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Resurrecting State and Local Race-Conscious Set-Aside Programs

CHARLOTTE F. WESTERHAUS*

INTRODUCTION

In *City of Richmond v. J.A. Croson Co.*, a majority of the Supreme Court declared a Richmond, Virginia voluntary program for minority-owned business enterprises (MBEs) unconstitutional. A plurality injected a lethal dose of strict scrutiny into the heart of race-conscious set-aside programs. First, the Court held that Richmond failed to demonstrate a compelling governmental interest to remedy private economic discrimination. In doing so, the Court soundly rejected the city's contention that remedying "past societal discrimination" was a compelling governmental interest. Second, *Croson* held that Richmond failed to identify the effects of past discrimination with "specificity" and that the factual predicate was not strong enough to establish a "prima facie case of a constitutional or statutory violation." Third, the Court held that the Richmond set-aside was not "narrowly tailored" to prevent lawmakers from enacting legislation furthering their own racial group. Thus, the Court held that Richmond lacked the constitutional authority to devise the race-conscious set-aside program.

2. Chief Justice Rehnquist and Justices White, O'Connor, Scalia, and Kennedy applied strict scrutiny. *Id.* at 493, 520. Justices Brennan, Marshall, Blackmun, and Stevens would have applied intermediate scrutiny. *Id.* at 514, 554.
3. *Id.* at 505.
4. *Id.* at 470.
5. *Id.*
6. *Id.* at 495-96.

The set-aside held constitutional in *Fullilove* was nearly identical to the program held invalid in *Croson*. *Croson*, 488 U.S. at 528 (Marshall, J., dissenting). The "only significant difference between the two [programs] was that in *Croson* there was a 30% set-aside, while in *Fullilove* the set-aside was only 10%. . . . [I]n *Fullilove* the relevant minority population represented between 15% and 18% of the total population, while in *Croson* it represented 50%." Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 Mich. L. Rev. 1729, 1745 n.71 (1989) (citations omitted).
unlike any state or political subdivision, has a specific constitutional mandate to enforce the dictates of the fourteenth amendment." The Court later held in *Metro Broadcasting, Inc. v. Federal Communications Commission* that intermediate scrutiny, not strict scrutiny, was the appropriate equal protection standard for "benign race-conscious measures mandated by Congress."

Although *Metro*’s holding shields federal affirmative action programs from strict scrutiny, *Croson*’s holding spread like a deadly virus into the heart of state and local MBEs not authorized by Congress, causing the post-*Croson* demise of state and municipal set-aside programs. As a result, some commentators predict that state and local set-aside programs are indeed dead and that the Supreme Court will no longer consider affirmative action cases such as *Croson*.

This Note will argue that the era of state and local set-aside programs is in fact over and that this perilous condition will persist due to the equal protection standard of review mandated by *Croson*. First, it will present and criticize the Court’s rationale for applying strict scrutiny for state and local race-conscious set-aside programs. Second, it will describe the dilemma created by *Croson*’s mandated factual predicate. Finally, it will present guidelines for federal legislation which will make it easier for states and localities to create set-aside programs.

I. RATIONALES AGAINST STRICT SCRUTINY

There are three types of MBE set-aside programs. The first type mandates that an established percentage of the total number of state or municipal

8. *Croson*, 488 U.S. at 490. This mandate is predicated on section 5 of the fourteenth amendment, which states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.

9. 110 S. Ct. 2997 (1990). *Metro* involved two minority ownership programs of the Federal Communications Commission (FCC). Congress enacted the legislation in an attempt to satisfy [the FCC's] obligation under the Communications Act of 1934 to promote diversification of programming, taking the position that its past efforts . . . had not resulted in sufficient broadcast diversity, and that this situation was detrimental not only to the minority audience but to all of the viewing and listening public.

Id. at 3000.

10. *Id.* at 3008 (footnote omitted).


contracts awarded each year be set aside and assigned to minority-owned businesses. For example, in *City of Richmond v. J.A. Croson Co.*, the Richmond city council created a pure set-aside by requiring that thirty percent of its contracts be awarded to MBEs. The second type of set-aside program requires that all prime contractors spend a percentage of the contract price with minority-owned subcontractors. The third type of set-aside requires that a prime contractor submit with their bid an "affirmative action plan" which commits the contractor to hire a specific percentage of minority-owned subcontractors.

Since set-aside programs require that a certain percentage of bids be accepted strictly from minorities, nonminorities are denied access. Therefore, effective set-aside programs must deny economic opportunities to one racial group in order to provide economic opportunities to another racial group. This dilemma has fostered cries of "reverse discrimination" from various sectors of the business and political community. Disgruntled plaintiffs in *Fullilove*, *Croson*, and *Metro* echoed this sentiment.

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15. See Associated Gen. Contractors of Cal. v. San Francisco Unified School Dist., 616 F.2d 1381 (9th Cir.), cert. denied, 449 U.S. 1061 (1980). In the plan discussed in *Associated*, the board of education required prime contractors to spend 25% of the contract price with minority-owned subcontractors. *Id.* at 1383.

