

City of Richmond v. J.A. Croson Co.: Charting a Course Through the Supreme Court's Affirmative Action Decisions

Introduction

During the 1989 term, the Supreme Court issued opinions that represent dramatic set-backs in many civil rights areas. One area dramatically affected was the constitutionality of affirmative action programs in the employment arena. In *City of Richmond v. J.A. Croson*,¹ the Court held that a Virginia set-aside plan which required thirty percent of all city-awarded contracts to be completed using minority subcontractors was invalid under the Equal Protection Clause of the Fourteenth Amendment. This ruling shocked civil rights supporters and sent municipal governments throughout the nation rushing to evaluate or dismantle their affirmative action programs.²

The Equal Protection Clause of the Fourteenth Amendment states that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."³ This grants the right of all United States citizens to equal treatment, regardless of factors such as race, religion, and gender. Equal treatment includes equality of opportunities to participate in all the basic privileges of citizenship.⁴ A legacy of discrimination has denied minorities equal rights and prevented minorities from achieving full representation in social institutions. This legacy thwarts the ideal of equality. Remedying discrimination against minorities remains "one of the most profound moral and constitutional challenges facing our nation."⁵ Progress in increased minority representation can be achieved only through remedial efforts designed to foster minority

1. 109 S. Ct. 706 (1989).

2. Joint Statement, *Constitutional Scholars' Statement on Affirmative Action After City of Richmond v. J.A. Croson Co.*, 98 YALE L.J. 1711, n.* (1989) (hereinafter "Joint Statement"). See Curry, *Set-aside Plans May Face Suits*, Chicago Tribune January 24, 1989, p. 2C: "The Supreme Court's rejection of Richmond's affirmative-action program will trigger legal attacks on minority set-aside programs and threaten voluntary efforts to rectify past discrimination. . . . According to [the U.S. Conference of Mayors,] 190 local governments and 36 states have adopted minority set-aside programs. . . ."

3. U.S. CONST. amend. XIV, § 1.

4. Joint Statement, *supra* note 2, at 1711.

5. *Id.*

opportunities.⁶

Employers and governments have recognized this need and enacted affirmative action programs to incorporate minority membership into areas of historical exclusion. These race-conscious plans that favor a historically disadvantaged group have been criticized for resulting in "reverse-discrimination," ultimately working to the disadvantage of whites. Critics of affirmative action argue⁷ that race-based distinctions violate the mandate that "[o]ur Constitution is color-blind."⁸

The Supreme Court struggled with the question of racial distinctions in the remedial context for twenty-five years. A majority, however, could not agree on the appropriate constitutional test to apply to race-conscious plans.⁹ The issue remained extremely divisive. Some members of the Court applied a "strict scrutiny" analysis while others applied a "near strict scrutiny" analysis.¹⁰ Affirmative action opinions were always written by pluralities of the Court.¹¹

Even under the rigid strict scrutiny approach, the Court would allow affirmative action programs in certain circumstances. In a recent article responding to the *Croson* decision, constitutional scholars argued that race-conscious programs "designed to bring excluded groups into the societal mainstream—to ensure equal citizenship for all Americans—promote the goals of the equal protection clause and cannot be viewed as inherently contrary to the Constitution"¹²

Croson represents the first case in which a majority of the Court held that all race-conscious programs will be judged by strict scrutiny. Under such a standard, the program must promote a compelling governmental interest by means necessary to promote that interest.¹³ In only one case, now widely discredited, has the governmental interest been sufficiently compelling to support a racial classification that disadvantaged minority groups.¹⁴ Under *Croson*, the strict scrutiny test the Court traditionally applied to "invidious" discrimination that disadvantages minorities now

6. *Id.*

7. See text accompanying notes 141-151.

8. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

9. *Wygant v. Jackson Board of Education*, 476 U.S. 267, 301 (1986) (Marshall, J., dissenting).

10. See text accompanying notes 26-30, 50-53, 58-61, and 81-83.

11. See text accompanying notes 24, 41, and 58.

12. Joint Statement, *supra* note 2, at 1712.

13. *City of Richmond v. J.A. Croson*, 109 S. Ct. 706, 721 (1989).

14. *Korematsu v. United States*, 323 U.S. 214 (1944). The Court rejected a Japanese-American's equal protection challenge to his conviction for violating internment orders issued under the 1942 Congressional Act confining all Japanese-Americans to detention camps during World War II.

applies to "benign"¹⁵ discrimination that favors minorities.¹⁶

This Comment examines the background of the Court's affirmative action jurisprudence, consisting of the three cases using constitutional analysis¹⁷ that preceded the *Croson* decision: *University of California v. Bakke*,¹⁸ *Fullilove v. Klutznick*,¹⁹ and *Wygant v. Jackson Board of Education*.²⁰ From these decisions to *Croson*, the Court's view of affirmative action is analyzed as represented by the individual Justices.

In this important area of equal protection, widespread disagreement continues among the Justices as to the appropriate role of the Court and the Constitution in race-conscious remedies. This Comment will examine the extent to which each Justice stands by the "Constitution is colorblind"²¹ mandate or, as Justice Blackmun stated in his *Bakke* opinion, "In order to get beyond racism, we must first take account of race. . . . [a]nd in order to treat some persons equally, we must treat them differently."²² This Comment also considers how each Justice finds the requisite governmental interest to support such programs by examining the extent to which each Justice requires specific prior instances of discrimination by the governmental entity. Finally, the alternatives and future of affirmative action after *Croson* will be briefly addressed.

I. Background

A. *University of California v. Bakke*

The celebrated case of *University of California v. Bakke*,²³ involved a challenge to a medical school affirmative action program. The university's program reserved 16 out of 100 seats for minority students.²⁴ In a plurality opinion, authored by Justice Powell, the Court invalidated the university's admissions program. The Court was divided, however, on the correct standard and on the appropriate disposition of the case. Four members of the majority found the plan violated Title VI of the 1964 Civil Rights Act, and thus did not reach the constitutional question of an

15. *University of California v. Bakke*, 438 U.S. 265, 356, 361 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring and dissenting).

16. *Croson*, 109 S. Ct. at 706. "The standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification." *Id.* at 721.

17. Constitutional analysis is appropriate when the state is a party since the Fourteenth Amendment applies only to state action. Programs enacted by private enterprises would be challenged under Title VII of the 1964 Civil Rights Act.

18. 438 U.S. 265 (1978).

19. 448 U.S. 448 (1980).

20. 476 U.S. 267 (1986).

21. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

22. 438 U.S. at 407 (Blackmun, J., concurring).

23. 438 U.S. 265 (1978).

