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The Future of Minority Set-Aside Programs after City of Richmond

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THE FUTURE OF MINORITY SET-ASIDE PROGRAMS
AFTER CITY OF RICHMOND

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I. INTRODUCTION

The 1988-89 United States Supreme Court term led many to believe that the judiciary's attitude toward affirmative action had taken a dramatic conservative shift, causing litigants thereafter to deal with a new conservative Court.\(^1\) Whether the issue is Title VII,\(^2\) Equal Protection,\(^3\) or any other kind of attack on discrimination,\(^4\) the feeling is that it will be more difficult for employees to prove, and easier for employers to practice, subtle forms of discrimination.


\(^2\) Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1982), which provides that it shall be unlawful for an employer to discriminate on the basis of race, color, religion, sex, or national origin. See Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2124 (1989) (where the Court held that in disparate-impact cases, the employee has the burden of isolating and identifying specific employment practices that are allegedly responsible for any statistical disparities, but the employer can rebut with evidence of business justification).


One type of controversial affirmative action plan is the minority set-aside program. Set-asides were instituted by various governmental agencies in an attempt to alleviate the effects of past discrimination in the government contracting process. This Note will focus on the future of these plans in the wake of the recent Supreme Court decision, City of Richmond v. J.A. Croson Co. The conclusion is that City of Richmond was rightly decided as this country moves into the 1990's and seeks to achieve the goal of true racial equality.

First, an examination of the background of affirmative action leading up to set-asides is in order. Second, this Note will analyze City of Richmond and the constitutional and social issues at stake, balancing whether minority set-asides are needed with the recognition that discrimination and lack of economic opportunity for minorities still exists in our society. Finally, the Note will examine several lower court cases in which judges have already begun to apply the City of Richmond analysis. It will become apparent that “strict” set-asides are not the answer to achieving social and economic equality. Race-neutral methods will be the wave of the future, since this decision will force government agencies to reevaluate and redefine their programs. The lower court cases examined are just the beginning of the application of the new principles. It will take several years to realize the full impact of City of Richmond, but it appears that the future is bleak for minority set-aside programs.

II. AFFIRMATIVE ACTION AND SET-ASIDES BEFORE CITY OF RICHMOND

In order to understand the Supreme Court's view of minority set-aside programs, it is important to review the three leading cases which laid the framework for the City of Richmond decision. These cases are Regents of the University of California v. Bakke, Fullilove v. Klutznick, and Wygant v. Jackson Board of Education. The Court's decisions in these three cases developed and refined the legal doctrines surrounding the current view of affirmative action and set-asides.

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5 Minority set-aside programs can be described as government programs that “require federal agencies to remove individual contracts and classes of contracts from the open competitive system and 'set them aside' for restricted bidding.” Lowry, Set-Aside Programs: Viable Vehicles for Change or Threats to the Free Enterprise System, in SELECTED AFFIRMATIVE ACTION TOPICS IN EMPLOYMENT AND SET-ASIDES, Vol. 1, U.S. Commission on Civil Rights 110 (March 1985) (quoting Assoc. Gen. Contractors of Am.).

6 While it is true that government set-aside programs assist many different types of minority businesses, this Note will focus specifically on the construction industry. This industry in particular has a history of documented racially discriminatory practices. See generally Fullilove v. Klutznick, 448 U.S. 448 (1980).


9 448 U.S. 448 (1980).

Affirmative action plans designed to hire and promote minorities took root in the early 1960's and were strengthened during President Johnson's administration. Initially, lower courts had upheld race-conscious plans designed to remedy past discrimination. However, affirmative action seemed to suffer a setback after Bakke. Justice Powell, writing the key opinion, interpreted the Equal Protection Clause as a guarantee which "cannot mean one thing when applied to one individual and something else when applied to a person of another color." He concluded that racial and ethnic classifications of any sort were suspect and subject to the most rigorous judicial scrutiny.

The plaintiff in Bakke, a white male, was twice rejected for admission to the University of California-Davis Medical School. The size of the entering class was set at 100 students, with 16 seats being set aside for "disadvantaged" applicants. In essence, the non-disadvantaged students could only compete for the 84 regular admission slots, while disadvantaged students could compete for all 100 slots. As the program was being administered, the only "disadvantaged" applicants accepted were members of designated minority groups. Bakke challenged the school's program, claiming racial discrimination in violation of the Equal Protection Clause.

Justice Powell declared the special admissions program invalid and found that Bakke should have been admitted to the medical school. He concluded that classifications based on race were impermissible unless the state had a substantial governmental interest. Here, because the admission program was not the result of past judicial findings, and the school could not identify particular instances of discrimination on its part, Powell found no compelling interest. Remediating "societal discrimination" was not a sufficient basis for a racial set-aside. Powell did remark, however, that while race can be a factor in an affirmative action policy,

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14 Id. at 291. The Court considered a preferential admissions program for minorities in law school in DeFunis v. Odegaard, 416 U.S. 312 (1974). Even though the case was not decided on its merits (the Court determined the issue was moot since the petitioner, who claimed discrimination, had been ordered admitted to law school by the lower court, and was near graduation), Justice Douglas suggested strict scrutiny should be used to evaluate even benign classifications. Id. at 333.
15 Bakke, 438 U.S. at 276-77.
16 Id. at 274-75.
17 Id. at 289.
18 Bakke, 438 U.S. at 276.
19 Id. at 278.
20 Id. at 320.
21 Id. at 305. Justice Powell was careful to note that legitimate state interests will always include ameliorating the effects of past, identified discrimination, such as in the school desegregation cases. Id. at 307.
22 Id.
it cannot be the sole factor.

In contrast, Justices Brennan, White, Marshall and Blackmun found the program constitutionally sound, establishing their view that "racial classifications are not per se invalid under the Fourteenth Amendment." Adopting a strict level of scrutiny, these Justices found that remedying societal discrimination was an important governmental objective, and using racial classifications was a means substantially related to that objective. Finally, Justice Stevens, along with Chief Justice Burger and Justices Stewart and Rehnquist, agreed that Bakke should have been admitted to the medical school. However, these Justices felt the case should have been decided under Title VI of the Civil Rights Act of 1964, without need to reach the constitutional issues.

After Bakke, affirmative action once again gained strength in Fullilove v. Klutznick. Fullilove was a challenge to the federal Public Works Employment Act of 1977, specifically the constitutionality of the section of the Act pertaining to "minority business enterprises" (MBEs). This section required that ten percent of money received from federal grants for local public works projects must be awarded to minority-owned businesses. Minorities were defined as Negroes, Spanish-speaking people, Orientals, Indians, Eskimos, and Aleuts. A total or partial waiver was permitted in the event the contractor could not meet the ten percent requirement after a good faith effort. Various associations of contractors and subcontractors filed suit alleging that the provision on its face violated the Equal Protection Clause of the fourteenth amendment and the Due Process Clause of the fifth amendment.

The ten percent set-aside was upheld, with the Justices splitting into several blocs. Chief Justice Burger delivered an opinion joined by Justices White and Powell. Noting first that Congress had the power to enact such legislation as an exercise of the Spending Power, Burger determined

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23 Bakke, 438 U.S. at 320.
24 Id. at 356 (Brennan, J., concurring in part and dissenting in part).
25 Id. at 362.
26 Id. at 376-77.
27 Id. at 411 (Stevens, J., concurring in part and dissenting in part) ("Our settled practice . . . is to avoid the decision of a constitutional issue if a case can be fairly decided on a statutory ground"). These Justices concluded that deciding whether race can ever be used as a factor in an admissions decision was not an issue in the case.
28 448 U.S. 448 (1980).
29 Pub. L. No. 95-28, 91 Stat. 116, which amended the Local Public Works Capital Development and Investment Act of 1976, Pub. L. No. 94-369, 90 Stat. 999, 42 U.S.C. §§ 6701-6736 (1982). Essentially, the Act permitted the Secretary of Commerce to make grants to any state or local government for construction or improvement of local public works projects. Id. at § 6702(a). The Act also provided that construction projects shall be awarded to the lowest bidder meeting established criteria. Id. at § 6705(e)(1).
32 Id.
33 Fullilove, 448 U.S. at 469-71.
34 Id. at 455.
35 U.S. Const. art. I, § 8, cl. 1.
that the legislature had abundant evidence of past discrimination in public contracting. Next, he found that the congressional program was sufficiently narrowly tailored to achieve the goal of remedying the effects of such discrimination because of the waiver provision as well as administrative mechanisms that ensured only bona fide MBEs were included in the program. Finally, while there was a burden on non-minority firms, Burger concluded that this burden was relatively light. Without actually identifying the level of scrutiny used, Burger and White concluded that the remedial measures adopted by Congress in the Public Works Employment Act of 1977 did not violate the Constitution.

On the other hand, Justice Powell wrote separately and used strict scrutiny, finding that Congress had a compelling governmental interest in redressing identified discrimination against minority contractors, and the means chosen were reasonably necessary to achieve the goal of remedying past discrimination. Powell concluded that legislative history showed Congress, in enacting the MBE provision, had identified past discrimination based upon extensive findings. Taking a different stance, Justices Marshall, Brennan and Blackmun agreed that, in general, government classifications based upon race are subject to strict scrutiny, but they emphasized that an exception must be made for government programs employing racial classifications for remedial purposes. These Justices contended that such programs should be subject to only intermediate scrutiny—the government objective must be important and the means must be substantially related to that objective. Under this standard, the set-aside would of course be found constitutional.