16. See Appeal of Associated Sign & Post, 485 N.E.2d 917 (Ind. Ct. App. 1985). The Indiana Court of Appeals upheld the application of a regulation initiated by the Bloomington City Human Rights Commission which required contractors submitting bids to submit an additional affirmative action proposal. *Id.* at 918-19.

17. Initially, race-conscious programs received minimal public resistance: Efforts to eliminate discrimination through affirmative action received widespread and broad-based support when blatant forms of discrimination were more prevalent. However, the enthusiasm for the economic redistribution that had evolved during the 1960's civil rights era began to wane in 1971 when the worldwide economic recession started to have an impact on the American economy. The continued expansion of the middle-class sector was no longer assured, and white males who found themselves competing not only with other white males but also with [African-Americans], other minorities, and women, began to seek judicial redress for their own claims of discrimination. Thus, affirmative action became one of the more controversial and vigorously litigated issues because it was claimed to impose discrimination in reverse against white male citizens and was, therefore, legally and morally indefensible. Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and Weber*, 50 N.C.L. Rev. 531, 536 (1980) (footnotes omitted).

Randall Kennedy asserts that the cries of "reverse discrimination" are unfounded because whites cannot be harmed constitutionally by affirmative action programs such as set-asides: [T]he claim [is] that the constitutional injury done to a white whose chances for obtaining some scarce opportunity are diminished because of race-based allocation schemes is legally indistinguishable from that suffered by a [African-American] victim of racial exclusion. . . . [However,] the injury suffered by white "victims" of affirmative action does not derive from a scheme animated by racial prejudice. Whites with certain credentials may be excluded from particular opportunities
Race-conscious set-asides, although divisive, attempt to alleviate a color-conscious America. However,

color-consciousness is unavoidable while the effects of decades of governmentally and privately imposed racial wrongs persist. The concept of affirmative action has arisen from that inescapable conclusion. A society that forecloses racially-conscious remedies would not be color-blind, but morally blind. The justification for affirmative action to secure equal access to the job market lies in the need to overcome the effects of past discrimination . . . . While care must be taken to safeguard against abuses, affirmative action . . . including those programs in which numerically based race-conscious remedies have been employed, can meet this fundamental standard.18

Race-conscious programs not only aid minorities but aid the nation as well. MBEs also alleviate the adverse economic impact of racial discrimination. Ralph C. Thomas, the Executive Director of the National Association of Minority Contractors, noted that set-aside legislation "is no different than other laws which routinely grant some form of 'preference' to a pre-determined class of eligibles in order to achieve economic results."19

For example, the Buy American Act often requires that American business firms be given a bid preference of either 6 or 12 percent over foreign firms when competing for federal contracts. On its face such a law appears to be blatantly discriminatory . . . .

they would receive if they were [African-American]. But this diminished opportunity is simply an incidental consequence of addressing a compelling societal need: undoing the subjugation of the [African-American]. Whites who would be admitted to professional schools in the absence of affirmative action policies are not excluded merely because of prejudice, as were countless numbers of [African-Americans] . . . . Rather, whites are excluded "because of a rational calculation about the socially most beneficial use of limited resources for [professional] education."

Kennedy, Persuasion and Distrust: A Comment on the Affirmative Action Debate, 99 Harv. L. Rev. 1327, 1336 (1986) (footnote omitted); see also Rosenfeld, supra note 7, at 1789-90 (footnotes omitted):

Compensatory affirmative action . . . is not meant to deprive whites of equal respect. The intent behind racial discrimination is exclusionary while that behind compensatory affirmative action is inclusionary. . . . Furthermore, the effects of failure in the competition for scarce public goods are not likely to be the same for [African-Americans] and whites. Such a failure by a white is unlikely to lead to his being treated as a second-class citizen. A similar failure by an [African-American], however, is likely to perpetuate the stigma of racial stereotypes and to inhibit the achievement of genuine equal dignity and respect . . . .

[T]he only thing that affirmative action seems to take away from the "innocent" white person is the increased prospects of success gained as a consequence of the racially discriminatory acts . . . of the state. The reduction in the prospects of [African-Americans] attributable to official racial discrimination has already produced a windfall in the form of increased prospects of success for all the other competitors seeking to obtain scarce public goods.

18. Belton, supra note 17, at 597-98.
[However,] [i]n [sic] such a law were . . . challenged as violating the United States Constitution . . . the courts would use a "rationality test" standard . . . .

John Jacob, president of the National Urban League, and Derrick Bell, a Harvard law professor, believe that "whites need to understand that their negative views of minorities and the resulting discrimination have a direct economic impact in terms of potentially lost productivity as the work force over time becomes populated by fewer whites and more minorities."

The opportunity for full participation in government procurement by minority businesses is essential not only to obtain social and economic equality for such persons but also to improve the functioning of the state, county or local economy.

By increasing the number of businesses which vie for its construction contracts, a locality should eventually enjoy more competitive costs . . . . Another by-product of increased minority business participation is greater competitiveness among government contractors which results in an improvement of the quality of the services performed.

In sum, although race-conscious set-asides are divisive, they have enormous societal and economic benefits.

