committee deserves this and more, especially because this work has been accomplished through the efforts of the private bar. Your work has not only been in the best tradition of the bar; it has set new traditions and new standards for lawyers otherwise engaged in private practice. You make me proud to be a lawyer.

Indeed, so brilliant and fruitful has been your professional leadership, I hope you will forgive me if I suggest yet another role for

* Professor of Law, Georgetown University Law Center, Former Chair Equal Employment Opportunity Commission. Remarks, Fifteenth Anniversary Luncheon, Washington Lawyer's Committee for Civil Rights Under Law, September 27, 1983.

ject, has made a substantial contribution towards addressing such problems since 1972. With continued effort, the next decade should see similar or even better results.

Redressing the Exclusion of and Discrimination Against Black Workers in the Skilled Construction Trades: The Approach of the Washington Lawyers' Committee for Civil Rights Under Law

JOHN PAYTON*

INTRODUCTION

The construction industry is one of the largest industries in the United States; it directly employs three to four million people and contributes over \$200 billion to the gross national product.¹ Moreover, the construction industry has several unique characteristics that are significant in terms of equal employment opportunities. First, construction wages are relatively high for skilled craft workers. Second, there are only minimal educational and other requirements for entry into the skilled construction crafts. Third, construction activity is highly visible, since a great deal of the work occurs outdoors, and therefore progress, or the lack thereof, in integrating black workers into the construction industry is readily apparent.² These characteristics would suggest that the enactment of laws prohibiting discrimination in employment would be followed by considerable progress in the integration of black workers in the construction industry.

* Associate at Wilmer, Cutler & Pickering. This report was prepared for the Fifteenth Anniversary Program of the Washington Lawyers' Committee for Civil Rights Under Law, held on September 27, 1983. The report would not have been possible without the research, drafting, and statistical analysis provided by Ginny Gourley, a paralegal at Wilmer, Cutler & Pickering.

1. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 740-43 (103d ed. 1982-83).

2. R. MARSHALL, EMPLOYMENT DISCRIMINATION 26 (1978) [hereinafter cited as MARSHALL].

However, in 1970, when the Lawyers' Committee first looked into this issue, virtually no progress had occurred. The percentage of black workers in the skilled construction trades was so disproportionately low as to be fairly characterized as representing the exclusion of black workers from those trades. The lack of progress was due in large part to the fact that the skilled construction crafts had erected some of the most effective and persistent barriers to the entry of black workers in all of industry. Furthermore, this exclusion of and discrimination against black workers in the construction crafts was not an incidental effect of a system but an intended effect.

This paper will describe the considerable contribution that the Washington Lawyers' Committee has made to alleviate these problems in the Washington area.³ Preliminarily, it will briefly trace the history of racial exclusion and discrimination in the construction industry nation-wide, as well as describe some of the earlier efforts to address this problem. This background is essential to a complete understanding of the problems presented to black workers seeking employment in the skilled construction trades. The paper will then describe the non-litigation efforts of the Lawyers' Committee to address these problems in the Washington area.

The major thrust of this paper, however, will be to examine carefully the efforts of the Lawyers' Committee to redress through the courts the exclusion of and discrimination against black workers in the skilled construction crafts. These efforts were designed in close cooperation with civil rights and community organizations but were spearheaded in large part by lawyers from Washington, D.C. law firms acting on a pro bono basis. An assessment of these efforts will be attempted. We learned a great deal from these efforts, not the least of which is a sense of frustration with trying to solve these problems by legal means alone. This paper concludes with some recommendations about future efforts in this area.

I. HISTORICAL DEVELOPMENT OF THE EXCLUSION OF BLACK WORKERS IN THE SKILLED CONSTRUCTION TRADES

The exclusion of black workers from the skilled construction

3. This focus on the Washington Lawyers' Committee's efforts is, of course, not meant to minimize the efforts by others, including the EEOC, other civil rights organizations and private litigants.

trades is the result of much more than racial discrimination derived from racist attitudes and preferences of white construction contractors and craft workers. Not that those factors did not play a role, for they certainly did. However, a much more important role was and is played by the white construction trade unions which were organized and operated in a manner that ensured that black workers were not allowed to compete with them for employment.

To understand how black workers have been excluded from the skilled construction trades, it is necessary to place the entire issue in historical perspective. The development of all white skilled construction crafts that are organized in ways that have perpetuated their racial exclusivity was no accident. This development occurred throughout the country, in both the North and the South.

A. Pervasive Racism

In the pre-Civil War period, the vast majority of all black people in the United States lived in the South in slavery. Slave owners often trained slaves to do work that otherwise would have been done by skilled white workers. Moreover, slaves dominated many of the skilled construction trades in the South.⁴ Of course, they were not allowed to enjoy the fruits of their labor.

The situation in the North with respect to black workers was qualitatively much better: they were not slaves. But, in other ways, their status was disturbingly unsatisfactory. While slavery had been abolished in the North by 1830, rigid segregation was not only the practice, it was the law in most northern states. Black people were either excluded from or assigned to special sections of virtually all public transportation—from stagecoaches, to railroad cars, to steam boats. They were either excluded from or assigned to special sections of theaters and lecture halls. For the most part, they were simply excluded from public accommodations—from hotels, motels, and resorts. Segregated schools, hospitals, churches, prisons, and even cemeteries were the rule. The only states that avoided those harsh measures were those with the fewest black people. The fact

4. It is estimated that of the 120,000 skilled construction craft workers in the South after the Civil War, over 100,000 were black. H. HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM* (1977) [hereinafter cited as HILL].

that the North was abolitionist meant that slavery would not be tolerated, not that equality would be promoted.

In every day practical terms, the oppressive situation in the South improved only marginally after the Civil War. The brief interlude of Reconstruction was followed by the Compromise of 1877 whereby the South was given, in essence, "home rule." This brief period of political power enjoyed by the black population ended and was replaced by disenfranchisement and legislated inferiority. Violence and terror directed against black people were at a very high level during this period. Meanwhile, white workers did all that they could to prevent black workers from competing with them. Jobs previously held by black workers, including construction craft jobs, were converted, by law or practice, into white-only jobs.⁵ There were over fifty strikes by white workers protesting the employment of black workers.⁶

Many of the "Jim Crow" laws that the South enacted during this period were similar to the laws that the North had been employing for decades. By the turn of the century, the segregation and exclusion of black people in the South was legally complete. From hospitals, to public accommodations, to transportation, to schools, to jobs, there were laws that excluded or segregated black people.⁷

Both in the North and in the South, there was a long period of indifference to institutional racism. Intentional and successful efforts to remove black workers from positions in which they could compete with white workers occurred in the entire country. Coupled with the complete loss of political power, and the absence of any economic power, it is not surprising that black workers were helpless to protect themselves.

B. *The Rise of the Unions/The Role of Skilled Construction Craft Unions*

The post-Civil War period brought with it the development of the industrial base of the country and the concomitant rise of powerful industrial unions. With the exception of the Knights of Labor,

5. HILL, *supra* note 4, at 12.

6. *Id.* at 1-16.

7. For extended treatment of this period see, R. LOGAN, *THE BETRAYAL OF THE NEGRO* at 147-64 (1965); C.W. WOODWARD, *THE STRANGE CAREER OF JIM CROW* 1-29 (1966).

which sought to organize *all* unskilled workers, including black workers, but whose influence faded prior to the turn of the century, the American labor movement was either openly hostile to black workers or indifferent to practices that discriminated against black workers. The increasingly powerful American Federation of Labor, which had initially taken a position against racial discrimination, eventually acquiesced and accepted many white-only unions. In those instances where there was a white union, the AFL theoretically allowed for the creation of parallel black unions. However, that alternative was unsatisfactory because it resulted in the reservation of the best work for white workers. In any event, the alternative of a parallel black union could be blocked by the objection of the white union. The effect of these union practices was to exclude black workers from the ever increasing industrial activity that was occurring.⁸

Construction craft unions made the most of this framework of racism by erecting perhaps the most significant barriers to black worker participation in any sector of the economy. This is due in part to the fact that the role unions play in the construction industry is significantly different from that which they play in nonconstruction industries. In general, a nonconstruction employer hires its permanent employees through its own personnel department. Its personnel department is advised of the qualifications which potential employees should possess and the personnel office will advertise or otherwise locate such applicants. Once hired, the employees may have to join a union.

In contrast, the construction contractor has few permanent employees. Instead, employees are hired to staff specific construction job requirements. At the end of the construction, the employment relationship terminates. When the contractor needs to hire employees, it does not usually turn to its personnel office—it usually does not have one—but to the unions. For the construction contractor, the role of the personnel office is often played by the construction craft unions. Thus, if the construction contractor wants to hire another rodman (an ironworker that places the steel rods that concrete is poured over) he calls up the ironworker's union and asks that one

8. J.H. FRANKLIN, *FROM SLAVERY TO FREEDOM*, 284-85 (5th ed. 1980) [hereinafter cited as FRANKLIN].

be sent over to the job site. Most unions have exclusive hiring hall agreements with construction contractors and therefore the only way a rodman could be sent to the job site is through the referral by the union.

Although construction craft workers are, in general, highly skilled, most enter the craft with few, if any, skills. It is in the craft that the skills are acquired. Despite the fact that there are few bona fide requirements for entry, entry is difficult. Often a worker must be recommended by a craft member, screened by a craft board and voted on by the craft for acceptance into the craft. For black workers, these barriers can prove insurmountable.⁹

White construction craft unions have for over a hundred years effectively denied access to the skilled construction crafts to black workers. Those black workers that were skilled, either by pre-Civil War training or through institutions such as Booker T. Washington's Tuskegee Institute, found few opportunities for work.¹⁰ No longer slaves, these carpenters, brickmasons, and similar workers, found that they were excluded by white unions (in some instances, laws banned them from their craft) and that white contractors preferred to hire white workers instead of them.

More importantly, black workers made no headway into the new crafts that were used in the construction associated with industrialization—sheetmetal workers, iron workers, pipefitters and steamfitters, among many others—because of the barriers imposed by those craft unions. In part these barriers remain to this day and the exclusion of black workers, though not complete, remains a major example of the institutional effects of racial discrimination.¹¹

C. *Response of Black Skilled Construction Workers*

Black construction trade workers, lacking both political and

9. It is true that the nonunion sector of the construction trades is significant and probably growing. Nevertheless, unions control the majority of those jobs—particularly of the best and highest paying jobs in commercial construction. This is certainly the case in Washington, D.C. and was the focus of the Lawyers' Committee's efforts.

10. R. ROWAN & L. RUBIN, *OPENING THE SKILLED CONSTRUCTION TRADES TO BLACKS*, 10 (1972, reprinted in 1974) [hereinafter cited as ROWAN & RUBIN].

11. As recently as 1979, the United States Supreme Court noted: "Judicial findings of exclusion from crafts on racial ground are so numerous as to make such exclusion a proper subject for judicial notice." *United Steelworkers v. Weber*, 443 U.S. 193, 198 n.1 (1979).

economic power, responded to this situation by forming their own unions and attempting to compete with white unions for work. Most of these efforts were unsuccessful. For example, during the Depression, black plumbers were invited to join the AFL Pipe Trades Council of Cook County (Chicago) which technically would have made them eligible to work for unionized construction firms. However, white locals still had closed-shop agreements that, in effect, meant that the black plumbers would still be excluded from three-quarters of the work. Furthermore, the offer to the black plumbers to join the Council was conditioned on the black plumbers agreeing to only work for black contracting firms, only on residential buildings, and only on those to be inhabited by black tenants.¹² In addition, the white union would let them work only on permits from the white locals and only for a probationary period.¹³ The black plumbers union voted against becoming a party to this agreement.

In Chicago, as elsewhere, white union officials continued to advocate the so-called duty of their union to secure employment for all their white members before black workers would be eligible for employment. The effect of this duty was to severely limit the opportunities available to black workers. During periods of economic decline in the construction industry, it virtually eliminated opportunities for black workers. During periods of economic expansion white workers were given the best work.

Black construction workers had no political or economic power and few allies. Their natural ally, labor, was the immediate cause of their plight. The American Federation of Labor refused to take any action against unions for discriminatory practices and black workers remained excluded in all parts of the country. When black construction workers organized their own unions, these unions were often not accepted by the AFL nor recognized as official unions.¹⁴ The Depression, therefore, saw little progress by black construction workers.

Even World War II and the end of the Depression did not mean good times for black construction workers. Federal agencies began signing "stabilization agreements," i.e., agreements preserving the status quo with craft unions, and thereby ensured gainful employ-

12. HILL, *supra* note 4, at 240.

13. *Id.*

14. *Id.* at 237.

ment only for the white workers on government projects. Since blacks were not allowed to join the white unions, the doors to the construction jobs remained shut for black workers. In Savannah, Georgia, for example, a major construction employer had a "closed shop" agreement with the Savannah Building Trades Council of the AFL. The Council referred only white carpenters when employment was available. When there were no white workers left, the Council called in white workers from outside the city rather than give the work to the many unemployed local black carpenters.

With only minimal economic and political power, and insignificant results from self-help efforts, it was apparent that a new approach was needed. That new approach was to turn to the federal government. New contracting practices by the government, which would not tolerate discrimination, were needed. Laws were also needed. It is important to realize that at this time there were no federal laws which were believed to prohibit racial discrimination.¹⁵

II. NATIONAL EFFORTS TO REMEDY RACIAL DISCRIMINATION IN THE CONSTRUCTION INDUSTRY

A. Early Efforts

National efforts to bring about equal employment opportunities in the construction industry finally gained momentum during World War II. Efforts were made by civil rights leaders to have contractors hire certain percentages of black construction workers in all trades. Contractors claimed that they did not object to meet the "negro quotas" in unskilled and trowel trades,¹⁶ but that they could not find black workers who were skilled in other crafts. This effort was not effective in increasing black participation in the construction trades. Black labor leaders were not deterred. They decided to focus their efforts on the federal government and the enormous amount of construction work that the federal government contracted for every year.

15. 42 U.S.C. § 1981 (1976) also may cover employment discrimination. Unfortunately, this 1866 act was "lost" until relatively recently. By the time the Lawyers' Committee's litigation was brought in the 1970s, it had been rediscovered and was pleaded in most of those cases as a cause of action.

16. ROWAN & RUBIN, *supra* note 10, at 23. See also, 5 A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS, (To Eliminate Employment Discrimination: July, 1975) 343. These trades were less skilled than the others.

A. Phillip Randolph, the President of the Brotherhood of Sleeping Car Porters, and other labor and civil rights leaders decided to put pressure on the Roosevelt administration to take action to prevent discrimination in the federal government and by federal government contractors. This pressure culminated in the threatened "March on Washington" planned in 1941. The pressure had a clear and positive effect. In 1941, President Roosevelt issued Executive Order 8802 which stated that discrimination based on race, creed, color, or national origin was prohibited in defense employment or government service.¹⁷

The early Fifties witnessed additional changes. President Eisenhower established the President's Committee on Government Contracts in 1953. This Committee was designed to persuade construction as well as nonconstruction contractors not to discriminate in hiring.

In May 1961, President Kennedy established the President's Committee on Equal Employment Opportunity (PCEEO).¹⁸ The PCEEO was granted the power

to publish names of non-complying contractors and unions, recommend legal action by the Justice Department to prosecute those who failed to comply or furnished false information, cancel the contracts of non-complying contractors, and prohibit government agencies from entering into new contracts with discriminating employers who had not demonstrated changes in their policies.¹⁹

Although at the time many thought this Committee would be effective, it had no real power and proved to be of little use.

B. Title VII and Executive Order 11246

Up to 1964, there was no federal law that addressed racial discrimination in employment.²⁰ Title VII of the 1964 Civil Rights Act changed that, and, with regard to federal contractors, Executive Order 11246, supplemented that Act. These two provisions constituted potentially powerful weapons in the fight against the exclusion of

17. Exec. Order No. 8802, 3 C.F.R. 957 (1938-1943 Comp.); FRANKLIN, *supra* note 8, at 426-27.

18. Exec. Order No. 10925, 3 C.F.R. 448 (1959-63 Comp.).

19. ROWAN & RUBIN, *supra* note 10, at 25.

20. See *supra* note 15.

and discrimination against black workers in the skilled construction trades. Title VII could be immediately and directly applied to the problem for there were no special problems presented by the construction industry to be dealt with. The problem is not the law, or the need for novel interpretations of the law, but rather merely the application of the law. Executive Order 11246, on the other hand, did require some fine tuning before it could be effectively applied to the construction industry. The discussion below, therefore, will deal rather briefly with Title VII and more extensively with the Executive Order.

The 1964 Civil Rights Act²¹ was the first major federal legislation that could be used to address discrimination in the construction industry.²² Title VII²³ of the 1964 Civil Rights Act gave the government and private litigants legal means to attack discrimination by federal contractors. Unions were also covered by Title VII. Section 703(c) prohibited discrimination in referrals and section 703(d) forbade any employer, union, or joint labor management committee which controlled apprenticeship or other training programs from racial discrimination.²⁴

Executive Order 11246,²⁵ issued in 1965 by President Johnson, was the first and remains the only direct federal effort to redress the effects of past racial discrimination by federal contractors, construction and nonconstruction. This Order stated that all federal contractors must take affirmative action to ensure equal employment opportunities, advertise their commitment to nondiscrimination, and file detailed reports with the federal contracting agency describing their own employment practices, those of their subcontractors, and those of the unions with which they are involved.

The Office of Federal Contract Compliance Programs (OFCCP) was established in the Department of Labor to supervise the enforcement of the executive order. In addition, OFCCP was to establish

21. Civil Rights Act of 1964, §§ 701-718, 42 U.S.C. §§ 2000e-17 (1976).

22. In addition to this Act, the federal government began to focus on apprenticeships. There were to be new selection procedures in these programs based on objective standards and equal opportunity. Although these programs were to adhere to these procedures, the penalties for not complying were extremely weak.

23. 42 U.S.C. § 2000e-17.

24. 42 U.S.C. § 2000.

25. Exec. Order No. 11246, 3 C.F.R. 339 1964-65 Comp. (reprinted in 42 U.S.C. 2000e) (1976).

"goals" for black participation in the federal contractor workforce. Contractors were required to show either that they had met those goals for each construction trade or that they had made "good faith" efforts to meet these goals. Penalties for failure to comply with the Executive Order could be as severe as disbarment (disqualification from future federal contracts).

Executive Order 11246 applied only to federal contractors, however, and therefore placed no obligation on unions.²⁶ Because of the commanding position that craft unions enjoy in construction, this omission has seriously limited the effectiveness of the executive order.

C. *The Philadelphia Plan*

The enforcement of Executive Order 11246 had to be revised in significant ways in order to have any chance of success in the construction industry. The nature of the construction industry—few permanent employees, reliance on craft union referrals for job-specific employees, seasonal nature of the work—had to be taken into account. Also, the fact that the Executive Order did not cover unions could not be ignored. Responding to these factors, the Department of Labor, in 1968 (the last year of the Johnson Administration), developed an approach based on an area-wide plan that would look to area-wide construction craft figures.

The pioneer program was the "Philadelphia Plan," an affirmative action program built around specific goals and timetables for each trade, covering federally funded construction in the Philadelphia Metropolitan area. The Plan was to include six construction trades and was designed to move black workers into these trades. The Plan established local goals for each trade. It was to cover all federal and federally-funded projects of \$500,000 or more in the five-county Philadelphia area. A designated time period of four years was given for contractors to reach their goals for minority employment in all crafts. The ultimate goal was to have the percentage of black workers in each covered craft equal to the percentage of black residents in the five-county area.

26. If a union fails to supply information to a covered contractor OFCCP requires this fact may be reported to the Justice Department of EEOC. Exec. Order No. 11246, section 209(c)(3).

The Plan was to be monitored by OFCCP. Every contractor was to comply or again show a "good faith effort." Whether or not such an effort was shown would be determined by OFCCP. As in the case of a non-Plan contractor found not to be complying, measures such as cancellation or suspension of contracts or portions of the contract and disbarment from further federal contracts could be taken.

The Department of Labor was optimistic that the Plan goals could be reached. There were many jobs opened and many opportunities to advance because of the construction industry's growth potential. Contractors, however, were extremely unhappy with the Plan and many brought their challenges to court. They even tried to put an end to the Plan in Congress. Both attempts were defeated. Although it did not support the Philadelphia Plan, the Nixon Administration found it difficult simply to turn its back on an imposed "solution" regarding skilled trade's discrimination and federal construction. Therefore, as an alternative, the Nixon Administration pressed hard for "hometown plans." There was virtually no uniformity among the plans nor any effort by the Department of Labor to direct "home town" solutions in one way or another. These plans involved agreements negotiated by local contractors, local union representatives, and community organizations. In part because those community organizations often lacked any substantial legal assistance, the hometown plans were almost uniformly worthless. They basically lacked any contractually binding obligations, often amounted to nothing more than a "we'll try harder" approach, and often only covered a very small portion of the problem (e.g., apprenticeship). It was, however, Department of Labor policy to foster these approaches and only to move ahead with imposed plans when local negotiations failed to produce any results.

III. LOCAL EFFORTS TO REMEDY RACIAL DISCRIMINATION IN THE CONSTRUCTION INDUSTRY: THE WASHINGTON PLAN

In Washington, D.C., the exclusion of and discrimination against black workers in the skilled trades became a focal point of civil rights activity in the late 1960s. The initial problem was the exclusion of black workers. As that problem began to respond, grad-

ually, to corrective efforts, a second problem, discrimination against those black workers that had gained access to the craft union or its work, increased in prominence. Out of the recognition of the need to change the situation, heightened by the prospect of major construction activity for the planned subway system, grew a coalition of local organizations, the Washington Area Construction Industry Task Force (Task Force), which, with the aid of the Washington Lawyers' Committee, played a substantial role in fighting racial discrimination in the construction craft.

The Task Force had a membership or body of over twenty endorsing organizations, including the traditional civil rights organizations (Washington Urban League, NAACP), minority employment and poverty organizations (Project Build, United Planning Organization), and community organizations (community organizations for the Shaw area, the 14th Street area, etc.).

With construction about to begin on the \$2.5 billion Washington Metro in early 1970 (and to extend for a decade) the Task Force's first effort was directed at this project. In 1969 and early 1970, the Task Force issued several reports covering the dimensions of the Metro project and the degree to which, if union labor were relied on, blacks and other minorities would be excluded from the economic benefits of jobs that could be created by this project.²⁷

In the early spring of 1970, the Task Force's community activism and Washington Urban League staff were complemented by legal capability provided by Arnold & Porter and Wilmer, Cutler & Pickering, with the coordinating role being filled by the Lawyers' Committee.²⁸

The principal effort of the Task Force was to see that a "Washington Plan," modeled after the Philadelphia Plan, was imposed on Washington. Local labor and contractor representatives were all too eager to negotiate a "hometown solution." The Department of Labor had scheduled hearings in April 1970 to hear testimony on the need for and nature of any plan for the Washington area. The Task Force decided that it should testify at the hearings. Accordingly, the Task Force, with legal assistance, prepared testimony, testified, and

27. There were also some demonstrations and sit-in activity at this point.

28. This was originally performed by the National Lawyers' Committee but soon thereafter moved to the Washington Lawyers' Committee.

sponsored other witnesses. In its testimony the Task Force opposed any negotiated hometown plan and supported an imposed plan similar to the Philadelphia Plan. Following the hearings, there were some further community activities and demonstrations organized by the Task Force.²⁹

On June 1, 1970, the Department of Labor issued the Washington Plan.³⁰ It followed the basic format of the Philadelphia Plan but also encompassed the federally-assisted construction activity of federal contractors. In its findings, the Department of Labor stated:

[I]t is apparent that minority workers . . . have been prevented from fully participating in certain construction trades. This exclusion is due in great measure to the special nature of employment practices in the construction industry where contractors and subcontractors rely on construction craft unions as their prime or sole labor source. Collective bargaining agreements and/or established custom between construction contractors and subcontractors and unions frequently provide for, or result in, exclusive hiring halls; even where the collective bargaining agreement contains no such hiring hall provisions or the custom is not rigid, as a practical matter most people working in these classifications are referred to the jobs by the unions. As a result of these hiring arrangements, referral by the union is a virtual necessity for obtaining employment in union construction projects. Minorities often have not gained admittance into membership of certain unions and into certain apprenticeship programs, and, thus, have not been referred for employment.³¹

The Department also published the percentages of minority participation in selected construction trades. That data is presented in the following chart.

29. Also, during this period, to some degree, under pressure from the Task Force, the Department of Labor ordered a freeze on Metro contracts (which had been imposed earlier and then withdrawn), pending a resolution of the Washington Plan situation.

30. 41 C.F.R. 60-5 (1974).

31. *Id.* at 223.

Trade	Percentage Minority
Asbestos Workers	1.4%
Boiler Makers	0.0%
Bricklayers	56.9%
Carpenters	16.2%
Cement Masons	71.1%
Electricians	4.8%
Elevator Constructors	10.6%
Glaziers	3.3%
Iron Workers	3.2%
Laborers	90.6%
Lathers	10.0%
Operating Engineers	24.4%
Pipefitters-Plumbers- Steamfitters	4.1%
Plasterers	25.4%
Reinforce Rodmen	32.4%
Roofers	85.3%
Sheet-Metal Workers	1.1%
Teamsters	87.0%
Tile and Terrazzo Workers	3.6%
Painters and Paperhangers	6.6%

These figures revealed a stark picture. In those trades that are used in commercial construction and are generally higher paying, electricians, elevator constructors, ironworkers, pipefitters, sheet-metal workers, there were very few black workers. In labor intensive categories, black workers dominated. In those trades that are used in small jobs and large jobs (residential and commercial construction), brick layers, cement masons, plasterers, roofers, the relatively high representation of black workers was misleading because in the generally higher paying commercial work they were badly underrepresented.

The Department determined that minority workers constituted approximately 26% of the total work force in the Washington, D.C. SMSA, and therefore excluded from the coverage of the Washington Plan those trades that exceeded or were close to that percentage. (The Department also noted that 71% of the population of Washington, D.C. was black). The remainder of the trades were included in the Plan. For each of those trades, goals for minority participation,

expressed in terms of a range, were established. In addition, in recognition of the fact that it would take time for some of the trades to achieve progress, the ranges were gradually increased over time. The following progression of ranges was established:

WASHINGTON PLAN GOALS FOR MINORITY EMPLOYMENT

	1971	1971-1972	1972-1973	1973-1974
Electricians	10%-16%	16%-22%	22%-28%	28%-34%
Painters and Paperhangers	14%-21%	21%-28%	28%-35%	35%-42%
Plumbers, Pipe- fitters, and Steamfitters	10%-15%	15%-20%	20%-25%	25%-30%
Iron Workers	11%-19%	19%-27%	27%-35%	35%-43%
Sheet Metal Workers	7%-13%	13%-19%	19%-25%	25%-31%
Elevator Constructors	16%-22%	22%-28%	28%-34%	34%-40%
Asbestos Workers	8%-14%	14%-20%	20%-26%	26%-32%
Lathers	16%-22%	22%-28%	28%-34%	34%-40%
Boiler Makers	6%-12%	12%-18%	18%-24%	24%-30%
Tile and Terrazzo Workers	10%-16%	16%-22%	22%-28%	28%-34%
Glaziers	10%-16%	16%-22%	22%-28%	28%-34%

Under the Plan no contract could be awarded for federal (or federally assisted) construction unless the contractor³² first submitted an affirmative action plan that incorporated the appropriate goals. After one year the contractor's performance would be reviewed to determine if it had met its obligations. A contractor would be considered to have met its obligations if (1) it met its goals in each of the trades it utilized, or (2) it was a member of a contractors' association that was seeking to increase minority participation in the construction trades as a group, and, that although the contractor had not met its goals the association as a whole had, or, (3) it showed that the construction crafts from which it received 80% of its trade workers

32. Contractor was defined to include subcontractors.

had referred sufficient minorities in the Plan area to satisfy the overall goal, or (4) if the contractor had not satisfied any of the above criteria, it could still be considered to be in compliance if it had made certain specified "good faith efforts" to recruit minority trade workers. The Plan applied to the entire Washington Standard Metropolitan Statistical Area.

IV. LITIGATION SPONSORED BY THE LAWYERS' COMMITTEE

In July 1970, right after the promulgation of the Washington Plan, the Lawyers' Committee and the National Urban Coalition sponsored an "Equal Employment in the Construction Industry Conference." Participants came from all across the country to discuss problems of discrimination in the skilled trades. The Lawyers' Committee arranged for the preparation of comprehensive legal matters for the conference: a memorandum on legal strategies for attacking discrimination and a booklet containing summaries of the various imposed plans and hometown plans in existence in other areas of the country.³³ As a follow-up to the conference, a model "negotiated" plan was prepared and distributed.³⁴

The legal strategies that came out of the conference were straightforward: rely on private suits under Title VII and put pressure on the Department of Labor to enforce Executive Order 11246. As commonplace as such a strategy appears now, it must be borne in mind that both tactics were relatively new at the time.

Title VII of the 1964 Civil Rights Act and Executive Order 11246 were designed to be powerful weapons in the fight against racial discrimination and it was thought that they could be easily adapted to the discrimination directed against black workers in the skilled construction crafts. This would be especially the case if class

33. These materials were prepared by Wilmer, Cutler & Pickering.

34. After a flurry of activity following imposition of the plan, the Task Force's activities subsided markedly. In hindsight it is easy to see that it was a mistake that the successes of the efforts in the spring of 1970 were not built upon, thereby galvanizing community involvement and leading to a very careful monitoring effort with respect to the activities of, and results obtained by, participating contractors. There were periodic Washington Plan review committee meetings but the Department of Labor refused to give solid statistical updates on performance under the Washington Plan at those meetings. Furthermore, the community did not do an effective job of utilizing the forum of those review committee meetings for that purpose.

actions were brought under Title VII and the enforcement effort by federal agencies of the executive order were reasonably effective.

The significance of Executive Order 11246 should not be underestimated. The federal government is the largest contractor for construction work in the United States. There is literally no major construction contractor that has not done business with the federal government. Therefore, the government, through OFCCP, should be able to wield very significant and effective power over non-complying federal construction contractors. The threat of being disbarred on future federal construction contracts, and the burden of remedial obligations, should prove an effective deterrent for other federal contractors.³⁵

A considerable effort had been directed to getting a Washington Plan that would apply Executive Order 11246 in this area. When that effort was frustrated by dismal enforcement by the Ford Administration, a suit was filed to require that the federal government effectively enforce the Executive Order. A similar effort was directed at the enforcement program of the District government. That effort likewise resulted in a suit.

Coupled with these efforts were the private suits. There were two obvious targets for such suits: construction contractors and construction craft unions. Suits against both were initiated. The limitation on the private suits was their scope: either the particular contractor or the particular union. In some instances the effect was limited to the plaintiff's specific relief. Often there was no class-wide remedy.

Ideally, actions should have been brought against each of the unions included in the Washington Plan, along with OFCCP and the District if they were not sufficiently aggressive in enforcing the Plan. For a number of reasons, that was not possible. Litigation requires plaintiffs, and for the purposes that this litigation effort was begun, most appropriate plaintiffs. Not only were plaintiffs not easy to come by, but it is never possible to know in advance that they will

35. As mentioned above, Executive Order 11246 has a serious hole in its coverage: it applies only to construction contractors, not to construction craft unions. In part this is due to the fact that the Executive Order applies to all federal contractors, including nonconstruction and construction. In its general application the order fails to take into account the significant special nature of construction: that most construction contractors rely on unions as their personnel agencies.

want to pursue a class action to the possible detriment of any individual claims they may have, or that they would be interested in lengthy litigation that will be frustrating under the most favorable circumstances.

Some of the Lawyers' Committee plaintiffs were identified by an EEOC funded project in which the Lawyers' Committee agreed to provide counsel for plaintiffs that were identified but who could not be represented by EEOC due to statutory restrictions then in place that limited the actions that EEOC could bring.³⁶ Others literally just came in off the street. The two actions by the Task Force against enforcement agencies were the only planned pieces of litigation. The litigation that was brought has therefore been scattered among the craft unions, contractors, and enforcement agencies. Some litigation that the Lawyers' Committee would like to have seen brought, it never had the opportunity to bring. Some of the litigation that was sponsored was perhaps ill advised.

The cases were litigated by various law firms contacted by the Lawyers' Committee. Periodically, the Lawyers' Committee sponsored meetings which included all of the lawyers handling all of the cases. The purpose of the meetings was to share experiences and, to a limited extent, coordinate efforts.

The following chart of the cases, each of which is described individually below, provides an overall view of the litigation sponsored by the Lawyers' Committee in connection with its effort to address racial discrimination in the construction industry.

36. There were a number of cities where the project operated.

<u>Case</u>	<u>% Minority</u>	<u>Class Action</u>	<u>Trial/Settle</u>	<u>Class Remedy</u>	<u>Inj. Relief</u>	<u>Monitoring</u>	<u>Description</u>
1. Union Actions							
<i>Moten v. Bricklayers</i>	56.9	yes	S	yes	yes	yes	Class action by black local bricklayers union against white bricklayers union alleging discrimination. Settled by merger of unions. Union EEO plan for employees for 5 years (including goals and timetables) with Lawyers' Committee oversight.
<i>Berger v. Ironworkers</i>	3.2	yes	T	incomp.	incomp.	incomp.	Class action by black ironworkers (rodmen) alleging exclusion and discrimination. Trial concluded; no judgment yet issued.
<i>Gray v. Electrical Workers</i>	4.8	yes	S	yes	yes	yes	Class action alleging racial discrimination and exclusion of black electricians. Settlement includes goals and timetables, ten-year monitoring program.
<i>Foster v. Carpenters</i>	16.2	yes	S	no	no	no	Class action by black carpenters alleging racial discrimination. Settled for individual relief.

<u>Case</u>	<u>% Minority</u>	<u>Class Action</u>	<u>Trial/Settle</u>	<u>Class Remedy</u>	<u>Inj. Relief</u>	<u>Monitoring</u>	<u>Description</u>
<i>Reynolds v. Sheetmetal Workers</i>	1.1	yes	S	yes	yes	yes	Class action by black sheetmetal workers. Partial SJ on apprenticeship program and qualification. Settled on issues of back pay, training program, attorneys' fees.
2. Contractor Actions							
<i>Kimber v. Izzo</i>	—	yes	S	yes	—	no	Class action against contractor by black bricklayers alleging discrimination in hiring and promotion. Settled for \$200K back pay for class. Injunctive relief negotiated but contractor ceased doing business.
<i>Jenkins v. Kelly Const.</i>	—	no	S	no	no	no	Indiv. action by black bricklayer foreman alleging discriminatory lay off. Settled for back pay, reinstatement, attorneys' fees.

Case	% Minority	Class Action	Trial/Settle	Class Remedy	Inj. Relief	Monitoring	Description
3. Enforcement Actions <i>Task Force v. Donovan</i>	—	—	S	—	—	yes	Action by Task Force alleging failure to enforce E.O. 11246 and Washington Plan. Settled. Compliance with Consent Order litigated 1978-82; Defendants responsive on some issues; District Court dismissed jurisdiction over Consent Order.
<i>Task Force v. Barry</i>	—	—	S	—	—	yes	Action by Task Force alleging failure to enforce local analog to Washington Plan; settled 1983; monitoring.

As might be expected, the different types of cases—union, contractor, and enforcement agency—raise different problems and have different degrees of effectiveness. First, each of the cases will be described.³⁷ Second, after each of the types of cases, a brief assessment, based on the experiences of the litigating attorneys, will be made.

A. Union Cases

*Moten v. Bricklayers*³⁸

This case was quite different from the other cases brought by the Lawyers' Committee. The white bricklayers union had effectively excluded black bricklayers from its ranks, and, in the late 1930s, the black bricklayers had responded by establishing a separate bricklayers union. That union had jurisdiction only over residential construction while the white union had commercial work and, consequently, most of the best work went to the members of the white union. Although the unions did not operate a hiring hall or formal referral program (rather the employers' foremen established a system of informal hiring referrals), members of the white local had an effective preference for work within the white local's jurisdiction. The overall percentage of black workers in the bricklayers trade, as found by the Department of Labor (56.9%), is therefore very misleading, for it did not take into account the existence of a predominantly white local union or quality of the work that the black bricklayers were receiving.

This action was filed on November 19, 1971. The gravamen of the amended complaint, which was filed in April, 1973, was that the establishment and maintenance of a dual union arrangement for the bricklayers trade in the Washington area, whereby a predominantly white local (Local 1) had jurisdiction over higher paying commercial work while the predominantly black local (Local 4) had jurisdiction over lower paying residential work, violated Title VII of the Civil Rights Act because it inherently tended to segregate memberships and to deny equal employment opportunities to black bricklayers.

37. The lawyers that worked on the various cases prepared descriptions of their cases and offered their assessments of the litigation. The case description and assessments are drawn from the materials prepared by those lawyers for this larger report.

38. *Moten v. Bricklayers*, 543 F.2d 224 (D.C. Cir. 1976).

The amended complaint was brought on behalf of a class of all members of Local 4. Other claims were also asserted against the two active defendants—Local 1 and the Bricklayers International Union.³⁹

After more than two years of discovery and an unsuccessful motion by plaintiffs for summary judgment, on the eve of final pretrial, the parties in early 1974 reached an agreement in principle concerning the settlement of this litigation. This agreement in principle culminated in a Stipulation of Settlement which was preliminarily approved by the district court, Judge Aubrey E. Robinson, Jr., on May 30, 1974.

In brief, the principal provisions of the stipulation of settlement provided for the merger of Local 1 and Local 4 into a single local, Local 6, and the establishment of an affirmative action program under which employment goals would be established for each contractor having a collective bargaining agreement with Local 6. In addition, it provided for a back pay fund in the amount of \$80,000 to be distributed to persons who were members of Local 4 between 1969 and 1973 based on a formula taking into account race, years of membership, and hours worked. A hearing on the proposed settlement of the class action was held on June 26, 1974, and the district court approved the settlement and entered a final judgment on June 28, 1974.

After the district court's final judgment, merger was accomplished as scheduled. The new bricklayers local (Local 6) is integrated, with more than 40% black members. However, although black bricklayers certainly get a higher percentage of commercial work than before the suit was filed, Local 6 failed in its effort to organize new residential construction or to maintain that which it had, and essentially all residential bricklaying work in the area is now nonunion.⁴⁰

39. The amended complaint also alleged that the establishment and maintenance of the dual union arrangement violated 42 U.S.C. § 1981 (1976), contractual rights of the plaintiff class (including the right to fair representation), and rights under the Davis-Bacon Act, 40 U.S.C. § 276(a)-(c) (1976).

40. After the parties to this case had informed the district court of the likelihood that this action would be settled, Anthony Izzo, a bricklaying contractor in the Washington area, filed a motion to intervene as a party defendant and to consolidate this case with a Title VII action then pending against it, *Kimber v. Anthony Izzo Co.* (This was also a Lawyers' Committee case; see *infra* for description.) The purpose of Izzo's motions was to attempt to delay or block

*Berger v. Ironworkers Local 201*⁴¹

In 1975, eight black rodmen brought a class action on behalf of all black rodmen or would-be rodmen alleging racial discrimination by five defendants that were alleged to have denied black rodmen employment opportunities, membership in the union, and participation in the union's apprenticeship program on the basis of race, all in violation of Title VII and of the Civil Rights Act of 1866.⁴² Defendant Local 201 was also alleged to have violated Title VII by causing or attempting to cause employers to discriminate against plaintiffs.⁴³

The rodman trade is a subset of the ironworker trade. Essentially, rodmen handle and place the steel rods which reinforce concrete and similar materials in structures of many kinds. Rodmen are needed in virtually every major construction project, from the subway system to office buildings to nuclear power plants.

The structure that controls union jobs in this area is a strong one. Defendant Iron Workers Reinforced Rodmen Local 201 has entered into a series of collective bargaining agreements with defendant Construction Contractors Council (CCC) which in turn represents a large group of construction contractors. All of these agreements have provided that the Local will operate an exclusive hiring hall.

The CCC and Local 201 each appoint half the governing boards of the Apprenticeship and Training Programs. Defendant International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO (International) has exercised pervasive control over the activity of its subordinate local unions, such as Local 201, on such matters as testing and admission to membership, standards for

the settlement of *Moten*. Izzo argued basically that it was improper to settle this action while the *Kimber* case, brought on behalf of a class of all black Izzo employees charging discrimination by Izzo in promotions and job assignments, still remained. Izzo also objected to certain of the details of the settlement and the fact that there had been no employer input into the settlement. The District Court's June 22, 1974 final judgment which approved the settlement and dismissed the action with prejudice also denied Izzo's motions. Although the District Court's action was ultimately approved on appeal, Izzo's actions created uncertainty which adversely affected the new local and its EEO program.

41. *Berger v. Ironworkers Local*.

42. In addition, defendants were alleged to have retaliated against certain of the class members for exercising their civil rights, a separate violation of Title VII. 42 U.S.C. § 2000e-3 (1976 & Supp. IV 1980).

43. 42 U.S.C. § 2000e-2(c).

the Apprenticeship and Training Programs, and establishing defendant National Iron Workers and Employers Training Program.

The agreements between the union and the CCC establish a preferential system for referral which, on its face, is based on skill determined on the basis of an examination administered monthly by the local. There are four "groups," A through D, which are distinguished—theoretically at least—on the basis of the ability to perform the trade. Thus, Groups A and B, the top groups, consist of rodmen with four years experience, who have passed an examination given by a rodman local, while Groups C and D consist of workers with one or more years experience who have not passed such an examination.

Evidence, presented by plaintiffs at trial, suggests a quite different reality. Plaintiffs were able to show that the referral system had had a disparate impact on blacks, shown by comparing those who had worked out of the hall with those who had been admitted to membership over the years; a training program instituted for experienced workers was in fact a discriminatory barrier to journeyman membership; blacks had been denied access to the exam for journeyman membership; and that black applicants had been excluded from the apprenticeship program.⁴⁴

The case was filed in 1975, and after discovery and extensive delays, the liability phase was tried before Judge Penn during the summer of 1981. All briefing on the liability issue was completed by February, 1982. The case remains undecided.

*Gray v. International Brotherhood of Electrical Workers*⁴⁵

In June, 1974, five black plaintiffs brought an action on their own behalf and on behalf of a class of black people alleging discrimination. The plaintiffs were two trainees and applicants to the apprenticeship program, an apprentice, and two qualified journeymen seeking admission to union membership. The defendants were the International Brotherhood of Electrical Workers (IBEW), IBEW local 26, the National Electrical Contractors Association (NECA) and

44. In its findings in support of its issuance of the Washington Plan, the Department of Labor found that only 3.2% of the ironworker's union was black and for that reason included them in the Plan.

45. *Gray v. Int'l Bhd. of Elec. Workers*, 10 EPD 10-453 (D.D.C. 1975).

NECA's D.C. Chapter. The complaint alleged discrimination in the entry and promotion of electrical workers in violation of Title VII. At the time of the suit, blacks comprised less than 5% of the membership of the local union. On February 15, 1977, Judge Gasch denied plaintiffs' motion to certify the class. Litigation of the individual claims continued.

Discovery proceeded on the individual claims and indicated that defendants had discriminated against blacks in connection with admission to union membership and to training opportunities and job classifications offering advancement to journeyman status. Principal reliance in this scheme was placed on the all white journeyman workforce to recommend applicants to the apprenticeship program. This recruitment device merely perpetuated the virtually all white composition of defendants' workforce.

Some of the criteria on which the defendants relied—the General Aptitude Test Battery, administered by the U.S. Employment Services, a high school diploma or its equivalent, and high school grades—had not been shown to be valid predictors of job performance and, furthermore, each had a disproportionate impact on black applicants. Defendants also relied on subjective interviews which arbitrarily excluded persons over twenty-four years old from entry. On top of all this, defendants would waive these requirements in favor of white applicants but not in favor of black applicants.

The job training programs were also operated in a discriminatory manner. The virtually all white apprenticeship program enabled participants to become union members, while the black trainee or pre-apprenticeship program did not. There were also significant differences in the benefits and wages between the two programs.

One day before the scheduled trial, plaintiffs and defendants entered into a consent decree in which the defendants agreed to comply with Title VII and section 1981 and to meet three sets of goals and timetables. First, they agreed that for each of the next ten years, blacks shall comprise at least 33% of all persons admitted to and entering (a) commercial journeyman membership in Local 26 and (b) each training program maintained or operated by any or all of the defendants. Second, they agreed that by 1987 blacks shall comprise at least 26% of all commercial journeyman members of Local 26 and, as interim goals, that blacks would constitute 10% of com-

mercial journeyman members by 1979, 14% by 1981, 18% by 1983, and 22% by 1985. Finally, they agreed, that, by 1987, blacks would comprise at least 26% of all commercial journeymen assigned to or placed in the highest priority work referral group.

It was further agreed that the defendants would keep detailed records related to their apprenticeship and training programs and make periodic reports on their progress under the decree. The implementation of the decree was entrusted to a three-man Monitoring Board comprised of one member appointed by the plaintiffs, one appointed by the defendants and a third appointed by agreement of the other two members. The Board was to meet no less than once every three months, have access to the defendants' records, periodically review progress in the implementation of the decree, resolve certain disputes, make annual reports to the court, and, when necessary, recommend such changes in the defendants' practices as may become necessary in order to assure that the Board defendants meet the goals and timetables set out in the decree.

It now appears that the defendants have generally complied with their agreement that blacks would comprise a third of those admitted to the apprenticeship classes, but that the other objectives of the decree are not being met. The Monitoring Board held a few initial meetings but has since become moribund.

*Foster v. Local 2311 of United Brotherhood of Carpenters and Joiners of America*⁴⁶

In 1978, four black piledrivers brought a class action against Local 2311 of the United Brotherhood of Carpenters and Joiners of America on behalf of all black persons who were discriminated against on the basis of race by Local 2311. Local 2311 is principally engaged in piledriving work for the construction industry in the Washington, D.C. area. Other defendants named were the business agent for Local 2311, the Construction Contractors Council (the employer association which negotiated a collective bargaining agreement with the carpenters and piledrivers of metropolitan Washington), John Doe Contractors (the employers who hired union

members for piledriving work), and the International Union (The United Brotherhood of Carpenters and Joiners).

In the late 1960s, few blacks had been admitted to Local 2311. Union membership opportunities had been limited to friends of the predominantly all white membership, thus perpetuating past discrimination. Blacks were discouraged from seeking union membership by misrepresentation of prerequisites for membership. Black applicants had to be certified welders; not all white applicants met this requirement. Black applicants had to have a certain amount of prior experience; whites were not required to have such experience. After 1973, the union gave subjective written and practical tests which had the effect of discriminating against black applicants. Not all whites had to take these tests.

Once black piledrivers were admitted to the union, they were sent to jobs less frequently than their white counterparts. The union business agent gave referrals to whites over the telephone while blacks were required to be present at the hiring hall. Blacks were also denied equal opportunities to work as supervisors by the contractor defendants. They were assigned the least desirable and the shortest-term jobs. Blacks were also denied equal opportunity to work overtime and they were denied the opportunity to work as union stewards. Black workers were laid off and terminated more frequently than white workers. The union's apprenticeship programs were limited to relatives and close friends of union members (usually white).

When black union members filed complaints with the D.C. Human Rights Office or the Equal Employment Opportunity Commission, the business agent did not send them out on jobs. When the charges were withdrawn, the members were given work again. Blacks filed charges with the union's district council. The council took no effective action on the matters to eliminate the discrimination.

This suit was brought under 42 U.S.C. § 1981 and Title VII. The defendants completed virtually all of their discovery. But, before plaintiffs began taking depositions, their counsel engaged in extensive settlement negotiations. Defendants agreed to almost all the equitable relief demanded in the complaint but would not meet the plaintiffs' monetary demands. The court denied class action cer-

46. *Foster v. Local 2311 of United Bhd. of Carpenters*, No. 78-1644 (D.D.C. 1979).

tification on the grounds that the class sought to be represented was not sufficiently numerous. The lost wages for the named plaintiffs totaled about \$80,000.⁴⁷

After further extensive negotiations with individual defense counsel, the case was settled on behalf of the four original plaintiffs and three intervenor plaintiffs for most of the equitable relief sought and \$99,000, \$6,000 from the CCC and \$93,000 from the union defendants.

