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Recommended Citation

38 U. Kan. L. Rev. 281 (1989)

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Affirmative Action Doctrine and the Conflicting Messages of *Croson*

Douglas D. Scherer*

I. INTRODUCTION

The federal courts' development of affirmative action doctrine has mirrored the inconsistent response of white America to racial injustice. Friend and foe of the racial status quo have joined battle in the affirmative action arena, each side relying upon principles of equality, justice, and societal need.¹ Supreme Court decisions have been splintered, confusing, and misinterpreted. The perceived symbolism of the decisions often overshadows the holdings.

The most recent Supreme Court affirmative action decision is *City of Richmond v. J.A. Croson Co.*,² in which the Court concluded that a thirty percent minority contractor set-aside program violated the equal protection clause of the fourteenth amendment. The case was perceived as a retrenchment by the Court in the area of civil rights, as were other employment discrimination cases from the 1988 Term of the Court that impaired the effectiveness of Title VII of the 1964 Civil Rights Act³ and 42 U.S.C.

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1. Policy arguments favoring affirmative action are canvassed in Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327 (1986). See also Duncan, *The Future of Affirmative Action: A Jurisprudential/Legal Critique*, 17 HARV. C.R.-C.L. L. REV. 503 (1982); Edwards & Zaretsky, *Preferential Remedies for Employment Discrimination*, 74 MICH. L. REV. 1 (1975); Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); Nickel, *Preferential Policies in Hiring and Admissions: A Jurisprudential Approach*, 75 COLUM. L. REV. 534 (1975); Parker, *Ideas, Affirmative Action and the Ideal University*, 10 NOVA L.J. 761 (1986). Policy arguments opposing affirmative action are set forth in T. SOWELL, *THE ECONOMICS AND POLITICS OF RACE: AN INTERNATIONAL PERSPECTIVE* (1983); Pendleton, *Equality of Opportunity, or Equality of Results?* 13 HUM. RTS. Fall 1985 at 19; Reynolds, *The Reagan Administration and Civil Rights: Winning the War Against Discrimination*, 1986 U. ILL. L. REV. 1001; Sowell, *Weber and Bakke, and the Presuppositions of "Affirmative Action"*, 26 WAYNE L. REV. 1309 (1980); Thomas, *Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!*, 5 YALE L. & POL'Y REV. 402 (1987).

2. 109 S. Ct. 706 (1989).

3. 42 U.S.C. §§ 2000e - 2000e-17 (1982).

Section 1981⁴ and undermined the reliability of consent decree settlements of discrimination cases.⁵

4. Section 1981 is the current version of the part of the Reconstruction Era Civil Rights Acts that prohibits racial discrimination in contracting. The Supreme Court has construed § 1981 as extending to the contractual relationship between private sector employers and employees. *See, e.g., Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 285 (1976).

5. In *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), the Court partially overruled its unanimous 1971 decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). *Griggs* adopted disparate impact theory, which provides that Title VII is violated by an employment practice that has a disparate impact upon a race, sex, national origin, or religious group, unless the employer can prove business necessity. Chief Justice Burger's opinion for the Court held: "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." 401 U.S. at 432. In *Wards Cove*, the Court held that the employer's burden is to produce evidence of business necessity, whereas the plaintiff must prove the absence of business necessity. 109 S. Ct. at 2126. The Court softened the meaning of "business necessity" by ignoring the "essential to effective job performance" phrase in *Dothard v. Rawlinson*, 433 U.S. 321, 331 (1977), and using the phrase "serves, in a significant way, the legitimate employment goals of the employer." *Id.* at 2125-26 (citations omitted). The Court also adopted a plurality view from *Watson v. Fort Worth Bank & Trust Co.*, 108 S. Ct. 2777 (1988), that a plaintiff in a disparate impact case must establish linkage between the disparate impact and specific employment practices that have caused the impact. *Id.* at 2126. Thus, if an employer successfully prevents a plaintiff from proving which employment practices have caused disparate impact, the employer will be exonerated under Title VII. In his *Wards Cove* dissent, Justice Blackmun commented: "One wonders whether the majority still believes that race discrimination - or, more accurately, race discrimination against nonwhites - is a problem in our society, or even remembers that it ever was." 109 S. Ct. at 2136 (Blackmun, J., dissenting) (citing *City of Richmond v. J. A. Croson Co.*, 109 S. Ct. 706 (1989)).

Section 703(h) of Title VII provides that a bona fide seniority system is shielded from disparate impact challenge if any differences in compensation or terms and conditions of employment "are not the result of an intention to discriminate . . ." 42 U.S.C. § 2000e-2(h) (1982). However, a facially neutral seniority system established for the purpose of discrimination is not shielded from disparate impact attack. *See, e.g., Pullman-Standard v. Swint*, 456 U.S. 273 (1982). Justice Scalia's decision for the Court in *Lorance v. AT & T Technologies, Inc.*, preserves this approach, but with the new requirement that the statute of limitations for a Title VII challenge to such a system runs from the *date of adoption of the seniority system* rather than the date of harm to a plaintiff. 109 S. Ct. 2261, 2267-68 (1989). Thus, an employer and union may establish a facially neutral seniority system for the purpose of discrimination and carry out their discriminatory purpose, secure from Title VII challenge, if no person files a Title VII charge within 300 days after adoption of the seniority system. As Justice Marshall stated in his dissent: "[E]mployees must now anticipate, and initiate suit to prevent, future adverse applications of a seniority system, no matter how speculative or unlikely these applications may be." *Lorance*, 109 S. Ct. at 2273 (Marshall, J., dissenting).

In the much publicized case of *Patterson v. McLean Credit Union*, the majority limited 42 U.S.C. § 1981 to racially discriminatory refusals to enter into contracts. 109 S. Ct. 2363, 2375-76 (1989). Previously, the statute was interpreted as prohibiting other forms of employment discrimination, and complemented the protection against employment discrim-

Outside the judicial arena, affirmative action is gaining acceptance. Congress has enacted race-conscious legislation, most no-

ination provided by Title VII. Section 1981 actions permit awards for emotional pain and suffering and punitive damages, and are free from the short statute of limitations, fifteen employee jurisdictional requirement, and two year back-pay limitation of Title VII. Title VII actions require the prior filing of an administrative charge with the U.S. Equal Employment Opportunity Commission, a procedural prerequisite that is not applicable to § 1981 actions. As a result of *Patterson*, a black employee may be subjected to racial harassment, job segregation, discrimination in terms and conditions of employment and discriminatory discharge without redress through § 1981. The Court also reinterpreted § 1981 in *Jett v. Dallas Independent School District*, 109 S. Ct. 2702 (1989), and concluded that § 1981 does not provide a remedy for a racially discriminatory violation by a local government of the right to make and enforce contracts. *Id.* at 2720. Thus, a violation of § 1981 rights by a local government must be remedied through 42 U.S.C. § 1983, dealing with the deprivation of rights "under color of any statute, ordinance, regulation, custom, or usage, of any State . . ." *Id.* at 2722. Section 1983 limitations on liability will be applicable to such actions. *Id.* The Court also concluded, in *Will v. Michigan Department of State Police*, that § 1983 actions may not be brought against states or state officials acting in their official capacities. 109 S. Ct. 2304, 2312 (1989).

Martin v. Wilks held that persons adversely affected by implementation of a consent decree may challenge its legality without having intervened in the earlier proceedings and without proving collusion or fraud by the parties or lack of jurisdiction by the court. 109 S. Ct. 2180, 2185 (1989). This case will impede settlement of employment discrimination class action suits, and creates particular vulnerability for consent decrees now in effect that provide for affirmative action remedy.

Independent Federation of Flight Attendants v. Zipes, 109 S. Ct. 2732 (1989), may have more practical significance for affirmative action programs than *Martin v. Wilks*. In *Zipes*, Justice Scalia's opinion for the Court held that a successful Title VII plaintiff is not entitled to an award of attorney's fees from an unsuccessful intervening party, absent conduct by the intervenor that is "frivolous, unreasonable, or without foundation." *Id.* at 2736. Section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k) (1983), provides for an attorney's fee award to a prevailing plaintiff. In *Christiansburg Garment Co. v. EEOC*, the Court concluded that "under § 706(k) of Title VII a prevailing plaintiff ordinarily is to be awarded attorney's fees in all but special circumstances." 434 U.S. 412, 417 (1978). However, a Title VII defendant's liability for attorney's fees under § 706(k) does not extend to costs a plaintiff incurs because of intervenor claims. As a result of *Zipes*, a prevailing plaintiff will not be entitled to an attorney's fee award in respect to an intervenor's claim even if the intervenor defends unlawful conduct by a defendant, opposes a remedy agreed to by a defendant following admission of unlawful conduct, or raises defenses that otherwise would have been raised by a defendant. To the extent that major litigation expenses are incurred because of claims of intervenors, plaintiffs will be forced to secure financing or stop litigating, and this will frustrate the congressional objective of facilitating meritorious Title VII litigation by plaintiffs with limited means. *Zipes'* impact will be greatest in cases in which plaintiffs seek affirmative action injunctive relief rather than damage awards based upon prior discrimination. In these cases, employers will have little incentive to defend vigorously as their financial exposure often will extend only to their own defense costs and the attorney's fees of plaintiffs under § 706(k). Intervenors, on the other hand, are likely to oppose the affirmative action injunction relief and rarely will be subject to liability under § 706(k) for the litigation costs they impose on plaintiffs.

tably the minority contractor set-aside provision⁶ challenged and approved by the Court in *Fullilove v. Klutznick*.⁷ Presidential executive orders have required affirmative action dating back to the 1941 executive order of President Roosevelt applicable to defense industries.⁸ During his first formal news conference as president, four days after the *Crosby* decision, President Bush commented as follows:

It didn't kill all set-asides and it didn't kill off affirmative action. I have been committed to affirmative action, I want to see a reinvigorated Office of Minority Business and Commerce, I want to see our S.B.A. program go forward vigorously. And so I would say that decision spoke to one set of facts - in Richmond, I believe it was - and - but don't read into - I will not read into that a mandate, to me, to stop trying on equal employment and on affirmative action generally.⁹

From June 3 through September 12, 1988, Louis Harris and Associates conducted a survey for the NAACP Legal Defense and Educational Fund, Inc. that involved telephone interviews with 3123 persons representing a "cross-section of the adult population of the United States."¹⁰ The survey also involved home visits and interviews in more than 300 "persistently poor" households in eight major cities.¹¹ The survey revealed that "a 74-17% national majority of the American people is convinced that there should be 'affirmative action programs in employment for blacks, provided there are no rigid quotas.' Blacks favor such affirmative action programs by 78-12% and whites by 73-18%."¹²

6. Section 103(f)(2) of the Public Works Employment Act of 1977, Pub. L. 95-28, 91 Stat. 116, amending the Local Public Works Capital Development and Investment Act of 1976, Pub. L. 94-369, 90 Stat. 999 (codified as amended at 42 U.S.C. § 6705(f)(2) (1982)).

7. 448 U.S. 448 (1980).

8. See Jones, *The Origins of Affirmative Action*, 21 U.C. DAVIS L. REV. 383, 393-402 (1988).

9. N.Y. Times, Jan. 28, 1989, at 7, col. 3. Dr. Louis W. Sullivan, Secretary of the United States Department of Health and Human Services, discussed President Bush's view on affirmative action as follows:

I've gotten to know President Bush and his true beliefs have been submerged during his time as Vice President . . . They are looking at a goal of 25 percent women and minorities in senior Administrative positions. And I believe you are going to see a change in the climate in the Federal Government.

N.Y. Times, Feb. 19, 1989, at L31, col. 2.

10. NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., *THE UNFINISHED AGENDA ON RACE IN AMERICA*, at ii-iii (1989).

11. *Id.* at iv.

12. *Id.* at 29. The survey report continued as follows:

Observation: Despite the fact that blacks and whites are far apart in their perceptions of the handicaps and discrimination that exist for blacks in the job

The Supreme Court did not express enthusiasm for affirmative action when it invalidated the City of Richmond program in its January 23, 1989 *Croson*¹³ decision. The decision does not block all minority contractor set-aside programs by states and their political sub-divisions, but does tighten standards for judicial review. Questions remain concerning the stringency of these standards and the analytical approach the Court will take in the future. In the short run, the decision will dissuade units of state and local government from using minority contractor set-aside programs. In the long run, the decision may frustrate attempts to deal with deeply entrenched, self-perpetuating systems of racial structuring.

Justice O'Connor's opinion for the Court does not make significant technical changes in existing affirmative action doctrine. However, the opinion does communicate a message that race-conscious affirmative action programs will be greeted with suspicion and disfavor by a majority of the Court. This negative message, combined with the cumulative effect of the Title VII and section 1981 decisions from the 1988 Term, suggests hostility toward efforts to end the two century pattern of racial injustice that corrodes American society from within.

II. ORIGINAL INTENT OF THE FRAMERS OF THE FOURTEENTH AMENDMENT

The text of the equal protection clause¹⁴ provides scant guidance concerning the constitutionality of contemporary affirmative action programs. The clause established a general principle of equality and was primarily concerned with redress for racial discrimination

market, there is remarkable agreement that standardized, written tests are not reliable indicators of what a person might be able to do once on the job, that merit is not regularly rewarded in hiring and promotion practices, and that affirmative action programs are needed to open doors for blacks and to provide at least a modicum of equality in the job marketplace. The big difference, however, between black and white attitudes on jobs for blacks is that blacks feel urgently that the blocks of prejudice and discrimination must be wiped away, while whites barely acknowledge that they exist at all. Whites will respond positively to affirmative action and other programs designed to help blacks obtain better job opportunities. But there are few signs such initiatives will emanate from the white community without strong leadership from both the national political and business sectors. Meanwhile, blacks will continue to perceive that they are being discriminated against with respect to being hired, being trained for better jobs, and being promoted.

Id.

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

14. "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

by state and local government.¹⁵ It is unclear what the specific response of the framers would have been to the deeply entrenched patterns of racial discrimination, perpetuated by superficially neutral systemic forces that have largely replaced intentional acts of discrimination as the cause of racial stratification in America. The framers were reacting to overt acts of racial harassment, intimidation, violence, and murder.¹⁶ The framers, nevertheless, recognized the need for far-ranging race-conscious measures to deal with America's 1866 versions of racial discrimination, and this provides interpretive guidance.

From 1863-1866, Congress considered significant remedial legislation, despite opposition to "preferential treatment for blacks."¹⁷ This legislation included (1) the Freedmen's Bureau Bill of 1864, which was not enacted despite House and Senate agreement on basic provisions,¹⁸ (2) the Freedmen's Bureau Act of 1865,¹⁹ signed

15. Historian Eric Foner describes the reason for the fourteenth amendment text chosen by Congress as follows:

For more than a century, politicians, judges, lawyers, and scholars have debated the meaning of this elusive language. The problem of establishing the Amendment's "original intent" is complicated by the fact that its final wording resulted from a series of extremely narrow votes in the Joint Committee and subsequent alterations on the floor of Congress. To complicate matters further, the broadest statements of the Amendment's purposes originated with opponents, who, in an attempt to discredit the measure, claimed it would destroy the powers of the states, establish equality "in every respect" between black and white, and empower Congress to legislate on any local matter it chose - an interpretation Republicans vehemently denied.

Whether the courts *should* be bound by the "original intent" of a constitutional amendment is a political, not historical question. But the aims of the Fourteenth Amendment can only be understood within the political and ideological context of 1866: the break with the President, the need to find a measure upon which all Republicans could unite, and the growing consensus within the party around the need for strong federal action to protect the freedmen's rights, short of the suffrage. Despite the many drafts, changes, and deletions, the Amendment's central principle remained constant: a national guarantee of equality before the law.

E. FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877*, 256-57 (1988).

16. See *id.* at 119-123, 148. See also Brief *Amicus Curiae* of Eric Foner, John H. Franklin, Louis R. Harlan, Stanley N. Katz, Leon F. Litwack, C. Vann Woodward and Mary Frances Berry at 4-10, *Patterson v. McLean Credit Union*, 805 F.2d 1143 (4th Cir. 1986) (No. 87-107) *aff'd in part, vacated in part*, 109 S. Ct. 2363 (1989).

17. See Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 758 (1985). This article comprehensively details the various legislative proceedings and enactments that were contemporaneous with and related to the Thirty-ninth Congress' proposal of the fourteenth amendment.