Prior to Croson, the Supreme Court and federal courts of appeals had permitted competent public bodies, such as state legislatures, school boards, and local governments, to enforce the fourteenth amendment. In addition, state-sponsored set-asides were afforded a variety of constitutional treatments by lower courts. Therefore, before Croson Congress's "unique" powers under the fourteenth amendment did not preclude other competent bodies from remedying acts of past discrimination.

The Croson plurality applied strict scrutiny to the Richmond MBE because of their belief that state and local set-asides deny majority-owned
businesses the individual rights guaranteed by the fourteenth amendment. 28 Additionally, the Court held that Congress was the only legislative body that possessed a “unique” power to enforce the fourteenth amendment upon the states. 29 Therefore, the Court in Croson found strict scrutiny applicable to state and local set-asides. 30

Croson acknowledged that a state may have a compelling interest in rectifying specific discrimination found in both public and private institutions. 31 However, the Court held that “societal discrimination” was not specific enough to qualify as a compelling state interest 32 and that a governmental body would have to show that a public entity, in using public funds, would “not serve to finance the evil of private prejudice.” 33

For two reasons, the outcome in Croson might have been different had the set-aside been enacted by the Virginia legislature rather than by the Richmond city council. First, in holding state and local governments to the highest scrutiny, the Croson Court took little notice of section 1 of the fourteenth amendment which applies directly to the states. 34 The states,

Furthermore, the set-aside program the Croson Court held invalid was remedial and had already expired six months before the Court issued its decision. Id. at 1748. “It is thus ironic that this important affirmative action decision . . . should settle a dispute over a defunct plan.” Id. 28. See Croson, 488 U.S. at 493; see also Taylor, supra note 12, at 54 (The Croson plurality “adamant[ly] belie[ved] that the equal protection guarantees of the fourteenth amendment create essentially personal rights . . . as opposed to class rights.”).

29. Croson, 488 U.S. at 488; accord Fullilove v. Klutznick, 448 U.S. 448, 500 (1979) (Powell, J., concurring). What did Justice Powell mean by the term “unique” in his Fullilove concurrence? A lower court argued the word “unique” was somewhat ambiguous and was not intended to foreclose the powers possessed by other competent governmental bodies. See Keip, 713 F.2d at 172 (“Though Justice Powell in Fullilove referred to the power of Congress as ‘unique’ we believe he meant the power was ‘notable’ or ‘unequalled,’ not ‘sole’ or ‘exclusive[.]’”).

30. Croson, 488 U.S. at 485. Justice O’Connor also reasoned that since African-Americans held “[t]hree of the nine seats on the [Richmond] city council” and since the set-aside favored African-Americans who “comprise[d] approximately 50% of the . . . city of Richmond” the Croson scenario was similar to situations where a white majority enacts a plan that discriminates against African-Americans. Id. at 495. Justice O’Connor failed to note that although there may be a majority of [African-Americans] on the City Council, the fact that there is no [African-American] majority in Richmond should serve as a powerful incentive for [African-American] Council members not to act with disregard for the interests of one half of their constituents. In any event, the . . . decision to adopt the [set-aside] was not made strictly along racial lines. One white council member voted with the majority and another abstained.

Rosenfeld, supra note 7, at 1774 (footnote omitted).


32. Id. at 497, 504.

33. Id. at 492.

34. Section 1 of the fourteenth amendment states: “No state shall . . . deny . . . any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. This section prohibits purposeful discrimination by the state and also prohibits state action which may perpetuate the effects of past discrimination.
unlike Congress, need no enforcement provision to apply the fourteenth amendment within their jurisdictions.\(^\text{35}\)

Second, since states have police powers which enable them to "protect the health, safety and morals in the community,"\(^\text{36}\) Virginia might have constitutionally created a state race-specific set-aside program. Because the Supreme Court has held in the past that state legislation prohibiting race discrimination is within the police power of the state,\(^\text{37}\) it would logically follow for the Court to rely on the police power as authority for states to remedy the present effects of past discrimination.\(^\text{38}\) In \textit{Croson}, Justice Marshall argued in dissent that states could enact set-aside programs under the authority of their police powers: "[N]othing in the [three reconstruction] Amendments themselves, or in our long history of interpreting or applying those momentous charters, suggests that States, exercising their \textit{police power}, are in any way constitutionally inhibited from working alongside the Federal Government in the fight against discrimination and its effects."\(^\text{39}\) Therefore, state police power could be a source of authority independent of the fourteenth amendment to alleviate racial imbalances caused by past and present discriminatory practices.