*Reynolds v. Sheet Metal Workers Local 102*⁴⁸

On May 14, 1975, six black plaintiffs, on behalf of a broad class of black persons, brought suit against the Sheet Metal Workers Local 102 (now Local Association—Washington, D.C. Chapter (SMACNA-DC)), Joint Apprenticeship Committee (JAC), Sheet Metal Workers International Association (SMWIA), Sheet Metal and Air-Conditioning Contractors National Association (SMACNA), and National Joint Apprenticeship Training Committee (NJATC).

The complaint alleged discrimination in all phases of the union sheetmetal trade in the Washington, D.C. metropolitan area, including: admission to the sheetmetal apprentice program; treatment during the apprentice program; developing standards for admissions to such programs; developing and administering the minority training or "pre-apprenticeship" program; and discriminatorily excluding blacks from union membership. The complaint sought injunctive relief, back pay, damages, attorneys' fees and expenses. On March 24, 1976, the court certified this as a class action on behalf of a broad class of black persons.⁴⁹

On January 29, 1979, the plaintiffs amended their complaint to add as defendants the twenty-five local sheetmetal contractors who are members of SMACNA-DC, to add to the complaint specific alle-

47. About this time, plaintiffs and their counsel became involved in a dispute and could not resolve their differences. Plaintiffs' counsel withdrew, and Williams & Connolly was asked to take over the litigation.

48. *Reynolds v. Sheet Metal Workers Local 102*, 498 F. Supp. 952 (D.D.C. 1980) *aff'd*, 702 F.2d 221 (D.C. Cir. 1981).

49. This class is limited to those who suffered an act of racial discrimination in violation of 42 U.S.C. § 2000e (1)-(17) since July 9, 1971, or who had an actionable claim under 42 U.S.C. § 1981 on or after May 14, 1972.

gations concerning the exclusively minority pre-apprentice training program and discrimination in direct journeyman admissions, and to incorporate causes of action based on right-to-sue letters which had been recently issued to the named plaintiffs.

Extensive discovery was obtained by all parties over the seven-year course of this litigation. The plaintiffs obtained discovery from the named defendants early in the litigation and it was this information which provided much of the basis for the motion to add the members of the contractors' association as defendants.

One result of the lawsuit was that from 1975 through 1978, the defendants did not indenture any new apprentices. In the fall of 1979, the JAC decided to accept a new class of about fifty. In January 1980, plaintiffs moved for a preliminary injunction to prevent the defendants from using their discriminatory apprentice selection practices in choosing those apprentices. Following a four-day trial-type hearing, the court granted the requested injunction, precluding further use in apprentice selection of a high school diploma requirement, arrest record inquiries, and subjective personal interviews.

Shortly after the argument on defendants' appeal of the preliminary injunction, counsel for the plaintiff class began discussions with the new attorneys representing the local union, contractors' association and JAC in the hope of resolving this matter. Following over a year of negotiations, a proposed consent decree was agreed upon. After several months of further discussions, all defendants consented to the decree and it was presented to the court. Following extensive efforts to notify absent class members and meetings with class members to explain the decree to them, on October 25, 1982, Judge Bryant granted final approval to the decree.

The consent decree is designed to end discrimination in all phases of the union sheetmetal trade and particularly to increase the black membership of Local 100. The injunctive and affirmative action provisions of the consent decree are cornerstones of this approach.

The decree provides that apprentice vacancies shall be advertised in a manner likely to reach eligible blacks and that at least 42% of those accepted for an apprenticeship shall be black. If applicant flow exceeds 42%, black selection must take place at the rate of applicant flow, up to 50%. The decree also forbade discrimination dur-

ing apprenticeship, required establishment of an affirmative action program to provide black apprentices with additional instruction, and established a goal that 42% of those graduating from the apprentice program to journeyman be black. The decree addresses the issue of disparate black terminations from apprenticeship programs by establishing a number of permissible reasons for terminating apprentices and for requiring them to repeat periods of apprenticeship. In response to the plaintiffs' allegation of discrimination in direct journeyman admissions, the decree provides that at least 42% of individuals admitted directly shall be black. Although certain exceptions are provided, the decree provides a mechanism to ensure that they are not used to circumvent the decree.

Many of the injunctive provisions of the proposed decree are to be supervised by a special Monitoring Board. The Board is composed of three members, one chosen by counsel for the plaintiff class, one chosen by counsel for the local defendants and the third member, the Chairman, either agreed upon or appointed by the court.

The Board is responsible for general oversight of the implementation of the decree. Complaints under the decree go to the Board for resolution in the first instance. In addition, the Board reviews all decisions by the JAC to terminate black apprentices, either to ensure that the JAC properly invoke one of the permissible reasons for termination, or to rule on a JAC request to terminate an apprentice for other good cause. Similarly, the Board is charged with ensuring that direct admissions of journeymen to Local 100 under exceptions to the 42% requirement are not used to circumvent the purposes of the decree.

The Monitoring Board also is responsible, together with the JAC, for administration of the fund provided for affirmative action. If the decree runs for eight years, \$260,000 would be committed to this fund. Such monies are maintained jointly by the Board and the JAC. The funds may be expended for a number of purposes specifically noted in the decree and for any additional purposes agreed upon by the JAC and the Board.

The consent decree will be in effect for a minimum of five years and a maximum of nine. The variable term is designed to promptly increase the number and proportion of black journeymen in Local

100. The decree provides for termination at any time after five years if the defendants demonstrate:

- (1) at least 42% of all apprentices indentured by the JAC since the date of entry of the Decree have been black; and
- (2) at least seventy-five new black journeymen have been admitted to Local 200 from within the Washington Metropolitan Area of former Local 102 since the date of entry of the Decree.

If the defendants cannot make this showing at the end of the eight-year term of the decree, it will be extended for one additional year only. An additional payment for affirmative action would be made upon extension, if the defendants' failure to achieve the goals was caused "in substantial part by bad faith."

The five-year minimum ensures that the decree is in effect long enough to have a lasting impact on the four-year apprenticeship process. By permitting termination after that time period, with consequent reductions in liability for funding of affirmative action programs, the decree creates incentives for the defendants to meet the goals of the Decree expeditiously.

The consent decree provides \$250,000 for monetary awards to class members and in addition, up to \$300,000 was designated for the affirmative action program. To minimize distribution costs, which were to come out of the fund, awards were made on a *per capita* basis, so that eligible claimants received an equal share of the fund. The consent decree also provided for additional payments of between \$4,500 and \$7,500 to each of the named plaintiffs for their efforts in prosecuting the action.

Finally, the decree provided \$250,000 for the costs of the litigation and attorneys' fees.

Assessment of Union Cases

The one point that was made by several of the lawyers who handled each of the union cases was that the chances for success are increased if, in addition to the union (the international as well as the local), the contractor and the contractor's associations are joined as defendants. There are two reasons for this. First, the contractors often share some of the power that the union has in such matters as entry into the apprenticeship program. In this respect, the presence of the contractor is necessary for complete and effective relief. It

also makes it difficult for the union to blame the contractor and, in another action, for the contractor to blame the union. Second, the contractor is often the potential defendant with the most to lose, in that unions, especially locals, often have only limited financial resources.

In *Reynolds*, the sheetmetal case, for example, a major victory was won when the plaintiffs were allowed to amend their complaint to add the contractors as defendants. In *Moten*, the bricklayers case, one of the complicating elements was the attempted intervention of a contractor, Izzo. Instead of that case proceeding in one action with all potential defendants, the litigation was split into two cases, with a number of employers never subject to suit.

Another point that is apparent on reviewing the cases is that where there is injunctive relief, the presence of effective monitoring is very important. There can be no question that it is essential that compliance with the settlement should be monitored. The equally important point is that plaintiffs cannot be relied on to perform that task. Often they have received what they wanted from the litigation and it is not realistic or even fair to expect more of them. Therefore, the use of an independent monitoring board, as in *Reynolds* or *Grey*, is an essential element of a successful litigation.

B. Contractor Cases

*Kimber v. Anthony Izzo Company, Inc.*⁵⁰

In 1973, four black bricklayers, on their own behalf and on behalf of "all black bricklayers who are now employed by defendant, who were or might have been employed by defendant since July 2, 1965 or who may be employed by defendant in the future," brought suit against Anthony Izzo Company, Inc., a large Washington area bricklaying contractor. The plaintiffs alleged violations of Title VII and § 1981 for systematically discriminating on the basis of race against plaintiffs (1) by refusing to promote qualified blacks to the position of foreman, and (2) by assigning blacks to lower-paid, less steady residential work. They sought damages, back pay, and injunctive relief.

After initial settlement discussions, the class was certified and

50. *Kimber v. Izzo Co., Inc.*

discovery was taken. The defendant moved to consolidate the action with a pending action against the labor union and to compel joinder of the labor union as a necessary party under Rule 19 or for leave to file a third-party complaint against the labor union. The court issued an order staying proceedings pending resolution on appeal of the defendant's motions in *Moten*, the union case. There followed an eighteen month hiatus after which the appeal was dismissed and the case was settled.

The settlement had two aspects: (1) \$200,000 back pay; and (2) an affirmative action program requiring the number of black foremen and hours worked by black bricklayers to approximate the proportion of black bricklayers employed by the defendant or the proportion of black bricklayers in the Washington area force, whichever was higher. Shortly after settlement, however, the defendant went out of business.

*Jenkins v. Kelly Construction Company*⁵¹

This case was an individual action brought in 1978 by a black bricklayer (foreman) alleging that he had been discriminated against when he was laid off. The claim was based on Title VII. The case was settled for reinstatement, back pay (in the amount of \$12,500), costs, and attorney's fees.

Assessment of the Contractor Cases

A difficulty with contractor cases is that they do not have the impact of the union cases or the enforcement agency cases because they affect only the sued contractor. Furthermore, the remedy sought is often only an individual remedy because the number of employees or potential employees involved is not sufficiently numerous to be brought as a class action. Finally, as is noted in the assessment of the union cases, it makes more sense to add the contractors to the union cases as the defendants rather than bring either the union cases or the contractor cases separately.

51. *Jenkins v. Kelly Constr. Co.*

C. Enforcement Agency Cases

*Washington Area Construction Industry Task Force v. Donovan*⁵²

The promise and optimism that attended the imposition of the Washington Plan was not warranted: the Washington Plan was never effectively enforced. In 1973, OFCCP conducted a review of the minority representation in the construction trades included in the Washington Plan. The results of that "compliance check," as OFCCP referred to it, revealed that: only one trade, the tile and terrazzo workers, had equaled or exceeded its goals. Even more disturbing, the enforcement activity of OFCCP was literally nonexistent. The Task Force, with the assistance of legal counsel, initiated discussions with the Department of Labor aimed at correcting this situation. Those discussions proved unsuccessful, and on January 18, 1977, the Task Force sued OFCCP and five other federal agencies for their failure to enforce the plan.

After a motion to dismiss for lack of standing was denied, settlement discussions were begun and the litigation was resolved by a consent order entered into on June 7, 1978. In that order, OFCCP agreed, among other things, (1) to develop, in consultation with the Task Force, effective construction compliance enforcement procedures; (2) to conduct a study of the staffing needs of the Washington office responsible for enforcement of construction compliance; (3) to revise the goals applicable to the Washington area; (4) to acquire a computerized management information system; and (5) to provide periodic reports to the Task Force and the court.

The Task force wrote a detailed letter on January 23, 1979, formally notifying OFCCP that progress under the order was significantly behind schedule. The Task Force suggested specific revisions to the Federal Contract Compliance Manual (Compliance Manual), targeting procedures for repeat violators, and a methodology for the staffing needs assessment required by the order. OFCCP neither adopted these recommendations nor answered the questions raised by that letter, despite an obligation under the order to respond, in writing, to the Task Force.

In April 1979, the court, on the unopposed motion of the Task Force, extended its jurisdiction over this action through March 1980,

because OFCCP had not yet performed the actions required by the order. A year later, and for the same reasons, as stipulated by the parties, the court again extended its jurisdiction, this time through March 1981. Throughout the period in which the order had been in effect, the Task Force had numerous contacts and communications with OFCCP. The Task Force made recommendations, formal and informal, on all aspects of the order and OFCCP's enforcement activities.

Nonetheless, none of the key elements of the order were in place by 1981. For over two years the Task Force had worked with OFCCP, the office within the Department of Labor responsible for enforcing Executive Order 11246 and implementing the consent order. Monitoring, enforcement, and reporting procedures used by OFCCP remained wholly inadequate for improving minority access to employment in the skilled trades in the construction industry. Procedures and policies suggested by the Task Force pursuant to paragraph 18 of the order had been ignored. Federal contractors' noncompliance with Executive Order 11246 and related regulations continued unabated. Most important, employment opportunities had not improved for minorities.

Therefore, in 1981, the Task Force petitioned the court not only to further extend its jurisdiction over this matter, but to modify the court order as well. The Task Force proposed specific modifications that were designed to insure effective enforcement of Executive Order 11246 and the regulations pursuant thereto. It also proposed more effective means of monitoring the Department of Labor's Office of Federal Contract Compliance Programs. This motion was responded to by the Reagan Department of Labor. Amazingly, it argued that it had fully complied with the consent order. The court supervised a year-long attempt at settlement which resulted in several issues being resolved. A Compliance Manual satisfactory to the Task Force was issued and targeting criteria satisfactory to the Task Force were adopted. However, other issues in contention would have required the court to order the Department of Labor to allocate what the court and the Department of Labor considered to be substantial sums of money. The court declined to do so and terminated the consent order in 1982.

52. *Washington Area Constr. Ind. Task Force v. Donovan*.

*Washington Area Construction Industry Task Force, Inc. v. Office of Human Rights, D.C.*⁵³

On July 24, 1977, the Task Force filed a suit against the District of Columbia Office of Human Rights (OHR), its director, and five other District of Columbia agencies for not enforcing Commission's Order 73-51 and chapter 2621 of the Commissioner's Administrative Instructions.⁵⁴ Commission Order 73-51⁵⁵ requires that all District government and government-assisted contracts include clauses under which the contractor commits itself not to discriminate in employment on the basis of race, religion, color, sex, or national origin, and further commits itself to ensure equal employment opportunities for minorities and women. More specifically, chapter 2621 of the Commissioner's Administrative Instructions requires that contractors on District government-related construction contracts in excess of \$100,000 make good faith efforts to attain certain specified target ranges of minority manpower utilization in eleven specified trades.

The complaint charged that the defendants had failed to monitor contractors⁵⁶ to determine whether they were in compliance with Order 73-51, the Commissioner's Administrative Instructions Section 2621.4, the equal employment opportunity clauses, or Affirmative Action Plan commitments of their contracts. Furthermore, it was alleged that the defendants had not collected the data or instituted mechanisms or procedures necessary for such monitoring. No measures had been taken against noncomplying contractors.

The Task Force sought a declaration that the defendants had acted unlawfully and had unlawfully failed to act as set forth in the Commissioner's Order 73-51, and the Commissioner's Administrative Instructions, chapter 2621; an injunction against further unlawful actions by the defendants; a mandatory injunction directing the defendants to perform all acts which they have unlawfully failed to perform; and, finally, an award of costs of the action and further relief as the court deemed appropriate.

53. *Washington Area Constr. Ind. Task Force, Inc. v. Office of Human Rights*, —.

54. The five agencies were the Dept. of General Services, the Dept. of Environmental Services, the Dept. of Housing and Comm. Develop., the Dept. of Human Resources and the Dept. of Transportation.

55. Comm.

56. Only those contractors whose estimated costs exceeded \$100,000 were covered.

On June 16, 1978, Judge Greene denied a motion by defendants that the suit be dismissed on standing grounds. He held that the Task Force was concretely involved in attempting to develop equal employment opportunities for minority members of their communities in accordance with the policy objectives of Commissioner's Order 73-51, and had alleged, with the "essential dimension of specificity," injuries as a result of the defendant's alleged failure to enforce the order.

After some discovery and a considerable amount of settlement discussions, the parties have tentatively agreed on a settlement agreement resolving this matter. The tentative agreement contains obligations on the part of the District and its agencies as well as elements which are designed to allow the Task Force to effectively monitor the performance of the District in meeting those obligations.

The tentative agreement sets at 42% the minimal minority utilization rate goal in the eighteen covered construction trades. The Office of Human Rights is obligated to have a minimal staff devoted to this program of monitoring the compliance of the covered contractors, including a computer capability. The Office of Human Rights agreed to adopt the present OFCCP Compliance Manual applicable to the construction industry and to put in place a systematic program for on site compliance reviews. Criteria for selecting contractors for compliance reviews are also set forth in the agreement.

In addition, OHR and the District are obligated to periodically report on their activities under the consent order so that their performance can be monitored and evaluated. The Task Force may go back to the court if the agreement is violated.

Assessment of the Enforcement Agency Litigation

The point of this litigation was to require the enforcement agencies to put in place adequate procedures and staffs to allow for effective enforcement of Executive Order 11246 or its District of Columbia analog. The difficulty with this litigation was that even assuming that such procedures and staffs were in place, effective enforcement also requires the good will of the enforcing agency. The enforcing agency will always retain significant discretion, and if the agency does not want to effectively enforce the Executive Order, the procedures put in place will not matter.

Under the Carter administration, it was assumed that there was good will on the part of the administrators in the Department of Labor. True, there was considerable resistance to the litigation, but that was largely bureaucratic in nature. On the need for effective enforcement there was agreement. Nevertheless, the record of the Carter administration was dismal. The consent order in the federal case was never fully implemented.

Under the Reagan administration, the problem of good will has become critical. In fact, the litigation achieved many of the more important procedural elements that were sought: the Construction Compliance Manual that was adopted is certainly adequate and the targeting criteria for compliance reviews were drafted in consultation with the Task Force. These elements, unfortunately, have nothing, or very little, to do with whether there will be aggressive and effective enforcement of the Executive Order. Good will cannot be achieved by means of a lawsuit.

There is no doubt that an aggressive OFCCP would be a powerful weapon in this battle. The most that litigation may be able to achieve, however, is that the tools are provided for an administration that is willing to use them.

The District case should prevent this possibility. The District government is certainly more sympathetic than the federal government to the issue. The five years of litigation in the *Donovan* case have resulted in some good enforcement procedures that have been incorporated into the District settlement. In the next few years, we should be able to see how effectively the District government uses these tools to enforce this program.

One thing that did become clear in the course of the *Donovan* litigation was the importance of having an active plaintiff. Once agreement was reached on a consent order, the real task was the monitoring of the performance of the Department of Labor under that order. This required constant review of reports, independent investigations, and seemingly endless meetings with OFCCP personnel. Monitoring of that order should have been a full time responsibility.

This was not a capability that the Task Force was able to fulfill. It had no staff and extremely limited resources. Lawyers are also ill-

prepared to perform such monitoring because they usually rely on the self interest of a client to supply the monitoring that is necessary.

Monitoring was not a new issue. In 1970, the Task Force had drafted a proposal for a funded monitoring program. No funds were located then. The need remains, and an effort should be made to insure effective monitoring if the District settlement occurs.

V. EVALUATION OF THE LAWYERS' COMMITTEE'S EFFORTS

A. *Assessment of the Tactics*

When the Lawyers' Committee first became involved in the problems of discrimination in the construction industry, there was a high level of civil rights activity and community concern directly focused on these problems. The initial assistance that the Lawyers' Committee offered to this effort was legal assistance to those community efforts that resulted in the Washington Plan. The combination of "legal" and "non legal" efforts proved to be very effective. This type of approach, integrating various efforts, is clearly the most effective.⁵⁷

The community activism, however, has unfortunately subsided. Coincidentally, the litigation strategy of the Lawyers' Committee was put into place at about that same time. Much of the litigation, therefore, occurred without the community pressure which could have been so effective in influencing the outcome. This is especially apparent where the outcome of a settled case requires monitoring. An active and involved community allows for effective monitoring. This capability was absent, for the most part, during the litigation. It would be anticipated, therefore, that the effectiveness of this overall effort is probably somewhat uneven. Litigation and community activism were never forged into one weapon, but operated separately at different periods.

The sense of many of the persons who were involved in this effort is that more progress occurred in the early period than in the later period. The reports which the Task Force periodically received from the Department of Labor seemed to support that theory. Initial progress was followed by slight erosions in the reported figures.

57. See, e.g., MARSHALL, *supra* note 2, at 59-60.

That is consistent with the ineffective enforcement by OFCCP. At the same time, however, the results of some of the most successful suits, the *Sheetmetal* case for example, will not be seen for several years to come.

In sum, the tactics used were effective, but that effectiveness could have been enhanced through better coordination and greater community involvement throughout the period.

B. *Assessment of the Overall Result of the Lawyers' Committee's Effort*

It is not easy to assess the results of this over-all effort to address the exclusion of and discrimination against black workers in the skilled construction trades. A number of factors contribute to this difficulty. First, it is not enough to merely analyze the litigation, for the goal of the entire effort was to affect the participation of black workers in these trades. Therefore, the analysis must look beyond the litigation and determine the change in the participation of black workers in these trades. Second, the analysis is complicated by the fact that there are numerous potential causes for any discernible improvement in the participation of black workers. In addition to the Lawyers' Committee's efforts, other factors included the general civil rights movement, the efforts of various governmental entities (e.g., the EEOC), the change in the local government administration, and a general enlightened sensitivity to discrimination, among other factors. The problem of attributing or distributing causation is a serious matter.

In evaluating the Lawyers' Committee's efforts, we have compared the participation of black workers in selected trades (some that were the subject of the litigation and some that were not) in 1970 with the participation in 1980. This will allow some judgment as to whether there has been any improvement. We have relied on sample data from the Census Bureau. It only gives the number of workers that are identified in a particular category—for our purposes, the construction trades. It does not indicate the actual participation of black trade workers in construction work or the share of income that goes to black workers because we did not have access to such data.⁵⁸

58. We contacted each of the relevant unions in the Washington area and asked if they

In addition, and so that we can attempt to evaluate the efforts here, we have performed the same analysis of five other metropolitan areas: Philadelphia, Boston, Atlanta, Seattle, and Cleveland. If there are different degrees of improvement in these cities, some conclusions may be drawn about specific efforts that were made in Washington.

The results of these analyses are contained in Appendices A & B. A chart presents the numbers of workers in selected construction crafts for each metropolitan area. Under each of the listed crafts is the percentage of black workers (in parenthesis) in 1970 (Appendix A) and 1980 (Appendix B). Appendix C presents an analysis of the change in the participation of black workers in these construction trades from 1970 to 1980. It shows the percentage of black workers in the trades in 1970 and 1980, the difference between the two, and the percentage change in the percentage participation of black workers.

A review of this data is revealing and appears to demonstrate that significant progress has occurred in Washington, in comparison to the other metropolitan areas examined. Of the eight crafts analyzed, there was improvement in seven. The only craft in which there was no improvement (a -14.1% in concrete and terrazzo finishers) revealed an over-representation of black workers in both 1970 (77.2%) and 1980 (66.3%). The improvement in other crafts is striking: 155% in sheetmetal workers; 139% in electrical workers; 59.1% in machinists; 41.1% in structural sheetmetal workers.

The improvement in the other selected crafts is more modest though still significant: 17.2% in bricklayers; 14.2% in carpenters; 40.3% in plumbers. These last trades are associated with residential as well as commercial construction. This type of construction is usually on a much smaller scale, often uses nonunion workers, and is very difficult to redress through litigation or even to monitor. It would be anticipated that a lower level of progress would have occurred in these crafts.

Washington compared very well with the other cities. Appendix B indicates that in every other metropolitan area, there were at least

would supply us with the racial composition of their union and the percentage of the work that goes to the various races. No union supplied us with such information. Most stated that they did not have such information.

two crafts in which the percentage change was negative. In Philadelphia, the performance was worse in every craft except for structural sheetmetal workers and the differences are significant. Boston is difficult to evaluate. The amount of change is roughly comparable. However, any change must be evaluated in light of the fact that Boston began in 1970 with much smaller absolute numbers than Washington, and therefore, the progress is misleading. Seattle also had a problem of small absolute numbers in 1970, but yet appears to suffer in comparison with Washington. Cleveland was worse than Washington in six of the eight trades.

Atlanta was an exception. The results in percentage terms were dramatic: increases of 716.7% in electricians; 453.8% in sheetmetal workers; 229.6% in structural sheetmetal workers. Each of these crafts was in commercial work. In those crafts that performed residential work, Atlanta did poorly: -11% in bricklayers; -12.5% in carpenters; 9.8% in plumbers; -2.9% in concrete and terrazzo finishers. The explanation for this difference is undoubtedly also due to the fact that it is much harder to affect those trades. Atlanta's success is due in large part to the concerted effort made by Mayor Maynard Jackson to see that construction contractors included black partners and black workers in their efforts. This is the equivalent of an aggressive enforcement effort, and attests to the potential results which could have resulted in Washington if OFCCP had, in fact, aggressively enforced the Executive Order. Atlanta also began with relatively small numbers and percentages of black workers in these trades. Consequently, the improvement, significant and dramatic as it is, must not be overstated.

The improvement in Washington is significant and, with the exception of Atlanta, probably unique among the metropolitan areas examined. It may well be that a large part of the credit should go to the efforts of the Lawyers' Committee, for this is the only city in which it has undertaken such a coordinated effort. Furthermore, Atlanta's success suggests that there might have been a much more significant improvement in Washington had OFCCP and the District effectively enforced the applicable Order. However, the improvements must be placed in perspective. None of the crafts covered in the Washington Plan have achieved the goals that were set in the Plan for 1974. The goal for plumbers was 25%-30%; the 1980 per-

centage was only 18.8%. The goal for electricians was 28%-34%; the 1980 percentage was only 21.8%. The 1980 goal for sheetmetal workers was 25%-31%; the 1980 percentage was only 17.6%.

While the relative progress for Washington is significant, the actual progress must be considered unsatisfactory. Much has been achieved, but not nearly enough.

VI. SUGGESTIONS FOR THE FUTURE

Important results have been achieved from this effort by the Lawyers' Committee. On the basis of the experience that has been gained through these efforts, however, it is clear that much more could be achieved. The litigation should not occur in isolation, but in the context of active community support. Civil rights and community groups should be reinolved in this effort so that their resources, expertise, and influence can be brought to bear on the problem.

Intimately related to this is the need to monitor the construction industry. Monitoring is especially crucial when a case has been successfully concluded, either by settlement or decision, to ensure compliance. In several of the cases, this monitoring element was built into the settlement. Even where this is the case, however, it is vital that the Lawyers' Committee be in a position to monitor these cases, as well as the enforcement agency cases, by means of its own resources. An institutional monitoring capability is therefore imperative.

This monitoring capability should prove to be a necessity with regard to the tentative settlement of the suit against the District for its defective enforcement. Such monitoring can quickly escalate into a full time function. The Lawyers' Committee should develop such a capability.

With respect to litigation, it is suggested that aggressive litigation against construction unions, with contractors added as defendants, be continued. As mentioned above, monitoring of these efforts will also be crucial. Individual actions against contractors would appear to be of less value because of the more modest potential impact.

Finally, the limited scope of the effort to assist black construction workers would seem to be unjustified. There are now significant

numbers of other minorities in the construction trades in Washington (see Appendix A). They may all be victims of discrimination and should be included within the mandate of this project.

The limited success which has been achieved should serve to encourage future efforts. What has been attempted has resulted in significant achievements. What has been learned should result in even greater success in the future.

fifty housing discrimination cases in federal courts and administrative agencies in Virginia, Maryland and the District of Columbia, most of which involve claims against major developers, landlords or real estate firms. Of the forty-five cases which have reached a conclusion, forty-two or 93% have been won at trial or resolved by settlements favorable to the plaintiffs. These cases have resulted in the payment of more than \$430,000 to victims of housing discrimination and their attorneys, as well as comprehensive injunctive relief involving hundreds of properties and the adoption of fair housing compliance programs by dozens of companies. This success reflects the potential for making further significant progress toward the eradication of racial barriers in the local housing market.

Advertising Cases: The Beginning

The very first fair housing cases brought by the Committee challenged the exclusive use of white models by local developers and homebuilders in their real estate display advertising and the failure of these companies to use the equal housing opportunity logotype in accordance with the HUD guidelines. These complaints, which were filed with HUD, did not request damages but did seek compliance with the advertising guidelines, which required in addition to the logo, that the race of people depicted in display ads reflect the racial makeup of the metropolitan area where the ads appear. The lead complainant in each of these cases was the Housing Opportunities Council of Metropolitan Washington,¹ which under the direction of James Harvey had examined the advertising and promotional materials used by the respondent companies. Referring to the failure of many local firms and homebuilders to depict models of blacks and other minorities in their advertising, Harvey remarked at the time: "In observing use of models in real estate ads, one would never know that 26% of the metropolitan population is black. Minorities are being ignored."²

The purpose of these cases was not merely to achieve compliance with the guidelines but also to reduce the segregation in the developments that were being advertised, many of which were al-

1. The Housing Opportunities Council later merged with the Metropolitan Washington Planning & Housing Association.

2. Washington Star-News, Aug. 24, 1974, at 12.

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THE MEANING AND SIGNIFICANCE OF THE CROSON CASE

John Payton*

OVERVIEW

*City of Richmond v. J.A. Croson Co.*¹ is the sixth case in which the Supreme Court has addressed the constitutionality of "the use of race-based measures to ameliorate the effects of past discrimination on the opportunities enjoyed by members of minority groups in our society."² In each of these six cases, beginning with the 1978 decision in *University of California Regents v. Bakke*,³ the Court has held that the use of such measures is not *per se* unconstitutional.⁴ However, in *Croson*, the Court established more stringent ground rules delineating their permissible scope.

To begin with, the Court distinguished federally promulgated racial classifications from those enacted by state and local governments, admonishing that Congress has broad and unequalled power to remedy

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¹ 109 S. Ct. 706 (1989).

² *Id.* at 712.

³ 438 U.S. 265 (1978). *Bakke* held unlawful a university admissions policy that reserved a certain percentage of places for minority applicants. Nevertheless, five Justices in *Bakke* agreed that, as a general proposition, it was not unconstitutional for a public university to give some consideration to the race of applicants. (The other four Justices decided the case on statutory grounds, ruling that the admissions policy violated Title VI of the 1964 Civil Rights Act; they did not reach the constitutional issue.) In short, the majority of the *Bakke* Court validated the concept of using race-based measures, recognizing that, at times, "in order to get beyond racism, we must first take account of race." *Id.* at 407 (Blackmun, J., concurring). In the decade-plus after *Bakke*, the Court addressed the constitutionality of "benign" race-conscious measures in a number of different contexts. In each case, the Court upheld the concept, even where it invalidated a particular measure.

⁴ Only Justice Scalia advocated a complete prohibition on the use of racial classifications, where the government is employing them to remedy discrimination other than discrimination that the government itself perpetrated.

the lingering effects of prior racial discrimination. By contrast, the Court ruled, racial classifications established by state and local governments must be predicated on specific findings of past discrimination and narrowly confined to fit their objectives.

Applying this stricter standard, the Court, by a 6-3 vote, held as unconstitutional a Richmond, Virginia ordinance that set aside 30% of the dollar value of public contracts for minority business enterprises ("MBE's"). In striking down the Richmond ordinance, the Court called into question the constitutionality of hundreds of other similar state and local MBE programs. Perhaps more fundamentally, the *Croson* standard will be applicable not just to MBE programs, but also to the use by state and local governments of remedial racial classifications of any kind—from preferential treatment for minorities in public university admissions policies to hiring and promotion goals for minorities in municipal fire departments. It remains to be seen, however, what affect *Croson* will have on state and local gender-based classifications designed to remedy the effects of past discrimination against women.

Although *Croson* only involved the constitutionality of legislative racial classifications, its principles are likely to be applied to court-ordered remedial racial classifications as well. *Croson* will perhaps even apply to private employers' use of racial preferences, which would affect the Title VII limits on race-based employment decisions.

I. THE RICHMOND PLAN

The Richmond City Council enacted the Minority Business Utilization Plan ("the Plan") at issue in *Croson* on April 11, 1983. Designed to last five years, the Plan required prime contractors to whom the City awarded construction contracts, to subcontract to one or more MBE's at least 30% of the dollar amount of the prime contract. The Plan defined "MBE" as a business of which at least 51% was owned and controlled by minority group members.⁸ "Minority group members" were defined as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos or Aleuts."⁹ The Plan included a waiver provision lifting the set-aside requirement where, after making every feasible attempt to comply, the prime con-

⁸ *Croson*, 109 S. Ct. at 713.

⁹ *Id.*

tractor demonstrated that it was unable to meet the 30% figure because sufficient, qualified MBE's were either unavailable or unwilling to participate in the contract.⁷

Before enacting the Plan, the City Council reviewed a study that indicated that although the population of Richmond was 50% black, only .067% of the City's prime construction contracts had been awarded to minority businesses during the period from 1978 to 1983. The City Council also heard evidence that the major construction trade associations in Richmond, to which many of the City's prime contractors belonged, had virtually no minority members.

In addition, one councilperson, a former mayor of Richmond, testified "without equivocation" that the local construction industry "is one in which race discrimination and exclusion on the basis of race is widespread."¹⁰ Finally, the City Council relied on the findings of nationwide discrimination in the construction industry on which Congress had predicated a similar MBE program in the Public Works Employment Act of 1977,¹¹ a program that the Supreme Court upheld in *Fullilove v. Klutznick*.¹²

The J.A. Croson Company ("Croson") is a non-MBE firm that bid on a city construction project. Croson sought a waiver of the subcontracting requirement, alleging that no MBE's were available. The City denied Croson's waiver application and rebid the project. Croson then sued the City, claiming that the MBE plan violated the Equal Protection Clause of the United States Constitution.¹³

II. THE POWERS OF THE CONGRESS VERSUS THE STATE AND THEIR POLITICAL SUBDIVISIONS

In deciding the constitutionality of the Richmond MBE ordinance, the Court first had to address *Fullilove*, which the City claimed was "controlling" precedent.¹⁴ Because the Richmond Plan was modeled on the set-aside upheld in *Fullilove*, and since the Plan hinged, in part, on the findings that Congress had made in passing the federal set-aside,

⁷ *Id.*

⁸ *Id.* at 714.

⁹ *Id.* at 716.

¹⁰ 448 U.S. 448 (1980).

¹¹ The Supreme Court treated Croson's law suit as a facial challenge to the Richmond ordinance, not as an "as applied" challenge to the City's denial of a waiver.

¹² *Croson*, 109 S. Ct. at 717.

the Court was in somewhat of a quandary.

It could have held that *Fullilove* was wrongly decided and struck down the Richmond ordinance. Instead, in ruling that the Richmond Plan was unconstitutional, the principal *Croson* opinion, written by Justice O'Connor, distinguished *Fullilove*.¹³

Justice O'Connor's opinion suggested that federal racial classifications designed to remedy past discrimination, such as the MBE program at issue in *Fullilove*, should not be subject to strict scrutiny, the Court's most rigorous level of constitutional review. Indeed, Justice O'Connor noted that the Court in *Fullilove* "did not employ 'strict scrutiny' or any other traditional standard of equal protection review."¹⁴ Rather, the Court in *Fullilove* reviewed the federal MBE plan cognizant of the "unique remedial powers of Congress under section 5 of the Fourteenth Amendment."¹⁵

Here, Justice O'Connor relied primarily on Chief Justice Burger's statement in *Fullilove* that there was "no organ of government, state or federal [with more] remedial power than in the Congress. . . ."¹⁶ In contrast, Justice O'Connor said, state and local governments have "no specific constitutional mandate [like section 5] to enforce the dictates of the Fourteenth Amendment."¹⁷ Rather, they are subject to the "explicit constraints" of section 1 of the Fourteenth Amendment. Thus, state and local governments' racial classifications, designed to remedy

¹³ Although only two other Justices (Chief Justice Rehnquist and Justice White) joined the part of Justice O'Connor's opinion that preserved and distinguished *Fullilove*, it is apparent that the three dissenting Justices (Marshall, Brennan and Blackmun) would also agree with Justice O'Connor; see *id.* at 755 (Marshall, J., dissenting).

The three concurring Justices in *Croson* each went their own way on the question of *Fullilove*'s precedential value. Justice Kennedy disputed Justice O'Connor's distinctions, remarking that "the process by which a law that is an equal protection violation when enacted by a state becomes transformed to an equal protection guarantee when enacted by Congress poses a difficult proposition for me." *Id.* at 734 (Kennedy, J., concurring). Justice Scalia said that he saw no need to extend *Fullilove* to state and local set-asides in public contracting. *Id.* at 736 (Scalia, J., concurring). Justice Stevens, who dissented in *Fullilove*, did not address Justice O'Connor's points directly. He did, however, quote at length from his *Fullilove* dissent, which took issue with the deference paid by the *Fullilove* majority to congressional findings of discrimination. *Id.* at 733-34 (quoting *Fullilove*, 448 U.S. at 522-54).

¹⁴ *Id.* at 717.

¹⁵ *Id.* at 718. The decision in *Fullilove* also was rooted in Congress' spending power and the Commerce Clause.

¹⁶ *Id.* (citing *Fullilove*, 448 U.S. at 483 (plurality opinion)).

¹⁷ *Id.* at 719.

past discrimination, must be given more stringent review.¹⁸

A. The Requisite Factual Predicate for Federal Racial Classifications Designed to Remedy Past Discrimination

The distinctions that Justice O'Connor drew between federal and state power led her to conclude that, in building a factual predicate for the use of remedial racial classifications, Congress does not have to make findings of discrimination with the same degree of specificity as the states and their subdivisions.¹⁹ In fact, Justice O'Connor said that "Congress may identify and redress the effects of society-wide discrimination. . . ."²⁰

Yet, Judge Silberman of the D.C. Circuit recently observed that in *Croson* Justice O'Connor did not "clearly explain whether there are any evidentiary requirements imposed . . . on Congress before it can authorize a remedy for societal discrimination, nor did she define exactly what is meant by 'societal discrimination.'"²¹ According to Judge Silberman, Justice O'Connor probably did not "mean that Congress [can] act without some quantum of particularized evidence of the effects of societal discrimination in [a particular] industry."²² If this is a correct reading of *Croson*, then federal racial classification designed to remedy past discrimination probably can be predicated on something less than identified discrimination, but should rest on something more than mere historical discrimination against minorities.²³

¹⁸ *Id.*

¹⁹ *Id.* ("[Richmond] is not just like the federal government with regard to the findings it must make to justify race-conscious remedial action.") (quoting *Associated Gen. Contractors v. City and County of San Francisco*, 813 F.2d 922, 929 (9th Cir. 1987)).

²⁰ *Id.*

²¹ *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, 915 (D.C. Cir. 1989).

²² *Id.* See also *Milwaukee County Pavers Ass'n v. Fielder*, 710 F. Supp. 1532, 1541 (W.D. Wis. 1989) (*Croson* and *Fullilove* "should be read to require some congressional findings of discrimination").

²³ Applying this analysis in *Shurberg*, Judge Silberman invalidated a federal racial preference for minority broadcasters that he said rested on "meager evidence." Judge Silberman contrasted this evidence with the "abundant evidence" on which the remedial racial classification at issue in *Fullilove* was allegedly predicated. *Shurberg*, 876 F.2d at 915. Justice O'Connor's *Croson* opinion described that "abundant evidence" as a "nationwide history of past discrimination [that] had reduced minority participation in federal construction grants." *Croson*, 109 S. Ct. at 718. However, in commenting on that evidence, Professor Tribe pointed out that Congress adopted the federal MBE set-aside "without any congressional hearings or investigations whatsoever." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 345 (2d. ed. 1988). See also *Days, Fullilove*, 96 YALE

B. Congress' Choice of Means to the Ends

In *Croson*, Justice O'Connor said "the breadth of discretion in the choice of remedies may vary with the nature and authority of the governmental body."²⁴ Thus, although a federal remedial racial classification "call[s] for close examination, the Court was . . . 'bound to approach [its] task with appropriate deference to Congress. . . .'"²⁵ Indeed, in examining the means to the ends of the federal MBE set-aside, Chief Justice Burger's *Fullilove* opinion did not formally apply the Court's usual test that analyzes whether a classification is "narrowly tailored" to achieve its objectives.

In his *Fullilove* concurrence, however, Justice Powell adopted strict scrutiny, and analyzed the federal set-aside against a series of factors that comprise the "narrowly tailored" test.²⁶ But in so doing, Justice Powell paid great deference to Congress' choice of remedy, saying that it should be upheld if the "means selected are equitable and reasonably necessary."²⁷ According to Justice Powell, this "test allowed the Congress to exercise necessary discretion."²⁸

Putting *Croson* together with the *Fullilove* opinions of Chief Justice Burger and Justice Powell, one federal court recently said that the "required fit between ends and means" for federal remedial racial classifications "is not as demanding as that" for state and local programs.²⁹ One must bear in mind, however, that in *Fullilove*, both Chief Justice Burger and Justice Powell observed that Congress has considered and rejected race-neutral alternatives before enacting the MBE set-aside.³⁰ The Court in *Croson* gave this aspect of *Fullilove* much emphasis in

L.J. 453, 465 (1987).

In short, there were no explicit congressional findings of past discrimination underlying the set-aside at issue in *Fullilove*. See *Fullilove*, 448 U.S. at 478 (plurality opinion). Rather, Congress relied primarily on earlier studies and reports prepared in conjunction with other legislation, that supported the conclusion that "private and governmental discrimination had contributed to the negligible percentage of public contracts awarded minority contractors." See *id.* at 502-03 (Powell, J., concurring).

²⁴ *Croson*, 109 S. Ct. at 719 (quoting *Fullilove*, 448 U.S. at 515-16 n.14) (Powell, J., concurring).

²⁵ *Id.* at 717 (quoting *Fullilove*, 448 U.S. at 472 (plurality opinion)).

²⁶ *Fullilove*, 448 U.S. at 510-11 (Powell, J., concurring). These factors are set out in Section III(B)(2) below.

²⁷ *Id.* at 510 (Powell, J., concurring).

²⁸ *Id.*

²⁹ *Milwaukee County Pavers*, 710 F. Supp. at 1549 n.9.

³⁰ *Fullilove*, 448 U.S. at 463-67 (plurality opinion); *id.* at 511 (Powell, J., concurring).

distinguishing the Richmond set-aside, because the Richmond City Council had not examined race-neutral approaches.³¹ Picking up on this distinction, Judge Silberman's opinion in *Shurberg* held that a federal preference for minority broadcasters was not narrowly tailored because "unlike the plan in *Fullilove* . . . Congress and the FCC chose . . . a [race-conscious] classification without consideration . . . of race-neutral means. . . ."³²

C. Congressional Authorization of State and Local Remedial Racial Classifications

In *Croson*, Justice O'Connor also intimated that Congress could empower, or perhaps even require, states and municipalities to institute remedial racial classifications that they could not enact on their own account.³³ This is particularly important because there are currently a number of programs in which federal assistance to local governments is conditioned on the establishment of racial preferences.³⁴

Subsequent to *Croson*, one lower court held that a state did not have to make its own independent findings of localized discrimination when it was merely implementing federal legislation, the Surface Transportation and Uniform Relocation Assistance Act of 1987, which required states to give 10% of federal highway grants to "disadvantaged business enterprises." [MBE's are presumptively regarded as "disadvantaged" under the Act.] Instead, the state could rely on the congressional findings of discrimination underlying the federal legislation.³⁵

Significantly, however, the Supreme Court recently vacated the decision in *H.K. Porter v. Dade County* and remanded for further consideration in light of the *Croson* decision.³⁶ In *H.K. Porter*, the Eleventh Circuit held that Dade County was not obligated to make findings

³¹ *Croson*, 109 S. Ct. at 728.

³² *Shurberg*, 876 F.2d at 917.

³³ *Croson*, 109 S. Ct. at 720 (citing *Bohrer*, *Bakke*, *Weber* and *Fullilove*: *Benign Discrimination and Congressional Power to Enforce the Fourteenth Amendment*, 56 IND. L.J. 512-13 (1981)).

³⁴ In fact, the legislation at issue in *Fullilove* — the Public Works Employment Act of 1977 — was an example of such a program. However, the plaintiff in *Fullilove* did not challenge the authority of states and localities to implement the federal set-aside requirement. Rather, the challenge was to Congress' authority to adopt the program in the first instance.

³⁵ See *Milwaukee County Pavers*, 710 F. Supp. at 1546.

³⁶ 109 S. Ct. 1333 (1989).

of discrimination in order to participate in, and implement the department of transportations' regulations under the Surface Transportation Assistance Act of 1978. Those regulations, like the 1987 Act, required recipients of federal financial assistance for the construction of highways and mass transportation systems to submit appropriate race-based measures to remedy the effects of discrimination against minority contractors.³⁷ This suggests that Congress has more leeway when it acts on the basis of race than does a federal agency like the Department of Transportation.

III. THE *CROSON* RULES FOR STATE AND LOCAL REMEDIAL RACIAL CLASSIFICATIONS

A. The Adoption of Strict Scrutiny

1. Racial Classifications and Whites as a "Suspect" Class

Croson marked the first time that a majority of the Court ruled that "benign" classifications enacted by state and local governments that are designed to remedy discrimination against minorities are subject to strict scrutiny, the same rigorous standard of constitutional review given "invidious" racial classifications that discriminate against minorities and other suspect classes.³⁸ Traditionally, when the Court subjects a legislative classification to strict scrutiny, the oft-cited maxim, "strict in theory and fatal in fact," rings true.³⁹ In adopting strict scrutiny, however, the Court in *Croson* clearly did not go that far. Specifically, the principal opinion makes plain that if the *Croson* ground rules are satisfied, then the racial classification will be upheld.

The *Croson* dissenters called the Court's adoption of strict scrutiny an "unwelcome development."⁴⁰ They argued that benign racial classifications warrant a different, more relaxed standard of review "than the

³⁷ *H.K. Porter*, 825 F.2d 324, 332 (11th Cir. 1987).

³⁸ The vote on the question of appropriate standard of review was 5-4. Justice Stevens, who supplied the sixth vote invalidating the Richmond ordinance, reiterated his long-held view that there should be only one, uniform standard of constitutional review of any kind of legislative classification, racial or otherwise. *Croson*, 109 S. Ct. at 732 n.5. Therefore, Justice Stevens declined to "engag[e] in a debate over the proper standard of review to apply in affirmative action litigation." *Id.* at 732.

³⁹ See Gunther, *Supreme Court 1971 Term: Forward — In Search of Evolving Doctrine on a Changing Court: A Model for New Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

⁴⁰ *Croson*, 109 S. Ct. at 752 (Marshall, J., dissenting).

most brute and repugnant forms of state-sponsored racism. . . ."⁴¹ For support, the dissenters observed that strict scrutiny is generally reserved for legislative classifications that burden "suspect" groups, like blacks, who have been "saddled with such disabilities, or subjected to . . . a history of purposeful unequal treatment, or relegated to . . . a position of political powerlessness. . . ."⁴² According to the dissenters, any white contractors burdened by Richmond's MBE ordinance were undeserving of the protection that strict scrutiny affords, because there was no "indication that they have any of the disabilities that have characteristically afflicted those groups this Court has deemed suspect."⁴³

Responding to the dissenters, the *Croson* majority admonished that the level of review of racial classifications was not dependent on the "ability of different racial groups to defend their interests in the representative process."⁴⁴ In other words, strict scrutiny would be appropriate even where a predominantly white legislature imposed the burdens of a racial classification upon a predominantly white constituency, rather than on a racial minority group.⁴⁵

In any event, the majority said, were the standard of review of racial classifications to vary with the race of those burdened or benefited, strict scrutiny was appropriate in *Croson* because blacks constituted a majority of the Richmond City Council and roughly 50% of the City's population, and thus the burdens of the MBE ordinance fell on a white "minority."⁴⁶ At bottom, this alternative defense of the application of strict scrutiny in *Croson* indicates the Court is concerned that "absent searching judicial inquiry into their justification" race-based classifications may be a product of simple "racial politics."⁴⁷ It also suggests that in the future, the Court will look particularly close at racial classifications that benefit groups whose members comprise a political majority of the enacting legislature and local population.⁴⁸

⁴¹ *Id.*

⁴² *Id.* at 753 (quoting *San Antonio Indep. School District v. Rodriguez*, 411 U.S. 1, 28 (1973)).

⁴³ *Id.* (Marshall, J., dissenting).

⁴⁴ *Id.* at 722.

⁴⁵ *Id.* (citing *J. ELY, DEMOCRACY AND DISTRUST* 170 (1980)).

⁴⁶ *Id.*

⁴⁷ *Id.* at 721.