18. See *id.* at 755-760.

19. Act of March 3, 1865, ch. 90, 13 Stat. 507. See also Foner, *supra* note 15, at 68-71 (1988); Schnapper, *supra* note 17, at 760.

by President Lincoln, (3) the first Freedmen's Bureau Bill of 1866, vetoed by President Johnson,²⁰ (4) the Freedmen's Bureau Act of 1866,²¹ enacted into law by a 104 to 33 House vote and 33 to 12 Senate vote following veto by President Johnson,²² and (5) legislation protecting black servicemen from excessive fees charged by agents handling claims.²³

The Thirty-ninth Congress proposed the fourteenth amendment in 1866, and the states completed ratification in 1868. This Congress was dominated by Radical Republicans who obtained passage of the far-reaching Civil Rights Act of 1866,²⁴ the predecessor legislation to 42 U.S. Code Sections 1981 and 1982 dealing with private and public sector racial discrimination affecting contract rights, and real and personal property rights, respectively. The Thirty-ninth Congress simultaneously considered the Freedmen's Bureau Act of 1866 and the fourteenth amendment, and proponents of the fourteenth amendment believed that it would provide constitutional support for the Freedmen's Bureau Act of 1866 and the Civil Rights Act of 1866.²⁵ The race-conscious remedial provisions of the Freedmen's Bureau legislation would be invalid under an interpretation of the equal protection clause of the fourteenth amendment that narrowly limits the power of government to engage in affirmative action. Clearly, the framers of the fourteenth amendment, who also were the supporters of the Freedmen's Bureau legislation, did not envision this result.²⁶ Mr. Schnapper wrote on this topic as follows:

The composition of the majority supporting the amendment was nearly identical to that which supported the Act. . . . [T]he supporters of the Act and the amendment regarded them as consistent and complementary, and opponents viewed the two, together with the Civil Rights Act of 1866, as part of a single coherent policy. No member of Congress hinted at any inconsistency between the fourteenth amendment and the Freedmen's Bureau Act.²⁷

20. See Schnapper, *supra* note 17, at 769-71.

21. Act of July 16, 1866, ch. 200, 14 Stat. 173.

22. See Schnapper, *supra* note 17, at 771-75.

23. Resolution of July 26, 1866, No. 86, 14 Stat. 367. See also Schnapper, *supra* note 17, at 778-80.

24. Ch. 31, 14 Stat. 27 (1866).

25. See Schnapper, *supra* note 17, at 785-87. See also Jones, *supra* note 8, at 389-92.

26. See Schnapper, *supra* note 17, at 788-90.

27. *Id.* at 784-85 (footnotes omitted). The *amicus curiae* brief filed in the *Croson* case by the NAACP Legal Defense & Educational Fund, Inc. noted that the basic purpose of the fourteenth amendment and the Freedmen's Bureau Bill of 1866 was "the amelioration of the condition of the freedman." Brief *Amicus Curiae* for the NAACP Legal Defense & Educational Fund, Inc. at 24, *City of Richmond v. J. A. Croson Co.*, 109 S. Ct. 706

The foregoing discussion illustrates consistency between the intent of the framers of the fourteenth amendment and the use of a race-conscious remedy for the current effects of prior discrimination. The framers intended to permit attack on those forms of discrimination that are deeply entrenched and not easily dealt with through litigation, just as the Freedmen's Bureau legislation did not rely primarily on litigation strategies. The Thirty-ninth Congress painted with a broad brush in its remedial legislation, and extended Freedmen's Bureau benefits to all black persons in the southern states "emphasizing the past harm to blacks as a group and providing relief that encompassed the entire race."²⁸ To the extent that legislative action by the Thirty-ninth Congress has contemporary interpretive significance, it would reject an equal protection clause interpretation that narrowly confines remedial efforts.

III. DEVELOPMENT OF AFFIRMATIVE ACTION DOCTRINE PRIOR TO THE 1988 TERM

The equal protection clause of the fourteenth amendment provides: "No state shall . . . deny to any person within its jurisdiction

(1989), (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866)). This brief summarized the historical evidence of original intent, especially in light of legislation enacted by the Thirty-eighth and Thirty-ninth Congresses, as follows:

The Congress which fashioned the Fourteenth Amendment squarely considered the propriety of race-conscious remedies in support of black victims of racial discrimination. Thus while the Amendment plainly prohibits any racial classification which has the purpose or effect of stigmatizing as inferior any racial or ethnic group, the history of the Fourteenth Amendment demonstrates that the framers intended it to legitimate and to allow implementation of race-specific remedial measures where a substantial need for such programs was evident. Indeed, Congress believed that such programs were not merely permissible but necessary.

Id. at 11-13 (footnote omitted).

This brief also notes that "[t]he Freedmen's Bureau Act of 1866, the Reconstruction measure which probably contained the most race-specific remedial legislation, was considered simultaneously in Congress with the Fourteenth Amendment." *Id.* at 21. The interpretive connection also is demonstrated by congruity of sponsorship. "The sponsors of the Amendment, Congressman Stevens and Senator Wade, as well as its apparent author, Congressman Bingham, all voted for the Freedmen's Bureau Act. The sponsors of the Act, Senator Trumbull and Congressman Eliot, voted for the Amendment" *Id.* at 23. Footnote 25 of this brief discusses the voting pattern as follows:

Of the 33 Senators and 104 Representatives who voted to override President Johnson's second veto of the Freedmen's Bureau Act, all who were present for the vote on the Fourteenth Amendment voted for it. Of the 33 Senators and 120 Representatives who voted for the Amendment, all but 4 representatives who were present for the vote [on] the veto voted to override it.

Id. at 23 n.25 (citing CONG. GLOBE, 39th Cong., 1st Sess. 3042, 3149, 3842, 3850 (1866)).

28. See Schnapper, *supra* note 17, at 793.

the equal protection of the laws.”²⁹ Supreme Court majority opinions interpreting this language have articulated strikingly different standards for judicial review depending on the type of classification involved.

The most deferential form of judicial review under the equal protection clause, rational basis scrutiny, has two basic forms. The most common form defers almost completely to the legislative branch in the areas of social and economic regulation. The Court considers theoretical reasons that might have motivated enactment of challenged legislation and asks if the legislation is “rationally related to a legitimate state interest” as opposed to being “wholly arbitrary.”³⁰ The less deferential form of rational basis scrutiny effectively replaces the rationality requirement with a reasonableness requirement and questions the legitimacy of state objectives.³¹

The Court has increased the intensity of its scrutiny, and decreased its deference to governmental decision-making, in what generally is referred to as “intermediate level scrutiny.”³² This level of scrutiny most notably has been employed for gender-based classifications. First articulated by Justice Brennan in his opinion for the Court in the 1976 *Craig v. Boren*³³ decision, and subsequently reaffirmed by Justice O'Connor's 1982 opinion for the Court in *Mississippi University for Women v. Hogan*,³⁴ this ap-

29. U.S. CONST. amend. XIV, § 1.

30. *City of New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976). This form of review recently was employed to sustain legislation in *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980); *Schweiker v. Wilson*, 450 U.S. 221 (1981); *Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159 (1985); and *Pennell v. City of San Jose*, 485 U.S. 1 (1988). In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 444 (1982), however, an Illinois complaint dismissal procedure was invalidated under this form of review because it was considered to be “arbitrary and irrational.” This highly deferential form of rational basis scrutiny led to the invalidation of state legislation due to the absence of a “legitimate state interest” in *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 880 (1985) and the absence of a “legitimate purpose” in *Williams v. Vermont*, 472 U.S. 14, 23 (1985).

31. In an early example of this less deferential form of rational basis scrutiny, the Court asked whether a classification is “reasonable, not arbitrary, and . . . rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation” F.S. *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). See also *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389 (1928). A reasonableness, less deferential, form of rational basis scrutiny was used to: invalidate a gender-based preference in an Idaho probate statute, *Reed v. Reed*, 404 U.S. 71 (1971); approve a Florida gender-based property tax exemption, *Kahn v. Shevin*, 416 U.S. 351 (1974); prevent exclusion from public schools of illegal alien children, *Plyler v. Doe*, 457 U.S. 202 (1982); and invalidate a zoning decision that disadvantaged mentally retarded persons, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

32. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, §§ 16-25, 16-26 (2d ed. 1988).

33. 429 U.S. 190 (1976).

34. 458 U.S. 718 (1982).

proach provides that gender-based classifications will survive scrutiny if the government defendant establishes that an important governmental objective is being served by means that are substantially related to the achievement of that objective.³⁵

The most rigorous form of scrutiny under the equal protection clause, known as strict scrutiny, has been reserved for "suspect classifications"³⁶ and classifications that significantly burden or penalize the exercise of fundamental rights.³⁷ Strict scrutiny for suspect classifications arrived on the scene in *Hirabayashi v. United States*³⁸ and *Korematsu v. United States*,³⁹ which upheld the convictions of Japanese-Americans for violations of wartime curfew and exclusion orders. Strict scrutiny requires that racial classifications by government be justified by proof of a compelling governmental objective and necessary means for accomplishing this objective. This form of review, described as "'strict' in theory and fatal in fact,"⁴⁰ has resulted in the Court's invalidation of all racial classifications to which it has been applied except for those in *Korematsu* and *Hirabayashi*.⁴¹

35. The decision in *Clark v. Jeter*, 486 U.S. 456 (1988), confirmed that classifications based upon illegitimacy are subject to an identical test.

36. The words "suspect classifications" have been applied to classifications based upon race, *Brown v. Board of Educ.*, 347 U.S. 483 (1954), *Loving v. Virginia*, 388 U.S. 1 (1967), and *Palmore v. Sidote*, 466 U.S. 429 (1984); national origin, *Hirabayashi v. United States*, 320 U.S. 81 (1943); and alienage, *Graham v. Richardson*, 403 U.S. 365 (1971).

37. The Court has employed strict scrutiny to invalidate classifications that burden or penalize the exercise of fundamental rights, including: (1) interstate travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969), *Dunn v. Blumstein*, 405 U.S. 330 (1972), *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1972), and *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986); (2) voting, *Reynolds v. Sims*, 377 U.S. 533 (1964), *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), *Dunn v. Blumstein*, 405 U.S. 330 (1972), and *Hill v. Stone*, 421 U.S. 289 (1975); (3) procreation, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); (4) marriage, *Loving v. Virginia*, 388 U.S. 1 (1967), and *Zablocki v. Redhail*, 434 U.S. 374 (1978); (5) marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); and (6) reproductive privacy, *Eisenstadt v. Baird*, 405 U.S. 438 (1972), *Roe v. Wade*, 410 U.S. 113 (1973), *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

38. 320 U.S. 81 (1943).

39. 323 U.S. 214 (1944).

40. Gunther, *The Supreme Court, 1971 Term - Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

41. For example, strict scrutiny was used to invalidate public school segregation by states, *Brown v. Board of Educ.*, 347 U.S. 483 (1954), and by the federal government, *Bolling v. Sharpe*, 347 U.S. 497 (1954); state anti-miscegenation statutes, *Loving v. Virginia*, 388 U.S. 1 (1967); and the consideration of the race of a step-parent in a child custody dispute, *Palmore v. Sidote*, 466 U.S. 429 (1984).

In *Croson*, a majority of the Court adopted strict scrutiny as the appropriate form of judicial review for race-conscious affirmative action programs that disadvantage whites. The use of the phrase "strict scrutiny" for review of race-conscious affirmative action programs, and the implicit equating of such programs with exclusionary, stigmatizing racial segregation and bias against black Americans, sends a message to federal and state courts that affirmative action programs are presumptively invalid under the equal protection clause.

Doctrine relating to the phrase "deny to any person . . . the equal protection of the laws" seems to have evolved like frogs on different parts of an island chain, separated by time and space for thousands of generations. The different formulae for review reflect policy choices rather than constitutional text and history, and equal protection doctrine has proven to be remarkably malleable. With respect to affirmative action doctrine, decisions during the last fifteen years have reflected evolving policy views of individual members of the Court. The constitutional text and history, however, provide guidance concerning the remedial objectives of the framers, and these objectives should inform the decision-making process of the Court.

Equal protection doctrine specifically relevant to remedial, race-conscious affirmative action has developed through four principal categories of cases. First, one series of cases dealt with standards for equal protection review of remedial, gender-based classifications.⁴² Second, a series of employment discrimination cases brought under Title VII involved race-conscious principles of violation, proof and remedy, and approved voluntary affirmative action programs by private sector employers and unions.⁴³ Third, a group of public education, voting and public employment cases used race-conscious remedy in a non-affirmative action context.⁴⁴ Fourth,

42. The cases used in this Article to illustrate this first category are as follows: *Kahn v. Shevin*, 416 U.S. 351 (1974); *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Califano v. Webster*, 430 U.S. 313 (1977); *Orr v. Orr*, 440 U.S. 268 (1979); and *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

43. The cases used in this Article to illustrate the second category are as follows: *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Local 28 of the Sheet Metal Workers' Int'l Assoc. v. EEOC*, 478 U.S. 421 (1986); *Local Number 93, Int'l Assoc. of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986); and *Johnson v. Transportation Agency*, 480 U.S. 616 (1987).

44. The cases used in this Article to illustrate the third category are as follows: *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *United Jewish Orgs. of Williamsburgh v. Carey*, 430 U.S. 144 (1977); and *United States v. Paradise*, 480 U.S. 149 (1987).

five cases directly involved equal protection review of remedial, race-conscious affirmative action programs by government.⁴⁵ *Croson* is the most recent case in this fourth category and represents an important step in the development of doctrine. *Croson* is best understood, however, in the context of prior cases.

Kahn v. Shevin,⁴⁶ the first gender case, involved a \$500 Florida property tax exemption for widows that was challenged on equal protection grounds by a widower who had been denied the exemption. The majority opinion by Justice Douglas applied the less deferential form of rational basis scrutiny,⁴⁷ and concluded that the Court was dealing "with a state tax law reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden."⁴⁸ In his dissent, Justice Brennan, joined by Justice Marshall, applied "close judicial scrutiny"⁴⁹ and concluded that the remedial objectives of the state tax law provided a "compelling governmental interest."⁵⁰ The dissent also concluded, however, that "the State's interest can be served equally well by a more narrowly drafted statute."⁵¹

A similar analytical approach was taken in *Schlesinger v. Ballard*,⁵² which approved a preference the U.S. Navy provided to female officers. Female officers were given thirteen years for promotion under a Navy "up or out" system, whereas males were given eight years. The Court viewed this gender-based preference as compensation for barriers that disadvantage females in gaining

45. These cases are as follows: *DeFunis v. Odegaard*, 416 U.S. 312 (1974); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); and *City of Richmond v. J. A. Croson Co.*, 109 S. Ct. 706 (1989).

46. 416 U.S. 351 (1974).

47. Justice Douglas stated: "There can be no doubt, therefore, that Florida's differing treatment of widows and widowers "'rest[s] upon some grounds of difference having a fair and substantial relation to the object of the legislation.'" 416 U.S. at 355 (quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920))).

48. *Id.* at 355.

49. *Id.* at 357 (Brennan, J., dissenting).

50. *Id.* at 358 (Brennan, J., dissenting). Later in his dissent, Justice Brennan wrote: "I agree that, in providing special benefits for a needy segment of society long the victim of purposeful discrimination and neglect, the statute serves the compelling state interest of achieving equality for such groups." *Id.* at 358-59 (Brennan, J., dissenting).

51. *Id.* at 358 (Brennan, J., dissenting). Justice Brennan also wrote: "The statute . . . fails to satisfy the requirements of equal protection, since the State has not borne its burden of proving that its compelling interest could not be achieved by a more precisely tailored statute or by use of feasible, less drastic means." *Id.* at 360 (Brennan, J., dissenting).

52. 419 U.S. 498 (1975).

the experience needed for promotion in the Navy.⁵³ Similarly, in *Califano v. Webster*,⁵⁴ the Court approved a social security provision that permitted females to use a formula for calculating retirement benefits that resulted in more retirement income than the formula used by males. The Court applied an intermediate level form of review and noted that "[r]eduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as . . . an important governmental objective."⁵⁵ The Court concluded that "[t]he challenged statute operated directly to compensate women for past economic discrimination. . . . [A]llowing women, who as such have been unfairly hindered from earning as much as men, to eliminate additional low-earning years from the calculation of their retirement benefits works directly to remedy some part of the effect of past discrimination."⁵⁶

*Orr v. Orr*⁵⁷ should be contrasted with *Kahn, Schlesinger, and Califano*. *Orr* involved an Alabama alimony statute that provided for alimony to be paid by males to females, but not by females to males. The Court rejected the remedial objective argument of the state because individualized hearings were used to evaluate the financial situations of parties to divorce proceedings.⁵⁸ The hearings eliminated any need for a presumption favoring females. The only effect of the statute was to shield females who might be subject to an obligation to *pay* alimony in the absence of the statute. Likewise, in *Mississippi University for Women v. Hogan*,⁵⁹ the defendant nursing school defended its females-only admissions policy as a remedial program for women. Justice O'Connor's majority opinion rejected the remedial protestations of the defendant as follows: "Rather than compensate for discriminatory barriers faced by women, MUW's policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively women's job."⁶⁰

This first category of cases, involving gender, reflects the emergence of intermediate level equal protection review for remedial, gender-based classifications. The second category of cases, involving employment discrimination under Title VII, technically focuses

53. *Id.* at 508.

54. 430 U.S. 313 (1977).

55. *Id.* at 317.

56. *Id.* at 318.

57. 440 U.S. 268 (1979).

58. *Id.* at 281-82.

59. 458 U.S. 718 (1982).

60. *Id.* at 729.

on matters of statutory interpretation. These statutory cases, however, exposed the Supreme Court and lower federal courts to theories of violation, methods of proof, and appropriate remedy for race, national origin, and gender discrimination, and reflect the evolving views of the Justices concerning race-conscious, remedial affirmative action.

The 1971 decision in *Griggs v. Duke Power Co.*⁶¹ approved disparate impact theory as a means for establishing a violation of Title VII.⁶² In *Griggs*, black applicants for employment with Duke Power Company had significantly less likelihood than whites of being high school graduates.⁶³ Therefore, the use of a high school diploma hiring requirement had a disparate impact on black applicants, and violated Title VII because the employer could not demonstrate "a manifest relationship" between the hiring criterion and successful job performance.⁶⁴ The significance of disparate impact theory for affirmative action doctrine is that a statutory violation may occur without intentional discrimination by an employer because the employment practices of the employer have a disparate impact connected to race, national origin, religion, or gender. If such a phenomenon constitutes a violation of Title VII, it also should justify an employer's voluntary affirmative action efforts to avoid Title VII liability.⁶⁵

*Albemarle Paper Co. v. Moody*⁶⁶ applied Title VII disparate impact theory to general ability, nonverbal intelligence, and verbal intelligence tests used by employers to select employees. The Court held that employee selection tests which have disparate impact against blacks may be used only if they can be justified by proof of "job relatedness."⁶⁷ Significantly, the Court approved guidelines

61. 401 U.S. 424 (1971).

62. 42 U.S.C. §§ 2000e - 2000e-17 (1982). Title VII prohibits employment discrimination by employers with 15 or more employees on the basis of race, color, religion, sex or national origin. Under disparate impact theory, Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Griggs*, 401 U.S. at 431. Disparate impact theory was modified in ways that favor employers by *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989). See *supra* note 5.

63. *Griggs*, 401 U.S. at 430 n.6.

