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Benign Classification Based on Race Must Be Narrowly Tailored to Achieve a Compelling Governmental Interest.

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CONSTITUTIONAL LAW—Equal Protection—Benign Classifications Based on Race Must be Narrowly Tailored to Achieve a Compelling Governmental Interest.

City of Richmond v. J.A. Croson Co.,
__ U.S. __, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989).

The City Council of Richmond, Virginia enacted a Minority Business Utilization Plan ("the Plan") on April 11, 1983.[1] The Plan, referred to as a "set-aside," obligated prime contractors receiving city construction contracts to subcontract a minimum of 30 percent of the total contract amount to a Minority Business Enterprise (MBE).[2] After receiving bid forms on a city jail construction project,[3] the J.A. Croson Co. ("Croson") attempted to comply with the set-aside, but it was unable to locate qualified, interested MBEs.[4] Croson won the prime contract as the only bidder and requested the set-aside requirement be waived.[5] The city refused to waive the requirement and rebid the project.[6] Croson brought suit in federal district court

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1. *See* City of Richmond v. J.A. Croson Co., __ U.S. __, __, 109 S. Ct. 706, 712, 102 L. Ed. 2d 854, 871 (1989).

2. *Id.* at __, 109 S. Ct. at 712-13, 102 L. Ed. 2d at 871-72. Under the Plan, an MBE is a business "at least 51 percent of which is owned and controlled by minority group members." *Id.* The Plan defined a minority group member as a United States citizen who is Eskimo, Aleut, Spanish-speaking, Oriental or Black. The Plan did not require the MBE to be located in the Richmond area; MBEs throughout the United States were eligible to participate. If the prime contract was given to a minority-owned business, however, the set-aside requirement was not applicable to the city contract. *Id.*

3. *Id.* at __, 109 S. Ct. at 715, 102 L. Ed. 2d at 874. The project required the contractor to supply and install plumbing fixtures for the Richmond jail. *Id.*

4. City of Richmond v. J.A. Croson Co., __ U.S. __, __, 109 S. Ct. 706, 715, 102 L. Ed. 2d 854, 874 (1989). Eugene Bonn, Croson's regional manager, determined that Croson would have to purchase the plumbing fixtures from an MBE in order to comply with the 30 percent set-aside. *Id.* After telephoning three agencies that kept lists of MBEs, Bonn obtained the names of several MBEs who might be able to supply the needed fixtures. Of the five or six potential suppliers contacted by Bonn, none provided him with a quote. On the day bid submissions were required, Bonn was able to contact Continental Metal Hose ("Continental"), an area MBE who was interested in supplying the fixtures. Continental had problems getting credit approval from the manufacturer and was unable to give Bonn a quote for the fixtures before the prime bids were due. *Id.* Six days after receiving the prime contract, Croson still did not have a quote from Continental. *Id.*

5. *Id.*

6. *Id.* at __, 109 S. Ct. at 715, 102 L. Ed. 2d at 875. Three weeks after the prime contract bids were required, Continental gave Croson a quote for the fixtures that was 7 percent higher than the market price and approximately $6,000 higher than the figure Croson had used to calculate the prime bid. *Id.* The president of Continental, after hearing of Croson's waiver

claiming that the Plan was a violation of the equal protection clause of the fourteenth amendment.[7] The district court found the Richmond Plan constitutional.[8] The United States Court of Appeals for the Fourth Circuit affirmed.[9] The United States Supreme Court granted certiorari, vacated the court of appeals judgment, and remanded for further review[10] in light of the Court's decision in *Wygant v. Jackson Board of Education*.[11] On remand, the United States Court of Appeals for the Fourth Circuit reversed the district court and struck down the Plan as violating the equal protection clause.[12] The Supreme Court again granted certiorari to determine whether the Richmond Plan was a violation of the fourteenth amendment's equal protection clause.[13] Held—*Affirmed*. Benign classifications based on race must be narrowly tailored to achieve a compelling governmental interest.[14]

The fourteenth amendment states that "no state shall deny to any person

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proposal, notified city officials that Continental could provide the plumbing fixtures. The city notified Bonn that Croson must give the city an MBE Utilization Commitment Form within 10 days. Bonn sent a letter to the city explaining that Continental was not authorized as a supplier by either of the manufacturers of the particular fixtures. Bonn's letter also indicated that Continental's quote for the fixtures was still dependent on credit approval, was much higher than the other quotes Bonn had received, and was provided three weeks after the due date for prime bids. *Id.* The city refused Croson's waiver application and refused Croson's request that the prime bid be raised to cover the extra cost of subcontracting to Continental. *Id.* Croson's attorney requested that the denial be reviewed. *Id.* at __, 109 S. Ct. at 715-16, 102 L. Ed. 2d at 875. The city attorney indicated that the city had chosen to bid the project again and the decision could not be appealed. *Id.*

7. Brief for Appellant at 10, City of Richmond v. J.A. Croson Co., __ U.S. __, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989)(No. 87-998).

8. *Croson*, __ U.S. at __, 109 S. Ct. at 716, 102 L. Ed. 2d at 875.

9. *Id.* at __, 109 S. Ct. at 716, 102 L. Ed. 2d at 874.

10. City of Richmond v. J.A. Croson Co., __ U.S. __, __, 109 S. Ct. 706, 716, 102 L. Ed. 2d 854, 876 (1989).

11. 476 U.S. 267 (1986). In *Wygant*, the Court struck down a collective bargaining agreement between a school district and a teachers' union that preferred minority teachers in protection against lay-offs. *Id.* at 283-84. The first court of appeals decision was on November 25, 1985. J.A. Croson Co. v. City of Richmond, 779 F.2d 181 (4th Cir. 1985), *vacated*, 478 U.S. 1016 (1986), *on remand*, 822 F.2d 1355 (4th Cir. 1987), *aff'd*, __ U.S. __, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989). Certiorari was granted on July 7, 1986 and the case remanded to the court of appeals following *Wygant*. J.A. Croson Co. v. City of Richmond, 478 U.S. 1016 (1986). *Wygant* had been decided on June 30, 1986. Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

12. *Croson*, __ U.S. at __, 109 S. Ct. at 716, 102 L. Ed. 2d at 876. The court of appeals read *Wygant* as requiring that a remedial measure based on race be narrowly tailored to accomplish a compelling governmental interest. *Id.* at __, 109 S. Ct. at 716-17, 102 L. Ed.2d at 876-77. The court of appeals held that remedying historical discrimination was not a compelling interest, nor was the plan a narrowly tailored remedy. *Id.*

13. *Id.* at __, 109 S. Ct. at 717, 102 L. Ed. 2d at 877.

14. *Id.*

within its jurisdiction the equal protection of the laws."[15] This mandate protects persons who are similarly situated from unequal treatment by state governments.[16] A state government enacting legislation that burdens one class of persons and benefits a similarly-situated class must provide sufficient justification for its action to survive equal protection analysis.[17] When the classification is based on race or national origin—classes considered inherently suspect—a reviewing court subjects the governmental action to strict

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15. U.S. CONST. amend. XIV, § 1.