Justices Stewart and Rehnquist, joining in a dissenting opinion, declared that any official action that classifies according to race is “inherently suspect and presumptively invalid.” The MBE provision in

36 Fullilove, 448 U.S. at 477-78. Chief Justice Burger noted the extensive congressional hearings surrounding the passage of the Act. Id. at 453-72. At the same time, however, he pointed out that Congress could legislate without making the extensive findings required of a judicial or administrative proceeding. Id. at 478.

37 Id. at 481-82.

38 “[T]he 10% minimum minority business participation contemplated by this program would account for only 0.25% of the annual expenditure for construction work in the United States.” Id. at 484, n.72.

39 Fullilove, 448 U.S. at 491-92.

40 Id. at 507 (Powell, J., concurring).

41 Id. at 515 (Powell, J., concurring). In concluding that the means were necessary, Justice Powell weighed five considerations: 1) alternative remedies had been tried and were unsuccessful; 2) the MBE provision was not a permanent part of the federal contracting requirements; 3) the 10% figure chosen was reasonable, falling roughly between the percentage of contractors that are minorities and the percentage of total population that is minority; 4) the program included a waiver provision; and, 5) the burden on innocent third parties was minimal. Id. at 511-14.

42 Id. at 503.

43 Fullilove, 448 U.S. at 517-18 (Marshall, J., concurring).

44 Id. at 519.

45 Id.

46 Id. at 523 (Stewart, J., dissenting).
question was found to be discriminatory on its face since it preferred members of one group over members in another solely because of race. Justice Stevens in his dissenting opinion concluded that the MBE provision was not a narrowly tailored remedial measure.47 His analysis suggested that he would likely vote to strike down most legislative minority set-aside programs.

After Fullilove, lower courts struggled to analyze minority set-aside plans in the wake of the latest word from the Supreme Court.48 Wygant v. Jackson Board of Education49 one of the next affirmative action cases accepted for review by the nation's highest court, helped the movement toward strict scrutiny for all racial classifications.50 Wygant concerned an attack by white teachers against a layoff policy instituted by the Jackson, Michigan Board of Education that allowed white teachers with more seniority to be laid off in lieu of minority teachers with less seniority.51

47 Id. at 537-41 (Stevens, J., dissenting). Justice Stevens was concerned that the remedy must bear a rational relationship to the extent of the harm it was intended to cure. The remedy here was much broader than necessary to remedy any past wrong because it included groups that may have never been victimized by racial discrimination. Id.

48 See South Fla. Chapter of the Associated Gen. Contractors of Am. v. Metropolitan Dade County, 723 F.2d 846 (11th Cir. 1984) (court upheld county minority set-aside program finding a legitimate objective of past discrimination coupled with means that were sufficiently narrowly tailored); Associated Gen. Contractors of Cal. v. City and County of San Francisco, 813 F.2d 922 (9th Cir. 1987) (municipal ordinance that gave bidding preference to minority owned business struck down because no finding of prior discrimination by the city nor were the means narrowly tailored); Ohio Contractors Ass'n v. Keip, 713 F.2d 167 (6th Cir. 1983) (state statute allowing minority set-asides upheld because of sufficient findings of past discrimination and the statute was sufficiently narrow in scope to comply with Fullilove); J. Edinger & Son, Inc. v. City of Louisville, 802 F.2d 213 (6th Cir. 1986) (municipal ordinance giving preference to minority-owned businesses struck down because statistical evidence to support alleged past discrimination was insufficient); Michigan Road Builders Ass'n v. Milliken, 894 F.2d 563 (6th Cir. 1987) (lack of evidence to support past identified discrimination compelled court to strike down state set-aside program).


50 Wygant is discussed because it was decided on Equal Protection grounds and because the Supreme Court, on remand, ordered the Fourth Circuit to reconsider City of Richmond in light of Wygant. Of course, the Supreme Court had decided other affirmative action cases around the same time as Wygant. See Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) (struck down layoff plan that discharged white firefighters who were not responsible for past discrimination); Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) (Title VII did not preclude city from voluntarily entering consent decree benefiting individuals who were not the actual victims of discrimination); Johnson v. Transportation Agency, 480 U.S. 616 (1987) (affirmative action plan to increase the number of women in traditionally male positions upheld); Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421 (1986) (Court affirmed race-conscious remedies imposed by trial judge on union that had been found to have violated Title VII); United States v. Paradise, 480 U.S. 149 (1987) (using Equal Protection analysis, Court upheld a district court order mandating a one-for-one promotional quota for black state troopers).

The Board followed this policy after suit was brought by minority teachers alleging non-compliance with an agreement between the Board and the Jackson Education Association. The District Court upheld the racial preferences outlined in the agreement, finding that the approach was a permissible remedy for past societal discrimination by providing "role models" for the minority schoolchildren. The Sixth Circuit Court of Appeals affirmed.

Justice Powell, joined by Chief Justice Burger and Justices Rehnquist and O'Connor, found that the layoff policy violated the Equal Protection Clause. Powell looked to his Bakke and Fullilove opinions and once again concluded that any classification based on race was inherently suspect and was subject to the most searching examination. Thus, a two-pronged strict scrutiny analysis provided that the racial classification must be justified by a compelling governmental interest and the means chosen by the government must be narrowly tailored to achieve its purpose. As in Bakke, Powell found that alleviating societal discrimination was not a compelling governmental interest, and he reaffirmed the government agency's lack of authority to remedy past societal discrimination. In addition, there was no factual finding that the Board itself discriminated in the past. Keeping in mind that remedial measures may take race into account, Justice Powell deemed the means chosen by the government were not sufficiently narrow, since less intrusive measures such as hiring goals were available. Layoffs created an undue burden on innocent third parties; "valid hiring goals," even though they may burden some, are not as harsh and are more evenly spread throughout society.

Justices Marshall, Brennan and Blackmun dissented. They argued that layoffs were a permissible way to remedy past discrimination, especially in this case, since the agreement was ratified by the teachers, eighty percent of whom were white. These Justices seemed greatly concerned with the possibility that requiring an admission of guilt or judicial determination of culpability would dissuade a government agency from

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52 The provision in question was part of a collective bargaining agreement between the Board and the teachers union which provided protection against layoffs for minority teachers. Id. at 270. The state court where the suit was filed found that the Board had breached its contract with the minority plaintiffs. But the agreement was upheld even though it effectively discriminated against white teachers, as a permissible remedy for past societal discrimination. Thus, the Board adhered to the agreement after the successful suit by the plaintiffs. Id. at 272. This led to the present action by white teachers.

50 Id. at 272-73.
54 Id. at 284. Justice O'Connor did not join in Part IV of the opinion.
55 Wygant, 476 U.S. at 273-74.
56 Id. at 274.
57 Id. at 276.
58 Id. at 278.
59 Id. at 283-84.
60 Id. at 282-83.
61 Id. at 299 (Marshall, J., dissenting).
instituting voluntary affirmative action.\textsuperscript{62} This view was also expressed by Justice O'Connor, who stated: "The imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations."

\textit{Bakke} and \textit{Wygant} show the progression of the Court toward rejecting remedial programs based solely on race.\textsuperscript{64} \textit{Fullilove}, however, confirmed the Court's hesitation to overturn an action of Congress designed to remedy racial discrimination. The Court consistently divided into factions. Brennan, Marshall and Blackmun felt that an intermediate level of scrutiny was required for affirmative action plans of all types. Powell, Burger, Rehnquist and Stewart followed a strict scrutiny analysis for any classification based on race. The current Supreme Court, with the inclusion of conservative justices Scalia and Kennedy, seemed destined to strike down the municipal set-aside program in \textit{City of Richmond}.