64. *Id.* at 432.

65. Disparate impact theory has affirmative action significance for the public sector because Title VII was amended in 1972 to extend its coverage from private sector employers to the federal government and state and local governments, with some exceptions. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (amended 1972).

66. 422 U.S. 405 (1975).

67. *Id.* at 425. Proof of job relatedness in this context requires proof of "validity."

of the U.S. Equal Employment Opportunity Commission that require differential validation of test results "wherever technically feasible."⁶⁸ That is, separate studies are required to evaluate the correlation between job performance and test scores for different racial groups. If a score of forty for a black has the same job performance predictive significance as a score of fifty for a white, the two test scores must be treated as being equivalent to each other to avoid violation of Title VII. Some persons would regard the use of different test scores for the hiring of black and white persons as improper reverse discrimination. Others would view this as permissible affirmative action. Under the theory of *Albemarle*, ignoring differences between test scores of racial groups may result in actionable discrimination because these scores may mean different things for different racial groups.

*International Brotherhood of Teamsters v. United States*⁶⁹ permitted the use of group statistics to prove a pattern and practice violation of Title VII based upon race and national origin. *Hazelwood School District v. United States*,⁷⁰ a Title VII case relied upon by Justice O'Connor in her *Croson* opinion, concluded: "Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination."⁷¹ *Teamsters* and *Hazelwood* thus place pressure on public and private sector employers to implement voluntary affirmative action programs to avoid a prima facie case of a Title VII violation based upon statistical imbalances.⁷²

A test is valid if test scores correlate with successful job performance in a statistically significant manner. *Id.* at 431. Apparently, *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), has not changed the foregoing, although the plaintiff now must meet a burden of proof with respect to invalidity. Prior to the 1988 Term, the employer with access to test scores and job performance records of employees had a burden of proof with respect to validity if a test had a provable disparate impact. *See supra* note 5.

68. Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607.5(B), 1607.14 (1988).

69. 431 U.S. 324 (1977).

70. 433 U.S. 299 (1977).

71. *Id.* at 307-08 (citation omitted).

72. The Bureau of National Affairs Operations Manual, published to interpret the 1964 Civil Rights Act, anticipated this affirmative action pressure as follows:

As a practical matter, . . . the very existence of the law may result in pressures to increase the percentage of minority group members on the payroll, particularly if the reports required by the Equal Employment Opportunity Commission compel the employer to specify the number [or] percentage of minority group members in various job classifications.

BUREAU OF NAT'L AFFAIRS, OPERATIONS MANUAL, THE CIVIL RIGHTS ACT OF 1964, 39 (1964).

The Court directly confronted the question of voluntary affirmative action programs under Title VII in *United Steelworkers v. Weber*.⁷³ In *Weber*, an employer and a union agreed, through collective bargaining, to implement an affirmative action program for transfer of unskilled production workers into on-the-job training programs designed to develop craftworker skills.⁷⁴ Seniority was used to select persons for transfer, but with the requirement that at least fifty percent of those transferred must be black.⁷⁵ The Court concluded that Title VII permits voluntary affirmative action programs of this nature, and provided some guidance concerning the differences between permissible and impermissible programs.⁷⁶ Justice Brennan wrote for the majority as follows:

The purposes of the plan mirror those of the statute. Both were designed to break down old patterns of racial segregation and hierarchy. Both were structured to "open employment opportunities for Negroes in occupations which have been traditionally closed to them."

At the same time, the plan does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new black hirees. Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white. Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance.⁷⁷

*Local Number 93, International Association of Firefighters v. City of Cleveland*⁷⁸ applied *Weber* to a public sector employer.⁷⁹ The intervening union, Local Number 93 of the International Association of Firefighters, AFL-CIO, challenged a consent decree that settled a Title VII race and national origin class action suit brought by Vanguard of Cleveland against the City of Cleveland.⁸⁰ The Court considered the consent decree to be the equivalent of a voluntary affirmative action program;⁸¹ *Weber*, therefore, was

73. 443 U.S. 193 (1979).

74. *Id.* at 197.

75. *Id.*

76. *Id.* at 208-09.

77. *Id.* at 208 (quoting 110 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey) (citation and footnote omitted)).

78. 478 U.S. 501 (1986).

79. In *Weber*, a private sector employer and union were involved. The Court specifically noted that "[s]ince the Kaiser-USWA plan does not involve state action, this case does not present an alleged violation of the Equal Protection Clause of the Fourteenth Amendment." 443 U.S. at 200.

80. *Firefighters*, 478 U.S. at 511.

81. Therefore, § 706(g) of Title VII, dealing with remedy following proof of violation at trial, was inapplicable. "[I]t is readily apparent that consent decrees are not included among the 'orders' referred to in § 706(g), for the voluntary nature of a consent decree is its most fundamental characteristic." *Id.* at 521-22 (citations omitted).

controlling precedent.⁸² The Court also relied on *Weber* in *Johnson v. Transportation Agency*,⁸³ a Title VII case involving an affirmative action promotion of a female even though a male applicant scored higher on the promotional examination. Justice Brennan's opinion for the majority⁸⁴ upheld the plan because it was "designed to eliminate Agency work force imbalances in traditionally segregated job categories,"⁸⁵ did not "unnecessarily [trammel] the rights of male employees or [create] an absolute bar to their advancement,"⁸⁶ and "was intended to attain a balanced work force, not to maintain one."⁸⁷ Justice Brennan focused only on statutory issues because "[n]o constitutional issue was either raised or addressed in the litigation below."⁸⁸

Justice O'Connor concurred in the judgment. She viewed the "manifest imbalance" requirement of the majority as "an expansive and ill-defined approach to voluntary affirmative action by public employers"⁸⁹ Her approach would require that "the employer [have] a firm basis for believing that remedial action was required,"⁹⁰ although actual findings of prior discrimination would not be required.⁹¹

82. Justice O'Connor's concurring opinion indicated her view that the consent decree satisfied the requirements of Title VII and the equal protection clause. She wrote: "Even if nonminority employees do not object to the consent decree, a court should not approve a consent decree that on its face provides for racially preferential treatment that would clearly violate § 703 [of Title VII] or the Fourteenth Amendment." *Id.* at 531 (O'Connor, J., concurring). Subsequently, in *Johnson v. Transportation Agency*, 480 U.S. 616, 652 (1987) (O'Connor, J., concurring), a Title VII case, she stated: "I see little justification for the adoption of different standards for affirmative action under Title VII and the Equal Protection Clause."

83. 480 U.S. 616 (1987).

84. Justice Brennan was joined by Justices Marshall, Blackmun, Powell, and Stevens.

85. *Johnson*, 480 U.S. at 637.

86. *Id.* at 637-38.

87. *Id.* at 639 (emphasis in original).

88. *Id.* at 620 n.2 (citation omitted).

89. *Id.* at 648 (O'Connor, J., concurring).

90. *Id.* at 649 (O'Connor, J., concurring).

91. In her *Johnson* concurring opinion, Justice O'Connor noted: "An employer would have such a firm basis if it can point to a statistical disparity sufficient to support a prima facie claim under Title VII by the employee beneficiaries of the affirmative action plan of a pattern or practice claim of discrimination." *Id.* at 649 (O'Connor, J., concurring). Later, she wrote: "I concluded in *Wygant* that the employer must point to evidence sufficient to establish a firm basis for believing that remedial action is required, and that a statistical imbalance sufficient for a Title VII prima facie case against the employer would satisfy this firm basis requirement" *Id.* at 650-51 (O'Connor, J., concurring). As regards a findings requirement, she wrote: "I concluded in *Wygant* that a contemporaneous finding of discrimination should not be required because it would discourage voluntary efforts to remedy apparent discrimination. A requirement that an employer actually prove that it had discriminated in the past would also unduly discourage voluntary efforts to remedy apparent discrimination." *Id.* at 652 (O'Connor, J., concurring).

The final case in the Title VII category is *Local 28 of the Sheet Metal Workers International Association v. EEOC*,⁹² which involved a union found to have violated Title VII through intentional race and national origin discrimination. The union was also found to be in contempt of court for its failure to comply, from 1975 until 1983, with remedial orders of the federal district court. A twenty-nine percent nonwhite membership goal was imposed by the district court along with fines.⁹³ A plurality of four⁹⁴ concluded that the percentage goal requirement was an appropriate remedy under section 706(g) of Title VII,⁹⁵ and that such remedy need not be limited to "the identified victims of unlawful discrimination."⁹⁶ Instead, section 706(g) permits a court to order "affirmative race-conscious relief as a remedy for past discrimination . . . where an employer or a labor union has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination."⁹⁷

Local 28, Sheet Metal Workers does not provide direct guidance concerning the permissible limits under Title VII or the equal protection clause of a voluntary affirmative action plan. Rather, it describes the power of a federal district court, under section 706(g) of Title VII, to order race-conscious affirmative action remedies following proof of a Title VII violation.⁹⁸

92. 478 U.S. 421 (1986).

93. *Id.* at 432.

94. The four were Justices Brennan, Blackmun, Marshall, and Stevens. Justice Powell concurred in part.

95. 42 U.S.C. § 2000e-5(g) (1982). Section 706(g) provides:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . , the court may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay . . . , or any other equitable relief as the court deems appropriate

Id.

96. *Sheet Metal Workers*, 478 U.S. at 445.

97. *Id.*

98. Justice White, in his dissent, acknowledged that relief under § 706(g) may extend to non-victims, and wrote: "As the Court observes, the general policy under Title VII is to limit relief for racial discrimination in employment practices to actual victims of the discrimination. But I agree that § 706(g) does not bar relief for nonvictims in all circumstances." *Id.* at 499 (White, J., dissenting). Therefore, the Court rejected the dicta in *Firefighters Local Union No. 1784 v. Stotts*, to the effect that the "policy" behind § 706(g) "is to provide make whole relief only to those who have been actual victims of illegal discrimination" 467 U.S. 561, 579-83 (1984). Justice Brennan summarized the position of the Court as follows: "[S]ix Members of the Court agree that a district court may, in appropriate circumstances, order preferential relief benefiting individuals who are not the actual victims of discrimination as a remedy for violations of Title VII" *Local 28, Sheet Metal Workers*, 478 U.S. at 482.

The third category of cases which reflect the development of affirmative action doctrine includes four equal protection cases, involving public education, voting, and public employment. *Brown v. Board of Education*⁹⁹ held that the equal protection clause is violated by racially segregated public schools, despite equivalency in "tangible" factors.¹⁰⁰ The Court relied on sociological data demonstrating that racial segregation in public schools affects black children by generating "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."¹⁰¹ *Brown* may be viewed as establishing a "color-blind" requirement for governmental action in that overt, intentional discrimination and segregation are impermissible. The more subtle message of *Brown*, however, arises from the fact that the racially separate schools appeared to be equal on the surface, although the deeper reality was inequality. Thus, *Brown* reflected the need to go beyond the superficial appearance of equality because most racial discrimination in America is multi-dimensional, deeply entrenched, self-perpetuating, and independent of overt, intentional acts of racial hostility. In *Swann v. Charlotte-Mecklenburg Board of Education*,¹⁰² the Court approved the use of busing, pairing and grouping of non-contiguous attendance zones, and mathematical ratios for student assignments as appropriate remedies in school desegregation cases. Of direct significance for affirmative action programs by state and local government, the Court stated:

School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.¹⁰³

A similar approval of race-conscious governmental action occurred in *United Jewish Organizations of Williamsburgh v. Carey*,¹⁰⁴ in which a Hasidic Jewish community had been split into different

99. 347 U.S. 483 (1954).

100. *Id.* at 493.

101. *Id.* at 494.

102. 402 U.S. 1 (1971).

103. *Id.* at 16. The views of Justice Stevens concerning the permissibility of race-conscious action by government in pursuit of a "legitimate public purpose," see *infra* text accompanying notes 221-24, are consistent with this dicta from *Swann*.

104. 430 U.S. 144 (1977).

state legislative districts to avoid dilution of the voting strength of blacks and Puerto Ricans. The State of New York was attempting to comply with the vote dilution provisions of the Voting Rights Act of 1965.¹⁰⁵ The state used race and national origin criteria to create legislative districts in which at least sixty-five percent of the voters were black or Puerto Rican, even though there was no preexisting constitutional or statutory violation to be remedied. Justice White's opinion concluded that "[t]he permissible use of racial criteria is not confined to eliminating the effects of past discriminatory districting or apportionment."¹⁰⁶ Justice Brennan referred to the plan as a "policy of benign racial sorting"¹⁰⁷ and wrote that "not every remedial use of race is forbidden."¹⁰⁸ Approval of the state reapportionment plan in *Carey* thus demonstrates that Congress may mandate a form of affirmative action for state legislative districting that benefits persons who have not been proven to be individual victims of prior voting discrimination, but who are members of groups that historically have suffered denial or abridgement of the right to vote on the basis of race or national origin. A prior constitutional or statutory violation is not necessary to justify this race-conscious action.¹⁰⁹

The public employment case in this third category, *United States v. Paradise*,¹¹⁰ focused upon appropriate remedy after trial rather than voluntary affirmative action. As of 1972, no black had ever served as an Alabama state trooper.¹¹¹ The federal district court found that the Alabama Department of Public Safety "had systematically excluded blacks from employment in violation of the Fourteenth Amendment."¹¹² Eleven years later, faced with Alabama's failure to develop appropriate promotion procedures, "the District Court ordered the promotion of one black trooper for each white trooper elevated in rank, as long as qualified black candidates were available, until the Department implemented an

105. 42 U.S.C. § 1973c (1982).

106. *Carey*, 430 U.S. at 161.

107. *Id.* at 175 (Brennan, J., concurring).

108. *Id.* at 171 (Brennan, J., concurring).

109. The State of New York was subject to the pre-clearance provisions of the Voting Rights Act because three counties in the state used a literacy test to determine the qualifications of voters as of November 1, 1968, and fewer than 50% of the voting-age residents of those counties voted in the 1968 presidential election. Williamsburgh is an area in one of those counties, Kings County, and had a population of about 30,000 Hasidim. *Id.* at 148, 152.

110. 480 U.S. 149 (1987).

111. *Id.* at 154 (citing *NAACP v. Allen*, 340 F. Supp. 703, 705 (M.D. Ala. 1972)).

112. *Id.* at 153.

acceptable promotion procedure.”¹¹³ Justice Brennan, writing for a plurality, concluded that it was unnecessary to determine what standard of review applies to a remedial order of this nature because “the relief ordered survives even strict scrutiny analysis: it is ‘narrowly tailored’ to serve a ‘compelling governmental purpose.’”¹¹⁴ The plurality found compelling interests in “remedying past and present discrimination by a state actor”¹¹⁵ and “the societal interest in compliance with the judgments of federal courts.”¹¹⁶ Justice Brennan considered several factors developed in prior cases in concluding that the remedy was narrowly tailored.¹¹⁷

Justice Stevens concurred in the judgment because the district court had “broad and flexible” remedial authority where “the record discloses an egregious violation of the Equal Protection Clause.”¹¹⁸ Justice O’Connor dissented because, in her view, the remedy was not narrowly tailored to accomplish remedial objectives.¹¹⁹ She viewed the remedy as designed to coerce the State of Alabama into developing an appropriate promotion procedure, an objective which could have been achieved through imposition of fines for civil contempt and in other ways.¹²⁰ In light of these alternatives for achieving the district court’s purpose, “the District Court’s order was not ‘manifestly necessary’ to achieve compliance with that court’s previous orders.”¹²¹

The question of limits on a federal district court’s power to impose a race-conscious remedy upon an unwilling party following proof of violation is very different from the question of the limits that the equal protection clause imposes when a willing governmental actor voluntarily and in good faith pursues the goal of remedying the current effects of past discrimination. *Paradise* has limited relevance to the second question.

The fourth and most pertinent category of cases to be considered involves equal protection challenges to voluntary affirmative action programs. *Croson* is the most recent in a series of cases which

113. *Id.*

114. *Id.* at 166-67 (quoting opinion of Powell, J., concurring).

115. *Id.* at 167 (citations omitted).

116. *Id.* at 170.

117. Justice Brennan considered “the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.” *Id.* at 171 (citations omitted).

118. *Id.* at 190.

119. *Id.* at 199 (O’Connor, J., dissenting).

120. *Id.* (O’Connor, J., dissenting).

121. *Id.* at 197 (O’Connor, J., dissenting).

began with *DeFunis v. Odegaard*.¹²² Marco DeFunis was denied admission to the University of Washington Law School.¹²³ The law school had an affirmative action program which gave separate consideration to minority¹²⁴ applicants and admitted minority applicants with lower Law School Admission Test (LSAT) scores and undergraduate grade point averages than those of DeFunis.¹²⁵ DeFunis brought an action in state court which eventually reached the Supreme Court and was dismissed because of mootness. DeFunis was going to graduate regardless of the disposition of the case by the Court.¹²⁶

Justice Douglas dissented from the mootness determination and expressed opposition to affirmative action programs.¹²⁷ He concluded that the racial classification used by the law school should be subject to "the strictest scrutiny under the Equal Protection Clause."¹²⁸ He wrote: "There is no superior person by constitutional standards Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner."¹²⁹ "The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized."¹³⁰

Four years later, in *Regents of the University of California v. Bakke*,¹³¹ a case involving the set-aside of sixteen slots in a medical school entering class for members of minority groups, five justices concluded that it is permissible under the equal protection clause for government to engage in remedial race-conscious affirmative action.¹³² Four justices declined to consider constitutional issues¹³³

122. 416 U.S. 312 (1974).

123. *Id.* at 314.

124. The minority groups designated by the program were black, Chicano, American Indian, and Filipino. *Id.* at 320 (Douglas, J., dissenting).

125. *Id.* at 324-25 (Douglas, J., dissenting).

126. *Id.* at 319-20.

127. *Id.* at 320, 337, 342-43 (Douglas, J., dissenting).

128. *Id.* at 333 (Douglas, J., dissenting).

