Presentations from

"Straight Talk"
a Symposium on

Disparity Studies: Five Years After *Croson*

November 3-4, 1994

Special thanks to those who participated in the symposium.

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Introductory Note: The following presentations were prepared for the Straight Talk symposium, **"Disparity Studies: Five Years After *Croson.*"** This document reflects the unedited version of the presenters' comments and no portion of the document can be copied without permission from the Institute.

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Thursday, November 3, 1994

11:00 am - 6:00 pm — **Registration**

12:00-1:30 — **Luncheon**

pm

Keynote Speaker: Former Congressman Parren Mitchell
"How we got to Croson: The Advent of M/WBE Programs"

2:00-3:30 — **Plenary Session**

"The Croson Decision: A Historical Perspective"

This session will explore the background conditions, previous lawsuits and court decisions: the ***Bakke*** case, the recent ***Jacksonville*** decision, the 1977 Local Public Works Employment Act that began set-aside programs, the ***Klutznick*** decision, and the ***Croson*** case, including its constitutionality in the current Supreme Court environment. Presenters: Nathan Garrett, Jack Boger and Anthony Robinson.

3:45-5:30 — **Plenary Session**

"Disparity Studies: What Are They?"

This session will explore the working details of disparity studies: Why are disparity studies conducted? What is studied? How is the study conducted? What details are explored? What analyses are made? Presenters: Andrea Harris, Steve Humphrey, J. Vincent Eagan and John Sullivan.

6:30-9:00 — **Dinner Session**

"Disparity Studies: Do They Work? Local Experiences and Results"

This session will be a roundtable of government officials who have completed disparity studies. The session was designed to create dialogue and open discussions among panelists and Symposium participants regarding experiences with disparity studies of their governmental units and the results which these studies have stimulated. Presenters: Frayda Bluestein, Fred Aikens, Isaac Robinson, Andrew Romanet and Richard Vinroot.

agenda

Friday, November 4, 1994

7:30-8:30 **Breakfast Buffet**

8:45-10:00 **Concurrent Sessions**

am

Session 1 - Issues Relevant to the Role of a City/County Attorney"

This session will explore questions and perspectives which city/county attorneys must answer for their governing boards. Presenters: James Schenck, Frayda Bluestein, Ron Seeber and Reggie Watkins.

Session 2 - "Before and After the Study"

This session will explore issues and perspectives for city/county managers and elected officials with regard to disparity studies. This will include the needs assessment and set-up of the study and dissemination of information gathered. Presenters: C. Betina Morris, Fred Aikens, Cheryl Dobbins and Nedra Farrar-Luten.

Session 3 - "Race Neutral Programs: What Are They?"

This session will explore the areas of bonding, financing, information access and dissemination, technical assistance, and other issues geared to administrators and practitioners. Presenters: Lewis Myers, John Leaston, Claretha Wallace and Sherri White.

Session 4 - "Certification: The Case for Uniform Certification"

This session will present perspectives on the development and implementation of uniform certification programs. Presenters: Cora Cole-McFadden, Joyce Ashby, Liz Mills and Patricia Melvin.

10:15-11:45 **Wrap-Up Session**

"Case Study -- North Carolina: Where Do We Go From Here?"

This session will provide a synopsis of the symposium and an overview of the statewide disparity study which is currently in progress. This wrap-up session will provide participants with explorations of needed policies, legislation, information-sharing mechanisms and visions for the future. Presenters: Andrea Harris, Secretary Katie Dorsett, Andrew Romanet and Steve Humphrey.

SECTION 2

STATEMENT OF PARREN J. MITCHELL, CHAIRMAN
MINORITY BUSINESS ENTERPRISE LEGAL DEFENSE AND EDUCATION FUND
BEFORE THE NORTH CAROLINA INSTITUTE OF MINORITY ECONOMIC DEVELOPMENT'S SYMPOSIUM, "STRAIGHT TALK: DISPARITY STUDIES -- NORTH CAROLINA FIVE YEARS AFTER CROSON, NOVEMBER 3, 1994

I often think that some times we are too trusting of the power structure of this nation. We trust. We believe that an action, a course, or a development that is good for people, or for the nation is accepted by most Americans, and all the people will cooperate. Minority business development is good for minorities and is a good thing for the nation. Taxes are paid; jobs are created; and the gross national product is increased. However, in my opinion, only a very, very small percentage of white Americans accepts the efficacy of minority business development. An even smaller percentage accepts government involvement to facilitate that process.

The initial federal efforts to foster minority business met with resistance and culminated in the United States Supreme Court case, Fullilove v. Klutznick, et.al. The Court ruled that a 10% minority business set-aside was constitutional. Following that decision, frontal assaults against set-asides waned but the tempo of the guerilla attacks against set-asides increased on many fronts.

I was delighted when local and state governments began to facilitate business development by enacting laws, regulations, and policies designed to enhance the growth and protection of minority business. Annually, states, cities and counties spend billions of dollars in contract and procurement opportunities, but minority firms were virtually excluded from participation. Round II of the Federal Public Works Act forced local and state governments to deal with minority entrepreneurs. The doors were opened, although only slightly, but our enemies saw this as some dreadful threat and immediately began to file suits. They doggedly pursued this tactic, and finally, the U.S. Supreme Court took up the issue in the case of City of Richmond v. J.A. Croson Co.

We had been led to believe that the U.S. Supreme Court is isolated from political and social pressures. This is certainly not the case. In Croson, the decision was a political one based upon the hue and cry about minority business set-asides. It was not a decision based on sound law. In essence, the Court took the astonishing position that each case had to prove that there was racial discrimination in the marketplace. Such was the "wisdom" of the Court.

Immediately after the panic over the Court decision commenced, the Minority Business Enterprise Legal Defense and Education Fund, Inc. (MBELDEF) took the lead in doing disparity studies so that local and state governments could meet the criteria set forth by the Court in the Croson decision. To date, many government entities have reinstated their minority business programs, which they all too hastily scoffed at in the wake of the Croson decision.

Earlier, I said that in my opinion, the vast majority of America opposes government efforts to facilitate and enhance minority business development. That is why the struggle continues. Two recent court decisions buttress my belief.

In the first case, a United States district court decided that the Fulton County Airport minority business set-aside program developed in 1982 is unconstitutional. The Court held that the program improperly allowed a prosperous minority or female-owned firm with sufficient capital, bonding, skills and experience to gain an unfair advantage over their competitors while eliminating an opportunity for another minority or female entrepreneur to enter the economic mainstream. This decision has major negative implications for federally-funded programs. It is also another example of the divide and conquer strategy.

A more ominous development is that of the U.S. Supreme Court in the Adarand v. Pena case, which is a challenge to a federal contracting program that gives preference to businesses run by blacks, other minorities, and women. The Court will decide whether such programs unconstitutionally discriminate against enterprises owned by white men. This case is of critical importance because it is the first major challenge to the federal programs since the challenge made in the Fullilove case.

My brothers and my sisters, gird up your loins. We are facing a renewed legal assault against federal programs. We must prepare ourselves for a long, vicious fight. Our business communities in every city and state must be galvanized to meet the challenge. We must use every forum, every meeting or the media, to condemn this impending threat. We cannot, we must not go backwards. If we act, and if we do these things and more, we will beat back this latest assault. Our cause must prevail!

"Straight Talk-Disparity Studies: Five Years After *Croson*"
Sheraton Imperial Hotel, November 3, 1994
Research Triangle Park, North Carolina

Excerpted from the presentation by John Sullivan

North Carolina Construction Firms With Employees (1987)

	Companies #	Companies %	Employees #	Employees %	Payroll (000) $	Payroll (000) %
All	17,720	100	151,909	100	2,692,416	100
African Americans	896	5.1	2,521	1.7	31,287	1.2
Hispanics	21	0.1	29	.02	708	.03
Asians and Others	254	1.4	509	.33	8,459	.31
Women	1,009	5.7	5,187	3.4	90,567	3.4
Non-M/WBEs	15,540	87.7	143,663	94.6	2,561,395	95.1

Sources: 1987 County Business Patterns and Surveys of Minority and Women Owned Business Enterprises.

Massachusetts Construction Businesses

by Employee Size - 1987

Employees	1-4	5-9	10-19	20-49	50-99	100-249	250-499	500-999	1000	Total
Firms	11,608	3448	1860	948	221	89	7	1	3	18,185

Source: County Business Patterns.