III. \textit{City of Richmond v. J.A. Croson Co.}

A. Facts and Opinions

The Supreme Court decided \textit{City of Richmond v. J.A. Croson Co.}\textsuperscript{65} in January 1989. Justice O'Connor, joined in part by Chief Justice Rehnquist and Justices White, Kennedy and Stevens, wrote the majority opinion

\begin{footnotesize}
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\item \textsuperscript{62} Id. at 304. Justice Marshall emphasized that "formal findings" of past discrimination should not be necessary before an agency adopts an affirmative action program, nor should any remedial policy be directed only at specific acts of identified discrimination. \textit{Id.} at 305. Presumably, he takes the position that remedying societal discrimination is permissible.
\item \textsuperscript{63} Id. at 290 (O'Connor, J., concurring).
\item \textsuperscript{64} The Supreme Court's movement affected how lower courts applied the stricter standards of scrutiny to minority set-asides. Prior to \textit{Wygant}, for example in Ohio Contractors Ass'n v. Keip, 713 F.2d 167 (6th Cir. 1983) and South Florida Chapter of the Associated Gen. Contractors of America v. Metropolitan Dade County, Florida, 723 F.2d 846 (11th Cir. 1984), federal courts appeared willing to uphold minority set-asides. However, the strict scrutiny analysis in \textit{Wygant} forced courts to strike down set-asides. Courts found that lesser government agencies were attempting to remedy societal discrimination (a non-compelling interest), since they did not sufficiently identify past discrimination. \textit{See}, \textit{e.g.}, J. Edinger & Son, Inc. v. City of Louisville, 802 F.2d 213 (6th Cir. 1986) (court found that city had not identified its own discriminatory practices, but instead was trying to remedy societal discrimination); Michigan Road Builders Ass'n v. Milliken, 834 F.2d 583 (6th Cir. 1987) (state did not develop evidence of its own discrimination; it did not have a compelling governmental interest in remedying past societal discrimination); Associated Gen. Contractors of Cal. v. City and County of San Francisco, 813 F.2d 922 (9th Cir. 1987) (court concluded city had no proof of its own discrimination; thus, its set-aside must have been an attempt to remedy societal discrimination).
\item \textsuperscript{65} 488 U.S. 469 (1989).
\end{itemize}
\end{footnotesize}
which struck down Richmond, Virginia's minority set-aside program. Using the Wygant analysis, O'Connor concluded that the city's program violated the Equal Protection Clause because it had instituted a loosely defined plan without sufficiently identifying the need for remedial action.66

The Richmond City Council had passed a minority set-aside ordinance which required all non-minority prime contractors that received municipal construction contracts to award at least thirty percent of the dollar value of subcontracts to Minority Business Enterprises (MBEs).67 Minorities were defined as blacks, Spanish-speaking people, Orientals, Indians, Eskimos, or Aleuts.68 In addition, the plan was described as "remedial in nature," temporary in duration, and waivable where the prime contractor could prove that it was unable to obtain thirty percent minority participation.69 J.A. Croson Company, a white contracting firm, had submitted a bid on a contract for new plumbing fixtures in the city jail. After attempting to comply with the thirty percent MBE requirement, Croson submitted a waiver application.70 The city denied the waiver and announced plans to rebid the project. Croson subsequently filed suit, alleging the ordinance was unconstitutional. The District Court found the plan was valid and the Fourth Circuit affirmed, following principles laid out in Fullilove.71 However, on remand from the Supreme Court after Wygant, the Fourth Circuit reversed, and found the plan invalid.72 Richmond appealed that decision.

Justice O'Connor, in delivering the opinion, first rebuffed Richmond's argument that Fullilove controls and thus the city has the power to find and remedy past discrimination in its local construction industry. Citing Fullilove, O'Connor reemphasized the broad remedial powers possessed by Congress.73 But, the fact "[t]hat Congress may identify and redress the effects of society-wide discrimination does not mean that . . . States and their political subdivisions are free to decide that such remedies are appropriate."74 O'Connor did point out that a municipality can take remedial measures if it can prove it had become a "passive participant" in

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66 Id. at 511.
67 Id. at 477.
68 Id. at 478.
69 Id.
70 Id. at 482.
71 See J.A. Croson Co. v. City of Richmond, 779 F.2d 181 (4th Cir. 1985).
72 See J.A. Croson Co. v. City of Richmond, 822 F.2d 1355 (4th Cir. 1987). This was typical of lower federal court findings on minority set-asides after Wygant. See cases cited, supra note 64.
73 City of Richmond, 488 U.S. at 488-89. Chief Justice Burger had found this power both in the Commerce Clause and in § 5 of the fourteenth amendment. Fullilove, 448 U.S. at 475-76.
74 City of Richmond, 488 U.S. at 490.
past discrimination in its local construction industry.\textsuperscript{75} As in \textit{Wygant}, O'Connor reaffirmed that societal discrimination alone is not a sufficient compelling governmental interest to warrant set-asides.\textsuperscript{76} It appeared the thirty percent rigid quota established by the Richmond City Council could not be tied to any proof of the city's past discrimination.\textsuperscript{77} In addition, O'Connor was concerned about "[t]he gross overinclusiveness of Richmond's racial preference [which] strongly impugns the city's claim of remedial motivation,"\textsuperscript{78} as well as the fact that the city had not attempted race-neutral methods to increase minority participation in the construction industry.\textsuperscript{79}

Justice Stevens approached the problem from a different angle, observing that the Court should be more concerned with the class of persons benefitted than the standard of review.\textsuperscript{80} Here, the persons benefitted could be contractors that have never even been in Richmond, let alone discriminated against by the city.\textsuperscript{81} Justice Scalia concurred in the judgment as well, underscoring his view that only rare social emergencies can ever justify a governmental agency making a classification based on race.\textsuperscript{82}

As expected, Justice Marshall, joined by Justices Brennan and Blackmun, filed a strong dissent. Marshall reaffirmed his belief that remedial race-conscious plans should be subject only to intermediate scrutiny. To him, it was clear that the city had an important interest in eradicating

\textsuperscript{75} \textit{Id.} at 492. A "passive participant" would be a government agency, who, through inaction, permits discrimination to continue in the private sector. Presumably, if the local construction industry is dominated by white-owned businesses that refuse to hire minorities, then a city would have a "compelling interest" in establishing set-asides. Thus, a city would have a right to interfere in the private sector to prevent public funds from furthering discriminatory practices. Rosenfeld, \textit{Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality}, 87 \textit{Mich. L. Rev.} 1729, 1751-52 (1989). The problem, of course, is what will be sufficient evidence for the city or state to prove private discrimination?

In a post-\textit{Crosen} decision, the district court in Washington found that King County, Washington was a "passive participant" in discrimination in the local construction industry. \textit{Coral Constr. Co. v. King County}, 729 F. Supp. 734, 738 (W.D. Wash. 1989). The court determined that evidence supporting King County's set-aside program was sufficient. That evidence included written or oral descriptions of discrimination. The court concluded that this evidence was not just general assertions of past discrimination, but was strong evidence of discrimination in the local construction industry. \textit{Id.} at 737. Thus, since King County's construction project dollars flowed through the local construction industry, the county was found to be a passive participant in any discrimination which could be documented. \textit{Id.} at 738.

\textsuperscript{76} \textit{City of Richmond}, 488 U.S. at 497-98.

\textsuperscript{77} \textit{Id.} at 499-500.

\textsuperscript{78} \textit{Id.} at 506.

\textsuperscript{79} \textit{Id.} at 507. For a discussion of race-neutral methods see infra Section III.

\textsuperscript{80} \textit{Id.} at 514 (Stevens, J., concurring).

\textsuperscript{81} \textit{Id.} at 515. The statute places no boundaries on MBEs to be used. Thus, contractors from all over the United States could compete for the subcontractor bids. \textit{Id.} at 478.

\textsuperscript{82} \textit{Id.} at 521 (Scalia, J., concurring).
and preventing reinforcement and perpetuation of past discrimination. He also felt the set-aside plan was substantially related to the achievement of the city’s goal. Richmond had closely followed the Congressional plan upheld in Fullilove, both in the percentage chosen and in allowing a waiver where compliance was not possible. Thus, the dissenting Justices remained strong in their belief that plans which favor minorities are a permitted means to remedy past discrimination.

B. The Constitutional and Social Issues at Stake

When determining the validity of state and local minority set-aside programs, the constitutional issue is whether the program survives analysis under the Equal Protection Clause of the fourteenth amendment. Presumably this amendment, as well as much of the legislative activity surrounding the end of the Civil War, was designed to enable the newly freed slaves to become integrated into society as free and equal persons. However, the language of the Equal Protection Clause is race-neutral. Recognizing this fact, the Supreme Court has closely scrutinized any classification based on race. Thus, the fourteenth amendment applies to all citizens; it would be just as appropriate for a white contractor as it would be for a minority contractor to seek equal protection in the process of procuring government construction projects.

However, applying equal protection to blacks and whites has never been easy. The main problem has been using strict scrutiny with classifications based on race, while making an exception for race-conscious affirmative action. Here is where the social issues come into play. It is no secret that discrimination against minorities, especially blacks, has been pervasive in this country. Affirmative action programs are supposed to eradicate this differential treatment, but non-minorities now claim they are being treated unequally. Of course, equal protection should not allow reverse discrimination either. So how does society deal with the...

83 City of Richmond, 488 U.S. at 536-37 (Marshall, J., dissenting). In order to have an interest in remedying past discrimination there must be proof. Justice Marshall felt that Richmond had provided plenty of evidence which came from the local officials as well as the Congressional findings from Fullilove. Id. at 540-43.

84 Id. at 548-51.

85 See generally, Schnapper, Affirmative Action and The Legislative History of the Fourteenth Amendment, 71 Va. L. Rev. 753 (1985). In the Slaughter-House Cases, Justice Miller stated that “the one pervading purpose” of the reconstruction amendments was to protect and secure the freedom of the slave race. 83 U.S. (16 Wall.) 36, 71-72 (1873).