⁴⁸ Justice Scalia's concurrence is illustrative. As he put it, the Richmond City Council's "enactment of a set-aside clearly and directly beneficial to the dominant political group, which happened also to be the dominant racial group. . . has no doubt happened before in other cities. . . and

2. *Croson* and "Benign" Gender Classifications

The Richmond Plan at issue in *Croson* involved only racial classifications; it did not give preferences to women in public contracting. Thus, *Croson* did not treat the constitutionality of "benign" gender classifications. Indeed, none of the Court's affirmative action decisions to date has addressed that question.⁴⁹ Therefore, it is uncertain whether the rules delineating the permissible scope of racial classifications designed to benefit minorities established in *Croson* apply to gender classifications that benefit women.⁵⁰

B. The Meaning of Strict Scrutiny

Strict scrutiny requires racial classifications to be (1) supported by a compelling interest, and (2) narrowly tailored to ensure that the classification fits that interest.⁵¹ The "compelling interest" prong of the strict scrutiny test addresses whether the ends of a particular classification are permissible. If the ends are permissible, the "narrowly tailored" inquiry focuses on whether the means selected to achieve the ends are reasonable.

blacks have often been on the receiving end of the injustice." *Id.* at 737 (Scalia, J., concurring). In Justice Scalia's view, however, blacks cannot now reverse the tables and play their own brand of racial politics, because "[w]here injustice is the game . . . turn-about is not fair play." *Id.* See also *Hammon v. Barry*, 826 F.2d 73, 88 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 2023 (1988) (racial classification instituted by predominantly black legislature in predominantly black city is example of one ethnic group "claiming that which their predecessor group" which previously held power had "once enjoyed," and playing "old-fashioned American politics, which has always had a strong ethnic flavor").

⁴⁹ *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), was a Title VII challenge to a local government unit's use of gender classifications. The plaintiff could have also brought a constitutional claim, but chose not to do so. See *id.* at 620 n.2.

⁵⁰ Prior to *Croson*, at least two federal courts had bifurcated their constitutional analyses of affirmative action plans that gave preferences to both minorities and women. See *Michigan Road Builders Association v. Milliken*, 834 F.2d 583, 595 (6th Cir. 1987), *aff'd* 109 S. Ct. 1333 (1989); *Associated General Contractors v. City and County of San Francisco*, 813 F.2d 922 (1987). The court in *Associated General Contractors* said that since gender classifications are not as "equally suspect" as racial classifications, they should receive a lower standard of review. 813 F.2d at 928. Therefore, the court employed the "mid-level" review, or intermediate scrutiny, that the Supreme Court has traditionally applied to gender classifications that disadvantage women. Under intermediate scrutiny, gender classifications "must serve important government objectives and must be substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976).

⁵¹ *Croson*, 109 S. Ct. at 721.

1. Satisfying the Compelling Interest Prong

a. Remedying Identified Discrimination: The Prima Facie Evidence Standard

Under *Croson*, the compelling interest prong of the strict scrutiny test is satisfied if a racial classification is intended to remedy identified discrimination in a particular sector or industry.⁵² Mere societal discrimination against minorities is not a sufficient predicate for a racial classification because it "is too amorphous" and would justify "remedies that are ageless in their reach into the past, and timeless in their ability to affect the future."⁵³

To prove that a racial classification is based on identified, rather than societal discrimination, *Croson* apparently requires state and local governments to have prima facie evidence that the constitutional or statutory rights of minorities have been violated.⁵⁴ This evidentiary standard demands more specific evidence of discrimination than the "generally framed test[s]" previously endorsed by both the *Wygant* plurality and Justice O'Connor in her *Wygant* concurrence, in which proof of a "prima facie violation . . . would appear to have been but one means of building the requisite factual predicate for affirmative action."⁵⁵ However, the *Croson* Court did not specify a quantum of evidence that amounts to prima facie proof of identified discrimination. Still, it is possible to glean from *Croson* some attributes of a prima facie test.

As a preliminary matter, *Croson* leaves somewhat unclear how a state or local government will determine that it has satisfied the prima facie test. At one point Justice O'Connor said that "states and their subdivisions . . . must identify [past] discrimination with some speci-

⁵² *Id.* at 720. The Court rejected the lower court's holding that state and local government affirmative action plans must be limited to redressing the effects of that government unit's own identified discrimination. Thus, state and local governments can attempt to remedy the discrimination of private actors.

⁵³ *Id.* at 723 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion)).

⁵⁴ *Id.* at 724.

⁵⁵ *Id.* at 754 n.12 (Marshall, J., concurring). In *Wygant*, the plurality suggested that state and local governments could enact racial classifications when they had "sufficient evidence to justify the conclusion that there has been prior discrimination," 476 U.S. at 277 (plurality opinion), while Justice O'Connor said a public actor need only have a "firm basis for believing that remedial action was required." *Id.* at 286 (O'Connor, J., concurring).

ficity before they may use race-conscious relief."⁵⁶ Nevertheless, it does not appear that the Court intends, for example, that a city which in 1985 had before it all of the evidence necessary to make the findings—but did not do so because it concluded that such a predicate was not then required—should have to go through the entire legislative process again. Rather, the purpose behind the specificity requirement appears merely to be to ensure that there is an adequate basis that existed at the time of the enactment. It is unlikely, therefore, that if Richmond had produced adequate evidence of discrimination in the district court proceedings to justify its ordinance, the Court would have not considered that evidence because it was "out of time." The issue of "out of time" evidence, however, will certainly be litigated.⁵⁷

In any event, these findings of discrimination must be specific for each minority group included as beneficiaries of a remedial classification. Like many racial classifications designed to remedy past discrimination, the Richmond ordinance defined "minority" to include not just blacks and Hispanics, but also Orientals, Eskimos and Aleuts. In the Court's view, the ordinance was overly inclusive because Richmond had only purported to remedy identified discrimination against blacks, and not discrimination against any of the other groups that received contracting preferences.⁵⁸

In addition, the Court said that the "mere recitation" that a racial classification has a remedial purpose "is entitled to little or no weight" in evaluating whether it is premised on a factual predicate of identified discrimination.⁵⁹ By contrast, specific instances of discrimination compiled through testimony of minorities, and perhaps evidence of discrimination in reports of civil rights commissions, might pass the prima facie test.⁶⁰

⁵⁶ *Croson*, 109 S. Ct. at 727.

⁵⁷ A number of municipalities are currently attempting to modify their race-conscious programs to now comply with the *Croson* decision. Given such efforts, several leading constitutional scholars recently argued that lower courts should allow municipalities time to establish the necessary factual predicate if their MBE programs are challenged during the period that municipalities are reevaluating these programs in light of *Croson*. See *Constitutional Scholar's Statement on Affirmative Action After City of Richmond v. Croson*, 98 YALE L. J. 1711, 1719 (1989).

⁵⁸ *Croson*, 109 S. Ct. at 728. The Court also noted that "it may well be that Richmond has never had an Aleut or Eskimo citizen."

⁵⁹ *Id.* at 724.

⁶⁰ For example, in *Higgins v. City of Vallejo*, 823 F.2d 351 (9th Cir. 1987), a pre-*Croson* case, the City met the requisite factual predicate because it based a remedial racial classification

Perhaps most significantly, the Court made clear that statistical evidence may support an inference of identified discrimination in a particular sector or industry. However, the Court indicated that this would be true only when the statistics compare relevant figures. In *Croson*, comparisons between general population statistics for blacks in Richmond and the number of City contracts awarded to blacks were deemed not probative of identified discrimination against Richmond's black contractors, let alone against contractors from any of the other minority groups that stood to benefit from the ordinance.⁶¹ Similarly, the Court found the evidence that there were virtually no minority members in local construction trade associations to be irrelevant. Since contracting is a skilled job, the Court said, more probative statistical inquiries would have compared the number of qualified blacks in the relevant labor market with the city dollar value of the contracts they received, and also compared the number of black contractors qualified to join the local trade associations with the number of blacks in those associations.⁶² The Court said that gross statistical disparity between these sets of figures might be prima facie evidence of discrimination. Even then, however, the Court intimated that such proof might have to be supplemented with testimonial evidence of specific instances of discrimination against blacks.⁶³

Where discrimination has been especially widespread, statistical comparisons using the "right" figures (e.g., the number of minorities qualified to perform a certain job and their representation in that particular job category) will fail to reveal the actual effect of that discrimination. In this situation, state and local governments should be permitted to try and explain that the number of qualified minorities is artificially low precisely because of past discrimination. For instance, an economic analysis could show that racial discrimination has reduced or precluded minority participation in a particular job, and therefore

on findings of discrimination in a report prepared by the California Fair Employment Practices Commission. Shortly after *Croson*, the Supreme Court denied certiorari in the *City of Vallejo* case. See 109 S. Ct. 1310 (1989).

⁶¹ *Croson*, 109 S. Ct. at 725, 727-28. Richmond pointed out that in five years from 1978 to 1983, 0.67% of its contracts were awarded to blacks, even though blacks comprised half of the City's population, and argued that these figures created an inference of discrimination against blacks in the local construction industry. *Id.* at 714.

⁶² *Id.* at 725.

⁶³ *Id.* at 729.

skewed the statistical comparison. Similarly, studies could demonstrate that more minorities would have been qualified to do the job in 1989 "but for" discrimination that existed, and that may have even been legal under Jim Crow regimes, in 1959.⁶⁴

Finally, the outcome of the statistical inquiry necessarily hinges on the geographical scope of the relevant labor market. In *Croson*, however, the Court did not say whether the relevant labor market could include areas outside of the jurisdiction of the government unit seeking to employ a remedial racial classification.⁶⁵

b. Non-Remedial Justifications for Benign Racial Classifications

Societal and identified discrimination represent two competing predicates for remedial racial classifications. However, they have at least one thing in common. Both premises seek to remedy discrimination of some sort (either society's bad act or the misconduct of certain individuals), and thus justify the use of racial classifications as "precise penance for . . . specific sins of racism . . . committed in the past. . . ."⁶⁶ In short, the two predicates look backward. In his *Croson* concurrence, however, Justice Stevens repeated his view, which he first articulated in dissent in *Wygant*, that government units should, in certain circumstances, be allowed to look forward and adopt racial classifications for non-remedial purposes.⁶⁷

In *Wygant*, Justice Stevens suggested that a public school system might have a compelling interest in hiring teachers according to their race as a means of integrating the teaching staff in a school with many

⁶⁴ See *Scoggins v. Nashville, Ark. Bd. of Educ.*, 853 F.2d 1472, 1478-79 (8th Cir. 1988) (city could not rely on "present conditions" where percentage of blacks in relevant labor market is artificially low because of past discrimination). The extent to which a municipality could look back in time in assessing the effects of discrimination today was one of many issues that separated Judges Starr and Mikva in *Hammon*, *supra* n. 48. Judge Starr focused on current statistical evidence, while Judge Mikva analyzed the data in light of discriminatory practices long ago. *Hammon*, 826 F.2d at 77, 92-93.

⁶⁵ To be sure, the Court did criticize the Richmond plan on the grounds that it awarded preferences to MBE's "from anywhere in the country." *Croson*, 109 S. Ct. at 729. However, this aspect of the geographic scope of the Richmond ordinance related to whether it was narrowly tailored. The Court was not necessarily saying that Richmond would have been precluded from giving benefits to minorities who lived outside of the City if, in fact, the relevant labor market for public contracting was regional or national.

⁶⁶ Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, HARV. L. REV. 78, 80 (1986).

⁶⁷ *Croson*, 109 S. Ct. at 731 (Stevens, J., concurring).

minority students, even if there were no evidence of discrimination in the hiring of minority teachers.⁶⁸ By contrast, in *Croson* Justice Stevens said that even if the City of Richmond had proffered a non-remedial objective for its MBE plan, he would have rejected it because, in his view, there is no "arguable basis for suggesting that the race of a subcontractor or general contractor should have any relevance to his or her access to the market."⁶⁹

In addition to Justice Stevens, two other Justices have approved non-remedial justifications for racial classifications. In *Bakke*, Justice Powell said that a state university might have a compelling interest in classifying applicants according to race in order to create racial diversity among the student body.⁷⁰ Similarly, in her *Wygant* concurrence, Justice O'Connor also seemed to accept the diversity rationale for affirmative action in higher education.⁷¹ Yet Justice Stevens interpreted Justice O'Connor's *Croson* opinion as repudiating all non-remedial justification for racial classifications in any context including higher education.⁷² However, Justice Stevens' assessment of *Croson* may be inaccurate because Justice O'Connor's opinion did not directly address the question of the constitutionality of non-remedial racial classifications.

Two different panels of the D.C. Circuit have recently reached conflicting conclusions on whether non-remedial racial classifications survive *Croson*. The first panel read *Croson* as holding either that the only justification for racial classification is a remedial one or, at minimum, that non-remedial racial classifications should be limited to the educational setting.⁷³ A majority of the second panel, however, claimed that *Croson* had not necessarily undermined the use of non-remedial racial classifications.⁷⁴

⁶⁸ *Wygant*, 476 U.S. at 313-15 (Stevens, J., dissenting). Similarly, using Justice Stevens' rationale, public officials could hire police officers on the basis of their race in a city beset with racial tension, even if there were no evidence of discrimination in the hiring of minority police officers. Cf. *United States v. Paradise*, 480 U.S. 149, 167-68 n.18 (1987) (plurality opinion) ("generalized government interest in effective law enforcement" could justify race-conscious hiring intended to "restore community trust in the fairness of law enforcement. . .").

⁶⁹ *Croson*, 109 S. Ct. at 731 (Stevens, J., concurring).

⁷⁰ *Bakke*, 438 U.S. at 311-15 (1978) (opinion Powell, J.).

⁷¹ *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring).

⁷² *Croson*, 109 S. Ct. at 730 n.1 (Stevens, J., concurring).

⁷³ See *Shurberg Broadcasting*, 876 F.2d 902 (D.C. Cir. 1989).

⁷⁴ See *Winter Park Communications, Inc. v. F.C.C.*, 873 F.2d 347 (D.C. Cir. 1989), cert. granted in part sub nom.; *Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 715 (1990).

2. Narrow Tailoring

Even where state and local governments have a compelling interest in classifying individuals on the basis of race, a classification will still be unconstitutional if it is not narrowly tailored to achieve that interest. According to the Court, this requirement "ensures that the means selected closely 'fit' the ends."⁷⁶

Prior to *Croson*, in determining whether a racial classification designed to benefit minorities was narrowly tailored, the Court had considered several factors, including: (1) the necessity for the classification and the efficacy of alternative remedies; (2) the relationship of the numerical goals in the classification to the relevant labor market; (3) whether the classification contained a meaningful waiver provision; (4) the burden of the classification on non-minorities; and (5) the duration and flexibility of the classification.⁷⁶ In *Croson*, the Court addressed only three of these factors.

a. The Factors Considered in *Croson*

(1) Alternative Remedies

Prior to *Croson*, the efficacy of alternative remedies was generally viewed in conjunction with the other factors of the narrowly tailored test. Thus, a reviewing court was arguably free to pay less attention to the fact that race-neutral choices might have been available when, for example, a race-conscious classification satisfied the other "narrowly tailored" factors.⁷⁷

In *Croson*, however, the Court ruled that state and local governments must, at minimum, consider the efficacy of race-neutral alternatives before adopting a race-conscious classification.⁷⁸ This requirement seems to reflect a concern that "affirmative action plans have not benefitted during their formulation from the thorough deliberation that such plans require. Upon inspection, many plans appear to be the products of hasty decisions to 'do something.'"⁷⁹ In the Court's view, the

⁷⁶ *Croson*, 109 S. Ct. at 721.

⁷⁷ See *United States v. Paradise*, 480 U.S. at 171 (plurality opinion); *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 481 (1986) (plurality opinion); *Id.* at 486 (Powell, J., concurring in part and concurring in judgment); *Fullilove v. Klutznick*, 448 U.S. at 510-11 (Powell, J., concurring).

⁷⁸ Cf. *Fullilove*, 448 U.S. at 510 (Powell, J., concurring).

⁷⁹ *Croson*, 109 S. Ct. at 728.

⁸⁰ See *Days*, *Fullilove*, 96 YALE L.J. at 459.

Richmond ordinance was insufficiently tailored because there was no indication that the City Council had debated the efficacy of race-neutral alternatives, such as lowering the bonding requirements for, and giving financial assistance to, economically disadvantaged businesses, of which MBE's would generally be a subset.⁸⁰

Significantly, the Court did not say that race-neutral alternatives had to be tried and exhausted.⁸¹ The Court failed, however, to define what constitutes adequate consideration of alternatives. One option that may satisfy *Croson* is for a state or local government to hire experts to analyze thoroughly why race-neutral programs would be insufficient. As a fail-safe, however, legislators might actually prefer to adopt—at least temporarily—programs that give preferences to individuals on the basis of social and economic status, not race.⁸² If this race-neutral approach fails to meet its objectives, there may then be grounds for enacting a race-conscious classification.

(2) Relationship of Numerical Goal or Quota to Labor Market

The Court in *Croson* said that the 30% set-aside in the Richmond ordinance was unrelated to the number of qualified minorities in the relevant labor market. Rather, the 30% figure was tied to the minority population of Richmond, and thus "rest[ed] upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population."⁸³

It is unclear, however, whether the Court would allow a numerical goal to be higher than the number of qualified minorities in a relevant labor market if the latter is found to be artificially low due to past discrimination. For example, if only 1% of the eligible contractors for an MBE program are minorities, but this number would have been higher but for discrimination thirty years ago, or but for preclusive practices in contracting trades that created barriers for minorities, then

⁸⁰ *Croson*, 109 S. Ct. at 728, 738 (Scalia, J., concurring).

⁸¹ *Id.* at 734. For Justice Kennedy, however, racial classifications are "a last resort," (Kennedy, J., concurring), which implies that a government unit should exhaust, not just consider, race-neutral alternatives before using a race-conscious program.

⁸² A possible model is the Small Business Act, 15 U.S.C. § 637 (1984), which gives the Small Business Administration broad discretion to assist disadvantaged businesses in the area of government contracting.

⁸³ *Croson*, 109 S. Ct. at 728 (quoting *Sheet Metal Workers*, 478 U.S. at 494 (O'Connor, J., concurring in part and dissenting in part)).

conceivably, the goal could be set at more than 1%. How much more depends on what conclusions are drawn concerning projected levels of minority participation in a particular industry absent past discrimination.

(3) *Meaningful Waivers*

The Court in *Croson* dealt with the waiver provision in the Richmond ordinance only briefly. The Court criticized the provision because it "focuse[d] solely on the availability of MBE's; there [was] no inquiry into whether or not the particular MBE seeking a racial preference ha[d] suffered from the effects of past discrimination. . . ."⁸⁴

b. *Factors Not Considered in Croson*

Although the *Croson* Court addressed only three of the factors in the narrowly tailored calculus, racial classifications must also comport with the remaining two factors.

(1) *Impact on Third Parties*

Prior to *Croson*, the Court had recognized that remedial racial classifications necessarily call on "innocent persons" to bear some degree of burden.⁸⁵ That burden is too high, however, when a classification either divests whites of existing contracts and thus "unsettle[s] legitimate firmly rooted expectations,"⁸⁶ or visits the entire burden on particular whites, instead of whites as a whole.⁸⁷

Thus, for example, in *Wygant* the Court invalidated a racial classi-

⁸⁴ *Id.* at 729. At least one court has read the *Croson* discussion of waivers to mean that a racial classification is not narrowly tailored unless its waiver provision "target[s] the preference to those actually entitled to a remedy." *Shurberg Broadcasting*, 876 F.2d at 916. See also *id.* at 917 n.19, opinion of Judge Silberman ("[W]hen the government grants preferences to individuals on the basis of 'minority status,' determinations of that status . . . must depend on some notion of individual disadvantage, if not discrimination."); *Winter Park Communications*, 873 F.2d at 368, dissenting opinion of Judge Williams, (interpreting *Croson* to mean that racial classifications must contain waivers that ensure benefits are awarded "only to victims of prior discrimination"). Compare *Shurberg Broadcasting*, *supra*, dissenting opinion of Chief Judge Wald, at 946 (preference should not be "rendered invalid by the fact that participating minority broadcasters are not required to prove that they are individual victims of discrimination").

⁸⁵ See, e.g., *Wygant*, 476 U.S. at 281 (plurality opinion).

⁸⁶ *Johnson v. Trans. Agency*, 480 U.S. at 638.

⁸⁷ See, e.g., *Sheet Metal Workers*, 478 U.S. at 488 (Powell, J., concurring).

fication that caused the layoffs of some white teachers.⁸⁸ By contrast, the Court has upheld minority hiring and promotion goals because they neither throw whites out of their current positions nor impose burdens on distinct whites.⁸⁹ However, "it is too simplistic to conclude . . . that hiring [or other employment] goals withstand constitutional muster whereas layoffs do not . . . The proper constitutional inquiry focuses on the effect, if any, and the diffuseness of the burden imposed on non-minorities, not on the label applied to the particular employment at issue."⁹⁰ In fact, the lower court in *Croson* ruled that the Richmond MBE plan "unnecessarily tramm[e]d the rights" of white contractors—even though it did not directly cause layoffs—because "the competitive disadvantage" it imposed was too onerous,⁹¹ and one post-*Croson* decision found a federal racial preference in the granting of broadcast licenses to be excessively burdensome because it "deprived [the white plaintiff] of a unique opportunity to own a [television] station."⁹²

(2) *Flexibility*

The more flexible a remedial racial classification, the more likely it is to be considered narrowly tailored. One element of flexibility is the existence of a definitive end date for classification. This ensures that race-based decisions and their accompanying burdens are only temporary.⁹³ An "express assurance" that a racial classification is ephemeral "is particularly important if a program" involves a quota that "actually sets aside positions according to specific numbers."⁹⁴ The lack of the end date is less troubling, however, when a racial classification

⁸⁸ *Wygant*, 476 U.S. at 282-83 (plurality opinion); see also, *id.* at 294 (White, J., concurring) (plan unconstitutional because it "impose[d] the entire burden of achieving racial equality on particular individuals").

⁸⁹ See *Sheet Metal Workers*, 478 U.S. at 481 (plurality opinion) (hiring goals); *Paradise*, 480 U.S. at 182 (plurality opinion) (promotion goals).

⁹⁰ *Sheet Metal Workers*, 478 U.S. at 488 n.3 (Powell, J., concurring). See also *Wygant*, 476 U.S. at 319 ("distinction" between layoffs and hiring goals "is artificial") (Stevens, J., dissenting).

⁹¹ See *J.A. Croson Co. v. City of Richmond*, 822 F.2d 1355, 1361 (4th Cir. 1987); see also *Associated General Contractors*, 813 F.2d at 922, 936 (MBE plan unreasonably burdensome because it "may well [have] destroyed" white contracting firms).

⁹² *Shurberg Broadcasting*, 876 F.2d at 917.

⁹³ See *Sheet Metal Workers*, 478 U.S. at 479 (plurality opinion).

⁹⁴ *Johnson*, 480 U.S. at 640.

prescribes goals, rather than quotas.⁹⁵ Unfortunately, distinguishing goals from quotas is not always easy.

For instance in *Sheet Metal Workers*, five members of the Court said that a "goal" of 29.23% minority membership in a trade union was not inflexible. To support this conclusion, Justice Brennan pointed out that the deadline for achieving the goal was adjusted twice, and that there were continual changes in the size of the "classes from which the union drew its members to account for the fact that economic conditions prevented [the union] from meeting their membership targets."⁹⁶ As such, the plan was not intended "simply to achieve and maintain racial balance but rather [acted] as a bench mark against which the court could gauge the [union's] efforts to remedy past discrimination." In dissent, Justices O'Connor and White claimed that irrespective of the fine-tuning, what the majority labeled a "goal" actually operated as a "rigid-membership quota," because it required the racial composition of the union to mirror the relevant labor pool without any possible deviation.⁹⁷

Johnson provided somewhat more guidance for distinguishing goals from quotas. There, the Court found sufficient flexibility because gender was only one of the many factors the employer considered in making promotion decisions. Furthermore, the employer's plan in *Johnson* set "modest short-term goals" of promoting a small percentage of women to a certain skilled job, and took into account demographic and economic variables that could have made compliance with the plan's long-term objectives impractical.⁹⁸

Nevertheless, after *Johnson*, lower courts continued to struggle trying to separate goals from quotas. *Hammon v. Barry*⁹⁹ is illustrative. In that case a three judge panel of the D.C. Circuit purported to apply *Johnson*, but the labels that two of the panel members attached to a plan that required at least 60% of each entering class of municipal fire fighters to be black were worlds apart. Judge Starr called the plan a "tell-tale, single-factor, rigid quota," and then for good measure, a "hard-core, cold-on-the-docks quota, nothing less," concluding that it

⁹⁵ *Id.*

⁹⁶ *Sheet Metal Workers*, 478 U.S. at 478 (plurality opinion).

⁹⁷ *Id.* at 498 (O'Connor, J., dissenting); *Id.* at 499 (White, J., dissenting).

⁹⁸ *Johnson*, 480 U.S. at 636, 641. See also *id.* at 655 (O'Connor, J., concurring in the judgment) (plan flexible because it promoted women on basis of modest short-term goals).

⁹⁹ 826 F.2d 73 (D.C. Cir. 1987), cert. denied, 108 S. Ct. 2023 (1988).

was a far cry from what had been embraced in *Johnson*.¹⁰⁰ Citing *Johnson*, Judge Mikva found that the plan did not authorize hiring solely by race. Rather, the City could hire only those who had passed an exam that made them eligible for the entering class. It was from that pool that the City arrived at its figure of 60% (the percentage of blacks that made up the class that passed the test). Furthermore, for Judge Mikva, the City's "goal" of attaining parity between the percentage of black fire fighters and the percentage of blacks in the City was only a long-term aspiration. The City's short-term objectives were, like the short-term plan in *Johnson*, quite modest.¹⁰¹

IV. THE IMPACT OF *CROSON* BEYOND THE CONTEXT OF LEGISLATIVE RACIAL CLASSIFICATIONS

A. Impact on Court-Ordered Racial Classifications

Court-ordered racial classifications involve "state action," and thus are subject to constitutional limits. It is unclear however, whether the *Croson* Court's adoption of strict scrutiny as the appropriate standard of constitutional review for state and local governments' remedial racial classifications is also applicable to court-ordered remedial racial classifications.

Actually, in its two cases reviewing court-ordered racial classification, *Paradise* and *Sheet Metal Workers*, a majority of the Court purported to apply strict scrutiny and upheld the challenged classifications.¹⁰² Moreover, every Justice in both cases—including the

¹⁰⁰ *Id.* at 79.

¹⁰¹ *Id.* at 89-90 (Mikva, J., dissenting). The D.C. Circuit recently confronted the goal versus quotas problem once again in *Winter Park Communications*. Writing for the majority in a 2-1 decision, Judge Edwards ruled that racial classifications are not quotas when race "is simply one factor among several" on which the government bases its decision. *Winter Park Communications*, 873 F.2d at 353. But Judge Williams' dissent claimed that "the line between a simple quota and a multi-factored allocation" that Judge Edwards had drawn was "painfully thin," because the government's intention was to "keep giving race weight until" minority participation in the particular industry "matches the racial composition of the population at large." Rather tersely, Judge Williams remarked that such a program "look[ed] like a quota" to him. *Id.* at 368.

¹⁰² Writing for a four Justice plurality in both cases, Justice Brennan found no need to resolve the then undecided debate on the appropriate standard of review of remedial racial classifications because the court orders at issue "survive[d] even strict scrutiny." *Paradise*, 480 U.S. at 167. See also *Sheet Metal Workers*, 478 U.S. at 480. Justice Powell wrote separately in both cases stating his position that remedial racial classifications should be subject to strict scrutiny. Even under that standard, however, Justice Powell found the court orders constitutional. See *Par-*

dissenters—concluded that the court-ordered racial classifications at issue were predicated on a “compelling interest,” because of the well-documented egregious discrimination and resistance of those on whom the orders were imposed.¹⁰³ In *Paradise*, however, the majority and dissenters disagreed on the degree of deference owed to a district judge’s choice of means to remedy that discrimination.

This dispute centered on the question of the availability of race-neutral alternatives. The *Paradise* majority determined that, in light of the Alabama Highway Department’s legacy of discrimination and abstinence in responding to previous court orders, the series of post-hoc alternative remedies proposed by the dissenters would not have worked.¹⁰⁴ For Justice O’Connor, however, if strict scrutiny had any meaning, alternatives to racial classifications should have been explored.¹⁰⁵ Thus, what “disturbed” her most about the race-conscious order in *Paradise* was that “the District Court imposed the [remedy] without consideration of any of the available alternatives.”¹⁰⁶ By contrast, Justice O’Connor said, the district court in *Sheet Metal Workers* has at least “‘considered the efficacy of alternative remedies’ before imposing a racial quota.”¹⁰⁷

Responding to Justice O’Connor, the plurality said reviewing courts must defer to a lower court’s remedial orders when a constitu-

adise, 480 U.S. at 187 n.2 (Powell, J., concurring); *Sheet Metal Workers*, 478 U.S. at 484-85 (Powell, J., concurring).

¹⁰³ See *Paradise*, 480 U.S. at 167 (plurality opinion) (district court had “compelling interest . . . in remedying . . . pervasive systematic and obstinate discriminatory conduct. . .”); *Id.* at 184 (Powell, J., concurring); *Id.* at 196 (O’Connor, J., dissenting); *Sheet Metal Workers*, 478 U.S. at 480-81 (plurality opinion) (district court had detailed evidence of union’s discriminatory conduct); *Id.* at 485 (Powell, J., concurring) (“findings by District Court and Court of Appeals that [union] had engaged in egregious violations of Title VII establishes without a doubt, a compelling government interest sufficient to justify the imposition” of affirmative action).

¹⁰⁴ See *Paradise*, 480 U.S. at 177 (plurality opinion) (“we conclude that . . . when the district court judge entered his [race-conscious] order it is doubtful, given the . . . history [of the] litigation, [he] had available to [him] any other effective remedy”). *Id.* at 188 (Powell, J., concurring) (“[g]iven the findings of persistent discrimination, the Department’s longstanding resistance to necessary remedies, and the exigent circumstances presented to the District Court,” the choice of race-conscious remedy was constitutional).

Incidentally, the majority felt that this was also true in *Sheet Metal Workers*. See 478 U.S. at 486 (Powell, J., concurring) (“an alternative remedy such as a simple injunction would not have been effective”); see also *id.* at 481 (plurality opinion).

¹⁰⁵ *Paradise*, 480 U.S. at 199-200 (O’Connor, J., dissenting).

¹⁰⁶ *Id.* at 200 (emphasis in original).

¹⁰⁷ *Id.* (quoting *Sheet Metal Workers*, 478 U.S. at 481 (plurality opinion)).

tional violation was proven below.¹⁰⁸ In this regard, the plurality remarked that the district judge in *Paradise* “ha[d] first hand experience with the parties and [was] best qualified to deal with the ‘flinty, intractable realities of day to day imposition of constitutional commands.’”¹⁰⁹ Therefore, although strict scrutiny requires race-conscious remedies to be narrowly tailored, “that requirement [did] not operate to remove all discretion from the District Court in its construction of a remedial decree.”¹¹⁰

Justice Stevens’ *Paradise* concurrence was particularly emphatic on this point. He declared that a “District Court ha[s] broad and flexible authority to remedy the wrongs resulting from [a proven constitutional] violation.”¹¹¹ Relying heavily on school desegregation cases in which the Court had given district courts wide latitude in remedying proven constitutional violations, Justice Stevens said that “[t]he notion that this Court should craft special and narrow rules for reviewing judicial decrees in race-discrimination cases [had been] soundly rejected.”¹¹²

In his *Croson* concurrence, Justice Stevens sounded this theme again, claiming that:

[i]t is the judicial system, rather than the legislative process, that is best equipped to identify past wrongdoers and to fashion [appropriate] remedies. Thus, in cases involving the review of judicial remedies imposed against persons who have been proved guilty of violations of law, I would allow courts in racial discrimination cases the same broad discretion that chancellors enjoy in other areas of the law.¹¹³

Justice Stevens was, however, the only member of the *Croson* majority to distinguish the latitude of a district judge with that of a legis-

¹⁰⁸ *Paradise*, 480 U.S. at 183 (plurality opinion).

¹⁰⁹ *Id.* at 184 (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 6 (1971)). See also *Sheet Metal Workers*, 478 U.S. at 486 (Powell, J., concurring) (district court was in “best position to judge whether an alternative remedy . . . would have been effective”).

¹¹⁰ *Paradise*, 480 U.S. at 185. The Second Circuit cited the *Paradise* plurality extensively on this point and thus gave deference to a district judge’s orders imposing sweeping race-conscious relief in a recent politically charged case involving a municipality’s alleged discrimination. *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1235-36 (2d Cir. 1987), cert. denied, 108 S. Ct. 2831 (1988).

¹¹¹ *Paradise*, 480 U.S. at 189 (Stevens, J., concurring).

¹¹² *Id.* at 191.

¹¹³ *Croson*, 109 S. Ct. at 732 (Stevens, J., concurring).

lature in instituting remedial classifications. For the other five Justices, four of whom had dissented in *Paradise* on the grounds that the district judge had allegedly abused his discretion, consideration of race-neutral alternatives would probably be imperative before a court could order race-conscious remedies.¹¹⁴

B. Effect of Croson on Title VII Limits on Remedial Racial Classifications.

In *Johnson*, five Justices stated that Title VII of the 1964 Civil Rights Act "was not intended to extend as far as . . . the Constitution."¹¹⁵ Nonetheless, the same basic two-step approach determines the validity of remedial racial classifications under the Constitution and Title VII: (1) It must have a legitimate factual predicate, and (2) the means to its ends must be reasonable. As a practical matter, the second step does not vary with the nature of the challenge, because under Title VII, the Court has generally applied the same factors it applies in determining if a racial classification is "narrowly tailored" for constitutional purposes.¹¹⁶

Presently, the difference between the constitutional and statutory limits on remedial racial classification lies in the requisite factual predicate. Under the Court's current Title VII jurisprudence, private employers' remedial racial classification need only be predicated on a "manifest racial imbalance[] in traditionally segregated job categories."¹¹⁷ In determining whether such an imbalance exists, an employer may compare the percentage of minorities (or women, if the plan is gender-based) in the employer's work force with the percentage of minorities (or women) in the general population or, if the job requires special skills, with the number of qualified minorities in the relevant labor market.¹¹⁸

Significantly, a "manifest imbalance" need not support a prima

¹¹⁴ Justice Kennedy was not on the Court when *Paradise* was decided. It is highly probable, however, that he would join Justice O'Connor and the other *Paradise* dissenters in requiring district judges, at minimum, to consider race-neutral remedies.

¹¹⁵ *Johnson*, 480 U.S. at 628 n.6.

¹¹⁶ See, e.g., *Sheet Metal Workers*, 478 U.S. at 477-79, 481 (applying nearly identical considerations to determine whether plan was reasonable under Title VII and narrowly tailored under the Constitution); see also *Ledoux v. District of Columbia*, 820 F.2d 1293, 1301 (D.C. Cir. 1987).

¹¹⁷ *Johnson*, 480 U.S. at 628 (quoting *Steelworkers v. Weber*, 443 U.S. 193, 197 (1979)).

¹¹⁸ *Id.* at 631-32.

facie case of a Title VII violation by the employer.¹¹⁹ Thus, an employer can institute a remedial racial classification even if he or she had not previously discriminated.¹²⁰ In fact, there is no need under Title VII to show anybody's identified discrimination; an employer can predicate a remedial racial classification on mere societal discrimination. To be sure, in *Weber* there was evidence that somebody had discriminated, namely the craft unions from which the employer drew its labor pool.¹²¹ In *Johnson*, however, the manifest imbalance that the Court found to exist was not tied to anybody's identified discrimination.¹²²

The Court's rationale for permitting employers to adopt remedial racial classifications under Title VII on a showing of "manifest imbalance" is its belief that the statute is intended to encourage "voluntary employer [initiatives to] . . . eliminat[e] the effects of discrimination in the workplace."¹²³ According to the Court, application of the prima facie standard would "thwart" voluntary efforts by forcing employers to "confess" their past misconduct, which, in turn, might subject them to lawsuits filed by those against whom they have admittedly discriminated.¹²⁴

Justice O'Connor concurred in the judgment in *Johnson*, but said that under Title VII, a remedial racial classification can be justified only if "the employer could point to evidence sufficient to establish a firm basis for believing that remedial action is required . . . [A] statistical imbalance sufficient for a Title VII prima facie case against the employer would satisfy this firm basis test."¹²⁵ In making this point,

¹¹⁹ *Id.* at 632.

¹²⁰ Indeed, in *Weber* and *Johnson*, there was no evidence that the employer enacting the plan had itself discriminated.

¹²¹ The Court in *Weber* took judicial notice of a history of racial discrimination in craft unions. 443 U.S. at 198 n.1.

¹²² See *Johnson*, 480 U.S. at 666 n.4 (Scalia, J., dissenting).

¹²³ *Id.* at 630.

¹²⁴ *Id.* As Justice Blackmun described, the prima facie test would place an employer on a "tightrope" between "liability for past discrimination against blacks . . . and liability to whites for any voluntary preference adopted to mitigate the effects of prior discrimination against blacks." The only way for the employer to "keep [its] footing [is to] eschew all forms of voluntary affirmative action." *Weber*, 443 U.S. at 210 (Blackmun, J., concurring).

¹²⁵ *Johnson*, 480 U.S. at 650-51 (citing *Wygant*, 476 U.S. at 292 (O'Connor, J., concurring)). In *Johnson*, Justice O'Connor applied the prima facie test and found that affirmative action was justified: "When compared to the percentage of women in the qualified work force, the statistical disparity would have been sufficient for a prima facie case brought by unsuccessful women job applicants." 480 U.S. at 656 (O'Connor, J., concurring). As Justice Scalia explained it, the "firm basis" for Justice O'Connor's belief that there was prima facie evidence of sex dis-

Justice O'Connor remarked that there is "little justification for the adoption of different standards for affirmative action under Title VII and the Equal Protection Clause."¹²⁶

As indicated previously, after *Croson*, the Constitution apparently requires prima facie evidence of identified discrimination as the predicate for state and local remedial racial classification. If Justice O'Connor's view that the constitutional and statutory limits on remedial racial classifications should be the same garners the support of a majority of the Court, then the prima facie standard would also presumably apply to Title VII.

Since *Johnson*, Justice Kennedy has replaced Justice Powell, who was one of the five Justices in favor of the "manifest imbalance" standard as the requisite Title VII factual predicate for remedial racial classifications. In *Croson*, Justice Kennedy agreed with Justice O'Connor that the Constitution requires such classifications to be predicated on prima facie evidence of discrimination. It is quite possible that Justice Kennedy will also join Justice O'Connor and opt for the prima facie requirement under Title VII. If Justice O'Connor also gets the votes of the Chief Justice, and Justices Scalia and White on this question, the constitutional and statutory limits on remedial racial classification will be virtually identical.¹²⁷

CONCLUSION

While there is no doubt that the *Croson* decision will make it more difficult for states and municipalities to employ race-based measures to remedy the continuing effects of discrimination, there is also no doubt that if the Court's requirements are met, such measures will remain constitutional. Cities and states that are struggling with the persistent

problem of discrimination therefore need not abandon using appropriately justified and limited racial classifications. At the same time, those states and municipalities should determine if some of the benefits from these measures could not be obtained through non-racial means. The effect of *Croson* on federal programs and other classifications (e.g., gender) is less clear. However, *Croson* suggests that Congress has greater leeway than state and local governments in enacting remedial racial classifications. In any event, the meaning of *Croson* will certainly be the subject of continuing litigation and court decisions.

crimination lay in the "inexorable zero": the complete absence of any women in skilled positions." See *id.* at 666 n.4 (Scalia, J., dissenting).

¹²⁶ *Id.* at 652 (O'Connor, J., concurring).

¹²⁷ In *Croson*, Justice Stevens rejected the prima facie requirement for constitutional purposes, and he most certainly would reject it for Title VII purposes as well. For in *Johnson*, Justice Stevens said that, under Title VII, he "see[s] no reason why [an] employer has any duty, prior to granting a preference to a qualified minority employee, to determine whether his past conduct might constitute an arguable violation of Title VII." *Johnson*, 480 U.S. at 646 (Stevens, J., concurring). Reiterating his "forward looking" approach, Justice Stevens said that employers should be allowed to "focus on the future" and predicate racial classifications on non-remedial grounds. *Id.* See generally Note, *Rethinking Weber: The Business Response to Affirmative Action*, 102 HARV. L. REV. 658 (1989).

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CITY OF RICHMOND V. J.A. CROSON CO., 488 U.S. 469 (1989)

Payton was counsel of record on the briefs for the City of Richmond, Virginia. He argued the case at the Supreme Court on behalf of Richmond.

Croson involved a constitutional challenge to a Richmond ordinance that required city contractors to subcontract 30% of their contracts to "minority business enterprises." The subcontracting requirement could be waived if the contractor demonstrated that no qualified minority business was available or willing to participate in the contract. Plaintiff was a white-owned company that bid on a city contract, and that was not awarded the contract because it did not comply with the subcontracting requirement.

The ordinance was adopted in 1983; its stated purpose was to remedy racial discrimination in the local construction industry. As set forth in Payton's brief, the Richmond City Council took account of the following factors in determining that remedial action was warranted:

- Blacks constituted 50% of the City's population.
- In the five years prior to the adoption of the ordinance, .067% of city construction contracts had been awarded to minority businesses.
- The major construction trade associations in the Richmond area had virtually no black members.
- At a public hearing, a former mayor of Richmond and the City Manager spoke of widespread discrimination in the local construction industry.
- In Fullilove v. Klutznick, 448 U.S. 448 (1980), the Supreme Court had upheld a federal set-aside plan for minority contractors based on congressional findings of nationwide discrimination in the construction industry.

The Supreme Court struck down the Richmond ordinance by a 6-3 vote. The principal opinion was authored by Justice O'Connor.¹ As initial matter, the Court accepted Payton's

¹ The other Justices in the majority were Chief Justice Rehnquist, and Justices White, Kennedy, Scalia, and Stevens. Justice Marshall wrote a dissenting opinion that was joined by

argument that, in certain circumstances, state and local governments can employ race-based measures, such as contracting set-asides, to remedy discrimination in some sector or industry within their jurisdictions. The Court rejected the lower court's holding that a state or local governmental entity can only act on the basis of race when remedying the entity's own discrimination.

However, the Court rejected Payton's argument that the principles established in Fullilove were applicable. Rather, Justice O'Connor said that the standards for reviewing congressionally-mandated affirmative programs such as the one at issue in Fullilove were not as stringent as the standards applicable to constitutional review of affirmative action programs adopted by state or local governments. Although only two other Justices in the majority agreed with Justice O'Connor on that point, a majority of Justices did agree that race-based measures of state and local governments that are designed to benefit minorities must be evaluated under strict scrutiny -- the most rigorous standard of constitutional review, and the same standard that is applicable to laws that discriminate against minorities. Relying on arguments made principally by Justices Brennan and Marshall in prior cases, Payton's brief had urged the Court to apply a more relaxed standard, intermediate scrutiny.

Croson marked the first time that a majority of the Court held that strict scrutiny applies to affirmative action measures. Under strict scrutiny, race-based action must further a compelling governmental interest, and must be narrowly tailored to fit that interest. The compelling interest inquiry focuses on the purposes or ends of the program; the narrowly tailored inquiry focuses on the means to those ends. Payton's brief argued that if strict scrutiny were held to apply, the Richmond ordinance would still pass constitutional muster. But the Court rejected that contention.

In terms of the compelling interest question, the Court said that remedying the effects of societal discrimination is not a permissible justification for race-based action, because it is too amorphous. Rather, a state or local government must identify the discrimination to be remedied with sufficient particularity. The Court suggested that this evidence should approach a prima facie showing of discrimination against minorities. The Court rejected Payton's contention that the statistical disparities on which the City relied demonstrated that there was discrimination in the Richmond construction industry. The Court said that those statistics were not probative -- rather than using general population statistics, the City should have compared the number of qualified minorities with the number of contracts awarded to

Justices Brennan and Blackmun.

minorities and the number of minorities in the trade associations.

After holding that the Richmond ordinance was not supported by a compelling interest, the Court went on to consider two factors that it said showed that the ordinance also failed the "narrowly tailored" prong of strict scrutiny. First, the Court said that it did not appear that the City had considered race-neutral alternatives before resorting to race-conscious action. Payton's brief had argued that the City had tried race-neutral alternatives in the form of laws banning racial discrimination in public contracting. The Court did not discuss that argument. Second, characterizing the subcontracting requirement as a "rigid numerical quota," the Court said the ordinance was defective because it did not provide for an individualized determination as to whether the quota should be waived where beneficiaries could not demonstrate that they had suffered from the effects of the discrimination that the City was seeking to remedy. The Court stressed that the Ordinance benefitted minority groups, such as Aleuts and Native-Americans, for which the City had no findings of discrimination. Payton's brief argued that the inclusion of those groups was based on federal statutes, and that it was irrelevant anyway because no member of those groups was likely to bid on a city contract.

In sum, Croson was a landmark decision. It clarified the constitutional rules governing the use of affirmative action. Since Croson, lower courts have applied the rules in reviewing other contracting set-asides, as well as when reviewing affirmative action programs in college and universities and preferential hiring and promotion policies in police and fire departments. It bears emphasizing that the Court in Croson did not hold that affirmative action is constitutionally impermissible. Indeed, only Justice Scalia would have imposed a near-blanket ban on affirmative action. On the other hand, the Court did make it harder for state and local governments to take race-based action.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF RICHMOND,

Appellant,

v.

J.A. CROSON COMPANY,

Appellee.

On Appeal from the United States Court of Appeals
for the Fourth Circuit

BRIEF OF APPELLANT CITY OF RICHMOND

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April 21, 1988

QUESTION PRESENTED

Whether a city, in order to remedy the virtual absence of minority participation in its city construction contracts caused by racial discrimination in its construction industry, may enact an ordinance that requires prime construction contractors to subcontract a portion of their city contracts to minority businesses.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

No. 87-998

CITY OF RICHMOND,
v. *Appellant,*
J.A. CROSON COMPANY,
Appellee.

On Appeal from the United States Court of Appeals
for the Fourth Circuit

BRIEF OF APPELLANT CITY OF RICHMOND

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit from which this appeal is taken is reported at 822 F.2d 1355 (4th Cir. 1987). It is reproduced at page 1a in the appendices attached to the Jurisdictional Statement ("J.S. App. 1a"). The order of the court of appeals denying the Petition for Rehearing with Suggestion for Rehearing En Banc is unreported and is reproduced at page 27a of the appendices attached to the Jurisdictional Statement. An earlier opinion of the court of appeals, which was vacated by this Court, is reported at 779 F.2d 181 (4th Cir. 1985) and is reproduced at page one of the supplemental appendices to the Jurisdictional Statement ("J.S. Supp. App. 1"). The decision of this Court granting certiorari, vacating the earlier judg-

ment of the court of appeals and remanding to the court of appeals is reported at 106 S. Ct. 3327 (1986) and is reproduced at page 31a in the appendices attached to the Jurisdictional Statement. The opinion of the district court is unreported and is reproduced at page 112 of the supplemental appendices to the Jurisdictional Statement.

JURISDICTION

The decision of the court of appeals declaring the Richmond ordinance unconstitutional and remanding to the district court for determination of appropriate relief was issued on July 9, 1987. J.S. App. 1a. A petition for rehearing with suggestion for rehearing en banc, filed on July 23, was denied on September 18, 1987, by a vote of 6-5. *Id.* at 27a. A notice of appeal to this Court was filed with the court of appeals on November 18, 1987. *Id.* at 29a. This Court entered an order noting probable jurisdiction in this case on February 22, 1988.

On March 7, 1988, the Clerk of this Court granted appellant City of Richmond an extension of time for filing its brief until April 21, 1988, pursuant to Rule 29.4 of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(2) (1982).

CONSTITUTIONAL PROVISION AND ORDINANCE INVOLVED

This appeal involves (1) the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which provides that no state shall "deny to any person within its jurisdiction the Equal Protection of the laws," and (2) Richmond's Minority Business Utilization Plan, codified at Richmond, Va., Code ch. 24.1, art. I(F) (Part B) ¶ 27.10-27.20, art. VIII-A (1983). This plan is reproduced at page 233 of the supplemental appendices to the Jurisdictional Statement.