The \textit{Croson} Court believed that strict scrutiny would advance individual rights by "ensuring that courts [would] not allow intrusion upon the equal protection rights of any individuals, including nonminorities, and by restricting to exceptionally meritorious remedial situations the disparate treatment of nonminority individuals under affirmative action programs."\(^\text{40}\) Additionally, the \textit{Croson} Court perceived state and local set-asides as running counter to the fourteenth amendment's mandate of a race-neutral

\[\begin{align*}
\text{35. See, e.g., Keip, 713 F.2d at 172, in which the Sixth Circuit Court of Appeals said: Section I of the Fourteenth Amendment speaks directly to the states: "nor [shall any state] deny to any person within its jurisdiction the equal protection of the laws." No enabling provision is required to authorize a state government to enact legislation to prevent the denial of equal protection to persons within its jurisdiction. The prohibition against denial of equal protection carries with it the power to prevent such denial and to remedy past violations. When a state legislature takes steps in compliance with the equal protection clause it is acting in the same capacity as that of Congress in adopting legislation to implement the equal protection component of the Fifth Amendment's due process clause.}

\text{36. Kende, supra note 26, at 613 (quoting Sax, \textit{Takings and the Police Power}, 74 \textit{Yale L.J}. 36, 36 n.6 (1964)).}

\text{37. District of Columbia v. John R. Thompson Co., 346 U.S. 100, 109 (1953) ("[T]here is no doubt that legislation which prohibits discrimination on the basis of race . . . is within the police power of the states.").}

\text{38. Cf. Croson, 488 U.S. at 504 (implying that the states might constitutionally use race-conscious relief to compensate for past discrimination if they identify that pattern of discrimination with specificity).}

\text{39. Id. at 560-61 (Marshall, J., dissenting) (emphasis added).}

\text{40. Taylor, supra note 12, at 54 (footnote omitted).}
\end{align*}\]
A "color-blind" society requires the equal treatment of individuals within all classes. The philosophy of "racial neutrality" bolsters the reverse discrimination claims of MBE opponents and supports Justice Scalia's contention that "[t]he relevant proposition is not that it was [African-Americans] who were discriminated against, but that it was individual men and women, 'created equal,' who were discriminated against." 

_Croson_’s rhetoric of racial neutrality is flawed for two elementary reasons. First, it fails to reflect the framers’ intent in enacting the fourteenth amendment. The fourteenth amendment was intended to prevent the

41. Id. at 493. Alexander Bickel advocated this race-neutral view of the fourteenth amendment:

The 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. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored.


42. In _Croson_, this concept was adopted by Justice Scalia in his concurrence. 488 U.S. at 522 (Scalia, J., concurring).

As Randall Kennedy noted, “the color-blind theory of the Constitution is precisely that—a ‘theory,’ one of any number of competing theories that seek to interpret the fourteenth amendment’s delphic proscription of state action that denies any person ‘the equal protection of the laws.’” Kennedy, _supra_ note 17, at 1335. See also Williams, The Obliging Shell: An Informal Essay on Formal Equal Opportunity, 87 Mich. L. Rev. 2128, 2142 (1989) (“So-called formal equal opportunity has done a lot but misses the heart of the problem. It put the vampire back in its coffin, but it was no silver stake. The rules may be color-blind but people are not.”). But see Rosenfeld’s contention that the color-blind doctrine has three virtues:

First, it is very easy to implement and does not require the elaboration of any complicated theoretical apparatus to determine the nature and scope of its proper application. Second, justification of the color-blind principle could rest entirely on the moral axiom that it is wrong for public authorities to draw any distinctions on the basis of race. This would obviate the need to delve at any depth into the divisive realm of substantive equality. Third, it provides an effective means of assuring the prohibition of racial classifications that inure to the disadvantage of oppressed racial minorities.

For all its virtues, however, the color-blind principle is too blunt ... and is incompatible with the Supreme Court’s endorsement of color-conscious remedies in a long line of school desegregation cases.

Rosenfeld, _supra_ note 7, at 1755-56 (footnote omitted).

43. Kennedy, _supra_ note 17, at 1327 (“Opponents of affirmative action maintain that commitment to a nonracist social environment requires strict color-blindness in decisionmaking as both a strategy and a goal.”); see also Thomas, Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!, 5 YALE L. & POL’Y REV. 402, 410-11 (1987) (“[T]o whatever extent we do want to give preferences to compensate those who have been unfairly deprived ... [they] should be directly related to the obstacles that have been unfairly placed in those individuals’ paths, rather than on the basis of race ... .”) (footnote omitted) (emphasis added); Belton, _supra_ note 17, at 540 (“[T]he notion of color-blindness ... is often analogized to positions in a foot race: if race is eliminated as a factor in the employment decision, [African-Americans] will be on an equal footing with whites.”) (footnote omitted).

44. E.g., Williams, _supra_ note 42, at 2137-43.

45. _Croson_, 488 U.S. at 529 (Scalia, J., concurring).
majority class of white Americans from discriminating against African-Americans and to protect African-Americans against the horrors of Reconstruction statutes.\footnote{66} In his dissent in \textit{Croson}, Justice Marshall asserted that Congress' concern in passing the Reconstruction Amendments, and particularly their congressional authorization provisions, was that States would not adequately respond to racial ... 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.\footnote{47}

The Court's color-blind interpretation is thus bankrupt historically.

Second, Justice O'Connor's rhetoric of racial neutrality fails to account for the repressive treatment endured historically by racial minorities not because they are individuals but because they are racially identifiable as a group.\footnote{48} According to one commentator, such beliefs of "color-blindness...
and equal process . . . would make no sense at all in a society in which identifiable groups had actually been treated differently historically and in which the effects of this difference in treatment continued into the present.\textsuperscript{49} Her analysis was also fallacious historically when she professed that "Sec\textsuperscript{[o]n] 1 of the Fourteenth Amendment stemmed from a distrust of state legislative enactments based on race."\textsuperscript{50} In fact, the fourteenth amendment was a result of distrust by Congress of state legislation that discriminated against African-Americans based on race.