86 U.S. Const. amend. XIV, § 1 reads in part as follows:
No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

reality that minorities are not economically equal due to past discriminatory treatment versus the movement of the Court toward equal treatment regardless of race? Full equality must emphasize individual merit and opportunity. On the other hand, there must be a commitment to those discriminated against so that they have a meaningful opportunity to compete effectively in the marketplace. Keeping this in mind, the following sections will explore the argument for and against set-asides, concluding that City of Richmond is a step in the right direction.

1. Argument of Proponents

Proponents of minority set-asides present two important arguments. First, they argue that these programs are necessary to rid the construction industry of the racial discrimination documented by Congress prior to the enactment of the Public Works Employment Act of 1977. Following Fullilove, many state and local governments, including Richmond, adopted such plans modeled after the federal program. The concern of proponents is that these plans will come under judicial attack and programs will be dismissed at a time when minorities have not yet achieved economic equality. This is a legitimate concern for minorities in America, especially blacks. Statistics show that their economic condition is still behind that of whites. Proponents have obvious reason to be concerned.

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88 See Brief Amicus Curiae for the NAACP Legal Defense and Education Fund, Inc. at 27, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (No. 87-998), which states that the principal purpose of set-aside programs is to provide a “fair opportunity for excluded segments of the community to compete, by compensating for the competitive disadvantages they face because of their virtual exclusion from the marketplace.” See also Drawing New Battle Lines in the Civil Rights Fight, The Washington Post, February 19, 1989, at D1, col. 1. Successful black businessmen point out that minority set-aside programs really do work, perhaps because it is the only way a minority-owned firm will get a share of public contracting. They further contend that “the absence of business set-asides inhibits minority entrepreneurs from even starting out because the odds are against any new or minority business winning a contract.” Id.

89 See Drawing New Battle Lines In the Civil Rights Fight, The Washington Post, Feb. 19, 1989, at D1, col. 1. Only a few days after City of Richmond was decided, Guilford County, N.C. voted to overturn its minority contract program.

90 The NAACP stresses that the goal should be “economic equilibrium in which the percentage of minority businesses is roughly equal to the percentage of minorities in the population,” Brief Amicus Curiae for the NAACP at 37-38, City of Richmond (No. 87-998).

91 For example, both whites and blacks have increased their hourly wage by 50% from 1979 to 1988. Blacks, however, earn on the average $6.15 per hour as compared to $6.81 median wages for whites. Black men fare the worst in relation to white men: $6.94 per hour compared to $8.66 per hour median wages. Black women, on the other hand, earn $5.61 per hour to $5.86 per hour median wages for their white counterparts. BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, BULLETIN 2340, HANDBOOK OF LABOR STATISTICS, Table 40 at 160 (August 1989). See also N.Y. Times, Jan. 20, 1989, at B3, col. 1. The New York Times reported that a study by the Community Service Society in New York City, a 140-year-old non-profit advocacy organization, found that in 1986, 80% of those earning less than $20,000 were black or Hispanic even though employees from those groups made up 42% of the city’s work force.
with the current conservative Supreme Court because it appears indifferent to remedi- ing the social ills of racial discrimination. Some members of Congress also seem uneasy about the latest conservative approach to affirmative action.\textsuperscript{92}

A second important argument of proponents is based on the fact that state and local legislatures are closest to the problems of discrimination since they are closest to the people they represent. Because the politics are local, proponents believe that these branches of government are most likely to represent the wishes of the electorate and that courts should be reluctant to interfere with the decision-making processes at these levels, unless individual constitutional rights are at stake. "Local officials, by virtue of their proximity to, and their expertise with, local affairs, are exceptionally well qualified to make determinations of public good 'within their respective spheres of authority.'"\textsuperscript{93}

This argument has merit. Richmond City Council, which passed the ordinance at a meeting open to public debate, may have been justified in determining that such a program was necessary. The city used several factors in considering its set-aside program.\textsuperscript{94} First, there was a judicially found history of discrimination in the city with regard to voting and education. Second, Richmond relied on findings that over the past five years, less than one percent of public contracts had gone to minorities, even though minorities made up fifty percent of the population. Third, few minorities were members of contracting associations. Finally, the city relied on Congressional findings used to institute the Fullilove plan. In other words, Richmond argued that it should be left alone by courts as long as its decisions were supported with sufficient findings.

However, the Supreme Court in City of Richmond concluded that such state and local government findings are insufficient. For instance, local governments cannot rely on Congressional findings; they must do their own work in proving a history of past discrimination.\textsuperscript{95} The problem for the local and state governments is that they are responsible for remedi- ing discrimination,\textsuperscript{96} yet it is being made increasingly difficult for them to

\textsuperscript{92} Rep. Howard Wolpe of Michigan remarked that the City of Richmond decision "strikes a severe blow to the struggle for racial justice in our country. Affirmative action efforts such as Richmond's have been indispensable to ongoing efforts to correct the economic and social inequities which centuries of racial discrimination have engendered." 135 CONG. REC. E451, Vol. 135, No. 16 (Feb. 22, 1989) (statement of Rep. Wolpe). \textit{But see} 135 CONG. REC. E2495, Vol. 135, No. 93 (July 13, 1989) (statement of Rep. Sensenbrenner) (Congressional action that would overturn the recent Supreme Court decisions goes against everything bargained for in civil rights—a color-blind society).

\textsuperscript{93} \textit{City of Richmond}, 488 U.S. at 544 (Marshall, J., dissenting).

\textsuperscript{94} \textit{See generally}, Joint Appendix, \textit{City of Richmond} (No. 87-998). \textit{See also}, 488 U.S. at 499-500, 544.

\textsuperscript{95} \textit{Cf. City of Richmond}, 488 U.S. at 547 (Marshall, J., dissenting) (city does not have to conduct new studies or produce independent evidence but can rely on evidence generated by other cities as long as it is reasonable) (referring to Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51-52 (1986)).

\textsuperscript{96} \textit{Wygant}, 476 U.S. at 291 (O'Connor, J., concurring in part and concurring in judgment).
do so. Cities can least afford to employ personnel to investigate and compile evidence of identified instances where specific acts of discrimination have taken place.97 Thus, a government agency, while trying to remedy what it truly believes to be discriminatory practices by implementing set-asides such as Richmond’s, runs the risk of the program being struck down in court. On the other hand, local governments may do nothing due to fear of exposing their own past practices.98 However, they then bear a significant risk of lawsuits from disappointed minorities who feel their constitutional rights have been infringed.99 Either way the government will lose, and valuable tax dollars will be spent to defend lawsuits. One problem with strict scrutiny review of minority set-aside programs is that it will require the state and local governments to engage in expensive, detailed fact finding in order to meet the “compelling governmental interest” prong of the analysis. Unless local governments can explicitly prove discrimination, an agency will not be found to have a “compelling governmental interest” in implementing a set-aside program. A further extension of local governments’ problems is whether they have the competency or authority to find and remedy past discrimination.100 Congress has been found to have broad powers in both these areas.101 State legislatures have also been found to have this power,102

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97 Brief of The Nat’l League of Cities, U.S. Conference of Mayors, Nat’l Ass’n of Counties, and Int’l City Management Ass’n as Amici Curiae in Support of Appellant at 20, City of Richmond (No. 87-998) [hereinafter Brief of the Nat’l League].


99 Justice O’Connor noted the dilemma faced by public employers. "[T]hey are trapped between the competing hazards of liability to minorities if affirmative action is not taken to remedy apparent employment discrimination and liability to nonminorities if affirmative action is taken," Wygant, 476 U.S. at 291 (O’Connor, J., concurring in part and concurring in judgment) (emphasis in original).


101 Fullilove v. Klutznick, 448 U.S. 448, 476 (1980). The Chief Justice found that Congress had the power to enforce equal protection guarantees under § 5 of the Fourteenth Amendment. Justice Kennedy, however, was troubled with Congress’ power as found in Fullilove and the denial of such power to states in City of Richmond. "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 . . . ." City of Richmond, 488 U.S. at 518.

102 Ohio Contractors Ass’n v. Keip, 713 F.2d 167, 172 (6th Cir. 1983). See also Michigan Road Builders Ass’n v. Milliken, 834 F.2d 583 (6th Cir. 1987) (state may permissibly employ racial classification but must make sufficient findings that it has discriminated in the past against now favored class).
and so have cities. Thus, the courts have given cities and states the green light to go ahead and implement race-conscious policies, but only after those government units have documented specific acts of discrimination. Presumably, a city may not be aware of how much documentation is enough until it is tested in court. This leads back to the argument that cities and states can least afford to engage in massive fact finding sufficient to satisfy an unknown requirement. Confusion arises where good-faith council members, like those in Richmond, implement a race-conscious program assuming it will pass judicial scrutiny, only to have it struck down as unconstitutional.

Cities and states may believe their programs are constitutionally sound. Yet, the only true test may be in court, since after City of Richmond all existing minority set-aside programs may be subject to judicial review. Civil rights leaders and good-faith proponents of these plans naturally are concerned that the programs will be abandoned. However, the following section will point out that despite negative feelings from some groups, the restructuring of set-aside programs will help move this country toward a state of meaningful equal treatment and bidding on a competitive basis.