16. *See, e.g.*, Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985)(fourteenth amendment directs state to treat similarly situated persons alike); Plyler v. Doe, 457 U.S. 202, 216 (1982)(classification by legislature allowable only when related to legitimate purpose); Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)(state may classify for taxation purposes when grounds are such that persons in similar circumstances receive similar treatment). In *Royster*, the tax laws of Virginia subjected Virginia corporations to tax on income gained both inside and outside the state if the corporation did business in the state. 253 U.S. at 414. Corporations that merely were incorporated in Virginia and did not do any business in the state were exempt from tax on income derived from outside Virginia. In striking down this legislation, the Court stated that a governmental classification must rest on grounds fairly related to the purpose of the legislation, "so that all persons similarly circumstanced shall be treated alike." *Id.* In *Michael M. v. Superior Court*, different treatment was justified because the classes were not similarly situated. 450 U.S. 464, 469 (1981). The plaintiff in *Michael M.* was a young male accused of having sexual intercourse with a female under 18 in violation of a California "statutory rape" statute. *Id.* at 466. He attempted to have the information set aside by claiming the statutory rape law discriminated against males. *Id.* at 467. The Court upheld the statute as a reasonable classification reflecting the basic difference that only females risk pregnancy as a result of intercourse. *Id.* at 476. For a discussion of legislation that treats similarly situated persons alike, see Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 344-53 (1949), and *Developments in the Law-Equal Protection*, 82 HARV. L. REV. 1065, 1076-87 (1969).

17. *See, e.g.*, *Plyler*, 457 U.S. at 216-17; Craig v. Boren, 429 U.S. 190, 197 (1976); Reed v. Reed, 404 U.S. 71, 75-76 (1971). In *Plyler*, the Texas legislature had enacted a law that withheld from school districts state money used to educate undocumented alien children. *Plyler*, 457 U.S. at 230. The statute also permitted school districts to refuse enrollment to children who were not "legally admitted" into the United States. *Id.* The Court held that the state did not justify its denial of free public education to this group. *Id.* In *Craig*, an Oklahoma law made it unlawful to sell 3.2 percent beer to females less than 18 years of age and males less than 21 years of age. 429 U.S. at 191-92. Craig was a young man between the ages of 18 and 21 who claimed the statute discriminated against men in that age group because females of the same age could purchase 3.2 beer while males could not. *Id.* at 192. The Court agreed and found the statute a violation of equal protection. *Id.* at 218. In *Reed*, the Court found that reducing the burden on probate courts was an insufficient justification for preferring males who apply to become administrators of the estate of a person who dies intestate. *Reed*, 404 U.S. at 76. *See generally* Farrell, *Equal Protection: Overinclusive Classifications and Individual Rights*, 41 ARK. L. REV. 1, 12-35 (1988)(equal protection concerned with relationship between classification and governmental purpose); Comment, City of Cleburne, Texas v. Cleburne Living Center, Inc.: *The Mentally Retarded and the Demise of Intermediate Scrutiny*, 20 VAL. U.L. REV. 349, 362-65 (1986)(Court analyzes equal protection challenge by reviewing interest involved and classification drawn).

scrutiny, the highest level of review.[18] To pass strict scrutiny, the government must demonstrate that it had a compelling interest in enacting the legislation, and it chose narrowly tailored means to advance its purpose.[19] Courts will use a somewhat less exacting level of review, referred to as intermediate scrutiny, when the classification is one that is quasi-suspect,[20] such as gender[21] or illegitimacy.[22] To be found valid, a quasi-suspect classification must be substantially related to an important governmental interest.[23]

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18. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429, 432 (1984)(racial classification more likely based on prejudicial views than legitimate concerns); Loving v. Virginia, 388 U.S. 1, 11 (1967)(racial distinction viewed with strictest scrutiny and such distinctions especially suspect); McLaughlin v. Florida, 379 U.S. 184, 192 (1964)(racial distinctions constitutionally suspect and viewed with rigid scrutiny); *see also* Erler, *The Fourteenth Amendment and the Protection of Minority Rights*, 1987 B.Y.U. L. REV. 977, 999-1000 (1987)(core of fourteenth amendment involves realization that racial classification never legitimate without compelling and necessary purpose).

19. *E.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986); *Cleburne*, 473 U.S. at 440; *Plyler*, 457 U.S. at 217.

20. *See* Cleburne v. Cleburne Living Center, Inc. 473 U.S. 432, 446 (1985)(refusing to find mentally retarded a quasi-suspect class); Massachussetts Bd. of Retirement v. Murgia, 427 U.S. 307, 325 (1976)(Marshall, J., dissenting)(women, illegitimates are quasi-suspect classes). *See generally*, Note, *Quasi-Suspect Classes and Proof of Discriminatory Intent: A New Model*, 90 YALE L.J. 912, 915-16 (1981)(explaining quasi-suspect classes).

21. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 721-22 (1982)(state has burden of proving classification bears substantial relationship to important governmental interest); Michael M. v. Superior Court, 450 U.S. 464, 468 (1981)(gender based distinction requires greater focus); Craig v. Boren, 429 U.S. 190, 197 (1976)(government must show gender classification substantially related to important objective). *See generally* Comment, *Gender Based Discrimination in Police Reluctance to Respond to Domestic Assault Complaints*, 75 GEO. L.J. 667, 677-91 (1986)(arguing for intermediate scrutiny of discriminatory police action); Note, *Looking for Mr. Bobb: Equal Protection and Gender-Based Discrimination in* Bobb v. Municipal Court, 12 HASTINGS CONST. L. Q. 315, 325 (1985)(discussion of gender classifications challenged under fourteenth amendment).

22. Lalli v. Lalli, 439 U.S. 259, 264 (1978)(state action must have substantial relationship to permissible interest if basis for classification is illegitimacy); Trimble v. Gordon, 430 U.S. 762, 767 (1977)(Court requires more than rationality for classification of illegitimates). *See generally* Zingo, *Equal Protection for Illegitimate Children: The Supreme Court's Standard for Discrimination*, 3 ANTIOCH L.J. 59, 83-91 (1985)(discussion of cases reviewing classifications based on illegitimacy).

23. Craig v. Boren, 429 U.S. 190, 197 (1976); *Hogan*, 458 U.S. at 721-22. In *Hogan*, the Mississippi University for Women claimed that the female-only policy of admissions was maintained to rectify discrimination against females. 458 U.S. at 727. The Court found that the state had not shown the alleged purpose to be the real purpose for the policy. *Id.* at 730. Further, the Court held the classification was not sufficiently related to the alleged purpose. *Id. See generally* Seeburger, *The Muddle of the Middle Tier: The Coming Crisis in Equal Protection*, 48 MO. L. REV. 587, 598-615 (1983)(discussion of development of middle-tier scrutiny for classifications based on illegitimacy and gender); Comment, *Intermediate Equal Protection Scrutiny of Welfare Laws that Deny Subsistence*, 132 U. PA. L. REV. 1547, 1551-55 (1984)(discusses history of intermediate scrutiny).

The least exacting standard of review, referred to as the rational basis test,[24] applies to social or economic regulatory legislation.[25] Under the rational basis test, the state must prove only that the classification bears a rational relationship to a legitimate governmental purpose.[26] The Court has not settled on the correct level of analysis, however, when the government acts to benefit a class of persons that traditionally has been the victim of discrimination.[27]

Courts have upheld legislative affirmative action programs benefitting victims of discrimination on the grounds that these programs are valid methods of remedying the present effects of prior discrimination.[28] The Supreme

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24. *See, e.g.*, New Orleans v. Dukes, 427 U.S. 297, 304 (1976)(ordinance prohibiting sale of food from pushcarts passed rationality test); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976)(rational basis test applied to mandatory retirement statute); Williamson v. Lee Optical, 348 U.S. 483, 488 (1955)(statute prohibiting selling eyeglasses without prescription need only be rational means to address governmental objective).