The color-blind interpretation of the fourteenth amendment that Croson espoused\textsuperscript{51} perpetuates perceptions of an ideal American society that should exist but that in reality does not. Fatalistic prejudicial beliefs and racial intolerance of minorities are not phenomena of the past.\textsuperscript{52}

Racism is far from dead in the United States. Despite undeniable progress for many, no American of African descent, regardless of status or success, is safe from racial aggression ranging from an unthinking insult to a life-threatening attack. Even the most successful [African-Americans] are haunted by the plight of their less fortunate brethren who struggle to survive in what social scientists call "the underclass." Burdened with life-long poverty and soul-devastating despair, they live their lives beyond the pale of the American dream.\textsuperscript{53}

A recent study revealed that a majority of Americans believe African-Americans as a group are more lazy, less intelligent, and less patriotic than continued to deny [African-Americans] equal . . . opportunity, enforcing a strict policy of segregation that itself stamped [African-Americans] as inferior.


The Fourteenth Amendment, the embodiment in the Constitution of our abiding belief in human equality, has been the law of the land for only slightly more than half [of] its [two hundred] years. And for [one hundred years] the Equal Protection Clause was . . . moribund . . . . [T]he clause was early turned against those whom it was intended to set free, condemning them to a "separate but equal" status before the law, a status always separate but seldom equal.

\textit{Id.} at 326-27 (citation omitted) (footnote omitted).


51. See \textit{id.} at 520 (Scalia, J., concurring).

52. See, e.g., \textit{id.} at 529 (Marshall, J., dissenting). Precursory results of a continuing survey of white Americans conducted by the University of California at Berkeley's Survey Research Center found that nine percent of the white American respondents "expressed antagonism to [African-Americans] when asked questions about integration." Winkler, \textit{While Concern Over Race Relations Has Lessened Among Whites, Sociologists Say Racism is Taking New Forms, Not Disappearing}, Chron. of Higher Educ., Sept. 11, 1991, at A8, col. 2, A11, col. 1. Fifty-one percent of the respondents expressed hostility toward African-Americans when asked about antidiscrimination measures such as affirmative action programs. \textit{Id.} Paul Sniderman, professor of political science at Stanford University, commented that the results "mean[] the odds of [African-American] facing discrimination are high . . . . If [the] results are correct, then racism remains." \textit{Id.}

white Americans. Economic opportunities are not equitably distributed to all members of our society. Discrimination aimed at minorities in the workplace is still prevalent. Residential segregation based on race, subtle and apparent, is as alive and well today as it was thirty years ago. In short, the health and welfare of this country's African-American population is alarmingly lower than white Americans in every conceivable area.

54. A nationwide survey conducted by the National Opinion Research Center at the University of Chicago revealed these responses from non-African American respondents:

* 78% said African-Americans as a group are more likely than whites “to prefer to live off welfare” and are less likely “to be self-supporting.”
* 62% said African-Americans “are more likely to be lazy.”
* 56% said African-Americans are “less intelligent.”
* 51% said “they think [African-Americans] are less patriotic.”

Whites’ Racial Stereotypes Persist, supra note 21, at A4, col. 4. Tom W. Smith of the research center said that the responses explain that “in part the reason why people are against affirmative action or quotas is that they have images of minorities that brand minorities as undeserving of help.” Id. at A1, col. 1.

55. The following are stark statistics provided by a 1987 study done by Alan Hutchinson:

* 32.4% of African-American families were below the poverty line.
* 47.3% of African-American children were below the poverty line.
* 17.2% of African-Americans were unemployed in 1984, when only 7.2% of whites were unemployed.
* The median income for all African-American families in 1983 was $14,506, while the median income for all white families was $25,757.


The United States Census Bureau reported that white United States households have 10 times the median wealth of African-American households. The survey, conducted in 1988, found that the median white household had net assets of $43,280 and the median African-American household had net assets that totaled only $4170. In addition, the census report found that the median white household had a monthly income of $2064 and the median African-American household had a monthly income of $1305. Huge Disparity in Wealth Found Among Races, Wash. Post, Jan. 11, 1991, at A3, col. 1.

John Jacob, president of the National Urban League, said: “It really means the poverty we see demonstrated in the [African-American] community is likely to continue for some time . . . . We’re [African-Americans] not going to move toward a position of parity without increasing the wealth of [African-American] community[es] and we can’t do that without doing something about . . . . business ownership . . . .” Id. at A3, col. 3.

56. In a study conducted in the summer of 1990, two-person teams, consisting of one African-American and one white job applicant, applied for identical entry-level jobs. Whites faced discrimination 7% of the time while African-Americans were discriminated against 20% of the time. “From the employer’s perspective, these were two [applicants] making an equal effort, who were equally attractive as job candidates. We’re confident the only difference was something about . . . . business ownership . . . .” Job Hunt: Blacks Face More Bias, USA Today, May 15, 1991, at A1, col. 5.