2. Argument of Opponents

Those against set-asides propose three major arguments, the most important of which is that the Constitution mandates that equal protection should be applied without preference for anyone. Thus any government classification based on race should be subject to strict scrutiny. Opponents would agree that using this standard in City of Richmond was appropriate. Forcing a government to have a compelling interest will not necessarily mean the complete end of race-conscious remedies. Rather, it will encourage government agencies to examine the facts carefully to ascertain who has been discriminated against and what remedy would

103 Associated Gen. Contractors of Cal. v. City and County of San Francisco, 813 F.2d 922 (9th Cir. 1987). "Like the federal government, a state or its political subdivision has the authority—indeed the 'constitutional duty'... to ascertain whether it is denying its citizens equal protection of the laws and, if so, to take corrective steps." Id. at 929.

104 For the argument from the states' point of view see Brief of the States, supra note 98, at 6-10.

105 A detailed listing of existing state and municipal minority business enterprise programs appears in Appendix I and II, Brief of the Nat'l League, supra note 97.

106 See Bakke, 438 U.S. 265 at 291 (opinion of Powell, J.) "[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny." (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)); "[A]ny racial classification 'must be justified by a compelling governmental interest'... and the means chosen by the State to effectuate its purpose must be 'narrowly tailored to the achievement of that goal.'" Wygant, 476 U.S. at 274.
be appropriate. Narrowly tailored programs would hopefully mean that only those who actually suffered discrimination will receive the remedy. In turn, innocent parties will not be unduly burdened with any program preferring others.

To satisfy a compelling governmental interest in apportioning public contracts on the basis of race, the state or city must identify past discriminatory practices. An example of an adequate finding would be proof that non-minority contractors systematically excluded minority contractors from subcontracting opportunities.\footnote{City of Richmond, 438 U.S. at 509.} Also, an inference of racially motivated exclusion could have been found from a "significant statistical disparity between the number of qualified minority contractors willing and able to perform ... and the number of such contractors actually engaged by the locality ...."\footnote{Id. Justice O'Connor seemed to indicate that a relevant statistical disparity would be sufficient evidence for a city to implement a set-aside. But it is questionable whether the statistical disparity would be sufficient to permit the aggrieved plaintiff to move forward with a claim of discrimination. For example, in Wards Cove Packing Co., Inc. v. Attonio, 109 S. Ct. 2115, 2125 (1989), a Title VII action, the Court held that the plaintiff has the burden of isolating and identifying the employment practices that are responsible for any statistical disparities.} It is important to note that City of Richmond does not prevent a city from remediing governmental and private discrimination which is identified,\footnote{488 U.S. at 491-92.} but it reaffirms the Court's stance that only Congress has the power to remedy past societal discrimination; that is, discrimination not traceable to a specific act or source. Opponents of set-asides would argue that the Supreme Court should prohibit states and cities from attempting to ameliorate societal discrimination since these governments are not in a position to understand and appropriately remedy this problem. They represent a much smaller and less diverse constituency than Congress, for instance, and they may be more informal in their procedures. Thus, they could be more easily influenced by the local majority.\footnote{See Note, supra note 100, at 616.}

Not only must the government agency have a "compelling interest," but the affirmative action program must also be narrowly tailored to achieve the goal that the government agency articulates. Here, the Richmond City Council claimed that it was attempting to remedy past discrimination that accounted for the small number of minority contracting firms in the city.\footnote{See Brief of Appellant City of Richmond at 14, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (No. 87-998). Appellant concluded that the City Council had "abundant reason to conclude that racial discrimination was responsible" for the great disparity in the percentage of contracts awarded and the percentage of minority population. Id. at 26.} Yet the ordinance included contractors from all over the country as well as racial minorities that did not even live in Richmond. It looked more and more like the city had "other reasons" for enacting...
the ordinance,\textsuperscript{112} such as political favoritism based on race. Justice O'Connor alluded to this possibility by noting that blacks comprise fifty percent of Richmond's population and hold a majority of the council seats.\textsuperscript{113} There is the possibility of a political, or racial, majority acting to the disadvantage of a minority based on "unwarranted assumptions or incomplete facts."\textsuperscript{114} O'Connor felt this alone was sufficient reason for subjecting a race-conscious plan to strict scrutiny. Opponents may reason that the potential for racial politics becomes even more important as the United States moves into the 1990's, since more racial minorities are being elected to political offices.\textsuperscript{115} Courts are just as likely to protest racial favoritism as they are to protest political favoritism.\textsuperscript{116}

Two additional factors support the finding that set-asides like Richmond's are not narrowly tailored. First, the city adopted the thirty percent figure using the same analysis as Congress did in \textit{Fullilove}. The ten percent figure justified by Congress fell "roughly halfway between the present percentage of minority contractors and the percentage of minority group members in the Nation."\textsuperscript{117} The thirty percent figure used by Richmond was approximately halfway between one percent (the percentage of city contracts awarded to minority contractors over the last five years) and fifty percent (the percentage of minority population in Richmond).\textsuperscript{118} While this made more sense for the nationwide remedy, it did not make any sense for the municipal remedy since it did not take into account the available number of minority contractors in the city. Thus, the thirty percent figure was virtually unattainable by using Richmond minority contractors,\textsuperscript{119} forcing prime contractors to look outside the city to meet

\textsuperscript{112} "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." \textit{City of Richmond}, 488 U.S. at 506.

\textsuperscript{113} 488 U.S. at 495.

\textsuperscript{114} \textit{Id.} at 495-96. \textit{See also Id.} at 516, n.9 (Stevens, J., concurring in part and concurring in judgment). "The ordinance might be nothing more than a form of patronage. But racial patronage, like a racial gerrymander, is no more defensible than political patronage or a political gerrymander."

\textsuperscript{115} \textit{Id.} at 496. \textit{See also Id.} at 453, 479 (1987). \textit{See also The Washington Post}, February 19, 1989, at D2, col. 1. Successful black businessmen argue that other minority racial and ethnic groups have made it in America by just such political favoritism, why not blacks? Justice Scalia acknowledged that actions which benefit the dominant political or racial group have occurred in the past, with blacks usually receiving the injustice. However, "[w]here injustice is the game . . . turn-about is not fair play." \textit{City of Richmond}, 488 U.S. at 524 (Scalia, J., concurring).

\textsuperscript{116} Fullilove v. Klutznick, 448 U.S. 448, 542 (Stevens, J., dissenting).

\textsuperscript{117} \textit{Id.} at 513-14 (Powell, J., concurring).

\textsuperscript{118} Brief of Appellant City of Richmond at 46, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (No. 87-998).

\textsuperscript{119} Joint Appendix at 35-36, \textit{City of Richmond} (1989) (No. 87-998) (remarks of Patrick Murphy, representative of the American Subcontractors Association).
the goal for the contract being bid on. Richmond argued that this high percentage was necessary in order to take into account the fact that industry discrimination had prevented minorities from participating in the past. However, it would seem that if the problem was not enough minorities in the field, the solution would be to get them into the field, not set aside contracts for those already there. Second, the city haphazardly included the same racial minorities that Congress included in the Public Works Employment Act of 1977. While blacks, Spanish-speaking people, Orientals, Indians, Eskimos, and Aleuts are citizens of the entire United States, the only racial minorities predominantly present in Richmond are blacks.

The second major argument against set-aside programs is the possibility of corruption. Government-backed programs that confer benefits on the basis of race have the potential for assisting individuals, who through fraudulent misrepresentations, are undeserving of assistance. Minority fronts are a predominant form of corruption with set-asides. There are two potential ways that minority fronts can operate: First, firms actually owned by whites employ black owners as "fronts." Second, actual minority contracting firms may win contracts through set-aside programs, and then broker subcontracts to white-owned firms. Thus, companies may receive set-aside benefits without being eligible. In addition, there is the possibility that a government agency does not monitor the continued certification of true minority firms. Minority fronts and ineligible firms partaking in these programs lead many to believe that set-asides are inherently corrupt.

Finally, there is the effect on competition. Set-aside plans like the one Richmond proposed may force a prime contractor to accept a bid from a minority firm that did not provide the lowest bid, just to meet the thirty percent requirement. This in turn would raise the cost of the project to cover the higher subcontractor bid. Either the white prime contractor must reduce his profit on the project in order to submit a lower overall

120 Brief of the Appellant City of Richmond at 45-46, City of Richmond (No. 87-998).
121 City of Richmond, 488 U.S. at 506.
123 "The most widely publicized abuse of a program designed to assist minority businesses was the Wedtech scandal. See Wedtech's Story: From Symbol of Hope to Emblem of Greed, The New York Times, August 5, 1988, at B4, col. 1.
125 "A 1979 internal audit by the Small Business Administration ... revealed that up to a third of minority firms receiving its set-asides were actually ineligible." Perkins, Creating a Climate for Black Business, in A CONSERVATIVE AGENDA FOR BLACK AMERICANS, 65, 72 (2d ed. J. Perkins ed. 1990) (available from The Heritage Foundation).
126 Joint Appendix at 31, City of Richmond (No. 87-998) (remarks of Richard Beck, Richmond contractor).
bid, or bid higher on the project.\textsuperscript{127} If he ends up being the only contractor bidding, as was the case with J.A. Croson Company, the city may be forced to pay the higher cost of the project. Proponents may argue that this spreads the cost of past discrimination over society. Another way to look at it is that it may promote monopolistic practices. For instance, if there is only one minority subcontractor available to do a particular job, he may submit an inflated bid knowing that the prime contractor must pick him to meet the thirty percent goal.