Figure B
Firms with Employees in the SIC Codes
Used by the MGT Study (1987 data)

	Women*	Blacks*	Hispanics*	Asians,* Nat. Am.	Non-M/WBEs	M/WBEs %*
SIC (172=1721) Painting, Wallpapering, Decorating	108	56	1	13	767	19%
SIC 078 Landscape	77	61	2	9	1156	11%
SIC 0782 Lawn/Garden	35	13	2	2	na	na
SIC Code 0783 Orn. Shrub/Tree	1	5	1	3	na	na
SIC (421=4210) Trucking	62	128	1	18	2350	8%
SIC 1799 Special Trade	37	12	1	3	684	7%
SIC 1791 Structural Steel	3	0	0	3	80	7%
SIC Code 1600s (Except 1611) Heavy Const.	41	14	0	4	853	7%
SIC (173=1731) Electrical	71	18	0	8	1577	6%
SIC 1794 Excav./Foundation	13	5	0	0	315	5%
SIC Code 1611 Hwy/Street Const.	**8**	**4**	**0**	**1**	**274**	**5%**
SIC (891=8911) Architects + Engineers	45	10	2	8	1380	4%
SIC 1795 Wrecking/Demolition	0	0	0	0	9	0%
Total	501	326	10	72	9445	9%

Source: Special Tabulation by the Census Bureau, based on the 1987 Surveys of Minority and Women Owned Business Enterprises by Four Digit SIC Code for North Carolina.

* These numbers include firms which are double counted because they are owned by minority women. This probably amounts to about 11 percent of the total of all M/WBEs.

Summary of Disparity Findings for the RTD
Based on Dollars

Procurement Category	Locally Funded Procurements	Federally Funded Procurements	Total RTD Procurements*	Private Sector
Construction:				
African American	89.19 %	464.87 %	359.46 %	1.35 %
Hispanic	227.11	6.78	68.47	6.78
Asian	0.00	0.00	0.00	2.50
Women	134.43	7.63	43.10	21.89
Subcontracts:				
African American	0.00 %	0.00 %	0.00 %	1.35 %
Hispanic	40.49	193.79	181.68	12.18
Asian	1476.98	0.00	116.64	5.00
Women	212.97	26.72	41.42	52.98
Services:				
African American	104.97 %	0.00 %	62.73 %	16.77 %
Hispanic	142.17	6.83	87.95	30.18
Asian	197.75	222.52	207.66	21.69
Women	60.93	3.11	37.81	33.78
Purchasing:				
African American	246.67 %	16.67 %	196.67 %	0.00 %
Hispanic	88.53	48.36	79.51	4.30
Asian	44.09	0.00	34.41	4.10
Women	100.10	19.75	82.50	16.32

* "Total" estimates are based on both locally and federally funded RTD procurements.

Note: This table reports the ratio of M/WBE utilization (i.e. the percent of all procurement dollars received by M/WBEs) to M/WBE availability (i.e. the percent of all firms that are owned by M/WBEs) in the RTD's geographic market area. A ratio of less than 100 percent indicates that the particular M/WBE group received less than its expected share of the procurement dollars based on its availability.

A case against affirmative action

By John Sullivan

Contractors in Atlanta saw it as a "death knell." A national association of minority businesses claimed it left members feeling "confusion, panic and fear." Scholars viewed it as inflicting "another, perhaps lethal blow."

"It" was a U.S. Supreme Court decision, City of Richmond vs. J.A. Croson Co., handed down five years ago. Croson remains maybe the most significant civil rights decision of the past few decades. In the five years since Croson, the decision has permanently restructured affirmative action and in the process spawned a multimillion-dollar, taxpayer-funded, study-producing industry.

Croson involved steel urinals and water closets - what the Supreme Court delicately termed "plumbing fixtures," in the Richmond city jail. Richmond had a requirement that 30 percent of all city contracts be awarded to minority businesses. Because no minority business was interested in the jail contract, J.A. Croson was unable to meet the set-aside. The project was eventually rebid and awarded to another, higher bidder with minority participation. Upset at his treatment by Richmond bureaucrats, Jim Croson sued.

Justice Sandra Day O'Connor wrote the opinion for a very divided Supreme Court. She found the Richmond program unconstitutional. Eskimos and Aleuts were eligible for a program in Virginia, a clear indication that the program was not crafted to solve local problems. More important, there was no evidence of identified discrimination in Richmond public contracting to justify a program that prevented firms owned by white males from competing for 30 percent of the city's contracts.

Croson's effect was immediate and dramatic. Because the Richmond program was typical of minority business programs around the country, dozens of programs were voluntarily suspended, including the North Carolina Department of Transportation program with a 10 percent set-aside. There were successful Croson-based challenges in Atlanta; Dayton, Ohio; and Washington, D.C. There are ongoing challenges in Columbus, Philadelphia and New York City.

Croson has produced another, less predictable, result. The opinion insists on evidence of identified discrimination; local governments have attempted to compile this evidence through documents known as disparity studies. They measure the difference between the amount of government contracts going to minority businesses and the number of minority businesses. If the minority businesses are getting less than expected, the disparity may indicate discrimination.

The earliest disparity studies were fairly short and inexpensive. One done in 1989 for San Francisco was well under 100 pages and cost $40,000. Since then, the studies have grown in thickness and price. The Atlanta study cost $600,000 and ran eight volumes. The 22-volume New Jersey study completed last year had a price tag of $840,000. The studies done in North Carolina are between these extremes. The Greensboro study was 85 pages, while the Charlotte and state Department of Transportation studies were 225 and 250 pages respectively.

These studies combine history, economics, stories and statistics intended to show that minorities receive fewer contract dollars due to discrimination. Of the nearly 80 studies completed at a cost to the taxpayer of more than $40 million, no study has yet been subjected to a full trial, which is probably fortunate for local governments since these studies almost invariably suffer two fatal flaws:

- First, the studies ignore the importance of qualifications and firm size. Obviously, a business with 100 employees can complete projects that a business consisting of one guy in a pickup truck with a box of tools cannot. Most construction firms have no paid employees besides the owner. In business, the larger companies generally get the larger contracts, for reasons that have nothing to do with discrimination.
- The second flaw of the studies is their acceptance of claims of discrimination as fact. Few if any accounts are verified, offered under oath, or even investigated. In a courtroom test, Croson will not permit unsubstantiated stories to be the basis of a minority business program.

Croson has already been applied in areas outside minority business programs, including hiring plans for police and fire departments. The case offers effective precedent for any challenge to a local affirmative action program. Without persuasive evidence of discrimination, that program may be unconstitutional. In the next few years, the Supreme Court will revisit affirmative action.

Then, the court may rule that race-based affirmative action in public contracting is as unacceptable as separate-but-equal in public education.

Sullivan is associate director of the Project on Civil Rights and Public Contracting in Baltimore, Md.

Fayetteville Observer-Times

February 28, 1994

EVIDENTIARY CONSIDERATIONS FOR GOALS PROGRAM

by

Reginald L. Watkins *

Presented at the Symposium
"Straight Talk-Disparity Studies: Five Years After *Croson*"
Sheraton Imperial Hotel, November 4, 1994, 10:00 am
Research Triangle Park, North Carolina

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* Senior Deputy Attorney General with the North Carolina Attorney General's Office and Director of the Civil Division. Assistant Attorney General Elizabeth McKay provided invaluable assistance in preparing the case summaries appearing in the Appendix. This paper has not been reviewed and approved in accordance with procedures for issuing an Attorney General's Opinion. It may not be cited as the official position of the Attorney General's Office.

EVIDENTIARY CONSIDERATIONS FOR GOALS PROGRAM

INTRODUCTION

This paper highlights evidentiary considerations which may be helpful in establishing a goals program which seeks to provide greater opportunity for minority, disadvantaged or women businesses to participate in construction projects funded by the state or local governments. It is not an exhaustive analysis of numerous court decisions addressing the constitutionality of such programs. Rather, its purpose is to highlight factors which should be considered in creating a goals program.

I. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed. 2d 854 (1989).

In a sharply divided opinion, the Court struck down as unconstitutional an ordinance adopted by the City of Richmond which required that 30% of all public construction contracting would go to minority-owned business. It reasoned that the evidence relied on by the City of Richmond was insufficient to establish a "compelling governmental interest" necessary to justify the racial classification inherent in the set-aside program. Croson, 109 S.Ct. at 723-25.

A close reading of Croson illustrates the need for the following precautions:

A. **Avoid statistics comparing the minority population of the State to the percentage of prime contracts awarded to minority firms.**

"[T]he statistics comparing the minority population of Richmond to the percentage of prime contracts awarded to minority firms had little or no probative value in establishing prior discrimination in the relevant market, and actually suggested 'more of a political than a remedial basis for the racial preference'." Croson, 109 at 717.