129. *Id.* at 337 (Douglas, J., dissenting).

130. *Id.* at 342 (Douglas, J., dissenting). Despite this language, which appears to condemn race-conscious affirmative action, Justice Douglas suggested that the law school might have justified its affirmative action program by reference to "cultural or racial biases in the LSAT or in the candidates' undergraduate records." *Id.* at 326 (Douglas, J., dissenting). In the last paragraph of his internally inconsistent opinion, Justice Douglas wrote: "I cannot conclude that the admissions procedure of the Law School of the University of Washington that excluded DeFunis is violative of the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 344 (Douglas, J., dissenting).

131. 438 U.S. 265 (1978).

132. *Id.* at 325. (Justices Powell, Brennan, Marshall, Blackmun, and White).

133. *Id.* at 411-12 (Chief Justice Burger and Justices Stevens, Stewart, and Rehnquist).

and concluded that section 601 of the Civil Rights Act of 1964¹³⁴ was violated. These four seemingly concluded that Congress intended section 601 to implement a color-blind approach.¹³⁵ The other justices concluded that section 601 incorporates limitations identical to those imposed by the equal protection clause.¹³⁶ Justice Powell believed that the plan violated the equal protection clause and therefore violated section 601.¹³⁷ This equal protection and statutory conclusion by Justice Powell, combined with the purely statutory conclusion of Chief Justice Burger and Justices Stevens, Stewart, and Rehnquist, sent Allan Bakke to medical school. The important question, however, was the constitutionality of government affirmative action, and this was answered affirmatively by all of the justices who addressed the question.¹³⁸

Justice Powell wrote an opinion joined by no other member of the Court. He applied strict scrutiny¹³⁹ and concluded that the university had a compelling interest, grounded in the first amendment, in the "attainment of a diverse student body."¹⁴⁰ The university, however, failed to use narrowly tailored means to serve that interest because its program, "focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity."¹⁴¹ He believed that use of race as a "plus"¹⁴² factor would be appropriate, and praised the Harvard College Admissions Program which he surprisingly concluded was limited in its purpose to the achievement of a diverse student body.¹⁴³

134. 42 U.S.C. § 2000d (1982). This section provides that "[n]o person . . . shall, on the ground of race, . . . be excluded from participation in, . . . any program or activity receiving Federal financial assistance." *Id.*

135. The somewhat cryptic decision by Justice Stevens did not explain why § 601 was violated. The text of § 601 was quoted, but Justice Stevens did not say that this text always mandates colorblind conduct. *Bakke*, 438 U.S. at 412-13 (Stevens, J., concurring in part and dissenting in part).

136. *Id.* at 287 (Powell, J.), 340 (Brennan, White, Blackmun, and Marshall, concurring in part and dissenting in part).

137. *Id.* at 320.

138. *Id.* at 325 (Brennan, White, Blackmun, and Marshall, concurring in part and dissenting in part).

139. *Id.* at 291.

140. *Id.* at 311-12.

141. *Id.* at 315 (emphasis in original).

142. *Id.* at 317.

143. *Id.* at 316-19. Professor Greenawalt responded to this portion of Justice Powell's opinion writing:

I have yet to find a professional academic who believes the primary motivation for preferential admissions has been to promote diversity in the student body for the better education of all the students while they are in professional school. Diversity is undoubtedly one reason for such programs, but the justification of

Justice Powell's first amendment discussion was not the significant part of his opinion. Rather, his separate conclusion that race-conscious affirmative action by government may be justified as a remedy for prior discrimination was his contribution to affirmative action doctrine. He required, as a factual predicate for a remedial, race-conscious affirmative action program, "judicial, legislative or administrative findings of a constitutional or statutory violation."¹⁴⁴ Because the university made no such findings, and had no power to make such findings, he did not discuss the type of remedial program that would have been permissible had there been findings.¹⁴⁵

The *Bakke* opinion by Justice Brennan, joined by Justices Marshall, Blackmun, and White, applied the following intermediate level test: "[R]acial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to achievement of those objectives.'" ¹⁴⁶ Under this approach, "any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program."¹⁴⁷

This fourth category of cases includes *Fullilove v. Klutznick*,¹⁴⁸ in which the Court approved a ten percent minority contractor set-aside program established by Congress.¹⁴⁹ Chief Justice Burger

countering the effects of societal discrimination . . . comes closer to stating their central purpose . . .

Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CALIF. L. REV. 87, 122 (1979).

144. *Bakke*, 438 U.S. at 307. This "findings" requirement is rather loose in light of the open and flexible nature of fact-finding by legislatures and administrative agencies performing quasi-legislative tasks. For example, Justice Powell's concurring opinion in *Fullilove v. Klutznick*, 448 U.S. 448, 499-506 (1980), concluded that the record of many years of deliberations by Congress on discrimination in the construction industry satisfied his *Bakke* "findings" requirement. Justice Powell's plurality opinion in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986), abandons the findings requirement in favor of requiring a "strong basis in evidence for [an employer's] conclusion that remedial action was necessary." See *infra* notes 171 and 172 and accompanying text.

145. *Bakke*, 438 U.S. at 309-11.

146. *Id.* at 359 (quoting *Califano v. Webster*, 430 U.S. 313, 317 (1977) (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976))).

147. *Id.* at 361.

148. 448 U.S. 448 (1980).

149. Six members of the Court approved the program, through an opinion by Chief Justice Burger, joined by Justices Powell and White, and an opinion by Justice Marshall, joined by Justices Brennan and Blackmun. A seventh member of the Court, Justice Stevens, concluded: "The interest in facilitating and encouraging the participation by minority business enterprises in the economy is unquestionably legitimate." 448 U.S. at 542-43

applied a form of review different from any equal protection approach previously used by the Court.¹⁵⁰ He wrote: "As a threshold matter, we reject the contention that in the remedial context the Congress must act in a wholly 'color-blind' fashion."¹⁵¹ Chief Justice Burger took an expansive view of the remedial powers of Congress under section five of the fourteenth amendment.¹⁵² His description of the form of review to be used included the words "close examination"¹⁵³ and "most searching examination."¹⁵⁴ Chief Justice Burger's analysis of the means used to achieve remedial objectives emphasized the existence of a waiver provision and led him to conclude that "application of the MBE program will be limited to accomplishing the remedial objectives contemplated by

(Stevens, J., dissenting). The set-aside program failed to survive his scrutiny because, in his view, "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Id.* at 537 (Stevens, J., dissenting). He summarized his assessment of the program writing: "I cannot accept this slapdash statute as a legitimate method of providing classwide relief." *Id.* at 539 (Stevens, J., dissenting). Justice Stevens subsequently contrasted the *Fullilove* set-aside program with the race-conscious layoff protection involved in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), pointing to "the procedural inadequacy and unjustified breadth of the race-based classification in *Fullilove v. Klutznick*." *Id.* at 318 (Stevens, J., dissenting) (citation omitted).

150. Chief Justice Burger disclaimed approval of either the Powell or Brennan approach in *Bakke* by stating: "This opinion does not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as *University of California v. Bakke*." 448 U.S. at 492 (citation omitted).

151. *Id.* at 482.

152. Section five provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. Chief Justice Burger wrote:

Here we deal . . . not with the limited remedial powers of a federal court . . . but with the broad remedial powers of Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees. Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to declare certain conduct unlawful, it may, as here, authorize and induce state action to avoid such conduct.

448 U.S. at 483-84.

153. Chief Justice Burger wrote: "A program that employs racial or ethnic criteria, even in a remedial context, calls for close examination . . ." *Id.* at 472.

154. *Id.* at 491. The language Chief Justice Burger chose to describe the applicable form of review had not been used in prior cases, which permitted his opinion to be evaluated without distortion. In contrast, Justice O'Connor's use of the phrase "strict scrutiny" in *Croson* will result in her opinion being interpreted in light of prior strict scrutiny cases.

Congress and . . . misapplications of the racial and ethnic criteria can be remedied.”¹⁵⁵

Justice Marshall’s opinion, joined by Justices Brennan and Blackmun, applied the intermediate level scrutiny test that these members of the Court advocated in *Bakke* for remedial, race-conscious affirmative action programs.¹⁵⁶ The opinion concluded that the ten percent set-aside provision was “carefully tailored to remedy racial discrimination while at the same time [it avoided] stigmatization and penalizing those least able to protect themselves in the political process.”¹⁵⁷ Therefore, “the racial classifications employed in the set-aside provision [were] substantially related to the achievement of the important and congressionally articulated goal of remedying the present effects of past racial discrimination.”¹⁵⁸

The most important pre-*Croson* affirmative action case is *Wygant v. Jackson Board of Education*.¹⁵⁹ The basic holding of *Wygant* was simple. A lay-off provision protected minority teachers at the expense of more senior non-minority teachers as part of an attempt to bring the percentage of minority teachers in a school system into conformity with the percentage of minority students and provide “minority role models for . . . minority students.”¹⁶⁰ This lay-off provision violated the equal protection clause because it was unrelated to prior employment discrimination against minority teachers and applicants for teaching positions.¹⁶¹ Justice Powell’s plurality opinion noted the Court of Appeals’ characterization of the provision as “an attempt to alleviate the effects of societal discrimination.”¹⁶² In Justice Powell’s view, “[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.”¹⁶³ “This Court never has held

155. *Id.* at 489. Chief Justice Burger expanded upon his waiver discussion by noting that there was “administrative scrutiny to identify and eliminate from participation in the program MBE’s who are not ‘bona fide’ within the regulations and guidelines; for example, spurious minority-front entities can be exposed.” *Id.* at 487-88. He discussed the availability of a complaint procedure and availability of “waiver . . . to avoid dealing with an MBE who is attempting to exploit the remedial aspects of the program by charging an unreasonable price, *i.e.*, a price not attributable to the present effects of past discrimination.” *Id.* at 488.

156. *Id.* at 519.

157. *Id.* at 521.

158. *Id.*

159. 476 U.S. 267 (1986).

160. *Id.* at 274.

161. *Id.* at 276.

162. *Id.* at 274.

163. *Id.* at 276.

that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination."¹⁶⁴

Justice O'Connor expanded upon Justice Powell's dicta by writing: "I agree with the plurality that a governmental agency's interest in remedying 'societal' discrimination, that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny."¹⁶⁵ Her dicta apparently would disable government from using race-conscious means to attack racial discrimination unless government is the discriminator.¹⁶⁶

Justice Powell concluded that strict scrutiny should be applied to all racial classifications.¹⁶⁷ Therefore, there must be a "compelling governmental interest"¹⁶⁸ and "means chosen by the State to effectuate its purpose [which are] 'narrowly tailored to the achievement of that goal.' "¹⁶⁹ He further concluded that "a public employer like the Board must ensure that, before it embarks on an affirmative action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination."¹⁷⁰ Neither prior findings of discrimination¹⁷¹ nor a

164. *Id.* at 274.

165. *Id.* at 288 (O'Connor, J., concurring).

166. Justice O'Connor's concurring opinion discussed the necessary evidence of prior discrimination as follows:

In this case, the hiring goal that the layoff provision was designed to safeguard was tied to the percentage of minority students in the school district, not to the percentage of qualified minority teachers within the relevant labor pool. The disparity between the percentage of minorities on the teaching staff and the percentage of minorities in the student body is not probative of employment discrimination; it is only when it is established that the availability of minorities in the relevant labor pool substantially exceeded those hired that one may draw an inference of deliberate discrimination in employment.

Id. at 294 (O'Connor, J., concurring). Justice Marshall's dissent, joined by Justices Brennan and Blackmun, concluded that there was a properly remedial basis for the layoff provision, *id.* at 306, and that there should have been a remand for further development of evidence concerning prior employment discrimination. *Id.* at 296 (O'Connor, J., concurring).

167. *Wygant*, at 273.

168. *Id.* at 274.

169. *Id.*

170. *Id.* at 277. Justice Powell expanded on the "sufficient evidence" phrase as follows: "In such a case, the trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary." *Id.*

171. The Court's abandonment of a findings requirement is confirmed in a footnote

prima facie case of a constitutional or statutory violation was identified as necessary to justify an affirmative action program challenged under the equal protection clause.¹⁷²

In her *Wygant* concurrence, Justice O'Connor stated that "the public employer must have a firm basis for determining that affirmative action is warranted,"¹⁷³ and summarized the Court's affirmative action doctrine as follows:

The Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program. 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. . . .

It appears, then, that the true source of disagreement on the Court lies not so much in defining the state interests which may support affirmative action efforts as in defining the degree to which the means employed must "fit" the ends pursued to meet constitutional standards. Yet even here the Court has forged a degree of unanimity; it is agreed that a plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently "narrowly tailored," or "substantially related," to the correction of prior discrimination by the state actor Ultimately, the Court is at least in accord in believing that a public employer, consistent with the Constitution, may undertake an affirmative action program which is designed to further a legitimate remedial purpose and which implements that purpose by means that do not impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals directly and adversely affected by a plan's racial preference.¹⁷⁴

Justice O'Connor explained her agreement with the use of strict scrutiny language as follows:

I subscribe to JUSTICE POWELL's formulation because it mirrors the standard we have consistently applied in examining racial classifications in other contexts Although JUSTICE POWELL's formulation may be viewed as more stringent than that suggested by JUSTICES BRENNAN, WHITE, MARSHALL, and BLACKMUN, the disparities between the two tests do not preclude a fair measure of consensus. In particular, as regards

by Justice Marshall in which he wrote: "[A] majority of the Court has explicitly rejected the argument that an affirmative-action plan must be preceded by a formal finding that the entity seeking to institute the plan has committed discriminatory acts in the past" *Id.* at 312-13, n.7 (Marshall, J., dissenting).

172. Four members of the Court, Chief Justice Burger and Justices Powell, White, and Rehnquist, concluded that lay-off protection similar to that in this case cannot be justified. See Justice Powell's opinion, *id.* at 282-84, and Justice White's opinion, *id.* at 294-95 (White, J., concurring).

173. *Id.* at 292 (O'Connor, J., concurring).

174. *Id.* at 286-87 (O'Connor, J., concurring) (citations omitted).

certain state interests commonly relied upon in formulating affirmative action programs, the distinction between a "compelling" and an "important" governmental purpose may be a negligible one.¹⁷⁵

Justice Marshall acknowledged the essential agreement among members of the Court in regard to remedy for prior discrimination by a state actor by writing: "Despite the Court's inability to agree on a route, we have reached a common destination in sustaining affirmative action against constitutional attack."¹⁷⁶ His dissent in *Croson* suggests that he now regrets those friendly words.¹⁷⁷

IV. FACTS OF *CROSON*

The City Council of Richmond, Virginia adopted a Minority Business Utilization Plan ("the Plan") in 1983 that required prime contractors for city construction projects to use Minority Business Enterprises ("MBEs") for at least thirty percent of the dollar amount of their prime contracts.¹⁷⁸ "The plan defined an MBE as '[a] business at least fifty-one (51) percent of which is owned and controlled . . . by minority group members.'"¹⁷⁹ The plan defined minority group members as "'[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos or Aleuts.'" ¹⁸⁰ Under the Plan, an MBE from any part of the country could be used by a prime contractor to satisfy the thirty percent requirement.¹⁸¹ The Plan was temporary, with an expiration date of June 30, 1988.¹⁸²

175. *Id.* at 285-86 (O'Connor, J., concurring).

176. *Id.* at 302 (Marshall, J., dissenting). Commentators have recognized the Court's acceptance of affirmative action as an appropriate response to discrimination. *See, e.g.*, Schwartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over but the Shouting*, 86 MICH. L. REV. 524 (1987); Edwards, *The Future of Affirmative Action in Employment*, 44 WASH. & LEE L. REV. 763 (1987); Selig, *Affirmative Action in Employment: The Legacy of a Supreme Court Majority*, 63 IND. L.J. 301 (1987). An excellent discussion of burdens of proof in litigation and the specifics of affirmative action programs that appeared to be acceptable to the Court after the 1987 Term is contained in Woodside & Marx, *Walking the Tightrope Between Title VII and Equal Protection: Public Sector Voluntary Affirmative Action After Johnson and Wygant*, 20 URB. LAW. 367 (1988).

177. Justice Marshall characterized the significance of *Croson* as follows: "The majority today sounds a full-scale retreat from the Court's longstanding solicitude to race-conscious remedial efforts 'directed toward the deliverance of the century-old promise of equality of economic opportunity.' The battle against pernicious racial discrimination or its effects is nowhere near won." *City of Richmond v. J. A. Croson Co.*, 109 S. Ct. 706, 757 (1989) (Marshall, J., dissenting) (citations omitted).

178. *Id.* at 712-13.

179. *Id.* at 713 (quoting RICHMOND, VA., CITY CODE § 12-23 at 941 (1985)).

180. *Id.* (quoting RICHMOND, VA., CITY CODE § 12-23 at 941 (1985)).

181. *Id.*

182. *Id.*

J. A. Croson Company was the only bidder for a city jail plumbing contract, but was denied the contract because it did not comply with the thirty percent set-aside requirement.¹⁸³ Litigation ensued which eventually reached the Supreme Court. Justices O'Connor and Marshall wrote the two principal opinions.¹⁸⁴ The opinions differ in the form of review they apply and in their assessment of the need for remedial action and tailoring of the Plan to achieve remedial objectives.