25. *See* McGowan v. Maryland, 366 U.S. 420, 426 (1960)(no equal protection violation if any reasonable justification for Sunday closing laws); Morey v. Doud, 354 U.S. 457, 468 (1957)(statute regulating licensing of money orders violated equal protection); *Lee Optical*, 348 U.S. at 491 (upholding statute regulating sale of eyeglasses). *See generally* Andersen, *Equal Protection During the 1984 Term: Revitalized Rational Basis Examination in the Economic Sphere*, 36 DRAKE L. REV. 25, 31-37 (1986-87)(discusses three instances when government did not meet rational basis standard).

26. *E.g.*, Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1984); Schweiker v. Wilson, 450 U.S. 221, 230 (1981); *Dukes*, 427 U.S. at 304.

27. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 265, 274 (1986)(strict scrutiny required by plurality); *Wygant*, 476 U.S. at 301-02 (Marshall, J., dissenting)(Justices Marshall, Brennan and Blackmun argue for intermediate scrutiny). In *Fullilove v. Klutznick*, the majority upheld an affirmative action plan while expressly refusing to decide on the appropriate standard of review. *See* 448 U.S. 448, 492 (1980)(no formula for review adopted). In the Court's first affirmative action decision, only five justices reached the constitutionality issue. *See* Regents of Univ. of Calif. v. Bakke, 438 U.S. 265, 325 (1978)(Justices Brennan, Blackmun, Marshall, White and Powell reached fourteenth amendment issue). Justice Powell stated that any racial distinction calls for "the most exacting judicial examination." *Id.* at 291. Justice Brennan, Blackmun, Marshall, and White argued for intermediate scrutiny. *Id.* at 359 (opinion of Brennan, White, Marshall, and Blackmun, J.J., concurring in the judgment in part and dissenting in part). *See generally* Jones, *The Origins of Affirmative Action*, 21 U.C. DAVIS L. REV. 383, 405-19 (1988)(commentator calls for greater clarity in affirmative action analysis).

28. *See Fullilove*, 448 U.S. at 492 (Congressional set-aside upheld); South Fla. Chapter of the Associated Gen. Contractors of Am. v. Metropolitan Dade County, 723 F.2d 846, 856 (11th Cir. 1984)(county ordinance setting aside portion of county contracts for black contractors upheld as remedy for present effects of past discrimination), *cert. denied*, 469 U.S. 871 (1984). *See generally* Choper, *The Constitutionality of Affirmative Action: Views From the Supreme Court*, 70 KY. L.J. 1, 1 (1981-82)(affirmative action, reverse discrimination, benign discrimination refer to race-based classification aimed at helping minorities). The Court has also reviewed affirmative action plans when the challenger claimed the program was a violation of Title VII of the Civil Rights Act of 1964. *See* Johnson v. Transp. Agency, 480 U.S. 616, 620-21 (1987)(upholding plan considering race and gender in promotion decisions); United Steelworkers of Am. v. Weber, 443 U.S. 193, 199-200 (1979)(upholding plan requiring

Court, however, has been unable to agree whether race-based remedies should be subject to the same strict review as non-remedial race-based legislation.[29] In *Regents of University of California v. Bakke*,[30] the Court's first review of an affirmative action program, an admissions plan favored minorities over non-minority applicants in the medical school admissions process.[31] The Court's fragmented decision did not provide a clear indication of the standard to be used in reviewing the constitutionality of such remedial measures.[32] Of the five Justices addressing the equal protection question in *Bakke*,[33] four held that an intermediate level of scrutiny was applicable,[34] and one held that strict scrutiny was the appropriate measure for any racial

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50 percent quota of blacks in craft training program). The challenge brought in *Croson* was decided only on equal protection grounds. *City of Richmond v. J.A. Croson Co.*, __ U.S. __, __, 109 S. Ct. 706, 730, 102 L. Ed. 2d 854, 893 (1989)(plan violates equal protection clause). For a discussion of the statutory and constitutional tests for affirmative action plans, see Lally-Green, *Affirmative Action: Are the Equal Protection and Title VII Tests Synonymous?*, 26 DUQ. L. REV. 295 (1987). The Court has reviewed court ordered affirmative action plans as well. *See* United States v. Paradise, 480 U.S. 149, 166-67 (judicial plan ordering relief for discrimination in police department survives equal protection); Sheet Metal Workers v. EEOC, 478 U.S. 481, 482 (1986)(upholding court-ordered relief for discrimination under Title VII).

29. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 301 (1986)(Marshall, J., dissenting)(agreement on equal protection analysis of affirmative action has eluded Court). *See generally* Schwartz, *It's All Over But the Shouting*, 86 MICH. L. REV. 524, 543-53 (1987)(discussion of stand taken by each Justice on level of scrutiny appropriate to affirmative action).

30. 438 U.S. 265 (1978).

31. *Id.* at 275. The University of California at Davis Medical School devised a program that held open 16 of 100 places in the enrolling class for "special admission" minority applicants who were excepted from the minimum grade point average required of regular applicants. *Id.* Alan Bakke was a non-minority applicant who was not accepted into the school for two consecutive years although minority students with lower scores were accepted. *Id.* at 277-78. Bakke brought suit, claiming he was denied admission based on race. *Id.* The Court declined to decide the merits of an earlier equal protection challenge to an affirmative action plan. *See* DeFunis v. Odegaard, 416 U.S. 312, 314 (1974). The challenger had been denied admission to a law school. *Id.* at 314. The trial court granted a mandatory injunction requiring the school to admit him. *Id.* at 314-15. The state's highest court held that the admissions plan did not violate the equal protection clause. *Id.* at 315. At the time the student petitioned for writ of certiorari to the United States Supreme Court, he was a third year student. *Id.* The Court refused to decide the merits of the case because his status as a third year student rendered the controversy moot. *Id.* at 319-20.

32. *See id. Bakke* consisted of six separate opinions in which five Justices agreed that the plan was impermissible. *Id.* at 271. Four of the five Justices, however, avoided the fourteenth amendment issue, finding the admissions program a violation of Title VII. *Id.* at 421. *See generally* Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 913-31 (1983)(overview of disagreement between Justices in *Bakke* over affirmative action); Stone, *Equal Protection in Special Admissions Programs: Forward from Bakke*, 6 HASTINGS CONST. L.Q. 719, 719-23 (1979)(discussing the complex decision); Ginger, *Who Needs Affirmative Action?*, 14 HARV. C.R.-C.L. L. REV. 265, 290-91 (1979)(explaining what the Court left undecided in *Bakke*).

33. *See Bakke*, 438 U.S. at 325 (Justices Brennan, Blackmun, Marshall, White and Pow-

classification.[35] In *Fullilove v. Klutznick*,[36] a plurality of the Court refused to adopt a particular level of scrutiny in upholding a congressional minority set-aside plan.[37] *Fullilove* did not clarify the confusion surrounding judicial review of race conscious remedial programs,[38] although a majority of the Court found a benign racial distinction valid after applying somewhat heightened scrutiny.[39] The next major affirmative action decision, *Wygant v.*

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ell reach fourteenth amendment issue). Justices Brennan, Blackmun, Marshall, and White held the affirmative action plan was constitutional. *Id.* at 325-26.