"'[W]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value'." **Id**. at 725. **"[W]here special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task."** **Id.** at 725 (emphasis added).

"Compare Ohio Contractors Assn. v. Keip, 713 F.2d at 171 (relying on percentage of minority businesses in the State compared to percentage of state purchasing contracts awarded to minority firms in upholding set-aside)." **Id.** at 725.

STRATEGY

1. Show how many MBEs in the relevant market are qualified to undertake prime or subcontracting work in state construction.
2. Show what percentage of total state construction dollars MBEs now receive as prime contractors or as subcontractors on prime contracts let

by the state.

3. In other words, determine how many MBEs are present in the state construction market and the level of their participation in state construction projects.

"Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform and particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory **exclusion could arise**...In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion." **Id.** at 729 (emphasis added).

"Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified." **Id.** at 729.

B. **Avoid generalized statements that there has been past discrimination in an entire industry.**

"[A] generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." **Id.** at 723. Similarly, the "mere recitation of a 'benign' or legitimate purpose for a racial classification, is entitled

to little or no weight." Id. at 724 (emphasis added).

STRATEGY

Offer evidence that qualified minority contractors have been passed over for state construction contracts or subcontracts, either as a group or in any individual case. This is required to show that remedial action was necessary. See id. at 730. For example, evidence should show, among other things, that the state's prime contractors had discriminated against minority-owned subcontractors.

The Croson Court held that a state or locality may enact race-conscious remedial legislation (a) to cure its own prior discrimination or (b) when it had been a "passive participant" in private discrimination due to its financing of a "system of racial exclusion practiced by elements of the construction industry." Id. at 720, 727. However, such entities must provide a "strong basis in evidence for its conclusion that remedial action was necessary;" this "strong basis" must "approach a prima facie case of a constitutional or statutory violation" by persons involved in a particular industry. Id. at 724.

For these reasons, must avoid statements rejected in Croson such as, "there was racial discrimination in the construction industry 'in this area, and the State, and around the nation'." Id. at 724.

C. **Do not rely on low black membership in trade organizations, standing alone, to establish a prima facie case of discrimination.** Id. at 726.

"For low minority membership in these associations to be relevant, the city

would have to link it to the number of local MBEs eligible for membership. If the statistical disparity between eligible MBEs and MBE membership were great enough, an inference of discriminatory exclusion could arise. In such a case, the city would have a compelling interest in preventing its tax dollars from assisting these organizations in maintaining a racially segregated construction market." Id. at 726 (emphasis added).

D. **Use care in relying on Congress' finding in connection with the set-aside approved in Fullilove that there had been nationwide discrimination in the construction industry.**

"The probative value of these findings for demonstrating the existence of discrimination in Richmond is extremely limited. By its inclusion of a waiver procedure in the national program addressed in Fullilove, Congress explicitly recognized that the scope of the problem would vary from market area to market area." Id. at 726.

Consider this: Are there Congressional findings as to discrimination in North Carolina's construction industry? If yes, what significance should they be given? "While the States...may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief." Id. at 727.

E. **Use care in identifying minorities for inclusion in the set-aside program.**

Remember the relief must be "narrowly tailored."

"There is absolutely no evidence of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry...The gross over inclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation." Id. at 728. In summary, findings of identified discrimination are necessary to both justify the race-conscious program and to assist the state or locality in narrowly tailoring the remedy to the identified discrimination. Id. at 730.

II. Federal Decisions Interpreting Croson*

A. Harrison & Burrowes Bridge Constructors v. Cuomo, 743 F. Supp. 977 (N.D. N.Y. 1990), aff'd, 981 F.2d 50 (2nd Cir. 1992).

Croson requires information **"which shows that the participation of MBEs is low relative to the number of MBEs ready and able to perform the contracts."** Harrison, 743 F. Supp. at 1000 (emphasis added). It also requires information tending to show

1) how many complaints of racial discrimination were made;

2) the race or national origin of those making the complaints;

3) the number of MBEs available to undertake public contracting work;

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*See Appendix for more extensive synopsis of cases addressing MBE programs.

4) the number of violations of state and federal anti-discrimination laws; and

5) if specific evidence was ever presented to the legislature or the State DOT before the adoption of the legislation and accompanying regulations. 743 F. Supp. at 1001 (Compare item 5 to language in Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1991) that it may be acceptable to compile this evidence after the enactment of the program).

The district court noted this information "is necessary for the court to determine whether the state legislature had a "'strong basis in evidence for its conclusion that [race-conscious] remedial action was necessary.'" 743 F. Supp. at 1001.

B. Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1991), cert. denied, __U.S.__, 112 S.Ct. 875, 116 L.Ed.2d 780 (1992).

1. **Must combine anecdotal and statistical evidence of discrimination.**

"Undeniably, the record in the present case is considerably more extensive than that compiled by the Richmond City Council in Croson. In particular, the 700-plus page record contains the affidavits of at least 57 minority or women contractors, each of whom complains in varying degrees of specificity about discrimination within the local construction industry." **Id.** at 917.

"Examples of discrimination in the private sector noted in affidavits filed

in Coral include:

* I believe the refusal of prime contractors, developers and architects to award contracts to my business for private sector work is due to discrimination against minority persons and minority-owned businesses generally." **Id.** at 918.

* "I have tried repeatedly in the past to obtain contracts and subcontracts on private construction contracts and have been unsuccessful. I know from my eleven years of experience in the construction industry that my businesses's prices are competitive with non-minority businesses' prices and that my business performs as high quality work as non-minority businesses. Nonetheless, when I have submitted bids to prime contractors for work on private projects or when I have attempted to negotiate contracts with these persons, I have been refused the right to participate in the projects." **Id.** at 918.

As to examples of complaints about discrimination in subcontracting awards on public projects, the following examples were cited:

* "We recently were in line to receive the site work contract for the King County Goodwill Games Pool Project, and were bypassed for a non-minority firm when King County relaxed their requirements for MBE participation." **Id.** at 918.

* "[T]here is no minority requirement on this project, so we are

going to use someone else." [These comments were overheard by a minority contractor.] **Id.** at 918.

Notwithstanding this evidence, the Coral court said: "Notably absent from the record, however, is any statistical data in support of the County's MBE program. The Supreme Court has suggested...that a statistical comparison is an invaluable tool with which to evaluate an affirmative action program."

"While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan. (citation omitted). Nonetheless, **the combination of convincing anecdotal and statistical evidence is potent**." **Id.** at 919 (emphasis added).

2. **Evidence may be adduced after the fact.**

[T]his requirement of some evidence does not mean that a program will be automatically struck down if the evidence before the municipality at the time of enactment does not completely fulfill both prongs of the strict scrutiny test. Rather, **the factual predicate for the program should be evaluated based upon all evidence presented to the district court, whether such evidence was adduced before or after enactment of the MBE.**" Id. at 920.

Furthermore, "we will not invalidate an MBE program due to an inadequate record where an adequate factual predicate is subsequently proven." In essence, "we will not strike down the program for

inadequacy of the record if subsequent factfinding bears out the need for the program. In other words, a plan will not be invalidated solely because the record at time of enactment did not measure up to constitutional standards." **Id.** at 921; See Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia, 6 F.3d 990, 1004 (3rd Cir. 1993); Harrison & Burrowes Bridge Construction Inc. v. Cuomo, 981 F.2d 50, 60 (2nd Cir. 1992).

C. Contractors Ass'n of Eastern Pennsylvania, Inc., v. City of Philadelphia, 6 F.3d 990 (3rd Cir. 1993).

1. **Probative statistical evidence of discrimination.**

Croson indicates that the most probative statistics supporting a race-based contract preference program show minority contractors received a disproportionately low share of contracts given their representation in the total contractor population. Contractors Ass'n, 6 F.3d at 1004. Further,

> "In determining whether the statistical evidence was adequate here, we look to its critical component - the 'disparity index.' The index consists of the percentage of minority contractor participation in City contracts divided by the percentage of minority contractor availability or composition in the 'population' of Philadelphia area construction firms. This equation yields a percentage figure which is then multiplied by 100 to generate a

number between 0 and 100, with 100 consisting of full participation by minority contractors given the amount of the total contracting population they comprise.