Justice O'Connor concluded that "the factual predicate offered in support of the Richmond Plan" suffered from fatal defects¹⁸⁵ and referred to the record in the following way:

In this case, the city does not even know how many MBEs in the relevant market are qualified to undertake prime or subcontracting work in public construction projects. . . . Nor does the city know what percentage of total city construction dollars minority firms now receive as subcontractors on prime contracts let by the city. . . . Without any information on minority participation in subcontracting, it is quite simply impossible to evaluate overall minority representation in the city's construction expenditures.¹⁸⁶

She concluded that it was "sheer speculation how many minority firms there would be in Richmond absent past societal discrimination . . . ,"¹⁸⁷ and that "[t]he 30% quota cannot in any realistic sense be tied to any injury suffered by anyone."¹⁸⁸ In reference to evidence of nation-wide discrimination in the construction industry relied on by Congress in enacting the ten percent set-aside program that the Supreme Court upheld in its 1980 *Fullilove v. Klutznick*¹⁸⁹ decision, she wrote that "[t]he probative value of these findings for demonstrating the existence of discrimination in Richmond is extremely limited."¹⁹⁰ "[A] generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy."¹⁹¹ Justice O'Connor objected to the definition used for "minority group members," which included groups not

183. *Id.* at 715.

184. *Id.* at 712, 739.

185. *Id.* at 723.

186. *Id.* at 725-26.

187. *Id.* at 724.

188. *Id.*

189. 448 U.S. 448 (1980).

190. *Croson*, 109 S. Ct. at 726.

191. *Id.* at 723.

shown to have suffered from prior discrimination in Richmond.¹⁹²

According to Justice O'Connor, the significant facts in the record were that the Richmond City Council (1) relied upon national rather than local construction industry data, (2) identified no specific acts of discrimination against minority contractors, (3) obtained no information concerning the number of qualified minority contractors in the Richmond area or the amount of city contracting business then being received by minority contractors, (4) made no determination concerning the number of minority contractors that likely would have been in business in Richmond or the amount of business they would have been receiving in the absence of prior discrimination, (5) considered the low level of membership by minority contractors in local contractor's associations without establishing that this low level was the result of prior discrimination, (6) included Spanish-speaking, Oriental, Indian, Eskimo and Aleut persons in the definition of minority persons for MBE purposes even though "[t]he District Court took judicial notice of the fact that the vast majority of 'minority' persons in Richmond were black,"¹⁹³ and (7) permitted the use of MBEs from any part of the country.¹⁹⁴ Finally, although the general population of Richmond was approximately fifty percent black, Justice O'Connor saw no meaningful connection between that population percentage and the thirty percent set-aside percentage.¹⁹⁵

Justice Marshall concluded that the City of Richmond, "the former capital of the Confederacy,"¹⁹⁶ had "supported its deter-

192. Justice O'Connor addressed this issue as follows:

[T]here is *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond, suggests that perhaps the city's purpose was not in fact to remedy past discrimination The gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation.

Id. at 727-28 (citations omitted).

193. *Id.* at 728.

194. *Id.* at 725-28.

195. *Id.* at 724. Justice Kennedy's short concurring opinion echoed the factual conclusions of Justice O'Connor:

The nature and scope of the injury that existed; its historical or antecedent causes; the extent to which the City contributed to it, either by intentional acts or by passive complicity in acts of discrimination by the private sector; the necessity for the response adopted, its duration in relation to the wrong, and the precision with which it otherwise bore on whatever injury in fact was addressed, were all matters unmeasured, unexplored, unexplained by the City Council.

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

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

mination that minorities have been wrongly excluded from local construction contracting,"¹⁹⁷ and regarded the city's initiative as a "welcome sign of racial progress."¹⁹⁸ The record revealed a "legitimate factual predicate"¹⁹⁹ for a race conscious affirmative action plan. Justice Marshall credited testimony before the City Council by city officials concerning "the exclusionary history of the local construction industry,"²⁰⁰ and "testimony that the major Richmond area construction trade associations had virtually no minorities among their hundreds of members."²⁰¹ In his opinion, evidence of nation-wide patterns of discrimination in the construction industry was relevant proof of construction industry discrimination in Richmond.²⁰² He noted that the Plan's definition of minority group members was the same as that used by Congress in the *Fullilove* set-aside program. He also argued that "[e]ven

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

198. *Id.* at 739. In regard to evidence submitted by the city, Justice Marshall wrote: Its proof includes statistics showing that minority-owned businesses have received virtually no city contracting dollars and rarely if ever belonged to area trade associations; testimony by municipal officials that discrimination has been widespread in the local construction industry; and the same exhaustive and widely publicized federal studies relied on in *Fullilove*; studies which showed that pervasive discrimination in the Nation's tight-knit construction industry had operated to exclude minorities from public contracting. These are precisely the types of statistical and testimonial evidence which, until today, this Court had credited in cases approving of race-conscious measures designed to remedy past discrimination.

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

199. *Id.* at 745-46 (Marshall, J., dissenting).

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

201. *Id.* at 742 (Marshall, J., dissenting).

202. Justice Marshall quoted from a 1975 report of the House Committee on Small Business that compared the approximately 16% minority population of the United States with the approximately 3% ownership of businesses by minority persons, and concluded: "These statistics are not the result of random chance. *The presumption must be made that past discrimination systems have resulted in present economic inequities.*" *Id.* at 741 (Marshall, J., dissenting) (quoting H.R. REP. No. 468, 94th Cong., 1st Sess., at 2 (1975) (emphasis added in the opinion)). He also quoted from a 1977 report of the House Committee on Small Business that discussed the existence in the past of "a business system which has traditionally excluded measurable minority participation." The report continued: "Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate past inequities." *Id.* (Marshall, J., dissenting) (H.R. REP. No. 1791, 94th Cong., 2d Sess., at 182 (1977) (summarizing H.R. REP. No. 840, 94th Cong., 1st Sess., at 17 (1975))). Justice Marshall noted that the Richmond City Council heard testimony concerning more extreme statistics in Richmond, in that "although minority groups made up half of the city's population, only .67% of the \$24.6 million which Richmond had dispensed in construction contracts during the five years ending in March 1983 had gone to minority-owned prime contractors." *Id.* at 742 (Marshall, J., dissenting).

accepting the majority's view that Richmond's ordinance is overbroad because it includes groups, such as Eskimos or Aleuts, about whom no evidence of local discrimination has been proffered, it does not necessarily follow that the balance of Richmond's ordinance should be invalidated."²⁰³

For Justice Marshall, there was sufficient evidence that prior discrimination was the reason for the low percentage of minority contractors in Richmond. He described the city's role in exacerbating the effects of private discrimination as follows:

When government channels all its contracting funds to a white-dominated community of established contractors whose racial homogeneity is the product of private discrimination, it does more than place its imprimatur on the practices which forged and which continue to define that community. It also provides a measurable boost to those economic entities that have thrived within it, while denying important economic benefits to those entities which, but for prior discrimination, might well be better qualified to receive valuable government contracts The more government bestows its rewards on those persons or businesses that were positioned to thrive during a period of private racial discrimination, the tighter the dead-hand grip of prior discrimination becomes on the present and future. Cities like Richmond may not be constitutionally required to adopt set-aside plans. But there can be no doubt that when Richmond acted affirmatively to stem the perpetuation of patterns of discrimination through its own decisionmaking, it served an interest of the highest order.²⁰⁴

It might be argued that the majority in *Croson* requires proof of the obvious, and refuses to acknowledge the obvious if it is hard to prove. If a miniscule number of minority contractors are in business in Richmond because of a generally recognized history of public and private sector discrimination, and if proof of prior discrimination requires a comparison between the percentage of contracts received by minority contractors and the percentage of all contractors who are minority contractors, the almost complete success of prior discrimination precludes its proof. Alternatively, if remedial programs need not be based upon accurate identification of discrimination, ostensibly remedial programs may be used for improper purposes. A form of judicial review is needed that permits effective measures for dealing with racial discrimination, while prohibiting unacceptable use of race.

The Richmond City Council apparently did not attempt to determine what the level of minority business participation would have been in the absence of prior discrimination, and did not

203. *Id.* at 751 n.11 (Marshall, J., dissenting).

204. *Id.* at 744-45 (Marshall, J., dissenting) (citations omitted).

tailor its set-aside program to redress a proven under-representation. Yet, the requirement of linkage between specific evidence of prior discrimination and narrowly tailored remedial measures may leave untouched and untouchable the vestiges of prior discrimination which preclude all, or nearly all, opportunity. Obvious manifestations of prior discrimination should be accepted as an appropriate basis for affirmative action, even if this discrimination cannot be proved through the methods of proof used in Title VII employment discrimination litigation.²⁰⁵

V. *CROSON* DOCTRINE

The certitude with which members of the *Croson* Court espouse different positions masks major areas of agreement, including the view of at least seven²⁰⁶ Justices that remedial, race-conscious affirmative action is permissible under appropriate circumstances. Although the *Croson* decision articulates four seemingly inconsistent theoretical approaches to judicial review, in the opinions by Justices O'Connor, Marshall, Stevens, and Scalia, and contains a significant variation on Justice O'Connor's approach by Justice Kennedy, the core dispute revolves around the factual circumstances that identify the need for remedial action, and the manner in which affirmative action programs must be tailored to achieve remedial objectives. Thus, each theoretical approach is understandable only in a factual setting.

Chief Justice Rehnquist and Justices White and Kennedy joined those parts of Justice O'Connor's opinion in which she concluded that a strict scrutiny formula is required for judicial review of a race-conscious public sector affirmative action program.²⁰⁷ Justice Scalia, in his separate opinion, also applied strict scrutiny,²⁰⁸ for

205. Justice Marshall expressed this as follows: "Of course, Richmond could have built an even more compendious record of past discrimination, one including additional stark statistics and additional individual accounts of past discrimination. But nothing in the Fourteenth Amendment imposes such onerous documentary obligations upon states and localities once the reality of past discrimination is apparent." *Id.* at 750 (Marshall, J., dissenting).

206. Chief Justice Rehnquist joined Justice Stewart's dissent in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), that would have prohibited remedial race-conscious affirmative action programs. He also strongly dissented in *United Steelworkers of America v. Weber*, 443 U.S. 193, 219 (1979), in which he expressed opposition to affirmative action. His concurrence in Justice O'Connor's *Croson* opinion, however, seems to reflect a shift in position. If so, eight members of the Court now regard properly tailored remedial race-conscious affirmative action programs to be constitutional. Justice Scalia alone would oppose such programs.

207. *Croson*, 109 S. Ct. at 720-23.

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

a total of five members of the Court embracing strict scrutiny language. At first glance, the significance of *Croson* would seem to be the emergence of a strict scrutiny approach to remedial race-conscious affirmative action plans. In the Supreme Court it takes five to tango, but a close reading of the opinions demonstrates that Justice Scalia hears a different beat. The strict scrutiny of Justice O'Connor, in application, has more in common with the intermediate level scrutiny of Justice Marshall than with the "Say No to Affirmative Action" position of Justice Scalia.

Justice Marshall's intermediate level scrutiny requires proof of an important governmental objective and means that are substantially related to the achievement of that objective.²⁰⁹ Justices Marshall, Brennan, and Blackmun consistently have advocated this form of review for remedial race-conscious affirmative action programs, and they would reserve strict scrutiny for stigmatizing, exclusionary racial classifications.²¹⁰ The significant difference between this intermediate level approach and that of Justice O'Connor lies in the amount of deference given to governmental evaluation of the need for affirmative action and the precision required in tailoring programs to achieve remedial objectives.

Justice Marshall referred to the "signal" implicit in the adoption of strict scrutiny language in the following portion of his opinion:

In concluding that remedial classifications warrant no different standard of review under the Constitution than the most brute and repugnant forms of state-sponsored racism, a majority of this Court signals that it regards racial discrimination as largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice. I, however, do not believe this Nation is anywhere close to eradicating racial discrimination or its vestiges. In constitutionalizing its wishful thinking, the majority today does a grave disservice not only to those victims of past and present racial discrimination in this Nation whom government has sought to assist, but also to this Court's long tradition of approaching issues of race with the utmost sensitivity.²¹¹

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

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

211. *Id.* (Marshall, J., dissenting). The "signal" of *Croson* was received by Judge Posner, of the 7th Circuit Court of Appeals, in *United States v. City of Chicago*, 870 F.2d 1256 (7th Cir. 1989). This case involved a Title VII challenge to a promotional examination for police officers which had a disparate impact on blacks and was not shown to be job-related. A new examination was developed, which also had a disparate impact on blacks and had not been subjected to validation analysis to determine if it was job-related. Instead, the plaintiffs and defendant requested permission from the district court to use different passing scores for black and white officers to eliminate disparate impact. This was the likely Title VII remedy had the facts been contested and the matter gone to trial. The district court granted this request but was reversed by the 7th Circuit Court of Appeals.

Justice O'Connor discussed her use of strict scrutiny language, with its baggage of prior case law, in a way that ignored the underlying message of suspicion and hostility toward affirmative action. She wrote:

Our continued adherence to the standard of review employed in *Wygant*, does not, as JUSTICE MARSHALL's dissent suggests, indicate that we view "racial discrimination as largely a phenomenon of the past" or that "government bodies need no longer preoccupy themselves with rectifying racial injustice." . . .

Under the standard proposed by JUSTICE MARSHALL's dissent, "[r]ace-conscious classifications designed to further remedial goals," are forthwith subject to a relaxed standard of review. How the dissent arrives at the legal conclusion that a racial classification is "designed to further remedial goals," without first engaging in an examination of the factual basis for its enactment and the nexus between its scope and that factual basis we are not told The dissent's watered-down version of equal protection review effectively assures that race will always be relevant in American life, and that the "ultimate goal" of "eliminat[ing] entirely from governmental decisionmaking such irrelevant factors as a human being's race," will never be achieved.²¹²

Justice Kennedy's concurring opinion suggested reluctant approval of the short-term use of race-conscious remedial measures. His opinion included the following discussion:

The moral imperative of racial neutrality is the driving force of the Equal Protection Clause. Justice Scalia's opinion underscores that prop-

The decision by Judge Posner relied on *Croson*, as follows:

[T]he plaintiffs argue that the action of the City and the black sergeants in getting together and altering the test scores so that more blacks and Hispanics and fewer whites are promoted is not lawful affirmative action or good-faith compliance with the district court's directive to work out a nondiscriminatory examination, but is gratuitous discrimination against whites by a city that now has a black mayor.

The argument has considerable force . . . , especially now that "reverse discrimination" is subject to strict scrutiny. *City of Richmond v. J. A. Croson Co.*, 109 S. Ct. 706 (1989). There has never been a determination that the 1987 exam was racially biased. The fact that blacks happen not to do as well on some examinations as whites, or vice versa, does not establish that the examination is discriminatory The black sergeants who are the plaintiffs in *Bigby* worked with the City to develop the test and did not suggest until they saw its results (which one might suppose would be too late) that it was biased in favor of whites. So bias could not be presumed. Yet instead of trying to determine whether the new test was in fact biased, the parties to the decree simply raised the scores of the blacks.

Id. at 1261 (citations omitted).

212. *Croson*, 109 S. Ct. at 721-22 (citations omitted). Justice O'Connor suggested a pragmatic, evidentiary purpose for strict scrutiny "to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." *Id.* at 721.

osition, quite properly in my view

Nevertheless, given that a rule of automatic invalidity for racial preferences in almost every case would be a significant break with our precedents that require a case-by-case test, I am not convinced we need adopt it at this point. On the assumption that it will vindicate the principle of race neutrality found in the Equal Protection Clause, I accept the less absolute rule contained in JUSTICE O'CONNOR's opinion, a rule based on the proposition that any racial preference must face the most rigorous scrutiny by the courts I am confident that, in application, the strict scrutiny standard will operate in a manner generally consistent with the imperative of race neutrality, because it forbids the use even of narrowly drawn racial classifications except as a last resort.²¹³

In a portion of her opinion not joined by a majority of the Court, Justice O'Connor distinguished between the broad remedial powers of Congress and the powers of the states. She acknowledged that "Congress may identify and redress the effects of society-wide discrimination," but concluded that "the Framers of the Fourteenth Amendment . . . desired to place clear limits on the States' use of race as a criterion for legislative action" ²¹⁴

213. *Id.* at 734 (Kennedy, J., concurring). The Hispanic National Bar Association supported Justice Kennedy during his confirmation hearing before the Senate Judiciary Committee. On September 16, 1988, he addressed the annual convention of the Association and spoke eloquently of the "promise of a society without racial barriers that, if it is to be fulfilled, . . . must first become a reality in our profession." Albuquerque J., Sept. 17, 1988, at A1, col. 4. When questioned about his position on affirmative action, he responded: "I have explained many times that we don't have a free society unless we have the elimination of ethnic barriers." *Id.* at A2, col. 6. This response, in context, suggested that an affirmative action program designed to eliminate racial and ethnic barriers would enjoy his support. His response, however, also tracked the language of those who say they oppose affirmative action because they oppose discrimination.

214. *Id.* at 719. In *Milwaukee County Pavers Association v. Fiedler*, 710 F. Supp. 1532 (W.D. Wis. 1989), which involved a state highway construction set-aside program authorized by the Surface Transportation and Uniform Relocation Assistance Act of 1987, the court used a more lenient standard of review for congressionally authorized affirmative action. Judge Crabb wrote:

Croson . . . concerns the constitutionality of affirmative action programs enacted by states and local governments. The standards articulated in *Croson* do not apply to federal affirmative action programs or to state programs which are subsidiary to them. The challenged Richmond program was not related to any federal program and did not involve any federal funds or federal oversight. The Court emphasized that Congress may enact race-based remedial legislation that might be impermissible if enacted by a state or local government.

However, if the state program is subsidiary to a federal program, it should be analyzed as a federal program to which *Croson* would not apply. The applicable standard for analyzing the constitutionality of federal affirmative action programs that impose requirements on states is found in *Fullilove v. Klutznick*

Id. at 1539-40 (citation omitted).