34. Regents of Univ. of Calif. v. Bakke, 438 U.S. 265, 359 (1978)(Brennan, J., dissenting)(remedial race-based classifications must have substantial relationship to important governmental objectives). Justices Blackmun, Marshall and White joined Justice Brennan in calling for intermediate review. *Id.*

35. *See id.* at 289-91 (review of admissions plan calls for strict scrutiny). Justice Powell expressed his view that equal protection means the same protection regardless of the claimant's race, and any racial distinction is suspect, requiring "the most exacting judicial examination." *Id.* at 291.

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

37. *Id.* at 491-92. Chief Justice Burger concluded that the set-aside plan would survive the scrutiny articulated in either of the two tests advocated in *Bakke*. *Id.* The set-aside in *Fullilove* was a congressional plan which required grantees of federal money for local public works projects to purchase 10 percent of the materials for such projects from a Minority Business Enterprise. *Id.* at 458-59. A Minority Business Enterprise was defined as a business owned at least 50 percent by minorities, or if a public enterprise, at least 51 percent minority stockholders. Minorities are United States citizens who are Negroes, Orientals, Spanish-speaking, Indians, Aleuts and Eskimos. *Id.* at 459. The plan allowed for a waiver of the requirement if compliance with the 10 percent set-aside was not feasible. *Id.* at 461. The plan was enacted to address barriers, caused by racial discrimination, that prevented access by minority-owned businesses to public contracts. *Id.* at 463. To this end, the regulation included guidelines that stated a minority business that had not been socially or economically disadvantaged was not eligible to participate in the set-aside. *Id.* at 464.

38. *See* City of Richmond v. J.A. Croson Co., __ U.S. __, __, 109 S. Ct. 706, 717, 102 L. Ed. 2d 854, 877 (1989)(opinion by Chief Justice Burger in *Fullilove* did not apply any traditional form of equal protection review). There were five opinions written in *Fullilove*, consisting of the plurality, two concurrences and two dissents. *Id.* at 453, 496, 517, 522, 532. In concurring, Justice Powell argued that strict scrutiny applies to any racial classification. *Id.* at 496 (Powell, J., concurring). Justice Marshall, joined by Justices Brennan and Blackmun, concurred in the plurality's judgment and in doing so stated their view that a remedial racial classification is subject to intermediate scrutiny. *Id.* at 519 (Marshall, J., concurring). Justice Stewart was joined by Justice Rehnquist in his dissent in which he stated that benign racial distinctions should not be treated differently than any racially drawn statute. *Id.* at 526 (Stewart, J., dissenting). Without stating a clear standard of review, Justice Stevens found the plan not narrowly tailored. *Id.* at 552 (Stevens, J., dissenting). *See generally* Note, *The Affirmative Action Controversy*, 3 HOFSTRA LAB. L.J. 111, 120-24 (1985)(analysis of Justices' views as expressed in *Fullilove*); Kilgore, *Racial Preferences in the Federal Grant Programs: Is There a Basis for Challenge After Fullilove v. Klutznick ?*, 32 LAB. L.J. 306, 308-11 (1981)(review of stances taken by each member of Court in *Fullilove*).

39. *Fullilove*, 448 U.S. at 492. Chief Justice Burger wrote the opinion of the plurality, joined by Justices White and Powell. *Id.* at 453. The concurring opinion by Justices Marshall, Brennan and Blackmun named the intermediate standard of requiring the government to es-

Jackson Board of Education,[40] addressed the constitutionality, under the equal protection clause, of a collective bargaining agreement that provided preferential treatment to minority teachers in protection against lay-offs.[41] The Court struck down the lay-off provision in *Wygant* as being too intrusive,[42] yet it admitted that some race-conscious remedies are appropriate if adequately supported by evidence of discrimination and sufficiently tailored to advance the remedial purpose.[43] In his plurality opinion, Justice Powell found that the remedy did not satisfy strict scrutiny.[44] After discussing the invalidity of remedying the effects of general societal discrimination as a compelling governmental interest,[45] Justice Powell reasoned that the lay-off program was not a narrowly tailored remedy.[46] Once again, the Court disagreed on the measure of review, with four Justices requiring strict scrutiny,[47] three Justices finding an intermediate review appropriate,[48] and two Justices stating no clear standard.[49]

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tablish that the classification is substantially related to the furtherance of an important objective as the correct level of review. *Id.* at 519.

40. 476 U.S. 267 (1986).

41. *Id.* at 273. The plan was part of a collective bargaining agreement approved by a school board and a teachers union. *Id.* at 270. The plan provided that, should lay-offs become necessary, those teachers having seniority would keep their positions except that there would not be a greater ratio of minority teachers laid off than the existing ratio of minority teachers. *Id.* Thus, a more senior non-minority teacher might be laid off before a less senior minority teacher to retain the current percentage of minority positions. *Id.* at 272. The plaintiffs in *Wygant* were teachers with more seniority who had been laid off while less senior minority teachers were retained. *Id.*

42. *Id.* at 283-84. The plurality found the plan too burdensome on innocent non-minority teachers whose lives would be seriously disrupted by the loss of their job. *Id.* at 283.

43. *Id.* at 280-81.

44. *Id.* at 283-84.

45. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986). The plurality decision first discussed the validity of the purpose for the plan as articulated by the school board. *Id.* The stated purpose was to provide role models for minority school children in an attempt to redress the effects of discrimination by society. The plurality stated that societal discrimination without other evidence does not justify a racial preference. Writing for the plurality, Justice Powell concluded that the plurality requires proof of previous discriminatory acts on the part of the governmental entity that is enacting the racial classification. *Id.* Justice Powell explained that the proper statistical analysis for proving discrimination on the part of the school board would be to show a disparity between the ratio of minority teachers in the school system and the ratio of qualified minority teachers in the job market. *Id.* at 275.

46. *Id.* at 283-84.

47. *Id.* at 280. Chief Justice Burger and Justices O'Connor and Rehnquist joined in the plurality opinion. *Id.* at 268-69.

48. *Id.* at 301-02 (Marshall, J., dissenting). Justice Marshall stated that neither strict scrutiny nor rational basis were applicable; rather, racial distinctions must have a substantial relationship to an important governmental objective. Justices Brennan and Blackmun joined in the dissent. *Id.* at 295 (Marshall, J., dissenting).

49. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 294-95 (1986)(White, J., concurring).

In *City of Richmond v. J.A. Croson Co.*,[50] the Supreme Court settled on strict scrutiny as the correct measure of review for affirmative action legislation.[51] Justice O'Connor, writing for the majority, examined the ordinance and found that the city had not introduced sufficient evidence to show the plan was a remedy for previous discrimination.[52] The majority repeated the rule established in *Wygant* that the existence of societal discrimination alone is not an adequate justification for enacting race-based legislation.[53] The Court refused to limit affirmative action programs to situations where governmental bodies admit to their own past discrimination.[54] Instead, the Court indicated that relevant evidence of discrimination would consist of a statistical comparison revealing a disparity between the number of qualified MBEs available and the number actually receiving contracts.[55] The Court found the city's statistical evidence did not establish actual discrimination in the construction industry in the Richmond area.[56]

Justice White found the plan impermissible without stating the applicable standard of review. Justice Stevens, in a separate dissent, found the plan constitutional by weighing the purpose and the harm caused. *Id.* at 317 (Stevens, J., dissenting).

50. __ U.S.__, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989).

51. *Id.* at __, 109 S. Ct. at 721, 102 L. Ed. 2d at 881-82.

52. *Id.* at __, 109 S. Ct. at 723-24, 102 L. Ed. 2d at 884-85.