Other courts considering equal protection challenges to ... ordinances have relied on disparity indices in determining whether Croson's evidentiary burden is satisfied. Disparity indices are highly probative evidence of discrimination because they ensure that the 'relevant statistical pool' of minority contractors is being considered." **Id**. at 1005.

2. **Standard of review**.

"Choice of the appropriate standard of review turns on the nature of the classification." Contractors Ass'n, 6 F.3d at 999. Inasmuch as classifications based on race, ethnicity, or gender are inherently suspect under equal protection analysis, they merit closer judicial attention. **Id**. Strict scrutiny applies to racial preferences under Croson while intermediate scrutiny applies to gender preferences under Mississippi University for Women v. Hogan, 458 U.S. 718, 724, 102 S.Ct. 3331, 3336, 73 L.Ed. 2d 1090 (1982). When analyzed "[u]nder strict scrutiny, a law may only stand if it is 'narrowly tailored' to a 'compelling government interest.' Under intermediate scrutiny, a law must be

'substantially related' to the achievement of 'important government objectives.'" Contractors Ass'n, 6 F.3d at 999 n.9 (citations omitted). Further, where a preference is created for handicapped business owners, it is reviewed under the rational basis test, which validates the classification if it is "rationally related to a legitimate governmental purpose." **Id**. at 1001.

D. O'Donnell Construction Co. v. District of Columbia, 963 F.2d 420 (D.C. Cir. 1992)

1. Court of Appeals held District of Columbia Minority Contracting Act which created 35% MBE goals program for construction contracts was not justified by sufficient findings of discrimination.

2. Court's analysis of findings found insufficient to justify Act.

   a. Act declared its purpose is to "overcome the effects of past discrimination in the allocation of contracts." **Id.** at 425.

      Court held, however, the record "is devoid of...evidence that agencies of the District of Columbia had been favoring white contractors over non-whites, or that the typical bidding process was somehow rigged to have this effect." **Id.** at 425.

   b. Court further held that statement in the Act that "a persistent pattern of racial discrimination in our society has prevented [MBEs] from gaining a fair share of contracts and subcontracts for

construction..." cannot be relied upon to enact racial preferences. **Id.** at 425.

3. Examining other materials offered by the District to support the Act, the Court noted that a report stating that there were about 300 minority-owned construction firms in operation in 1974 in the Washington metropolitan area failed to specify:

   a) what types of construction work these firms performed and the race of the owners;

   b) the total volume of business they handled;

   c) whether they were in the private or public contracting sector;

   d) whether they were fully employed;

   e) or whether they had been unable to get work as a result of racial discrimination. **Id.** at 425.

4. A report showing that 82 minority contractor firms did $52,156,000 worth of business in 1974 was discounted by the Court because it

   a) did not indicate how much was done in the private sector;

   b) did not indicate how much was done in the public sector;

   c) did not indicate how much by federal government, or how much by state and local governments in Maryland and Virginia;

   d) or if any of the 82 firms had been discriminated against by public or private entities. **Id.** at 426.

5. Further, the Court was not persuaded by information in the report showing that the D.C. Department of General Services spent $152,765,363 on construction in **1974**, but only 3.4% or $5,267,630 went to minority owned firms. The Court noted that the Committee which prepared the report compared the 82 firms' $52.1 million with the Department of General Services $152.7 million in construction expenditures and that the Committee thought the **MBEs** had the ability to perform 34% of the **District's contracts.** This was error because the **statistics only related to construction contracts let by one agency in one year.** In addition, **the Committee did not determine if the 82 firms were qualified or available to perform any of that agency's $152.7 million in construction contracts, "many of which appear to have been for large scale building projects such as schools and detention facilities."** Id. at 426.

6. The Court said this about the 3.4% figure:

"The same document form which the Committee derived its 3.4 percent figure regarding construction contracts let by the Department of General Services reveals that the agency awarded to minority firms 32.4% of repairs and improvement contracts; 32.2% of its architectural contracts; and 24.5% of its material management contracts. These other figures cast doubt that the 3.4% figure resulted from agency discrimination." Id. at

426.

7. It also offered the following possible explanations for the 3.4% figure:

   a) MBEs may not have bid on the Department of General Services construction contracts because they were too small to take on large projects;

   b) or they may have been fully occupied with other projects;

   c) or the District's contracts may not have been as lucrative as others available in the Washington metropolitan area;

   d) or they may not have had the expertise needed to perform the contracts; or

   e) they may have bid but were rejected because others had a lower bid. **Id.** at 426.

8. In another portion of the report, the Committee noted that the level of MBE participation was grossly insufficient for a city with more than 72% minority population. But the Court, citing Croson, said "[c]omparisons between the percentage of a city's minority population and the percentage of contracts awarded to MBEs are irrelevant...." **Id.** at 427.

9. Turning to testimony received by the Committee from several minority contractors, the Court said: "Much of the testimony related to bonding requirements and other structural impediments any firm would have to overcome, no matter what the race of its owners...Anecdotal evidence is

most useful as a supplement to strong statistical evidence - which the Council did not produce in this case." **Id.** at 427.

10. The Court noted that when the Act first became law in 1977, it contained a 25% figure. The 1983 Act increased the goal to 35%, but the District conceded that no findings whatever were made when the percentage was increased, meaning that the District "has demonstrated no interest compelling enough to survive strict scrutiny under the Constitution." **Id.** at 427.

    The District also conceded that the Council has never made any findings with respect to discrimination in the construction industry against Hispanic Americans, Asian Americans, Pacific Islander Americans, or Native Americans, all of whom are included in the Act's current definition of "minority." This defect raises doubts about the remedial nature of the Act's program. **Id.** at 428.

11. The Act, like Croson, contained no geographic limitations on the MBEs eligible for preferential treatment. The Committee's report included a large percentage of out-of District firms. Specifically, of the 82 firms, at least 30 were not based in the District.

12. Finally, the District's original legislation was to expire in 3 years, but the Council reenacted the law in 1980, deleting the sunset provision. 15 years have passed since the MBE goal program went into effect. "The District

has not suggested that an end is in sight." Id. at 428.

E. Associated General Contractors of California v. City and County of San Francisco, 748 F. Supp. 1443 (N.D. Cal. 1990), aff'd, 950 F.2d 1401 (9th Cir. 1991), cert. denied, __U.S.__, 112 S.Ct. 1670, 118 L.Ed. 2d 390 (1992).

The court held that General Contractors Association was not entitled to a preliminary injunction because it failed to show likelihood of success on its claim that bid preference imposed by San Francisco did not serve a compelling interest of remedying effects of past discrimination and was not narrowly tailored to that goal.

1. Must find a compelling governmental interest in remedying effects of discriminatory practices.

   a) Governmental Unit must have a firm evidentiary basis for its conclusion that remedial action is necessary. 950 F. Supp at 1449.

   b) Unlike the situation in Croson, the City and County of San Francisco did far more than point to generalized discrimination in the construction industry and statistics with little probative value. Rather it identified discrimination by both the city and private contractors. Id. at 1450.

   c) "Particularly significant is the statistical analysis prepared by BPA Economics. Using the city and county as the relevant market the study compared the number of available MBE prime contractors

in San Francisco with the amount of contract dollars awarded by the city to San Francisco MBE's." Id. at 1450.

d) The study found that with respect to prime construction contracting, the disparity between the number of available Asian, Black, and Hispanic owned locally based firms and the number of contracts awarded to such firms was statistically significant, not attributable to chance, and supported an inference of discrimination. Id.

e) "Here the statistical disparities, based on appropriate comparisons, provide a reliable basis for inferring discriminatory conduct by the City of San Francisco against Asian, Black and Hispanic construction companies seeking prime contracts with the City." Id. at 1451.

f) In addition to statistics, the Board was presented, over the course of several hearings, with written and oral testimony from many MBE's who complained that discriminatory practices kept them excluded from prime contracts with the City. Id. at 1451.

g) Because the City, through statistical and other evidence, will likely demonstrate that it has a strong basis in evidence" for taking corrective action and that its asserted remedial purpose was genuine, the court found the plaintiff was not likely to prevail on

its claim that the ordinance failed to serve a compelling state interest. Id. at 1452.