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STATEMENT OF THE CASE

This case will decide the constitutionality of an ordinance enacted by appellant City of Richmond to remedy the effects on its public works program of racial discrimination in its local construction industry. Before the enactment of the ordinance, the Minority Business Utilization Plan, minority-owned businesses had been receiving virtually none of Richmond's public construction contracts even though the population of Richmond was half minority. The ordinance requires recipients of city construction contracts to subcontract at least thirty percent of the dollar amount of their contracts to qualified minority-owned businesses.

Appellee J.A. Croson Co. ("Croson") is a non-minority contractor that was denied a city construction contract because it refused to comply with the ordinance's subcontracting requirement. The district court upheld the ordinance but the court of appeals reversed, finding the ordinance in violation of the Equal Protection Clause of the Fourteenth Amendment.

A. Enactment Of The Minority Business Utilization Ordinance

The Minority Business Utilization Plan was conceived and enacted as a remedy for racial discrimination in Richmond's construction industry that had all but excluded minority businesses from the City's public works program. Expressly designated "remedial," it promotes wider participation by minority businesses in the City's construction projects. J.S. Supp. App. 248.

Prior to the ordinance, Richmond had been awarding more than 99 percent of its construction business to white-owned firms. Data compiled by the City's Department of General Services in early 1983 indicated that in the five previous years, two-thirds of one percent—essentially none—of the City's \$124 million in construction contracts had been awarded to minority-owned busi-

nesses.¹ At that time, Richmond's population was approximately half minority, primarily black.²

The City's elected leadership concluded that this deplorable situation was a direct result of racial discrimination in Richmond's construction industry. On April 11, 1983, the Richmond City Council held a public hearing and the merits of the proposed ordinance were vigorously debated.³ In addition to information about the negligible minority participation in the City's public construction contracts, the City Council heard evidence that the major construction trade associations in the Richmond area contained virtually no black members. The Associated General Contractors of Virginia had 600 members, including more than 130 in Richmond, but no black members;⁴ the American Subcontractors Association had 80 members in the Richmond area but no black members;⁵ the Richmond chapter of the Professional Contractors Estimators Association had 60 members but only one black member;⁶ the Central Virginia Electrical Contractors Association had 45 members but only one black member;⁷ and the Virginia Chapter of the National Electrical Contractors

¹ Joint Appendix ("J.A.") 41. The data indicated that 0.67 percent of the value of the City's construction contracts went to minority-owned firms. See also J.S. Supp. App. 115.

² J.A. 12, 29. The district court took judicial notice of the fact that most minorities in Richmond were black. J.S. Supp. App. 207.

³ In its opinion below, the court of appeals stated that the debate occurred "at the very end of a five-hour council meeting." J.S. App. 6a. In fact, as appellee J.A. Croson Company stated in its brief to the court of appeals, the debate lasted approximately one hour and forty-five minutes. Brief of Appellant/Cross-Appellee at 23, *J.A. Croson Co. v. City of Richmond*, No. 85-1002 (L) No. 85-1041 (4th Cir. Mar. 18, 1985).

⁴ J.A. 27-28.

⁵ *Id.* at 36.

⁶ *Id.* at 39.

⁷ *Id.* at 40.

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Association had 81 members but only two black members.⁸

Representatives of each of these trade organizations appeared at the public hearing and spoke against the proposed ordinance. They claimed, among other things, that there was an insufficient number of minority contractors in the Richmond area to make the law work, and that those available would be more expensive and less reliable.⁹ Supporters of the ordinance replied that similar arguments had long been used to limit minority participation in other endeavors, and often had proven unjustified.¹⁰ In Richmond's own recent experience such arguments had been made when the City began to administer federal Community Development Block Grants, which required minority participation in federally funded construction and other projects. Those arguments were proven unfounded.¹¹ One of the ordinance's sponsors also pointed out that the very purpose of the ordinance was to provide opportunities for minority businesses to gain experience and prove their capabilities.¹²

The existence of discrimination in Richmond's construction industry—the core of the problem being addressed—was discussed at the public hearing and not disputed. One council member, a former Richmond mayor, drew on his own long experience with the Richmond construction industry. He stated “without equivocation”

⁸ *Id.* at 34.

⁹ *Id.* at 31-32 (statement of Mr. Beck); *id.* at 33-34 (statement of Mr. Singer); *id.* at 35-37 (statement of Mr. Murphy); *id.* at 38-39 (statement of Mr. Shuman).

¹⁰ *Id.* at 37 (statement of Mr. Kenney); *id.* at 43-44, 48 (statement of Mr. Richardson).

¹¹ *Id.* at 41 (statement of Mr. Marsh). Mr. Marsh explained that the percentage of minority participation in Community Development Block Grants “exceeded the numbers specified and the problems anticipated had not been realized.”

¹² *Id.* at 43-44 (statement of Mr. Richardson).

that the industry is one in which "race discrimination and exclusion on the basis of race is widespread."¹³ Richmond's City Manager, who has oversight responsibility for city procurement matters, concurred in these remarks.¹⁴ No one denied that discrimination in the industry was widespread,¹⁵ although some of the trade association representatives denied that their particular organizations engaged in discrimination.¹⁶

The City Council also was aware that there has been pervasive racial discrimination in the nation's construction industry. In 1977, the United States Congress had enacted a federal set-aside plan for minority contractors based on findings that the nation's construction industry is "a business system which has traditionally excluded measurable minority participation,"¹⁷ and that industry discrimination had severely limited minority participation in public contracting at the federal, state and local level.¹⁸ In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), this Court upheld the constitutionality of the federal set-aside plan, finding that Congress had "abundant evi-

¹³ *Id.* at 41 (statement of Mr. Marsh). Aside from his time in public office in Richmond, Councilman Marsh has been practicing law in Richmond since 1961.

¹⁴ *Id.* at 42 (statement of Mr. Deese).

¹⁵ J.S. Supp. App. 164-65.

¹⁶ J.A. 20 (statement of Mr. Watts); *id.* at 39 (statement of Mr. Shuman).

¹⁷ H.R. Rep. No. 1791, 94th Cong., 2d Sess. 182 (1977) (quoted in *Fullilove v. Klutznick*, 448 U.S. 448, 466 n.48 (1980) (plurality opinion); *id.* at 505 (Powell, J., concurring).

¹⁸ Years earlier, the President of the United States had issued an executive order authorizing affirmative action policies in federal contract procurement as a means to remedy the effects of discrimination. Exec. Order No. 11,114, 3 C.F.R. 774 (1959-63). This program was continued with Exec. Order No. 11,246. See Exec. Order No. 11,246, 3 C.F.R. 339 (1964-65) as amended by Exec. Order No. 12,086, 3 C.F.R. 230 (1979).

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dence" of racial discrimination in the construction industry to support its remedial action. *Id.* at 477-78 (plurality opinion). The Richmond ordinance was drafted with the *Fullilove* decision, and the findings of discrimination discussed therein, in mind. J.A. 14-15, 24-25.

At the end of the public hearing, the City Council voted six to two, with one abstention, to enact into law the Minority Business Utilization Plan.¹⁹

B. The Ordinance's Provisions

The Minority Business Utilization Plan requires contractors to whom the City awards prime contracts to subcontract at least thirty percent of the dollar amount of the contracts to minority business enterprises (MBEs), unless the prime contractor is itself an MBE or the City waives the requirement. The ordinance is designed to expire on June 30, 1988.²⁰

Because the ordinance does not set aside prime contracts for minority businesses, the competitiveness of the bidding process is preserved. Since a prime contractor normally must make subcontracting arrangements before it can calculate its bid, the ordinance contemplates that minority subcontractors will be participants in the competitive bidding process. Once the bids are opened, the apparent low bidder is given ten days to submit a satisfactory Minority Business Utilization Commitment Form, containing information about the MBE subcontractor or

¹⁹ Richmond, Va. Code ch. 24.1, art. I(F) (Part B) §§ 27.10-27.20 (1983). The plan actually was enacted pursuant to two ordinances. See J.S. Supp. App. 233, 249.

²⁰ Of course, the expiration of the Minority Business Utilization Plan does not moot this case. There remains a live controversy between the parties over whether Richmond's refusal to award Croson a contract was unlawful and entitles Croson to damages. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 8-9 (1978).

subcontractors, or to seek a waiver of the minority subcontracting requirement. J.S. Supp. App. 60-61, 69.²¹

The ordinance authorizes the Director of the Department of General Services to promulgate regulations "which . . . shall allow waivers in those individual situations where a contractor can prove to the satisfaction of the director that the requirements herein cannot be achieved."²² According to these regulations, the thirty percent requirement will be waived or lowered in the following circumstance:

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 (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. at 67-68. The denial of a waiver may be appealed under the City's normal appeals procedures for disappointed bidders. *Id.* at 192.

The ordinance defines a Minority Business Enterprise as a business at least fifty-one percent of which is owned and controlled by minority group members.²³ The ordi-

²¹ Since the time that Croson brought this lawsuit, that procedure has been changed. The new requirement is that a prime contractor must submit a Minority Business Utilization Form or a waiver request with its bid or the bid will be considered non-responsive.

²² J.S. Supp. App. 247. The City Council contemplated that the regulations would be similar to the waiver provisions used in the City's administration of Community Development Block Grants. J.A. 12-13.

²³ J.S. Supp. App. 251. The requirement that the business be controlled as well as owned by minority group members was added by amendment to the plan in June 1983. *See id.* at 217-18. Minority group members are defined as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." *Id.* at 252.

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nance's regulations require a city administrative officer to verify that minority businesses seeking to participate in a city construction contract are in fact owned and controlled by minorities, so that "sham" MBEs cannot take advantage of the plan. *Id.* at 62. The regulations also list the names and phone numbers of five Richmond agencies that will assist contractors in locating qualified, bona fide minority businesses to participate in a construction contract. *Id.* at 67.

C. The Ordinance Applied To Croson

On September 6, 1983, Richmond invited bids for the installation of plumbing fixtures at the city jail. The bids were due by October 12. J.S. Supp. App. 120. Croson, a non-MBE mechanical, plumbing, and heating contractor based in Richmond, decided to bid on the project and determined that it could meet the City's minority subcontracting requirement by purchasing certain plumbing fixtures from an MBE. *Id.* at 121.

Croson's regional manager, Eugene Bonn, had brief telephone conversations with several MBE suppliers on September 30.²⁴ On October 12, the day the bids were due, he contacted a local MBE, Continental Metal Hose ("Continental").²⁵ Continental's president, Melvin Brown, told Bonn that he wished to participate in the project with Croson, but he could not state a firm price on such short notice because he could not get an immediate commitment from suppliers. *Id.* at 122-23. Croson then sub-

²⁴ Evidence in the record indicates that Croson's efforts to make subcontracting arrangements with an MBE were less than diligent. Telephone records submitted to the district court indicated that the five conversations lasted a total of less than ten minutes. See *id.* at 8 n.4. According to testimony before the district court, two of these MBEs expressed interest in the project and requested bid specifications from Bonn, but never received them. Officers of a third testified that they never received Bonn's call. *Id.*

²⁵ Bonn claims to have telephoned Continental's president on September 30, but the president denies this. *Id.* at 121-22.

mitted a bid using a quote for the plumbing fixtures received from a non-minority firm. *Id.* at 124.

As it turned out, Croson was the only bidder and was awarded the contract subject to its commitment to subcontract with an MBE. Continental's Brown attended the bid opening on October 13 and at that meeting was encouraged by Croson to continue trying to obtain a quote from suppliers. *Id.* at 123-24. Croson nevertheless requested a waiver of the MBE requirement on October 19, indicating simply that Continental was "unqualified" and that other MBEs contacted were "non-responsive" or "unable to quote." Brown learned of the waiver request on October 27, at which point he contacted a city official and represented that Continental was available to provide the fixtures specified in the contract. *Id.* at 124-25.

The City denied Croson's request for a waiver by letter dated November 2, and gave Croson ten more days to comply with the subcontracting requirement. By that time, Continental was able to quote a firm price, but it was higher than Croson had hoped. Croson again requested a waiver, or, alternatively, an increase in the contract price. The City elected instead to rebid the project and invited Croson to submit another bid. Rather than submit a new bid, Croson brought this lawsuit. *Id.* at 126-29.

D. The Proceedings Below

In its complaint, Croson claimed that the Minority Business Utilization Plan violated the Equal Protection Clause of the Fourteenth Amendment and Virginia state law, and it sought an injunction, declaratory relief, and damages. After a bench trial, the district court held for Richmond on all counts.²⁶

²⁶ *Id.* at 112. Croson also raised federal statutory claims based on 42 U.S.C. §§ 1981 and 1983 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. However, Croson agreed these claims had no basis in the absence of a valid equal protection claim, J.S. Supp. App. 222-23, and did not raise them on appeal.

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After finding the Richmond ordinance permissible under Virginia law, the district court considered Croson's equal protection claim. J.S. Supp. App. 155. Since the appropriate constitutional standard for review of race-based remedial programs had been left unresolved by this Court in *Fullilove* and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), the district court relied on a three-part test synthesized from those cases by the Eleventh Circuit:

(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 interest over another; (3) that the use of such classifications extend no further than the established need of remedying the effects of past discrimination.²⁷

The district court determined that the Richmond ordinance met all the requirements of this test, and thus comported with the decisions of this Court in *Fullilove* and *Bakke*.

The first element of the test was satisfied because Virginia law granted municipalities the authority to adopt such legislation. J.S. Supp. App. 162-63. The district court found the second element satisfied because the City Council had before it sufficient evidence to conclude that racial discrimination in the local construction industry had severely impaired minority participation in the industry and that minority participation in the City's own public works program was negligible as a result. It cited the "enormous disparities" between the percentage of city construction contracts awarded to minorities and the

²⁷ J.S. Supp. App. 161-62 (quoting *South Florida Chapter of Associated Gen. Contractors of Am. v. Metropolitan Dade County*, 723 F.2d 846, 851-52 (11th Cir.), cert. denied, 469 U.S. 871 (1984) (emphasis omitted)).

percentage of minorities in Richmond, the hearing testimony of trade association representatives indicating that there were few minority businesses in the local construction industry, and the unrefuted hearing testimony about discrimination in that industry. *Id.* at 164-65. It also stated that Congress had "already extensively documented the fact that low levels of minority business participation in the construction industry in general and government contracting in particular reflect continuing effects of past discrimination." *Id.* at 165.

In considering the third element of the test, concerning the means employed in the remedial ordinance, the district court relied on a five-factor inquiry derived from Justice Powell's *Fullilove* opinion: (1) the reasonableness of the percentage chosen; (2) the adequacy of the waiver provision; (3) the consideration of alternative remedies; (4) the duration of the remedy; and (5) the ordinance's effects on innocent third parties. The court did a careful analysis of each of these factors and concluded that the test was satisfied. *Id.* at 172-98. It also rejected the argument that the Richmond ordinance was "overinclusive." *Id.* at 198-209.

On appeal, the court of appeals affirmed the district court in all respects, with Judge Wilkinson dissenting. *Id.* at 1. It found that the district court was correct to review the Richmond ordinance under the equal protection standards established in *Fullilove*, and that the district court had appropriately applied those standards. *Id.* at 24-55.

Croson sought certiorari from this Court, which granted the writ, summarily vacated the judgment, and remanded the case for consideration in light of *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). On remand, and without briefing or argument on the impact of *Wygant*, the original panel of the court of appeals reversed itself and found the Richmond ordinance unconstitutional, Judge Wilkinson writing for a divided court over a dissent from Judge Sprouse. J.S. App. la.

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As the court of appeals' majority interpreted *Wygant*, Richmond was required to demonstrate a "compelling" interest in its ordinance, and could do that only by showing that it "had a firm basis for believing [there was] prior discrimination by the locality itself." *Id.* at 9a. The majority considered the City's statistical evidence "spurious" and the City Council hearing testimony "nearly weightless." *Id.* at 8a. It concluded that the Richmond ordinance was predicated only on "the loosest sort of inferences" of past discrimination by the City, and therefore was unconstitutional. *Id.* The majority also held, in the alternative, that the ordinance was not sufficiently "narrowly tailored" to meet its remedial goal. *Id.* at 11a.

The dissent argued that the majority "misconstrues and misapplies *Wygant*." *Id.* at 14a. It stated that *Wygant* did not require evidence of discrimination in public procurement by the City itself, but that this requirement had been satisfied in any event. *Id.* at 18a. It noted the history of pervasive racial discrimination in the nation's construction industry, *id.* at 19a, and it found that the disparity between the percentage of Richmond's construction contracts awarded to minority businesses and the percentage of minorities in Richmond was so dramatic as to "break[] the bounds of the sometimes suspect 'science' of statistics." *Id.* at 21a.

The dissent concluded that the proof of governmental discrimination required by the majority "might be fatally counterproductive to the concept of affirmative action," *id.* at 20a, and in any event is inappropriate "in areas where discrimination had effectively prohibited the entry of minorities into the contracting business, as in Richmond." *Id.* n.11. It stated that the proof required by the majority "would ensure the continuation of a systemic *fait accompli*, perpetuating a qualified minority contractor pool that approximates two-thirds of one percent of the overall contractor pool." *Id.* at 20a. The dissent also found the

Richmond ordinance sufficiently narrowly tailored to pass constitutional muster.

Richmond filed a petition for rehearing and suggestion for rehearing en banc. The court of appeals denied the petition by a vote of six to five. *Id.* at 27a.

SUMMARY OF ARGUMENT

The central issue in this case is whether the court of appeals erred in holding Richmond's Minority Business Utilization Plan unconstitutional on the basis of language in the plurality opinion in *Wygant v. Jackson Board of Education*, which it construed to require a governmental entity to demonstrate its own discrimination in order to justify an affirmative action plan. To reach this conclusion, the court of appeals ignored relevant precedents of this Court, particularly *Fullilove v. Klutznick*, which presented facts and legal issues very close to those presented here.

Upon analysis, it is clear that *Wygant* does not control this case and that Richmond's remedial ordinance is entirely consistent with the relevant precedents of this Court. The ordinance represents a responsible legislative effort to remedy the effects on the City's public works program of longstanding, pervasive racial discrimination in the local construction industry. Richmond's ordinance is well designed to achieve its remedial purpose and has only minimal impact on non-minorities.

In the five years prior to the enactment of the Minority Business Utilization Plan in 1983, Richmond, which has a population that is half minority, awarded more than 99 percent of its \$124 million in public construction contracts to white-owned businesses. There is no serious dispute that this fact reflects a local construction industry in which minority entry and advancement have been stymied by years of racial discrimination. The effects of this discrimination also are reflected in the virtual absence of black members in Richmond's major construction

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trade associations. At the public hearing on the merits of the ordinance, the City Council heard knowledgeable and unrefuted testimony about this industry discrimination. The City Council was well aware that Richmond was part of a longstanding pattern of racial discrimination throughout the nation's construction industry.

Richmond had a compelling interest in remedying the effects of this identified local industry discrimination on its own public works program, much like the interest supporting the federal program in *Fullilove*. Like Congress, the City had been awarding its taxpayers' dollars to a pool of contractors from which minorities had been substantially excluded by unlawful racial discrimination, and thus it had become a passive participant in that discrimination. Like Congress, Richmond sought to put minority-owned construction firms on a more equitable footing with respect to public contracting opportunities. As this Court found in *Fullilove*, this was an entirely appropriate use of affirmative action. Richmond needed to take race into account because race-neutral remedies would not overcome the disabling effects of past discrimination.

Richmond's interest in its ordinance was especially compelling since if Richmond had not acted, there would have been no remedy. Though part of a national pattern, the effects of local construction industry discrimination on Richmond's own public works program was Richmond's problem, peculiarly within the competence of Richmond's legislative body. It would distort principles of federalism to deny Richmond the means effectively to address this problem, while permitting the federal government to take similar remedial action under similar circumstances.

The court of appeals below nevertheless held Richmond's ordinance unconstitutional because it was not predicated on Richmond's own discrimination against

minority contractors. This requirement was based entirely on language in the plurality opinion in *Wygant*. Not only did this language not receive the support of a majority of this Court, but even the plurality did not decide that a government always must demonstrate its own discrimination in order to enact an affirmative action plan. Governmental discrimination was not a decisive issue in *Wygant*, both because the evidence in the record was not probative of any sort of discrimination, and because layoffs were determined to be an inappropriate means to achieve even a compelling purpose. *Wygant* does not control the result here.

The court of appeals' "governmental discrimination" requirement is wholly inappropriate because pervasive, unlawful industry discrimination, and its profound effect on Richmond's public works program, provided an adequate basis for remedial action. Requiring evidence of governmental discrimination under these circumstances is unnecessary and beside the point. Moreover, because proof of governmental discrimination is elusive where industry discrimination has largely prevented minority businesses from even competing for city construction contracts, this requirement would preclude any remedy for this most effective and pernicious discrimination.

Finally, the minority business utilization ordinance is carefully designed to meet its remedial goal with minimal impact on non-minorities. By teaming up minority subcontractors with more established, white-owned firms, the ordinance removes obstacles that have kept minority businesses out of public contracting and provides them with valuable experience, credibility, and an opportunity to develop business relationships with more established firms. The ordinance's impact on non-minorities is slight since no prime contracts are set aside for minorities, the subcontracting requirement does not unsettle any vested right or expectation, and thirty percent of city construc-

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tion contracts represents only a tiny fraction of all construction contracting opportunities in Richmond. In addition, the ordinance is temporary, contains a reasonable waiver provision, and is designed to root out "sham" minority businesses.

ARGUMENT

Racial inequality remains a scourge of our society. Cities, states, and the federal government each have a crucial role to play in the effort to rid our country of racial discrimination and its continuing effects.

Richmond, like other cities, has accepted that responsibility. In 1983, in response to clear evidence that racial discrimination in its local construction industry had resulted in a nearly all-white industry, and consequently a distribution of public construction contracts only to businesses owned by whites, Richmond enacted the Minority Business Utilization Plan. This ordinance requires contractors to whom the City awarded prime contracts to subcontract at least thirty percent of the dollar amount of their city contracts to minority businesses.

This case tests whether the Constitution forbids Richmond from enacting this remedial legislation. More particularly, it tests whether the court of appeals was correct in relying on language in *Wygant* to the exclusion of a line of more relevant precedents of this Court, especially *Fullilove*. When the Richmond ordinance is analyzed in light of its purpose and those precedents, it is clear that it is constitutional and that the court of appeals' reliance on *Wygant* was misplaced.

The level of constitutional scrutiny to be applied to remedial legislation like the Richmond ordinance has not been determined by this Court.²⁸ Appellant submits that

²⁸ "[A]lthough this Court has consistently held that some elevated level of scrutiny is required when a racial or ethnic distinction is

an intermediate level of scrutiny, as endorsed by several members of this Court, is the appropriate standard to be applied in this case because racial classifications are not inherently suspect where they are used as part of a remedy for the effects of identified racial discrimination.²⁹

made for remedial purposes, it has yet to reach consensus on the appropriate constitutional analysis." *United States v. Paradise*, 107 S. Ct. 1053, 1064 (1987) (plurality opinion). See also *id.* n.17; *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 3019, 3052-53 (1986) (plurality opinion) ("We have not agreed . . . on the proper test to be applied in analyzing the constitutionality of race-conscious remedial measures").

²⁹ "Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice. . . ." *Bakke*, 438 U.S. at 325 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part). See also *Wygant*, 476 U.S. at 296 (Marshall, J., dissenting); *id.* at 313 (Stevens, J., dissenting); *Fullilove*, 448 U.S. at 507 (Powell, J., concurring); *id.* at 519 (Marshall, J., concurring in the judgment); *id.* at 550-554 (Stevens, J., dissenting); *Bakke*, 438 U.S. at 305 (opinion of Powell, J.); *id.* at 359 (Brennan, White, Marshall, and Blackmun JJ., concurring in the judgment in part and dissenting in part).

The Equal Protection Clause of the Fourteenth Amendment does not require strict scrutiny of affirmative action measures. Its core purpose is not to prohibit the use of racial classifications *per se*, but to prohibit their use to subjugate or disadvantage on the basis of race. See *Brown v. Board of Education*, 347 U.S. 483, 493-94 (1954) (racial segregation in public schools violates the Equal Protection Clause because it "generates a feeling of inferiority" in the hearts and minds of black children). See also J. Ely, *Democracy and Distrust* 135-36, 152-53 (1980); L. Tribe, *American Constitutional Law* 1514-21 (2d ed. 1988). Whites as a racial group historically have not been subjugated or disadvantaged by non-whites, and affirmative action does not have such a purpose or effect. Where, as here, it appears that racial classifications are being used to remedy past discrimination against non-whites, an intermediate level of judicial scrutiny is sufficient to ensure that they are not actually serving some improper purpose and that the effect that they have on whites is not unreasonably burdensome.

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Even under strict scrutiny, however, the Minority Business Utilization Plan passes constitutional muster.

Whatever the level of scrutiny, the constitutional inquiry has two prongs: 1) whether the affirmative action plan serves interests sufficiently "important" or "compelling" to justify the use of racial classifications; and 2) whether the plan is adequately tailored to serve its purpose without unnecessarily harming the interests of non-minorities.³⁰ Richmond's minority business utilization ordinance satisfies both of these requirements. It is legislation designed to remedy the effects of identified racial discrimination in Richmond's construction industry that substantially had foreclosed minority access to contracting opportunities with the City, and it is a temporary, flexible plan that imposes little burden on non-minorities.

I. RICHMOND HAS A COMPELLING INTEREST IN REMEDYING THE EFFECTS ON ITS PUBLIC WORKS PROGRAM OF RACIAL DISCRIMINATION IN THE LOCAL CONSTRUCTION INDUSTRY

State and local governments unquestionably have "a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination."³¹ Richmond's City Council adopted its Minority Business Utilization Plan because racial discrimination in Richmond's construction industry long had impaired minority entry and advancement in the industry, and, as a consequence, minority businesses were receiving virtually none of the City's public construction contracts. This factual predicate was found by the district court to be amply supported and has not seriously been contested.

³⁰ See *Paradise*, 107 S. Ct. at 1064 & n.17 (plurality opinion); *Sheet Metal Workers*, 106 S. Ct. at 3052-53 (plurality opinion).

³¹ *Bakke*, 438 U.S. at 307 (opinion of Powell, J.).

Whether this predicate of discrimination justifies Richmond's ordinance is the critical issue in this case. The court of appeals held that the only predicate that would justify the ordinance is the City's own discrimination. Richmond submits that it has a compelling interest in remedying the effects of identified construction industry discrimination on its public works program regardless of whether the City itself has discriminated. Richmond's remedial action represents a considered decision by Richmond's elected legislative body, which is fully aware of its responsibilities to all the people of Richmond, and constitutes an appropriate use of affirmative action.

A. Racial Discrimination In The Local Construction Industry Had Substantially Foreclosed Minority Access To City Contracting Opportunities

In 1983, one-half of the population of Richmond was minority, primarily black. In the five years prior to 1983, two-thirds of one percent—practically none—of the City's \$124 million in construction contracts was awarded to minority-owned businesses. As both the City Council and the district court concluded, this disturbing fact was a direct consequence of pervasive racial discrimination in Richmond's local construction industry that had impaired minority entry and advancement and had substantially foreclosed minority opportunities to compete for city construction contracts.

This conclusion has abundant support in the facts of this case. The disparity between the percentage of city contracts awarded to minority businesses and the percentage of minorities in Richmond—less than one percent versus fifty percent—is so enormous that by itself it creates a strong inference of discrimination. In a city that is half minority and that awards \$124 million in city construction contracts over a five-year period, one would expect

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minority businesses to be awarded much more than two-thirds of one percent of those contracts, absent discrimination.³² Because the number of minority contractors in Richmond was "quite small," J.S. App. 7a, this discrimination must have been in the industry itself.

When this evidence is combined with other facts, the inference of discrimination becomes so powerful that "innocent" explanations of the meager minority participation in Richmond's city construction contracts seem far-fetched at best.³³ As the City Council learned, and as the following chart demonstrates, in 1983 there were literally no black members in one of Richmond's principal construction trade associations, the Associated General Contractors, and virtually no black members in other major construction trade associations in the Richmond area:

³² See *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339-40 & n.20 (1977) (statistics showing racial imbalance between work force and general population may reflect discrimination).

³³ The probativeness of the statistical evidence here is illustrated by comparison to the statistical evidence of discrimination in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). In enacting the minority set-aside provision of the Public Works Employment Act of 1977, Congress also relied on a disparity between the percentage of federal contracts awarded to minority businesses and the percentage of minorities in the general population. *Id.* at 459 (plurality opinion). The level of minority participation in federal contracts was also less than one percent, but minorities comprised only 15-18 percent of the nation's population, compared to 50 percent in Richmond. Chief Justice Burger nevertheless cited this disparity as a key piece of evidence in upholding Congress' findings on the effects of racial discrimination in the nation's construction industry. *Id.* at 478 (plurality opinion).

BLACK MEMBERSHIP IN RICHMOND'S MAJOR
CONSTRUCTION TRADE ASSOCIATIONS IN 1983 ³⁴

<u>Organization</u>	<u>Total Membership</u>	<u>Black Membership</u>
Associated General Contractors (Virginia)	600	0
Associated General Contractors (Richmond)	130	0
American Subcontractors Association (Richmond)	80	0
Professional Contractors Estimators Association (Richmond)	60	1
Central Virginia Electrical Contractors Association	45	1
National Electrical Contractors Association (Virginia)	81	2

Like the negligible minority participation in the City's construction contracts, the near absence of minority members in these trade organizations is a manifestation of pervasive racial discrimination in Richmond's local con-

³⁴ This chart lists those trade associations whose representatives testified at the City Council hearing on the Minority Business Utilization Plan and provided information on black membership. J.A. 27-28, 34, 36, 39-40. The Richmond Builders Exchange, the Richmond Plumbing, Heating and Cooling Contractors Association and Richmond Area Municipal Contractors Association also were represented at the hearing but provided no information on black membership.

struction industry. Moreover, because membership in these organizations represents a significant economic opportunity,³⁵ these figures dramatically underscore the continuing effects of that discrimination.

At the City Council hearing, there was knowledgeable testimony, including the testimony of a former Richmond mayor, that discrimination in Richmond's construction industry in fact was widespread.³⁶ Moreover, while the merits of the ordinance were vigorously debated, no one denied that pervasive discrimination had occurred. It simply was beyond dispute that discrimination had denied minorities significant participation in the local construction industry, and therefore in Richmond's public construction contracts as well.³⁷

Richmond's experience is not unique. There is a long, well-documented history of racial discrimination throughout the nation's construction industry. Black workers for years have been excluded from the skilled construction trade unions and training programs and hired only for relatively unskilled positions.³⁸ Whites have dominated

³⁵ For example, members of the Associated General Contractors of America ("AGC") perform almost 80 percent of all commercial construction work in this country, according to a brief filed by the AGC in the court of appeals below. See Motion of the Associated General Contractors of America, Inc. for Leave to File as an *Amicus Curiae* in Support of the Appellant/Cross-appellee at 3, *J.A. Croson Co. v. City of Richmond*, Nos. 85-1002, 85-1041 (4th Cir. Mar. 18, 1985). The AGC also points out that construction is one of the largest industries in the United States, representing approximately eight percent of the nation's gross national product. *Id.*

³⁶ See *supra* p. 5-6.

³⁷ The record in this case contains no finding on the precise number of contractors in Richmond who were minority in 1983, though there has been no dispute that the number is "quite small." J.S. App. 7a.

³⁸ As this Court noted in a similar context, "[j]udicial findings of exclusion from crafts on racial grounds are so numerous as to make

the skilled construction trades, and blacks have been prevented from following the traditional path from laborer to entrepreneur.³⁹ Consequently, most construction businesses are owned and managed by whites, as in Richmond.⁴⁰ Those few minority-owned construction businesses that have been formed have faced formidable ob-

such exclusion a proper subject for judicial notice." *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 198 n.1 (1979).

This exclusion of black workers from skilled construction crafts began over a hundred years ago. At the time of the Civil War, black workers constituted the majority of the skilled workers, including construction workers, in the South. H. Hill, *Black Labor and the American Legal System: Race, Work and the Law* 9-11 (1985); S. Spero & A. Harris, *The Black Worker: The Negro and the Labor Movement* 16 (1931); G. Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* 1079-1124 (1962); R. Weaver, *Negro Labor: A National Problem* 4-5 (1946); R. Rowan & L. Rubin, *Opening the Skilled Construction Trades to Blacks: A Study of the Washington and Indianapolis Plans for Minority Employment* 10-15 (1972). After the Civil War, and particularly after Reconstruction, black workers were systematically evicted from their craft positions in favor of white workers and barriers were erected to prevent black workers from entering those crafts in the future. Hill, *supra* at 12-34, 235-47; Myrdal, *supra* at 228-29. Construction historically is an industry from which blacks have been excluded by law and by the dominance of racially restrictive unions. M. Karson & R. Radosh, "The AFL and the Negro Worker, 1894-1949," in *The Negro and the American Labor Movement* 157-58 (J. Jacobson ed. 1968); Marshall, "The Negro in Southern Unions," in *The Negro and the American Labor Movement* 145 (J. Jacobson ed. 1968).

³⁹ *Fullilove*, 448 U.S. at 511-12 (Powell, J., concurring); *Rhode Island Chapter, Associated Gen. Contractors of Am. v. Kreps*, 450 F. Supp. 338, 356 (D.R.I. 1978); Days, *Fullilove*, 96 Yale L.J. 453, 477 (1987).

⁴⁰ J.S. App. 7a. According to testimony at the City Council hearing by a representative of the American Subcontractors Association, the latest Bureau of Census figures indicated that 4.7 percent of construction firms in this country are minority-owned, and 41 percent of these are concentrated in California, Illinois, New York, Florida and Hawaii. J.A. 35.

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stacles, rooted in discrimination, that have impaired their ability to compete.⁴¹ As one report of the United States House of Representatives stated, "The very basic problem . . . is that, over the years, there has developed a business system which has traditionally excluded measurable minority participation."⁴² This discrimination has as an inevitable corollary minimal participation by minority-owned businesses in public construction contracting opportunities.

This history of racial discrimination in the construction industry and its effects on public contracting are significant here because Richmond obviously has been part of this national pattern. The drafters of Richmond's Minority Business Utilization Plan in fact consulted this Court's decision in *Fullilove*, which discussed findings by the United States Congress that the effects of industry discrimination have not been confined to federal contracting. J.S. Supp. App. 165. The *Fullilove* plurality stated: "[T]here was direct evidence before the Congress that this pattern of disadvantage and discrimination existed with respect to state and local construction contracting as well."⁴³ The congressional findings further support

⁴¹ In *Fullilove*, this Court explained some of the barriers that minority businesses have faced in gaining access to government contracting opportunities at the federal, state and local levels:

Among the major difficulties confronting minority businesses were deficiencies in working capital, inability to meet bonding requirements, disability caused by an inadequate 'track record,' lack of awareness of bidding opportunities, unfamiliarity with bidding procedures, preselection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavor minority businesses.

448 U.S. at 467 (plurality opinion).

⁴² H.R. Rep. No. 1791, 94th Cong., 2d Sess. 182 (1977) (quoted in *Fullilove*, 448 U.S. at 466 n.48 (plurality opinion) and at 505 (Powell, J., concurring)).

⁴³ 448 U.S. at 478 (plurality opinion). This Court has held that a city's "substantial governmental interest" in regulating the time,

the conclusion that the enormous racial disparity in the awarding of city construction contracts was a consequence of racial discrimination in Richmond's local construction industry.⁴⁴

The Richmond City Council, based upon the evidence of discrimination outlined above and also upon its own familiarity with the economic and social history of Richmond in general and the local construction industry in particular,⁴⁵ had abundant reason to conclude that racial discrimination was responsible for the problem that it faced. Its conclusion that discrimination had occurred is unassailable. Richmond's local construction industry

place, or manner of protected speech may be established by findings and studies generated by other cities, "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986). It follows that Richmond should be able to rely on findings relevant to its problem made by the United States Congress and found by this Court to be supported by direct evidence.

⁴⁴ The facts supporting the Richmond ordinance are thus fundamentally different from the statistical evidence found insufficient to support the remedial plan in *Wygant*. In *Wygant*, the statistical evidence was not probative of discrimination. See *infra* p. 39. Here the extraordinary size of the disparity combines with other facts to compel the conclusion that discrimination had occurred.

⁴⁵ "No race-conscious provision that purports to serve a remedial purpose can be fairly assessed in a vacuum." *Wygant*, 476 U.S. at 296 (Marshall, J., dissenting). As this Court well knows, Richmond had confronted in its recent past the need to break down racial barriers in various other segments of its society and in the city government itself. See, e.g., *City of Richmond v. United States*, 422 U.S. 358 (1975) (concerning the City's annexation plan and its compliance with the Voting Rights Act); *Bradley v. School Board*, 462 F.2d 1058, 1065 (4th Cir. 1972) (en banc) (school desegregation case, finding that "within the City of Richmond there has been state . . . action tending to perpetuate apartheid of the races . . ."), *aff'd by an equally divided Court*, 412 U.S. 92 (1973) (per curiam).

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clearly has been "a business system which has traditionally excluded measurable minority participation."⁴⁶

Once Richmond established a basis for its remedial action, the ultimate burden of proving the plan invalid was on Croson. *Johnson v. Transportation Agency, Santa Clara County*, 107 S. Ct. 1442, 1449 (1987); *Wygant*, 476 U.S. at 277-78 (plurality opinion). Croson did not meet this burden. It could do nothing to rebut the compelling inference that racial discrimination was responsible for the "glaring absence" of construction contracts awarded to minority contractors. *International Brotherhood of Teamsters*, 431 U.S. at 342, n.23 ("[F]ine tuning of the statistics could not have obscured the glaring absence of minority line drivers [T]he company's inability to rebut the inference of discrimination came not from a misuse of statistics but from 'the inexorable zero'" (quoted in *Johnson*, 107 S. Ct. at 1465 (O'Connor, J., concurring in the judgment))). No other explanation even would have been plausible.

The district court heard all the facts and agreed that they supported an inference of discrimination. In a thorough opinion, it explicitly found "ample evidence" to conclude that the minimal minority participation in Richmond construction contracting reflected pervasive racial discrimination in the local construction industry.⁴⁷ The

⁴⁶ *Fullilove*, 448 U.S. at 466 n.48 (quoting H.R. Rep. No. 1791, 94th Cong., 2d Sess. 182 (1977)).

⁴⁷ J.S. Supp. App. 165-66, 172. A factual predicate for an affirmative action plan properly is established when, after the plan is challenged in court, the trial court finds "a strong basis in evidence" for the remedial action. *Wygant*, 476 U.S. at 277 (plurality opinion); see also *id.* at 286 (O'Connor, J., concurring in part and concurring in the judgment) (contemporaneous finding not required as long as there is "firm basis for believing that remedial action is required"). Because the district court below properly applied the "strong basis in evidence" test, its finding is entitled to deference. Cf. *American Textile Mfr's Inst. v. Donovan*, 452 U.S. 490, 529-30 (1981) ("Whether or not in the first instance we would find the Secretary's conclusions supported by substantial

court of appeals did not question the conclusion that discrimination had occurred, holding instead that the Richmond plan was unconstitutional because there was no finding of discrimination by Richmond itself. J.S. App. at 9a. Because the factual predicate for the Richmond ordinance has more than adequate support in the record of this case, the district court's findings should not be disturbed on this appeal.

B. Like Congress, Richmond Had A Compelling Interest In Remediating The Effects Of Identified Discrimination On Its Own Public Works Program

The Minority Business Utilization Plan was enacted after the City found itself doing business only with construction firms owned by whites, as a consequence of pervasive racial discrimination in Richmond's local construction industry. The City had a compelling interest in ending this appalling state of affairs and creating opportunities in its own public works program that had been unavailable to minorities due to that racial discrimination.

State and local governments⁴⁸ unquestionably have a compelling interest in remedying the effects of discrimination and providing equal protection of the laws in their

evidence, we cannot say that the court of appeals in this case 'misapprehended or grossly misapplied' the substantial evidence test").

⁴⁸ A local government derives its powers from the state. The manner in which a state chooses to delegate its powers to its political subdivisions is a question of state law. *Bakke*, 438 U.S. at 366 n.42 (opinion of Brennan, J., White, J., Marshall, J. and Blackmun, J., concurring in the judgment in part and dissenting in part); *South Florida Chapter of the Associated Gen. Contractors of Am. v. Metropolitan Dade County*, 723 F.2d at 852; *Schmidt v. Oakland Unified School Dist.*, 662 F.2d 550, 558 (9th Cir. 1981), *vacated on other grounds*, 457 U.S. 594 (1982). The district court found that the City Council had the authority under state law to enact the Minority Business Utilization Plan. J.S. Supp. App. 141-154. The court of appeals did not disturb this finding.

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jurisdictions.⁴⁹ This Court has held that this compelling governmental interest extends to ensuring that publicly available commercial opportunities are not denied to segments of the population on the basis of race, gender, or ethnic origin. See *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).⁵⁰ In so holding, the Court stressed "the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups" *Id.* at 626.

This case does not test the boundaries of this governmental interest, for at the very least a municipal government has a compelling interest in eradicating the effects of discrimination and ensuring equal opportunity in its own public works program. This interest is equivalent to

⁴⁹ For example, in *Railway Mail Ass'n v. Corsi*, 326 U.S. 88 (1945), this Court held that the states constitutionally could enact legislation prohibiting discrimination by labor organizations.

⁵⁰ In *Roberts*, this Court unanimously held that the Minnesota Human Rights Act, which prohibits discrimination in places of public accommodation, constitutionally could be applied to forbid the Jaycees from excluding women from full membership. The Court stressed that the exclusion of women from the Jaycees deprived them of business contacts, employment promotions and other commercial advantages that were publicly available to men. 468 U.S. at 626. The Court concluded that the state's interest in breaking down traditional barriers to opportunity was so compelling that it justified some infringement on the Jaycee male members' first amendment rights of free association. *Id.* at 623-626. Justice O'Connor, concurring, did not find an infringement of any rights of association, but agreed with the Court that a compelling governmental interest was involved. She stressed the importance of "the power of States to pursue the profoundly important goal of ensuring nondiscriminatory access to commercial opportunities in our society." *Id.* at 632 (O'Connor, J., concurring in part and concurring in the judgment). See also *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 107 S. Ct. 1940 (1987).

that which survived "a most searching examination" by this Court in *Fullilove*.⁵¹ Like Congress, Richmond determined that minority businesses were receiving practically none of its public construction contracting funds as a result of racial discrimination in the construction industry. Like Congress, Richmond "has not sought to give select minority groups a preferred standing in the construction industry, but has embarked on a remedial program to place them on a more equitable footing with respect to public contracting opportunities." 448 U.S. at 485-86 (plurality opinion). Ensuring nondiscriminatory access to government contracting opportunities is, this Court has stated, "one aspect of the equal protection of the laws." *Id.* at 478 (plurality opinion).

Like Congress, the City needed to take race into account in fashioning its remedy.⁵² Simply prohibiting discrimination by its public contractors would have served little purpose, since the discrimination was already unlawful.⁵³

⁵¹ 448 U.S. at 491 (plurality opinion). See also *id.* at 496 (Powell, J., concurring) (upholding the federal program "under the most stringent level of review").

⁵² A local government's action is not unconstitutional merely because it has some negative impact on individuals' constitutional rights. See, e.g., *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (a city's interest in advancing esthetic values is sufficiently compelling to justify some curtailment of speech protected by the first amendment).

⁵³ Exclusion from a construction trade union on racial grounds constitutes a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982). See *United Steelworkers of America v. Weber*, 443 U.S. 193, 198 n.1 (1979) (judicial findings under Title VII of "exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice"). Other forms of employment discrimination in the construction industry also violate Title VII, and employment discrimination by a recipient

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Moreover, prohibiting future discrimination does nothing to remedy the disabling effects of past discrimination. In Richmond, years of purposeful racial discrimination in the local construction industry had left white contractors with overwhelming advantages in the competition for public construction contracts and the industry generally. The negligible participation of minorities in the City's construction contracts certainly gave no indication that this state of affairs was going to change by itself any time soon. Like Congress, the City determined that affirmative action was necessary to create opportunities for minority businesses in public contracting and help them become more competitive. Otherwise, the City faced the likely prospect of continuing indefinitely to distribute its taxpayers' dollars to a pool of construction contractors from which minorities had been effectively excluded.

The importance to Richmond of ensuring that government contracts are awarded without the taint of racial discrimination cannot be overstated. Like discrimination by the government itself, discrimination that forecloses access to government benefits "creates mistrust, alienation, and all too often hostility toward the entire process of government."⁵⁴ The City, by continuing to award construction contracts to a pool of contractors from which minorities had been practically excluded, in effect had become a passive participant in a system based on discrimination, and was helping to perpetuate that system. There was great potential for mistrust of and hostility toward the city government under these circumstances,

of a Virginia public contract violates Virginia law as well. Va. Code Ann. § 11-44 (Repl. 1985). In addition, a white-owned construction firm's refusal on racial grounds to do business with a minority-owned firm violates 42 U.S.C. § 1981 (1982), which prohibits discrimination in contracting. See *Runyon v. McCrary*, 427 U.S. 160 (1976).

⁵⁴ *Wygant*, 476 at 290 (O'Connor, J., concurring) (quoting from S. Rep. No. 415, 92d Cong., 1st Sess. 10 (1971)).

and Richmond's interest in taking remedial action was substantial.

Furthermore, had Richmond not acted to remedy the problem, there would have been no remedy. Though part of a national pattern, the negligible minority participation in Richmond's public works program was Richmond's problem, to be addressed by Richmond. No other governmental entity has the same interest in this problem, and certainly no other governmental entity has the same competence to recognize the problem and fashion an appropriate remedy. No other governmental program in fact addresses the problem. It would be a perversion of federalism to hold that the federal government has a compelling interest in remedying the effects of racial discrimination on its own public works program, but a city government does not.⁵⁵

Finally, there should be no question that the Richmond City Council was an appropriate governmental unit to take action in furtherance of the City's remedial interest. As the City's legislative body accountable to the Richmond public, the City Council was competent to identify the existence of discrimination in Richmond's construction industry and its effects on the City's own public works

⁵⁵ The United States Commission on Civil Rights has urged that "States and their subdivisions must, at a minimum, enact laws which provide for their citizens the same level of protection offered by Federal statutes, executive orders, court decisions, and executive policy pronouncements." IV United States Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974*, at 129 n.32 (1975) (emphasis added) (quoting United States Commission on Civil Rights, "Revenue Sharing Program—Minimum Civil Rights Requirements" (1971)). And the Report of the National Advisory Commission on Civil Disorders (1968) (the "Kerner Commission"), established to study the causes and solutions to the urban riots of 1967, was emphatic that "[b]ecause the city is the focus of racial disorder, the immediate responsibility rests on community leaders and local institutions." Report of the Kerner Commission at 229.

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program, and to determine that the City should enact appropriate remedial legislation.

C. Richmond's Remedial Action Is Justified Without Evidence Of Its Own Discrimination

The court of appeals below held Richmond's Minority Business Utilization Plan unconstitutional because it was not predicated on "prior discrimination by the locality itself." J.S. App. 9a. This requirement was unwarranted because pervasive local industry discrimination had prevented minority businesses even from competing for city contracts, and thus provided an adequate predicate for the remedial ordinance. Requiring evidence of the City's own discrimination in these circumstances would only permit this pernicious industry discrimination, and its effects on public contracting, to go unremedied. The court of appeals' requirement is incompatible with the precedents of this Court.⁵⁶

The decision below rested on the premise that remedying a government's own discrimination is the only governmental interest that will support affirmative action policies. This case shows that this premise is untenable. As explained above, Richmond has a compelling interest in its remedial plan because of the profound effects of identified, pervasive, unlawful discrimination on its public works program. This interest is compelling regardless of whether the City itself discriminated against minorities in construction procurement.