53. *Id.* at __, 109 S. Ct. at 723, 102 L. Ed. 2d at 885.

54. *Id.* at __, 109 S. Ct. at 717, 102 L. Ed. 2d at 877 (city not limited to addressing its own discrimination). Although the Croson Co. argued *Wygant* held that the enacting body only has the power to remedy its own discrimination, Justice O'Connor found that this "stark alternative" was not the appropriate analysis. *Id.*

55. City of Richmond v. J.A. Croson Co., __ U.S. __, __, 109 S. Ct. 706, 725, 102 L. Ed. 2d 854, 887 (1989).

56. *Id.* at __, 109 S. Ct. at 727, 102 L. Ed. 2d at 889. Justice O'Connor analyzed each of the five facts used by the district court in deciding that the city had sufficiently identified an injury that would permit a race-conscious remedy. The five facts were as follows: 1) the ordinance claims to be remedial; 2) proponents of the Plan expressed their view that past discrimination existed in the construction trade; 3) although minorities comprised 50 percent of Richmond's population, only .67 percent of the city's prime contracts went to minority businesses; 4) state and local contractors' organizations included few minority members; and 5) Congress determined, in 1977, that past discrimination had prevented minorities from participating nationally in the construction trade. *Id.* at __, 109 S. Ct. at 724, 102 L. Ed. 2d at 885-86. The first claim, that the ordinance called itself a remedy, was found to carry little weight since race-based distinctions require a more compelling purpose than good intentions on the part of the legislature. *Id.* The Court considered the statements offered by the Plan's proponents regarding past discrimination in the construction industry to be highly conclusory generalizations. The Court dismissed the disparity between the number of MBEs receiving city contracts and the number of minorities in the population as having little relevance. The Court noted that the proper evidence would show the comparison between the number of contracts awarded to minority businesses and the number of minority businesses available to accept such contracts. *Id.* Furthermore, the percentage quoted reflected the statistics regarding prime contracts; the city had no figures showing the percentage of subcontracts or the total dollar amount of subcontracts awarded to minority firms. The Court did not find the low member-

The Court considered it difficult to determine whether the set-aside was narrowly tailored because the city had not clearly defined the discrimination being remedied.[57] The ordinance, however, was found not to meet the strict scrutiny requirement that a plan be narrowly tailored.[58] The Court reasoned that Richmond had not first considered race-neutral alternatives,[59] and the plan's thirty percent quota was not linked to any identified goal.[60] Furthermore, the Court stated that the city could review its contracting policies on a case-by-case basis rather than set a rigid quota.[61] Justice O'Connor reasoned that such a searching analysis would serve to reveal those instances where a legislature is not using a racial distinction legitimately.[62] Justice O'Connor also noted that strict scrutiny provides that the means used to further the compelling goal fit that goal so closely that there is little chance that the racial distinction was brought about by underlying stereotypes or racial prejudice.[63] Finally, the Court stated that racial distinctions create a dangerous stigma which may further unfounded conceptions of racial inferiority, and therefore, such distinctions must be subject to the highest level of review.[64]

In his dissenting opinion, Justice Marshall criticized the majority's reasoning that each piece of evidence, taken alone, would not justify the measure enacted.[65] The dissent found the factual basis sufficient to establish prior discrimination.[66] The dissenting Justices argued for intermediate scrutiny as

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ship in trade organizations significant, absent evidence of the number of MBEs eligible to become members. *Id.* at __, 109 S. Ct. at 726, 102 L. Ed. 2d at 888. Finally, reliance on congressional findings of past discrimination in *Fullilove* was found to be of little help in establishing that discrimination existed in Richmond. *Id.*

57. *Id.* at __, 109 S. Ct. at 728, 102 L. Ed. 2d at 890.

58. *Id.* at __, 109 S. Ct. at 729, 102 L. Ed. 2d at 891.

59. City of Richmond v. J.A. Croson Co., __ U.S. __, __, 109 S. Ct. 706, 729, 102 L. Ed. 2d 854, 890-91 (1989).

60. *Id.* at __, 109 S. Ct. at 728, 102 L. Ed. 2d at 891.

61. *Id.* The Court reasoned that because the city already considered both bids and waiver applications individually, the rigid quota was unnecessary. *Id.* at __, 109 S. Ct. at 728, 102 L. Ed. 2d at 891. The *Fullilove* waiver provision provided a waiver where an MBE's higher bid was not due to discriminatory effects. *Id.* This was found to pose less of an equal protection problem since the remedy was not based only on race. *Id.* at __, 109 S. Ct. at 729, 102 L. Ed. 2d at 891.

62. *Id.* at __, 109 S. Ct. at 721, 102 L. Ed. 2d at 881-82.

63. City of Richmond v. J.A. Croson Co., __ U.S. __, __, 109 S. Ct. 706, 721, 102 L. Ed. 2d 854, 881-82 (1989).

64. *Id.* Justice O'Connor was joined by Justices White and Kennedy and by Chief Justice Rehnquist in this portion of the opinion. *Id.* at __, 109 S. Ct. at 712, 102 L. Ed. 2d at 871. Justice Scalia, in his concurrence, supported the requirement that any racial distinction must be subject to strict scrutiny. *Id.* at __, 109 S. Ct. at 735, 102 L. Ed. 2d at 899 (Scalia, J., concurring).

65. *Id.* at __, 109 S. Ct. at 746, 102 L. Ed. 2d at 913 (Marshall, J., dissenting).

66. *Id.* at __, 109 S. Ct. at 740, 102 L. Ed. 2d at 905 (Marshall, J., dissenting).

the proper standard of review for remedial programs.[67] Using this level of analysis, the dissent found the plan sufficiently tailored to Richmond's objectives of remedying the effects of prior discrimination.[68] The dissent relied on the similarity between the Richmond Plan and the plan upheld by the Court in *Fullilove*.[69] The dissent argued that the strict standard applied by the majority will impose a heavy burden on governmental entities that desire to use race-conscious programs to address the current effects of past discrimination.[70]

The Supreme Court's decision in *Croson* established a standard of review that will ensure that affirmative action programs are what they claim to be—a remedy for the proven effects of discrimination.[71] An affirmative action plan can only be effective when the government has fully developed the factual basis for the remedy.[72] The Court correctly pointed out that without a solid factual predicate, it is difficult to determine the proper scope of a race-

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67. City of Richmond v. J.A. Croson Co., __ U.S. __, __, 109 S. Ct. 706, 743, 102 L. Ed. 2d 854, 909 (1989)(Marshall, J., dissenting).

68. *Id.* at __, 109 S. Ct. at 750, 102 L. Ed. 2d at 917 (Marshall, J., dissenting).

69. City of Richmond v. J.A. Croson Co., __ U.S. __, __, 109 S. Ct. 706, 750, 102 L. Ed. 2d 854, 917 (1989). The dissent pointed out that both plans had limited duration, included waiver provisions, and operated only prospectively so that no contractor lost vested rights in a particular contract. *Id.* at __, 109 S. Ct. at 750, 102 L. Ed. 2d at 917-18 (Marshall, J., dissenting).

70. *Id.* at __, 109 S. Ct. at 754, 102 L. Ed. 2d at 922. Justice Blackmun authored a separate dissent in which he wrote that the majority opinion pretends discrimination has not existed in Richmond. *Id.* at __, 109 S. Ct. at 757, 102 L. Ed. 2d at 926 (Blackmun, J., dissenting).