In similar fashion, the D. C. Circuit Court of Appeals relied upon *Fullilove* rather than *Croson* in approving the Federal Communications Commission's use of minority ownership

Her approach provides a convenient rationale for upholding the *Fullilove* case, and would permit lenient review of affirmative action programs established by Congress, or implemented by state and local governments pursuant to specific authorization by Congress. At the same time, her approach sets a trap for advocates of affirmative action, because affirmative action efforts at state and local levels should be free of the restrictions that Congress likely would impose. As a matter of basic constitutional law, our theory of government contemplates a system of enumerated grants of power to the federal government, combined with inherent sovereign powers of the states limited by the constitution, treaties and statutes of the federal government.²¹⁵ Reliance on section five of the fourteenth amendment as the source of federal power to establish affirmative action programs is appropriate. However, a comparable power is inherent in state governments, and section one of the fourteenth amendment prohibits only that state action which its framers, the Thirty-ninth Congress, sought to prohibit. The Thirty-ninth Congress unquestionably did not intend to curtail remedial efforts by state and local governments, and would have applauded state and local remedial programs. Justice O'Connor's approach would grant to Congress the power to determine the meaning of section one of the fourteenth amendment, because Acts of Congress would determine whether or not state and local affirmative action programs violate section one. This approach is flatly inconsistent with *Marbury v. Madison*,²¹⁶ in which Chief

as the basis for "qualitative enhancement" in considering competing applications for broadcast licenses. *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989). Judge Edwards wrote:

[T]he *Richmond* Court made a distinction between programs enacted by Congress and those adopted by states or local governments. The Court observed that the *Richmond* plan was adopted by a city council, which had no specific constitutional mandate to enforce the Fourteenth Amendment; rather "[s]ection 1 of the Fourteenth Amendment is an explicit *constraint* on state power." The plan upheld in *Fullilove*, by contrast, was passed by Congress, which has "unique remedial powers . . . under § 5 of the Fourteenth Amendment."

Like the set-aside plan in *Fullilove*, the FCC's minority preference policy has Congress' express approval.

Id. at 354-55 (citations omitted).

215. The supremacy clause provides:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U. S. CONST. art. VI, cl. 2.

216. 5 U.S. (1 Cranch) 137 (1803).

Justice John Marshall wrote: "It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act."²¹⁷ Justice Kennedy politely rejected this dual approach to limits on federal and state power with the following statement: "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"²¹⁸ Justice Kennedy's approach is consistent with the generally accepted view that section one of the fourteenth amendment imposes the same limitations on state action, in nearly all situations,²¹⁹ as the due process clause of the fifth amendment imposes on the federal government.²²⁰

Justice Stevens responded to the doctrinal dispute of other members of the Court by suggesting that "instead of engaging in a debate over the proper standard of review to apply in affirmative-action litigation, . . . it is more constructive to try to identify the characteristics of the advantaged and disadvantaged classes that may justify their disparate treatment."²²¹ He then advocated a fact-dependent "impartiality" standard for equal protection review.²²² He expressed strong reservations about non-victim based affirmative action, at least in the context of a minority contractor set-aside program.²²³ He would, however, support a race-conscious program which serves "a legitimate public purpose."²²⁴

217. *Id.* at 176.

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

219. The single area in which the Supreme Court has applied different standards is that of discrimination based upon alienage. The Court has applied strict scrutiny to alienage discrimination by a state, unless the discrimination relates to selection of a person to perform a "political function." *See Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986); *Bernal v. Fainter*, 467 U.S. 216 (1984); *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982); *Ambach v. Norwich*, 441 U.S. 68 (1979); *Foley v. Connelie*, 435 U.S. 291 (1978); *Graham v. Richardson*, 403 U.S. 365 (1971). The Court has taken a more deferential approach to alienage discrimination by the federal government because of the immigration and naturalization powers vested in Congress by the Constitution. *See Matthews v. Diaz*, 426 U.S. 67 (1976).

220. *See, e.g., Vance v. Bradley*, 440 U.S. 93, 94 (1979), in which the Court referred to "the equal protection component of the Fifth Amendment's Due Process Clause."

221. *Croson*, 109 S. Ct. at 732 (Stevens, J., concurring) (citations omitted).

222. Justice Steven's footnote five reads: "There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases." *Id.* at 732 (Stevens, J., concurring) (quoting *Craig v. Boren*, 429 U.S. 190, 211-12 (1976)).

223. *Id.* at 732-34 (Stevens, J., concurring).

224. *Id.* at 730-31, n.1 (Stevens, J., concurring). Justice Stevens expressed this view in

Justice Scalia concluded that "there is only one circumstance in which the States may act *by race* to 'undo the effects of past discrimination': where that is necessary to eliminate their own maintenance of a system of unlawful racial classification."²²⁵ He quoted the first Justice Harlan who used the phrase "Our constitution is color-blind" in *Plessy v. Ferguson*.²²⁶ Justice Harlan, however, was focused on state mandated segregation, not remedial affirmative action, and Justice Scalia's use of the quotation arguably is inconsistent with the intent behind Justice Harlan's words.²²⁷

his footnote one:

In my view the Court's approach to this case gives unwarranted deference to race-based legislative action that purports to serve a purely remedial goal, and overlooks the potential value of race-based determinations that may serve other valid purposes. With regard to the former point - as I explained at some length in *Fullilove v. Klutznick*, 448 U.S. 448, 532-554, 100 S. Ct. 2758, 2802-2814, 65 L.Ed.2d 902 (1980) (Stevens, J., dissenting) - I am not prepared to assume that even a more narrowly tailored set-aside program supported by stronger findings would be constitutionally justified. Unless the legislature can identify both the particular victims and the particular perpetrators of past discrimination, which is precisely what a court does when it makes findings of fact and conclusions of law, a *remedial* justification for race-based legislation will almost certainly sweep too broadly. With regard to the latter point: I think it unfortunate that the Court in neither *Wygant* nor this case seems prepared to acknowledge that some race-based policy decisions may serve a legitimate public purpose. I agree, of course, that race is so seldom relevant to legislative decisions on how best to foster the public good that legitimate justifications for race-based legislation will usually not be available. But unlike the Court, I would not totally discount the legitimacy of race-based decisions that may produce tangible and fully justified future benefits.

Id. at 730-31 n.1 (Stevens, J., concurring).

225. *Id.* at 737 (Scalia, J., concurring).

226. *Id.* at 735 (Scalia, J., concurring) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

227. Daniel Maguire discussed the color-consciousness of America as follows:

For two hundred years the United States has been operating under a rigid quota system. This quota system has insisted on and got a 90 to 100 per cent monopoly for white males in all the principal centers of power in government, business, and the professions, and in the competition for desirable jobs at every level. This white male predominance has been institutionalized and legalized. Now, belatedly, it is being challenged. White males are responding with a vociferous reliance on "meritocratic" ideals. Never in history has merit been so passionately befriended. The goal of the merit strategy is defensive. Its deeper implications, however, should not be missed since they are both racist and sexist. Insistence on merit subtly implies that merit has always prevailed-and thus that those at the top belong there while those at the bottom . . . (ellipses in the original text).

D. MAGUIRE, *A NEW AMERICAN JUSTICE: ENDING THE WHITE MALE MONOPOLIES* 3 (1980).

James Madison wrote in *The Federalist* No. 10 about the tendency of a majority in small political groups to engage in "oppression."²²⁸ Justice Scalia quoted Madison and wrote: "The prophecy of these words came to fruition in Richmond in the enactment of a set-aside clearly and directly beneficial to the dominant political group, which happens also to be the dominant racial group."²²⁹ Thus, Justice Scalia linked Madison's political group concept to his own assumption of bad faith politics by black members of the Richmond City Council. Nothing in the record supported his assumption that the black members of the city council pursued a goal other than a good faith remedial objective.²³⁰ Thus, race is left as the only basis for his assumption.²³¹

In his separate opinion, Justice Scalia did not focus upon the intent of the framers of the fourteenth amendment, but did acknowledge that "in our society blacks have suffered discrimination immeasurably greater than any directed at other racial groups."²³² In light of this recognition and the impossibility of a belief that racial discrimination has ended in America, Justice Scalia's opposition to affirmative action appears to be based upon an unwillingness to deny whites opportunities as the price for redressing existing patterns of racial injustice. He expressed this view as follows:

Racial preferences appear to "even the score" (in some small degree) only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered

228. *THE FEDERALIST* No. 10, at 129-36 (J. Madison) (B. Wright ed. 1961).

229. *Croson*, 109 S. Ct. at 737 (Scalia, J., concurring).

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

231. Justice O'Connor discussed the underlying political factors in a milder way, stating:

In this case, blacks comprise approximately 50% of the population of the city of Richmond. Five of the nine seats on the City Council are held by blacks. The concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case.

Id. at 722.

Justice Marshall was not mild in his response to Justices Scalia and O'Connor:

The majority's view that remedial measures undertaken by municipalities with black leadership must face a stiffer test of Equal Protection Clause scrutiny than remedial measures undertaken by municipalities with white leadership implies a lack of political maturity on the part of this Nation's elected minority officials that is totally unwarranted. Such insulting judgments have no place in constitutional jurisprudence.

Id. at 753-54 (Marshall, J., dissenting).

232. *Id.* at 739 (Scalia, J., concurring).

in the past to a black man should be compensated for by discriminating against a white. Nothing is worth that embrace.²³³

Justice Scalia would favor race-neutral remedial measures, and made the following argument for their effectiveness:

Since blacks have been disproportionately disadvantaged by racial discrimination, any race-neutral remedial program aimed at the disadvantaged *as such* will have a disproportionately beneficial impact on blacks. Only such a program, and not one that operates on the basis of race, is in accord with the letter and the spirit of our Constitution.²³⁴

Advocating a broad-scale attack on disadvantage ignores the unique reasons for disadvantage suffered by blacks in America, and the extent to which opportunities for social, educational, and economic advancement available to whites have not been available to blacks. It also distorts the original purpose of the fourteenth amendment, to remedy racial discrimination and not disadvantage in general.²³⁵

233. *Id.* at 739 (Scalia, J., concurring). Some would suggest that the few times during the lifetime of an American white male when he might suffer disadvantage because of race is of less individual and societal significance than disadvantage based upon race visited upon one for whom discrimination has been a lifelong burden, for whom there are few alternative opportunities, and for whom the disadvantage represents insult and attack on personal worth. It is the difference between a superficial scratch and a cut that leaves a scar. The rationale for Justice Scalia's contrary view emerged during his law professor days, in Scalia, *The Disease as Cure: "In order to get beyond racism, we must first take account of race."*, 1 WASH. U.L.Q. 147 (1979). He wrote:

My father came to this country when he was a teenager. Not only had he never profited from the sweat of any black man's brow, I don't think he had ever seen a black man. There are, of course, many white ethnic groups that came to this country in great numbers relatively late in its history-Italians, Jews, Irish, Poles-who not only took no part in, and derived no profit from, the major historic suppression of the currently acknowledged minority groups, but were, in fact, themselves the object of discrimination by the dominant Anglo-Saxon majority. . . . I owe no man anything, nor he me, because of the blood that flows in our veins. To go down that road (or I should say to return down that road), even behind a banner as gleaming as restorative justice, is to make a frightening mistake The affirmative action system now in place . . . is based upon concepts of racial indebtedness and racial entitlement rather than individual worth and individual need; that is to say, . . . it is racist.

Id. at 152-54.

234. *Croson*, 109 S. Ct. at 739 (Scalia, J., concurring).

235. Language from the majority opinion by Justice Miller in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872) is pertinent:

[I]n the light of this recapitulation of events, almost too recent to be called history . . . and on the most casual examination of the language of these [the thirteenth, fourteenth and fifteenth] amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom,

The *Croson* opinions provide clear guidance only with respect to minority contractor set-aside programs nearly identical to that established by the Richmond City Council. Five members of the Court (Chief Justice Rehnquist, and Justices O'Connor, White, Stevens, and Kennedy) disapproved of the means used by the Richmond City Council to achieve remedial objectives. Three members of the Court (Justices Marshall, Brennan, and Blackmun) were satisfied with the means used, and one member of the Court (Justice Scalia) did not evaluate the means used. The crucial open question concerns the characteristics of an affirmative action plan that will survive scrutiny by a majority of the Court.

Justice O'Connor wrote that there was no " 'strong basis in evidence for [the city council's] conclusion that remedial action was necessary.' " ²³⁶ "While the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief." ²³⁷ The "identify . . . with some specificity" phrase indicates flexibility

and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth. . . .

"Nor shall any State deny to any person within its jurisdiction the equal protection of the laws."

In the light of the history of the amendments, and the pervading purpose of them, . . . it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.

If, however, the States did not conform their laws to its requirements, then by the fifth section of the article of amendment Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of [section five of the fourteenth amendment, providing that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article"]. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.

Id. at 71-72, 81.

236. *Croson*, 109 S. Ct. at 724 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion)).

237. *Id.* at 727.

with respect to the necessary form of the requisite "factual predicate."²³⁸

Justice O'Connor has abandoned her *Wygant* dicta suggesting that governmental affirmative action must be limited to providing remedy for governmental discrimination. In *Croson*, she wrote:

Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction. If the city of Richmond had evidence before it that non-minority

238. Justice O'Connor wrote that "none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry." *Id.* at 727. She concluded that "it is almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way." *Id.* at 728. Justice Marshall concluded that the impact of the majority opinion was to limit "state authority to confront the effects of past discrimination to those situations in which a prima facie case of a constitutional or statutory violation can be made out." *Id.* at 754 (Marshall, J., dissenting). If this is correct, then *Wygant* has been partially overruled, which would be inconsistent with Justice O'Connor's reliance on *Wygant* in her *Croson* opinion. Some of her *Croson* language, however, does suggest the need for a prima facie case. She stated, for example, that:

If the city of Richmond had evidence before it that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion. Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality's prime contractors, an inference of discriminatory exclusion could arise. Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria. In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.

Id. at 729 (citations omitted). The most reasonable interpretation of the quoted language, in light of her *Wygant* concurring opinion, is that proof of a constitutional or statutory violation simply is one way through which the necessary factual predicate for affirmative action may be established. Her language, however, will be construed by opponents of affirmative action, and by judges who wish to rely upon *Croson* to invalidate affirmative action programs, as requiring a prima facie case of a statutory or constitutional violation as a prerequisite for affirmative action. In another part of her opinion, Justice O'Connor wrote: "There is nothing approaching a prima facie case of a constitutional or statutory violation by *anyone* in the Richmond construction industry." *Croson*, 109 S. Ct. at 724 (emphasis in original). This does not necessarily mean that she *would require* a prima facie case of a constitutional or statutory violation as a prerequisite for governmental affirmative action. If this were true, the meaning of the fourteenth amendment would depend upon the definitions of statutory violations contained in federal and state legislation. *See id.* at 754 (Marshall, J., dissenting). On the other hand, this will be the message received by many. For example, in *Shurberg Broadcasting v. FCC*, a case which involved the "distress sale policy" of the F.C.C., Judge Silberman wrote that "[a] state or local government must have stronger evidence of discrimination before it can employ racial classifications, . . . and that evidence must 'approach[] a prima facie case of a constitutional or statutory violation.'" 876 F.2d 902, 912 (D.C. Cir. 1989) (quoting *Croson*, 109 S. Ct. at 723-24).

contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.²³⁹

The intermediate level scrutiny of Justices Brennan, Marshall and Blackmun²⁴⁰ and "legitimate public purpose" approach of Justice Stevens²⁴¹ do not limit permissible affirmative action by government to remedy for prior governmental discrimination. Justice Kennedy's *Croson* opinion likewise rejects such a distinction. He wrote: "[T]he state has the power to eradicate racial discrimination and its effects in both the public and private sectors, and the

239. *Id.* at 729 (citations omitted). Justice O'Connor framed the issue as follows: The parties and the supporting *amici* fight an initial battle over the scope of the city's power to adopt legislation designed to address the effects of past discrimination. Relying on our decision in *Wygant*, appellee argues that the city must limit any race-based remedial efforts to eradicating the effects of its own prior discrimination Appellant argues that . . . the city of Richmond enjoys sweeping legislative power to define and attack the effects of prior discrimination in its local construction industry. We find that neither of these two rather stark alternatives can withstand analysis.

Id. at 717.

Justice O'Connor described a state's affirmative action remedial power as follows: "[A] state or local subdivision . . . has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction. This authority must, of course, be exercised within the constraints of § 1 of the Fourteenth Amendment." *Id.* at 720 (footnote omitted). She explained the "state actor discrimination" limitation from *Wygant* as follows:

It was in the context of addressing the school board's power to adopt a race-based layoff program affecting its own work force that the *Wygant* plurality indicated that the Equal Protection Clause required "some showing of prior discrimination by the governmental unit involved." . . . [T]he Court of Appeals erred in following *Wygant* by rote in a case involving a state entity which has state-law authority to address discriminatory practices within local commerce under its jurisdiction.

Id. (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986)).

Inexplicitly, she also suggested a requirement for linkage between private discrimination and the state that would revive, in part, the state actor discrimination requirement from *Wygant* that she abandoned. She wrote:

As a matter of state law, the city of Richmond has legislative authority over its procurement policies, and can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment

Thus, if the city could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system.

Id.

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

241. *Id.* at 731 n.1 (Stevens, J., concurring).

absolute duty to do so where those wrongs were caused intentionally by the state itself."²⁴²

Justice O'Connor's opinion contained an unclear discussion of "findings." She wrote:

Proper findings . . . are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics Because the city of Richmond has failed to identify the need for remedial action in the awarding of its public construction contracts, its treatment of its citizens on a racial basis violates the dictates of the Equal Protection Clause.²⁴³

She also used the word "findings" to describe the "five predicate 'facts' " found by the District Court and concluded that these "findings" do not "provide the city of Richmond with a 'strong basis in evidence for its conclusion that remedial action was necessary.' "²⁴⁴ Justice O'Connor apparently used the word "findings" as a loose reference to the need for factual justification of an affirmative action program, or as a reference to fact-finding by a trial court, and was not suggesting that formal findings are required as a procedural prerequisite for voluntary affirmative action by government.²⁴⁵ Despite this, the underlying message of her ambiguous discussion of findings is that an affirmative action program not supported by findings should be viewed with skepticism, and many will construe her words as setting forth a requirement for formal findings.²⁴⁶

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

243. *Id.* at 730.