57. See R. FARLEY & W. ALLEN, THE COLOR LINE AND THE QUALITY OF LIFE IN AMERICA 140-41 (1987) (On a 100-point scale where a score of 100 represents an apartheid society in which all whites and all African-Americans live in racially homogeneous areas, residential segregation in the twenty-five United States cities with the largest African-American populations averaged 88 in 1960 and 81 in 1980); see also Denton & Massey, Residential Segregation of Blacks, Hispanics, and Asians by Socioeconomic Status and Generation, 69 Soc. Sci. Q. 797, 813-14 (1988) (In the 1980s, African-Americans of all socioeconomic levels continue to be racially segregated in spite of their desires for integration.).

58. See Hutchinson, supra note 55, at 662-64.
Justice O'Connor admitted that "the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for [African-American] entrepreneurs." Nonetheless, she added that "it is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination." Although it would be difficult to predict accurately the number of minority firms in Richmond that would have existed had racial discrimination in the Deep South never existed, the number would doubtless have been higher.

In suggesting an explanation for the underrepresentation of African-Americans in the Richmond construction industry, Justice O'Connor said that they may have been "disproportionately attracted to industries other than construction." Nonetheless, she failed to account for the historical fact that prior to the reconstruction of the South after the Civil War, the construction industry in the South was dominated by skilled African-American slaves. The post-Civil War era brought on purposeful acts of discrimination against African-American workers. For example, construction craft unions intentionally barred African-Americans from applying for membership. As a result, these unions became exclusively white.

In an opinion preceding *Croson*, the Supreme Court, fully aware of the prevalence of discrimination in the construction industry, stated: "Judicial findings of [African-Americans'] exclusion from [construction] crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice." Justice O'Connor should not dismiss lightly the magnitude of racial discrimination endured by African-Americans as mere speculation or vestiges of the past.

The focus of the debate should not be whether "a disappointed white contractor had a constitutional right to a government contract . . . [but] whether he had a mere expectation that the system would continue as it had in the past." In an American society where racism is prevalent, race-

59. *Croson*, 488 U.S. at 499. Perhaps Justice O'Connor was noting Richmond's reputation as being the "cradle of the Old Confederacy" due to its sorrowful history of slavery, segregation, and racial discrimination. See, e.g., Rosenfeld, *supra* note 7, at 1746 ("Through the official acts of its governing officials, Richmond, among other things, deliberately diluted the voting rights of its [African-American] residents, mounted stiff hurdles against school desegregation, and sanctioned pervasive housing discrimination.").

60. *Croson*, 488 U.S. at 499.

61. *Id.* at 503. Rosenfeld counters this argument by contending that "it was mere speculation for Justice O'Connor to assert that the virtual exclusion of [African-Americans] from the construction industry might have been the result of free career choices rather than the consequences of fierce, direct racial discrimination." Rosenfeld, *supra* note 7, at 1792.


65. See, e.g., Kennedy, *supra* note 17, at 1331.

conscious set-aside programs are a necessity. Unfortunately, state and local MBE's are imperiled by Croson's mandate of strict scrutiny.

II. THE FACTUAL PREDICATE DILEMMA

City of Richmond v. J.A. Croson Co. marked the first time the Supreme Court dealt with the constitutionality of a municipal race-conscious set-aside. The Croson MBE was modeled after the federal MBE upheld in Fullilove v. Klutznick. In Fullilove, only Chief Justice Burger implied that Congress was singularly the germane body to mandate legislation based on racial criteria. None of the Justices in the dissent, Justices Stewart, Rehnquist, and Stevens, held "states to higher standards than those applicable to Congress." State and local governments perceived the Court's silence as a judicial green light to establish set-aside programs fashioned after the set-aside in Fullilove.

In Fullilove, the majority upheld a congressionally sponsored set-aside even though the MBE lacked "any contemporaneous legislative hearings or committee reports of debate justifying its action." State and local governments took this to mean that they could do the same. Subsequently, state and local governments nationwide enacted set-aside programs based on "generalized evidence in support of the existence of discrimination." Reviewing courts upheld these set-asides without requiring a precise factual predicate, and for a period of nine years such programs multiplied.

Croson radically altered the Fullilove foundation by requiring state and local governments to establish a "prima facie case of a constitutional or statutory violation" in order to justify race-conscious set-aside programs. Croson requires that state and local governments establish more than generalized evidence of minority underrepresentation due to historical or present discriminatory practices. Additionally, under Croson it is insufficient for lawmakers to merely label state and local set-asides as "remedial" measures because "[r]acial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice."