71. *See id.* at __, 109 S. Ct. at 721, 102 L. Ed. 2d at 881 (searching inquiry separates actual remedies from politically motivated classifications); *see also* Days, *Fullilove*, 96 YALE L.J. 453, 458-59 (1987)(courts should develop criteria separating valid and invalid affirmative action plans). Drew Days successfully argued for the congressional set-aside upheld in *Fullilove*. Days, *Fullilove*, 96 YALE L.J. 453, 453 (1987). In his article, he suggests that the standards for review of set-asides through the time of the *Fullilove* decision were not strict enough in light of public sensitivity to race-based classifications. *Id.* at 456. He further suggests that remedial measures will not be successful legally, socially or as to their results in the long run if such programs are not carefully designed and executed. *Id.*; *see also Joint Statement: Constitutional Scholars' Statement on Affirmative Action After* City of Richmond v. J.A. Croson Co., 98 YALE L.J. 1711, 1713 (1989)(Court in *Croson* required remedy be fair and effective).

72. *See Wygant*, 476 U.S. at 276 (improper factual basis may be used to avoid pursuing actual remedy); *see also* Days, *Fullilove*, 96 YALE L.J. 453, 469 (1987)(without careful factfinding program may fail to reach those most deserving). In his article, Professor Days argues that effective affirmative action legislation requires a thorough examination of the facts, or a remedy may not be effective. Days, *Fullilove*, 96 YALE L.J. 453, 469 (1987). Without careful identification of the reasons for a remedial program, the benefits may never reach those who suffer the effects of discrimination. *Id.* Furthermore, a program without a proper factual basis may benefit the undeserving, may burden innocent persons unfairly, and may continue longer than necessary. *Id.*

conscious remedy.[73] Thus, a legislative body attempting to remedy the effects of discrimination must sufficiently define the effects being addressed.[74] The Richmond Plan is an example of a program that was hastily enacted, without a full inquiry into the effects of discrimination faced by the minority-owned construction companies in the Richmond area.[75] As such, the ordinance was not drafted in response to meaningful evidence which would define the program's scope.[76]

The Court recognized that legislative racial preferences are permissible when properly used;[77] however, the Court was appropriately concerned with

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73. Croson, __ U.S. at __, 109 S. Ct. at 728, 102 L. Ed. 2d at 890. In *Regents of Univ. of Calif. v. Bakke*, Justice Powell explained that a state government can use a race-based classification only when there have been judicial, administrative or legislative findings of discrimination. 438 U.S. 265, 307 (1978). Justice Powell noted that permissible racially drawn remedies were limited in scope to vindicate constitutional violations. *Id.* at 300. The set-aside in *Fullilove v. Klutznick* was found to be based on "abundant evidence" allowing Congress to conclude that governmental contracting practices continued to deny access to public contracting opportunities for MBEs. 448 U.S. 448, 478-79 (1980). The Court reasoned that a program is permissible when narrowly tailored to further its objectives. *Id.* at 490. The Court found the set-aside to pass the "most searching examination." *Id.* at 491.

74. *See* City of Richmond v. J.A. Croson Co., __ U.S. __, __, 109 S. Ct. 706, 727, 102 L. Ed. 2d 854, 889 (1989)(states and municipalities must identify discriminatory practices with degree of specificity); *see also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986)(without particularized findings, remedies without real limits). The school district did not sufficiently define the discrimination addressed in *Wygant*. 476 U.S. at 276. The school district argued that minority children need minority role models to overcome the effects of societal discrimination. *Id.* at 274. The Court rejected this theory as being "too amorphous a basis for a imposing a racially classified remedy." *Id.* at 276. The role model theory could allow for a racial preference to continue indefinitely without a logical termination. *Id.* at 275.

75. *See* Brief for Appellee at 7, City of Richmond v. J.A. Croson Co., __ U.S. __, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989)(No. 87-998). The council enacted the plan following a two hour hearing where two speakers promoted the program and five speakers spoke out against it). A council member sponsoring the plan announced that only .67 percent of Richmond's prime contracts had gone to MBEs. *Id.* at 8. He provided no documentation for this figure. *Id.* The only document before the council was a list of city contract amounts given out from January, 1978 through February, 1983. The list did not identify which firms were MBEs. Furthermore, the council did not identify the reasoning behind the 30 percent set-aside amount. *Id.* A council member stated that there was discrimination present in the construction trade in the area. *Croson*, __ U.S. at __, 109 S. Ct. at 724, 102 L. Ed. 2d at 886. The city manager stated that racial discrimination continued to affect his hometown of Pittsburg. *Id.* The Court in *Croson* found these statements of little value in proving the existence of discrimination in the city's construction industry. *Id.*

76. *See* Croson, __ U.S. at __, 109 S. Ct. at 725, 102 L. Ed. 2d at 887 (city had no record of number of MBEs available for prime or subcontracts in city). The city's claims of pervasive discrimination in the Richmond construction industry were not raised in the district court. Brief for Appellee at 12, City of Richmond v. J.A. Croson Co., __ U.S. __, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989)(No. 87-998).

77. *See Croson*, __ U.S. at __, 109 S. Ct. at 720, 102 L. Ed. 2d at 881 (city may act to dismantle system of racial discrimination in local industry). The Court's previous decisions

the possible misuse of such a suspect tool.[78] The requirements of strict scrutiny provide protection from arbitrary, illegitimate or unreasoned governmental classifications.[79] Since all racial classifications have the potential danger of encouraging divisive racial stereotypes, such programs should be carefully deployed.[80] Racial distinctions are highly controversial measures because of the public's sensitivity to racial classifications.[81] Furthermore, the use of a preference for minorities creates a burden for non-minorities which must be justified by more than just good intentions.[82] When an af-

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also recognized that race-conscious remedies may be appropriate. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280-81 (1986)(remedies may take race into account); Fullilove v. Klutznick, 448 U.S. 448, 490 (1980)(Congress may use racial distinction to further remedial goals). *But see Fullilove*, 448 U.S. at 525 (Stewart, J., dissenting)(Constitution prohibits government from ever causing detriment to individual because of race). *See generally* Comment, *Set-Asides of Local Government Contracts For Minority Owned Businesses: Constitutional and State Law Issues*, 17 N.M.L. REV. 337, 338-48 (1987)(discussion of constitutionality of set-aside programs).

78. *Croson*, __ U.S. at __, 109 S. Ct. at 721, 102 L. Ed. 2d at 881-82. The Court has consistently stated that any racial classification is suspicious. *See Fullilove*, 448 U.S. at 480 (programs using racial criteria require careful evaluation by courts); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978)(dictum)(any racial distinction inherently suspect and requires exacting review); *see also* Days, *Fullilove*, 96 YALE L.J. 453, 457 (1987)(programs not carefully reviewed susceptible to abuse). *But cf.* Schwartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over But The Shouting*, 86 MICH. L. REV. 524, 548-51 (1987)(affirmative action does not arise from prejudice towards whites because majority unlikely to prejudice itself).

79. *See* City of Richmond v. J.A. Croson, __ U.S. __, __, 109 S. Ct. 706, 721, 102 L. Ed. 2d 854, 882 (1989)(strict scrutiny protects against illegitimate motives); Fullilove v. Klutznick, 448 U.S. 448, 491 (1980)(any racial preference requires most searching review to uphold constitutional guarantee); Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985)(race rarely relevant to achieving legitimate goals).