24. *Id.* at 275.

equal protection violation.²⁵

Justices Blackmun, Brennan, White, and Marshall would have upheld the plan as constitutional despite the university's lack of prior deliberate discrimination. They applied the much less demanding intermediate scrutiny.²⁶ Under this approach a racial classification used for remedial or "benign" purposes must serve important governmental objectives and must be substantially related to achievement of those objectives.²⁷

Powell alone found the program unconstitutional. He argued that any racial or ethnic classification, regardless of the class at issue, must be subjected to strict scrutiny.²⁸ The scheme would be upheld only if its objective was "permissible and substantial" and the use of classification was necessary to accomplish that objective.²⁹ Justice Powell rejected the notion that affirmative action could be used to redress broad societal discrimination, but could be used only where "judicial, legislative, or administrative findings of constitutional or statutory violations existed."³⁰ Powell then found that the need to obtain the educational benefits that flow from an ethnically diverse student body was a constitutionally permissible goal.³¹ This goal may not be achieved constitutionally by a rigid quota, but could be pursued by considering minority status as one factor in the admissions process.³² The plurality found the interest in a diverse student body sufficiently compelling to allow race to be considered as a "plus" in the admissions process.³³

The views expressed in *Bakke*, Powell's strict scrutiny approach and the dissent's less demanding intermediate analysis, establish the debate that still rages over the appropriate level of scrutiny with which to analyze race-based programs. In recognizing, at the least, that race could be "a factor" in the admissions process, Powell's opinion rejected the rigid "color-blind constitution" approach that some justices later would support.³⁴ The *Bakke* decision, however, also made clear that broad societal discrimination will not support affirmative action remedies.³⁵ Much more explicit findings of past discrimination by the actual governmental

25. Chief Justice Burger and Justices Stevens, Stewart and Rehnquist analyzed the case from this approach. *Id.* at 408.

26. 438 U.S. at 359 (Brennan, White, Marshall, and Blackmun, JJ., concurring and dissenting).

27. *Id.* (citations omitted).

28. *Id.* at 291 (plurality opinion).

29. *Id.* at 305 (citations omitted).

30. *Id.* at 307-08.

31. *Id.* at 316-17.

32. *Id.* at 317.

33. *Id.* at 317-18.

34. *See supra* note 52 and accompanying text.

35. 438 U.S. at 307-08.

unit are now required.³⁶

All of the justices agree that a race-based remedy may be used to make the actual victims of prior illegal discrimination whole.³⁷ Further, the Court has affirmed remedial racial classifications for prior discrimination by the governmental unit involved even though the programs went beyond compensating individuals denied jobs or other opportunities.³⁸ The Court, however, refuses to allow affirmative action in response to a general finding of societal discrimination. Affirmative action may not serve as a remedy for the "effects of societal discrimination."³⁹

B. *Fullilove v. Klutznick*

In *Fullilove v. Klutznick*,⁴⁰ the Court, in a 6-3 decision, upheld Congress' ten percent minority set-aside program embodied in The Public Works Employment Act of 1977.⁴¹ The plurality opinion, authored by Chief Justice Burger and joined by Justices White and Powell, gave great deference to congressional findings of past discrimination in the construction industry.

[W]e . . . approach our task with appropriate deference to 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 Fourteenth Amendment.' Art. I, sec 8, cl.1; Amdt. 14, sec 5.⁴²

While upholding the set-aside, the plurality failed to state the required standard of constitutional review.⁴³

The Court found that Congress had evidence of a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises.⁴⁴ The Court also found that Congress acted to cease perpetuation of the effects of prior discrimination which had impaired or foreclosed access by minority businesses to public contracting businesses, and that this congressional motive justified the creation of the Minority Business Enterprise (MBE) provision.⁴⁵

36. *Id.*

37. Choper, *Continued Uncertainty as to the Constitutionality of Remedial Racial Classifications: Identifying the Pieces of the Puzzle*, 72 IOWA L. REV. 255, 263 (1987).

38. *Id.*

39. *University of California v. Bakke*, 438 U.S. 207, 308 (1978); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274 (1986); *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 728 (1989).

40. 448 U.S. 448 (1980).

41. *Id.* at 492 (plurality opinion). The Plan defined a Minority Business as one owned by at least fifty percent minority group members. *Id.* at 454.

42. *Id.* at 472.

43. *Id.* at 491-92.

44. *Id.* at 478.

45. *Id.* at 473.

In assessing the burden imposed by the set-aside on innocent firms not guilty of prior discrimination, the Court found that an "incidental consequence" of denying contracts to nonminorities is permissible.⁴⁶ Considering the effects of prior discrimination, the Court reasoned that "it was within congressional power to act on the assumption that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities."⁴⁷ Although the Court has recognized historical disadvantage to minorities and consequential advantages accruing to nonminorities, it has refused to hold such factors as a sufficient government interest to implement remedial programs. The relevance of any benefits that nonminorities may have previously received in analyzing affirmative action plans may be limited to cases when Congress has acted.

As a threshold matter, the Court specifically "reject[ed] the contention that in the remedial context Congress must act in a wholly 'color-blind' fashion."⁴⁸ The Court's reliance on congressional findings of past discrimination in the construction industry stands in stark contrast to *Croson*, where these findings could not be relied on to justify a state program. *Fullilove*, however, indicates that when dealing with broad remedial powers of Congress, the Court will give deference to congressional findings and not require a high showing of past discrimination to justify implementing affirmative action.⁴⁹

Justices Powell, Brennan, Marshall, and Blackmun all adhere to the standards they applied in *Bakke*, and all concur in the *Fullilove* judgment. Powell advocates the application of strict scrutiny, while Marshall, Brennan and Blackmun assert that the application of strict scrutiny is "inapposite to racial classifications that provide benefits to minorities for the purpose of remedying the present effects of past racial discrimination. Such classifications may disadvantage some whites, but whites as a class lack the 'traditional indicia of suspectness . . .'"⁵⁰ Such programs, therefore, should not be subject to conventional strict scrutiny which is "strict in theory, but fatal in fact."⁵¹

46. *Id.* at 484.

47. *Id.* at 485.

48. *Id.* at 482.

49. *Id.* at 472-73.

50. *Id.* at 518 (Marshall, J., concurring) (citations omitted). "[W]hites as a class [do not] have any of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subject to 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." *University of California v. Bakke*, 438 U.S. 265, 357 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring and dissenting) (quoting *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973)).

51. *Id.* at 519 (quoting *Bakke*, 438 U.S. at 362) (Brennan, White, Marshall, and Blackmun, JJ., concurring and dissenting).