67. See supra notes 18-22 and accompanying text.
69. 448 U.S. 448 (1980).
70. Id. at 473; see also Days, Fullilove, 96 Yale L.J. 453, 474 & n.100 (1987) (In Fullilove, Chief Justice Burger "thought it dispositive that the set-aside emanated from Congress.").
71. Days, supra note 70, at 474.
72. Id. at 476.
73. Id. at 475-76 & n.107.
74. Id. at 477.
75. Id. at 476, 477.
76. Croson, 488 U.S. at 500. For a further discussion of the factual predicate mandated by Croson, see Taylor, supra note 12, at 58-62.
78. Id. at 500.
Other generalized evidence found by the Court to be inept and of little probative value were allegations of racial discrimination in a relevant industry,\(^79\) findings of racial discrimination nationwide and in other cities and states,\(^80\) and evidence of previous discrimination in the relevant industry.\(^81\) Under the analysis of *Croson*, evidence of these types failed to "adequately identify actionable discrimination nor do they permit tailoring of an appropriately narrow remedy."\(^82\)

*Croson* dictates that state and local governments identify the specific discrimination the set-aside is to remedy.\(^83\) For example, evidence that a state or municipality engaged in specific discriminatory practices would be specific direct evidence of a constitutional or statutory violation.

In addition, gross disparities "between the number of MBE members in local trade associations and the number of MBEs eligible for membership in such associations"\(^84\) would be enough to support the creation of a race-conscious set-aside program. Statistics that show distinct differences between "the percentage of the relevant governmental contracts awarded to MBEs and the percentage of MBEs that the government deems qualified to perform such contracts" would also be sufficient under *Croson*.\(^85\)

The percentage of contracts awarded to MBEs must take into consideration both the relevant prime contracts the government awards directly to MBEs and the relevant prime contracts that nonminority prime contractors subcontract to MBEs. *Croson* . . . also indicate[s] that the number of MBEs included in this statistical comparison should only encompass qualified MBEs that engage in the particular industry subject to the set-aside program in question.\(^86\)

State and local governments are not equipped to compile the technical statistics necessary to fulfill the required factual predicate. Many states keep few or no written records of their proceedings.\(^87\) Local governmental bodies, such as city councils and county legislatures, fall far behind even the states in their ability to compile the necessary records. In sum, the majority of

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\(^79\) *Id.* at 498.

\(^80\) *Id.* at 500.

\(^81\) *Id.* at 504.

\(^82\) Taylor, *supra* note 12, at 61 (discussing the Court's holding in *Croson*); see also *Croson*, 488 U.S. at 505 (The evidence of the school desegregation experience in Richmond and congressional reports provides insufficient data "to define the scope of any injury to minority contractors in Richmond or the necessary remedy.").

\(^83\) *Croson*, 488 U.S. at 505.

\(^84\) Taylor, *supra* note 12, at 61.

\(^85\) *Id.* at 61-62. *But see* Harrison & Burrowes Bridge Constructors v. Cuomo, 743 F. Supp. 977, 998, 999, 1001 (N.D.N.Y. 1990) (refusing to uphold an MBE set-aside despite statistical evidence of discrimination because it was "too generalized and conclusory to meet the stringent requirements of *Croson*"; "identified instances of racial discrimination" are required instead).

\(^86\) Taylor, *supra* note 12 at 61-62.

\(^87\) Kende, *supra* note 26, at 614 n.144.
states and virtually all local governmental bodies are not capable of fulfilling *Croson*’s factual predicate.

*Croson*’s impact was immediate. Lower courts, frequently citing *Croson* as precedent, have invalidated several state and local set-asides.\(^8\) *Croson* threatens to erode affirmative action strides of the past two decades. How can the federal government, vested with the power of the fourteenth amendment’s enforcement clause, aid in protecting and encouraging the growth of state and local set-asides?

III. Proposed Guidelines For the Use of Federal Findings of Past Discrimination By State and Local Governments

State and local governments desiring to encourage and support the creation and continued existence of minority-owned businesses within their jurisdictions are now faced with two stark realities. First, *City of Richmond v. J.A. Croson Co.*’s\(^9\) factual predicate requires them to compile extensive and complex technical data to establish evidence of specific racial discrimination within their jurisdictions. Second, they are faced with growing fiscal demands and ever-shrinking budgets, making it more difficult to compile the evidence required. Thus, the desperate need to alleviate racial discrimination within the economic sector may be stifled by *Croson*’s requirement of a rigid factual predicate. These concerns would be alleviated best through enactment by Congress of legislation enabling states and localities to utilize specific evidence of discrimination contained in congressional studies and findings.

This legislation should be passed for three reasons. First, it would permit states and localities to rely on federal findings, thereby making it easier for them to enact MBE programs which would meet the factual predicate requirement of *Croson*. This reliance would reduce the implementation costs associated with state and local MBE programs. Second, this legislation would encourage Congress to produce region-specific findings. Third, the legislation would address Justice O’Connor’s concern that state and local legislators might aid their own racial groups.\(^9\)

*Croson* refused to allow Richmond to rely on congressional findings of “nationwide discrimination in the construction industry” because “Congress explicitly recognized that the scope of the problem would vary”\(^9\) from state


\(^9\) See id. at 506, 510.

\(^9\) Id. at 504 (emphasis added).
However, the Court noted that "[s]tates and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination." Therefore, *Croson* would permit state and local legislators to rely on federal findings so long as such findings were region-specific.