80. *See Fullilove*, 448 U.S. at 535 (Stevens, J. dissenting)(racial distinctions potentially harmful); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978)(opinion of Justice Powell)(racial preferences may serve to reinforce stereotypes). *See generally* Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312, 1318-19 (1986)(race-conscious approach to affirmative action damaging to racial equality).

81. *See Wygant*, 476 U.S. at 273 (distinctions based on ancestry are offensive to free nation); *see also* United Steelworkers of America v. Weber, 443 U.S. 193, 254 (1979)(Rehnquist, J., dissenting)(nothing as destructive to idea of equality as racial quota); Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312, 1322-23 (1986)(affirmative action exacerbates societal divisions).

82. *See Fullilove*, 448 U.S. at 484 (burden on innocent permissible when remedy appropriately limited); *see also Wygant*, 476 U.S. at 283-84 (preferential treatment in protection from lay-offs too burdensome on non-minority individuals); *Bakke*, 438 U.S. at 298 (some inequity in placing burdens for past wrongs on innocent persons); Weinberger v. Weinsenfeld, 420 U.S. 636, 648 (1975)(merely stating benign purpose not shield from inquiry into actual purpose). *See generally* Rutherglen & Ortiz, *Affirmative Action Under the Constitution and Title VII: From Confusion to Convergence*, 35 UCLA L. REV. 467, 485-91 (1988)(analyzes reason Court found lay-off plan too burdensome in *Wygant*); Note, *The Non-perpetuation of Discrimination*

firmative action program is narrowly tailored to reach its goals, the positive results for persons who have had limited opportunities because of discrimination justify the burden on non-minorities.[83] The burdens created by Richmond's ordinance were not justified because there was no review of the Plan's effectiveness for victims of discrimination.[84] Furthermore, the waiver provision was not flexibly administered.[85] In addition, both the program's overly broad definition of minorities and its allowance for subcontracts to MBEs throughout the entire country revealed that the Plan was not well-reasoned.[86] The Court's careful review of the ordinance under strict scru-

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in Public Contracting: A Justification for State and Local Minority Business Set-Asides After Wygant, 101 HARV. L. REV. 1797, 1799-1802 (1988)(Court found burden of lay-offs too intrusive as remedy).

83. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 281 (1986)(eradication of racial discrimination may require innocent persons to bear some burden); Fullilove v. Klutznick, 448 U.S. 448, 484 (1980)(permissible for limited and appropriately tailored remedy to create some burden on innocent individuals). *See generally* Morris, *New Light on Racial Affirmative Action*, 20 U.C. DAVIS L. REV. 219, 243-46 (1987)(discussion of burdens on innocent persons created by remedial program).

84. *See* Brief for Appellee at 30, City of Richmond v. J.A. Croson Co., __ U.S. __, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989)(No. 87-998)(five year term of Richmond Plan may be renewed indefinitely without review). In comparison, the plan in *Fullilove* was a temporary remedy for which Congress must review the need before extending the duration. *Fullilove*, 448 U.S. at 513 (opinion of Powell, J. concurring); *see also* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 308 (1978)(proper remedy for proven discrimination subject to continuing review). *See generally* Choper, *The Constitutionality of Affirmative Action: Views From the Supreme Court*, 70 KY. L.J. 1, 15-21 (1981-82)(discussion of elements of *Fullilove* program that led to Court's conclusion of validity).

85. *See* City of Richmond v. J.A. Croson Co., __ U.S. __, __, 109 S. Ct. 706, 713, 102 L. Ed. 2d 854, 872 (1989)(waiver only in exceptional circumstances). To justify a waiver of the 30 percent set-aside, the prime contractor must show he has made "every feasible attempt to comply" and there were not enough qualified MBEs available or interested in participating. *Id.* In contrast, the plan upheld in *Fullilove* allowed a waiver where a grantee could establish that his "best efforts" would not produce the 10 percent goal of the program. *Fullilove*, 448 U.S. at 488. Furthermore, in *Fullilove*, complete or partial waiver was allowed where an MBE quoted an unreasonably high price which was not due to that firm's extra costs from the present effects of discrimination. *Id.* at 470-71. *See generally* Comment, *Set-Asides of Local Governmental Contracts For Minority Owned Businesses: Constitutional and State Law Issues*, 17 N.M.L. REV. 337, 344-47 (1987)(narrow tailoring includes requirement of adequate waiver).

86. *See Croson*, __ U.S. at __, 109 S. Ct. at 727-28, 102 L. Ed. 2d at 890 (no evidence of discrimination affecting Indian, Eskimo, Oriental, Spanish-speaking or Aleut persons in Richmond area). Although the city ostensibly enacted the Plan to remedy discrimination in the Richmond construction industry, the Plan had no geographic limit for MBEs. *Id.* at __, 109 S. Ct. at 713, 102 L. Ed. 2d at 871-72. In addition, the Richmond ordinance, unlike the *Fullilove* set-aside, did not inquire whether the individual MBE seeking benefit of the Plan had actually suffered from disadvantages due to discrimination. *Compare Fullilove*, 448 U.S. at 482 (administrative measure available to prevent participation by minority firms not disadvantaged by discrimination) *with Croson*, __ U.S. at __, 109 S. Ct. at 729, 102 L. Ed. 2d at 891 (no consideration whether participating MBE actually experienced effects of discrimination).

tiny revealed these fundamental flaws which may have been overlooked under a less exacting standard.[87]

Justice Marshall, in his dissent, suggested that the majority's application of strict scrutiny represents a step backwards for affirmative action programs.[88] Strict scrutiny need not prove fatal to affirmative action; instead, it can serve to promote carefully designed programs that address proven discrimination.[89] Justice O'Connor's opinion continues to recognize the right of a state or municipality to enact a remedial program.[90] Strict scrutiny only requires that if the governmental unit chooses a race-based plan, the government must carefully document the need for the plan and clearly define the scope of the plan to fit the injury.[91] While applauding the City of Richmond for its attempt to remedy the effects of discrimination,[92] the dissent over-

87. *See Croson*, __ U.S. at __, 109 S. Ct. at 730, 102 L. Ed. 2d at 893 (city's racial preference violates equal protection clause in failure to properly identify need for remedy); *see also* Days, *Fullilove*, 96 YALE L.J. 453, 480 (1987)(governmental entity promulgating set-aside should meet tougher standards than currently employed).

88. *See* Fullilove v. Klutznick, 448 U.S. 448, 492-93 (1980)(MBE set-aside plan survives review under intermediate or strict scrutiny). In Justice O'Connor's concurrence in *Wygant*, she reiterated her view that strict scrutiny is the appropriate standard of review for remedial classifications. *Wygant*, 476 U.S. at 285 (O'Connor, J., concurring). She points out, however, that the Justices agree that a remedy for present or past discrimination by the government is an interest that justifies the use of a "carefully constructed affirmative action program." *Id.* at 286 (O'Connor, J., concurring).

89. *See Croson*, __ U.S. at __, 109 S. Ct. at 721, 102 L. Ed. 2d at 882 (adherence to strict scrutiny does not indicate racial remedies no longer needed). In *Croson*, Justices Marshall, Brennan and Blackmun reiterated their view previously expressed in *Fullilove* and *Bakke* that remedial classifications warrant only intermediate scrutiny in part because the Justices see strict scrutiny as being "fatal in fact." *Id.* at __, 109 S. Ct. at 752, 102 L. Ed. 2d at 920 (Marshall, J., dissenting). In *Fullilove*, however, the Court found a congressional set-aside plan constitutional under either intermediate or strict scrutiny, revealing that the highest standard of review is not automatically fatal to a remedial classification. *See Fullilove*, 448 U.S. at 493 (under Court's analysis the provision survives either test); *see also Joint Statement: Constitutional Scholars' Statement on Affirmative Action After* City of Richmond v. J.A. Croson Co., 98 YALE L.J. 1711, 1712 (1989)(Court in *Croson* insists affirmative action plans be designed carefully, not repealed).