Those against set-asides may produce a host of other reasons for abolishing the programs.\textsuperscript{128} Yet, society must not forget past discrimination against blacks and other minorities in the United States. The next section considers what appears to be the best alternative available after \textit{City of Richmond}—race-neutral methods. These proposals have potential if implemented with planning and dedication.

\textsuperscript{127} Appellee J.A. Croson Co. made a valid argument with regard to the burden on non-minorities. Noting that the 30\% set-aside does not apply to minority prime contractors, non-minority prime contractors are forced to bid on contracts which contain uncompetitive bids from minority subcontractors. Minority prime contractors, on the other hand, can seek competitive bids from both minority and non-minority subcontractors. Brief on Behalf of the Appellee at 29, \textit{City of Richmond} (No. 87-998).

\textsuperscript{128} Another argument against affirmative action programs of all types lies in some peoples' perception of the stigma that it perpetuates for the minority. William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, 1981 to 1988, remarks:

Minorities suffered the stigma of being selected because of the color of their skin, not because of the content of their character; those rejected felt the harsh rebuke of a denial inspired by race, rather than by a competitor's superior qualifications or performance. Negative preference had wormed its way into the policy of "affirmative action" and threatened everything sacred to the American ideal of equality of opportunity.


Minority set-asides especially further this feeling in an industry that has been plagued with problems of discrimination for years. (For a brief discussion of the history of discrimination against blacks in the construction industry see Brief of Appellant City of Richmond at 23, n.38, \textit{City of Richmond}, 488 U.S. 469 (1989) (No. 87-998)). The white contractor may resent being forced to subcontract to someone because he is an available black if he feels the minority firm is not qualified according to his standards. Mark Singer, representative of the Virginia Chapter of the National Electrical Contractors Association, commented at the Richmond City Council meeting: "Set-asides tend to posture contractors in such a way so as to bid jobs that perhaps they really may not be able to perform." Joint Appendix at 33, \textit{City of Richmond} (87-998).

Assistant Professor Randall Kennedy of Harvard Law School argues for affirmative action. He feels that the stigmatic effect of affirmative action must be balanced against the stigmatization that occurs when blacks are absent from significant positions in society. Placing blacks in important institutional settings helps the public become accustomed to the idea that blacks should participate fully in all areas of life. Thus, affirmative action outweighs any stigma that it may cause. Kennedy, \textit{Pursuasion and Distrust: A Comment on the Affirmative Action Debate}, 99 \textit{HARV. L. REV.} 1327, 1331 (1986).
3. Race-Neutral Methods

A valid question is whether set-asides really help minorities enter the construction industry or just help a few successful minority firms remain successful. Justice Stevens commented that the minority firms most likely to benefit from set-aside ordinances would be the ones that "have survived in the competitive struggle, rather than those that have perished." City of Richmond, 488 U.S. at 515 (Stevens, J., concurring). This suggests that set-asides may help perpetuate a monopoly consisting of the strong minority-owned firms, rather than assisting new firms in getting started.

Justice O'Connor criticized Richmond for not attempting race-neutral methods to increase minority business participation in city contracting. A minority firm faces many of the same problems as any other small business getting started, yet the failure rate for minority firms is much higher than for non-minority firms. Race-neutral methods should concentrate on helping new firms, whether minority or not, enter the industry and become viable, competitive enterprises. These methods would also target other potentially disadvantaged groups such as Appalachian whites, veterans, displaced farmers, or non-established white contractors. Including these people in a proposed plan may gain greater acceptance since the emphasis will be on individual merits rather than race-based group entitlement.

There are several major problems faced by new firms getting started. First, obtaining financing is a chief concern. Local governments should concentrate on loan assistance programs, perhaps providing incentives to gain the cooperation of local banks in providing financial assistance

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130 See Brief of the Associated Specialty Contractors, Inc., Amicus Curiae at 4, City of Richmond (No. 87-998). See also Fullilove, 448 U.S. at 467 (1980).

131 Brief of the Associated Specialty Contractors, Inc. at 4, City of Richmond (No. 87-998).

132 City of Richmond, 488 U.S. at 507. "If MBEs disproportionately lack capital or cannot meet bonding requirements, a race-neutral program of city financing for small firms would, a fortiori, lead to greater minority participation." Id.


134 Lowry, supra note 5, at 119. The minority business failure rate over a 30 month period from September 1980 to March 1983 averaged 60% higher than non-minority business failure.

135 R. Glover, supra note 133, at 40.
to new firms and setting up qualification guidelines not dependent upon race. Strict bonding requirements also make it difficult for new firms, especially minority ones, to obtain bonding for government contracting jobs, since bonding companies are reluctant to deal with unestablished contractors. As Justice O'Connor suggested, relaxed bonding requirements (perhaps backed up with government guarantees to bonding companies) would greatly open up the public contracting market.

Another focus should be on the available labor pool. Encouraging apprenticeship programs for minorities and others disadvantaged would increase the number of skilled workers available. This could be accomplished with the cooperation of unions and associations within the construction industry. Knowledge of education and training programs could be made available to this untapped labor pool through trade associations such as the National Association of Minority Contractors.

Finally, new firms lack management and business skills which enable them to operate productively and profitably. States and cities can help in this area. By conducting training seminars, governments can educate contractors as to the "ins and outs" of getting started with public contracting. Local governments can set up seminars, encouraging participation by contracting associations, banks and bonding companies. James H. Lowry, a management consultant experienced in minority business development programs, suggests more private sector involvement, with government incentives such as tax breaks. He further suggests a complete phaseout of the federal government in these programs, with a phasing in of the private sector over a twenty year period. The private sector has the capital to invest and their participation "compounds the resources available for minority . . . business development and transfers much of the responsibility away from the government and into the hands of the free enterprise system."

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137 488 U.S. at 510.

138 See United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979) (Court upheld voluntary plan between a private employer and a union whereby the employer reserved 50% of the openings in a training program for black employees).

139 The National Association of Minority Contractors is a nonprofit organization founded in 1969 to address the needs of small and minority construction contractors. The organization is headquartered in Washington, D.C., and its members include minority and women general contractors, subcontractors, managers, manufacturers, and suppliers. Thomas, *Testimony of the National Association of Minority Contractors* in *SELECTED AFFIRMATIVE ACTION TOPICS IN EMPLOYMENT AND BUSINESS SET-ASIDES*, supra note 5 at 237.

140 R. Glover, supra note 133, at 53.

141 Lowry, supra note 5, at 126.

142 Id.
IV. AFTER City of Richmond: THE PROPOSED DEATH OF MINORITY SET-ASIDES

A. Consideration of Existing Programs

The principles espoused in City of Richmond have already begun to work their way through the lower courts. It appears the future is bleak for minority set-asides as they currently exist. An examination of the first few lower court cases after City of Richmond will give an indication as to how present programs stack up against strict scrutiny analysis. This information will assist state and local governments as they prepare to revamp existing programs.

The Georgia Supreme Court was one of the first to strike down a minority set-aside program after City of Richmond in American Subcontractors Association v. City of Atlanta. The plaintiff in that case challenged a minority and female business enterprise ordinance instituted by the City of Atlanta, alleging violation of the equal protection clause of the Georgia state constitution. The court applied the strict scrutiny analysis set forth in City of Richmond and Wygant; that is, whether there was sufficient evidence of past discrimination to enable the city to have a compelling governmental interest and whether the program was narrowly tailored.

Under the first prong of the strict scrutiny test, the Georgia Supreme Court examined the evidence offered by Atlanta, and was unable to find a compelling government interest. The city had relied upon two studies, a 1977 U.S. Department of Commerce study, and a Voter Education Project study on discrimination against black-owned businesses in Georgia. However, the court ruled this evidence did not support specific discrimination against black contractors in Atlanta; rather, it represented general societal discrimination. In addition, witnesses for the city suggested there were non-racial reasons why there were few black contractors.

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144 The ordinance covered contracts of $25,000 or more. In addition, the plan did not have an expiration date (such as Richmond's ordinance, which expired within five years of its inception), there was no geographical limit, and waivers were permitted if a good faith effort failed to achieve stated goals. American Subcontractors Ass'n v. City of Atlanta, 259 Ga. 14, 14-15, 376 S.E.2d 662, 663 (1989). In addition, the percentage goal was to be set by the mayor, who declared the 1985 goal to be 35%. Id. at 16, 376 S.E.2d at 663.
145 The Georgia state constitution provides: "Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws." Id. at 16, 376 S.E.2d at 663 (quoting GA. CONST. art. I, § 1, cl. 2).
146 Id. at 17, 376 S.E.2d at 664.
147 Id. at 18, 376 S.E.2d at 665.
148 Id. Interestingly enough, the city's Minority Participation Report boasted that MBEs participated in 29% of all city contracts in 1980 and 41.3% in 1981, thus causing the court to question the real need for this kind of program. Id.
Nor did Atlanta's program pass the second prong of strict scrutiny; the program was not narrowly tailored to remedy the alleged discrimination.149 Just like the Richmond statute, Atlanta's statute was not linked to identified acts of discrimination. In addition, there was no attempt at race-neutral methods, such as improving city purchasing and payment procedures or providing loan assistance. These methods would make sense since witnesses for the city testified that problems encountered by minority contractors were not primarily racial, but linked to the usual problems of entry into the profession.150

Another minority set-aside program was struck down in Cone Corp. v. Hillsborough County.151 Hillsborough County, Florida, implemented an MBE plan that required an annual goal of twenty-five percent minority and female participation on projects greater than $100,000.152 The program also included a waiver if good faith efforts failed to produce the requisite percentage of minority or female participation. The plaintiffs brought suit alleging discrimination pursuant to this MBE program.