Focusing on whether the City itself discriminated misses the point. Because racial discrimination in the local construction industry had substantially foreclosed minority access to city contracting opportunities, it had the same effect as discrimination by Richmond itself. In either case, the end result is the same—negligible minor-

⁵⁶ The court of appeals derived the requirement from language in the plurality opinion in *Wygant*. As explained in part D below, *Wygant* does not control this case. See *infra* p. 38-41.

ity participation in the City's public construction contracts.⁵⁷

The court of appeals' approach is unsound and leads to an anomalous result. It held that the City should have compared "the number of minority contracts and the number of minority *contractors*, taking into account other relevant variables such as experience and specialties." J.S. App. 7a (emphasis in original). This comparison never will be probative of governmental discrimination where, as here, industry discrimination has prevented minority contractors from even competing for city contracts.⁵⁸ The court of appeals' approach would permit

⁵⁷ See, Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 Harv. L. Rev. 78 (1986) (arguing that affirmative action plans may serve a variety of important goals other than remedying the past discrimination of the entity adopting the plan).

⁵⁸ As the district court found, the low number of minority contractors indicates "that past discrimination has stymied minority entry into the construction industry in general, as well as participation in government contracting in particular." J.S. Supp. App. 167.

In this sense, this case is like *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979). In *Weber*, this Court held that a private employer's affirmative plan was justified by a showing of a "conspicuous . . . imbalance in traditionally segregated job categories," 443 U.S. at 209, rather than a disparity between the percentage of black skilled craft workers hired and the percentage in the area labor market. In discussing this aspect of *Weber*, the Court in *Johnson* stated:

Such an approach reflected a recognition that the proportion of black craft workers in the local labor force was likely as miniscule as the proportion in Kaiser's work force. The Court realized that the lack of imbalance between these figures would mean that employers in precisely those industries in which discrimination has been most effective would be precluded from adopting training programs to increase the percentage of qualified minorities.

107 S. Ct. at 1453 n.10. Cf. *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977) (in establishing a prima facie case of employment dis-

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this pervasive, unlawful industry discrimination to go unremedied. It would virtually guarantee the perpetuation of the status quo.⁵⁹

Nothing in this Court's decisions requires evidence of Richmond's own discrimination. In *Fullilove*, there was no evidence that the federal government itself had engaged in racial discrimination in its disbursement of federal contracting funds. 448 U.S. at 527 (Stewart, J., dissenting). This Court's judgment did not depend on evidence of governmental discrimination of any type. The Court upheld the federal plan as a remedy for the effects of discrimination in limiting public contracting opportunities for minorities; though some of that discrimination was committed by state actors, nothing in either plurality opinion suggests that this was essential to the result.⁶⁰

crimination, plaintiff could rely on statistics concerning general population rather than applicant pool, where discriminatory practices may have discouraged persons from even entering applicant pool).

⁵⁹ In its affirmative action program for construction contractors, the federal government relies on general population statistics for precisely this reason. The Department of Labor concluded that it would not consider particular trades or crafts as the relevant labor pool, since minorities had been excluded from those trades and crafts by discrimination. See 41 C.F.R. § 60-4 (1987); Notice, 45 Fed. Reg. 65983 (1980).

⁶⁰ For Justice Powell, the result in *Fullilove* clearly turned on the existence of identified, illegal discrimination, whether committed by private or state actors. He stated in his concurring opinion: "[T]he distinction between permissible remedial action and impermissible racial preference rests on the existence of a constitutional or statutory violation. . . ." 448 U.S. at 498. Congress' action was permissible in his view because refusals to subcontract to minority contractors could violate Title VII of the Civil Rights Act of 1964 or the Fourteenth Amendment, depending on the identity of the discriminating party. *Id.* at 506. It was also signifi-

In *Johnson*, this Court held that Title VII of the Civil Rights Act of 1964 does not require a public employer's voluntary affirmative action plan to be predicated on its own discrimination. 107 S. Ct. at 1451. To justify its affirmative action plan, an employer need not show that it has committed even an "arguable violation" of Title VII; all that is required is a showing of a manifest imbalance in a traditionally segregated job category. *Id.* at 1451-52. This is the requirement under Title VII even where, as in *Johnson*, the court affirmatively finds that the employer has not engaged in discrimination. *Id.* at 1466 (Scalia, J., dissenting).

A significantly different requirement should not be imposed under the Equal Protection Clause. Even if the prohibitions of Title VII and the Equal Protection Clause are not identical, a point about which there has been some dispute, they serve similar purposes.⁶¹ In *Johnson*, this

cant that Congress was a competent body to remedy the effects of this discrimination. *Id.* at 498 (Powell, J., concurring).

Justice Powell had applied the same rationale in *Bakke*, concluding that the state medical school's use of race-conscious measures was unconstitutional because it was not predicated on findings of identified discrimination made by a governmental body competent to make such findings. *Bakke*, 438 U.S. at 307-09. See also *Fullilove*, 448 U.S. at 498.

⁶¹ Moreover, Title VII contains a prohibition on racial discrimination that is far more specific than the language in the Equal Protection Clause. Therefore, as Justice Scalia stated in *Johnson*, joined by Chief Justice Rehnquist and Justice White, "it is most unlikely that Title VII was intended to place a *lesser* restraint on discrimination by public actors than is established by the Constitution." 107 S. Ct. at 1469 (Scalia, J., dissenting) (emphasis in original). Justice O'Connor in *Johnson* also stated her view that "the proper initial inquiry in evaluating the legality of an affirmative action plan by a public employer under Title VII is no different from that required by the Equal Protection Clause." *Id.* at 1461 (O'Connor, J., concurring). In *Paradise*, 107 S. Ct. at 1075 n.1 (Powell, J., concurring), Justice Powell indicated his belief that the standards of analysis in Title VII and Equal Protection cases are similar, though not identical.

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Court reasoned that requiring employers to present evidence of even an "arguable violation" of law could thwart voluntary affirmative action efforts, which can play a critical role in furthering Title VII's objective of "break[ing] down old patterns of racial segregation and hierarchy." *Id.* at 1450-51 (quoting *Weber*, 443 U.S. at 208).⁶² The Equal Protection Clause of the Fourteenth Amendment, ratified into law as centuries of slavery were coming to an end, had an objective similar to and no less compelling than that of Title VII.⁶³ Requiring a municipality to present evidence of its own discrimination would undermine the goals of the Equal Protection Clause, just as it undermines the goals of Title VII.⁶⁴ Such a require-

⁶² The Richmond City Council in fact was very concerned that its enactment of a remedial plan not be construed as an admission of liability for past discrimination. When one Council member expressed concern that characterizing the plan as "remedial" might give rise to liability, the City's attorney responded:

In the term remedial, we're not just implying that the City was intentionally discriminatory in the past. What we're saying is that there are statistics about the number of minorities which were awarded contracts in the past which would justify the remedial aspects of the legislation. We're not saying there was intentional discrimination in any particular case.

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⁶³ See *Bakke*, 438 U.S. at 291 (Powell, J.) (the Fourteenth Amendment's "'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 oppressions of those who had formerly exercised unlimited dominion over him'" (quoting from *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 71 (1872)). It would be ironic to use the amendment to prevent the states from achieving that original purpose. "Those original aims persist. And that, in a distinct sense, is what 'affirmative action,' in the face of proper facts, is all about." *Bakke*, 438 U.S. at 405 (opinion of Blackmun, J.).

⁶⁴ Not only would such a requirement generate concerns about legal liability, but the process of requiring public officials to reopen the past could be painful and divisive to the community as a whole. A municipality that wishes to achieve racial equality should not have to take such risks in order to do so.

ment would be a dramatic departure from this Court's reasoning in *Johnson*.⁶⁵

D. *Wygant v. Jackson Board of Education* Does Not Control This Case

The sole support cited by the court of appeals for its "governmental discrimination" requirement is language in the plurality opinion in *Wygant*. The portion of the opinion on which it relied is as follows:

This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination.

476 U.S. at 274 (plurality opinion). See J.S. App. 5a. The court of appeals incorrectly concluded that this language dictates the result in this case.

The language quoted above did not receive the support of a majority of this Court in *Wygant*, and in any event had little to do with even the holding of the plurality.

⁶⁵ In *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 3019 (1986), this Court reaffirmed the proposition that there is a compelling governmental interest in remedying the effects of identified racial discrimination even where the government itself has not discriminated. The Court held that a district court was not statutorily or constitutionally prohibited from ordering a union and its apprenticeship committee to implement affirmative action policies to improve minority membership. The union and apprenticeship committee had been found guilty of egregious violations of Title VII by discriminating against racial minorities in recruitment, selection, training and admission to the union. Because of this discrimination, which was wholly private, the court's order survived even Justice Powell's strict scrutiny under the Equal Protection Clause. He stated that the finding of egregious Title VII violations "establishes, without a doubt, a compelling governmental interest sufficient to justify the imposition of a racially classified remedy." 106 S. Ct. at 3055 (Powell, J., concurring).

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In contrast to *Fullilove*, *Wygant* involved issues very different from those presented here. Not only did it concern a layoff scheme in a school employment context, but the governmental interest supporting the layoffs was nothing like that supporting the Richmond plan. The court of appeals below simply misapplied *Wygant* to the facts of this case.

The court of appeals in *Wygant* had upheld a race-conscious layoff provision on the theory that a school board had an interest in providing minority role models for its minority students in order to alleviate the effects of societal discrimination. A plurality of the Court rejected the court of appeals' approach, reasoning that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." 476 U.S. at 276. Moreover, the key evidence in the record in *Wygant* simply was not probative of any sort of discrimination. As Justice Powell explained, "[t]here are numerous explanations for a disparity between the percentage of minority students and the percentage of minority faculty, many of them completely unrelated to discrimination of any kind. In fact, there is no apparent connection between the two groups." *Id.*

There thus was an absence of identified discrimination in *Wygant*; the Court never considered whether a local governmental body always must demonstrate its own discrimination in order to establish an "important" or "compelling" interest in its remedial plan.⁶⁶ It certainly never considered "governmental interest" issues in the public contracting context. The critical issues in the present case were neither addressed nor resolved in *Wygant*.

⁶⁶ The Court did not consider the school board's claims that it in fact had engaged in past discrimination because a plurality of the Court found the school board's layoff provision an unconstitutional means to implement affirmative action policies in any event. See *Wygant*, 476 U.S. at 277 (plurality opinion).

At most, the plurality in *Wygant* held that societal discrimination alone, as exemplified by the lower court's role model theory, is insufficient to justify a racial classification.⁶⁷ The entire Court also reaffirmed the proposition that "remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest" to justify a racial classification. *Id.* at 286 (O'Connor, J., concurring in part and concurring in the judgment) (emphasis added). However, *Wygant* decided little or nothing about governmental interests that lie between these two extremes.⁶⁸

Fullilove clearly is the precedent most relevant to this case. The governmental interest here is practically the same as that at issue in *Fullilove*, and is fundamentally different from that at issue in *Wygant*. Richmond's ordinance was not a remedy for "societal discrimination." It was predicated on identified, purposeful discrimination in Richmond's construction industry that had caused an extraordinary racial imbalance in the awarding of city construction contracts. The City was a passive participant in that discrimination almost every time it awarded

⁶⁷ *Id.* at 274-76 (plurality opinion). As the term had been used in *Bakke*, "societal discrimination" simply meant unidentified discrimination by society at large. See, e.g., 438 U.S. at 307 (Powell, J.). Prior to *Wygant*, the term had not been used to refer to all discrimination not committed by a state actor. In fact, this Court in *Fullilove* held that the interest in remedying private identified discrimination may support a government's use of racial classifications. See *supra* p. 35 & note 60.

⁶⁸ As Justice O'Connor pointed out in her separate opinion:

[C]ertainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies.

Id. at 286 (O'Connor, concurring in part and concurring in the judgment).

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a construction contract. Under these circumstances, Richmond had a substantial interest in opening for minority businesses the public contracting opportunities that long had been closed to them.

II. THE RICHMOND ORDINANCE IS SUFFICIENTLY NARROWLY TAILORED TO ACHIEVE ITS REMEDIAL PURPOSE

A state or local government must choose appropriate means to implement the ends of its affirmative action plan. This Court has identified a number of factors to be considered in determining whether a race-conscious plan employs constitutionally acceptable means to achieve its purpose. These include:

the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.

Paradise, 107 S. Ct. at 1067 (plurality opinion).⁶⁹ When considered in light of these factors, the Richmond ordinance is sufficiently narrowly tailored to pass constitutional muster. It is a temporary, flexible plan that is designed to fit its remedial purpose and have minimal impact on the interests of non-minorities.⁷⁰

⁶⁹ These factors are almost identical to those set forth by Justice Powell in his concurring opinion in *Fullilove*, see 448 U.S. at 510-11, and considered by the district court below. See *supra* p. 12.

⁷⁰ The plan also was reasonably applied to appellee Croson. The district court so found after conducting an evidentiary hearing on the circumstances surrounding the refusal to award Croson a contract. J.S. Supp. App. 209-214 & n.20. The court of appeals did not disturb this factual finding.

A. The Richmond Ordinance Is Necessary To Remedy the Effects Of Racial Discrimination On City Construction Contracting And Has Minimal Adverse Impact On Non-Minorities

Once Richmond identified the problem that it faced, it enacted an ordinance that was well designed to correct that problem. The ordinance has minimal impact on non-minorities, and it preserves the competitiveness of the bidding process for city construction contracts.

As Congress found and this Court acknowledged in *Fullilove*, minority opportunities in public construction contracting have been limited by business practices that effectively perpetuate the effects of longstanding racial discrimination.⁷¹ This clearly is the case in Richmond. Like Congress, the Richmond City Council had good reason to believe that there could be no change in the status quo without race-conscious affirmative action to break down barriers to minority opportunity in its public works program.

Richmond's ordinance was well designed to remedy the problems faced by minority-owned construction firms. These firms needed an opportunity to develop so that they could better compete in the marketplace, including the market for the City's construction contracts. Accordingly, none of the City's prime construction contracts have been set aside for minority businesses. Rather, the City more realistically chose to ensure opportunities for minorities at the subcontracting level. By teaming up minority businesses with more established, white-owned firms, the ordinance removes some obstacles that had kept existing minority firms out of public contract-

⁷¹ See *Fullilove*, 448 U.S. at 478 (plurality opinion) ("a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises . . . result[s] . . . from the existence and maintenance of barriers to competitive access which had their roots in racial and ethnic discrimination. . .").

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ing, such as lack of a track record, access to financing to meet bonding requirements, and purposeful racial discrimination within the industry. *See supra* note 41. It also aids these firms by providing a source of revenue, giving them greater experience and credibility, and creating an opportunity to develop relationships with the more established contractors.

In addition, the ordinance encourages the formation of contracting firms by minorities that previously had seen little opportunity in construction contracting in Richmond. As this Court has stated: "Affirmative action 'promptly operates to change the outward and visible signs of yesterday's racial distinctions and thus, to provide an impetus to the process of dismantling the barriers, psychological or otherwise, erected by past practices.'" *Sheet Metal Workers*, 106 S. Ct. at 3037 (plurality opinion) (quoting *NAACP v. Allen*, 493 F.2d 614, 621 (5th Cir. 1974)). In short, racial discrimination had created a "business system"⁷² that had largely excluded minorities and had enabled white-owned firms to dominate the competition for city construction contracts; the Minority Business Utilization Plan was well designed to remedy the effects of this discrimination by bringing minority contractors into the business system and thus into a position to compete for city contracts.

The ordinance also has only a minor impact on non-minority contractors. Unlike white teachers who are laid off because of preferences given to minorities, *see Wygant*, 476 U.S. at 272 (plurality opinion), no contractor has a vested right to a public construction contract, or a portion thereof. Nor does the Richmond ordinance unsettle any contractor's "legitimate firmly rooted expectation." *Johnson*, 107 S. Ct. at 1455. As this Court recognized in *Fullilove*, the actual "burden" shouldered by non-minority firms is very light when the amount spent

⁷² *See supra* note 42 and accompanying text.

by the City on construction contracting is compared with overall construction opportunities.⁷³ Moreover, as this Court also observed in *Fullilove*, it is not unreasonable to assume "that in the past some non-minority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities." 448 U.S. at 485 (plurality opinion). In view of these considerations, any slight burden that the ordinance imposes on this group is constitutionally acceptable.

Because it does not set aside prime contracts for minority businesses, the ordinance also preserves the competitiveness of the bidding process for city construction contracts. It contemplates that minority businesses will be involved in this process as subcontractors. A minority contractor has every interest in making its price competitive, since that will enhance the prospect that its prime contractor will receive the contract. The ordinance therefore does not give minority firms any monopoly power.⁷⁴ Indeed, by opening up the pool of competitors, the ordinance is likely in the long run to increase the

⁷³ 448 U.S. at 484 (plurality opinion). In the five years preceding the enactment of the Minority Business Utilization Plan, the City spent \$124 million, or approximately \$25 million per year, on construction contracts. According to the United States Bureau of the Census, between \$220 and \$280 million was spent each year on new construction projects in Richmond between 1978 and 1983. United States Bureau of the Census, May Report: "Value of New Construction Put in Place" (1986). These figures indicate that city construction projects account for approximately ten percent of all construction in Richmond. This means that the thirty percent minority subcontracting requirement accounts for only three percent of all construction contracting opportunities in Richmond.

⁷⁴ As the district court found, even if a minority business did have some monopoly power and tried to extract an unreasonably high price, the City could exclude that business from participation on the ground that it is not a "responsible" business. J.S. Supp. App. 186. The City has every financial incentive to ensure that minority businesses do not abuse the plan to obtain unfair profits.

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competition for city contracts, and thus reduce costs to the city.⁷⁵

B. The Ordinance Is Designed To Be Reasonable, Flexible And Temporary

The Minority Business Utilization Plan does not establish unreasonable, rigid quotas for the participation of minority-owned businesses in city construction contracts. Its waiver provision permits the plan to be applied in a flexible manner and limits its impact on non-minority contractors. In addition, the Richmond ordinance is temporary and benefits only bona fide minority-owned businesses.

The ordinance provides for five agencies to assist contractors in locating qualified minority businesses to participate in a construction contract. J.S. Supp. App. 67. If a prime contractor demonstrates that compliance with the subcontracting requirement is not feasible because sufficient qualified minority businesses are not available, the City waives or lowers the thirty percent requirement as appropriate. *Id.* at 65-70. The thirty percent requirement therefore is not a rigid numerical quota, but a goal that is waived or lowered in instances where it unduly burdens non-minority prime contractors and serves no remedial purpose.⁷⁶

Particularly in light of the waiver provision, the choice of the thirty percent figure was reasonable. Tying the subcontracting requirement to the percentage of minority contractors in Richmond was not a viable option. Because the percentage of minority contractors was itself

⁷⁵ For precisely this reason, the district court concluded that the Richmond ordinance was consistent with competitive principles. *Id.* at 142-46.

⁷⁶ The City also has a procedure whereby a disappointed bidder may protest an award or a decision to award a contract. As the district court found, this procedure may be used to protest the denial of a requested waiver once the contract has been awarded. See J.S. Supp. App. 192.

low as a result of discrimination, that approach only would have perpetuated that discrimination. Instead, the thirty percent figure is approximately midway between one percent—the percentage of city contracts awarded to minorities—and fifty percent—the percentage of minorities in Richmond. The ten percent set-aside upheld in *Fullilove* rested on similar logic. Justice Powell explained that the set-aside was reasonable because the figure “falls roughly halfway between the present percentage of minority contractors and the percentage of minority group members in the Nation.” 448 U.S. at 513-14 (Powell, J., concurring). Arriving at the thirty percent figure “‘necessarily involve[d] a degree of approximation and imprecision,’”⁷⁷ but the choice was a reasonable one.⁷⁸

The fact that the Richmond ordinance is temporary further enhances its reasonableness. The expiration date is consistent with the remedial nature of the ordinance. Because the ordinance was designed to last only five years, and virtually no minority firms had been receiving city construction contracts, it was highly unlikely that the ordinance would outlive its remedial purpose. J.A. 14. The ordinance is designed merely to *attain* a better racial balance in the awarding of city construction contracts, rather than to *maintain* a particular balance. See *Johnson*, 107 S. Ct. at 1456.

⁷⁷ *Paradise*, 107 S. Ct. at 1072 (quoting *International Brotherhood of Teamsters*, 431 U.S. at 372).

⁷⁸ A similar choice for a similar purpose was made by the Office of Federal Contracts Compliance of the U.S. Department of Labor (“OFCCP”). OFCCP in 1980 set employment goals for the construction industry for standard metropolitan statistical areas (“SMSA”) through the United States. 41 C.F.R. § 60-4 (1987); Notice, 45 Fed. Reg. 65984-91 (1980). It adopted a goal of 24.9% minority employment for the Richmond SMSA which, according to the 1970 census figures used by OFCCP, had a minority population of 25.5%. 45 Fed. Reg. at 65981, 65985. See U.S. Bureau of the Census, PC(1)-B48, General Population Characteristics Virginia, 1970 Census of Population (1970).

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Finally, the Richmond ordinance has administrative provisions which, as the district court found, require the city contracting officer to deny minority business status to firms unless they are majority owned and actually controlled by minorities. J.S. Supp. App. 62, 215-19. The purpose of these provisions is to ensure that businesses participating in the plan are not "sham" minority businesses in fact controlled by whites. *Id.* at 218. The City takes this provision seriously, as illustrated by *Mega Contractors v. City of Richmond*, Civ. No. 84-0022-R (E.D. Va. Dec. 3, 1984), the companion case to this one below. In that case, the district court found that the City acted reasonably in denying minority business status to a contracting firm that was nominally owned by a minority group member but actually controlled and operated by whites. See J.S. Supp. App. 215-22.

CONCLUSION

For the reasons stated herein, this Court should reverse the decision of the court of appeals and uphold the constitutionality of Richmond's Minority Business Utilization Plan.

Respectfully submitted,

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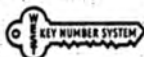
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April 21, 1988

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search occurred. The judgment of the Court, therefore, is to reverse outright on the Fourth Amendment issue. Accordingly, for the reasons set forth above, I respectfully dissent.



CITY OF RICHMOND, Appellant

v.

J.A. CROSON COMPANY.

No. 87-998.

Argued Oct. 5, 1988.

Decided Jan. 28, 1989.

Bidder brought suit challenging city's plan requiring prime contractors awarded city construction contracts to subcontract at least 30% of the dollar amount of each contract to one or more "Minority Business Enterprises." The United States District Court for the Eastern District of Virginia, Robert R. Merhige, Jr., J., ruled in favor of city. Bidder appealed. The Court of Appeals, Fourth Circuit, 779 F.2d 181, affirmed. Certiorari was granted. The Supreme Court, 106 S.Ct. 3327, remanded case for further consideration. On remand, the Court of Appeals, 822 F.2d 1355, struck down the set-aside program, and probable jurisdiction was noted. The Supreme Court, Justice O'Connor, held that: (1) city failed to demonstrate compelling governmental interest justifying the plan, and (2) plan was not narrowly tailored to remedy effects of prior discrimination.

Affirmed.

Justices Stevens and Kennedy filed opinions concurring in part and concurring in the judgment.

Justice Scalia filed an opinion concurring in the judgment.

Justice Marshall filed a dissenting opinion in which Justice Brennan and Blackmun joined.

Justice Blackmun filed dissenting opinion in which Justice Brennan joined.

1. Federal Courts ¶13

Expiration of ordinance requiring prime contractors to whom city awarded construction contracts to subcontract at least 30% of the dollar amount of each contract to one or more "Minority Business Enterprises" did not render controversy between city and bidder moot, as there remained a live controversy between the parties over whether city's refusal to award bidder a contract pursuant to the ordinance was lawful and thus entitle contractor to damages. U.S.C.A. Const.Amend. 14.

2. Constitutional Law ¶215.2

City's plan, requiring prime contractors awarded city construction contracts to subcontract at least 30% of the dollar amount of each contract to one or more "Minority Business Enterprises," denied certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race, and thus strict scrutiny standard of review had to be applied, which required firm evidentiary basis for concluding that underrepresentation of minorities was a product of past discrimination. U.S.C.A. Const.Amend. 14.

3. Constitutional Law ¶215

Standard of review under equal protection clause is not dependent on race of those burdened or benefited by a particular classification. U.S.C.A. Const.Amend. 14.

4. Municipal Corporations ¶356

City failed to demonstrate compelling governmental interest to justify plan requiring prime contractors awarded city construction contracts to subcontract at least 30% of the dollar amount of each contract to one or more "Minority Business Enterprises," since factual predicate supporting plan did not establish the type of identified past discrimination in city's construction

industry that would authorize race-based relief. U.S.C.A. Const.Amend. 14.

5. Constitutional Law ¶70.1(4)

Municipal Corporations ¶63.1(2)

Fact-finding process of legislative bodies is generally entitled to presumption of regularity and deferential review by the judiciary.

6. Civil Rights ¶44(1)

Where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination under Title VII, but when special qualifications are required to fill particular jobs, comparisons to the general population, rather than to smaller groups of individuals who possess the necessary qualifications, may have little probative value. Public Works Employment Act of 1976, § 102 et seq., 42 U.S.C.A. § 6701 et seq.

7. Civil Rights ¶44(1)

Where special qualifications are necessary, relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task.

8. Municipal Corporations ¶356

City's plan requiring prime contractors awarded city construction contracts to subcontract at least 30% of the dollar amount of each contract to one or more "Minority Business Enterprises" was not narrowly tailored to remedy prior discrimination; there did not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting, and the 30% quota could not be said to be narrowly tailored to any goal, except perhaps outright racial balancing. U.S.C.A. Const. Amend. 14.

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the

9. Civil Rights ¶13.13(1)

Municipal Corporations ¶356

Where there is a significant statistical disparity between the number of minority contractors willing and able to perform a particular service and the number of such contractors actually employed by the locality or locality's prime contractors, inference of discriminatory exclusion could arise; under such circumstance could act to dismantle the closed bid system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria; in the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion. U.S.C.A. Const.Amend.

10. Municipal Corporations ¶356

Racially motivated refusal to award city construction contracts to minority contractors would justify penalizing discriminator and providing appropriate relief to victim of such discrimination; moreover, evidence of a pattern of individual discriminatory acts can, supported by appropriate statistical proof, support to local government's determination that broader remedial relief is justified. U.S.C.A. Const.Amend. 14.

Syllabus*

Appellant city adopted a Minority Business Utilization Plan (Plan) requiring contractors awarded city construction contracts to subcontract at least 30% of the dollar amount of each contract to one or more "Minority Business Enterprises" (MBEs), which the Plan defined to include business from anywhere in the country at least 51% of which is owned and controlled by black, Spanish-speaking, Orientals, Eskimo, or Aleut citizens. At the time the Plan declared that it was "remedial" in nature, it was adopted after a public hearing at which no direct evidence was presented that the city had discriminated on the basis of race in letting contracts.

See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 499.

that its prime contractors had discriminated against minority subcontractors. The evidence that was introduced included: a statistical study indicating that, although the city's population was 50% black, only 0.67% of its prime construction contracts had been awarded to minority businesses in recent years; figures establishing that a variety of local contractors' associations had virtually no MBE members; the city's counsel's conclusion that the Plan was constitutional under *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902, and the statements of Plan proponents indicating that there had been widespread racial discrimination in the local, state, and national construction industries. Pursuant to the Plan, the city adopted rules requiring individualized consideration of each bid or request for a waiver of the 30% set-aside, and providing that a waiver could be granted only upon proof that sufficient qualified MBEs were unavailable or unwilling to participate. After appellee construction company, the sole bidder on a city contract, was denied a waiver and lost its contract, it brought suit under 42 U.S.C. § 1983, alleging that the Plan was unconstitutional under the Fourteenth Amendment's Equal Protection Clause. The Federal District Court upheld the Plan in all respects, and the Court of Appeals affirmed, applying a test derived from the principal opinion in *Fullilove, supra*, which accorded great deference to Congress' findings of past societal discrimination in holding that a 10% minority set-aside for certain federal construction grants did not violate the equal protection component of the Fifth Amendment. However, on appellee's petition for certiorari in this case, this Court vacated and remanded for further consideration in light of its intervening decision in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260, in which the plurality applied a strict scrutiny standard in holding that a race-based layoff program agreed to by a school board and the local teacher's union violated the Fourteenth Amendment's Equal Protection Clause. On remand, the

Court of Appeals held that the city's Plan violated both prongs of strict scrutiny, in that (1) the Plan was not justified by a compelling governmental interest, since the record revealed no prior discrimination by the city itself in awarding contracts, and (2) the 30% set-aside was not narrowly tailored to accomplish a remedial purpose.

Held: The judgment is affirmed.

822 F.2d 1355 (CA4 1987), affirmed.

Justice O'CONNOR delivered the opinion of the Court with respect to Parts I, III-B, and IV, concluding that:

1. The city has failed to demonstrate a compelling governmental interest justifying the Plan, since the factual predicate supporting the Plan does not establish the type of identified past discrimination in the city's construction industry that would authorize race-based relief under the Fourteenth Amendment's Equal Protection Clause. Pp. 723-728.

(a) A generalized assertion that there has been past discrimination in the entire construction industry cannot justify the use of an unyielding racial quota, since it provides no guidance for the city's legislative body to determine the precise scope of the injury it seeks to remedy and would allow race-based decisionmaking essentially limitless in scope and duration. The city's argument that it is attempting to remedy various forms of past societal discrimination that are alleged to be responsible for the small number of minority entrepreneurs in the local contracting industry fails, since the city also lists a host of nonracial factors which would seem to face a member of any racial group seeking to establish a new business enterprise, such as deficiencies in working capital, inability to meet bonding requirements, unfamiliarity with bidding procedures, and disability caused by an inadequate track record. Pp. 723-724.

(b) None of the "facts" cited by the city or relied on by the District Court, singly or together, provide a basis for a prima facie case of a constitutional or statutory violation by anyone in the city's con-

struction industry. The fact that the Plan declares itself to be "remedial" is insufficient, since the mere recitation of a "benign" or legitimate purpose for a racial classification is entitled to little or no weight. Similarly, the views of Plan proponents as to past and present discrimination in the industry are highly conclusory and of little probative value. Reliance on the disparity between the number of prime contracts awarded to minority businesses and the city's minority population is also misplaced, since the proper statistical evaluation would compare the percentage of MBEs in the relevant market that are qualified to undertake city subcontracting work with the percentage of total city construction dollars that are presently awarded to minority subcontractors, neither of which is known to the city. The fact that MBE membership in local contractors' associations was extremely low is also not probative absent some link to the number of MBEs eligible for membership, since there are numerous explanations for the dearth of minority participation, including past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial choices. Congress' finding in connection with the set-aside approved in *Fullilove* that there had been nationwide discrimination in the construction industry also has extremely limited probative value, since, by including a waiver procedure in the national program, Congress explicitly recognized that the scope of the problem would vary from market area to market area. In any event, Congress was acting pursuant to its unique enforcement powers under § 5 of the Fourteenth Amendment. Pp. 724-727.

(c) The "evidence" relied upon by Justice MARSHALL's dissent—the city's history of school desegregation and numerous congressional reports—does little to define the scope of any injury to minority contractors in the city or the necessary remedy, and could justify a preference of any size or duration. Moreover, Justice MARSHALL's suggestion that discrimination

findings may be "shared" from jurisdiction to jurisdiction is unprecedented and contrary to this Court's decisions. P. 727.

(d) Since there is *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the city's construction industry, the Plan's random inclusion of those groups strongly impugns the city's claim of remedial motivation. Pp. 727-728.

2. The Plan is not narrowly tailored to remedy the effects of prior discrimination, since it entitles a black, Hispanic, or Oriental entrepreneur from anywhere in the country to an absolute preference over other citizens based solely on their race. Although many of the barriers to minority participation in the construction industry relied upon by the city to justify the Plan appear to be race neutral, there is no evidence that the city considered using alternative, race-neutral means to increase minority participation in city contracting. Moreover, the Plan's rigid 30% quota rests upon the completely unrealistic assumption that minorities will choose to enter construction in lockstep proportion to their representation in the local population. Unlike the program upheld in *Fullilove*, the Plan's waiver system focuses upon the availability of MBEs, and does not inquire whether the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors. Given the fact that the city must already consider bids and waivers on a case-by-case basis, the city's only interest in maintaining a quota system rather than investigating the need for remedial action in particular cases would seem to be simply administrative convenience, which, standing alone, cannot justify the use of a suspect classification under equal protection strict scrutiny. Pp. 728-729.

Justice O'CONNOR, joined by THE CHIEF JUSTICE and Justice WHITE, concluded in Part II that if the city could

identify past discrimination in the local construction industry with the particularity required by the Equal Protection Clause, it would have the power to adopt race-based legislation designed to eradicate the effects of that discrimination. The principal opinion in *Fullilove* cannot be read to relieve the city of the necessity of making the specific findings of discrimination required by the Clause, since the congressional finding of past discrimination relied on in that case was made pursuant to Congress' unique power under § 5 of the Amendment to enforce, and therefore to identify and redress violations of, the Amendment's provisions. Conversely, § 1 of the Amendment, which includes the Equal Protection Clause, is an explicit constraint upon the power of States and political subdivisions, which must undertake any remedial efforts in accordance with the dictates of that section. However, the Court of Appeals erred to the extent that it followed by rote the *Wygant* plurality's ruling that the Equal Protection Clause requires a showing of prior discrimination by the governmental unit involved, since that ruling was made in the context of a race-based policy that affected the particular public employer's own work force, whereas this case involves a state entity which has specific state-law authority to address discriminatory practices within local commerce under its jurisdiction. Pp. 717-720.

Justice O'CONNOR, joined by THE CHIEF JUSTICE, Justice WHITE, and Justice KENNEDY, concluded in Parts III-A and V that:

1. Since the Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely on their race, *Wygant*'s strict scrutiny standard of review must be applied, which requires a firm evidentiary basis for concluding that the underrepresentation of minorities is a product of past discrimination. Application of that standard, which is not dependent on the race of those burdened or benefited by the racial classification, assures that the city is pursuing a remedial

goal important enough to warrant use of a highly suspect tool and that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype. The relaxed standard of review proposed by Justice MARSHALL's dissent does not provide a means for determining that a racial classification is in fact "designed to further remedial goals," since it accepts the remedial nature of the classification before examination of the factual basis for the classification's enactment and the nexus between its scope and that factual basis. Even if the level of equal protection scrutiny could be said to vary according to the ability of different groups to defend their interests in the representative process, heightened scrutiny would still be appropriate in the circumstances of this case, since blacks comprise approximately 50% of the city's population and hold five of nine seats on the City Council, thereby raising the concern that the political majority may have acted to disadvantage a minority based on unwarranted assumptions or incomplete facts. Pp. 720-723.

2. Even in the absence of evidence of discrimination in the local construction industry, the city has at its disposal an array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races who have suffered the effects of past societal discrimination, including simplification of bidding procedures, relaxation of bonding requirements, training, financial aid, elimination or modification of formal barriers caused by bureaucratic inertia, and the prohibition of discrimination in the provision of credit or bonding by local suppliers and banks. Pp. 729-730.

Justice STEVENS, although agreeing that the Plan cannot be justified as a remedy for past discrimination, concluded that the Fourteenth Amendment does not limit permissible racial classifications to those that remedy past wrongs, but requires that race-based governmental decisions be eval-

uated primarily by studying their probable impact on the future. Pp. 730-734.

(a) Disregarding the past history of racial injustice, there is not even an arguable basis for suggesting that the race of a subcontractor or contractor on city projects should have any relevance to his or her access to the market. Although race is not always irrelevant to sound governmental decisionmaking, the city makes no claim that the public interest in the efficient performance of its construction contracts will be served by granting a preference to minority-business enterprises. Pp. 731-732.

(b) Legislative bodies such as the City Council, which are primarily policymaking entities that promulgate rules to govern future conduct, raise valid constitutional concerns when they use the political process to punish or characterize past conduct of private citizens. Courts, on the other hand, are well equipped to identify past wrongdoers and to fashion remedies that will create the conditions that presumably would have existed had no wrong been committed, and should have the same broad discretion in racial discrimination cases that chancellors enjoy in other areas of the law to fashion remedies against persons who have been proven guilty of violations of law. Pp. 731-732.

(c) Rather than engaging in debate over the proper standard of review to apply in affirmative-action litigation, it is more constructive to try to identify the characteristics of the advantaged and disadvantaged classes that may justify their disparate treatment. Here, instead of carefully identifying those characteristics, the city has merely engaged in the type of stereotypical analysis that is the hallmark of Equal Protection Clause violations. The class of persons benefited by the Plan is not limited to victims of past discrimination by white contractors in the city, but encompasses persons who have never been in business in the city, minority contractors who may have themselves been guilty of discrimination against other minority group

members, and firms that have prospered notwithstanding discriminatory treatment. Similarly, although the Plan unquestionably disadvantages some white contractors who are guilty of past discrimination against blacks, it also punishes some who discriminated only before it was forbidden by law and some who have never discriminated against anyone. Pp. 732-734.

Justice KENNEDY concluded that the Fourteenth Amendment ought not to be interpreted to reduce a State's power to eradicate racial discrimination and its effects in both the public and private sectors, or its absolute duty to do so where those wrongs were caused intentionally by the State itself, except where there is a conflict with federal law or where, as here, a state remedy itself violates equal protection. Although a rule striking down all racial preferences which are not necessary remedies to victims of unlawful discrimination would serve important structural goals by eliminating the necessity for courts to pass on each such preference that is enacted, that rule would be a significant break with this Court's precedents that require a case-by-case test, and need not be adopted. Rather, it may be assumed that the principle of race neutrality found in the Equal Protection Clause will be vindicated by the less absolute strict scrutiny standard, the application of which demonstrates that the city's Plan is not a remedy but is itself an unconstitutional preference. Pp. 734-735.

Justice SCALIA, agreeing that strict scrutiny must be applied to all governmental racial classifications, concluded that:

1. The Fourteenth Amendment prohibits state and local governments from discriminating on the basis of race in order to undo the effects of past discrimination, except in one circumstance: where that is necessary to eliminate their own maintenance of a system of unlawful racial classification. Moreover, the State's remedial power in that instance extends no further than the scope of the constitutional violation, and does not encompass the continu-

ing effects of a discriminatory system once the system itself has been eliminated. Pp. 735-738.

2. The State remains free to undo the effects of past discrimination in permissible ways that do not involve classification by race—for example, by according a contracting preference to small or new businesses or to actual victims of discrimination who can be identified. In the latter instance, the classification would not be based on race but on the fact that the victims were wronged. Pp. 738-739.

O'CONNOR, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III-B, and IV, in which REHNQUIST, C.J., and WHITE, STEVENS, and KENNEDY, JJ., joined, an opinion with respect to Part II, in which REHNQUIST, C.J., and WHITE, J., joined, and an opinion with respect to Parts III-A and V, in which REHNQUIST, C.J., and WHITE and KENNEDY, JJ., joined. STEVENS, J., and KENNEDY, J., filed opinions concurring in part and concurring in the judgment. SCALIA, J., filed an opinion concurring in the judgment. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, J., joined.

John Payton, Washington, D.C., for appellant.

Walter H. Ryland, Richmond, Va., for appellee.

Justice O'CONNOR announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III-B, and IV, an opinion with respect to Part II, in which THE CHIEF JUSTICE and Justice WHITE join, and an opinion with respect to Parts III-A and V, in which THE CHIEF JUSTICE, Justice WHITE and Justice KENNEDY join.

In this case, we confront once again the tension between the Fourteenth Amend-

ment's guarantee of equal treatment to all citizens, and the use of race-based measures to ameliorate the effects of past discrimination on the opportunities enjoyed by members of minority groups in our society. In *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), we held that a congressional program requiring that 10% of certain federal construction grants be awarded to minority contractors did not violate the equal protection principles embodied in the Due Process Clause of the Fifth Amendment. Relying largely on our decision in *Fullilove*, some lower federal courts have applied a similar standard of review in assessing the constitutionality of state and local minority set-aside provisions under the Equal Protection Clause of the Fourteenth Amendment. See, e.g., *South Florida Chapter, Associated General Contractors of America, Inc. v. Metropolitan Dade County*, 723 F.2d 846 (CA11), cert. denied, 469 U.S. 871, 105 S.Ct. 220, 83 L.Ed.2d 150 (1984); *Ohio Contractors Assn. v. Keip*, 713 F.2d 167 (CA6 1983). Since our decision two Terms ago in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), the lower federal courts have attempted to apply its standards in evaluating the constitutionality of state and local programs which allocate a portion of public contracting opportunities exclusively to minority-owned businesses. See, e.g., *Michigan Road Builders Assn., Inc. v. Milliken*, 834 F.2d 583 (CA6 1987), appeal docketed, No. 87-1860; *Associated General Contractors of Cal. v. City and Cty. of San Francisco*, 818 F.2d 922 (CA9 1987). We noted probable jurisdiction in this case to consider the applicability of our decision in *Wygant* to a minority set-aside program adopted by the city of Richmond, Virginia.

I

On April 11, 1983, the Richmond City Council adopted the Minority Business Utilization Plan (the Plan). The Plan required prime contractors to whom the city awarded construction contracts to subcontract at

least 30% of the dollar amount of the contract to one or more Minority Business Enterprises (MBEs). Ordinance No. 83-69-59, codified in Richmond, Va., City Code, § 12-156(a) (1985). The 30% set-aside did not apply to city contracts awarded to minority-owned prime contractors. *Ibid.*

[1] The Plan defined an MBE as "[a] business at least fifty-one (51) percent of which is owned and controlled . . . by minority group members." § 12-23, p. 941. "Minority group members" were defined as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." *Ibid.* There was no geographic limit to the Plan; an otherwise qualified MBE from anywhere in the United States could avail itself of the 30% set-aside. The Plan declared that it was "remedial" in nature, and enacted "for the purpose of promoting wider participation by minority business enterprises in the construction of public projects." § 12-158(a). The Plan expired on June 30, 1988, and was in effect for approximately five years. *Ibid.*¹

The Plan authorized the Director of the Department of General Services to promulgate rules which "shall allow waivers in those individual situations where a contractor can prove to the satisfaction of the director that the requirements herein cannot be achieved." § 12-157. To this end, the Director promulgated Contract Clauses, Minority Business Utilization Plan (Contract Clauses). Section D of these rules provided:

"No partial or complete waiver of the foregoing [30% set-aside] requirement shall be granted by the city 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 suffi-

cient, relevant, qualified Minority Business Enterprises . . . are unavailable or unwilling to participate in the contract to enable meeting the 30% MBE goal." Contract Clauses ¶ D, Record, Exhibit 24, p. 1; see *J.A. Croson Co. v. Richmond*, 779 F.2d 181, 197 (CA4 1985) (*Croson I*).

The Director also promulgated "purchasing procedures" to be followed in the letting of city contracts in accordance with the Plan. *Id.*, at 194. Bidders on city construction contracts were provided with a "Minority Business Utilization Plan Commitment Form." Record, Exhibit 24, p. 3. Within 10 days of the opening of the bids, the lowest otherwise responsive 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 30% set-aside was then referred to the city Human Relations Commission (HRC). The HRC verified that the MBEs named in the commitment form were in fact minority owned, and then either approved the commitment form or made a recommendation regarding the prime contractor's request for a partial or complete waiver of the 30% set-aside. *Croson I*, *supra*, at 196. The Director of General Services made the final determination on compliance with the set-aside provisions or the propriety of granting a waiver. *Ibid.* His discretion in this regard appears to have been plenary. There was no direct administrative appeal from the Director's denial of a waiver. Once a contract had been awarded to another firm a bidder denied an award for failure to comply with the MBE requirements had a general right of protest under Richmond procurement policies. Richmond, Va., City Code, § 12-126(a) (1985).

1. The expiration of the ordinance has not rendered the controversy between the city and Croson moot. There remains a live controversy between the parties over whether Richmond's refusal to award Croson a contract pursuant to

the ordinance was unlawful and thus entitles Croson to damages. See *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 8-9, 98 S.Ct. 1554, 1559-1560, 56 L.Ed.2d 30 (1978).

The Plan was adopted by the Richmond City Council after a public hearing. App. 9-50. Seven members of the public spoke to the merits of the ordinance: five were in opposition, two in favor. Proponents of the set-aside provision relied on a study, which indicated that, while the general population of Richmond was 50% black, only .67% of the city's prime construction contracts had been awarded to minority businesses in the 5-year period from 1978 to 1983. It was also established that a variety of contractors' associations, whose representatives appeared in opposition to the ordinance, had virtually no minority businesses within their membership. See Brief for Appellant 22 (chart listing minority membership of six local construction industry associations). The city's legal counsel indicated his view that the ordinance was constitutional under this Court's decision in *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980). App. 24. Councilperson Marsh, a proponent of the ordinance, made the following statement:

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

There was no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors. See *Id.*, at 42 (statement of Councilperson Kemp) ("[The public witnesses] indicated that the minority contractors were just not available. There wasn't a one that gave any indication that a minority contractor

would not have an opportunity, if he were available").

Opponents of the ordinance questioned both its wisdom and its legality. They argued that a disparity between minorities in the population of Richmond and the number of prime contracts awarded to MBEs had little probative value in establishing discrimination in the construction industry. *Id.*, at 30 (statement of Councilperson Wake). Representatives of various contractors' associations questioned whether there were enough MBEs in the Richmond area to satisfy the 30% set-aside requirement. *Id.*, at 32 (statement of Mr. Beck); *id.*, at 33 (statement of Mr. Singer); *id.*, at 35-36 (statement of Mr. Murphy). Mr. Murphy noted that only 4.7% of all construction firms in the United States were minority owned and that 41% of these were located in California, New York, Illinois, Florida, and Hawaii. He predicted that the ordinance would thus lead to a windfall for the few minority firms in Richmond. *Ibid.* Councilperson Gillespie indicated his concern that many local labor jobs, held by both blacks and whites, would be lost because the ordinance put no geographic limit on the MBEs eligible for the 30% set-aside. *Id.*, at 44. Some of the representatives of the local contractors organizations indicated that they did not discriminate on the basis of race and were in fact actively seeking out minority members. *Id.*, at 38 (statement of Mr. Shuman) ("The company I work for belonged to all these [contractors'] organizations. Nobody that I know of, black, Puerto Rican or any minority, has ever been turned down. They're actually sought after to join, to become part of us"); see also *id.*, at 20 (statement of Mr. Watts). Councilperson Gillespie expressed his concern about the legality of the Plan, and asked that a vote be delayed pending consultation with outside counsel. His suggestion was rejected, and the ordinance was enacted by a vote of six to two, with councilmember Gillespie abstaining. *Id.*, at 49.

On September 6, 1983, the city of Richmond issued an invitation to bid on a project for the provision and installation of certain plumbing fixtures at the city jail. On September 30, 1983, Eugene Bonn, the regional manager of J.A. Croson Company (Croson), a mechanical plumbing and heating contractor, received the bid forms. The project involved the installation of stainless steel urinals and water closets in the city jail. Products of either of two manufacturers were specified, Acorn Engineering Company (Acorn) or Bradley Manufacturing Company (Bradley). Bonn determined that to meet the 30% set-aside requirement, a minority contractor would have to supply the fixtures. The provision of the fixtures amounted to 75% of the total contract price.

On September 30, Bonn contacted five or six MBEs that were potential suppliers of the fixtures, after contacting three local and state agencies that maintained lists of MBEs. 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 wished 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 quotation 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. 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, 1983, Croson had still not received a bid from Continental. On that date it submitted a request for a waiver of the 30% set-aside. Croson's waiver request indicated 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 upon his discussions with Acorn, Brown subsequently submitted a bid on the fixtures to Croson. Continental's bid was \$6,183.29 higher than the price Croson had included for the fixtures in its bid to the city. This constituted a 7% increase over the market price for the fixtures. With added bonding and insurance, using Continental would have raised the cost of the project by \$7,663.16. On the same day that Brown contacted Acorn, he also called city procurement officials and told them that Continental, an MBE, could supply the fixtures specified in the city jail contract. On November 2, 1983, the city denied Croson's waiver request, indicating that Croson had 10 days to submit an MBE Utilization Commitment Form, and warned that failure to do so could result in its bid being considered unresponsive.

Croson wrote the city on November 8, 1983. In the letter, Bonn indicated that Continental was not an authorized supplier for either Acorn or Bradley fixtures. He 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 21 days after the prime bids were due. In a second letter, Croson laid out the additional costs that using Continental to supply the fixtures would entail, and asked that it be allowed to raise the overall contract price accordingly. The city denied both Croson's request for a waiver and its suggestion that the contract price be raised. The city informed Croson that it had decided to rebid the project. On December 9, 1983, counsel for Croson wrote

the city asking for 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. Shortly thereafter Croson brought this action under 42 U.S.C. § 1983 in the Federal District Court for the Eastern District of Virginia, arguing that the Richmond ordinance was unconstitutional on its face and as applied in this case.