In his dissenting opinion, Justice Stewart, joined by Justice Rehnquist, states the traditional argument against racial classifications: " 'Our Constitution is color-blind . . . ' " ⁵² They concede only that Congress has the power to remedy its own racial discrimination, but maintain there was no showing here of such illegal discrimination. ⁵³

In his separate dissent, Justice Stevens argues that the minority set-aside was not a narrowly tailored remedial measure because it provided benefits to classes without showing that these classes had been wrongfully excluded from competing in the past. ⁵⁴

C. *Wygant v. Jackson Board of Education*

Six years after *Fullilove*, the Court invalidated an affirmative action program giving preference to minorities in firing decisions. In *Wygant v. Jackson Board of Education*, ⁵⁵ a five-to-four Court found a layoff plan embodied in the collective bargaining agreement between a school board and teachers' union unconstitutional. ⁵⁶ The plan provided that if layoffs became necessary, those with most seniority would be retained. The plan further provided that at no time would there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff. Subsequently, layoffs became necessary and the school board's adherence to the agreement called for the firing of tenured nonminority teachers and retention of minority teachers with less seniority. ⁵⁷ The teacher's union filed suit to enjoin the school board from adhering to the plan.

Again, there was no majority decision. Justice Powell wrote for the plurality which included Chief Justice Burger, and Justices Rehnquist and O'Connor. They found the layoff provision violated the Equal Protection Clause. ⁵⁸ "Racial and ethnic distinctions of any sort are inherently suspect and thus call for most exacting judicial examination." ⁵⁹ The Court rejected the approach that only the specific victims of discrimination be permitted to displace whites. ⁶⁰ Instead the Court applied the strict scrutiny standard to the layoff provision. Thus, this provision was required to promote a compelling governmental interest by a means narrowly tailored to achieve that interest. ⁶¹

52. *Id.* at 522 (Stewart, J., dissenting) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

53. *Id.* at 528.

54. *Id.* at 541 (Stevens, J., dissenting).

55. 476 U.S. 267 (1986).

56. *Id.* at 284 (plurality opinion).

57. *Id.* at 271.

58. *Id.* at 284.

59. *Id.* at 273 (quoting *University of California v. Bakke*, 438 U.S. 265, 291 (1978)).

60. *Id.* at 277.

61. *Id.* at 274 (citations omitted).

Justice Powell rejected the two purposes for the preferences advanced by the school board as insufficient to establish a compelling governmental interest.⁶² First, the board argued the layoff protection plan preserved minority teachers who were "role models" for minority students. Second, the plan alleviated the effects of "societal discrimination."⁶³ The school board proposed a forward-looking approach⁶⁴ by advancing the presence of minority teachers as "role models." Thus, minority preferences were not implemented exclusively to remedy past instances of illegal discrimination. The school board's strategy was to apply the role model theory. This theory suggests that increasing the percentage of minority teachers would lead to positive future results for the students.⁶⁵ The role model theory is not a backward-looking approach that justifies present classifications for past injustices.

As in *Bakke*, the Court required convincing evidence that remedial action was warranted. Here the Court found no deliberate discrimination in hiring. Echoing the *Bakke* decision, a general claim of societal discrimination alone is not enough to justify the remedial action at issue in *Wygant*.⁶⁶ The Court has insisted upon a showing of prior discrimination by the governmental unit involved before allowing use of remedial racial classifications.⁶⁷ Also, the role model theory has "no stopping point" because it allows discrimination long past the point required by any legitimate remedial purpose.⁶⁸

Turning to the second prong of the strict scrutiny test, the *Wygant* Court concluded that the school board's means were not narrowly framed to accomplish the proposed objective.⁶⁹ The burden on innocent teachers denied their jobs was held to be far too great. The Court distinguished goals implemented in hiring decisions from those taking effect through layoffs.

In cases involving valid hiring goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job.⁷⁰

62. *Id.* at 274, 278.

63. *Id.* at 274.

64. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 87 (1986).

65. *Id.* at 87.

66. *Wygant*, 476 U.S. at 274 (plurality opinion).

67. *Id.*

68. *Id.* at 275.

69. *Id.* at 283.

70. *Id.* at 282-83.

Once hired, the teachers had certain expectations. Their seniority was a valuable capital asset that was disrupted by the layoff plan. General hiring goals, on the other hand, do not have such a broad impact.⁷¹ Thus, the Court considered the burden on particular individuals too intrusive and found the means not narrowly tailored. Furthermore, the Court suggested that adoption of hiring goals and other less intrusive means were available to accomplish the school board's goals.⁷² Although the plurality emphasized unwillingness to allow race to deny one a job already obtained, the *Croson* decision extends this unwillingness into hiring goals as well.⁷³

The *Wygant* plurality is willing to take race into account in order to remedy prior discrimination. As a result, the Court notes that these programs may call upon innocent parties to bear some of the burden of the remedy.⁷⁴ It is interesting that Justice Rehnquist joins the *Wygant* plurality because the reasoning is contrary to the *Fullilove* dissent in which he advocated the "colorblind Constitution."⁷⁵

In *Wygant*, Justice O'Connor wrote a concurring opinion in which she agreed that strict scrutiny should be applied to programs that favor minorities. *Wygant* was her first affirmative action case focusing on constitutional grounds, and Justice O'Connor expressed optimism about the disagreements expressed in prior Supreme Court decisions addressing affirmative action. "In the final analysis, the diverse formulations and the number of separate writings put forth by various Members of the Court in these difficult cases do not necessarily reflect an intractable fragmentation in opinion with respect to certain core principles."⁷⁶ Remedying past or present racial discrimination is a sufficiently weighty state interest to warrant remedial use of affirmative action programs. This 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.⁷⁷

The layoff provision in *Wygant* was not narrowly tailored because it was based on a hiring goal unrelated to remedying discrimination.⁷⁸ The hiring goal was tied to the percentage of qualified minority students in the school district, not to the percentage of qualified minority teachers in the relevant labor pool. Thus the goal used was not probative of discrimination. Only when the availability of minority teachers substantially ex-

71. *Id.* at 283 (citations omitted).

72. *Id.* at 283-84.

73. *City of Richmond v. J.A. Croson Co.*, 109 S. Ct 706, 723-24 (1989).

74. *Wygant*, 476 U.S. at 281 (plurality opinion).

75. *Fullilove v. Klutznick*, 448 U.S. 448, 522 (1980) (Stewart, J., joined by Rehnquist, J., dissenting).

76. *Wygant*, 476 U.S. at 287 (O'Connor, J., concurring).

77. *Id.* at 291.

78. *Id.* at 294.

ceeded those hired would an inference of discrimination be proper.⁷⁹

Justice Marshall was joined by Justices Brennan and Blackmun in his dissenting opinion. They asserted that the public employer, with full agreement of its employees, should be permitted to preserve the benefits of a legitimate and constitutional affirmative-action hiring plan. Unlike Justice O'Connor, the dissenters expressed pessimism about the Court's affirmative action jurisprudence. "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."⁸⁰

The dissenters would apply the same near strict scrutiny test where remedial use of race is permitted "if it serves 'important governmental objectives' and is 'substantially related to achievement of those objectives.' This standard is genuinely a 'strict and searching' judicial inquiry, but is 'not " 'strict' in theory and fatal in fact." ' "⁸¹ Marshall determined that regardless of which test applied, near strict scrutiny or strict scrutiny, the plan in *Wygant* would be constitutional.⁸² Explicit Board admission of or judicial determination of culpability would only have exposed the Board to further litigation and liability, contributing nothing toward the goal of integrating schools.⁸³ The dissenters' concern with the future goal of integration reflects a forward-looking rationale for remedial programs, even though they are willing to frame the question of affirmative action in terms of past discrimination.