2. The ordinance was also found to be "narrowly tailored."

a) The program here did not set aside any amount of city contracting dollars for minority or women owned enterprises. Rather the remedial focus is on bid preferences of 5% for LBE's (locally owned businesses) and 10% for MBE's and WBE's. Id. at 1453.

b) As a result the ordinance excludes no one from bidding and non-MBE's may invoke the same preference available to MBE's through a joint venture. Id. at 1453.

c) Nor was there any indication that the ordinance resulted in any undue burden. During the first 6 months of its duration, the vast majority (92.7%) of all prime contract dollars went to non-MBE's.

d) The form of the remedy also corresponds to the identified discrimination. The City found that discriminatory procurement practices and an effective "old boys network" created a competitive disadvantage for MBE's. The 5% bidding preference provided a modest "competitive plus" to offset this disadvantage, and the 5% bidding preference was selected in light of MBE availability figures. Id.

e) The "competitive plus" is also limited to qualifying MBE's in San

Francisco who are economically disadvantaged, and it is further limited to minority groups for which the evidence supported a finding of discrimination. Moreover bid preferences are also limited to those particular types of contracts for which evidence of discrimination was found. Id. at 1454.

f) The ordinance is also limited to 3 years, and provides for a waiver of bid preferences under certain circumstances. Administrative procedures have been provided which allow any business to file a complaint requesting that the bid preference not be applied to that industry because MBE participation in City prime contracts has reached parity with their number in the relevant industry community and MBE's no longer suffer from a discrimination induced competitive disadvantage. Id.

g) Finally the City only implemented the "bid preference" after it was determined that other means, such as anti-discrimination laws and relaxed bonding requirements, would be ineffective. Id.

h) "In sum, the modest five percent bidding preference enacted by San Francisco is of a wholly different nature than the outcome determinative, 'grossly overinclusive' legislation enacted by the City of Richmond... [T]he 1989 ordinance's scaled-down, measured approach appears to preclude the possibility that the motivation for

the classification was illegitimate racial prejudice or stereotype." Thus the court concluded that plaintiff had not shown that it is likely to succeed on its contention that San Francisco's plan was insufficiently tailored to satisfy the structures of the legal protection class. Id. at 1455.

III. Designing the Program

A. **The program must be narrowly tailored.**

Characteristics of a narrowly tailored program:

"First, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation in public contracting." Coral Construction Co., 941 F. 2d at 922.

"The second characteristic of a narrowly-tailored program is the use of minority utilization goals set on a case-by-case basis, rather than upon a system of rigid numerical quotas." **Id.**

"Finally, an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction." **Id.**

B. **Race neutral alternatives must be considered, but exhaustion of every possible alternative is not required.** Id. at 923.

Examples of race-neutral measures include:

1) Hosting training sessions for small businesses, covering such topics as doing business with the government, small business management, and

accounting techniques. **Id**.

2) Providing information on accessing small business assistance programs. **Id**.

3) Relaxing bonding requirements and enhancing access to capital. Contractors Ass'n, 6 F.3d. at 1009.

C. **Program flexibility is an indicator of a program's narrow tailoring.**

"An important means of achieving such flexibility is through use of case-by-case utilization goals, rather than rigid numerical quotas or goals. (citation omitted). The Richmond program was fatally flawed because of its use of a rigid 30% quota for each city contract." Coral Construction Co., 941 F.2d at 924.

"King County's program does not suffer from the rigidity that plagued the Richmond program. Under the "set-aside" method, the prescribed percentage of MBE subcontractor participation is determined individually on each contract according to the availability of qualified MBEs." **Id.** at 924.

"While the preference is locked at five percent, such a fixed preference is not unduly rigid, particularly in light of the waiver provisions...." **Id.** at 924.

A valid MBE program should include a waiver system that accounts for both the availability of qualified MBEs and whether the qualified MBEs have suffered from the effects of past discrimination by the County or prime contractors. (citation omitted). King County's program provides for waivers in both instances." **Id.** at 924.

Examining King County's program, the Ninth Circuit concluded it was flexible because:

1) The actual percentages of required MBE participation are determined on a case-by-case basis;

2) Set-aside levels may be further reduced if the prescribed levels are not feasible, if qualified MBEs are unavailable, or if MBE price quotes are not competitive;

3) Complete waiver of set-aside requirements is permitted if a non-MBE is the sole source of a good or service, or if no MBE is otherwise available or competitively priced; and

4) When the preference method is employed, a non-MBE will be awarded the contract if it is the lowest bidder and no MBE is within five percent of the low bid. **Id.** at 924-25.

IV. Summary of Steps Establishing Evidentiary Basis for Goals Program

1. Must show what percentage of total state construction dollars MBEs now receive as prime contractors (PC) or as subcontractors (SC) on prime contracts let by the state for state funded contracts for specified period.

   a) Total State-Funded Construction Projects _____

   b) Total amount awarded to MBEs as PC _____

c) Total amount awarded to MBEs as SC _____

d) Percentage of contracts awarded to MBEs as PC _____

e) Percentage of contracts awarded to MBEs as SC _____

f) Percentage of contracts awarded to non-MBEs as PC _____

g) Percentage of contracts awarded to non-MBEs as SC _____

2. Must show how many MBEs in the relevant market are qualified to undertake prime or subcontracting work in construction funded by state.

3. Statistics should be compiled showing and comparing relative rates of availability and participation of qualified MBE and non-MBE firms for purposes of showing prior discrimination against MBEs. Further, statistics should show rates of availability and participation for specific minority groups located in North Carolina, e.g., Blacks, Hispanics, Asians, etc., to ensure that the program is narrowly tailored.

4. Statistics regarding specific instances of alleged discrimination should be obtained, and anecdotal evidence in the form of affidavits should be obtained where possible. To make the necessary showings, the following specific types of

statistics and information should be obtained:

a) the number of MBEs available in this State to undertake both public prime and subcontracting work relating to construction;

b) the number of MBEs available in this State to undertake prime contracting work relating to construction;

c) the number of MBEs available in this State to undertake subcontracting work relating to construction;

d) percentage of total building contractors who are MBEs;

e) percentage of total building contractors who are non-MBEs;

f) the types of construction work these firms performed;

g) the race or nationality of the MBE owners;

h) the location of the business office of each MBE in this State (see articles of incorporation, etc.)

i) the total volume of business they handled;

j) whether they were in the private or public contracting sector and the amount of business in each sector;

k) whether they were fully employed with other projects;

or

l) whether they had been unable to get work as a result of racial discrimination;

m) the average percentage of capacity at which MBE and non-MBE firms

worked;

n) percentage of total construction work which MBE firms were capable of performing;

o) percentage of total construction work which non-MBE firms were capable of performing;

p) percentage of construction work which was actually awarded to MBE firms;

q) percentage of construction work which was actually awarded to non-MBE firms;

r) examination of percentages of MBE versus non-MBE firms in construction industry and compare to the percentages of total construction work awarded to MBE firms versus non-MBE firms;

s) examination of percentages of total construction work capable of being performed by MBE and by non-MBE firms as compared to the percentages of total construction work awarded to MBE and non-MBE firms;

t) the number of complaints of racial discrimination that were made;

u) the race or national origin of those making the complaints;

v) if possible, the number of violations of state and federal anti-discrimination laws; and

w) if specific evidence was ever presented to the legislature or the State DOT before or after the adoption of the legislation and accompanying regulations.

5. As to low number of MBEs in trade organizations in the state construction industry, must establish a link between the number of MBEs eligible for membership:

a) identify trade organizations in this State involved with construction industry;

b) identify total membership in such organizations;

c) identify total number of non-MBE members;

d) identify number of MBEs eligible for membership;

e) compare c and d to get percentage of MBEs in trade organizations; and

f) compare percentages of MBE and non-MBE contractors who are eligible for membership with the percentages of MBE and non-MBEs who are actually members.