The District Court upheld the Plan in all respects. See Supplemental App. to Juris. Statement 112-232 (Supp.App.). In its original opinion, a divided panel of the Fourth Circuit Court of Appeals affirmed. *Croson I*, 779 F.2d 181 (1985). Both courts applied a test derived from "the common concerns articulated by the various Supreme Court opinions" in *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), and *University of California Regents v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978). See *Croson I*, 779 F.2d, at 188. Relying on the great deference which this Court accorded Congress' findings of past discrimination in *Fullilove*, the panel majority indicated its view that the same standard should be applied to the Richmond City Council, stating:

"Unlike the review we make of a lower court decision, our task is not to determine if there was sufficient evidence to sustain the council majority's position in any traditional sense of weighing the evidence. Rather, it is to determine whether 'the legislative history ... demonstrates that [the council] reasonably concluded that ... private and governmental discrimination had contributed to the negligible percentage of public contracts awarded minority contractors.'" *Id.*, at 190 (quoting *Fullilove*, *supra*, 448 U.S. at 503, 100 S.Ct. at 2787 (Powell, J., concurring)).

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, ren-

dered the city council's conclusion that low minority participation in city contracts was due to past discrimination "reasonable." *Croson I*, 779 F.2d, at 190, and n. 12. The panel opinion then turned to the second part of its "synthesized *Fullilove*" test, examining whether the racial quota was "narrowly tailored to the legislative goals of the Plan." *Id.*, at 190. First, the court upheld the 30% set-aside figure, by comparing it not to the number of MBEs in Richmond, but rather to the percentage of minority persons in the city's population. *Id.*, at 191. The panel held that to remedy the effects of past discrimination, "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." *Ibid.* Thus, in the court's view the 30% figure was "reasonable in light of the undisputed fact that minorities constitute 50% of the population of Richmond." *Ibid.*

Croson sought certiorari from this Court. We granted the writ, vacated the opinion of the Court of Appeals, and remanded the case for further consideration in light of our intervening decision in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986). See 478 U.S. 1016, 106 S.Ct. 3327, 92 L.Ed.2d 733 (1986).

On remand, a divided panel of the Court of Appeals struck down the Richmond set-aside program as violating both prongs of strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *J.A. Croson Co. v. Richmond*, 822 F.2d 1355 (CA4 1987) (*Croson II*). The majority found that the "core" of this Court's holding in *Wygant* was 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." *Id.*, at 1357. As the court read this requirement, "[f]indings of societal discrimination will not suffice; the findings must concern 'prior discrimination by

the government unit involved.'" *Id.*, at 1358 (quoting *Wygant*, *supra*, 476 U.S., at 274, 106 S.Ct., at 1846) (emphasis in original)).

In this case, the debate at the city council meeting "revealed no record of prior discrimination by the city in awarding public contracts..." *Croson II*, *supra*, at 1358. Moreover, 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, and actually suggested "more of a political than a remedial basis for the racial preference." 822 F.2d, at 1359. The court concluded that, "[i]f this plan is supported by a compelling governmental interest, so is every other plan that has been enacted in the past or that will be enacted in the future." *Id.*, at 1360.

The Court of Appeals went on to hold that even if the city had demonstrated a compelling interest in the use of a race-based quota, the 30% set-aside was not narrowly tailored to accomplish a remedial purpose. The court found that the 30% figure was "chosen arbitrarily" and was not tied to the number of minority subcontractors in Richmond or to any other relevant number. *Ibid.* The dissenting judge argued that the majority had "misconstrue[d] and misapplied[d]" our decision in *Wygant*. 822 F.2d, at 1362. We noted probable jurisdiction of the city's appeal, see 484 U.S. —, 108 S.Ct. 1010, 98 L.Ed.2d 976 (1988), and we now affirm the judgment.

II

The parties and their supporting amici fight an initial battle over the scope of the city's power to adopt legislation designed to address the effects of past discrimination. Relying on our decision in *Wygant*, appellee argues that the city must limit any race-based remedial efforts to eradicating the effects of its own prior discrimination. This is essentially the position taken by the Court of Appeals below. Appellant argues

that our decision in *Fullilove* is controlling, and that as a result the city of Richmond enjoys sweeping legislative power to define and attack the effects of prior discrimination in its local construction industry. We find that neither of these two rather stark alternatives can withstand analysis.

In *Fullilove*, we upheld the minority set-aside contained in § 103(f)(2) of the Public Works Employment Act of 1977, Pub.L. 95-28, 91 Stat. 116, 42 U.S.C. § 6701 *et seq.* (the Act) against a challenge based on the equal protection component of the Due Process Clause. The Act authorized a four billion dollar appropriation for federal grants to state and local governments for use in public works projects. The primary purpose of the Act was to give the national economy a quick boost in a recessionary period; funds had to be committed to state or local grantees by September 30, 1977. The Act also contained the following requirement: "Except to the extent the Secretary determines otherwise, no grant shall be made under this Act ... 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." *Fullilove*, 448 U.S., at 454, 100 S.Ct., at 2762 (quoting 91 Stat. 116, 42 U.S.C. § 6705(f)(2)). MBEs were defined as businesses effectively controlled by "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." *Ibid.*

The principal opinion in *Fullilove*, written by Chief Justice Burger, did not employ "strict scrutiny" or any other traditional standard of equal protection review. The Chief Justice noted at the outset that although racial classifications call for close examination, the Court was at the same time, "bound to approach [its] task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the ... general Welfare of the United States' and 'to enforce by appropriate legislation,' the equal protection guarantees of the Four-

" 448 U.S., at 472, 100 S.Ct. 1131, 68 L.Ed.2d 467, the principal opinion asked first, were the objectives of the program within the power of Congress? and, was the limited use of racial and ethnic criteria a permissible means for Congress to carry out its objectives within the constraints of the Due Process Clause? *Id.*, at 473, 100 S.Ct., at 2772.

On the issue of congressional power, the Chief Justice found that Congress' commerce power was sufficiently broad to allow it to reach the practices of prime contractors on federally funded local construction projects. *Id.*, at 475-476, 100 S.Ct., at 2773-2774. Congress could mandate state and local government compliance with the set-aside program under its § 5 power to enforce the Fourteenth Amendment. *Id.*, at 476 100 S.Ct., at 2773 (citing *Katzenbach v. Morgan*, 384 U.S. 641, 651, 86 S.Ct. 1717, 1723, 16 L.Ed.2d 828 (1966)).

The Chief Justice next turned to the constraints on Congress' power to employ race-conscious remedial relief. His opinion stressed two factors in upholding the MBE set-aside. First was the unique remedial powers of Congress under § 5 of the Fourteenth Amendment:

"Here we deal ... not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." 448 U.S., at 483, 100 S.Ct., at 2777 (plurality opinion) (emphasis added).

Because of these unique powers, the Chief Justice concluded that "Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to declare certain conduct unlawful, it may, as here, authorize and induce state

action to avoid such conduct." *Id.*, at 483-484, 100 S.Ct., at 2777 (emphasis added).

In reviewing the legislative history behind the Act, the principal opinion focused on the evidence before Congress that a nationwide history of past discrimination had reduced minority participation in federal construction grants. *Id.*, at 458-467, 100 S.Ct., at 2764-2769. The Chief Justice also noted that Congress drew on its experience under § 8(a) of the Small Business Act of 1953, which had extended aid to minority businesses. *Id.*, at 463-467, 100 S.Ct., at 2767-2769. The Chief Justice concluded that "Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination." *Id.*, at 478, 100 S.Ct., at 2775.

The second factor emphasized by the principal opinion in *Fullilove* was the flexible nature of the 10% set-aside. Two "congressional assumptions" underlay the MBE program: first, that the effects of past discrimination had impaired the competitive position of minority businesses, and second, that "adjustment for the effects of past discrimination" would assure that at least 10% of the funds from the federal grant program would flow to minority businesses. The Chief Justice noted that both of these "assumptions" could be "rebutted" by a grantee seeking a waiver of the 10% requirement. *Id.*, at 487-488, 100 S.Ct., at 2779-2780. Thus a waiver could be sought where minority businesses were not available to fill the 10% requirement or, more importantly, where an MBE attempted "to exploit the remedial aspects of the program by charging an unreasonable price, i.e., a price not attributable to the present effects of prior discrimination." *Id.*, at 488, 100 S.Ct., at 2780. The Chief Justice indicated that without this fine tuning to remedial purpose, the statute would not have "pass[ed] muster." *Id.*, at 487, 100 S.Ct., at 2779.

In his concurring opinion, Justice Powell relied on the legislative history adduced by

the principal opinion in finding that "Congress reasonably concluded that private and governmental discrimination had contributed to the negligible percentage of public contracts awarded minority contractors." *Id.*, at 503, 100 S.Ct., at 2787. Justice Powell also found that the means chosen by Congress, particularly in light of the flexible waiver provisions, were "reasonably necessary" to address the problem identified. *Id.*, at 514-515, 100 S.Ct., at 2793-2794. Justice Powell made it clear that other governmental entities might have to show more than Congress before undertaking race-conscious measures: "The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of the governmental body." *Id.*, at 515-516, n. 14, 100 S.Ct., at 2794, n. 14.

Appellant and its supporting amici rely heavily on *Fullilove* for the proposition that a city council, like Congress, need not make specific findings of discrimination to engage in race-conscious relief. Thus, appellant argues "[i]t would be a perversion of federalism to hold that the federal government has a compelling interest in remedying the effects of racial discrimination in its own public works program, but a city government does not." Brief for Appellant 32 (footnote omitted).

What appellant ignores is that Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to "enforce" may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations. See *Katzenbach v. Morgan*, supra, 384 U.S., at 651, 86 S.Ct., at 1723 ("Correctly 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"). See also *South Carolina v. Kat-*

zenbach, 383 U.S. 301, 326, 86 S.Ct. 803, 817, 15 L.Ed.2d 769 (1966) (similar interpretation of congressional power under § 2 of the Fifteenth Amendment). The Civil War Amendments themselves worked a dramatic change in the balance between congressional and state power over matters of race. Speaking of the Thirteenth and Fourteenth Amendments in *Ex parte Virginia*, 100 U.S. 339, 345, 25 L.Ed. 676 (1880), the Court stated: "They were intended to be, what they really are, limitations of the powers of the States and enlargements of the power of Congress."

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. To hold otherwise would be to cede control over the content of the Equal Protection Clause to the 50 state legislatures and their myriad political subdivisions. The mere recitation of a benign or compensatory purpose for the use of a racial classification would essentially entitle the States to exercise the full power of Congress under § 5 of the Fourteenth Amendment and insulate any racial classification from judicial scrutiny under § 1. We believe that such a result would be contrary to the intentions of the Framers of the Fourteenth Amendment, who desired to place clear limits on the States' use of race as a criterion for legislative action, and to have the federal courts enforce those limitations. See *Associated General Contractors of Cal. v. City and Cty. of San Francisco*, 813 F.2d, at 929 (Kozinski, J.) ("The city is not just like the federal government with regard to the findings it must make to justify race-conscious remedial action"); see also *Days, Fullilove*, 96 Yale L.J. 453, 474 (1987) (hereinafter *Days*) ("*Fullilove* clearly focused on the constitutionality of a congressionally mandated set-aside program") (emphasis

in original); Bohrer, *Bakke*, *Weber*, and *Fullilove*: Benign Discrimination and Congressional Power to Enforce the Fourteenth Amendment, 56 Ind. L.J. 473, 512-513 (1981) ("Congress may authorize, pursuant to section 5, state action that would be foreclosed to the states acting alone").

We do not, as Justice MARSHALL's dissent suggests, see *post*, at 755-756, find in § 5 of the Fourteenth Amendment some form of federal pre-emption in matters of race. We simply note what should be apparent to all—§ 1 of the Fourteenth Amendment stemmed from a distrust of state legislative enactments based on race; § 5 is, as the dissent notes, "a positive grant of legislative power" to Congress. *Post*, at 755, quoting *Katzenbach v. Morgan*, 384 U.S., at 651, 86 S.Ct., at 1723 (1966) (emphasis in dissent). Thus, our treatment of an exercise of congressional power in *Fullilove* cannot be dispositive here. In the *Slaughter-House Cases*, 16 Wall. 36, 21 L.Ed. 394 (1873), cited by the dissent, *post*, at 756, the Court noted that the Civil War Amendments granted "additional powers to the Federal government," and laid "additional restraints upon those of the States." 16 Wall., at 68.

It would seem equally clear, however, that a state or local subdivision (if delegated the authority from the State) has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction.² This authority must, of course, be exercised within the constraints of § 1 of the Fourteenth Amendment. Our decision in *Wygant* is not to the contrary. *Wygant* addressed the constitutionality of the use of racial quotas by local school authorities pursuant to an agreement reached with the local teachers' union. It was in the context of addressing the school board's power to adopt a race-based layoff program affecting its own work force that the *Wygant* plurality indicated that the

2. In its original panel opinion, the Court of Appeals held that under Virginia law the city had the legal authority to enact the set-aside program. *Croson I*, 779 F.2d 181, 184-186 (CA4

Equal Protection Clause required "some showing of prior discrimination by the governmental unit involved." *Wygant*, 476 U.S., at 274, 106 S.Ct., at 1846. As a matter of state law, the city of Richmond has legislative authority over its procurement policies, and can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment. To this extent, on the question of the city's competence, the Court of Appeals erred in following *Wygant* by rote in a case involving a state entity which has state-law authority to address discriminatory practices within local commerce under its jurisdiction.

Thus, if the city could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice. Cf. *Norwood v. Harrison*, 413 U.S. 455, 465, 93 S.Ct. 2804, 2810, 37 L.Ed.2d 723 (1973) ("Racial discrimination in state-operated schools is barred by the Constitution and [i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish") (citation and internal quotations omitted).

III

A

[2] The Equal Protection Clause of the Fourteenth Amendment provides that "[N]o State shall . . . deny to any person within its jurisdiction the equal protection

1985). That determination was not disturbed by the court's subsequent holding that the Plan violated the Equal Protection Clause.

of the laws" (emphasis added). As this Court has noted in the past, the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Shelley v. Kraemer*, 334 U.S. 1, 22, 68 S.Ct. 836, 846, 92 L.Ed. 1161 (1948). The Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. To whatever racial group these citizens belong, their "personal rights" to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.

Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

[3] Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility. See *University of California Regents v. Bakke*, 438 U.S., at 298, 98 S.Ct., at 2752 (opinion of Powell, J.) ("[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth"). We thus reaffirm the view expressed by the plurality in *Wygant* that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited

by a particular classification. *Wygant*, 476 U.S., at 279-280, 106 S.Ct., at 1849-1850; *id.*, at 285-286, 106 S.Ct., at 1852-1853 (O'CONNOR, J., concurring). See also *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 105, 93 S.Ct. 1278, 1333, 36 L.Ed.2d 16 (1973) (MARSHALL, J., dissenting) ("The highly suspect nature of classifications based on race, nationality, or alienage is well established") (footnotes omitted).

Our continued adherence to the standard of review employed in *Wygant*, does not, as Justice MARSHALL's dissent suggests, see *post*, at 752, indicate that we view "racial discrimination as largely a phenomenon of the past" or that "government bodies need no longer preoccupy themselves with rectifying racial injustice." As we indicate below, see *infra*, at 729-730, States and their local subdivisions have many legislative weapons at their disposal both to punish and prevent present discrimination and to remove arbitrary barriers to minority advancement. Rather, our interpretation of § 1 stems from our agreement with the view expressed by Justice Powell 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." *Bakke*, *supra*, 438 U.S., at 289-290, 98 S.Ct., at 2748.

Under the standard proposed by Justice MARSHALL's dissent, "[r]ace-conscious classifications designed to further remedial goals," *post*, at 743, are forthwith subject to a relaxed standard of review. How the dissent arrives at the legal conclusion that a racial classification is "designed to further remedial goals," without first engaging in an examination of the factual basis for its enactment and the nexus between its scope and that factual basis we are not told. However, once the "remedial" conclusion is reached, the dissent's standard is singularly deferential, and bears little resemblance to the close examination of legislative purpose we have engaged in when reviewing classifications based either on

race or gender. See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648, 95 S.Ct. 1225, 1233, 43 L.Ed.2d 514 (1975) ("[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme"). 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." *Wygant*, supra, 476 U.S., at 320, 106 S.Ct., at 1871 (STEVENS, J., dissenting) (footnote omitted), will never be achieved.

Even were we to accept a reading of the guarantee of equal protection under which the level of scrutiny varies according to the ability of different groups to defend their interests in the representative process, heightened scrutiny would still be appropriate in the circumstances of this case. One of the central arguments for applying a less exacting standard to "benign" racial classifications is that such measures essentially involve a choice made by dominant racial groups to disadvantage themselves. If one aspect of the judiciary's role under the Equal Protection Clause is to protect "discrete and insular minorities" from majoritarian prejudice or indifference, see *United States v. Carolene Products Co.*, 304 U.S. 144, 153, n. 4, 58 S.Ct. 778, 784, n. 4, 82 L.Ed. 1234 (1938), some maintain that these concerns are not implicated when the "white majority" places burdens upon itself. See J. Ely, *Democracy and Distrust* 170 (1980).

In this case, blacks comprise approximately 50% of the population of the city of Richmond. Five of the nine seats on the City Council are held by blacks. The concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case. See Ely, *The*

Constitutionality of Reverse Racial Discrimination, 41 U.Chi.L.Rev. 723, 739, n. 58 (1974) ("Of course it works both ways: a law that favors Blacks over Whites would be suspect if it were enacted by a predominantly Black legislature").

In *Bakke*, supra, the Court confronted a racial quota employed by the University of California at Davis Medical School. Under the plan, 16 out of 100 seats in each entering class at the school were reserved exclusively for certain minority groups. *Id.*, 438 U.S., at 288-289, 98 S.Ct., at 2747-2748. Among the justifications offered in support of the plan were the desire to "reduce[] the historic deficit of traditionally disfavored minorities in medical school and the medical profession" and the need to "counte[r] the effects of societal discrimination." *Id.*, at 306, 98 S.Ct., at 2756 (citations omitted). Five Members of the Court determined that none of these interests could justify a plan that completely eliminated nonminorities from consideration for a specified percentage of opportunities. *Id.*, at 271-272, 98 S.Ct., at 2738 (Powell, J.) (addressing constitutionality of Davis plan); *id.*, at 408, 98 S.Ct., at 2808 (STEVENS, J., Burger, C.J., Stewart, and REHNQUIST, JJ. concurring and dissenting) (addressing only legality of Davis admissions plan under Title VI of the Civil Rights Act of 1964).

Justice Powell's opinion applied heightened scrutiny under the Equal Protection Clause to the racial classification at issue. His opinion decisively rejected the first justification for the racially segregated admissions plan. The desire to have more black medical students or doctors, standing alone, was not merely insufficiently compelling to justify a racial classification, it was "discrimination for its own sake," forbidden by the Constitution. *Id.*, at 307, 98 S.Ct., at 2757. Nor could the second concern, the history of discrimination in society at large, justify a racial quota in medical school admissions. Justice Powell contrasted the "focused" goal of remedying "wrongs worked by specific instances of racial discrimination" with "the remedying

of the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past." *Ibid.* He indicated that for the governmental interest in remedying past discrimination to be triggered "judicial, legislative, or administrative findings of constitutional or statutory violations" must be made. *Ibid.* Only then does the Government have a compelling interest in favoring one race over another. *Id.*, at 308-309, 98 S.Ct., at 2757-2758.

In *Wygant*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), four Members of the Court applied heightened scrutiny to a race-based system of employee layoffs. Justice Powell, writing for the plurality, again drew the distinction between "societal discrimination" which is an inadequate basis for race-conscious classifications, and the type of identified discrimination that can support and define the scope of race-based relief. The challenged classification in that case tied the layoff of minority teachers to the percentage of minority students enrolled in the school district. The lower courts had upheld the scheme, based on the theory that minority students were in need of "role models" to alleviate the effects of prior discrimination in society. This Court reversed, with a plurality of four Justices reiterating the view expressed by Justice Powell in *Bakke* that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Wygant*, supra, at 276, 106 S.Ct., at 1847 (plurality opinion).

The role model theory employed by the lower courts failed for two reasons. First, the statistical disparity between students and teachers had no probative value in demonstrating the kind of prior discrimination in hiring or promotion that would justify race-based relief. *Ibid.*; see also *id.*, at 294, 106 S.Ct., at 1857 (O'CONNOR, J., concurring) ("The disparity between the percentage of minorities on the teaching staff and the percentage of minorities in the student body is not probative of employment discrimination"). Second, be-

cause the role model theory had no relation to some basis for believing a constitutional or statutory violation had occurred, it could be used to "justify" race-based decision-making essentially limitless in scope and duration. *Id.*, at 276, 106 S.Ct., at 1847 (plurality opinion) ("In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future").

III

B

[4] We think it clear that the factual predicate offered in support of the Richmond Plan suffers from the same two defects identified as fatal in *Wygant*. The District Court found the city council's "findings sufficient to ensure that, in adopting the Plan, it was remedying the present effects of past discrimination in the construction industry." Supp.App. 163 (emphasis added). Like the "role model" theory employed in *Wygant*, 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. It "has no logical stopping point." *Wygant*, supra, at 275, 106 S.Ct., at 1847 (plurality opinion). "Relief" for such an ill-defined wrong could extend until the percentage of public contracts awarded to MBEs in Richmond mirrored the percentage of minorities in the population as a whole.

Appellant argues that it is attempting to remedy various forms of past discrimination that are alleged to be responsible for the small number of minority businesses in the local contracting industry. Among these the city cites the exclusion of blacks from skilled construction trade unions and training programs. This past discrimination has prevented them "from following the traditional path from laborer to entrepreneur." Brief for Appellant 23-24. The city also lists a host of nonracial factors

which would seem to face a member of any racial group attempting to establish a new business enterprise, such as deficiencies in working capital, inability to meet bonding requirements, unfamiliarity with bidding procedures, and disability caused by an inadequate track record. *Id.*, at 25-26, and n. 41.

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 black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia. Like the claim that discrimination in primary and secondary schooling justifies a rigid racial preference in medical school admissions, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.

It is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination, just as it was sheer speculation how many minority medical students would have been admitted to the medical school at Davis absent past discrimination in educational opportunities. Defining these sorts of injuries as "identified discrimination" would give local governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor.

These defects are readily apparent in this case. The 30% quota cannot in any realistic sense be tied to any injury suffered by anyone. The District Court relied upon five predicate "facts" in reaching its conclusion that there was an adequate basis for the 30% quota: (1) the ordinance declares itself to be remedial; (2) several proponents of the measure stated their views that there had been past discrimination in the construction industry; (3) minority businesses received .67% of prime contracts from the city while minorities constituted 50% of the city's population; (4) there were very few minority contractors in local

and state contractors' associations; and (5) in 1977, Congress made a determination that the effects of past discrimination had stifled minority participation in the construction industry nationally. Supp.App. 163-167.

None of these "findings," singly or together, provide the city of Richmond with a "strong basis in evidence for its conclusion that remedial action was necessary." *Wygant*, 476 U.S., at 277, 106 S.Ct., at 1848 (plurality opinion). There is nothing approaching a prima facie case of a constitutional or statutory violation by anyone in the Richmond construction industry. *Id.*, at 274-275, 106 S.Ct., at 1846-1847; see also *id.*, at 293, 106 S.Ct., at 1856 (O'CONNOR, J., concurring).

The District Court accorded great weight to the fact that the city council designated the Plan as "remedial." But the mere recitation of a "benign" or legitimate purpose for a racial classification, is entitled to little or no weight. See *Weinberger v. Wiesenfeld*, 420 U.S., at 648, n. 16, 95 S.Ct., at 1233, n. 16 ("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"). Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice.

[5] The District Court also relied on the highly conclusionary statement of a proponent of the Plan that there was racial discrimination in the construction industry "in this area, and the State, and around the nation." App. 41 (statement of Councilperson Marsh). It also noted that the city manager had related his view that racial discrimination still plagued the construction industry in his home city of Pittsburgh. *Id.*, at 42 (statement of Mr. Deese). These statements are of little probative value in establishing identified discrimination in the Richmond construction industry. The fact-

finding process of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary. See *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488-489, 75 S.Ct. 461, 464-465, 99 L.Ed. 563 (1955). But when a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification's relevance to its goals. See *McLaughlin v. Florida*, 379 U.S. 184, 190-192, 85 S.Ct. 283, 287-289, 13 L.Ed.2d 222 (1964). A governmental actor cannot render race a legitimate proxy for a particular condition merely by declaring that the condition exists. See *id.*, at 193, 85 S.Ct., at 289; *Wygant*, 476 U.S., at 277, 106 S.Ct., at 1848. The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis. See *Korematsu v. United States*, 323 U.S. 214, 235-240, 65 S.Ct. 193, 202-205, 89 L.Ed. 194 (1944) (Murphy, J., dissenting).

[6] Reliance on the disparity between the number of prime contracts awarded to minority firms and the minority population of the city of Richmond is similarly misplaced. There is no doubt that "[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination" under Title VII. *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-308, 97 S.Ct. 2736, 2741, 53 L.Ed.2d 768 (1977). But it is equally clear that "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Id.*, at 308, n. 13, 97 S.Ct., at 2742, n. 13. See also *Mayor v. Educational Equality League*, 415 U.S. 605, 620, 94 S.Ct. 1323, 1333, 39 L.Ed.2d 630 (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").

[7] In the employment context, we have recognized that for certain entry level positions or positions requiring minimal training; statistical comparisons of the racial composition of an employer's workforce to the racial composition of the relevant population may be probative of a pattern of discrimination. See *Teamsters v. United States*, 431 U.S. 324, 337-338, 97 S.Ct. 1843, 1855-1856, 52 L.Ed.2d 396 (1977) (statistical comparison between minority truck drivers and relevant population probative of discriminatory exclusion). But where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task. See *Hazelwood*, *supra*, 433 U.S., at 308, 97 S.Ct., at 2741; *Johnson v. Transportation Agency*, 480 U.S. 616, 651-652, 107 S.Ct. 1442, 1462, 91 L.Ed.2d 615 (1987) (O'CONNOR, J., concurring).

In this case, 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. Compare *Ohio Contractors Assn. v. Keip*, 713 F.2d, at 171 (relying on percentage of minority businesses in the State compared to percentage of state purchasing contracts awarded to minority firms in upholding set-aside). 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.

To a large extent, the set-aside of subcontracting dollars seems to rest on the unsupported assumption that white prime contractors simply will not hire minority firms. See *Associated General Contractors of Cal. v. City and Cty. of San Francisco*, 813 F.2d, at 933 ("There is no finding—and we decline to assume—that male caucasian contractors will award contracts

only to other male caucasians").³ Indeed, there is evidence in this record that overall minority participation in city contracts in Richmond is seven to eight percent, and that minority contractor participation in Community Block Development Grant construction projects is 17% to 22%. App. 16 (statement of Mr. Deese, City Manager). Without any information on minority participation in subcontracting, it is quite simply impossible to evaluate overall minority representation in the city's construction expenditures.

The city and the District Court also relied on evidence that MBE membership in local contractors' associations was extremely low. Again, standing alone this evidence is not probative of any discrimination in the local construction industry. There are numerous explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial choices. Blacks may be disproportionately attracted to industries other than construction. See *The State of Small Business: A Report of the President Transmitted to the Congress* 201 (1986) ("Relative to the distribution of all businesses, black-owned businesses are more than proportionally represented in the transportation industry, but considerably less than proportionally represented in the wholesale trade, manufacturing, and finance industries"). The mere fact that black membership in these trade organizations is low, standing alone, cannot establish a prima facie case of discrimination. Cf. *Bazemore v. Friday*, 478 U.S. 385, 407-408, 106 S.Ct. 3000, 3013, 92 L.Ed.2d 315 (1986) (mere existence of single race clubs in absence of evidence of exclusion by race cannot create a duty to integrate).

3. Since 1975 the city of Richmond has had an ordinance on the books prohibiting both discrimination in the award of public contracts and employment discrimination by public contractors. See Reply Brief for Appellant 18, n. 42 (citing Richmond, Va., City Code, § 17.2 et seq. (1985)). The city points to no evidence that its prime contractors have been violating the ordi-

For low minority membership in these associations to be relevant, the city would have to link it to the number of local MBEs eligible for membership. If the statistical disparity between eligible MBEs and MBE membership were great enough, an inference of discriminatory exclusion could arise. In such a case, the city would have a compelling interest in preventing its tax dollars from assisting these organizations in maintaining a racially segregated construction market. See *Norwood*, 413 U.S., at 465, 93 S.Ct., at 2804; *Ohio Contractors*, 713 F.2d, at 171 (upholding minority set-aside based in part on earlier District Court finding that "the state had become a joint participant" with private industry and certain craft unions in a pattern of racially discriminatory conduct which excluded black laborers from work on public construction contracts").

Finally, the city and the District Court relied on Congress' finding in connection with the set-aside approved in *Fullilove* that there had been nationwide discrimination in the construction industry. The probative value of these findings for demonstrating the existence of discrimination in Richmond is extremely limited. By its inclusion of a waiver procedure in the national program addressed in *Fullilove*, Congress explicitly recognized that the scope of the problem would vary from market area to market area. See *Fullilove*, 448 U.S., at 487, 100 S.Ct., at 2779 (noting that the presumption that minority firms are disadvantaged by past discrimination may be rebutted by grantees in individual situations).

Moreover, as noted above, Congress was exercising its powers under § 5 of the Fourteenth Amendment in making a finding that past discrimination would cause

nance in either their employment or subcontracting practices. The complete silence of the record concerning enforcement of the city's own anti-discrimination ordinance flies in the face of the dissent's vision of a "tight-knit industry" which has prevented blacks from obtaining the experience necessary to participate in construction contracting. See *post*, at 746-747.

federal funds to be distributed in a manner which reinforced prior patterns of discrimination. While the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief. Congress has made national findings that there has been societal discrimination in a host of fields. If all a state or local government need do is find a congressional report on the subject to enact a set-aside program, the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity. See *Days* 480-481 ("[I]t is essential that state and local agencies also establish the presence of discrimination in their own bailiwicks, based either upon their own fact-finding processes or upon determinations made by other competent institutions").

Justice MARSHALL apparently views the requirement that Richmond identify the discrimination it seeks to remedy in its own jurisdiction as a mere administrative headache, an "onerous documentary obligation[n]." *Post*, at 750. We cannot agree. In this regard, we are in accord with Justice STEVENS' observation in *Fullilove*, that "[b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate." *Fullilove*, *supra*, at 533-535, 100 S.Ct., at 2803-04 (STEVENS, J., dissenting) (footnotes omitted). The "evidence" relied upon by the dissent, the history of school desegregation in Richmond and numerous congressional reports, does little to define the scope of any injury to minority contractors in Richmond or the necessary remedy. The factors relied upon by the dissent could justify a preference of any size or duration.

Moreover, Justice MARSHALL's suggestion that findings of discrimination may be "shared" from jurisdiction to jurisdiction in the same manner as information concerning zoning and property values is unprecedented. See *post*, at 749, quoting *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52, 106 S.Ct. 925, 931, 89 L.Ed.2d 29 (1986). We have never approved the extrapolation of discrimination in one jurisdiction from the experience of another. See *Milliken v. Bradley*, 418 U.S. 717, 746, 94 S.Ct. 3112, 3128, 41 L.Ed.2d 1069 (1974) ("Disparate treatment of white and Negro students occurred within the Detroit school system, and not elsewhere, and on this record the remedy must be limited to that system").

In sum, none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry. We, therefore, hold that the city has failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race. To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for "remedial relief" for every disadvantaged group. The 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 unmeasurable claims of past wrongs. "Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications..." *Bakke*, 438 U.S., at 296-297, 98 S.Ct., at 2751 (Powell, J.). We think such a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality.

The foregoing analysis applies only to the inclusion of blacks within the Richmond set-aside program. There is *absolutely no*

evidence of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry. The District Court took judicial notice of the fact that the vast majority of "minority" persons in Richmond were black. Supp.App. 207. It may well be that Richmond has never had an Aleut or Eskimo citizen. The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond, suggests that perhaps the city's purpose was not in fact to remedy past discrimination.

If a 30% set-aside was "narrowly tailored" to compensate black contractors for past discrimination, one may legitimately ask why they are forced to share this "remedial relief" with an Aleut citizen who moves to Richmond tomorrow? The gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation. See *Wygant*, 476 U.S., at 234, n. 13, 106 S.Ct., at 1852, n. 13 (haphazard inclusion of racial groups "further illustrates the undifferentiated nature of the plan"); see also *Days* 482 ("Such programs leave one with the sense that the racial and ethnic groups favored by the set-aside were added without attention to whether their inclusion was justified by evidence of past discrimination").

IV

[8] As noted by the court below, it is almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way. We limit ourselves to two observations in this regard.

First, there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting. See *United States v. Paradise*, 480 U.S. 149, 171, 107 S.Ct. 1053, 1067, 94 L.Ed.2d 203 (1987) ("In determining whether race-conscious remedies are appropriate, we look to several

factors, including the efficacy of alternative remedies"). Many of the barriers to minority participation in the construction industry relied upon by the city to justify a racial classification appear to be race neutral. If MBEs disproportionately lack capital or cannot meet bonding requirements, a race-neutral program of city financing for small firms would, *a fortiori*, lead to greater minority participation. The principal opinion in *Fullilove* found that Congress had carefully examined and rejected race-neutral alternatives before enacting the MBE set-aside. See *Fullilove*, 448 U.S., at 463-467, 100 S.Ct., at 2767-2769; see also *id.*, at 511, 100 S.Ct., at 2792 (Powell, J., concurring) ("[B]y the time Congress enacted [the MBE set-aside] in 1977, it knew that other remedies had failed to ameliorate the effects of racial discrimination in the construction industry"). There is no evidence in this record that the Richmond City Council has considered any alternatives to a race-based quota.

Second, the 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing. It rests upon the "completely unrealistic" assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population. See *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 494, 106 S.Ct. 3019, 3060, 92 L.Ed.2d 344 (1986) (O'CONNOR, J., concurring in part and dissenting in part) ("[I]t is completely unrealistic to assume that individuals of one race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination").

Since the city must already consider bids and waivers on a case-by-case basis, it is difficult to see the need for a rigid numerical quota. As noted above, the congressional scheme upheld in *Fullilove* allowed for a waiver of the set-aside provision where an MBE's higher price was not attributable to the effects of past discrimination. Based upon proper findings, such programs are less problematic from an equal protection standpoint because they

treat all candidates individually, rather than making the color of an applicant's skin the sole relevant consideration. Unlike the program upheld in *Fullilove*, the Richmond Plan's waiver system focuses solely on the availability of MBEs; 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.

Given the existence of an individualized procedure, the city's only interest in maintaining a quota system rather than investigating the need for remedial action in particular cases would seem to be simple administrative convenience. But the interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification. See *Frontiero v. Richardson*, 411 U.S. 677, 690, 93 S.Ct. 1764, 1772, 36 L.Ed.2d 583 (1973) (plurality opinion) ("[W]hen we enter the realm of 'strict judicial scrutiny,' there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality"). Under Richmond's scheme, a successful black, Hispanic, or Oriental entrepreneur from anywhere in the country enjoys an absolute preference over other citizens based solely on their race. We think it obvious that such a program is not narrowly tailored to remedy the effects of prior discrimination.

V

[9] Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction. If the city of Richmond had evidence before it that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion. Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to per-

form a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise. See *Bazemore v. Friday*, 478 U.S., at 398, 106 S.Ct., at 3008; *Teamsters v. United States*, 431 U.S., at 337-339, 97 S.Ct., at 1856. Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria. See, e.g., *New York State Club Assn. v. New York City*, 487 U.S. —, —, 108 S.Ct. 2225, —, 101 L.Ed.2d 1 (1988). In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.

[10] Nor is local government powerless to deal with individual instances of racially motivated refusals to employ minority contractors. Where such discrimination occurs, a city would be justified in penalizing the discriminator and providing appropriate relief to the victim of such discrimination. See generally *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-803, 93 S.Ct. 1817, 1824-1825, 36 L.Ed.2d 668 (1973). Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified. See *Teamsters*, 431 U.S., at 338, 97 S.Ct., at 1824-1825.

Even in the absence of evidence of discrimination, the city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination or neglect. Many of the formal barriers to new entrants may be the product of bureaucratic inertia more

than actual necessity, and may have a disproportionate effect on the opportunities open to new minority firms. Their elimination or modification would have little detrimental effect on the city's interests and would serve to increase the opportunities available to minority business without classifying individuals on the basis of race. The city may also act to prohibit discrimination in the provision of credit or bonding by local suppliers and banks. Business as usual should not mean business pursuant to the unthinking exclusion of certain members of our society from its rewards.

In the case at hand, the city has not ascertained how many minority enterprises are present in the local construction market nor the level of their participation in city construction projects. The city points to no evidence that qualified minority contractors have been passed over for city contracts or subcontracts, either as a group or in any individual case. Under such circumstances, it is simply impossible to say that the city has demonstrated "a strong basis in evidence for its conclusion that remedial action was necessary." *Wygant*, 476 U.S., at 277, 106 S.Ct., at 1848.

Proper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects. Such findings also serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself. Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics. "[I]f there is no duty to attempt

In my view the Court's approach to this case gives unwarranted deference to race-based legislative action that purports to serve a purely remedial goal, and overlooks the potential value of race-based determinations that may serve other valid purposes. With regard to the former point—as I explained at some length in *Fullilove v. Klutznick*, 448 U.S. 448, 532–554, 100 S.Ct. 2758, 2802–2814, 65 L.Ed.2d 902 (1980) (STEVENS, J., dissenting)—I am not prepared to assume that even a more narrowly tailored

either to measure the recovery by the wrong or to distribute that recovery within the injured class in an evenhanded way, our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate 'a piece of the action' for its members." *Fullilove*, 448 U.S., at 539, 100 S.Ct., at 2806 (STEVENS, J., dissenting). Because the city of Richmond has failed to identify the need for remedial action in the awarding of its public construction contracts, its treatment of its citizens on a racial basis violates the dictates of the Equal Protection Clause. Accordingly, the judgment of the Court of Appeals for the Fourth Circuit is

AFFIRMED.

Justice STEVENS, concurring in part and concurring in the judgment.

A central purpose of the Fourteenth Amendment is to further the national goal of equal opportunity for all our citizens. In order to achieve that goal we must learn from our past mistakes, but I believe the Constitution requires us to evaluate our policy decisions—including those that govern the relationships among different racial and ethnic groups—primarily by studying their probable impact on the future. I therefore do not agree with the premise that seems to underlie today's decision, as well as the decision in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong. See *ante*, at 721.¹ I do, however, agree with the

set-aside program supported by stronger findings would be constitutionally justified. Unless the legislature can identify both the particular victims and the particular perpetrators of past discrimination, which is precisely what a court does when it makes findings of fact and conclusions of law, a remedial justification for race-based legislation will almost certainly sweep too broadly. With regard to the latter point, I think it unfortunate that the Court in neither *Wygant* nor this case seems prepared to

Court's explanation of why the Richmond ordinance cannot be justified as a remedy for past discrimination, and therefore join Parts I, III-B, and IV of its opinion. I write separately to emphasize three aspects of the case that are of special importance to me.

First, the city makes no claim that the public interest in the efficient performance of its construction contracts will be served by granting a preference to minority-business enterprises. This case is therefore completely unlike *Wygant*, in which I thought it quite obvious that the School Board had reasonably concluded that an integrated faculty could provide educational benefits to the entire student body that could not be provided by an all-white, or nearly all-white faculty. As I pointed out in my dissent in that case, even if we

knowledge that some race-based policy decisions may serve a legitimate public purpose. I agree, of course, that race is so seldom relevant to legislative decisions on how best to foster the public good that legitimate justifications for race-based legislation will usually not be available. But unlike the Court, I would not totally discount the legitimacy of race-based decisions that may produce tangible and fully justified future benefits. See n. 2, *infra*; see also Justice Powell's discussion in *University of California Regents v. Bakke*, 438 U.S. 265, 311–319, 98 S.Ct. 2733, 2759–2763, 57 L.Ed.2d 750 (1978).

2. "Rather than analyzing a case of this kind by asking whether minority teachers have some sort of special entitlement to jobs as a remedy for sins that were committed in the past, I believe that we should first ask whether the Board's action advances the public interest in educating children for the future.

"[I]n our present society, race is not always irrelevant to sound governmental decisionmaking. To take the most obvious example, in law enforcement, if an undercover agent is needed to infiltrate a group suspected of ongoing criminal behavior—and if the members of the group are all of the same race—it would seem perfectly rational to employ an agent of that race rather than a member of a different racial class. Similarly, in a city with a recent history of racial unrest, the superintendent of police might reasonably conclude that an integrated police force could develop a better relationship with the community and thereby do a more effective job of maintaining law and order than a force composed only of white officers.

completely disregard our history of racial injustice, race is not always irrelevant to sound governmental decisionmaking.² In the case of public contracting, however, if we disregard the past, there is not even an arguable basis for suggesting that the race of a subcontractor or general contractor should have any relevance to his or her access to the market.

Second, this litigation involves an attempt by a legislative body, rather than a court, to fashion a remedy for a past wrong. Legislatures are primarily policymaking bodies that promulgate rules to govern future conduct. The constitutional prohibitions against the enactment of *ex post facto* laws and bills of attainder reflect a valid concern about the use of the political process to punish or characterize past conduct of private citizens.³ It is the

"In the context of public education, it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty. For one of the most important lessons that the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous 'melting pot' do not identify essential differences among the human beings that inhabit our land. It is one thing for a white child to be taught by a white teacher that color, like beauty, is only 'skin deep'; it is far more convincing to experience that truth on a day-to-day basis during the routine, ongoing learning process." *Wygant v. Jackson Board of Education*, 476 U.S. 267, 313–315, 106 S.Ct. 1842, 1867–1868, 90 L.Ed.2d 260 (1986) (STEVENS, J., dissenting) (footnotes omitted).

3. See U.S. Const., Art. I, § 9, cl. 3, § 10, cl. 1. Of course, legislatures frequently appropriate funds to compensate victims of past governmental misconduct for which there is no judicial remedy. See, e.g., Pub.L. 100-383, 102 Stat. 903 (provision of restitution to interned Japanese-Americans during World War II). Thus, it would have been consistent with normal practice for the city of Richmond to provide direct monetary compensation to any minority-business enterprise that the city might have injured in the past. Such a voluntary decision by a public body is, however, quite different from a decision to require one private party to compensate another for an unproven injury.

judicial system, rather than the legislative process, that is best equipped to identify past wrongdoers and to fashion remedies that will create the conditions that presumably would have existed had no wrong been committed. Thus, in cases involving the review of judicial remedies imposed against persons who have been proved guilty of violations of law, I would allow the courts in racial discrimination cases the same broad discretion that chancellors enjoy in other areas of the law. See *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15-16, 91 S.Ct. 1287, 1275-1276, 28 L.Ed.2d 554 (1971).⁴

Third, instead of engaging in a debate over the proper standard of review to apply in affirmative-action litigation,⁵ I believe it is more constructive to try to identify the characteristics of the advantaged and disadvantaged classes that may justify their disparate treatment. See *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 452-453; 105 S.Ct. 3249, 3261, 87 L.Ed.2d 313 (1985) (STEVENS, J., concurring).⁶ In this case that approach convinces me that, instead of carefully identifying the charac-

teristics of the two classes of contractors that are respectively favored and disfavored by its ordinance, the Richmond City Council has merely engaged in the type of stereotypical analysis that is a hallmark of violations of the Equal Protection Clause. Whether we look at the class of persons benefited by the ordinance or at the disadvantaged class, the same conclusion emerges.

The justification for the ordinance is the fact that in the past white contractors—and presumably other white citizens in Richmond—have discriminated against black contractors. The class of persons benefited by the ordinance is not, however, limited to victims of such discrimination—it encompasses persons who have never been in business in Richmond as well as minority contractors who may have been guilty of discriminating against members of other minority groups. Indeed, for all the record shows, all of the minority-business enterprises that have benefited from the ordinance may be firms that have prospered notwithstanding the discriminatory conduct

4. As I pointed out in my separate opinion concurring in the judgment in *United States v. Paradise*, 480 U.S. 149, 193-194, 107 S.Ct. 1053, 1078-1079, 94 L.Ed.2d 203 (1987):

"A party who has been found guilty of repeated and persistent violations of the law bears the burden of demonstrating that the chancellor's efforts to fashion effective relief exceed the bounds of 'reasonableness.' The burden of proof in a case like this is precisely the opposite of that in cases such as *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), and *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), which did not involve any proven violations of law. In such cases the governmental decisionmaker who would make race-conscious decisions must overcome a strong presumption against them. No such burden rests on a federal district judge who has found that the governmental unit before him is guilty of racially discriminatory conduct that violates the Constitution."

5. "There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases." *Craig v. Boren*, 429 U.S. 190,

211-212, 97 S.Ct. 451, 464, 50 L.Ed.2d 397 (1976) (STEVENS, J., concurring).

6. "I have always asked myself whether I could find a 'rational basis' for the classification at issue. The term 'rational,' of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. Thus, the word 'rational'—for me at least—includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially."

"In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a 'tradition of disfavor' by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment? In most cases the answer to these questions will tell us whether the statute has a 'rational basis.'" *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 452-453, 105 S.Ct. 3249, 3261, 87 L.Ed.2d 313 (1985) (STEVENS, J., concurring).

that may have harmed other minority firms years ago. Ironically, minority firms that have survived in the competitive struggle, rather than those that have perished, are most likely to benefit from an ordinance of this kind.

The ordinance is equally vulnerable because of its failure to identify the characteristics of the disadvantaged class of white contractors that justify the disparate treatment. That class unquestionably includes some white contractors who are guilty of past discrimination against blacks, but it is only habit, rather than evidence or analysis, that makes it seem acceptable to assume that every white contractor covered by the ordinance shares in that guilt. Indeed, even among those who have discriminated in the past, it must be assumed that at least some of them have complied with the city ordinance that has made such discrimination unlawful since 1975.⁷ Thus, the composition of the disadvantaged class of white contractors presumably includes some who have been guilty of unlawful discrimination, some who practiced discrimination before it was forbidden by law,⁸ and some who have never discriminated against anyone on the basis of race. Imposing a common burden on such a disparate class merely because each member of the class is of the same race stems from reliance on a stereotype rather than fact or reason.⁹

There is a special irony in the stereotypical thinking that prompts legislation of this kind. Although it stigmatizes the disadvantaged class with the unproven charge

7. See *ante*, at 726, n. 3.

8. There is surely some question about the power of a legislature to impose a statutory burden on private citizens for engaging in discriminatory practices at a time when such practices were not unlawful. Cf. *Teamsters v. United States*, 431 U.S. 324, 356-357, 360, 97 S.Ct. 1843, 1865, 1867, 52 L.Ed.2d 396 (1977).

9. There is, of course, another possibility that should not be overlooked. The ordinance might be nothing more than a form of patronage. But racial patronage, like a racial gerrymander, is no more defensible than political patronage or a political gerrymander. Cf. *Karcher v. Daggett*, 462 U.S. 725, 744-765, 103 S.Ct. 2653, 2665-

of past racial discrimination, it actually imposes a greater stigma on its supposed beneficiaries. For, as I explained in my *Fullilove* opinion:

"[E]ven though it is not the actual predicate for this legislation, a statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race." 448 U.S., at 454, 100 S.Ct., at 2767.

"The risk that habitual attitudes toward classes of persons, rather than analysis of the relevant characteristics of the class, will serve as a basis for a legislative classification is present when benefits are distributed as well as when burdens are imposed. In the past, traditional attitudes too often provided the only explanation for discrimination against women, aliens, illegitimates, and black citizens. Today there is a danger that awareness of past injustice will lead to automatic acceptance of new classifications that are not in fact justified by attributes characteristic of the class as a whole.

"When [government] creates a special preference, or a special disability, for a class of persons, it should identify the characteristic that justifies the special treatment. When the classification is defined in racial terms, I believe that such particular identification is imperative.