244. *Id.* at 724 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion)).

245. In his separate *Bakke* opinion, Justice Powell required judicial, legislative, or administrative findings as a prerequisite for remedial, race-conscious affirmative action. Eight years later, at the time of the *Wygant* decision, even Justice Powell had abandoned the findings requirement. In her *Wygant* concurring opinion, Justice O'Connor stated:

In sum, I do not think that the layoff provision was constitutionally infirm simply because the School Board, the Commission or a court had not made particularized findings of discrimination at the time the provision was agreed upon. But when the plan was challenged, the District Court and the Court of Appeals did not make the proper inquiry into the legitimacy of the Board's asserted remedial purpose

Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 293 (1986) (O'Connor, J., concurring). She also rejected a findings requirement in *Johnson*, a Title VII affirmative action case. See *supra* note 91. To conclude that Justice O'Connor and the three Justices who joined that portion of her decision which contained the "findings" discussion meant to establish a formal findings requirement would be unreasonable.

246. In *American Subcontractors Association v. City of Atlanta*, 259 Ga. 14, 376 S.E.2d

The *Croson* majority expressed a preference for “race-neutral means to increase minority business participation in city contracting,”²⁴⁷ and concluded that a victim-specific remedial approach may be required if the only purpose served by a non-victim affirmative action approach is “administrative convenience.” Justice O’Connor’s opinion discussed this as follows:

Given the existence of an individualized procedure [for evaluation of bids], the city’s only interest in maintaining a quota system rather than investigating the need for remedial action in particular cases would seem to be simple administrative convenience. But the interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification.²⁴⁸

The portion of Justice O’Connor’s opinion quoted above should be read in conjunction with her statement in *Wygant* that “it is agreed that a plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently ‘narrowly tailored,’ or ‘substantially related,’ to the correction of prior discrimination by the state actor.”²⁴⁹ Therefore, her *Croson* opinion should not be read as requiring affirmative action benefits to be limited to provable, individual victims of prior discrimination. Unfortunately, many will regard this as her true message.²⁵⁰

662 (1989), the Georgia Supreme Court relied upon *Croson* and unanimously invalidated a minority contractor set-aside program of the City of Atlanta under the *state* equal protection clause. Footnote six of the opinion refers to what the Court perceived as a *Croson* requirement for findings:

In its supplemental brief the city requests that this case be remanded to the trial court for additional evidence of discrimination, arguing that *City of Richmond* requires evidence of a different kind from its predecessors. This argument misses the point. It is the city, not the court, which must make particularized findings of past discrimination *before* enacting a program based on racial preference.

Id. at 18, 376 S.E.2d at 665 n.6 (emphasis in original).

247. *Croson*, 109 S. Ct. at 728. Justice O’Connor wrote: “[T]here does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting There is no evidence in this record that the Richmond City Council has considered any alternatives to a race-based quota.” *Id.* (citations omitted).

248. *Id.* at 729 (citations omitted).

249. *Wygant*, 476 U.S. at 287 (O’Connor, J., concurring).

250. See *Shurberg Broadcasting v. FCC*, in which Judge Silberman relied upon *Croson* and wrote: “Most important, a racial preference plan must allow for case-by-case consideration of applicants to ensure that each minority has in fact suffered from the effects of past discrimination. 876 F.2d 902, 912 (D.C. Cir. 1989), (citing *Croson*, 109 S. Ct. at 727-30, and *Fullilove v. Klutznick*, 448 U.S. 448, 486-87 (1980)).

Justice Marshall discussed the "factual inquiry"²⁵¹ engaged in by the Court in prior cases to determine if there had been "satisfactory proof of past discrimination."²⁵² He noted Justice Powell's *Wygant* requirement for a "strong basis in evidence for [the trial court's] conclusion that remedial action was necessary,"²⁵³ Justice O'Connor's *Wygant* concurrence which required "a firm basis for concluding that remedial action was appropriate,"²⁵⁴ and Justice Marshall, Blackmun and Brennan's *Wygant* dissent which would require a "legitimate factual predicate."²⁵⁵ Justice Marshall summarized by saying:

Our unwillingness to go beyond these generalized standards to require specific types of proof in all circumstances reflects, in my view, an understanding that discrimination takes a myriad of "ingenious and pervasive forms."

The varied body of evidence on which Richmond relied provides a "strong," "firm," and "unquestionably legitimate" basis upon which the City Council could determine that the effects of past racial discrimination warranted a remedial and prophylactic governmental response Richmond acted against a backdrop of congressional and Executive Branch studies which demonstrated with such force the nationwide pervasiveness of prior discrimination that Congress presumed that " 'present economic inequities' " in construction contracting resulted from " 'past discriminatory systems.' " The city's local evidence confirmed that Richmond's construction industry did not deviate from this pernicious national pattern In sum, to suggest that the facts on which Richmond has relied do not provide a sound basis for its finding of past racial discrimination simply blinks credibility.

. . . .
. . . If Richmond indeed has a monochromatic contracting community—a conclusion reached by the District Court, . . . this most likely reflects the lingering power of past exclusionary practices.²⁵⁶

Six weeks after announcing its *Croson* decision, the Court summarily disposed of two cases on the basis of *Croson*. The Court granted certiorari in *H. K. Porter Co., v. Metropolitan Dade County*,²⁵⁷ a case involving a five percent Minority Business Enterprise set-aside requirement for a mass transit construction project. The Eleventh Circuit Court of Appeals upheld the program,

251. *Croson*, 109 S. Ct. at 745 (Marshall, J., dissenting).

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

253. *Id.* (Marshall, J., dissenting) (quoting *Wygant*, 476 U.S. at 277).

254. *Id.* (Marshall, J., dissenting) (quoting *Wygant*, 476 U.S. at 293 (O'Connor, J., concurring)).

255. *Id.* (Marshall, J., dissenting) (quoting *Wygant*, 476 U.S. at 297 (Marshall, J., dissenting)).

256. *Id.* at 745-47 (Marshall, J., dissenting) (citations omitted).

257. 109 S. Ct. 1333 (1989).

but noted that the record did not suggest that there had been "detailed studies regarding past discrimination against MBE's in the awarding of construction contracts or investigations regarding the availability of MBE's qualified to participate in [the contract]." ²⁵⁸ The Supreme Court vacated the judgment and remanded "for further consideration in light of *City of Richmond v. J. A. Croson Company*." ²⁵⁹ On the same day, the Court summarily affirmed a Sixth Circuit Court of Appeals judgment in *Milliken v. Michigan Road Builders Association*, ²⁶⁰ a case that reached the Court through appeal. The Court of Appeals panel concluded that "[b]efore a state may permissibly employ a racial or ethnic classification . . . it must make a finding based upon material factual evidence, that it has in the past discriminated against those classes it now favors." ²⁶¹ The Court of Appeals invalidated a state contract set-aside program because the record did not contain evidence of past discrimination by the state. In *Croson*, only Justice Scalia expressed the view that a state's affirmative action efforts must be limited to remedying its own prior discrimination. ²⁶² Therefore, the *Milliken* case should be approached cautiously as precedent.

VI. AFFIRMATIVE ACTION DOCTRINE AFTER CROSON

In *Croson*, five members of the Court, Chief Justice Rehnquist and Justices O'Connor, White, Kennedy, and Scalia, applied strict scrutiny for review of race-conscious affirmative action programs. Of these, only Justice Scalia would not approve a narrowly tailored, remedial program. Three members of the Court, Justices Brennan, Marshall, and Blackmun, used intermediate level scrutiny, and a fourth, Justice Stevens, used a fact-dependent impartiality approach. All four of these justices have demonstrated a willingness to approve a narrowly tailored, remedial program. Despite these differences, the formula used by the Court to describe the applicable form of review provides little guidance as to likely outcome. An ad hoc, fact-dependent approach actually is used by all members of the Court except Justice Scalia.

Certain fundamental principles are clear. Eight members of the Court ²⁶³ recognize that policies of formal equality may result in

258. *H. K. Porter Co. v. Metropolitan Dade County*, 825 F.2d 324, 332 (11th Cir. 1987), *vacated*, 109 S. Ct. 1333 (1989).

259. 109 S. Ct. at 1333.

260. 109 S. Ct. 1333 (1989).

261. 834 F.2d 583, 589 (6th Cir. 1987), *aff'd*, 109 S. Ct. 1333 (1989).

262. *City of Richmond v. J. A. Croson Co.*, 109 S. Ct. 706, 737 (1989). *See supra* notes 225 and 239 and accompanying text.

263. The exception is Justice Scalia.

actual inequality.²⁶⁴ They have expressed agreement with the use of color-conscious remedy as a short-term approach justified by the long-term goal of true equality of opportunity.²⁶⁵

An affirmative action program need not limit its benefits to persons who can be shown to have suffered personally from discrimination. Rather, persons may receive benefits because of racial, national origin, or gender group membership.²⁶⁶ The Court's approval of affirmative action benefits for non-victims reflects a realization that a group-based remedy is appropriate for a group-based wrong.²⁶⁷ The abstract principle of individual rights under

264. This phenomenon was explained by the 1st Circuit Court of Appeals as follows: [O]ur society cannot be completely colorblind in the short term if we are to have a colorblind society in the long term. After centuries of viewing through colored lenses, eyes do not quickly adjust when the lenses are removed. Discrimination has a way of perpetuating itself, albeit unintentionally, because the resulting inequalities make new opportunities less accessible. Preferential treatment is one partial prescription to remedy our society's most intransigent and deeply rooted inequalities.

Associated Gen. Contractors of Mass., v. Altshuler, 490 F.2d 9, 16 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974).

Justice Blackmun expressed the same idea in *Bakke* when he wrote: "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring).

265. An excellent discussion of the systemic nature of discrimination and the need for affirmative action remedy can be found in Ellis, *Victim-Specific Remedies: A Myopic Approach to Discrimination*, 13 N.Y.U. REV. L. & SOC. CHANGE 575 (1984-85). Judge J. Skelley Wright concluded that "there can be no such thing as a 'color-blind' approach to achieving racial equality." Wright, *Color-Blind Theories and Color-Conscious Remedies*, 47 U. CHI. L. REV. 213, 245 (1980). In his view, preferential programs are the only effective means for remedying racial discrimination. *Id.* at 225. In an early article, Professor Kaplan discussed ways in which principles "of formal equality [may bear] so heavily upon . . . individual[s] as to result in serious inequality." Kaplan, *Equal Justice in an Unequal World: Equality for the Negro - The Problem of Special Treatment*, 61 NW. U.L. REV. 363, 363 (1966). In his view, even if racial considerations become irrelevant to the economic, political or social rights of an individual, there will be many persons who are educationally, economically, and psychologically disadvantaged in ways which require special preference to avoid a continuing forward of the earlier deprivation. *Id.* at 364-65.

266. Justice Brennan discussed the movement from remedy for identifiable victims of prior discrimination to remedy for members of the class subject to such discrimination in his *Bakke* opinion, when he wrote: "Such relief does not require as a predicate proof that recipients of preferential advancement have been individually discriminated against; it is enough that each recipient is within a general class of persons likely to have been victims of discrimination." *Bakke*, 438 U.S. at 363. Justice O'Connor endorsed the same principle in her *Wygant* concurring opinion. See *supra* text accompanying notes 173-75.

267. As noted by Professor Askin, "the historic exclusion of blacks from positions of prestige and power within society has not been done on a one-by-one basis; it has been group exclusion." Askin, *Eliminating Racial Inequality in a Racist World*, CIV. LIBERTIES REV. Spring 1975, 96, 103. He argued in favor of "group inclusion" to remedy "group

the equal protection clause is appealing,²⁶⁸ but will deprive individuals of equality if applied to a society in which group considerations determine allocation of opportunity. Protection of individual rights sometimes requires consideration of group-linked phenomena.²⁶⁹

The affirmative action doctrine that has emerged reflects a dual response by the Court, to individual claims for justice and to the societal need for elimination of race, national origin, and gender disadvantage. This response tracks the dual objectives of Congress in enacting Title VII, of "eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."²⁷⁰ Courts have interpreted the equal protection clause and section five of the fourteenth amendment as means for redressing a major societal problem, and not simply as authorizations for private causes of action. Therefore, the interests of society should be considered when the interests of private litigants are balanced.²⁷¹ Affirmative action is not justified strictly on the basis of individual entitlement connected to prior disadvantage. Of at least equal importance, the interests of society justify affirmative action.

exclusion." *Id.* See also Comment, *Individual Rights and Group Wrongs: An Alternative Approach to Affirmative Action*, 56 Miss. L.J. 781 (1986); Fallon & Weiler, *Firefighters v. Stotts: Conflicting Models of Racial Justice*, 1984 SUP. CT. REV. 1.

268. The Court stated this principle in *McCabe v. Atchison, Topeka & Santa Fe Railway*, 235 U.S. 151, 161 (1914) as follows: "[T]he essence of the constitutional right is that it is a personal one." See also *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) (footnote omitted), in which the Court said: "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights."

269. Many whites are justifiably proud that they have gained success despite their handicaps of early years. However, they have not faced the unique prejudices, stereotypes, and disadvantages faced by blacks, and they have begun from a position of cultural inclusion. A black commonly must be exceptional to receive unexceptional rewards. For example, the rule, rather than the exception, is that black applicants to law schools will have received poorer quality elementary and secondary education than their white counterparts, and will have lower Law School Admission Test scores and lower undergraduate grade point averages than whites. As a result, the exceptional black applicant normally is viewed as the "merit" equivalent of the unexceptional white applicant. [This comment is based upon the author's observations during ten years of work as a member or chair of law school admissions committees.]

270. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975).

271. Professor Sedler concluded that the question no longer revolves around "whether group rights can be preferred to individual rights, but around whether the racial preference advances societal interests and, if so, whether this justifies 'racial detriment' to individual rights." Sedler, *Racial Preference and the Constitution: The Societal Interest in the Equal Participation Objective*, 26 WAYNE L. REV. 1227, 1235 (1980). See also Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 582 (1975).

The interrelationship between the needs of individuals and those of society is revealed by a recent National Research Council publication,²⁷² which discusses the results of its study, begun in 1985, of the conditions facing black Americans in the 1980s. The study revealed deterioration or a lack of progress, especially in economic status, since the early 1970s.²⁷³ It confirmed the continued prevalence of racial segregation in housing, independent of economic factors, noting that "blacks of every economic level are highly segregated from whites of similar economic status."²⁷⁴ As of 1984, forty percent of black men aged twenty-five to fifty-five earned less than \$10,000 per year, compared to twenty percent of white men of the same age.²⁷⁵ In 1985, forty-four percent of all black children lived *below the poverty line*, compared to sixteen percent of all white children.²⁷⁶ Joblessness for young black men in inner cities is particularly complicated and intractable.²⁷⁷ Black babies die at birth at twice the rate of white babies,²⁷⁸ and their mothers die giving birth at three times the rate of white women.²⁷⁹ Overt, formal race discrimination in employment has been replaced, for the most part, by "less overt forms of behavior that are far more difficult to detect."²⁸⁰ The extent to which equal employment opportunity has become a reality was described as follows:

Although civil rights legislation, a general antidiscrimination ethos, affirmative action, and pressures from blacks and whites alike have greatly expanded opportunities for blacks, labor market discrimination has by no means completely disappeared. Rather, a very complicated picture has emerged. If a man or woman, regardless of race, manages to enter the labor market with a high-quality education or skill, he or she generally enjoys equal access to entry positions and to lower middle-status ranks. However, some evidence suggests that opportunities at the middle stage of a worker's career and at higher status positions are not equally available to blacks . . . and, importantly, clearly race plays a decisive role in determining whether a man or woman will in fact reach the labor market with a quality education This racial filter arises

272. NATIONAL RESEARCH COUNCIL, *A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY* (1989).

273. *Id.* at 6-9.

274. *Id.* at 144.

275. *Id.* at 275.

276. *Id.* at 279.

277. *Id.* at 319-23.

278. In 1985, the black infant mortality rate was 18.2 per 1,000 live births. The rate for whites was 9.3 per 1,000 live births. *Id.* at 398.

279. In 1984, the black maternal mortality rate was 19.7 per 100,000 live births. For whites, it was 5.4 per 100,000 live births. *Id.* at 403.

280. See NATIONAL RESEARCH COUNCIL, *supra* note 231, at 147.

partly from black-white separation in residential, educational, and social networks and especially from the growing isolation of the black poor. Furthermore, these interactions between race and status result in employment network patterns that often vitiate the benefits of education for black male high school graduates.²⁸¹

Choices between deserving people must be made when a scarce resource is distributed, and it is commonplace for some to be favored over others because of societal need in areas such as the military draft, veteran's preference, business regulation, distribu-

281. *Id.* at 315. The impact of racism upon black Americans prior to the 1970s was described by two black psychiatrists as follows:

The hatred of blacks has been so deeply bound up with being an American that it has been one of the first things new Americans learn and one of the last things old Americans forget. Such feelings have been elevated to a position of national character, so that individuals now no longer feel personal guilt or responsibility for the oppression of black people.

....

Black men . . . have been so hurt in their manhood that they are now unsure and uneasy as they teach their sons to be men. Women have been so humiliated and used that they may regard womanhood as a curse and flee from it. Such pain, so deep, and such real jeopardy, that the fundamental protective function of the family has been denied. These injuries we have no way to measure.

....

The grief and depression caused by the condition of black men in America is an unpopular reality to the sufferers. They would rather see themselves in a more heroic posture and chide a disconsolate brother. They would like to point to their achievements (which in fact have been staggering); they would rather point to virtue (which has been shown in magnificent form by some blacks); they would point to bravery, fidelity, prudence, brilliance, creativity, all of which dark men have shown in abundance. But the overriding experience of the black American has been grief and sorrow and no man can change that fact.