6. Repeat steps 1 thru 5 above to show discrimination against women businesses.

APPENDIX

Cases Upholding Program

Case Name	Program Challenged	Program Requirements	Holding
Adarand Constructors, Inc. v. Pena, 16 F.3d 1537 (10th Cir.), cert. allowed, ___ U.S. ___, 1994 WL 210043 (1994).	Subcontracting Compensation Clause (SCC) utilized by the Central Federal Lands Highway Division (CFLHD). Section 502 of the Small Business Act requires federal agencies, including the Department of Transportation, to set annual goals for small business participation in federal procurement contracts.	The contracts at issue in the SCC program in this case included a provision whereby prime contractors whose DBE subcontracts exceed 10% of overall contract amount are eligible for incentive payments of up to 1.5% of the original contract amount for utilization of one DBE, or up to 2% of the original contract amount for hiring two or more DBEs. Prime contractors are not required to hire DBEs as condition of eligibility for award of contract; the payments are an incentive to use DBEs.	(1) Contractor has standing to challenge the federal act. (2) Fullilove, not Croson, applies, therefore, no Croson findings were necessary. The program meets constitutional requirements under Fullilove. Summary judgment for United States defendants affirmed.
Feriozzi Co., Inc. v. City of Atlantic Beach, 266 N.J. Super. 124, 628 A.2d 821 (1993).	City plan for public contracts established by ordinance and executive order.	Prior to institution of lawsuit: Bidders on public contracts required to achieve 25% minority participation through minority subcontractors and/or suppliers. Minority subcontractors owned or controlled by white women could be no more than 20% of total minority participation. After lawsuit filed: Plan amended to rescind earlier requirements. Requires "good faith effort" by all bidders and contractors to utilize minimum of 10% minority contractors or suppliers. Deletes references to past discrimination; trying to present equal opportunity to participate in contract process.	Court held that challenge to program should be dismissed. New ordinance encourages but does not require 10% minority participation. Is not facially unconstitutional.
Ellis v. Skinner, 961 F.2d 912 (10th Cir.), cert. denied, ___ U.S. __, 113 S. Ct. 374, 121 L. Ed.2d 286 (1992).	Surface Transportation Assistance Act of 1978 (STAA) and Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA) as applied by the state of Utah	Federal law requires states, as prerequisite to receipt of federal funds, to set aside at least 10% of all federally aided highway contracts to DBEs. States must set an annual goal of less than 10% if can justify a lesser amount. States must also set DBE levels for each project.	Court found that Croson did not apply, therefore, no findings were required. Fullilove analysis.

Case Name	Program Challenged
Associated General Contractors of California, Inc. v. Coalition for Economic Equity, 950 F.2d 1401 (9th Cir. 1991), cert. denied sub nom, Associated General Contractors of California, Inc. v. City and County of San Francisco, ___ U.S. ___, 112 S. Ct. 1670, 118 L. Ed.2d 390 (1992).	city ordinance giving preference to MBEs
Tennessee Asphalt Co. v. Farris, 942 F.2d 969 (6th Cir. 1991).	Tennessee's implementation of federal highway DBE program (in STAA and STURAA). Challenge to program as applied.

Program Requirements	Holding
Post-Croson modification of program provided: a 5% bid preference for locally-owned enterprises (LBEs), WBEs and MBEs. (Local MBEs and WBEs therefore become eligible for a 10% preference.) Non-MBEs and non-WBEs can get varying preferences by engaging in a joint venture with an MBE or WBE which has certain percentages of participation.	NOTE: Before court on very narrow scope of review for preliminary injunction. Court holds: (1) the organization has standing to bring suit on behalf of its members. (2) the organization failed to show likelihood of success on the merits as required for preliminary injunctive relief. Therefore, the district court did not abuse its discretion in denying the motion for injunctive relief. (Note: concurring opinion points out the narrow scope of review and criticizes the discussion of the application of Croson as inappropriate.)
Federal law requires not less than 10% of amounts appropriated under federal act go to DBEs. (After STURAA, WB is included in DBE).	Fullilove, not Croson, controls. Congress acted properly under 14th Amendment in enacting the set aside requirements. The State did not violate the 14th Amendment by participating the federally initiated preferential scheme without making the particularized findings of discrimination which would be required for a race conscious program adopted by a state or local government.

Cases Finding Program Unconstitutional or Finding Insufficient Evidence to Rule on Constitutionality as a Matter of Law

Case Name	Program Challenged	Program Requirements	Holding
Concrete Works of Colorado, Inc. v. Denver, ___ F.3d ___, 1994 WL 515981 (September 23, 1994).	Denver city ordinance regarding MBE and WBE participation in public works projects.	Office of Contract Compliance to establish goals on a project by project basis for MBE and WBE participation in city projects. However, not required to set goals for every project and goals may be below statutory goals. Statutory goals for total annual construction expenditures: 16% for MBEs and 12% for WBEs. Goals for design services: 10% for MBEs and WBEs.	Before court on review of entry of summary judgment for city finding the ordinance constitutional. Appellate court finds genuine issues of material fact with regard to the evidentiary support for the Croson requirement that the ordinance is narrowly-tailored to specifically identified discrimination. Court notes that decision does not reflect on the city's likelihood of success at trial but is a holding consistent with the standard of review for summary judgment orders. Remanded for further proceedings.
Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia, 6 F.3d 990 (3d Cir. 1993).	Philadelphia ordinance establishing participation goals for DBEs on construction contracts.	ordinance establishes "goals" for participation of DBEs: 15% for MBs; 10% for Wbs and 2% for businesses owned by handicapped persons.	Before court on motions for summary judgment as to federal constitutional claim. Court finds: (1) As to the **black-owned businesses only**, the evidence presented creates an inference of discrimination which the plaintiff may rebut at trial. Evidence is sufficient to withstand a motion for summary judgment against the city. (Other racial/ethnic classifications do not survive motion for summary judgment) (2) As to women businesses, the evidence is insufficient to create an issue of fact and survive the motion for summary judgment; summary judgment for plaintiffs affirmed. (3) As to businesses owned by handicapped, the evidence meets the rational basis test. (Note: case previously before this court on issue of standing to challenge ordinance [945 F.2d 1260 (1991)].)
Arrow Office Supply Co. v. City of Detroit, 826 F. Supp. 1072 (E.D. Mich. 1993).	city ordinance for race and gender based awards	Ordinance required that each fiscal year, the city must award 20% of total dollar volume of all contracts awarded the prior fiscal year to entities designated "sheltered market participants." The stated goal of sheltered market program (SMP) is to award at least 40% of total dollar volume of all city contracts each year under the SMP and MBE subcontractor utilization program.	Court finds program unconstitutional: (1) evidence does not satisfy the intermediate scrutiny test for females; (2) evidence does not satisfy strict scrutiny test for race. There is no evidence that remedial action is necessary, no evidence that city has discriminated in the past and the statistical study presented is not persuasive; therefore, there is no compelling government interest.

Case Name	Program Challenged
O'Donnell Construction Co. v. District of Colombia, 815 F. Supp. 473 (D.D.C. 1992).	District of Colombia's Minority Contracting Act for construction contracts.
Associated General Contractors of Connecticut v. City of New Haven, 791 F. Supp. 941 (D. Conn. 1992).	municipal public works program

Program Requirements	Holding
Goal of 35% of dollar volume of all construction contracts to be let to local MBEs. Minority Business Commission (MBC) must establish a sheltered market approach to contracts and set aside contracts for limited competition amount MBEs to the exclusion of all others. Must set aside enough contracts to reach the 35% goal. Although the 35% figure is nominated a "goal", the ordinance requires the goal to be achieved. Also, a prime contractor must perform at lest 50% of the contracting effort and if it subcontracts any of the work, 50% of the subcontracting effort must go to MBEs. Additionally, a 37% goal under the STURAA.	Before district court on review to determine whether permanent injunction should be entered against the program. Court holds: (1) the challenge is not rendered moot by the passage of the DBE program in the STURAA. (2) the 37% set aside goal is outside the bounds of the STURAA. (3) the program is unconstitutional. Relying the reasoning of the D.C. Circuit court in O'Donnell, 963 F.2d 420 (D.C. Cir. 1992), the district court found the program unconstitutional: no evidence of discrimination by agencies of the District of Colombia against non-white contractors or that bidding process was rigged to have this effect; the statistical evidence presented did not make valid comparisons; no evidence of practice of discrimination in the district; the percentage of participation requirement was increased from 25% to 35% with no attempt to link the increase to any identified discrimination; no sunset provision; an overbroad program with respect to "local" DBE requirements.
Contracts with cost over $75,000.00. 4% of construction costs to be set aside for WBE and 10% to be set aside for MBE.	Unconstitutional in violation of equal protection clause. City did not show factual basis required by Croson. Evidence showed MB and WB received share of contracts in proportion to the number of firms in existence.