2668, 77 L.Ed.2d 133 (1983) (STEVENS, J., concurring); *Rogers v. Lodge*, 458 U.S. 613, 631-653, 102 S.Ct. 3272, 3283-3294, 73 L.Ed.2d 1012 (1982) (STEVENS, J., dissenting); *Mobile v. Bolden*, 446 U.S. 55, 83-94, 100 S.Ct. 1490, 1508-1513, 64 L.Ed.2d 47 (1980) (STEVENS, J., concurring in judgment); *Cousins v. City Council of Chicago*, 466 F.2d 830, 848-853 (CA7) (STEVENS, J., dissenting), cert. denied, 409 U.S. 893, 93 S.Ct. 85, 34 L.Ed.2d 151 (1972). A southern State with a long history of discrimination against Republicans in the awarding of public contracts could not rely on such past discrimination as a basis for granting a legislative preference to Republican contractors in the future.

"In this case, only two conceivable bases for differentiating the preferred classes from society as a whole have occurred to me: (1) that they were the victims of unfair treatment in the past and (2) that they are less able to compete in the future. Although the first of these factors would justify an appropriate remedy for past wrongs, for reasons that I have already stated, this statute is not such a remedial measure. The second factor is simply not true. Nothing in the record of this case, the legislative history of the Act, or experience that we may notice judicially provides any support for such a proposition." *Id.*, at 552-554, 100 S.Ct., at 2813-2814 (footnote omitted).

Accordingly, I concur in parts I, III-B, and IV of the Court's opinion, and in the judgment.

Justice KENNEDY, concurring in part and concurring in the judgment.

I join all but Part II of Justice O'CONNOR's opinion and give this further explanation.

Part II examines our caselaw upholding Congressional power to grant preferences based on overt and explicit classification by race. See *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980). With the acknowledgment that the summary in Part II is both precise and fair, I must decline to join it. The process by which a law that is an equal protection violation when enacted by a State becomes transformed to an equal protection guarantee when enacted by Congress poses a difficult proposition for me; but as it is not before us, any reconsideration of that issue must await some further case. For purposes of the ordinance challenged here, it suffices to say that the State has the power to eradicate racial discrimination and its effects in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself. The Fourteenth Amendment ought not to be interpreted to reduce a State's

authority in this regard, unless, of course, there is a conflict with federal law or a state remedy is itself a violation of equal protection. The latter is the case presented here.

The moral imperative of racial neutrality is the driving force of the Equal Protection Clause. Justice SCALIA's opinion underscores that proposition, quite properly in my view. The rule suggested in his opinion, which would strike down all preferences which are not necessary remedies to victims of unlawful discrimination, would serve important structural goals, as it would eliminate the necessity for courts to pass upon each racial preference that is enacted. Structural protections may be necessities if moral imperatives are to be obeyed. His opinion would make it crystal clear to the political branches, at least those of the States, that legislation must be based on criteria other than race.

Nevertheless, given that a rule of automatic invalidity for racial preferences in almost every case would be a significant break with our precedents that require a case-by-case test, I am not convinced we need adopt it at this point. On the assumption that it will vindicate the principle of race neutrality found in the Equal Protection Clause, I accept the less absolute rule contained in Justice O'CONNOR's opinion, a rule based on the proposition that any racial preference must face the most rigorous scrutiny by the courts. My reasons for doing so are as follows. First, I am confident that, in application, the strict scrutiny standard will operate in a manner generally consistent with the imperative of race neutrality, because it forbids the use even of narrowly drawn racial classifications except as a last resort. Second, the rule against race-conscious remedies is already less than an absolute one, for that relief may be the only adequate remedy after a judicial determination that a State or its instrumentality has violated the Equal Protection Clause. I note, in this connection, that evidence which would support a judicial finding of intentional discrimination

may suffice also to justify remedial legislative action, for it diminishes the constitutional responsibilities of the political branches to say they must wait to act until ordered to do so by a court. Third, the strict scrutiny rule is consistent with our precedents, as Justice O'CONNOR's opinion demonstrates.

The ordinance before us falls far short of the standard we adopt. The nature and scope of the injury that existed; its historical or antecedent causes; the extent to which the City contributed to it, either by intentional acts or by passive complicity in acts of discrimination by the private sector; the necessity for the response adopted, its duration in relation to the wrong, and the precision with which it otherwise bore on whatever injury in fact was addressed, were all matters unmeasured, unexplored, or unexplained by the City Council. We are left with an ordinance and a legislative record open to the fair charge that it is not a remedy but is itself a preference which will cause the same corrosive animosities that the Constitution forbids in the whole sphere of government and that our national policy condemns in the rest of society as well. This ordinance is invalid under the Fourteenth Amendment.

Justice SCALIA, concurring in the judgment.

I agree with much of the Court's opinion, and, in particular, with its conclusion that strict scrutiny must be applied to all governmental classification by race, whether or not its asserted purpose is "remedial" or "benign." *Ante*, at 720-721. I do not agree, however, with the Court's dicta suggesting that, despite the Fourteenth Amendment, state and local governments may in some circumstances discriminate on the basis of race in order (in a broad sense) "to ameliorate the effects of past discrimination." *Ante*, at 712. The benign purpose of compensating for social disadvantages, whether they have been acquired by reason of prior discrimination or otherwise, can no more be pursued by the illegitimate

means of racial discrimination than can other assertedly benign purposes we have repeatedly rejected. See, e.g., *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274-276, 106 S.Ct. 1842, 1847-1848, 90 L.Ed.2d 260 (1986) (plurality opinion) (discrimination in teacher assignments to provide "role models" for minority students); *Palmore v. Sidoti*, 466 U.S. 429, 433, 104 S.Ct. 1879, 1882, 80 L.Ed.2d 421 (1984) (awarding custody of child to father, after divorced mother entered an interracial remarriage, in order to spare child social "pressures and stresses"); *Lee v. Washington*, 390 U.S. 333, 88 S.Ct. 994, 19 L.Ed.2d 1212 (1968) (*per curiam*) (permanent racial segregation of all prison inmates, presumably to reduce possibility of racial conflict). The difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency—fatal to a nation such as ours—to classify and judge men and women on the basis of their country of origin or the color of their skin. A solution to the first problem that aggravates the second is no solution at all. I share the view expressed by Alexander Bickel 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." A. Bickel, *The Morality of Consent* 133 (1975). At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates, cf. *Lee v. Washington*, *supra*—can justify an exception to the principle embodied in the Fourteenth Amendment that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens," *Plessy v. Ferguson*, 163 U.S. 537, 559, 16 S.Ct. 1138, 1146, 41 L.Ed. 256 (1896) (Harlan, J., dissenting); accord, *Ex parte Virginia*, 100

U.S. 339, 345, 25 L.Ed. 676 (1880); 2 J. Story, Commentaries on the Constitution § 1961, p. 677 (T. Cooley ed. 1873); T. Cooley, Constitutional Limitations 439 (2d ed. 1871).

We have in some contexts approved the use of racial classifications by the Federal Government to remedy the effects of past discrimination. I do not believe that we must or should extend those holdings to the States. In *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), we upheld legislative action by Congress similar in its asserted purpose to that at issue here. And we have permitted federal courts to prescribe quite severe race-conscious remedies when confronted with egregious and persistent unlawful discrimination; see, e.g., *United States v. Paradise*, 480 U.S. 149, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987); *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986). As the Court acknowledges; however, *ante*, at 717-720 it is one thing to permit racially based conduct by the Federal Government—whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment, see U.S. Const., Amdt. 14, § 5—and quite another to permit it by the precise entities against whose conduct in matters of race that Amendment was specifically directed, see Amdt. 14, § 1. As we said in *Ex parte Virginia*, *supra*, 100 U.S., at 345, the Civil War Amendments were designed to “take away all possibility of oppression by law because of race or color” and “to be . . . limitations on the power of the States and enlargements of the power of Congress.” Thus, without revisiting what we held in *Fullilove* (or trying to derive a rationale from the three separate opinions supporting the judgment, none of which commanded more than three votes, compare 448 U.S., at 453-495, 100 S.Ct., at 2762-2783 (opinion of Burger, C.J., joined by WHITE and Powell, JJ.), with *id.*, at 495-517, 100 S.Ct., at 2783-2794 (opinion of Powell, J.), and *id.*, at 517-522, 100 S.Ct., at 2794-2797 (opinion of MARSHALL, J., joined by

BRENNAN and BLACKMUN, JJ.)), I do not believe our decision in that case controls the one before us here.

A sound distinction between federal and state (or local) action based on race rests not only upon the substance of the Civil War Amendments, but upon social reality and governmental theory. It is a simple fact that what Justice Stewart described in *Fullilove* as “the dispassionate objectivity [and] the flexibility that are needed to mold a race-conscious remedy around the single objective of eliminating the effects of past or present discrimination”—political qualities already to be doubted in a national legislature, *Fullilove*, *supra*, at 527, 100 S.Ct., at 2800 (Stewart, J., with whom REHNQUIST, J., joined, dissenting)—are substantially less likely to exist at the state or local level. The struggle for racial justice has historically been a struggle by the national society against oppression in the individual States. See, e.g., *Ex parte Virginia*, *supra* (denying writ of habeas corpus to a state judge in custody under federal indictment for excluding jurors on the basis of race); H. Hyman & W. Wiecek, *Equal Justice Under Law, 1835-1875*, pp. 312-334 (1982); Logan, *Judicial Federalism in the Court of History*, 66 Ore.L.Rev. 454, 494-515 (1988). And the struggle retains that character in modern times. See, e.g., *Brown v. Board of Education*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) (*Brown II*); *United States v. Montgomery Board of Education*, 395 U.S. 225, 89 S.Ct. 1670, 23 L.Ed.2d 263 (1969); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); *Griffin v. Prince Edward County School Board*, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964); *Cope v. Aaron*, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958). Not all of that struggle has involved discrimination against blacks; see, e.g., *Yick Wo v. Hopkins*, 118 U.S. 355, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) (Chinese); *Hernandez v. Texas*, 347 U.S. 475, 74 S.Ct. 687, 98 L.Ed. 866 (1954) (Hispanics), and not all of it has been in the Old South, see,

e.g., *Columbus Board of Education v. Penick*, 448 U.S. 449, 99 S.Ct. 2941, 61 L.Ed.2d 666 (1979); *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973). What the record shows, in other words, is that racial discrimination against any group finds a more ready expression at the state and local than at the federal level. To the children of the Founding Fathers, this should come as no surprise. An acute awareness of the heightened danger of oppression from political factions in small, rather than large, political units dates to the very beginning of our national history. See G. Wood, *The Creation of the American Republic, 1776-1787*, pp. 499-506 (1969). As James Madison observed in support of the proposed Constitution's enhancement of national powers:

“The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plan of oppression. Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.” The Federalist No. 10, pp. 82-84 (C. Rossiter ed. 1961). The prophesy of these words came to fruition in Richmond in the enactment of a bet-aside clearly and directly beneficial to the dominant political group, which happens also to be the dominant racial group. The same thing has no doubt happened before in other cities (though the racial basis of the preference has rarely been made textually explicit)—and blacks have often been on the receiving end of the

injustice. Where injustice is the game, however, turn-about is not fair play.

In my view there is only one circumstance in which the States may act by race to “undo the effects of past discrimination”: where that is necessary to eliminate their own maintenance of a system of unlawful racial classification. If, for example, a state agency has a discriminatory pay scale compensating black employees in all positions at 20% less than their nonblack counterparts, it may assuredly promulgate an order raising the salaries of “all black employees” by 20%. Cf. *Bazemore v. Friday*, 478 U.S. 385, 395-396, 106 S.Ct. 3000, 3006-3007, 92 L.Ed.2d 315 (1986). This distinction explains our school desegregation cases, in which we have made plain that States and localities sometimes have an obligation to adopt race-conscious remedies. While there is no doubt that those cases have taken into account the continuing “effects” of previously mandated racial school assignment, we have held those effects to justify a race-conscious remedy only because we have concluded, in that context, that they perpetuate a “dual school system.” We have stressed each school district's constitutional “duty to dismantle its dual system,” and have found that “[e]ach instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment.” *Columbus Board of Education v. Penick*, *supra*, 448 U.S., at 458-459, 99 S.Ct. at 2946-2947 (emphasis added). Concluding in this context that race-neutral efforts at “dismantling the state-imposed dual system” were so ineffective that they might “indicate a lack of good faith,” *Green v. County School Board*, 391 U.S. 430, 439, 88 S.Ct. 1689, 1695, 20 L.Ed.2d 716 (1968); see also *Raney v. Board of Education*, 391 U.S. 443, 88 S.Ct. 1697, 20 L.Ed.2d 727 (1968), we have permitted, as part of the local authorities’ “affirmative duty to disestablish the dual school system[s],” such voluntary (that is, noncourt-ordered) measures as attendance zones drawn to achieve greater racial balance, and out-of-zone assignment by race for the

same purpose. *McDaniel v. Barresi*, 402 U.S. 39, 40-41, 91 S.Ct. 1287, 1288, 28 L.Ed. 2d 582 (1971). While thus permitting the use of race to declassify racially classified students, teachers, and educational resources, however, we have also made it clear that the remedial power extends no further than the scope of the continuing constitutional violation. See, e.g., *Columbus Board of Education v. Penick*, *supra*, 443 U.S., at 465, 99 S.Ct., at 2950; *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 420, 97 S.Ct. 2766, 2775, 53 L.Ed.2d 851 (1977); *Milliken v. Bradley*, 418 U.S. 717, 744, 94 S.Ct. 3112, 3127, 41 L.Ed.2d 1069 (1974); *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S., at 213, 93 S.Ct., at 2699. And it is implicit in our cases that after the dual school system has been completely disestablished, the States may no longer assign students by race. Cf. *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 96 S.Ct. 2697, 49 L.Ed.2d 599 (1976) (federal court may not require racial assignment in such circumstances).

Our analysis in *Bazemore v. Friday*, *supra*, reflected our unwillingness to conclude, outside the context of school assignment, that the continuing effects of prior discrimination can be equated with state maintenance of a discriminatory system. There we found both that the government's adoption of "wholly neutral admissions" policies for 4-H and Homemaker clubs sufficed to remedy its prior constitutional violation of maintaining segregated admissions, and that there was no further obligation to use racial reassignments to eliminate continuing effects—that is, any remaining all-black and all-white clubs. 478 U.S., at 407-408, 106 S.Ct., at 3012-3013. "[H]owever sound *Green [v. County School Board]*, *supra* may have been in the context of the public schools," we said, "it has no application to this wholly different milieu." *Id.*, at 408, 106 S.Ct., at 3013. The same is so here.

A State can, of course, act "to undo the effects of past discrimination" in many per-

missible ways that do not involve classification by race. In the particular field of state contracting, for example, it may adopt a preference for small businesses, or even for new businesses—which would make it easier for those previously excluded by discrimination to enter the field. Such programs may well have racially disproportionate impact, but they are not based on race. And, of course, a State may "undo the effects of past discrimination" in the sense of giving the identified victim of state discrimination that which it wrongfully denied him—for example, giving to a previously rejected black applicant the job that, by reason of discrimination, had been awarded to a white applicant, even if this means terminating the latter's employment. In such a context, the white jobholder is not being selected for disadvantageous treatment because of his race, but because he was wrongfully awarded a job to which another is entitled. That is worlds apart from the system here, in which those to be disadvantaged are identified solely by race.

I agree with the Court's dictum that a fundamental distinction must be drawn between the effects of "societal" discrimination and the effects of "identified" discrimination, and that the situation would be different if Richmond's plan were "tailored" to identify those particular bidders who "suffered from the effects of past discrimination by the city or prime contractors." *Ante*, at 728-729. In my view, however, the reason that would make a difference is not, as the Court states, that it would justify race-conscious action—see, e.g., *ante*, at 727, 728-729—but rather that it would enable race-neutral remediation. Nothing prevents Richmond from accord[ing] a contracting preference to identified victims of discrimination. While most of the beneficiaries might be black, neither the beneficiaries nor those disadvantaged by the preference would be identified on the basis of their race. In other words, far from justifying racial classification, identification of actual victims would

discrimination makes it less supportable than ever, because more obviously unneeded.

In his final book, Professor Bickel wrote: "[A] racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice. Moreover, it can easily be turned against those it purports to help. The history of the racial quota is a history of subjugation, not beneficence. Its evil lies not in its name, but in its effects: a quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant." Bickel, *The Morality of Consent*, at 133.

Those statements are true and increasingly prophetic. Apart from their societal effects, however, which are "in the aggregate disastrous," *id.*, at 134, it is important not to lose sight of the fact that even "benign" racial quotas have individual victims, whose very real injustice we ignore whenever we deny them enforcement of their right not to be disadvantaged on the basis of race. *Johnson v. Transportation Agency, Santa Clara County, Cal.*, 480 U.S. 616, 677, 107 S.Ct. 1442, 1476, 94 L.Ed.2d 615 (1987) (SCALIA, J., dissenting). As Justice Douglas observed: "A. DeFunis who is white is entitled to no advantage by virtue of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner." *DeFunis v. Odegaard*, 416 U.S. 312, 337, 94 S.Ct. 1704, 1716, 40 L.Ed.2d 164 (1974) (Douglas, J., dissenting). When we depart from this American principle we play with fire, and much more than an occasional DeFunis, Johnson, or Croson burns.

It is plainly true that in our society blacks have suffered discrimination immeasurably greater than any directed at other racial groups. But those who believe that racial preferences can help to "even the score" display, and reinforce, a manner of

thinking by race that was the source of the injustice and that will, if it endures within our society, be the source of more injustice, still. The relevant proposition is not that it was blacks, or Jews, or Irish who were discriminated against, but that it was individual men and women, "created equal," who were discriminated against. And the relevant resolve is that that should never happen again. Racial preferences appear to "even the score" (in some small degree) only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered in the past to a black man should be compensated for by discriminating against a white. Nothing is worth that embrace. Since blacks have been disproportionately disadvantaged by racial discrimination, any race-neutral remedial program aimed at the disadvantaged as such will have a disproportionately beneficial impact on blacks. Only such a program, and not one that operates on the basis of race, is in accord with the letter and the spirit of our Constitution.

Since I believe that the appellee here had a constitutional right to have its bid succeed or fail under a decisionmaking process uninfected with racial bias, I concur in the judgment of the Court.

Justice MARSHALL, with whom Justice BRENNAN and Justice BLACKMUN join, dissenting.

It is a welcome symbol of racial progress when the former capital of the Confederacy acts forthrightly to confront the effects of racial discrimination in its midst. In my view, nothing in the Constitution can be construed to prevent Richmond, Virginia, from allocating a portion of its contracting dollars for businesses owned or controlled by members of minority groups. Indeed, Richmond's set-aside program is indistinguishable in all meaningful respects from—and in fact was patterned upon—the federal set-aside plan which this Court upheld in *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980).

A majority of this Court holds today, however, that the Equal Protection Clause of the Fourteenth Amendment blocks Richmond's initiative. The essence of the majority's position¹ is that Richmond has failed to catalogue adequate findings to prove that past discrimination has impeded minorities from joining or participating fully in Richmond's construction contracting industry. I find deep irony in second-guessing Richmond's judgment on this point. As much as any municipality in the United States, Richmond knows what racial discrimination is; a century of decisions by this and other federal courts has richly documented the city's disgraceful history of public and private racial discrimination. In any event, the Richmond City Council has supported its determination that minorities have been wrongly excluded from local construction contracting. Its proof includes statistics showing that minority-owned businesses have received virtually no city contracting dollars and rarely if ever belonged to area trade associations; testimony by municipal officials that discrimination has been widespread in the local construction industry; and the same exhaustive and widely publicized federal studies relied on in *Fullilove*, studies which showed that pervasive discrimination in the Nation's tight-knit construction industry had operated to exclude minorities from public contracting. These are precisely the types of statistical and testimonial evidence which, until today, this Court had credited in cases approving of race-conscious measures designed to remedy past discrimination.

More fundamentally, today's decision marks a deliberate and giant step backward in this Court's affirmative action jurisprudence. Cynical of one municipality's attempt to redress the effects of past racial discrimination in a particular industry, the majority launches a grapeshot attack on race-conscious remedies in general. The

1. In the interest of convenience, I refer to the opinion in this case authored by Justice O'Connor as "the majority," recognizing that certain

majority's unnecessary pronouncement will inevitably discourage or prevent governmental entities, particularly States and localities, from acting to rectify the scourge of past discrimination. This is the harsh reality of the majority's decision, but it is not the Constitution's command.

I

As an initial matter, the majority takes an exceedingly myopic view of the factual predicate on which the Richmond City Council relied when it passed the Minority Business Utilization Plan. The majority analyzes Richmond's initiative as if it were based solely upon the facts about local construction and contracting practices adduced during the City Council session at which the measure was enacted. *Ante*, at 713-715. In so doing, the majority downplays the fact that the City Council had before it a rich trove of evidence that discrimination in the Nation's construction industry had seriously impaired the competitive position of businesses owned or controlled by members of minority groups. It is only against this backdrop of documented national discrimination, however, that the local evidence adduced by Richmond can be properly understood. The majority's refusal to recognize that Richmond has proven itself no exception to the dismaying pattern of national exclusion which Congress so painstakingly identified infects its entire analysis of this case.

Six years before Richmond acted, Congress passed, and the President signed, the Public Works Employment Act of 1977, Pub.L. 95-28, 91 Stat. 116, 42 U.S.C. § 6701 *et seq.* (Act), a measure which appropriated \$4 billion in federal grants to state and local governments for use in public works projects. Section 103(f)(2) of the Act was a minority business set-aside provision. It required state or local grantees to use 10% of their federal grants to procure services or supplies from businesses owned or con-

portions of that opinion have been joined by only a plurality of the Court.

trolled by members of statutorily identified minority groups, absent an administrative waiver. In 1980, in *Fullilove*, *supra*, this Court upheld the validity of this federal set-aside. Chief Justice Burger's opinion noted the importance of overcoming those "criteria, methods, or practices thought by Congress to have the effect of defeating, or substantially impairing, access by the minority business community to public funds made available by congressional appropriations." *Fullilove*, *supra*, at 480, 100 S.Ct., at 2775. Finding the set-aside provision properly tailored to this goal, the plurality concluded that the program was valid under either strict or intermediate scrutiny. *Id.*, at 492, 100 S.Ct., at 2781.

The congressional program upheld in *Fullilove* was based upon an array of congressional and agency studies which documented the powerful influence of racially exclusionary practices in the business world. A 1975 report by the House Committee on Small Business concluded:

"The effects of past inequities stemming from racial prejudice have not remained in the past. The Congress has recognized the reality that past discriminatory practices have, to some degree, adversely affected our present economic system.

"While minority persons comprise about 16 percent of the Nation's population, of the 13 million businesses in the United States, only 382,000, or approximately 3.0 percent, are owned by minority individuals. The most recent data from the Department of Commerce also indicates that the gross receipts of all businesses in this country totals about \$2,540.8 billion, and of this amount only \$16.6 billion, or about 0.65 percent was realized by minority business concerns.

"These statistics are not the result of random chance. The presumption must be made that past discriminatory systems have resulted in present economic inequities." H.R.Rep. No. 94-468, pp. 1-2 (1975) (quoted in *Fullilove*, 448 U.S., at 465, 100 S.Ct., at 2768) (opinion of

Burger, C.J.) (emphasis deleted and added).

A 1977 Report by the same Committee concluded:

"[O]ver the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities. Minorities, until recently, have not participated to any measurable extent, in our total business system generally, or in the construction industry in particular." H.R.Rep. No. 94-1791, p. 182 (1977), summarizing H.R.Rep. No. 94-468, p. 17 (1976) (quoted in *Fullilove*, *supra*, at 466, n. 48, 100 S.Ct., at 2768, n. 48).

Congress further found that minorities seeking initial public contracting assignments often faced immense entry barriers which did not confront experienced nonminority contractors. A report submitted to Congress in 1975 by the United States Commission on Civil Rights, for example, described the way in which fledgling minority-owned businesses were hampered by "deficiencies in working capital, inability to meet bonding requirements, disabilities caused by an inadequate 'track record,' lack of awareness of bidding opportunities, unfamiliarity with bidding procedures, preselection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavor minority businesses." 448 U.S., at 467, 100 S.Ct., at 2769 (summarizing United States Comm'n on Civil Rights, Minorities and Women as Government Contractors (May 1975)).

Thus, as of 1977, there was "abundant evidence" in the public domain "that minority businesses ha[d] been denied effective participation in public contracting opportu-

nities by procurement practices that perpetuated the effects of prior discrimination." *Fullilove, supra*, at 477-478, 100 S.Ct., at 2774.³ Significantly, this evidence demonstrated that discrimination had prevented existing or nascent minority-owned businesses from obtaining not only federal contracting assignments, but state and local ones as well. See *Fullilove, supra*, at 478, 100 S.Ct., at 2774.³

The members of the Richmond City Council were well aware of these exhaustive congressional findings, a point the majority, tellingly, elides. The transcript of the session at which the Council enacted the local set-aside initiative contains numerous references to the 6-year-old congressional set-aside program, to the evidence of nationwide discrimination barriers described above, and to the *Fullilove* decision itself. See, e.g., App. 14-16, 24 (remarks of

2. Other reports indicating the dearth of minority-owned businesses include H.R. Rep. No. 92-1615, p. 3 (1972) (Report of the Subcommittee on Minority Small Business Enterprise, finding that the "long history of racial bias" has created "major problems" for minority businessmen); H.R. Doc. No. 92-194, p. 1 (1972) (text of message from President Nixon to Congress, describing federal efforts "to press open new doors of opportunity for millions of Americans to whom those doors had previously been barred, or only half-open"); H.R. Doc. No. 92-169, p. 1 (1971) (text of message from President Nixon to Congress, describing paucity of minority business ownership and federal efforts to give "every man an equal chance at the starting line").

3. Numerous congressional studies undertaken after 1977 and issued before the Richmond City Council convened in April 1983 found that the exclusion of minorities had continued virtually unabated—and that, because of this legacy of discrimination, minority businesses across the nation had still failed, as of 1983, to gain a real toehold in the business world. See, e.g., H.R. Rep. No. 95-949, pp. 2, 8 (1978) (Report of House Committee on Small Business, finding that minority businesses "are severely undercapitalized" and that many minorities are disadvantaged "because they are identified as members of certain racial categories"); S. Rep. No. 95-1070, pp. 14-15 (1978), U.S. Code Cong. & Admin. News 1978, pp. 3835, 3848, 3849; (Report of Senate Select Committee on Small Business, finding that the federal effort "has fallen far short of its goal to develop strong and growing disadvantaged small businesses," and "rec-

ogniz[ing] the pattern of social and economic discrimination that continues to deprive racial and ethnic minorities, and others, of the opportunity to participate fully in the free enterprise system"); S. Rep. No. 96-31, pp. IX, 107 (1979) (report of Senate Select Committee on Small Business, finding that many minorities have "suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control"); S. Rep. No. 96-974, p. 3 (1980), U.S. Code Cong. & Admin. News 1980, pp. 4953, 4954 (Report of Senate Select Committee on Small Business, finding that government aid must be "significantly increased" if minority-owned businesses are to "have the maximum practical opportunity to develop into viable small businesses"); H.R. Rep. No. 97-956, p. 35 (1982) (Report of House Committee on Small Business, finding that federal programs to aid minority businesses have had "limited success" to date, but concluding that success could be "greatly expanded" with "appropriate corrective actions"); H.R. Rep. No. 98-3, p. 1 (1983) (Report of House Committee on Small Business, finding that "the small business share of Federal contracts continues to be inadequate").

City Attorney William H. Hefty); *id.*, at 14-15 (remarks of councilmember William J. Leidinger); *id.*, at 18 (remarks of minority community task force president Freddie Ray); *id.*, at 25, 41 (remarks of councilmember Henry L. Marsh III); *id.*, at 42 (remarks of City Manager Manuel Deese).

The City Council's members also heard testimony that, although minority groups made up half of the city's population, only .67% of the \$24.6 million which Richmond had dispensed in construction contracts during the five years ending in March 1983 had gone to minority-owned prime contractors. *Id.*, at 43 (remarks of councilmember Henry W. Richardson). They heard testimony that the major Richmond area construction trade associations had virtually no minorities among their hundreds of members.⁴ Finally, they

4. According to testimony by trade association representatives, the Associated General Contractors of Virginia had no blacks among its 130 Richmond-area members, App. 27-28 (remarks of Stephen Watts); the American Subcontractors Association had no blacks among its 80 Richmond members, *id.*, at 36 (remarks of Patrick Murphy); the Professional Contractors Estimators Association had one black member

heard testimony from city officials as to the exclusionary history of the local construction industry.⁵ As the District Court noted, not a single person who testified before the City Council denied that discrimination in Richmond's construction industry had been widespread. Civ. Action No. 84-0021 (E.D. Va., Dec. 8, 1984) (reprinted in Supp. App. to Juris. Statement 164-165).⁶ So long as one views Richmond's local evidence of discrimination against the backdrop of systematic nationwide racial discrimination which Congress had so painstakingly identified in this very industry, this case is readily resolved.

II

"Agreement upon a means for applying the Equal Protection Clause to an affirmative-action program has eluded this Court every time the issue has come before us." *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 301, 106 S.Ct. 1842, 1861, 90 L.Ed. 2d 260 (1986) (MARSHALL, J., dissenting). My view has long been that race-conscious classifications designed to further remedial goals "must serve important governmental objectives and must be substantially related to achievement of those objectives" in order to withstand constitutional scrutiny. *University of California Regents v. Bakke*, 438 U.S. 265, 359, 98 S.Ct. 2783, 2783, 57 L.Ed.2d 750 (1978) (joint separate opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.) (citations

among its 60 Richmond members, *id.*, at 39 (remarks of Al Shuman); the Central Virginia Electrical Contractors Association had one black member among its 45 members, *id.*, at 40 (remarks of Al Shuman); and the National Electrical Contractors Association had two black members among its 81 Virginia members. *Id.*, at 34 (remarks of Mark Singer).

5. Among those testifying to the discriminatory practices of Richmond's construction industry was councilmember Henry Marsh, who had served as Mayor of Richmond from 1977 to 1982. Marsh stated:

"I have been practicing law in this community since 1961, and I am familiar with the practices in the construction industry in this area, in the State, and around the nation. And I can say without equivocation, that the general conduct

omitted); see also *Wygant, supra*, 476 U.S., at 301-302, 106 S.Ct., at 1861 (MARSHALL, J., dissenting); *Fullilove*, 448 U.S., at 517-519, 100 S.Ct., at 2794-2795 (MARSHALL, J., concurring in judgment). Analyzed in terms of this two-prong standard, Richmond's set-aside, like the federal program on which it was modeled, is "plainly constitutional." *Fullilove, supra*, at 519, 100 S.Ct., at 2795-2796 (MARSHALL, J., concurring in judgment).

A

1

Turning first to the governmental interest inquiry, Richmond has two powerful interests in setting aside a portion of public contracting funds for minority-owned enterprises. The first is the city's interest in eradicating the effects of past racial discrimination. It is far too late in the day to doubt that remedying such discrimination is a compelling, let alone an important, interest. In *Fullilove*, six members of this Court deemed this interest sufficient to support a race-conscious set-aside program governing federal contract procurement. The decision, in holding that the federal set-aside provision satisfied the Equal Protection Clause under any level of scrutiny, recognized that the measure sought to remove "barriers to competitive access which had their roots in racial and ethnic discrimination, and which continue today, even ab-

in the construction industry in this area, and the State and around the nation, is one in which race discrimination and exclusion on the basis of race is widespread.

"I think the situation involved in the City of Richmond is the same.... I think the question of whether or not remedial action is required is not open to question." App. 41. Manuel Deese, who in his capacity as City Manager had oversight responsibility for city procurement matters, stated that he fully agreed with Marsh's analysis. *Id.*, at 42.

6. The representatives of several trade associations did, however, deny that their particular organizations engaged in discrimination. See, e.g., App. 38 (remarks of Al Shuman, on behalf of the Central Virginia Electrical Contractors Association).

sent any intentional discrimination or unlawful conduct." 448 U.S., at 478, 100 S.Ct., at 2774; see also *id.*, at 502-506, 100 S.Ct., at 2787-2789 (Powell, J., concurring); *id.*, at 520, 100 S.Ct., at 2796 (MARSHALL, J., concurring in judgment). Indeed, we have repeatedly reaffirmed the government's interest in breaking down barriers erected by past racial discrimination, in cases involving access to public education, *McDaniel v. Barresi*, 402 U.S. 39, 41, 91 S.Ct. 1287, 1288, 28 L.Ed.2d 582 (1971); *University of California Regents v. Bakke*, 438 U.S., at 320, 98 S.Ct., at 2763 (Powell, J.); *id.*, at 362-364, 98 S.Ct., at 2784-2785 (joint separate opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.); employment, *United States v. Paradise*, 480 U.S. 149, 167, 107 S.Ct. 1053, 1064, 94 L.Ed.2d 203 (1987) (plurality opinion); *id.*, at 186-189, 107 S.Ct., at 1074-1076 (Powell, J., concurring), and valuable government contracts. *Fullilove*, *supra*, 448 U.S., at 481-484, 100 S.Ct., at 2776-2777 (opinion of Burger, C.J.); *id.*, at 496-497, 100 S.Ct., at 2783-2784 (Powell, J., concurring); *id.*, at 521, 100 S.Ct., at 2797 (MARSHALL, J., concurring in judgment).

Richmond has a second compelling interest in setting aside, where possible, a portion of its contracting dollars. That interest is the prospective one of preventing the city's own spending decisions from reinforcing and perpetuating the exclusionary effects of past discrimination. See *Fullilove*, 448 U.S., at 475, 100 S.Ct., at 2773 (noting Congress' conclusion that "the subcontracting practices of prime contractors could perpetuate the prevailing impaired access by minority businesses to public contracting opportunities"); *id.*, at 503, 100 S.Ct., at 2787 (Powell, J., concurring).

The majority pays only lip service to this additional governmental interest. See *ante*, at 720, 726. But our decisions have often emphasized the danger of the government tacitly adopting, encouraging, or furthering racial discrimination even by its own routine operations. In *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed.

1161 (1948), this Court recognized this interest as a constitutional command, holding unanimously that the Equal Protection Clause forbids courts to enforce racially restrictive covenants even where such covenants satisfied all requirements of state law and where the State harbored no discriminatory intent. Similarly, in *Norwood v. Harrison*, 413 U.S. 455, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973), we invalidated a program in which a State purchased textbooks and loaned them to students in public and private schools, including private schools with racially discriminatory policies. We stated that the Constitution requires a State "to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination." *Id.*, at 467, 93 S.Ct., at 2811-2812; see also *Gilmore v. City of Montgomery*, 417 U.S. 556, 94 S.Ct. 2416, 41 L.Ed.2d 304 (1974) (upholding federal court order forbidding city from allowing private segregated schools which allegedly discriminated on the basis of race to use public parks).

The majority is wrong to trivialize the continuing impact of government acceptance or use of private institutions or structures once wrought by discrimination. When government channels all its contracting funds to a white-dominated community of established contractors whose racial homogeneity is the product of private discrimination, it does more than place its imprimatur on the practices which forged and which continue to define that community. It also provides a measurable boost to those economic entities that have thrived within it, while denying important economic benefits to those entities which, but for prior discrimination, might well be better qualified to receive valuable government contracts. In my view, the interest in ensuring that the government does not reflect and reinforce prior private discrimination in dispensing public contracts is every bit as strong as the interest in eliminating private discrimination—an interest which

this Court has repeatedly deemed compelling. See, e.g., *New York State Club Assn. v. New York City*, 487 U.S. —, n. 5, 108 S.Ct. 2225, 2235 n. 5, 101 L.Ed.2d 1 (1988); *Board of Directors v. Rotary Club*, 481 U.S. 537, 549, 107 S.Ct. 1940, —, 95 L.Ed.2d 474 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 623, 104 S.Ct. 3244, 3252, 82 L.Ed.2d 462 (1984); *Bob Jones University v. United States*, 461 U.S. 574, 604, 103 S.Ct. 2017, 2035, 76 L.Ed.2d 157 (1983); *Runyon v. McCrary*, 427 U.S. 160, 179, 96 S.Ct. 2586, 2598, 49 L.Ed.2d 415 (1976). The more government bestows its rewards on those persons or businesses that were positioned to thrive during a period of private racial discrimination, the tighter the dead-hand grip of prior discrimination becomes on the present and future. Cities like Richmond may not be constitutionally required to adopt set-aside plans. But see *North Carolina State Bd. of Education v. Swann*, 402 U.S. 43, 46, 91 S.Ct. 1284, 1286, 28 L.Ed.2d 586 (1971) (Constitution may require consideration of race in remedying state-sponsored school segregation); *McDaniel*, *supra*, 402 U.S., at 41, 100 S.Ct., at 1288 (same, and stating that "[a]ny other approach would freeze the status quo that is the very target of all desegregation processes"). But there can be no doubt that when Richmond acted affirmatively to stem the perpetuation of patterns of discrimination through its own decision-making, it served an interest of the highest order.

2

The remaining question with respect to the "governmental interest" prong of equal protection analysis is whether Richmond has proffered satisfactory proof of past racial discrimination to support its twin interests in remediation and in governmental nonperpetuation. Although the Members of this Court have differed on the appropriate standard of review for race-conscious remedial measures, see *United States v. Paradise*, 480 U.S., at 166, and 166-167, n. 17, 107 S.Ct., at 1064, and 1064, n. 17 (plurality opinion); *Sheet Metal Workers v.*

EEOC, 478 U.S. 421, 480, 106 S.Ct. 3019, 3052, 92 L.Ed.2d 344 (1986) (plurality opinion), we have always regarded this factual inquiry as a practical one. Thus, the Court has eschewed rigid tests which require the provision of particular species of evidence, statistical or otherwise. At the same time we have required that government adduce evidence that, taken as a whole, is sufficient to support its claimed interest and to dispel the natural concern that it acted out of mere "paternalistic stereotyping, not on a careful consideration of modern social conditions." *Fullilove v. Klutznick*, 448 U.S., at 519, 100 S.Ct., at 2795 (MARSHALL, J., concurring in judgment).

The separate opinions issued in *Wygant v. Jackson Bd. of Education*, a case involving a school board's race-conscious layoff provision, reflect this shared understanding. Justice Powell's opinion for a plurality of four Justices stated that "the trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary." 476 U.S., at 277, 106 S.Ct., at 1848. Justice O'CONNOR's separate concurrence required "a firm basis for concluding that remedial action was appropriate." *Id.*, at 293, 106 S.Ct., at 1856. The dissenting opinion I authored, joined by Justices BRENNAN and BLACKMUN, required a government body to present a "legitimate factual predicate" and a reviewing court to "genuinely consider the circumstances of the provision at issue." *Id.*, at 297, 303, 106 S.Ct., at 1859, 1862. Finally, Justice STEVENS' separate dissent sought and found "a rational and unquestionably legitimate basis" for the school board's action. *Id.*, at 315-316, 106 S.Ct., at 1868-1869. Our unwillingness to go beyond these generalized standards to require specific types of proof in all circumstances reflects, in my view, an understanding that discrimination takes a myriad of "ingenious and pervasive forms." *University of California Regents v. Bakke*, 438 U.S., at 387, 98 S.Ct., at 2797 (separate opinion of MARSHALL, J.).

The varied body of evidence on which Richmond relied provides a "strong," "firm," and "unquestionably legitimate" basis upon which the City Council could determine that the effects of past racial discrimination warranted a remedial and prophylactic governmental response. As I have noted, *supra*, at 740-742 Richmond acted against a backdrop of congressional and Executive Branch studies which demonstrated with such force the nationwide pervasiveness of prior discrimination that Congress presumed that "present economic inequities" in construction contracting resulted from "past discriminatory systems." *Supra*, at 741 (quoting H.R. Rep. No. 94-468, pp. 1-2 (1975)). The city's local evidence confirmed that Richmond's construction industry did not deviate from this pernicious national pattern. The fact that just 67% of public construction expenditures over the previous five years had gone to minority-owned prime contractors, despite the city's racially mixed population, strongly suggests that construction contracting in the area was rife with "present economic inequities." To the extent this enormous disparity did not itself demonstrate that discrimination had occurred, the descriptive testimony of Richmond's elected and appointed leaders drew the necessary link between the pitifully small presence of minorities in construction contracting and past exclusionary practices. That *no one* who testified challenged this depiction of widespread racial discrimination in area construction contracting lent significant weight to these accounts. The fact that area trade associations had virtually no minority members dramatized the extent of present inequities and suggested the lasting power of past discriminatory systems. In sum, to suggest that the facts on which Richmond has relied do not provide a sound basis for its finding of past racial discrimination simply blinks credibility.

Richmond's reliance on localized, industry-specific findings is a far cry from the reliance on generalized "societal discrimina-

tion" which the majority decries as a basis for remedial action. *Ante*, at 722, 724, 727. But characterizing the plight of Richmond's minority contractors as mere "societal discrimination" is not the only respect in which the majority's critique shows an unwillingness to come to grips with why construction contracting in Richmond is essentially a whites-only enterprise. The majority also takes the disingenuous approach of disaggregating Richmond's local evidence, attacking it piecemeal, and thereby concluding that no single piece of evidence adduced by the city, "standing alone," see, e.g., *ante*, at 726, suffices to prove past discrimination. But items of evidence do not, of course, "stand alone" or exist in alien juxtaposition; they necessarily work together, reinforcing or contradicting each other.

In any event, the majority's criticisms of individual items of Richmond's evidence rest on flimsy foundations. The majority states, for example, that reliance on the disparity between the share of city contracts awarded to minority firms (67%) and the minority population of Richmond (approximately 50%) is "misplaced." *Ante*, at 724. It is true that, when the factual predicate needed to be proved is one of present discrimination, we have generally credited statistical contrasts between the racial composition of a work force and the general population as proving discrimination only where this contrast revealed "gross statistical disparities." *Hazelwood School District v. United States*, 433 U.S. 299, 307-308, 97 S.Ct. 2736, 2741-2742, 53 L.Ed.2d 768 (1977) (Title VII case); see also *Teamsters v. United States*, 431 U.S. 324, 339, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396 (1977) (same). But this principle does not impugn Richmond's statistical contrast, for two reasons. First, considering how minuscule the share of Richmond public construction contracting dollars received by minority-owned businesses is, it is hardly unreasonable to conclude that this case involves a "gross statistical disparity." *Hazelwood School Dist.*, *supra*, 433 U.S. at 307,

97 S.Ct., at 2741. There are roughly equal numbers of minorities and nonminorities in Richmond—yet minority-owned businesses receive *one-seventy-fifth* the public contracting funds that other businesses receive. See *Teamsters*, *supra*, 431 U.S., at 342, n. 23, 97 S.Ct., at 1858, n. 23 ("[F]ine tuning of the statistics could not have obscured the glaring absence of minority [bus] drivers.... [T]he company's inability to rebut the inference of discrimination came not from a misuse of statistics but from 'the inexorable zero'" (citation omitted) (quoted in *Johnson v. Transportation Agency*, 480 U.S. 616, 656-657, 107 S.Ct. 1442, 1665, 94 L.Ed.2d 615 (1987) (O'CONNOR, J., concurring in the judgment)).

Second, and more fundamentally, where the issue is not present discrimination but rather whether *past* discrimination has resulted in the *continuing exclusion* of minorities from an historically tight-knit industry, a contrast between population and work force is entirely appropriate to help gauge the degree of the exclusion. In *Johnson v. Transportation Agency*, *supra*, Justice O'CONNOR specifically observed that, when it is alleged that discrimination has prevented blacks from "obtaining th[e] experience" needed to qualify for a position, the "relevant comparison" is not to the percentage of blacks in the pool of qualified candidates, but to "the total percentage of blacks in the labor force." 480 U.S., at 651, 107 S.Ct., at 1462; see also *Steelworkers v. Weber*, 443 U.S. 193, 198-199, and n. 1, 99 S.Ct. 2721, 2724-2725, and n. 1, 61 L.Ed.2d 480 (1979); *Teamsters*, 431 U.S., at 339, n. 20, 97 S.Ct., at 1856, n. 20. This contrast is especially illuminating in cases like this, where a main avenue of introduction into the work force—here, membership in the trade associations whose members presumably train apprentices and help them procure subcontracting assignments—is itself grossly dominated by nonminorities. The majority's assertion that the city "does not even know how many MBE's in the relevant market are qualified," *ante*, at 725, is thus entirely

beside the point. If Richmond indeed has a monochromatic contracting community—a conclusion reached by the District Court, see Civ. Action No. 84-0021 (ED Va.1984) (reprinted at Supp.App. to Juris. Statement 164)—this most likely reflects the lingering power of past exclusionary practices. Certainly this is the explanation Congress has found persuasive at the national level. See *Fullilove*, 448 U.S., at 465, 100 S.Ct., at 2768. The city's requirement that prime public contractors set aside 30% of their subcontracting assignments for minority-owned enterprises, subject to the ordinance's provision for waivers where minority-owned enterprises are unavailable or unwilling to participate, is designed precisely to ease minority contractors into the industry.

The majority's perfunctory dismissal of the testimony of Richmond's appointed and elected leaders is also deeply disturbing. These officials—including councilmembers, a former mayor, and the present city manager—asserted that race discrimination in area contracting had been widespread, and that the set-aside ordinance was a sincere and necessary attempt to eradicate the effects of this discrimination. The majority, however, states that where racial classifications are concerned, "simple legislative assurances of good intention cannot suffice." *Ante*, at 724. It similarly discounts as minimally probative the City Council's designation of its set-aside plan as remedial. "[B]ind judicial deference to legislative or executive pronouncements," the majority explains, "has no place in equal protection analysis." *Ante*, at 724.

No one, of course, advocates "blind judicial deference" to the findings of the City Council or the testimony of city leaders. The majority's suggestion that wholesale deference is what Richmond seeks is a classic straw-man argument. But the majority's trivialization of the testimony of Richmond's leaders is dismaying in a far more serious respect. By disregarding the testimony of local leaders and the judgment of local government, the majority does vio-

lence to the very principles of comity within our federal system which this Court has long championed. Local officials, by virtue of their proximity to, and their expertise with, local affairs, are exceptionally well-qualified to make determinations of public good "within their respective spheres of authority." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 244, 104 S.Ct. 2321, 2331, 81 L.Ed.2d 186 (1984); see also *FERC v. Mississippi*, 456 U.S. 742, 777-778, 102 S.Ct. 2126, 2147, 72 L.Ed.2d 532 (1982) (O'CONNOR, J., concurring in judgment in part and dissenting in part). The majority, however, leaves any traces of comity behind in its headlong rush to strike down Richmond's race-conscious measure.

Had the majority paused for a moment on the facts of the Richmond experience, it would have discovered that the city's leadership is deeply familiar with what racial discrimination is. The members of the Richmond City Council have spent long years witnessing multifarious acts of discrimination, including, but not limited to, the deliberate diminution of black residents' voting rights, resistance to school desegregation, and publicly sanctioned housing discrimination. Numerous decisions of federal courts chronicle this disgraceful recent history. In *Richmond v. United States*, 422 U.S. 358, 95 S.Ct. 2296, 45 L.Ed.2d 245 (1975), for example, this Court denounced Richmond's decision to annex part of an adjacent county at a time when the city's black population was nearing 50% because it was "infected by the impermissible purpose of denying the right to vote based on race through perpetuating white majority power to exclude Negroes from office." *Id.*, at 373, 95 S.Ct., at 2305; see also *id.*, at 382, 95 S.Ct., at 2309 (BRENNAN, J., dissenting) (describing Richmond's "flagrantly discriminatory purpose... to avert a transfer of political control to what was fast becoming a black-population majority") (citation omitted).⁷

In *Bradley v. School Board of City of Richmond, Virginia*, 462 F.2d 1058, 1060, n. 1 (CA4 1972), *aff'd* by an equally divided Court, 412 U.S. 92, 93 S.Ct. 1952, 36 L.Ed.2d 771 (1973), the Court of Appeals for the Fourth Circuit, sitting en banc, reviewed in the context of a school desegregation case Richmond's long history of inadequate compliance with *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), and the cases implementing its holding. The dissenting judge elaborated:

"The sordid history of Virginia's, and Richmond's attempts to circumvent, defeat, and nullify the holding of *Brown I*, has been recorded in the opinions of this and other courts, and need not be repeated in detail here. It suffices to say that there was massive resistance and every state resource, including the services of the legal officers of the state, the services of private counsel (costing the State hundreds of thousands of dollars), the State police, and the power and prestige of the Governor, was employed to defeat *Brown I*. In Richmond, as has been mentioned, not even freedom of choice became actually effective until 1966, twelve years after the decision of *Brown I*." 462 F.2d, at 1075 (Winter, J.) (emphasis in original) (footnotes and citations omitted).