In a separate dissent, Justice Stevens found it unnecessary to inquire into specific instances of past discrimination. Stevens found that the school had a legitimate interest in employing more black teachers for the future. "Rather than . . . 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."⁸⁴

After *Wygant*, the positions of seven justices on affirmative action were evidenced. Chief Justice Burger, Justices Rehnquist, White and Powell all adhered to strict scrutiny in evaluating all racial classifications. Justices Brennan, Marshall, and Blackmun advocated the intermediate scrutiny analysis. Justices O'Connor and Stevens did not align with either group. O'Connor joined the plurality in *Wygant*, but only because she found the layoff plan was not sufficiently tailored to meet the school board's objectives. In her concurring opinion, she described the distinc-

79. *Id.*

80. *Id.* at 301 (Marshall, J., dissenting).

81. *Id.* at 301-02 (quoting *University of California v. Bakke*, 438 U.S. 265, 362 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring and dissenting)).

82. *Id.* at 303.

83. *Id.* at 304.

84. *Id.* at 313 (Stevens, J., dissenting).

tion between the plurality's "compelling" interest and the dissenters' "important" purpose "a negligible one."⁸⁵ In the end, she declined to adopt either test.

Justice Stevens alone was willing to look to public-interest factors and to the future effects of affirmative action without adopting a specific test.

D. Summary of Background Cases

Considering the *Bakke*, *Fullilove* and *Wygant* cases, affirmative action to bring minorities into areas from which they were previously excluded or to advance their future opportunities is not sufficient to uphold race-conscious programs. "[T]he Court has approved affirmative action only as precise penance for the specific sins of racism that a government, union, or employer has committed in the past."⁸⁶ The "sin" element of affirmative action has become the first prong of the strict scrutiny analysis—the requirement of a compelling government interest. To be valid, a program must seek to remedy specific incidents of past discrimination by the government body. This invites questions concerning what level of discrimination is required to employ remedial efforts.

The Court's analysis effectively requires a governmental body to confess to illegal activity before implementing a race-conscious remedy. "To admit guilt for past discrimination is against employers' and unions' self-interest, and indeed, may invite race discrimination lawsuits by non-whites; . . . the task of self-judgment and self-condemnation in *any* form casts a chill over efforts to implement affirmative action voluntarily."⁸⁷ This chill over voluntary affirmative action is a direct result of the Court's concern with past sin. "Making sins of past discrimination the justification for affirmative action, however, dooms affirmative action to further challenge even while legitimating it. As a practical matter, it subjects affirmative action plans to potentially protracted litigation over the 'factual predicate' for adopting them. . . ."⁸⁸

The Court's approach has invited assertions that white workers "innocent" of their employers' past discrimination should not pay for the sins of other members of their race.⁸⁹ The concern with such innocents has been integrated into the second part of the strict scrutiny analysis. Thus the effect on non-minorities will help determine whether the plan is sufficiently tailored to achieve the government's stated objectives.

85. *Id.* at 286 (O'Connor, J., concurring).

86. Sullivan, *supra* note 64, at 80.

87. *Id.* at 92.

88. *Id.*

89. *Id.*

II. The *Croson* Decision

A. The Facts

The Richmond City Council passed the "Minority Business Utilization Plan" to encourage contracting with minority-owned businesses. Such a set-aside program typically requires a certain percentage of city contracts reserved for minority businesses. Here, the Plan required prime contractors on city-awarded contracts to subcontract at least thirty percent of the dollar amount of the contract to one or more Minority Business Enterprises (MBEs).⁹⁰ The Plan defined an MBE as "[a] business at least fifty-one (51) percent of which is owned and controlled . . . by minority group members."⁹¹ Minority group members included "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts."⁹² The Plan declared that it was " 'remedial' " in nature, designed to promote wider participation by MBEs in the contracting industry.⁹³ A waiver of the thirty percent requirement was provided if the contractor could demonstrate that qualified MBEs were unavailable or unwilling to participate.⁹⁴

In public hearings on the Plan, a study revealed that while the general population of Richmond was fifty percent black, only 0.67 percent of the city's prime construction contracts had been awarded to minority businesses from 1978-1983.⁹⁵ Contractors' associations were found to have virtually no minorities in their membership. There was, however, no direct evidence of any racial discrimination on the part of the city or evidence that the city's prime contractors had discriminated against minority-owned subcontractors.

Croson was awarded the prime contract on a project to install plumbing fixtures in the city jail. He was unable to obtain any subcontractor bids from MBEs, and applied for a waiver of the thirty percent requirement. The city denied the waiver request when Croson received a MBE bid for seven percent above the market price and subsequently decided to accept new bids for the project.⁹⁶

B. The Opinions

In only her second affirmative action case using equal protection analysis, Justice O'Connor announced the decision of the Court. Chief Justice Rehnquist and Justices White and Stevens joined in Parts I, III-B and IV. Part II was joined by Rehnquist and White, and Parts II-A and

90. *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 712-13 (1989).

91. *Id.* at 713.

92. *Id.* (quoting *City of Richmond Minority Business Utilization Plan*).

93. *Id.* (quoting *City of Richmond Minority Business Utilization Plan*).

94. *Id.*

95. *Id.* at 714.

96. *Id.* at 715.

V were joined by Rehnquist, White and Kennedy. Justices Scalia and Kennedy concurred in the result, while Justices Brennan, Blackmun and Marshall characteristically dissented.

O'Connor rejected the "stark" alternatives advocated by the city and Croson.⁹⁷ Croson argued that the city must limit any race-based remedial efforts to eradicating the effects of its *own* prior discrimination.⁹⁸ The city, relying on the Court's *Fullilove* decision, felt they were entitled to broad legislative power to define and attack the effects of prior discrimination in its local construction industry.⁹⁹

Although the Richmond plan was strikingly similar to the plan upheld in *Fullilove*, the Court distinguished *Fullilove* as a federally enacted plan under Congress' fourteenth amendment powers.

Congress, unlike any State or political subdivision, has specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. . . . 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.¹⁰⁰

The States must exercise power within the limitations embodied in section 1 of the Fourteenth Amendment. "[M]ere 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 section 5 of the Fourteenth Amendment and insulate any racial classification from judicial scrutiny under section 1."¹⁰¹

The majority found strict scrutiny analysis appropriate because of the danger of stigmatic harm from racial classifications.¹⁰² Unless strictly reserved for remedial settings, "they [race-conscious programs] may in fact promote notions of racial inferiority and lead to a politics of racial hostility."¹⁰³

The Court cited a second reason for applying heightened scrutiny to the Plan—the racial composition of the city. In Richmond, blacks comprised approximately fifty percent of the population and five of the nine seats on the City Council.¹⁰⁴ In the usual case, racial preferences involve a choice made by a dominant racial group to its own disadvantage. In *Croson*, the Court notes that the preference was enacted to the advantage

97. *Id.* at 717.