Congress's "unique powers" to enforce the fourteenth amendment demand that it disseminate information to aid state and local governments in implementing MBE programs. The proposed legislation would fulfill Congress's responsibility under the fourteenth amendment. Although Congress is not required to make specific findings of discrimination to enact federal set-asides, Congress *does* frequently produce such evidence. Extensive testimony regarding discriminatory practices observed within the fifty states is often presented by expert witnesses at legislative hearings. The proposed legislation would make Congress cognizant of its responsibility to produce region-specific evidence during such hearings and would thereby increase the availability of this information.

92. See *id.* The Court said:

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 . . . with some specificity before they may use race-conscious relief. . . . 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.

*Id.* (citation omitted). See also *Days*, *supra* note 70, at 480:

State and local agencies creating set-asides should, for example, be able to rely in part upon federal legislative or agency findings and judicial determinations regarding nationwide discrimination against minority business enterprises as predicates for considering the propriety of set-asides in their respective jurisdictions. But it 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, such as courts and administrative agencies.

93. *Croson*, 488 U.S. at 504. States can presently utilize federal nationwide findings to establish state set-aside programs if the programs are adopted to satisfy governmental conditions for the receipt of federal funding. *See, e.g.*, Milwaukee County Pavers Ass'n v. Fiedler, 710 F. Supp. 1532 (W.D. Wis. 1989), *cert. denied*, 111 S. Ct. 2261 (1991). Congress enacted legislation which "establish[ed] a 10% goal for expenditures with disadvantaged businesses" in the construction of highways. *Id.* at 1535. In implementing this legislation, the State of Wisconsin used congressional findings of generalized evidence of discrimination to create a state set-aside program. The district court upheld the Wisconsin set-aside because the program was found to be a subsidiary of a federal program. *Id.* at 1545. The *Fiedler* court applied the equal protection analysis of *Fullilove*. The court also noted that Wisconsin could not have otherwise established the set-aside based solely on congressional findings of nationwide discrimination. *Id.* at 1546.

In contrast, in Metro Broadcasting, Inc. v. Federal Communications Comm'n, 110 S. Ct. 2997 (1990), the Supreme Court applied an intermediate level of scrutiny to uphold the FCC's program awarding enhancements for minority ownership in proceedings for FCC licenses and its "distress sale" program, which permits certain existing radio and television stations to be transferred only to minority-controlled firms. *Id.* at 3002.
Reliance on particularized congressional committee findings would aid states in amassing the direct evidence needed to establish proof of discrimination sufficient to satisfy the factual predicate required by Croson. Congress has financial resources, manpower, and expertise that states lack for gathering the necessary data. Additionally, the use of congressional chronicles would alleviate the record-keeping dilemma encountered by states and localities which do not keep transcripts of their investigatory proceedings.

In addition to citing federal findings, a state or locality would still be responsible for providing adequate showings that "the discriminatory practice has been defined adequately; [that] alternatives short of explicit reliance upon race have been canvassed and found wanting; and [that] any race-conscious remedy has been sufficiently limited in scope." The fulfillment of these factors would enable states and localities to fashion affirmative action programs that identify specific discriminatory practices and establish a factual predicate strong enough to show a "prima facie case of a constitutional or statutory violation."

Finally, use of congressional records would address Justice O'Connor's concern that state and local legislators might enact legislation furthering their own racial group. Findings from various federal sources would not be derived from state and local legislators or interest groups. Such evidence of discriminatory practices would be devoid of possible deviant localized motives.

**CONCLUSION**

The United States Congress should enact legislation to aid states and localities in establishing race-conscious set-aside programs. This legislation would enable state and local governments to utilize specific evidence of discrimination contained in congressional findings so that states may more easily satisfy the factual predicate mandated by Croson. This legislation would help states and localities in eradicating the effects of past racial discrimination and in furthering economic stability and growth. The resulting legislation should be narrowly tailored to address specifically-identified

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94. See Fullilove v. Klutznick, 448 U.S. 448, 503 (1980) (Congress has "information and expertise that [it] acquires in the consideration and enactment of earlier legislation."); Kende, *supra* note 26, at 605 ("Congress may also have intimate knowledge of state activities that perpetuate discrimination, given the information it derives from overseeing federal revenue-sharing programs and commerce regulation." (emphasis in original)).

95. *Days*, *supra* note 70, at 457.

96. *Croson*, 488 U.S. at 500 (citations omitted).

97. Justice Scalia explained in *Croson*, 488 U.S. at 522-23, that because the country is divided into factions, namely the states, Congress could not be used as a vehicle for the furtherance of discrimination by a minority group.
discriminatory practices in order to establish a prima facie case of an equal protection violation.

MBEs can effectively aid in eliminating America's tradition of discrimination against people of color. *Croson* should not be allowed to end the past era of growth in affirmative action programs. The rapid demise of state and local set-asides has already closed the doors of opportunity to a sizable number of minorities attempting to share in this country's economic wealth. Regardless of the persistent efforts of individual minorities and nonminorities, the color of one's skin still denies equal opportunities to a large segment of this nation's minority populace. Racial discrimination must be eradicated from our society by eliminating prevalent racial barriers. Minorities must be incorporated into the mainstream of American business. Resurrecting state and local set-asides is vital to transforming dreams of economic equality for minorities into reality.