Case Name	Program Challenged
Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1991), cert. denied, ___ U.S. ___, 112 S. Ct. 875, 116 L. Ed.2d 780, reh'g denied, ___ U.S. ___, 112 S. Ct. 1307, 117 L. Ed.2d 529 (1992).	county WB and MB set-aside program applicable to contacts including architectural and engineering, concession, construction, consultant, and purchasing and service contracts.
Milwaukee County Pavers Association v. Fielder, 922 F. 2d 419 (7th Cir. 1991).	challenge to federal highway funds DBE program and to state highway construction DBE program

Program Requirements	Holding
Post-Croson version of the program: Contracts of $10,000.00 or less: the "percentage preference method" gives a contract bidder who is an MWBE or will use MWBEs on the project a preference if its bid is within 5% of the lowest bid. Contracts of more than $10,000.00: the "subcontractor set-aside method" applies, under which a successful contractor must use MWBEs for a proscribed percentage of work performed on the contract. The actual percentage is individually determined on an ad hoc basis according to availability of qualified MWBEs.	Court holds: (1) WBE program is constitutional under the intermediate scrutiny test. (2) Summary judgment for county on the MBE program is reversed and remanded for further proceedings. Evidence that at the time the program was enacted, county did not give sufficient factual support to meet the "compelling governmental interest" requirement; no record of systemic discrimination within the county. Also, the program is geographically overbroad (although the record does not indicate if this program infirmity was the cause of plaintiff's harm.)
federal program (STURAA): reasonable efforts to award at least 10% of dollar values to DBEs. state program: beginning in fiscal year 1988-1989, allocate $4,000,000.00 each fiscal year for awarding of contracts to DBEs. Attempt to ensure that 75% of amount so allocated is for contracts to selected minority businesses. May award 100% of amount allocated each fiscal year to one DBE. In effect until 6/30/91.	Court holds: (1) As to federal program, by accepting STURAA funds, the state did not violate equal protection, although to the extent the state exceeded its authority under federal law, conduct was vulnerable to equal protection challenge. (2) Permanent injunction against the exclusively state-funded projects is affirmed. Program by which state sets aside certain exclusive state-funded projects for firms certified as DBEs is racially discriminatory in favor of blacks and other minorities in the absence of showing discrimination was necessary to rectify discrimination against minorities. (Note: Previous published decisions in this case regarding entry and modification of preliminary injunction.)

Case Name	Program Challenged
Concrete General, Inc. v. Washington Suburban Sanitary Commission, 779 F. Supp. 370 (D. Md. 1991).	procurement contracts by local sanitary commission
F. Buddie Contracting Co. v. City of Elyria, Ohio, 773 F. Supp. 1018 (N.D. Ohio 1991).	race and gender based city ordinance

Program Requirements	Holding
Goal of at least 25% of total dollar value of all procurement contracts awarded each year. Goal achieved by one or more of six practices: (1) require contractors to subcontract out at least 10% of contracts total value to minority subcontractors; (2) require procurement contracts to be awarded to minority businesses submitting a bid within 10% of the lowest bid; (3) require or recommend competitive bidding of procurement contracts be restricted to minority-owned firms; (4) require or recommend procurement contracts be directly negotiated with one or more minority-owned firms; (5) waive or reduce all or part of bonding and/or insurance requirement for minority businesses; and (6) recommend waiver of corporate experience requirement if at least one year relevant corporate experience and principals have experience.	Court held: (1) Commission not statutorily authorized to adopt the program; and (2) the program is overbroad and inclusive -- it is not narrowly tailored.
Ordinance provides: Any public contract valued at more than $20,000.00 shall provide that contractor shall award subcontracts to MBEs according to the following minimum percentages of dollar value of contract: (1) 14% for construction, repair or maintenance contracts; (2) 5% for supplies, services or professional contracts. Any public contract of $30,000.00 or more, WBEs shall be awarded the following percentage of total dollar values: (1) 3% for construction, repair or maintenance contracts; (2) 3% for supplies, services, and professional contracts.	Court held the program was unconstitutional: (1) no appropriate findings regarding eradicating present effects of past and/or present discrimination; (2) not narrowly tailored as to result; (3) no objective criteria for qualifications for MBEs and WBEs; and (4) no time limitation on ordinance.

Case Name	Program Challenged
General Building Contractors Association, Inc. v. City of Philadelphia, 762 F. Supp. 1195 (E.D. Pa. 1991).	challenge to affirmative action plan applicable to construction of convention center
Ecco III Enterprises, Inc. v. Metro-North Commuter Railroad Co., 170 A.D.2d 204, 565 N.Y.S.2d 103 (N.Y.A.D.), appeal dismissed, 77 N.Y.2d 978, 575 N.E.2d 392, 571 N.Y.S.2d 906 (N.Y.), leave to appeal denied, 78 N.Y.2d 863, 586 N.E.2d 60, 578 N.Y.S.2d 877 (N.Y. 1991).	Railroad company, public benefit corporation, DBE participation requirements.
Main Line Paving Co., Inc. v. Board of Education, School District of Philadelphia, 725 F. Supp. 1349 (E.D. Pa. 1989).	local school district requirements for construction contract to demolish abandoned building.
American Subcontractors Association, georgia Chapter, Inc. v. City of Atlanta, 259 Ga. 14, 376 S.E.2d 662 (Ga. 1989).	City of Atlanta affirmative action program established by charter amendment and administrative order of the mayor.

Program Requirements	Holding
Law required convention authority to develop affirmative action plan re contracting. Purpose of plan not to remedy past discrimination but to ensure maximum practical opportunity to participate in construction of convention center. Each individual contract has target goals for MB and WB participation levels.	NOTE: Case before court on narrow question of injunctive relief. Court holds (1) plaintiffs failed to establish causal connection between rejection of their bids and affirmative action program; (2) the plan presented a threat of discrimination in violation of equal protection clause because the plan was implemented in such a manner that the goals operate as a de facto quota of participation; and (3) injunctive relief is not appropriate because threat of irreparable injury is not sufficiently immediate.
STURAA requires 10% goal for expenditure of federal funds with DBEs. Railroad company had adopted a 20% DBE participation goal.	Court holds that the bidding process was unconstitutional. The 20% requirement was adopted unilaterally, without federal approval and without enumerating the specific additional findings required to justify the increased goal.
Bids of more than $200,000.00 must include a subcontracting plan guaranteeing: (1) no less than 15% of value of award to MBEs; and (2) no less than 10% of value of award to WBEs.	Insufficient evidence to establish that the chosen remedial legislation was necessary since there was no specific evidence, only generalized assertions, of current discrimination against those aided by the policy. Court also addressed other prongs of test (while recognizing that program failed because no factual predicate). Found that the program was not narrowly tailored. Also found that there was no evidence presented to justify the WB program since no evidence WB actually suffered discrimination.
Eligible projects: $25,000.00 or more for construction or repair to real estate; professional or consultant services where work by more than one professional is anticipated; and concession rights over $25,000.00 in value per year. No expiration date. No geographic limits on contractors. 1985 goal set by mayor at 35% participation.	Court holds: (1) lack of evidence of prior discrimination precluded minority preference participation plan; no strong basis in evidence for city's conclusion that remedial action was necessary. (2) lack of narrow tailoring of remedy rendered it in violation of equal protection; city not consider whether alternative remedies might serve same purposes and program; problem with annual "goals" shutting non-minority/female contractors out of competition on certain percentage of contracts.

Cases Not Addressing Constitutionality of Program

Case Name	Program Challenged	Program Requirements	Holding
Cone Corp. v. Hillsborough County, 848 F. Supp. 174 (M.D. Fla. 1994).	county ordinance	MBE goals set by committee for each project, the goal not to exceed 50% of participation.	Case has been from district court to appellate court several times (on issues of preliminary injunction and standing). In this opinion, the district court finds no standing by plaintiff to bring the action but gives plaintiff the opportunity to amend its complaint to properly allege a claim. [Plaintiff does not adequately do so and court ultimately enters sanction order against plaintiff. ___ F.R.D. ___, 1994 WL 526019 (September 16, 1994)].
Dickerson Carolina, Inc. v. Harrelson, 114 N.C. App. 693, 443 S.E.2d 127, appeal dismissed and disc. rev. denied, ___ N.C. ___, ___ S.E.2d ___ (1994).	Challenge to state transportation department's MBE and WBE program	Program percentages of value: 10% MB goal and 5% WB goal.	Before appellate court on review of order on cross motions for summary judgment. Court dismissed the constitutional challenge to the program as moot. (Program had been suspended and new program implemented in response to legislative study conducted after filing of lawsuit.)
Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, Florida, ___ U.S. ___, 113 S. Ct. 2297, 124 L. Ed.2d 586 (1993).	city capital improvement project contracts	Set aside for award to MBEs 10% of amount allocated for improvement contracts. MBEs awarded contracts expected to award 50% of subcontracting business to MBEs.	Supreme Court finds standing and no mootness; remands for further proceedings. (Note: district court had entered temporary injunction against program but injunction vacated by 11th Cir. which held that there was no standing to challenge ordinance and that challenge was moot [951 F.2d 1217 (11th Cir. 1992)]).
Domar Electric, Inc. v. City of Los Angeles, 19 Cal. App. 4th 1034, 24 Cal. App. 4th 1297, 23 Cal. Rptr. 2d 857 (Cal. App. 1993), review granted, 866 P.2d 774, 27 Cal. Rptr. 2d 316 (Cal. 1994).	city executive directive re MBE and DBE outreach program	No specific goals of the executive order are set forth in the opinion. Post-Croson clarification of the order to set forth criteria to assess contractor's efforts to include MBEs and WBEs. Expected levels of participation cannot be used as sole basis of awarding contract away from low bidder.	Court holds that program is invalid because it is authorized solely by executive directive and thus impermissibly creates a requirement for bidding on public contracts which is inconsistent with the city's charter provision. (Charter provision that for contracts of more than $25,000.00, the contract must be awarded to the lowest and best regular responsible bidder.) No Croson analysis.