98. *Id.* (emphasis added).

99. *Id.* at 717.

100. *Id.* at 719.

101. *Id.*

102. *Id.* at 721.

103. *Id.* (quoting *University of California v. Bakke*, 438 U.S. 265, 298 (1978) (plurality opinion)).

104. *Id.* at 722.

of the majority.¹⁰⁵

Applying the strict scrutiny test, the Court concludes there is no compelling interest to support the classification, nor is the Plan narrowly tailored to advance the city's interest.¹⁰⁶ A compelling interest requires more than a generalized assertion of past discrimination in the entire industry. Societal discrimination leading to the lack of opportunities for black entrepreneurs, standing alone, cannot justify the "rigid racial quota."¹⁰⁷ There was nothing close to a strong factual basis to show a constitutional or statutory violation by anyone in the Richmond construction industry.¹⁰⁸

Here, the city did not know the number of qualified MBEs in the relevant market, nor what percentage of total city construction dollars minority firms now received.¹⁰⁹ None of the evidence revealed any specific discrimination in the Richmond construction industry. The city, therefore, failed to demonstrate a sufficiently compelling interest to sustain the preference.¹¹⁰

Turning to the second prong of the strict scrutiny test, the Court stated that the Plan's means were not narrowly tailored; a thirty percent quota could not realistically be tied to any injury suffered by anyone.¹¹¹ The city's reliance on the disparity between the number of prime contracts awarded to minority firms and the minority population of Richmond was erroneous. "[W]here 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."¹¹²

In short, a city may enact a set-aside program only after specific findings of discrimination. In addition, all available race-neutral remedies must be attempted or at least considered prior to implementing a race-conscious remedy.¹¹³ While searching in the past for justification for affirmative action, Justice O'Connor ironically does not look back far enough. Her opinion does not recognize that, in fact, discrimination may prohibit some minorities from entering the contracting market. So the relevant statistical pool from which to determine discrimination, the percentage of minority firms, is already affected by discrimination. It is also

105. *Id.*

106. *Id.* at 727-28.

107. *Id.* at 724, 728.

108. *Id.* at 724 (quoting *Wygant v. Board of Education*, 476 U.S. 267, 274-75 (1986)).

109. *Id.* at 725.

110. *Id.* at 727.

111. *Id.* at 725.

112. *Id.* (citations omitted).

113. *Id.* at 728-29. O'Connor finds that many of the barriers to minority participation in the construction industry appear to be race-neutral. She then suggests city-financing to help with bonding requirements or simplification of the bidding procedures to facilitate minority representation.

interesting that O'Connor does not discuss the burdens imposed by the plan on white contractors because in both *Wygant* and *Fullilove* this was an important factor.

In his concurring opinion, Justice Stevens set himself apart from the majority opinion by basing race-conscious programs on future concerns instead of focusing on past conduct. "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."¹¹⁴ This statement is reminiscent of his dissent in *Wygant*.¹¹⁵ Unlike the majority, he says, "I, therefore, do not agree with the premise that seems to underlie today's decision as well as the decision in *Wygant* that a government decision that rests on racial classification is never permissible except as a remedy for a past wrong."¹¹⁶

Stevens did agree with the result because there was no claim by the city that the public interest would be served by the MBE provision.¹¹⁷ The city's plan was therefore distinguishable from *Wygant*, where an integrated faculty provided obvious benefits to students. He finds that the Plan benefits too many; firms were included that either never did business in the city or that discriminated against other minority groups.¹¹⁸

Justice Kennedy concurred and joined all but Part II of the decision which examined existing case law.¹¹⁹ His disagreement focused on O'Connor's characterization of federal affirmative action plans. "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."¹²⁰ Kennedy was drawn to Justice Scalia's approach which would "strike down all preferences which are not necessary remedies to victims of unlawful discrimination, [and] would serve important structural goals, as it would eliminate the necessity for courts to pass upon each racial preference that is enacted."¹²¹ Perhaps as one of the Court's newest members, Kennedy demonstrated some control over his apparent desire to disregard stare decisis by stating that "a rule of automatic invalidity for racial prefer-

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

115. *Wygant v. Jackson Board of Education*, 476 U.S. 267, 313 (1986) (Stevens, J., dissenting). In *Wygant*, Justice Stevens would have upheld the lay-off plan which preferred minority public teachers because of the public interest in educating children for the future. Here, his emphasis on the future impact of affirmative action again appears although he finds it insufficient to support the plan. *Id.*

116. *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 730 (1989) (Stevens, J., concurring).

117. *Id.* at 731.

118. *Id.* at 732.

119. *Id.* at 734 (Kennedy, J., concurring).

120. *Id.*

121. *Id.*

ences would be a significant break with our precedents I am not convinced we need adopt it at this point."¹²²

Kennedy favors strict scrutiny because it 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."¹²³ He recognizes the validity of such racial classifications only after a judicial determination that a State or its instrumentality has violated the Equal Protection Clause.¹²⁴

Justice Scalia adopts the rigid "[o]ur Constitution is colorblind" approach.¹²⁵ Although he concurred in the decision, Scalia disagreed with the Court's dicta that state and local governments may discriminate on the basis of race in order to "ameliorate the effects of past discrimination."¹²⁶ Where state or local action is at issue, he finds race-conscious programs appropriate only as a response to a social emergency rising to the level of imminent danger to life and limb.¹²⁷

Justice Marshall, joined by Justices Brennan and Blackmun, dissents, finding the city of Richmond's plan indistinguishable from the plan upheld in *Fullilove*.¹²⁸ He criticized the result as "a deliberate and giant step backward in this Court's affirmative action jurisprudence."¹²⁹ He also questioned the Court's second-guessing of the city's judgment in assessing prior discrimination within the city's construction industry.¹³⁰

The dissenters apply the test they have advocated since *Bakke*: race-conscious classifications designed to further remedial goals must serve important governmental objectives and be substantially related to achievement of those objectives in order to withstand constitutional scrutiny.¹³¹ The dissenters argue that remedying prior discrimination is a compelling, let alone important interest.¹³² The city has an additional "compelling interest" in preventing spending decisions from perpetuating exclusionary effects of past discrimination.¹³³ The dissenters conclude that under either the majority's strict scrutiny or their less strict approach, Richmond has produced enough evidence of prior discrimination in the industry and is not relying on generalized "societal

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 735 (Scalia, J., concurring).

126. *Id.* (quoting *id.* at 712).

127. *Id.*

128. *Id.* at 739 (Marshall, J., dissenting).