The district court followed the City of Richmond analysis, and once again a set aside program failed the strict scrutiny test set out by the Supreme Court.153 The opinion stated, "[i]n many instances this Court could substitute the words 'Hillsborough County' for the words 'City of Richmond' or 'Richmond' in the Croson decision and have a true and relevant statement."154 The court felt that the program should have been suspended earlier and money used to work on a new program which would conform to the Supreme Court's guidelines.155

Finally, the U.S. Supreme Court vacated and remanded another set-aside challenge in light of City of Richmond. In H.K. Porter Co. v. Metropolitan Dade County,156 the Eleventh Circuit had upheld a county minority set-aside program requiring five percent minority participation in the award of a federal construction contract for Miami's transportation system. H.K. Porter was the low bidder on the project, yet Dade County awarded the project to the next lowest bidder based on an affirmative action plan.157 The plan was instituted as a result of a Congressional statute, the Surface Transportation Assistance Act of 1978,158 which required affirmative action efforts in order to receive federal funding.159

149 American Subcontractors Ass'n, 259 Ga. at 19, 376 S.E.2d at 666.
150 Id.
152 Cone Corp. v. Hillsborough County, 723 F. Supp. 669, 674 (M.D.Fla. 1989). The County also instituted a set-aside provision whereby specific projects less than $100,000 may be available for bid only by disadvantaged and minority groups. Id. at 675.
153 Id. at 678.
154 Id.
155 Id.
156 825 F.2d 324 (11th Cir. 1987), vacated and remanded, 109 S. Ct. 1333 (1989).
157 Id. at 325.
159 To facilitate an initiative encouraging the participation of minority businesses in federal programs, grantees of the Surface Transportation Act "were required to establish written affirmative action plans which included percentage goals for minority business participation." H.K. Porter, 825 F.2d at 325.
Accordingly, Dade County's bid invitation included a requirement of five percent minority participation. H.K. Porter subsequently filed suit alleging that the five percent goal was unconstitutional.160

The Eleventh Circuit relied on Fullilove and the broad remedial powers of Congress in concluding that the Department of Transportation had authority to promulgate the MBE program in question.161 In addition, the court applied the two-prong Wygant test and found a compelling governmental interest162 and narrow means.163 H.K. Porter Co. argued that the five percent figure was unconstitutional because it was not based on any study or findings. While the court expressed concern about the lack of findings and support, it nevertheless upheld the plan since courts had upheld programs with much higher goals, such as the ten percent goal in Fullilove.164 H.K. Porter is significant in that the Supreme Court's remand appears to question a federal mandate that requires affirmative action. Thus, it may be that a local government's ability to rely on Congressional findings or efforts to remedy past discrimination is now being questioned.165

City of Richmond is forcing many state and local government agencies to reevaluate their minority business enterprise programs, either voluntarily or through litigation.166 In addition, City of Richmond principles are affecting other areas where discrimination is being alleged.167 It will

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160 Id. at 327.
161 Id. at 329.
162 A compelling government interest was found based on several factors. First, Dade County was acting pursuant to Congress' compelling interest in eradicating past discrimination against minorities in the industry. H.K. Porter Co., 825 F.2d at 330. Second, the remedy appeared to be temporary. Id. Finally, a waiver provision was included. Id. at 331.
163 The court found that the county was not required to make additional findings of past discrimination regarding the awarding of this project. "Congress was concerned about a national problem. Its findings provide adequate support for such local projects." 825 F.2d at 331. Cf. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (congressional findings inadequate to support local ordinance requiring minority set-aside goals).
164 H.K. Porter, 825 F.2d at 332.
165 But see Milwaukee County Pavers Ass'n v. Fiedler, 731 F. Supp. 1395 (W.D.Wis. 1990) (district court found that states can rely on congressional findings underlying the Surface Transportation Act of 1987).
167 See Mann v. City of Albany, 883 F.2d 999 (11th Cir. 1989) (remand to lower court in light of City of Richmond to determine whether white job applicant had viable claim of reverse discrimination based on city's promotion of black applicant); Winter Park Communications, Inc. v. FCC, 873 F.2d 347 (D.C. Cir. 1989), aff'd 110 S. Ct. 2997 (1990) (finding City of Richmond not applicable, court held FCC's use of qualitative enhancement for minority ownership in awarding broadcasting licenses did not violate equal protection).
take some time before the details are worked out in the lower courts; in the meantime, the question is what will constitute a valid affirmative action plan to assist minorities and others disadvantaged in public contracting?

B. Successful Future Programs

State and local government agencies must now make decisions regarding existing MBE programs. Routinely following the plan approved in *Fullilove* is no longer a sound course. Nor are waivers or durational limits sufficient to assure that a program will be sustained. Because race-neutral approaches are preferred, a government agency has several factors to consider if it insists upon using a race-conscious program.

First, it is obvious that the agency must adequately identify and support findings of discrimination and not try to remedy general societal discrimination. Relevant statistics can be helpful, but they should not be relied upon to tell the whole story. If racial discrimination is found, the plan must then narrowly define who is to benefit. This definition may require placing geographical boundaries upon those minorities getting preference and carefully limiting the benefit to those racial groups who were discriminated against. In a related area, a government agency should be careful not to rely on stereotypical attitudes when formulating plans.

Second, merely calling a minority set-aside percentage a goal instead of a quota will be insufficient. It is better to avoid percentages, but if one is used, it must be relevant. For example, in *Ohio Contractors Ass-*

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168 There are several criticisms of present set-aside plans. First, many programs have been privately adopted and were not subjected to public deliberation and debate. Second, many plans were hastily put together in an effort to “do something,” without identifying the problem or examining alternative remedies. Third, when confronted with court challenges to these plans, proponents have defended them in unqualified terms instead of attempting to separate the good plans from the bad ones. Days, *supra* note 115, at 458-59.

169 Justice O'Connor compared Richmond's plan with the plan upheld in *Ohio Contractors Ass'n v. Keip*, 713 F.2d 167 (6th Cir. 1983), noting that Richmond did not even know how many MBEs were qualified, whereas in *Ohio Contractors Ass'n*, the State compared the percentage of minority businesses in the state to the percentage of state contracts awarded to minority firms. *City of Richmond*, 488 U.S. at 502.

170 For example, Justice O'Connor points out that Richmond may never even have had an Aleut or Eskimo citizen. 488 U.S. at 506. Presumably, it would not make sense for Richmond to give a preference for these groups.

171 See, e.g., Associated Gen. Contractors of Cal. v. City and County of San Francisco, 813 F.2d 922, 933 (9th Cir. 1987) (supporters of plan could not prove, nor would the court assume, that "male caucasian contractors will award contracts only to other male caucasians").

172 Benna Ruth Solomon, who filed an amicus brief in *City of Richmond* on behalf of Richmond, representing the National Governors Association, the United States Conference of Mayors, and the National League of Cities, stated that "some governors and mayors who distinguished between 'goals' and 'quotas' might be deluding themselves about the effects of the decision." The New York Times, Jan. 25, 1989, at A18, col. 3.
The State of Ohio looked to a study done by a task force set up by the Ohio Attorney General. The study found that while minority businesses constituted seven percent of all Ohio businesses, they received less than one-half of one percent of all state purchase contracts. Therefore, the Ohio General Assembly provided that in state contracts, the general contractor must subcontract five to seven percent of the total value of the contract to certified minority businesses.

Third, the agency must have the competence, or the authority, to find and remedy past discrimination. Federal, state, and city legislatures will be found to have this competence; administrative agencies or mayors may not. Courts and Congress have constitutional authority to find and remedy discrimination. Other government agencies may be found competent if they have been delegated remedial power from another government body which itself has constitutional authority. In addition, not only must the agency have the authority to remedy discrimination, but the governing body must be careful not to violate any other existing statutes or ordinances.

Fourth, a somewhat controversial consideration is whether minorities comprise a majority of the cities' population or political leadership. Plans in areas where this is the case may be looked at more carefully as suggested by Justice O'Connor. Of course, this assumes that all majority decisions which favor the majority are suspect, even though there may be no basis in fact for this assumption.