90. *See Croson*, __ U.S. at __, 109 S. Ct. at 720, 102 L. Ed. 2d at 881 (city may act to dismantle system of exclusion based on race).

91. *See* Croson, __ U.S. at __, 109 S. Ct. at 729, 102 L. Ed. 2d at 892 (city may take appropriate measures where system of discrimination properly identified). *See generally Joint Statement: Constitutional Scholars' Statement on Affirmative Action After* City of Richmond v. J.A. Croson Co., 98 YALE L.J. 1711, 1712-13 (1989)(fair, effective, and flexible plans meet equal protection requirements).

92. *See id.* at __, 109 S. Ct. at 739, 102 L. Ed. 2d at 904 (welcome indication of progress); Fullilove v. Klutznick, 448 U.S. 448, 485-86 (1980)(valid for Congressional plan to attempt to put minority groups on more equal footing). *See generally* Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1329 (1986)(noting beneficial effects of affirmative action).

looked the likelihood that such an improperly designed remedy would not benefit those in Richmond who had been disadvantaged by discrimination.[93]

Although the majority was correct in finding the Richmond Plan to be without sufficient proof of discrimination, the requirements for proving discrimination after *Croson* may make it difficult for some municipalities to adopt an affirmative action plan.[94] Because it is unclear what constitutes a permissible plan, a governmental body may fear its plan would not survive an equal protection challenge.[95] Governments may also find that the collection of sufficient data to prove discrimination is too expensive to undertake. Additionally, requiring a comparison of the percentage of available MBEs, instead of the general minority population, does not take into account that discrimination may have prevented minorities from entering an industry.[96] The Court's decisions suggest that a plan is more likely to be considered narrowly tailored when the enacting body considers race-neutral means prior to enacting a racial classification.[97] A narrowly tailored plan should inquire whether individual MBEs seeking to participate have actually been disadvantaged.[98] Additionally, the Plan should allow for a waiver either

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93. *See* City of Richmond v. J.A. Croson Co., __ U.S. __, __, 109 S. Ct. 706, 729, 102 L. Ed. 2d 854, 891 (1989)(successful Oriental business owner from outside Richmond has preference). The Plan was ineffective because the ordinance would have allowed a minority business owner from another geographic area not affected by the discrimination alleged in the Richmond area to obtain a contracting advantage. *Id.* This inclusion of racial groups and geographically distant businesses could obstruct the actual remedial benefits in Richmond. *Id.*

94. *See Croson*, __ U.S. at __, 109 S. Ct. at 754, 102 L. Ed. 2d at 922 (decision creates daunting standard). The dissent suggested that the majority went further than necessary in reviewing the Richmond Plan. *Id.* at __, 109 S. Ct. at 740, 102 L. Ed. 2d at 905 (Marshall, J., dissenting). According to the dissent, this attack on affirmative action "will inevitably discourage governmental entities . . . from acting to rectify the scourge of past discrimination." *Id.*

95. *See* Days, *Fullilove*, 96 YALE L.J. 453, 484 (1987)(government may be unable to make required inquiries). The author argues for more substantial evidence of proven discrimination than courts required before *Croson*. *Id.* at 480-83. He concedes that this approach may leave some governmental bodies incapable of conducting the research necessary to support a set-aside. *Id.* at 484.

96. *See Croson*, __ U.S. at __, 109 S. Ct. at 747, 102 L. Ed. 2d at 913 (Marshall, J., dissenting)(minorities unable to enter tight-knit industry). The dissent would have validated evidence of disparity between the number of MBEs receiving contracts and the general minority population because discrimination has excluded minorities from the construction industry. *Id.* The majority agrees that discrimination has disadvantaged black entrepreneurs attempting to enter the industry, but finds this alone does not warrant the use of a racial quota. *Id.* at __, 109 S. Ct. at 724, 102 L. Ed. 2d at 885. For a discussion of how discrimination deters minorities from entering certain trades, *see Joint Statement: Constitutional Scholars' Statement on Affirmative Action After* City of Richmond v. J.A. Croson Co., 98 YALE L.J. 1711, 1714 (1989).

97. *See Croson*, __ U.S. at __, 109 S. Ct. at 728, 102 L. Ed. 2d at 890-91 (not narrowly tailored since no consideration of alternatives).

98. *See* City of Richmond v. J.A. Croson Co., __ U.S. __, __, 109 S. Ct. 706, 728-29, 102

where an MBE could not show its increased bid price resulted from the effects of discrimination or where there were no qualified MBEs available.[99] The enacting body should relate its quota to a clearly defined legislative goal.[100] The Court is more likely to validate a quota that is related to the percentage of available MBEs.[101] Finally, since affirmative action is remedial, a plan should be limited in duration and provide for a periodic review of its effectiveness.[102]

Proponents of affirmative action may fear that the Court has taken a stand against the constitutionality of any race-conscious remedy. In the past, strict scrutiny usually meant a governmental classification would fail. Hopefully the standard set in *Croson* only reveals that the Court requires that race-conscious remedies be carefully drawn so that the benefits to those who have suffered the effects of discrimination justify the burdens placed on innocent individuals. Because there was such minimal investigation by the city prior to its adoption of the Plan, this ordinance denied the equal protection of the burdened class. This result should not be read so broadly that no state, city or governmental agency is able to adequately define the discrimination it is attempting to address. Governmental entities that sincerely attempt to define the often subtle effects of racial discrimination are attempting to comply with the fourteenth amendment's mandate of equal protection and should not be barred from doing so by an unrealistic burden of proof. Governmental bodies that use relevant statistics to establish the existence of present effects of prior discrimination should be able to satisfy the requirement of a compelling governmental interest. Further, those governmental bodies that design a remedy based on those statistics that is flexible and sufficiently limited in duration should be able to meet the requirement of narrow tailoring. A reasonable application of strict scrutiny by courts will allow

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L. Ed. 2d 854, 891 (1989)(Richmond Plan did not consider whether MBE actually suffered discrimination).

99. *See Croson*, __ U.S. at __, 109 S. Ct. at 728, 102 L. Ed. 2d at 891 (waiver program makes plan less likely to deny equal protection).

100. *See* Days, *Fullilove*, 96 YALE L.J. 453, 484 (1987)(relates quota to percentage of MBEs). Days suggests that a city enacting a race-based quota should initially tailor the percentage to the percentage of minority contractors in the area. *Id.* The percentage could be raised if the city finds evidence that minorities previously excluded from the industry were responding favorably to the program. *Id.*

101. *Id.* at __, 109 S. Ct. at 728, 102 L. Ed. 2d at 891.

102. *See* City of Richmond v. J.A. Croson Co., __ U.S. __, __, 109 S. Ct. 706, 730, 102 L. Ed. 2d 854, 893 (1989)(preference for racial group temporary). The *Fullilove* plan upheld by the Court was not permanent and could be extended only after re-examination by Congress. Fullilove v. Klutznick, 448 U.S. 448, 513 (1980)(opinion of Powell, J., concurring).

effective affirmative action plans to operate without violating equal protection.

Martha J. Hess