129. *Id.* at 740.

130. *Id.*

131. *Id.* at 743 (quoting *University of California v. Bakke*, 438 U.S. 265, 359 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring and dissenting)).

132. *Id.*

133. *Id.* at 744.

discrimination."¹³⁴

The dissent also argues that the Plan is substantially related to legitimate city interests. There is no interference with any vested right of a contractor; nor upsetting of expectations of innocent parties. The thirty percent "target" results in a small impact, affecting only three percent of overall city contracting.¹³⁵ The city council reasonably relied on *Fullilove* in adopting a set-aside percentage halfway between the present percentage of Richmond-based minority contractors and the percentage of minorities in Richmond.¹³⁶

Justice Marshall's bitterness at the majority's decision is evident in the following passage: "[R]acial 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."¹³⁷ By using the same strict scrutiny standard here as the Court applied to the most "brute and repugnant forms of state-sponsored racism, a majority of this Court signals that it regards racial discrimination largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice."¹³⁸

Justice Blackmun, joined by Justice Brennan, wrote a separate dissent emphasizing the voluntary nature of the Plan enacted to increase minority participation in business and remedy effects of prior discrimination. "[T]his Court, the supposed bastion of equality, strikes down Richmond's efforts as though discrimination had never existed. . . . So the Court today regresses."¹³⁹ When local governments voluntarily put into place their own affirmative action programs, should there not be a presumption of validity, that they are addressing known and important instances of prior discrimination?

III. Current Justices' Views on Affirmative Action

The *Croson* decision, while recognizing the legitimacy of affirmative action in general, made the burden of proving the constitutionality of such plans difficult if not insurmountable. The result of adopting strict scrutiny as the standard of review can be attributed largely to the changing composition of the Court and the new conservative majority that has emerged.

134. *Id.* at 746.

135. *Id.* at 751.

136. *Id.*

137. *Id.* at 752.

138. *Id.*

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

The next section will evaluate each Justice's approach to affirmative action, where they have stood in previous decisions, and how closely they have adhered to their view of the purpose and effectiveness of such remedial classifications. Although the members of the Court are not divided along any bright line, it is useful to evaluate their approach in terms of two methods of analysis. First, whether they adhere to the rigid "Constitution is color-blind" maxim and thus reject most plans. Second, whether they are more closely aligned with Justice Blackmun's words in the *Bakke* decision, "To get beyond race . . . we must first take account of race . . . and treat them differently."¹⁴⁰ The principle that legal classifications must be color-blind does have many virtues: it is easy to implement, it rests entirely on the moral proposition that it is wrong to draw distinctions based on race, and it assures prohibition of racial classifications that disadvantage oppressed racial minorities.¹⁴¹

A. Justice Scalia

Of all the justices, Justice Scalia adheres closest to the principle that the constitution is color-blind. He stops short of that absolute assertion, however, by recognizing the legitimacy of only two narrowly drawn color-conscious practices. Race-based measures are appropriate only when necessary to protect life and limb or to compensate actual victims of discrimination.¹⁴²

For all its virtues, the color-blind principle is too blunt, and therefore, in spite of his obvious attraction to this model, Justice Scalia feels compelled to admit that the scope of constitutional equality extends beyond it.¹⁴³ Further, although the liberal wing of the Court may even agree with the utopian idea of a "color-blind Constitution," they recognize that race-conscious measures must be taken now to reverse the years of indifference and active resistance to equality that has pervaded this nation.¹⁴⁴

B. Chief Justice Rehnquist

Chief Justice Rehnquist joined Justice Stewart's dissent in *Fullilove* which emphasized a view, similar to Scalia's, of a "color-blind Constitution." The Chief Justice argues that all racial discriminations are invalid except to remedy the actual effects of a prior legal violation against a

140. *University of California v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring and dissenting).

141. Rosenfield, *Decoding Richmond: Affirmative Action and the Elusive meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1755 (1989).

142. *See id.*

143. *Id.*

144. *City of Richmond v. J. A. Croson, Co.*, 109 S. Ct. 706, 757 (1989) (Marshall, J., dissenting).

racial or ethnic group.¹⁴⁵ In *Wygant*, however, Rehnquist joined Powell's plurality which acknowledged that remedying past discrimination requires taking race into account. "It is doubtful that Rehnquist subscribes to all the language in Powell's *Wygant* decision. It is more likely that he joined the opinion because he agreed with the result."¹⁴⁶ This apparent disparity could be the result of the Chief Justice's willingness to forego some idealogy in order to gather a majority on issues that he favors. He is now widely regarded as a consensus builder within the Court, forming majority opinions to advance the policies of the administration.¹⁴⁷ In *Croson*, Rehnquist finally achieved a majority to apply strict scrutiny to race-conscious remedial plans.

C. Justice Kennedy

Justice Kennedy's prior decisions and confirmation testimony demonstrate that he is a genuine advocate of judicial restraint.¹⁴⁸ While on the Ninth Circuit he did not decide any affirmative action cases under the Equal Protection Clause. His opinions on gender discrimination and civil rights, however, are illustrative. They reveal a deference to institutions and a reluctance to employ the courts as an instrument to correct damaging institutional policies.¹⁴⁹ Justice Kennedy authored the decision that rendered a lethal blow to the "comparative worth" theory, which posits that employees in job classifications occupied primarily by women should be paid the same as employees in job classifications filled primarily by men, if the jobs are of equal value. Kennedy wrote that Title VII did not require equal pay for women performing jobs that, while not identical, were of "comparative worth" to higher paying job categories dominated by men.¹⁵⁰

In *Croson*, Kennedy rejected automatic invalidity of racial preferences only because he was confident that "strict scrutiny 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."¹⁵¹ He rejects race-conscious remedies except after

145. *Fullilove v. Klutznick*, 448 U.S. 448, 522-28 (1980) (Stewart, J., joined by Rehnquist, J., dissenting).

146. Choper, *Continued Uncertainty as to the Constitutionality of Remedial Racial Classifications: Identifying the Pieces of the Puzzle*, 72 IOWA L. REV. 255, 261 (1987).

147. Coyle, *Court Blazes a New Trail*, NAT'L L.J., Aug. 21, 1989, at 54, col. 1: "Two terms ago, . . . Chief Justice Rehnquist appeared to have abandoned his position as the lone ranger of dissent to forge some unusual coalitions within his divided court."

148. Bell, *Justice Anthony M. Kennedy: Will His Appointment to the United States Supreme Court Have an Impact on Employment Discrimination?* 57 U. CIN. L. REV. 1037, 1064 (1988).

149. *Id.* at 1052.

150. *Id.* at 1045. The decision was *AFSCME v. Washington*, 770 F.2d 1401 (9th Cir. 1985).