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713 F.2d 167 (6th Cir. 1983).
Id. at 171.
Id. at 169. See also Janowiak v. Corporate City of South Bend, 836 F.2d 1034 (7th Cir. 1987) (evidence of statistical disparity to support affirmative action plan must establish an imbalance between the relevant qualified area labor pool and the employer's work force).
See generally Note, supra note 100.
The Board of Regents of the Medical School of the University of California at Davis was found not to have this competence. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 309-10 (1978). Similarly, the district court in S. J. Groves & Sons Co. v. Fulton County found that the Department of Transportation is "an administrative agency whose authority is much more limited and whose procedures are subject to much more scrutiny than are the power and procedures of Congress." 696 F. Supp. 1480, 1490 (N.D.Ga. 1987).
See American Subcontractors Ass'n v. City of Atlanta, 259 Ga. 14, 17 n.5, 376 S.E.2d 662, 664 n.5 (1989) (mayor had no mandate to enact a minority business program).
See Note, supra note 100, at 600.
Id. For example, in Bakke, the Board of Regents did not have authority to implement affirmative action plans because the California legislature had not delegated the power to the Board. Id.
See, e.g., Georgia Branch, Associated Gen. Contractors of Am. v. City of Atlanta, 253 Ga. 397, 321 S.E.2d 325 (1984) (ordinance requiring certain contracts be awarded on the basis of race or sex conflicts with ordinance requiring "lowest and/or best bidder").
City of Richmond, 488 U.S. at 495-96.
See Rosenfeld, Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality, 87 Mich. L. Rev. 1729 (1989). The author argued that Justice O'Connor's conclusion was not supported by facts; and even if it were, it would be valid only at an abstract level.
Finally, and most importantly, race-neutral means must be used first. Since there is consensus that problems such as financing, bonding and insurance are barriers to entry into construction, an agency should focus on these areas. These problems can be addressed using race-neutral methods discussed earlier. As a corollary, governments must make sure they do not perpetuate their own past discriminatory practices. For example, effort must be made to be certain all contractors have equal access to potential contracts for bidding, with periodic monitoring in place. Also, reducing government regulations and accompanying paperwork would make it easier for small and minority businesses to operate since their overhead would be decreased.

A 1986 study of 120 municipal minority business development plans found several faults with existing programs. Most cities recognized that minority contractors needed assistance to take advantage of public contracting opportunities. While initial efforts focused on estimating, bidding, and certification of legitimate minority firms, little attention was paid to providing more in-depth technical and managerial assistance. In addition, qualified minority firms were not participating for reasons such as lack of awareness of the program’s existence, intent of the program, or how to access available resources. Successful municipal programs were the ones that have determined the needs of the minority business community, identified and coordinated resources, and established policies and procedures to achieve program objectives.

V. PROPOSED RACE-NEUTRAL MODEL STATUTE

A set-aside should only be used when there are actual identified victims of a discriminatory practice and the degree and type of harm is measurable. While the conclusions in the prior section should be considered if a race-conscious remedy is implemented, the preferred method for a government agency to assist businesses in the contract procurement process would be race-neutral measures. The following municipal model statute is offered as a suggestion:

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185 Sroka, Minority and Women's Business Set-Asides: An Appropriate Response to Discrimination? in SELECTED AFFIRMATIVE ACTION TOPICS IN EMPLOYMENT AND BUSINESS SET-ASIDES, supra note 5, at 103.


187 Id. at 4.

188 Id. at 8.

189 Id. at 7.

190 See Kilgore, supra note 136. at 133.
§ 1-101: All contracts shall be awarded on the basis of competitive sealed bidding, with the contract awarded to the lowest responsive bidder in compliance with municipal requirements. No contract shall be awarded on the basis of race, sex, religion, ethnic or national origin, or other criteria irrelevant to the competitive bidding process.

§ 2-101: There is hereby established a Municipal Procurement Commission appointed by the Mayor to implement regulations and procedures of the contract procurement process. The Commission shall include members of the business community who are experienced in the needs of small or disadvantaged businesses.

§ 3-101: The Commission shall establish regulations to implement a program of assistance for small and disadvantaged businesses in learning how to effectively do business with the city. A disadvantaged business is a small business owned or controlled by persons who have been denied the opportunity to obtain technical, business, or financial assistance because of social or economic disadvantages. A small business is one which is independently owned and operated and which employs less than 50 full-time employees. The Commission shall establish further guidelines as to which businesses will qualify as small or disadvantaged.

§ 3-102: The responsibilities of the Commission shall include, but are not limited to:

(1) assisting small and disadvantaged businesses in learning how to do business with the city, including procurement, bidding, financing and qualification procedures;

(2) developing and actively circulating information publications to small and disadvantaged businesses;

(3) maintaining and circulating lists of small and disadvantaged businesses to prime contractors to encourage subcontracting opportunities for such businesses; and,

(4) developing training programs, workshops, and seminars enlisting the assistance of the private sector whenever possible to aid small and disadvantaged businesses in issues such as financing, bonding, insurance, accounting, management, and other technical assistance.

§ 3-103: The Commission shall meet regularly to discuss problems, develop strategies, and review procedures and regulations pertaining to the small and disadvantaged business program, including the continued qualification of successful businesses.

This model is based on existing statutes. What makes it different is

that there is no mention of a goal, quota, or set-aside.\textsuperscript{192} Skeptics may argue that such an approach is a watered-down effort to deal with racial discrimination. But such approaches are already being implemented by some government agencies in conjunction with their set-aside percentages.\textsuperscript{193} Of course, establishing training and education programs may be more expensive and time consuming than merely checking compliance with a pre-set percentage. If such a program is to work, it will need rigorous enforcement and dedication from individuals within the agency.

Perhaps little will change with the implementation of race-neutral programs. It may be that minorities will remain the primary beneficiaries. There is nothing wrong with that result. The important fact is that no one will be excluded from participation because they are not the right color. No matter what the outcome, it appears the Supreme Court has committed governments to attempting race-neutral approaches and this is the current standard under which we must live.

\textbf{VI. Conclusion}

"The civil rights movement has turned away from its original principled campaign for equal justice under law to engage in an open contest for social and economic benefits conferred on the basis of race or other classifications previously thought to be invidious."\textsuperscript{194} Minority set-asides are

\textsuperscript{192} A local government must be careful how it defines a "disadvantaged business." For example, Philadelphia amended its municipal code to provide for increased participation in city contracting of "disadvantaged business enterprises" (DBEs). DBEs were defined as businesses owned at least 51% by socially or economically disadvantaged individuals who were described as "individuals subjected to racial, sexual, or ethnic prejudice because of their identity as a member of a group without regard to their individual qualities." However, the city maintained the same percentage participation goals for minorities and women as were required under the old code. The district court struck down the ordinance, finding that the DBE concept was merely camouflage for a race and gender based ordinance. Contractors Ass'n of Eastern Pa. v. City of Philadelphia, Civil Action No. 89-2737 (E.D.Pa., April 5, 1990).

\textsuperscript{193} For example, the Maine Department of Transportation has implemented a program designed to increase participation from certain groups. See MAss DEPARTMENT OF TRANSPORTATION, DISADVANTAGED BUSINESS ENTERPRISE, MINORITY BUSINESS ENTERPRISE, WOMEN BUSINESS ENTERPRISE PROGRAM (1989) (on file with the author). Even though the department adopted a goal of ten percent for 1989, it is committed to providing technical assistance (including seminars, workshops, books, pamphlets and consulting services) designed to assist women and minority businesses. See also City of Cleveland, Procedures Relating to MBE and FBE Participation in City Contracts (on file with the author). The Mayor's Office of Equal Opportunity in Cleveland, Ohio provides management and technical assistance in the areas of financing, planning and marketing. The program, however, is targeted specifically to women and minority participation.

a prime example of this turning away. By apportioning benefits on the
basis of race, these programs have further divided society into a system
where principles of individual merit have been eroded.195

As this Note has argued, a restructuring of current minority set-aside
programs is necessary. Recent court decisions such as City of Richmond
have helped to move this country back to the basics of the civil rights
movement; that is, equal opportunity for all, regardless of race. A new
civil rights agenda advocates minority skill improvement, basic educa-
tion, and encouragement of self-help,196 rather than government set-
asides, welfare, and quotas. The race-neutral methods emphasized in this
Note and in the City of Richmond decision advocate these same values.
The past two decades have proven that existing government programs
are ineffective in producing economic equality between the races.197 It is
time now to concentrate on programs that allow an individual to become
equipped to compete efficiently in the marketplace, regardless of race.

JUDY KERCZEWSKI KRANJC

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195 The district court in Georgia summed up one of the problems with affir-
mative action: "Agency-imposed discrimination bypasses the original problems
and creates its own new problems, including encouraging citizens to classify
themselves and others in terms of their race rather than their individual merit.”

196 See generally, Woodson, Race and Economic Opportunity, 42 VAND. L. REV.
1017 (1989). See also C. Bolick, Changing Course: Civil Rights at the Cross-
roads 92-121 (1988).

197 C. Bolick, supra note 196, at 115 (1988). In fact, "80% of black progress
between 1940-80 was made before 1965—before racial preferences, before massive
busing, before skyrocketing welfare spending.” Id. at 85 (footnotes omitted, em-
phasis in original).