W. GRIER & P. COBBS, *BLACK RAGE* 204-09 (1980).

Claude McKay, a black poet who lived from 1889-1948, personalized the effect of white racism in *The White House*:

Your door is shut against my tightened face,
And I am sharp as steel with discontent;
But I possess the courage and the grace
To bear my anger proudly and unbent.
The pavement slabs burn loose beneath my feet,
A chafing savage, down the decent street;
And passion rends my vitals as I pass,
Where boldly shines your shuttered door of glass.
Oh, I must search for wisdom every hour,
Deep in my wrathful bosom sore and raw,
And find in it the superhuman power
To hold me to the letter of your law!
Oh, I must keep my heart inviolate
Against the potent poison of your hate.

THE PASSION OF CLAUDE MCKAY 123 (W. Cooper ed. 1973).

tion of government benefits, and tax laws. As Professor Sedler noted, the principle of sacrifice of individual interests for the societal interest "is no less applicable where the societal interest advanced by the giving of the preference is a racial interest and the preference is a racial one."²⁸² In a similar fashion, a "sharing of the burden" of race-based remedy by white and black persons was accepted by the Court in *Franks v. Bowman Transportation Co.*²⁸³ and *Fullilove*.²⁸⁴

Certain individual members of minority groups may not have suffered from significant, personalized discrimination, and thus have no equitable claim to participation in an affirmative action program. However, society at large still may have an interest in including these persons because of their potential for moving into high policy and decision-making levels, and because of their potential for breaking down stereotypes.

Affirmative action is properly viewed as a transitional device designed to remedy the effects of discrimination and to place persons of both races on equal footing. The most significant racism in America is subconscious, and leaves a person unaware of the assumptions and stereotypes that govern his or her thinking. This permits a white to accept the status quo of American society without feeling personal responsibility. Affirmative action programs increase awareness and facilitate changes in behavior, thus combatting the stereotypes and assumptions that perpetuate racism.²⁸⁵

282. See Sedler, *supra* note 271, at 1243.

283. 424 U.S. 747, 777 (1976). *Franks* involved a retroactive award of seniority to successful black plaintiffs who proved violations of Title VII by an employer. This remedy diminished the seniority status of white employees.

284. See *supra* text accompanying notes 148-55. In *Fullilove v. Klutznick*, 448 U.S. 448 (1979), plaintiffs challenged a minority contractor set-aside program established by Congress. Chief Justice Burger wrote: "It is not a constitutional defect in this program that it may disappoint the expectation of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such 'a sharing of the burden' by innocent parties is not impermissible." *Id.* at 484 (citations omitted).

285. Professor Crenshaw discussed the success of antidiscrimination laws in eliminating "[f]ormal barriers [which] have constituted a major aspect of the historic subordination of African-Americans" Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1348 (1988). She also noted that this success led to "[t]he flagging commitment of the courts and of many whites to fighting discrimination" *Id.* at 1349. She perceptively discussed another negative consequence of "the attainment of formal equality," *id.* at 1378, as follows:

The end of Jim Crow has been accompanied by the demise of an explicit ideology of white supremacy. The white norm, however, has not disappeared. . . . Nor have the negative stereotypes associated with Blacks been eradicated. The rationalizations once used to legitimate Black subordination based on a belief in

Chief Justice Burger's *Fullilove* decision recognized the remedial prerogatives of Congress, and placed emphasis on the powers of Congress under the taxing and spending clause²⁸⁶ and section five of the fourteenth amendment: "[W]e are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the . . . general Welfare of the United States' and 'to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment."²⁸⁷ Chief Justice Burger quoted Justice Jackson, who wrote: "The vice of judicial supremacy . . . has been its progressive closing of the avenues to peaceful and democratic conciliation of our social and economic conflicts."²⁸⁸ He also quoted Justice Brandeis, who wrote: "To stay experimentation in things social and economic is a grave responsibility."²⁸⁹

Deference to Congress respects separation of powers limits on the Court's role in reviewing federal affirmative action programs. Principles of federalism impose comparable limits with respect to affirmative action programs of state and local governments. If the Court ignores these limits, and implements policy views out of harmony with those of the American people, it risks undermining

racial inferiority have now been reemployed to legitimate the domination of Blacks through reference to an assumed cultural inferiority.

White race consciousness, which includes the modern belief in cultural inferiority, acts to further Black subordination by justifying all the forms of unofficial racial discrimination, injury, and neglect that flourish in a society that is only formally dedicated to equality. In more subtle ways, moreover, white race consciousness reinforces and is reinforced by the myth of equal opportunity that explains and justifies broader class hierarchies.

After all, equal opportunity is the rule, and the market is an impartial judge; if Blacks are on the bottom, it must reflect their relative inferiority.

Racism, combined with equal opportunity mythology, provides a rationalization for racial oppression, making it difficult for whites to see the Black situation as illegitimate or unnecessary. If whites believe that Blacks, because they are unambitious or inferior, get what they deserve, it becomes that much harder to convince whites that something is wrong with the entire system. Similarly, a challenge to the legitimacy of continued racial inequality would force whites to confront myths about equality of opportunity that justify for them whatever measure of economic success they may have attained.

Id. at 1379-81 (footnotes omitted).

286. U.S. CONST. art. I, § 8, cl. 1.

287. *Fullilove*, 448 U.S. at 472 (quoting U.S. CONST. amend. XIV, § 5).

288. *Id.* at 491 (quoting R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 321 (1941)).

289. *Id.* (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

its authority.²⁹⁰ For the Court to enforce the prohibitions of the equal protection clause when faced with hostile, exclusionary, and stigmatizing racial segregation and discrimination is one thing. But, for the Court to block efforts by the states and coordinate branches of the federal government to achieve the remedial objectives of the equal protection clause is quite another.²⁹¹

Separation of powers and federalism principles require that there be a wide lane for voluntary effort, bounded on one side by the invidious forms of discrimination for which strict scrutiny review was developed, and bounded on the other side by ostensibly remedial programs which are so lacking in remedial purpose or so unlikely to achieve remedial objectives that they are the functional equivalent of invidious discrimination. Congress and the states should be given room for experimentation and good-faith error to avoid judicial preemption of their remedial efforts. As remedial objectives are achieved, the non-judicial branches of government should implement the shift to a color-blind approach.

Remedial efforts by Congress and the states will be improperly frustrated if the Court requires Title VII litigation methods of proof for non-litigation problems. The history of subordination of blacks and women in American society is not accurately evaluated through statistical comparisons, "smoking gun" evidence, and witness testimony, and affirmative action remedy should not be dependent upon the availability of such evidence. This would represent a demand by the Court that Congress and the states conduct themselves as though they are courts if they wish to deal with the complex sociological problems of race, national origin and gender discrimination, and would strip them of effective power to do what they are politically and morally obligated to do.

The specific programmatic requirements that have emerged in affirmative action cases reflect acceptance of affirmative action combined with short-term and long-term concerns over the costs and dangers involved. The overriding concern is that an affirmative action plan be remedial in purpose and effect, and not reflect

290. See Cox, *The Effect of the Search for Equality Upon Judicial Institutions*, 1979 WASH. U.L.Q. 795. It matters little whether remedial efforts are blocked by a technically accurate reading of an opinion or by the predictable response of state and federal judges to the underlying messages of the opinion.

291. Professor Tribe advanced the view that "the 14th amendment command of equal protection of the law was always intended at its most basic level to ban the use of law to subjugate black people." Proceedings of the 47th Annual Judicial Conference of the District of Columbia Circuit, 114 F.R.D. 419, 446 (1986). Acts of racial bias against blacks tend toward the subjugation of blacks. Affirmative action programs may disappoint whites but do not subjugate them.

racial balancing for its own sake or the allocation of opportunity on the basis of racial politics. A program must be designed to remedy current discrimination or the current effects of prior discrimination, and the existence of this discrimination and the remedial nature of the program must be clear. The Justices have used different phrases to describe the factual basis involved in these determinations, including "firm basis for believing that remedial action [is] required,"²⁹² "convincing evidence that remedial action is warranted,"²⁹³ "sufficient evidence to justify the conclusion that there has been prior discrimination,"²⁹⁴ "strong basis in evidence for [the employer's] conclusion that remedial action was necessary,"²⁹⁵ "firm basis for determining that affirmative action is warranted,"²⁹⁶ "firm basis for concluding that remedial action was appropriate,"²⁹⁷ "strong basis in evidence for the [city council's] conclusion that remedial action was necessary,"²⁹⁸ "identify . . . discrimination, public or private, with some specificity,"²⁹⁹ and "sound basis for [Richmond's] finding of past racial discrimination."³⁰⁰

It is difficult not to conclude that these phrases mean nearly the same thing, and that Justices O'Connor and Marshall, the authors of the principal *Croson* opinions, use a similar test for review of the factual justification for affirmative action, although Justice O'Connor labels her test strict scrutiny and Justice Marshall labels his test intermediate level scrutiny. Justices Brennan and Blackmun subscribe to the approach of Justice Marshall, and Chief Justice Rehnquist and Justices White and Kennedy seem to be in accord with the approach of Justice O'Connor.³⁰¹ Therefore, seven Justices use a similar test for equal protection review of the factual basis for race-conscious affirmative action.

Neither Justice Marshall nor Justice O'Connor requires formal findings to justify affirmative action by a state actor or a coor-

292. *Johnson v. Transportation Agency*, 480 U.S. 616, 649 (1987) (O'Connor, J., concurring).

293. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (Powell, J.).

294. *Id.* (Powell, J.).

295. *Id.* (Powell, J.).

296. *Id.* at 292 (O'Connor, J., concurring).

297. *Id.* at 293 (O'Connor, J., concurring).

298. *City of Richmond v. J. A. Croson Co.*, 109 S. Ct. 706, 724 (1989) (O'Connor, J.) (quoting *Wygant*, at 277).

299. *Id.* at 727 (O'Connor, J.).

300. *Id.* at 746 (Marshall, J., dissenting).

301. Justice Stevens apparently would be more receptive than Justice O'Connor to non-remedial uses of race, but it is unclear what he would approve in the affirmative action area. See *supra* text accompanying notes 221-24.

dinate branch of the federal government, and neither requires statistical evidence sufficient to establish a prima facie case of a statutory or constitutional violation. Neither requires that the discrimination to be remedied be prior discrimination by government,³⁰² and both would approve affirmative action if government is involved in or is affected by the discrimination.³⁰³ Neither requires that affirmative action beneficiaries be provable, individual victims of prior discrimination. Neither would evaluate a program by distinguishing between "quotas" and "goals."³⁰⁴ Both agree that the rights of others may not be "unnecessarily trammeling," and both probably agree that the likelihood of unnecessary trammeling increases dramatically if the beneficiaries of affirmative action are unqualified for whatever they receive.³⁰⁵ Both agree that

302. See *supra* notes 239-42 and accompanying text.

303. See *supra* notes 239-42 and accompanying text.

304. Justice O'Connor described the Richmond set-aside program as being a quota. Technically, however, her objections did not relate to use of a fixed number rather than a flexible goal or failure by the city council to consider race as a "plus" factor. Instead, her objections focused on remedial deficiencies, in that the set-aside program was not "'narrowly tailored' to compensate black contractors for past discrimination . . ." *Croson*, 109 S. Ct. at 728. She wrote that "the 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing . . .," *id.*, and that "[t]he 30% quota cannot in any realistic sense be tied to any injury suffered by anyone." *Id.* at 724. She also wrote, "an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota." *Id.* Technical matters aside, she seems to have used the word "quota" in a pejorative manner, suggesting personal disapproval.

305. The issue of "unnecessary trammeling" raises the question of how much negative impact upon whites is acceptable as the cost of race-based remedy. This issue has been central in the school desegregation context, and seems to be the primary concern of opponents of affirmative action. A response to discrimination that focuses primarily on balancing of white and black interests misses the crucial point. Evil is evil, injustice is injustice, and these words accurately describe the experience of black Americans during the two century history of our country. The need for remedy is a moral imperative, and a balancing process is appropriate only to the extent that moral costs and benefits are weighed in the balance. Justice Kennedy expressed this as follows: "The law now reflects society's consensus that discrimination based on the color of one's skin is a profound wrong of tragic dimension." *Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2379 (1989). The extent to which remedy for blacks has been accepted in the past only if white interests are served has been perceptively discussed by Professor Bell. See Bell, Bakke, *Minority Admissions, and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 3 (1979); D. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987). Professor Bell discussed the value for whites of racial discrimination against blacks as follows: "A major function of racial discrimination is to facilitate the exploitation of black labor, to deny us access to benefits and opportunities that would otherwise be available, and to blame all the manifestations of exclusion-bred despair on the asserted inferiority of the victims." Bell, *White Superiority in America: Its Legal Legacy, Its Economic Costs*, 33 VILL. L. REV. 767, 767 (1988). An early article discussing the valuation of white versus black interests is Wasserstrom, *Racism, Sexism and Preferential Treatment*, 24 UCLA L. REV. 581 (1977).

affirmative action remedy must be temporary, in the sense that it phases out as remedial objectives are achieved, and both would approve waiver provisions which avoid hardship while preserving remedial objectives.

The differences between Justices Marshall and O'Connor, and the explanation for the split in the *Croson* case, relates to choice of the phrase "strict scrutiny" rather than "intermediate level scrutiny" and disagreement concerning the forms of proof that are acceptable.³⁰⁶ Justices Marshall and O'Connor also viewed the record in different ways, particularly the persuasiveness of witness testimony before the city council and the relevance of national construction industry statistics for proof of local construction industry discrimination.³⁰⁷ If the city council had a firm basis for a conclusion that eight percent of local construction industry contractors were minority contractors, and received less than one percent of city contracts because of prior discrimination, an eight percent minority contractor set-aside program presumably would have been acceptable to Justice O'Connor. If the city council had a firm basis for a conclusion that thirty percent of local contractors would be minority contractors in the absence of prior discrimination, she presumably would have approved an extensive, multi-faceted program designed to develop minority contractors and provide them with public contracts. The thirty percent set-aside requirement at issue in *Croson*, however, could be satisfied only through use of minority contractors from other parts of the country, which she did not consider to be an appropriate, narrowly tailored remedy for discrimination in Richmond.

306. In his concurring opinion in *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3064 (1989) (Scalia, J., concurring), a case involving a Missouri abortion statute, Justice Scalia made reference to *Croson* as follows:

Just this Term, for example, in an opinion authored by Justice O'CONNOR, despite the fact that we had already held a racially based set-aside unconstitutional because unsupported by evidence of identified discrimination, which was all that was needed to decide the case, we went on to outline the criteria for properly tailoring race-based remedies in cases where such evidence is present.

This reflects his understanding that the case focused on evidentiary matters and the "tailoring" requirements imposed by use of the strict scrutiny form of review.

307. Another area of apparent disagreement relates to differences between Title VII and equal protection standards. Justice O'Connor advocates the use of the same method of analysis for Title VII and equal protection challenges to race-conscious affirmative action. A majority of the Court did not join her in this. The analytical approach of Justices Marshall, Brennan, and Blackmun in Title VII affirmative action cases differs from their method of analysis in equal protection affirmative action cases. In the former, they have considered the intent of Congress in enacting and amending Title VII, which raises different considerations from those applicable to constitutional analysis.

Formal evidentiary requirements, developed for use in Title VII and other statutory cases, will preclude affirmative action in areas in which it is most needed. The objectives of the equal protection clause are served by an evidentiary approach that permits variation and flexibility in the materials relied upon to establish a "firm basis" for affirmative action.³⁰⁸ A contrary approach would force upon the states and federal government proof requirements that ignore the true nature of discrimination in America and impede correction through affirmative action.

Justice O'Connor used the phrase "strict scrutiny" despite its long history of use by opponents of affirmative action who advocate a color-blind approach to block color-conscious remedy. If she did not mean to gut affirmative action, she should change her phrase or explain it better. Failure to correct the course set by the underlying messages of *Croson* will make Justice O'Connor, more than any other Justice, responsible for a retrenchment by federal and state courts in their response to race discrimination. It would be ironic indeed for the leader of the Court's retreat to be the Associate Justice nominated by a president who was fulfilling a public pledge to appoint a woman to the Court.³⁰⁹ Like the Richmond City Council, President Reagan did not share the powers granted to Congress by section five of the fourteenth amendment "to enforce, by appropriate legislation, the provisions of [the amendment]."³¹⁰ He did not establish a "strong basis in evidence for [his] conclusion that remedial action was necessary."³¹¹ He did not compare the percentage of females in the pool of persons qualified to serve on the Court with the zero percent of females then on the Court or the eleven percent that would be on the Court following confirmation of Justice O'Connor. If the true labor market percentage was less than eleven percent, his affir-

308. For example, the forms of evidence that are probative of exclusion of minority businesses from contracting opportunity, or exclusion of qualified applicants from jobs, are of marginal value for affirmative action admissions programs of colleges and universities. A more realistic approach to evidentiary matters is reflected by a recent decision by Judge Wisdom, for a three judge panel in the Eastern District of Louisiana, in which he applied *Croson* to a 10% "other-race" university admissions program. He concluded that this affirmative action measure was justified by "a specific judicial finding of prior discrimination with lingering segregation in Louisiana's entire public higher education system." *United States v. Louisiana*, 718 F. Supp. 525, 530 (E.D. La. 1989).

309. On October 14, 1980, then presidential candidate Reagan pledged that "one of the first Supreme Court vacancies in my administration will be filled by the most qualified woman I can find. . . ." N.Y. Times, Oct. 15, 1980, at A24, col. 1.

310. *City of Richmond v. J. A. Croson Co.*, 109 S. Ct. 706, 717-18 (1989) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980)).

311. *Id.* at 724.

mative action remedy was excessive and he was engaging in gender balancing for its own sake. Because he did not identify prior discrimination against females "with some specificity,"³¹² he created that odious thing, divisive of American society, the "unyielding . . . quota,"³¹³ and an unfortunate, deserving white male lost his big chance.

312. *Id.* at 727.

313. *Id.* at 724.