151. *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 734 (1989) (Kennedy, J., concurring).

judicial determination that a state or governmental unit has discriminated.¹⁵² This race-neutral approach and reliance on specific constitutional violations to support affirmative action places Kennedy squarely among the most conservative justices of the Court. Kennedy, Rehnquist, and Scalia present a formidable core of opposition to creators of affirmative action programs that the Court will find constitutional.

D. Justice O'Connor

During her confirmation hearings, Justice O'Connor was widely thought to be a moderate justice.¹⁵³ She was described as a swing vote, a centrist who stood between the Court's badly divided liberal and conservative wings. Newspapers frequently labeled her "moderate" . . . sometimes compared to retired Justice Powell.¹⁵⁴ The reality is that, with a few notable exceptions, O'Connor is most comfortably linked with the conservative views of her Arizona colleague Chief Justice Rehnquist. In her years on the Court, she has voted with Rehnquist eighty to ninety percent of the time.¹⁵⁵

After *Wygant*, O'Connor's position on affirmative action was clear. She joined Powell's opinion, finding the plan unconstitutional, but wrote separately emphasizing that the plan was not narrowly tailored.¹⁵⁶ In *Croson*, she specifically adopted Powell's approach requiring specific incidences of discrimination to support affirmative action programs and a narrowly tailored means keyed to the relevant labor pool.¹⁵⁷ Her failure to address the burden on non-minority contractors in *Croson* may signal that the effect on "innocents" is no longer a significant factor in the Court's affirmative action analysis.

E. Justice White

Since *Bakke*, it is a fair assumption that Justice White has stiffened his criteria for upholding remedial racial classifications. White joined Justices Brennan, Marshall, and Blackmun in dissent in the *Bakke* decision. He then subscribed to Chief Justice Burger's stricter standard in *Fullilove*. White found the plan in *Wygant* unconstitutional, but failed to state a standard of review. By joining the *Croson* majority, he has indicated his approval of strict scrutiny for all race-conscious programs.

152. *Id.*

153. Coyle, *Court Blazes a New Trail*, NAT'L L.J., Aug. 21, 1989, at 52, col. 1. Professor Marshall, of Northwestern University, has said, "O'Connor is a moderating force and she is terribly important in that respect." *Id.*

154. Cheh, *O'Connor's "Moderate" Image Springs from Liberals' Wishing Well*, MANHATTAN LAWYER, Aug. 14, 1989, at 12, col. 1.

155. *Id.*

156. *Wygant v. Jackson Board of Education*, 476 U.S. 267, 293-94 (1986) (O'Connor, J., concurring in part and in the judgment). See also *supra* text accompanying notes 61-64.

157. *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 723 (1989).

F. Justice Stevens

Justice Stevens joined Chief Justice Rehnquist in *Bakke* and dissented in *Fullilove*, finding the plan unconstitutional.¹⁵⁸ He then dissented in *Wygant*, for the first time approving an affirmative action program. The *Wygant* dissent was the surprise, applying neither a strict scrutiny nor a "near strict scrutiny" test. Stevens asked instead if the purpose of having an integrated faculty served a "rational" or "valid" or "legitimate" public purpose.¹⁵⁹

Steven's approach is quite deferential; transcending consideration of the harm to a disadvantaged group. This is a very unusual position, basing the validity of affirmative action not on *past* discrimination but on the needs of the *future*. "Justice Stevens stood alone in even suggesting . . . in *Wygant* that school boards are entitled to conclude that taking affirmative steps to get and keep black teachers on their faculties will provide 'obvious' educational benefits . . ."¹⁶⁰ Although he will find programs invalid if the public interest is insufficient to necessitate inclusion of minority groups with racial preferences, Stevens' approach is almost refreshing in light of the majority's concern with specific factual findings of prior illegal acts.¹⁶¹

G. Justices Brennan, Marshall, and Blackmun

Justices Brennan, Marshall, and Blackmun can effectively be grouped together as they consistently employ the same standard in affirmative action cases. They require that the plan serve important government interests and be substantially related to achieving that interest.¹⁶² In *Croson* it is interesting that while criticizing the majority's use of strict scrutiny, they demonstrate nonetheless that the Richmond plan satisfies the requirements of the strict scrutiny test as well.¹⁶³

Affirmative action may become another area where the more liberal wing of the Court continues to disagree with majority holdings and promote their own views through dissenting opinions. While the propriety of this type of jurisprudence is open to argument, it is true that this area of constitutional law is still in a state of flux, and the Court will be formulating standards based on the cases brought to them. For the time

158. See *infra* text accompanying notes 25 and 52.

159. *Wygant v. Jackson Board of Education*, 476 U.S. at 314-316 (Stevens, J., dissenting).

160. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 98 (1986).

161. See Note, *Justice Stevens' Equal Protection Jurisprudence*, 100 HARV. L. REV. 1146 (1987). "Since his elevation to the Supreme Court in 1975, . . . Justice Stevens has rejected the traditional multitiered method and has articulated a separate vision of equal protection." *Id.* at 1146.

162. See *supra* text accompanying notes 26-27, 50-51, 81-83.

163. *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 743, 751 (1989) (Marshall, J., dissenting).

being, Brennan, Blackmun and Marshall find their influence on the Court to be almost exclusively in the dissent rather than in the majority. They have been in this role before,

often joining forces in the past decade to criticize the court's conservative drift. But always, in years past, they have bucked the trend and have been able to pick up a fifth vote to eke out a number of major victories in civil rights and liberties cases. Now, however, as the Court's new five member conservative majority continues to solidify, victories for the liberals are rare.¹⁶⁴

The importance of dissent, however, has not been overlooked. The disagreement over affirmative action forces the majority to reconsider the result and address the dissent's arguments. As Professor Lawrence Tribe has said, "[T]here is a "generation-skipping" flavor to current dissents. Brennan and Marshall are speaking in their dissents to a more distant future."¹⁶⁵

IV. Enacting Constitutional Affirmative Action Plans after *Croson*

Part V of O'Connor's *Croson* opinion, in which three other justices join, gives specific guidance to cities seeking to enact constitutionally valid programs.¹⁶⁶ First, there must be specific evidence of discrimination excluding minorities from the industry.¹⁶⁷ Second, a statistical disparity must exist between the number of qualified minorities and the actual number hired.¹⁶⁸ Third, evidence of particular instances of denial of public contracts or subcontracts would lend support to a claim that broad relief is needed.¹⁶⁹ Fourth, a city should provide evidence that local governments' contracting rules, such as bonding or credit requirements, have a disproportionate negative impact on MBEs and that alternative safeguards without harmful side effects could ensure contractor responsibility. Finally, race-neutral methods must have been considered and found ineffective. Evidence of discrimination against MBEs, by bonding companies or banks providing financing, also would be quite important.¹⁷⁰

By requiring such exhaustive findings, the Court seems to expect governments to act as a court or commission in gathering and weighing evidence, creating a record, and considering alternative means. This ap-

164. Wermiel, *Four Justices Seem Prepared to Assent to a Full-Time Role Focusing on Dissent*, Wall St. J., February 19, 1990, at B4, col. 2.