The Court of Appeals majority in *Bradley*, used equally pungent words in describing public and private housing discrimination in Richmond. Though rejecting the black plaintiffs' request that it consolidate Richmond's school district with those of two neighboring counties, the majority nonetheless agreed with the plaintiffs' assertion that "within the City of Richmond there has been state (also federal) action tending to perpetuate apartheid of the races in ghetto patterns throughout the city." *Id.*, at 1065 (citing numerous public and private

black political power, see J. Moerser and R. Dennis, *The Politics of Annexation—Oligarchy Power in a Southern City* 50-188 (1982).

acts of discrimination).⁸

When the legislatures and leaders of cities with histories of pervasive discrimination testify that past discrimination has infected one of their industries, armchair cynicism like that exercised by the majority has no place. It may well be that "the autonomy of a state is an essential component of federalism," *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 588, 105 S.Ct. 1005, 1037, 83 L.Ed.2d 1016 (1985) (O'CONNOR, J., dissenting), and that "each State is sovereign within its own domain, governing its citizens and providing for their general welfare," *FERC v. Mississippi*, 456 U.S., at 777, 102 S.Ct., at 2147 (O'CONNOR, J., dissenting), but apparently this is not the case when federal judges, with nothing but their impressions to go on, choose to disbelieve the explanations of these local governments and officials. Disbelief is particularly inappropriate here in light of the fact that appellee Croson, which had the burden of proving unconstitutionality at trial, *Wygant*, 476 U.S., at 277-278, 106 S.Ct., at 1848 (plurality opinion), has at no point come forward with any direct evidence that the City Council's motives were anything other than sincere.⁹

Finally, I vehemently disagree with the majority's dismissal of the congressional and Executive Branch findings noted in *Fullilove* as having "extremely limited" probative value in this case. *Ante*, at 726.

8. Again the dissenting judge—who would have consolidated the school districts—elaborated: "[M]any other instances of state and private action contribut[ed] to the concentration of black citizens within Richmond and white citizens with out. These were principally in the area of residential development. Racially restrictive covenants were freely employed. Racially discriminatory practices in the prospective purchase of county property by black purchasers were followed. Urban renewal, subsidized public housing and government-sponsored home mortgage insurance had been undertaken on a racially discriminatory basis. [The neighboring counties] provided schools, roads, zoning and development approval for the rapid growth of the white population in each county at the expense of the city, without making any attempt

The majority concedes that Congress established nothing less than a "presumption" that minority contracting firms have been disadvantaged by prior discrimination. *Ibid.* The majority, inexplicably, would forbid Richmond to "share" in this information, and permit only Congress to take note of these ample findings. *Ante*, at 727. In thus requiring that Richmond's local evidence be severed from the context in which it was prepared, the majority would require cities seeking to eradicate the effects of past discrimination within their borders to reinvent the evidentiary wheel and engage in unnecessarily duplicative, costly, and time-consuming factfinding.

No principle of federalism or of federal power, however, forbids a state or local government from drawing upon a nationally relevant historical record prepared by the Federal Government. See *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52, 106 S.Ct. 925, 931, 89 L.Ed.2d 29 (1986) (city is "entitled to rely on the experiences of Seattle and other cities" in enacting an adult theater ordinance, as the First Amendment "does not require a city... to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the cities relies upon is reasonably believed to be relevant to the problem that the city addresses"); see also *Steelworkers v. Weber*, 443 U.S., at 198, n. 1, 99 S.Ct., at 2724, n. 1 ("Judicial findings of exclusion from

to assure that the development that they made possible was integrated. Superimposed on the pattern of government-aided residential segregation... had been a discriminatory policy of school construction, i.e., the selection of school construction sites in the center of racially identifiable neighborhoods manifestly to serve the educational needs of students of a single race.

"The majority does not question the accuracy of these facts." 462 F.2d, at 1075-1076 (Winter, J.) (emphasis in original) (footnotes and citations omitted).

9. Compare *Fullilove*, 448 U.S., at 541, 100 S.Ct., at 2807 (STEVENS, J., dissenting) (noting statements of sponsors of federal set-aside that measure was designed to give their constituents "a piece of the action").

7. For a disturbing description of the lengths to which some Richmond white officials went during recent decades to hold in check growing

crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice"); cf. *Wygant*, 476 U.S., at 296, 106 S.Ct., at 1858 (MARSHALL, J., dissenting). ("No race-conscious provision that purports to serve a remedial purpose can be fairly assessed in a vacuum").¹⁰ Of course, Richmond could have built an even more compendious record of past discrimination, one including additional stark statistics and additional individual accounts of past discrimination. But nothing in the Fourteenth Amendment imposes such onerous documentary obligations upon States and localities once the reality of past discrimination is apparent. See *infra*, at 728-726.

B

In my judgment, Richmond's set-aside plan also comports with the second prong of the equal protection inquiry, for it is substantially related to the interests it seeks to serve in remedying past discrimination and in ensuring that municipal contract procurement does not perpetuate that discrimination. The most striking aspect of the city's ordinance is the similarity it bears to the "appropriately limited" federal set-aside provision upheld in *Fullilove*, 448 U.S., at 489, 100 S.Ct., at 2780. Like the federal provision, Richmond's is limited to five years in duration, *ibid.*, and was not renewed when it came up for reconsideration in 1988. Like the federal provision, Richmond's contains a waiver provision freeing from its subcontracting requirements those nonminority firms that demon-

strate that they cannot comply with its provisions. *Id.*, at 483-484, 100 S.Ct., at 2777. Like the federal provision, Richmond's has a minimal impact on innocent third parties. While the measure affects 30% of public contracting dollars, that translates to only 3% of overall Richmond area contracting. Brief for Appellant 44, n. 73 (recounting federal census figures on construction in Richmond); see *Fullilove*, *supra*, at 484, 100 S.Ct., at 2778 (burden shouldered by nonminority firms is "relatively light" compared to "overall construction contracting opportunities").

Finally, like the federal provision, Richmond's does not interfere with any vested right of a contractor to a particular contract; instead it operates entirely prospectively. *Ibid.* Richmond's initiative affects only future economic arrangements and imposes only a diffuse burden on nonminority competitors—here, businesses owned or controlled by nonminorities which seek subcontracting work on public construction projects. The plurality in *Wygant* emphasized the importance of this not disrupting the settled and legitimate expectations of innocent parties. "While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive." *Wygant*, 476 U.S., at 283, 106 S.Ct., at 1851; see *Steelworkers v. Weber*, 443 U.S., at 208, 99 S.Ct., at 2730.

Act recites no preambulatory 'findings' on the subject, we are satisfied that Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination"; see also *id.*, at 549-550, and 550, n. 25, 100 S.Ct., at 2811-2812, and 2812, n. 25 (STEVENS, J., dissenting) (noting "perfunctory" consideration accorded the set-aside provision); Days, *Fullilove*, 96 Yale L.J. 453, 465 (1987) (citation omitted) ("One can only marvel at the fact that the minority set-aside provision was enacted into law without hearings or committee reports, and with only token opposition") (footnote omitted).

10. Although the majority sharply criticizes Richmond for using data which it did not itself develop, it is noteworthy that the federal set-aside program upheld in *Fullilove* was adopted as a floor amendment "without any congressional hearings or investigation whatsoever." L. Tribe, *American Constitutional Law* 345 (2d ed. 1988). The principal opinion in *Fullilove* justified the set-aside by relying heavily on the aforementioned studies by agencies like the Small Business Administration and on legislative reports prepared in connection with prior, failed legislation. See *Fullilove v. Klutznick*, 448 U.S. 448, 478, 100 S.Ct. 2758, 2774, 65 L.Ed.2d 902 (1980) (opinion of Burger, C.J.) ("Although the

These factors, far from "justify[ing] a preference of any size or duration," *ante*, at 727, are precisely the factors to which this Court looked in *Fullilove*. The majority takes issue, however, with two aspects of Richmond's tailoring: the city's refusal to explore the use of race-neutral measures to increase minority business participation in contracting, and the selection of a 30% set-aside figure. *Ante*, at 728. The majority's first criticism is flawed in two respects. 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. See *Richmond, Va., City Code*, § 17.1 *et seq.* (1985). The virtual absence of minority businesses from the city's contracting rolls, indicated by the fact that such businesses have received less than 1% of public contracting dollars, strongly suggests that this ban has not succeeded in redressing the impact of past discrimination or in preventing city contract procurement from reinforcing racial homogeneity. Second, the majority's suggestion that Richmond should have first undertaken such race-neutral measures as a program of city financing for small firms, *ante*, at 727, ignores the fact that such measures, while theoretically appealing, have been discredited by Congress as ineffectual in eradicating the effects of past discrimination in this very industry. For this reason, this Court in *Fullilove* refused to fault Congress for not undertaking race-neutral measures as precursors to its race-conscious set-aside. See *Fullilove*, *supra*, 448 U.S., at 463-467, 100 S.Ct., at 2767-2769 (noting inadequacy of previous measures designed to give experience to minority businesses); see also *id.*, at 511, 100 S.Ct., at 2792 (Powell, J., concurring) ("By the time Congress enacted [the federal set-

aside] in 1977, it knew that other remedies had failed to ameliorate the effects of racial discrimination in the construction industry"). The Equal Protection Clause does not require Richmond to retrace Congress' steps when Congress has found that those steps lead nowhere. Given the well-exposed limitations of race-neutral measures, it was thus appropriate for a municipality like Richmond to conclude that, in the words of Justice BLACKMUN, "[i]n order to get beyond racism, we must first take account of race. There is no other way." *University of California Regents v. Bakke*, 438 U.S., at 407, 98 S.Ct., at 2807-2808 (1978) (separate opinion).¹¹

As for Richmond's 30% target, the majority states that this figure "cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing." *Ante*, at 728. The majority ignores two important facts. First, the set-aside measure affects only 3% of overall city contracting; thus, any imprecision in tailoring has far less impact than the majority suggests. But more important, the majority ignores 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." *Fullilove*, *supra*, 448 U.S., at 513-514, 100 S.Ct., at 2792-2793 (Powell, J., concurring). The Richmond City Council's 30% figure similarly falls roughly halfway between the present percentage of Richmond-based minority contractors (almost zero) and the percentage of minorities in Richmond (50%). In faulting Richmond for not presenting a different explanation for its

at 2762. 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.

11. The majority also faults Richmond's ordinance for including within its definition of "minority group members" not only black citizens, but also citizens who are "Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons." *Ante*, at 727. This is, of course, precisely the same definition Congress adopted in its set-aside legislation. *Fullilove*, 448 U.S., at 454, 100 S.Ct.,

choice of a set-aside figure, the majority honors *Fullilove* only in the breach.

III

I would ordinarily end my analysis at this point and conclude that Richmond's ordinance satisfies both the governmental interest and substantial relationship prongs of our Equal Protection Clause analysis. However, I am compelled to add more, for the majority has gone beyond the facts of this case to announce a set of principles which unnecessarily restrict the power of governmental entities to take race-conscious measures to redress the effects of prior discrimination.

A

Today, for the first time, a majority of this Court has adopted strict scrutiny as its standard of Equal Protection Clause review of race-conscious remedial measures. *Ante*, at 721; *ante*, at 735 (SCALIA, J., concurring in judgment). This is an unwelcome development. A profound difference separates governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism or to prevent neutral governmental activity from perpetuating the effects of such racism. See, e.g., *Wygant v. Jackson Bd. of Education*, 476 U.S., at 301-302, 106 S.Ct., at 1861 (1986) (MARSHALL, J., dissenting); *Fullilove*, 448 U.S., at 517-519, 100 S.Ct., at 2794-2795 (MARSHALL, J., concurring in judgment); *University of California Regents v. Bakke*, 438 U.S., at 355-362, 98 S.Ct., at 2781-2784 (1978) (joint separate opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.) (citations omitted).

Racial classifications "drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism" warrant the strictest judicial scrutiny because of the very irrelevance of these rationales. *Id.*, at 357-358, 98 S.Ct., at 2782. 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 blacks and other racial minorities in this Nation has pervaded our Nation's history and continues to scar our society. As I stated in *Fullilove*: "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 fatal in fact." *Fullilove*, *supra*, 448 U.S., at 518-519, 100 S.Ct., at 2795 (citation omitted).

In concluding that remedial classifications warrant no different standard of review under the Constitution than the most brute and repugnant forms of state-sponsored racism, a majority of this Court signals that it regards racial discrimination as largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice. I, however, do not believe this Nation is anywhere close to eradicating racial discrimination or its vestiges. In constitutionalizing its wishful thinking, the majority today does a grave disservice not only to those victims of past and present racial discrimination in this Nation whom government has sought to assist, but also to this Court's long tradition of approaching issues of race with the utmost sensitivity.

B

I am also troubled by the majority's assertion that, even if it did not believe generally in strict scrutiny of race-based remedial measures, "the circumstances of this case" require this Court to look upon the Richmond City Council's measure with the strictest scrutiny. *Ante*, at 722. The sole such circumstance which the majority cites, however, is the fact that blacks in Richmond are a "dominant racial group" in

the city. *Ibid.* In support of this characterization of dominance, the majority observes that "blacks comprise approximately 50% of the population of the city of Richmond" and that "[f]ive of the nine seats on the City Council are held by blacks." *Ibid.*

While I agree that the numerical and political supremacy of a given racial group is a factor bearing upon the level of scrutiny to be applied, this Court has never held that numerical inferiority, standing alone, makes a racial group "suspect" and thus entitled to strict scrutiny review. Rather, we have identified other "traditional indicia of suspectness": whether a group has been "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." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28, 93 S.Ct. 1278, 1294, 36 L.Ed.2d 16 (1973).

It cannot seriously be suggested that nonminorities in Richmond have any "history of purposeful unequal treatment." *Ibid.* Nor is there any indication that they have any of the disabilities that have characteristically afflicted those groups this Court has deemed suspect. Indeed, the numerical and political dominance of nonminorities within the State of Virginia and the Nation as a whole provide an enormous political check against the "simple racial politics" at the municipal level which the majority fears. *Ante*, at 721. If the majority really believes that groups like Richmond's nonminorities, which comprise approximately half the population but which are outnumbered even marginally in political fora, are deserving of suspect class status for these reasons alone, this Court's decisions denying suspect status to women, see *Craig v. Boren*, 429 U.S. 190, 197, 97 S.Ct. 451, 456, 50 L.Ed.2d 397 (1976), and to persons with below-average incomes, see *San Antonio Independent School Dist.*, *supra*, 411 U.S., at 28, 93 S.Ct., at 1294, stand on extremely shaky ground. See *Castaneda v. Partida*,

430 U.S. 482, 504, 97 S.Ct. 1272, 1285, 51 L.Ed.2d 498 (1977) (MARSHALL, J., concurring).

In my view, the "circumstances of this case," *ante*, at 722, underscore the importance of not subjecting to a strict scrutiny straitjacket the increasing number of cities which have recently come under minority leadership and are eager to rectify, or at least prevent the perpetuation of, past racial discrimination. In many cases, these cities will be the ones with the most in the way of prior discrimination to rectify. Richmond's leaders had just witnessed decades of publicly sanctioned racial discrimination in virtually all walks of life—discrimination amply documented in the decisions of the federal judiciary. See *supra*, at 721-722. This history of "purposefully unequal treatment" forced upon minorities, not imposed by them, should raise an inference that minorities in Richmond had much to remedy—and that the 1983 set-aside was undertaken with sincere remedial goals in mind, not "simple racial politics." *Ante*, at 721.

Richmond's own recent political history underscores the facile nature of the majority's assumption that elected officials' voting decisions are based on the color of their skins. In recent years, white and black councilmembers in Richmond have increasingly joined hands on controversial matters. When the Richmond City Council elected a black man Mayor in 1982, for example, his victory was won with the support of the City Council's four white members. Richmond Times-Dispatch, July 2, 1982, p. 1, col. 1. The vote on the set-aside plan a year later also was not purely along racial lines. Of the four white councilmembers, one voted for the measure and another abstained. App. 49. The majority's view that remedial measures undertaken by municipalities with black leadership must face a stiffer test of Equal Protection Clause scrutiny than remedial measures undertaken by municipalities with white leadership implies a lack of political maturity on the part of this Nation's elected mi-

nority officials that is totally unwarranted. Such insulting judgments have no place in constitutional jurisprudence.

C

Today's decision, finally, is particularly noteworthy for the daunting standard it imposes upon States and localities contemplating the use of race-conscious measures to eradicate the present effects of prior discrimination and prevent its perpetuation. The majority restricts the use of such measures to situations in which a State or locality can put forth "a prima facie case of a constitutional or statutory violation." *Ante*, at 724. In so doing, the majority calls into question the validity of the business set-asides which dozens of municipalities across this Nation have adopted on the authority of *Fullilove*.

Nothing in the Constitution or in the prior decisions of this Court supports limiting state authority to confront the effects of past discrimination to those situations in which a prima facie case of a constitutional or statutory violation can be made out. By its very terms, the majority's standard effectively cedes control of a large component of the content of that constitutional provision to Congress and to state legislatures. If an antecedent Virginia or Richmond law had defined as unlawful the award to nonminorities of an overwhelming

share of a city's contracting dollars, for example, Richmond's subsequent set-aside initiative would then satisfy the majority's standard. But without such a law, the initiative might not withstand constitutional scrutiny. The meaning of "equal protection of the laws" thus turns on the happenstance of whether a State or local body has previously defined illegal discrimination. Indeed, given that racially discriminatory cities may be the ones least likely to have tough antidiscrimination laws on their books, the majority's constitutional incorporation of state and local statutes has the perverse effect of inhibiting those States or localities with the worst records of official racism from taking remedial action.

Similar flaws would inhere in the majority's standard even if it incorporated only federal anti-discrimination statutes. If Congress tomorrow dramatically expanded Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.*—or alternatively, if it repealed that legislation altogether—the meaning of equal protection would change precipitously along with it. Whatever the Framers of the Fourteenth Amendment had in mind in 1868, it certainly was not that the content of their Amendment would turn on the amendments to or the evolving interpretations of a federal statute passed nearly a century later.¹²

The rhetoric of today's majority opinion departs from *Wygant* in another significant respect. In *Wygant*, a majority of this Court rejected as unduly inhibiting and constitutionally unsupported a requirement that a municipality demonstrate that its remedial plan is designed only to benefit specific victims of discrimination. See 476 U.S., at 277-278, 106 S.Ct., at 1848-1849; *id.*, at 286, 106 S.Ct., at 1853 (O'CONNOR, J., concurring in part and concurring in judgment); *id.*, at 305, 106 S.Ct., at 1863 (MARSHALL, J., dissenting). Justice O'CONNOR noted the Court's general agreement that a "remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required.... [A] plan need not be limited to the remedying of specific instances of identified discrimination for it to be

To the degree that this parsimonious standard is grounded on a view that either § 1 or § 5 of the Fourteenth Amendment substantially disempowered States and localities from remedying past racial discrimination, *ante*, at 719, 726-727, the majority is seriously mistaken. With respect, first, to § 5, our precedents have never suggested that this provision—or, for that matter, its companion federal-empowerment provisions in the Thirteenth and Fifteenth Amendments—was meant to pre-empt or limit state police power to undertake race-conscious remedial measures. To the contrary, in *Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966), we held that § 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.*, at 651, 86 S.Ct., at 1723 (emphasis added); see *id.*, at 653-656, 86 S.Ct., at 1725-1726; *South Carolina v. Katzenbach*, 383 U.S. 301, 326-327, 86 S.Ct. 803, 817-818, 15 L.Ed.2d 769 (1966) (interpreting similar provision of the Fifteenth Amendment to empower Congress to "implement[] the rights created" by its passage); see also *City of Rome v. United States*, 446 U.S. 156, 173, 100 S.Ct. 1548, 1559, 64 L.Ed.2d 119 (1980) (same). Indeed, we have held that Congress has this authority even where no constitutional violation has been found. See *Katzenbach, supra* (upholding Voting Rights Act provision nullifying state English literacy requirement we had previously upheld against Equal Protection Clause challenge). Certainly *Fullilove* did not view § 5 either as limiting the traditionally broad police powers of the States to fight discrimina-

tion, or as mandating a zero-sum game in which state power wanes as federal power waxes. On the contrary, the *Fullilove* plurality invoked § 5 only because it provided specific and certain authorization for the Federal Government's attempt to impose a race-conscious condition on the dispensation of federal funds by state and local grantees. See *Fullilove*, 448 U.S., at 476, 100 S.Ct., at 2774 (basing decision on § 5 because "[i]n certain contexts, there are limitations on the reach of the Commerce Power").

As for § 1, it is too late in the day to assert seriously that the Equal Protection Clause prohibits States—or for that matter, the Federal Government, to whom the equal protection guarantee has largely been applied, see *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954)—from enacting race-conscious remedies. Our cases in the areas of school desegregation, voting rights, and affirmative action have demonstrated time and again that race is constitutionally germane, precisely because race remains dismayingly relevant in American life.

In adopting its prima facie standard for States and localities, the majority closes its eyes to this constitutional history and social reality. So, too, does Justice SCALIA. He would further limit consideration of race to those cases in which States find it "necessary to eliminate their own maintenance of a system of unlawful racial classification"—a "distinction" which, he states, "explains our school desegregation cases." *Ante*, at 737 (SCALIA, J., concurring in judgment). But this Court's remedy-stage school desegregation decisions cannot so conveniently be cordoned off. These decisions (like those involving voting rights and

deemed sufficiently 'narrowly tailored,' or 'substantially related,' to the correction of prior discrimination by the state actor." *Id.*, at 286-287, 106 S.Ct., at 1853. The majority's opinion today, however, hints that a "specific victims" proof requirement might be appropriate in equal protection cases. See, e.g., *ante*, at 727 (States and localities "must identify that discrimination ... with some specificity"). Given that just three Terms ago this Court rejected the

12. Although the majority purports to "adher[e] to the standard of review employed in *Wygant*," *ante* at 721, the "prima facie case" standard it adopts marks an implicit rejection of the more generally framed "strong basis in evidence" test endorsed by the *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) plurality, and the similar "firm basis" test endorsed by Justice O'CONNOR in her separate concurrence in that case. See *id.*, at 289, 106 S.Ct., at 1854; *id.*, at 286, 106 S.Ct., at 1853. Under those tests, proving a prima facie violation of Title VII would appear to have been but one means of adducing sufficient proof to satisfy Equal Protection Clause analysis. See *Johnson v. Transportation Agency*, 480 U.S. 616, 632, 107 S.Ct. 1442, 1452, 94 L.Ed.2d 615 (1987) (plurality opinion) (criticizing suggestion that race-conscious relief be conditioned on showing of a prima facie Title VII violation).

affirmative action) stand for the same broad principles of equal protection which Richmond seeks to vindicate in this case: all persons have equal worth, and it is permissible, given a sufficient factual predicate and appropriate tailoring, for government to take account of race to eradicate the present effects of race-based subjugation denying that basic equality. Justice SCALIA's artful distinction allows him to avoid having to repudiate "our school desegregation cases," *ibid.*, but, like the arbitrary limitation on race-conscious relief adopted by the majority, his approach "would freeze the status quo that is the very target" of the remedial actions of States and localities. *McDaniel v. Barresi*, 402 U.S., at 41, 100 S.Ct., at 1288; see also *Board of Education v. Swann*, 402 U.S., at 46, 91 S.Ct., at 1286 (striking down State's flat prohibition on assignment of pupils on basis of race as impeding an "effective remedy"); *United Jewish Organizations v. Carey*, 430 U.S. 144, 159-162, 97 S.Ct. 996, 1006-1008, 51 L.Ed.2d 229 (1977) (upholding New York's use of racial criteria in drawing district lines so as to comply with § 5 of the Voting Rights Act).

The fact is that Congress' concern in passing the Reconstruction Amendments, and particularly their congressional authorization provisions, was that States would not adequately respond to racial violence or, discrimination against newly freed slaves. To interpret any aspect of these Amendments as proscribing state remedial responses to these very problems turns the Amendments on their heads. As four Justices, of whom I was one, stated in *University of California Regents v. Bakke*:

"[There is] no reason to conclude that the States cannot voluntarily accomplish under § 1 of the Fourteenth Amendment what Congress under § 5 of the Fourteenth Amendment validly may authorize or compel either the States or private

persons to do. A contrary position would conflict with the traditional understanding recognizing the competence of the States to initiate measures consistent with federal policy in the absence of congressional pre-emption of the subject matter. *Nothing whatever in the legislative history of either the Fourteenth Amendment or the Civil Rights Act even remotely suggests that the States are foreclosed from furthering the fundamental purpose of equal opportunity to which the Amendment and those Acts are addressed.* Indeed, voluntary initiatives by the States to achieve the national goal of equal opportunity have been recognized to be essential to its attainment. 'To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment.' *Railway Mail Assn. v. Corsi*, 326 U.S. 88, 98, 65 S.Ct. 1483, 1489, 89 L.Ed. 2072 (Frankfurter, J., concurring)." 438 U.S., at 368, 98 S.Ct., at 2788 (1978) (footnote omitted) (emphasis added).

In short, 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." *The Slaughter-House Cases*, 16 Wall. 36, 77-78, 21 L.Ed. 394 (1873).¹³ The three Reconstruction Amendments undeniably "worked a dramatic change in the balance between congressional and state power," *ante*, at 719: they forbade state-sanctioned slavery, forbade the state-sanctioned denial of the right to vote, and (until the content of the Equal Protection Clause) was substantially applied to the Federal Government through the Due Process Clause of the Fifth Amendment) uniquely forbade States from denying equal protection. The Amendments also specifically empowered the Federal Government to

peals decision which relies upon statements by James Madison. *Ante*, at 719. Madison, of course, had been dead for 32 years when the Fourteenth Amendment was enacted.

combat discrimination at a time when the breadth of federal power under the Constitution was less apparent than it is today. But 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.

IV

The majority today sounds a full-scale retreat from the Court's longstanding solicitude to race-conscious remedial efforts "directed toward deliverance of the century-old promise of equality of economic opportunity." *Fullilove*, 448 U.S., at 463, 100 S.Ct., at 2767. The new and restrictive tests it applies scuttle one city's effort to surmount its discriminatory past, and imperil those of dozens more localities. I, however, profoundly disagree with the cramped vision of the Equal Protection Clause which the majority offers today and with its application of that vision to Richmond, Virginia's, laudable set-aside plan. The battle against pernicious racial discrimination or its effects is nowhere near won. I must dissent.

Justice BLACKMUN, with whom Justice BRENNAN joins, dissenting.

I join Justice MARSHALL's perceptive and incisive opinion revealing great sensitivity toward those who have suffered the pains of economic discrimination in the construction trades for so long.

I never thought that I would live to see the day when the city of Richmond, Virginia, the cradle of the Old Confederacy, sought on its own, within a narrow confine, to lessen the stark impact of persistent discrimination. But Richmond, to its great credit, acted. Yet this Court, the supposed bastion of equality, strikes down Richmond's efforts as though discrimination had never existed or was not demonstrated in this particular litigation. Justice MAR-

SHALL convincingly discloses the fallacy and the shallowness of that approach. History is irrefutable, even though one might sympathize with those who—though possibly innocent in themselves—benefit from the wrongs of past decades.

So the Court today regresses. I am confident, however, that, given time, it one day again will do its best to fulfill the great promises of the Constitution's Preamble and of the guarantees embodied in the Bill of Rights—a fulfillment that would make this Nation very special.



UNITED STATES, Petitioner

v.

Ray C. BROCE and Broce
Construction Co., Inc.

No. 87-1190.

Argued Oct. 4, 1988.

Decided Jan. 23, 1989.

Defendants who had pled guilty to two charges of conspiracy sought to have sentences set aside, alleging that there was only a single conspiracy. The District Court denied relief and defendants appealed. The Tenth Circuit Court of Appeals, 753 F.2d 811, reversed. Following rehearing en banc, 781 F.2d 792, the court reversed and remanded. On remand, the District Court vacated the judgments and sentences on one of the two indictments against defendants. The Court of Appeals for the Tenth Circuit affirmed and certiorari was granted. The Supreme Court, Justice Kennedy, held that: (1) plea of guilty and ensuing conviction comprehend all the factual and legal elements necessary to sustain a binding, final judgment of guilt

13. Tellingly, the sole support the majority offers for its view that the Framers of the Fourteenth Amendment intended such a result are two law review articles analyzing this Court's recent affirmative action decisions, and a court of ap-

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TESTIMONY ON AFF. ACTION IN FCC ALLOCATION OF BROADCAST LICENSES

Divider Title: _____

TESTIMONY ON AFFIRMATIVE ACTION IN FCC ALLOCATION OF BROADCAST LICENSES

On September 15, 1989, Payton testified before a Senate subcommittee² on the constitutionality of three congressionally-mandated affirmative action policies in the FCC's allocation of radio and television licenses. Those policies are as follows:

- The comparative hearing preference, in which the FCC treats minority ownership and participation as a "plus factor" in awarding broadcast licenses in a comparative bidding contest.
- The distress sale policy, in which the FCC allows a broadcaster whose fitness to own a license has been placed in doubt to sell the license at a "distressed" price, but only if the sale is to a member of a minority group -- nonminorities are not allowed to buy a station in a distress sale.
- The tax certificate policy, in which the FCC confers tax benefits on individuals who sell stations to a minority.

The FCC had instituted the policies in 1978. It justified the policies on two grounds: (1) the policies were designed to remedy the effects of discrimination that had worked to preclude minorities from owning broadcast licenses to any great degree; and (2) the policies were designed to foster a wider diversity of perspectives over the nation's airwaves, on the theory that the underrepresentation of minorities in the broadcasting industry had led to an underrepresentation of minority viewpoints in radio and television programming. In the mid 1980s, the FCC announced that it would reconsider the need for the policies. In response, Congress passed appropriations legislation precluding the FCC from repealing the policies. As a result, at the time of Payton's testimony, the policies had become congressionally-mandated.

Prior to Payton's testimony, questions about the constitutionality of the FCC's policies had been raised by two apparently conflicting court of appeals decisions, both of which had been issued in the wake of the Supreme Court decision in Croson. In Shurberg Broadcasting v. FCC, 876 F.2d 902 (D.C. Cir. 1989), a divided panel of the D.C. Circuit had held that the distress sale policy was unconstitutional in light of Croson. Three weeks later, in Winter Park Communications v. FCC, 873 F.2d 347 (D.C. Cir. 1989), another divided panel of the D.C. Circuit

² The Communications Subcommittee of the Senate Committee on Commerce, Science, and Transportation.

had applied Croson and upheld the comparative hearing preference. The Supreme Court was considering whether to review those decisions at the time of Payton's testimony. Accordingly, the purpose of the hearing was to ascertain whether Congress should direct the FCC to revamp its affirmative action policies, in part to fend off possible Supreme Court review. Although he urged Congress to make some slight modifications to the FCC's policies, Payton defended the constitutionality of policies.

Payton argued that Croson did not necessarily undermine the FCC's policies. Because they were congressionally-mandated, the policies were not subject to the rigorous standards of review applicable to the affirmative action programs of state and local governments, but rather, to the more lenient standards established in Fullilove.

Payton said that he believed there already were sufficient findings of discrimination underlying the FCC's policies so as to justify them as proper race-based remedial measures. However, to help protect them from constitutional challenge, Payton recommended that Congress make further findings on the linkage between discrimination and minority underrepresentation in broadcasting.

Payton also testified that it was constitutionally permissible for the FCC to base its policies on the need to promote diversity in broadcasting. Payton noted that in the seminal Bakke case in 1978, Justice Powell had said that it was constitutional for a university to take the race of applicants into account in its admission program in order to foster greater racial and ethnic diversity among the student body which, in turn, would lead to a more robust exchange of ideas on the campus. Payton argued that Justice Powell's notion applied with just as much force to radio and television. In that regard, Payton said that putting more stations in the hands of minorities would lead to changes in programming content and news reporting, thus exposing the nation to a broader range of perspectives that had essentially been unheard and unseen. Payton said that this thesis did not amount to crude stereotyping: it did not mean that there is such a thing as a "black perspective," and it did not mean that all blacks thing alike. Rather, Payton argued, the thesis was that in the aggregate, the viewpoints of members of minority groups will tend to vary from those of nonminorities.

With respect to the question of whether the FCC policies were "narrowly tailored," Payton stressed the following:

- That some of the beneficiaries of the policies were wealthy entrepreneurs who arguably had been able to surmount discrimination was irrelevant, particularly since it takes money to buy radio and television stations in the first place, and since the diversity

rationale of the policies would be furthered regardless of whether a beneficiary was rich or not.

- Congress and the FCC had considered and tried a series of race-neutral alternatives before resorting to the race-conscious policies.
- The comparative hearing preference and tax certificate policy did not preclude nonminorities from competing for stations. Under each policy, the race of a bidder was merely one factor in the allocation decision. By contrast, Payton noted, the distress sale policy operated as a sheltered market from which nonminorities were entirely foreclosed. Thus, it was somewhat more constitutionally suspect than the other two policies.

Congress did not pass any legislation modifying the FCC's policies. In any event, shortly after Payton's testimony, the Supreme Court agreed to review the constitutionality of the comparative hearing preference and the distress sale policy.

MINORITY OWNERSHIP OF BROADCAST STATIONS

HEARING
BEFORE THE
SUBCOMMITTEE ON COMMUNICATIONS
OF THE
COMMITTEE ON COMMERCE,
SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE
(ONE HUNDRED FIRST) CONGRESS
FIRST SESSION
ON
MINORITY OWNERSHIP OF BROADCAST STATIONS

SEPTEMBER 15, 1989

Printed for the use of the Committee on Commerce, Science, and Transportation



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Testimony of John Payton

Before the United States Senate
Committee on Commerce, Science and Transportation
Communications Subcommittee

September 15, 1989

Mr. Chairman and Members of the Subcommittee:

I am John Payton, a lawyer in private practice here in Washington, D.C. In the last several years I have been involved in defending a wide range of legislation that was designed to remedy the effects of racial discrimination by means of race-based measures. I represented Richmond in the City of Richmond v. Croson, before the Supreme Court, the case that is largely responsible for us being here today. I presently represent a number of local governments in connection with their efforts to comply with the requirements of Croson. Prior to that case, on behalf of the National Lawyers Committee for Civil Rights Under Law, the Washington Lawyers Committee for Civil Rights Under Law, the Minority Business Enterprise Legal Defense and Education Fund, and the Washington Area Construction Industry Task Force, I have either intervened or filed amicus briefs in such litigation. These efforts sought to defend federal as well as local programs, and have been in federal district and circuit courts.

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And, I should tell you, my firm represents Cook Inlet Region, Inc., whose President, Roy M. Huhndorf is also testifying before you today.

My testimony is presented on my behalf only and nothing I say should be attributed to my firm. I welcome this opportunity to address the Subcommittee on this important and timely issue.

Introduction

Society-wide discrimination has resulted in a disturbing underrepresentation of minorities in radio and television, and accounts in large part for the fact that while minorities are some 23% of our population, they own only just over 2% of the radio and television stations and a much smaller percentage of the cable franchises in the country.^{1/} The effects of this discrimination are not limited to those numbers. In fact, the more significant consequences have been to the radio and television media themselves, and to the country as a whole. Society-wide discrimination has led to the virtual absence of the diverse and rich viewpoints that minority owners could bring to the electronic media -- which media have indisputably become our dominant and

^{1/} See National Association of Broadcasters, Minority Broadcasting Facts 6 (1986); Minority Ownership of Cable Television Facilities, 52 Rad. Reg. 2d (P&F) 1469, 1471 (1982).

pervasive means of communication -- and we are all that much poorer for it.

I. The Need for Legislation

A. The Current Minority Preference Policies

For more than a decade, the FCC and the Congress have sought to address the paucity of minority ownership through three policies that directly encourage the acquisition of broadcasting licenses and (more recently) of cable franchises by members of racial minority groups. First, the FCC has treated minority ownership and participation as a factor enhancing an applicant's chance to prevail in a comparative contest for a broadcast license,^{2/} and Congress has mandated a similar approach when the FCC distributes mass media licenses by a system of random selection.^{3/} Second, broadcasters whose right to a continued license has been placed in serious doubt because of alleged misconduct have been allowed to sell their stations to members of minority groups in "distress sales" as an alternative to prosecuting the misconduct question to a conclusion.^{4/} And third,

^{2/} See, e.g., West Michigan Broadcasting Co. v. FCC, 735 F.2d 601 (D.C. Cir. 1984), cert. denied, 470 U.S. 1027 (1985).

^{3/} See 47 U.S.C. § 309(i)(3)(A) (1982).

^{4/} See Minority Ownership of Broadcasting Facilities, 68 (continued...)

the FCC has granted certificates that confer tax benefits on those who sell broadcasting stations or cable systems to members of minority groups, thereby enhancing the competitiveness of the potential minority purchaser.^{5/}

B. The Recent Court Decisions

We are here today because of the questions about the validity of these three programs raised by recent court decisions. The most prominent of these, of course, is City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989), in which the Supreme Court held that racial preferences granted by state or local governments violate the Fourteenth Amendment's ban on governmental discrimination unless they are narrowly tailored to meet a compelling public interest. Then, in the wake of Croson, the U.S. Court of Appeals for the District of Columbia Circuit decided Shurberg Broadcasting, Inc. v. F.C.C., 876 F.2d 902 (D.C. Cir. 1989). In Shurberg, a divided three-judge panel, applying Croson, held that the FCC's distress sale policy unconstitutionally discriminated against a white-owned enterprise that sought the license being transferred. But shortly thereafter in Winter Park

^{4/} (...continued)
F.C.C.2d 979 (1978). The policy only applies when no competing application has been filed.

^{5/} See id.; Minority Ownership of Cable Television Facilities, 52 Rad. Reg. 2d (P&F) 1469 (1982).

Communications, Inc. v. F.C.C., 873 F.2d 347 (D.C. Cir. 1989), another divided panel of the same court upheld the comparative hearing enhancement against a similar constitutional attack. The D.C. Circuit as a whole has declined to review Shurberg and Winter Park but it is likely that the Supreme Court will be asked to review one or both of them.

Two of the central disputes in Shurberg and Winter Park are (1) whether and to what extent Congress has mandated the FCC's actions, and (2) whether Congress had adequate ground to require race-conscious action by the FCC. A majority of the Supreme Court made clear in Croson that the unique powers of Congress give it much greater leeway to engage in race-conscious action than state or local governments. The majority in one panel decision by the District of Columbia Circuit, and a dissent in another, questioned the FCC's minority ownership policies, asserting that Congress has not unequivocally required those policies and that, even under the broader standards applicable to Congress, there is no factual record adequate to sustain race-conscious action.

C. The Need for a Congressional Response

I think this issue is far too important to leave under the present cloud of unconstitutionality. The minority ownership policies have been working. In 1978, less than 1% of all

broadcasting licenses were in minority hands.^{6/} The difference between that figure and today's 2% plus is real and important. Now is not the time to hazard a halt to that progress for lack of clear, unequivocal and adequately based congressional action.

This is not to say that the minority ownership policies should not be reviewed or adjusted where appropriate, or that the demand for strict scrutiny of any and all race-conscious programs is inappropriate. I do not urge a knee-jerk reaffirmation of everything that has been said or done in this field. I do urge that, when you give the matter a close look, you will find the core of the minority ownership policies sound.

II. The Purpose of the Minority Ownership Policies

It is important to be clear at the outset about the purpose of the policies in question. There has been considerable discussion in judicial opinions and elsewhere about the difference between race-conscious programs that are "remedial" and those that are not. In the eyes of some, a "remedial" program seeks to remedy a wrong. It compensates victims of racial discrimination for the wrongs done to them and therefore requires both findings of discrimination and a remedy tailored to the compensation of

^{6/} See Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d at 981.

identified victims. Justice O'Connor's statement in Croson that racial preferences should be "strictly reserved for remedial settings" has thus been taken to mean that racial preferences should be limited to those that compensate identified victims for past or present wrongs.^{7/}

On the other hand, a "nonremedial" racial preference is thought to have nothing to do with wrongful conduct. It looks solely to the accomplishment of some future good. Justice Powell's opinion in Regents of University of California v. Bakke, 438 U.S. 265 (1978), which affirmed the right of a state medical school to take the race of applicants for admission into account as a factor making for a desirable diversity in the student body, is viewed as exemplifying the nonremedial approach,^{8/} and Justice Stevens is viewed as the primary current exponent of that approach on the Supreme Court.^{9/}

In my view, any rigid distinction between these approaches is too simplistic to be tenable. We are where we are

^{7/} See Shurberg, 876 F.2d at 919-20 (opinion of Judge Silberman).

^{8/} See Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) (discussing Justice Powell's opinion in Bakke).

^{9/} See Croson, 109 S. Ct. at 731 & n.2 (Stevens, J., concurring); Wygant, 476 U.S. at 313-15 (Stevens, J., dissenting).

in this country on the subject of race largely (but by no means wholly) because of the past. One principal reason for singling out particular minority groups for special treatment is that past (and sometimes present) discrimination against them has continuing effects we wish to change. But those effects are not limited to the harms done to identifiable victims. They include the harm done to society at large by the lingering barriers to full participation of racial minorities in a wide range of American institutions -- barriers which, while largely traceable to past discrimination, deprive minorities of opportunities and the public of the contribution that those minorities could otherwise make today.

Nowhere is this point more evident than in connection with broadcasting and cable media, which are collectively present in virtually every American household and with which most Americans spend a substantial portion of their waking hours. The barriers to minority participation in ownership and control of those media deprive the public of the special contribution to the diversity of thought and perspective that minority ownership on more than a token scale can make.

The purpose of the minority ownership policies, as I understand them, is thus remedial and nonremedial at once. Those policies seek to overcome the continuing effects of past

discrimination. But they do so for the forward-looking purpose of securing a greater expression of, and sensitivity to, minority viewpoints and perspectives in the service that broadcasting and cable media render to the public. That purpose, I believe, can be achieved in full conformity with the Constitution. I also believe that this is true even under strict scrutiny, the most rigorous standard of constitutional review, a standard that the Supreme Court has never even applied to federal affirmative action programs.^{10/}

III. The Constitutional Standard

Much attention has been given to the fact that Croson marked the first time in which a majority of the Supreme Court adopted strict scrutiny in the affirmative action context, and that therefore now, "benign" racial preferences that are designed to remedy discrimination are ostensibly treated the same as "invidious" classifications that discriminate against minorities. While I believe, as do the Croson dissenters, that the adoption of strict scrutiny is "an unwelcome development,"^{11/} Congress must not be unduly deterred from taking race-conscious action when it is necessary to do so. Whether we like it or not, some effects of

^{10/} See Croson, 109 S. Ct. at 717.

^{11/} Id. at 752 (Marshall, J., dissenting).

racial discrimination can only be effectively addressed by remedies that take race into account.

Croson hardly sounds the death knell for the use of remedial racial preferences. Granted, when the Court has subjected a legislative classification -- racial or otherwise -- to strict scrutiny, the maxim "strict in theory and fatal in fact" has often rung true. But in adopting strict scrutiny in Croson, the Court did not intend to go that far. Indeed, the principal opinion of the Court, authored by Justice O'Connor, makes plain that if the constitutional ground rules are satisfied -- in other words, if the strict scrutiny components are met -- then remedial racial preferences will be upheld. In attempting to comply with those ground rules here, two points should be kept in mind.

First, the Court in Croson declared that the constitutional ground rules are less stringent for the remedial racial preferences enacted by the federal government than for those enacted by state and local governments. Relying on and reaffirming Fullilove v. Klutznick, 448 U.S. 448 (1980), which had upheld a congressionally-mandated remedial preference for minority contractors, Justice O'Connor's opinion could not have been more clear: Congress possesses "unique remedial powers" that enable it to use racial preferences where states and cities cannot. Croson, 109 S. Ct. at 718. Even Judge Silberman, the author of the lead

opinion in Shurberg, conceded that "Congress is clearly the institution with the most latitude to make findings of discrimination and authorize remedies on the basis of the evidence before it."^{12/}

Second, Croson does not fatally undermine the nonremedial aspects of the minority ownership policies. To the contrary, as 30 of the country's leading constitutional scholars (including 11 law school deans) concluded, "the positive educational value of assuring racial diversity and facilitating multiracial experiences" survives Croson.^{13/}

A. The Components of Strict Scrutiny

Strict scrutiny requires racial preferences to be supported by a factual predicate that gives rise to a "compelling interest." In addition, it requires that such preferences be "narrowly tailored" to ensure that the preferences fit that interest. The "compelling interest" inquiry addresses whether the ends of a particular preference are permissible. If the ends are permissible, the "narrowly tailored" inquiry focuses on whether the means selected to achieve the ends are reasonable.

^{12/} Shurberg, 876 F.2d at 912 (opinion of Judge Silberman).

^{13/} Constitutional Scholars' Statement on Affirmative Action After City of Richmond v. J.A. Croson Co., 98 Yale L. J. 1711, 1713 (1989).

The distinctions that Croson drew between federal and state power to use racial preferences mean that even under strict scrutiny, Congress retains a fair amount of discretion. To put this in terms of the two components of strict scrutiny, first, the broader federal authority allows Congress to establish the factual predicate for its racial preferences -- the "compelling interest" component -- without making findings of the same degree of precision and specificity as states and their subdivisions. Second, in analyzing whether a federal racial preference is "narrowly tailored" to achieve a compelling interest, courts will pay more deference to Congress' selection of the means to the ends of its racial preferences than they would to the choices of state and local governments.

B. Compelling Interest Analysis

1. Need for Congressional Findings Regarding Remedial Justification for FCC Minority Preferences.

The compelling interest analysis in Croson illustrates the sharp dichotomy between federal and state powers to enact remedial racial preferences. In examining the factual predicate of the plan at issue in Croson, the Court said that local government officials could use a racial preference only if they

had evidence of identified discrimination in a particular industry within their jurisdiction. Mere societal discrimination against minorities is an insufficient factual predicate.

By contrast, the Court admonished that Congress "may identify and redress the effects of society-wide discrimination." 109 S. Ct. at 719 (emphasis added). This reiterated the holding of Fullilove nearly a decade earlier. In that case, the Court deemed it unnecessary for Congress to have had before it evidence of identified instances of racial discrimination in the national construction industry.

I do not intend to imply that in authorizing remedial racial preferences in broadcasting, Congress need make no findings whatsoever and can simply take legislative notice of our nation's sordid history in race relations. Instead, it should, as Judge Silberman explained, base its action on "some quantum of particularized evidence of the effects of societal discrimination in [the broadcasting] industry." Shurberg, 876 F.2d at 915 (opinion of Judge Silberman) (emphasis added).^{14/}

^{14/} See also Milwaukee County Pavers Ass'n v. Fiedler, 710 F. Supp. 1532, 1541 (W.D. Wisc. 1989) (Croson and Fullilove "should be read to require some congressional findings of past discrimination").

Applying this evidentiary standard in Shurberg, Judge Silberman claimed that neither the FCC nor Congress had sufficient evidence on which to predicate the distress sale policy as a remedial measure. According to Judge Silberman, the policy was supported only by statistics purporting to show minority underrepresentation in broadcasting.^{15/} Since the same statistics underlie the comparative hearing enhancement and the tax certificate program, Judge Silberman would presumably say that, as remedial measures, those preferences have the same evidentiary deficiency as the distress sale policy. Indeed, Judge Williams found such flaws with the comparative hearing preference in his Winter Park dissent.^{16/}

My own view of the evidence of past discrimination in Shurberg and Winter Park differs from those of Judges Silberman and Williams. Be that as it may, Congress should develop more explicit links between the statistics evidencing minority

^{15/} See Shurberg, 876 F.2d at 915 (opinion of Judge Silberman).

^{16/} See Winter Park, 873 F.2d at 365 (Williams, J., concurring in part and dissenting in part). The majority opinion in Winter Park did not address the constitutionality of the comparative hearing enhancement as a remedial measure because the FCC had not argued to the court that the preference was a "cure [for] the effects of perceived racial discrimination." Id. at 353 n.6.