165. *Id.*

166. *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 729 (1989) (plurality opinion).

167. *Id.*

168. *Id.*

169. *Id.*

170. Dobrovir, *Creating a Program that Passes the Croson Test*, Legal Times, May 1, 1989, at 32, col. 2.

proach has been criticized as inconsistent with the Court's usual commands. "Usually the complaint is that the courts are acting too much like legislatures and city councils; here the Supreme Court insisted that the Richmond City Council act MORE like a judicial body."¹⁷¹ The prominent opponents of affirmative action are always prepared to entrust to the wisdom of state and local governments policy questions from abortion to welfare.¹⁷² Apparently, affirmative action is an exception where instead the Court will have the final word.¹⁷³

State laws that discriminate against minorities will be found unconstitutional except in the most extreme cases. No measure which explicitly discriminates against a racial group has been upheld since the infamous *Korematsu v. United States*,¹⁷⁴ cited in *Croson*. Affirmative action will most likely be judged less strictly. Programs will be upheld if narrowly tailored to remedy the effects of prior discrimination. This is a more lenient standard than the essentially automatic invalidity that applies to race-conscious measures injuring minorities.¹⁷⁵

Perhaps these differing standards recognize a fundamental distinction between discrimination for and against minorities. This distinction suggests that the ideal of a "color-blind Constitution" is no justification for subjecting race-conscious remedies to an exacting standard that effectively reduces the incentive for employers to voluntarily seek increased minority participation.

A. Congressional Cure?

The *Croson* decision did not signal the demise of affirmative action programs. "Rather, the fate of affirmative action has been determined in the way such matters should be settled—by the actions of countless individuals and institutions. . . . In the United States, affirmative action is an institutional reality."¹⁷⁶ Instead of trusting the future of affirmative action to institutions, Congress has introduced legislation to give states more deference in enacting voluntary programs.¹⁷⁷

171. Strauss, *Leaving the Door Open for Affirmative Action*, *Legal Times*, May 1, 1989, at 29, col. 1.

172. *Id.*

173. *See id.* at 30, col. 1.

174. 323 U.S. 214 (1944). "The reference to *Korematsu* clearly expresses the depth of the *Croson* majority's discomfort with the ever-expanding use of race as a criterion for distributing public resources and opportunities." Cooper, *A Slow Return to Constitutional Colorblindness*, *Legal Times*, May 1, 1989, at 27, col. 2.

175. Strauss, *supra* note 171, at 30, col. 1.

176. *Id.* at 29, col. 1.

177. Allen, *Time to Fight for Civil Rights*, *National Bar Exchange*, October, 1989, at 5. Representative Tom Campbell has introduced the Civil Rights Restoration Act of 1989, which would specify that certain groups defined by race be protected by the 1964 Civil Rights Act, that members of protected groups be entitled to representation or benefits in proportion to their numbers, and that numerical disproportion is *prima facie* proof of discrimination. *Id.*

V. Conclusion

Perhaps it is too late to hope that the Court will reconsider the standard announced in *Croson* to determine the validity of voluntary affirmative action programs. The new conservative majority that has emerged made the strict scrutiny test almost inevitable after the years of plurality opinions advancing that approach. State and local governments, however, should not interpret *Croson* as undermining their responsibilities to promote equality through minority hiring programs. Affirmative action will be upheld when supported by the requisite evidence of prior discrimination or of exclusion from the field. Nonetheless, Justice Marshall's description of *Croson* rings true, "Today's decision marks a deliberate and giant step backward in this Court's affirmative action jurisprudence."¹⁷⁸

VI. Recent Developments

A. *Metro Broadcasting v. FCC*

In the summer of 1990, the Supreme Court announced its decision in the closely watched case of *Metro Broadcasting v. FCC*.¹⁷⁹ This case presented the Court with an opportunity to apply the *Croson* standard to affirmative action programs enacted by Congress and thereby effectively overrule *Fullilove*. The Court, however, did not apply strict scrutiny, and in an opinion delivered by Justice Brennan, upheld the constitutionality of two federal affirmative action programs. He was joined by Justices White, Marshall, Blackmun and Stevens.

The cases concern policies enacted by the Federal Communications Commission to increase minority ownership of broadcast outlets. The majority opinion held that race-conscious measures mandated by Congress will be evaluated under the less demanding "near strict scrutiny" test. The plans enacted by the FCC were found to "serve important governmental objectives and [to be] substantially related to achievement of those objectives."¹⁸⁰ Justice Brennan noted that the standard set forth in *City of Richmond v. J.A. Croson Co.* did not prescribe the level of scrutiny applied to a racial classification employed by Congress.¹⁸¹ Justice Kennedy dissented, joined by Justice Scalia. Justice O'Connor also dissented, joined by Chief Justice Rehnquist and Justice Kennedy. Both dissents argued for the adoption of strict scrutiny analysis.

178. *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 740 (1989) (Marshall, J., dissenting).

179. 58 U.S.L.W. 5053 (June 26, 1990).

180. *Id.* at 5058.

181. *Id.* at 5057.

B. Justice Brennan's Resignation

After forging a majority in the *Metro Broadcasting* case to uphold two federal affirmative action programs, Justice Brennan surprised the nation by submitting his letter of resignation from the Supreme Court on July 20, 1990. His resignation surely represents a dramatic turning point for the Court. With over three decades of service on the Supreme Court, Brennan was widely regarded as the Court's leading liberal and great defender of civil rights.¹⁸² Although conservatives now dominate the Court and Justice Brennan most recently found his role as a dissenter, the *Metro Broadcasting* decision is just one example of how his vote has made the difference in the few recent liberal victories.

Justice Brennan's departure gives President Bush his first opportunity to appoint a Supreme Court justice and solidify the conservative majority. Bush's decision to name Judge David Souter has created much political controversy largely due to the paucity of prior decisions and writings from which to glean some idea of Souter's judicial philosophy. The debate has focused primarily on the abortion issue and the proper role of the Senate Judiciary Committee in questioning Judge Souter. The mystery surrounding Souter and his views on reproductive rights hopefully will not obscure the importance of his position on other civil rights issues like affirmative action. It seems likely that President Bush's choice will support the administration's stance against affirmative action. Despite this gloomy outlook, the civil rights bill now moving through the Senate will help to validate the legality of affirmative action programs. Nevertheless, the Court and the nation will never be the same without Justice Brennan keeping watch on our civil rights.

Considering the Court's conservative stronghold, Justice Brennan's departure will further cement the holding in *Croson* that state and local affirmative action plans must pass the strictest scrutiny.

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182. Greenhouse, *Brennan, Key Liberal Quits Supreme Court; Battle for Seat Likely*, N.Y. Times, July 21, 1990, at 1, col. 6.

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