Case Name	Program Challenged	Program Requirements	Holding
Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo, 981 F.2d 50 (2d Cir. 1992).	federal acts re transportation projects: STAA and STURAA; New York statutes re minority and women participation in transportation construction projects	**federal:** not less than 10% of amounts appropriated under STAA expended with contracts with small businesses owned and controlled by socially and economically disadvantaged individuals. (STURAA added the women businesses to group of minority businesses. **state:** statute establishes a development office to increase minority and women "participation." no quotas or percentages. (state program not apply if federal program applies.)	(1) state's implementation of federal program does not violate equal protection; (2) district court did not abuse its discretion in dismissing challenge to state program as moot since program had been suspended following commencement of lawsuit.
Maryland Highway Contractors Association v. State of Maryland, 933 F.2d 1246 (4th Cir.), cert. denied, ___ U.S. ___, 112 S. Ct. 373, 116 L. Ed.2d 325 (1991).	challenge to Maryland state MBE statute applicable to several state departments	Challenge in this case to 1988 state statute which required Maryland DOT to award 10% of total dollar value of procurement contracts $100,000.00 or more to MBEs (WBE include in definition of MBE). A new statute passed in 1990 that deleted some of the defined MBEs.	4th Circuit: (1) the new MBE statute renders the challenge to the old statute moot; (2) to the extent the issue may arise on challenge to new statute, the contractors association lacks standing to challenge the statute.
Cone Corp. v. Florida Department of Transportation, 921 F.2d 1190 (11th Cir.), cert. denied, 500 U.S. 942, 111 S. Ct. 2238, 114 L. Ed.2d 479 (1991).	Florida state statute for Dept. of Transportation set aside and MB program	(Note: program modeled on STURAA). not less than 10% of amounts expended from state transportation trust fund shall be expended with small business concerns defined by STURAA. Authorized to use: (1) set asides in which only DBEs may bid and (2) participation goals in which the prime contractor must let a certain percentage of dollar amount of contract to DBE subcontractor.	11th Cir. held that the contractors had no standing to challenge the state law. (Note: district court had previously found the program unconstitutional as to contracts which did not involve federal funds. That holding vacated by 11th Cir.)
S.J. Groves & Sons Co. v. Fulton County, 920 F. 2d 752 (11th Cir.), cert. denied, 500 U.S. 959, 111 S. Ct. 2274, 114 L. Ed.2d 725, and cert. denied, 501 U.S. 1252, 111 S. Ct. 2893, 115 L. Ed.2d 1057 (1991).	county minority business enterprise resolution (here, contract to construct airport facilities)	Program set a 20% MBE participation goal. (Based on federal Department of Transportation regulations.)	11th Cir. vacates district court order in favor of plaintiff and held: (1) contractor has no standing to challenge the constitutionality of the MBE resolution; (2) county's program violates Georgia's state low bid statute; and (3) remand to evaluate county's preemption defense.

Case Name	Program Challenged	Program Requirements	Holding
Michigan Road Builders Association, Inc. v. Blanchard, 761 F. Supp. 1303 (W.D. Mich. 1991), affirmed, 979 F.2d 851 (1992), cert. denied, ___ U.S. ___, 113 S. Ct. 1847, 123 L. Ed. 471 (1993).	Challenge to Michigan Department of Transportation set aside program. NOTE: No challenge to constitutionality of federal authorization statute.	For contracts containing federal funds, the state set aside 1.32% of dollars awarded for DBEs (WB and MB). For fiscal year 1991, goal of 15% of total dollar amount of all construction contracts containing federal funds to be awarded to DBEs. Of the total dollar amount awarded, approximately 1.32% was set aside to be exclusively bid upon, and thus awarded to, DBEs.	Court found that contractor association had no standing to challenge the program. Court also states that even if the association had standing, the defendants did not act unconstitutionally in setting up the program. (Holding based on Fullilove analysis.)
Capeletti Brothers, Inc. v. Metropolitan Dade County, 776 F. Supp. 1561 (S.D. Fla. 1991).	provisions governing county and federally funded construction projects	2 schemes (details not reported in decision): (1) STURAA authorized by Congress; and (2) Black Business Enterprise (BBE) created by county	Court held that plaintiff did not have standing to challenge the provisions.
First Capital Insulation, Inc. v. Jannetta, 768 F. Supp. 121 (M.D. Pa. 1991).	state university contract for asbestos removal	Statute sets suggested MBE and WBE participation levels; for this particular project, 15% of dollar value of total contract for MBEs and 5% for WBEs.	NOTE: Before court on narrow question of motion for preliminary injunction. Court finds that the letter rejecting the bid did establish the use of an unconstitutional racial quota system; rejection based on contractor's failure to explain discrepancies between commitment and solicitation sheets. Also refers to district precedent finding the statutory scheme facially valid.
Associated Pennsylvania Constructors v. Jannetta, 738 F. Supp. 891 (M.D. Pa. 1990).	administrative policy in Pennsylvania executive order regarding DOT projects	Policies do not require use of certain percentages of women and minorities but seek to ensure there is no current discrimination.	Court finds strict scrutiny test (of Croson) not apply since the policies are screening devices as opposed to classifications based on quotas for awards to MBEs and WBEs.
Capeletti Brothers, Inc. v. Broward County, 738 F. Supp. 1415 (S.D. 1990), aff'd, 931 F. 2d 903 (11th Cir.), cert. denied, 501 U.S. 1238, 111 S. Ct. 2871, 115 L. Ed.2d 1037 (1991).	county's minority set-aside program	Details of program not reported in opinion	District court finds no standing by these plaintiffs. Also, there is no ripeness under the case in controversy doctrine for this case.
H.K. Porter Co., Inc. v. Metropolitan Dade County, Florida, 489 U.S. 1062, 109 S. Ct. 1333, 103 L. Ed.2d 804 (1989).	federal and state funded electrified third rail on metrorail system	MBE involvement in 5% of contract work	U.S. Supreme Court vacates previous judgment in light of Croson. 11th Cir. opinion after remand [975 F.2d 726 (11th Cir. 1992)] is vacated based upon settlement agreement [998 F.2d 892 (11th Cir. 1993)].

"STRAIGHT TALK--DISPARITY STUDIES: Five Years After Croson"

"BEFORE AND AFTER THE STUDY"
Friday, November 4, 1994
Sheraton Imperial Hotel and Convention Center
Research Triangle Park, North Carolina

Presenter: Nedra Farrar-Luten, Human Resources Manager/DBE Officer
Raleigh-Durham Airport Authority

THE DECISION

Background

Subsequent to City of Richmond v. J.A. Croson Co., the state legislature adopted general statute 143-128 which addresses building construction projects of $100,000 or more. 143-128 combined women-owned businesses and a variety of ethnic minority classifications into a single definition of minority person. The purpose of the statute was to encourage and ensure that M/WBEs have the opportunity to participate on building construction projects. Prime contractors who do not meet the goal can defend themselves by stating that 1) they have not identified any areas of the project suitable for subcontracting; 2) they have not been able to solicit bids despite their efforts; and/or 3) they typically uses their own workforce to perform all of the work on such projects. The Airport Authority modified its plan in 1990 to conform to the requirements of 143-128. However, court decisions have limited the enforceability of the plan because there was not any proof that the plan was established and narrowly tailored to remedy the effects of past discrimination (per Croson).

Scope of Services

1. Identify, assess and document the impact of identifiable past discrimination on minority and women owned businesses;

2. determine the availability of qualified M/WBEs operating in the airport's owning jurisdictions geographical market;

3. determine whether and which of the Airport Authority's procurement policies, procedures and practices prevent M/WBEs from successfully competing for public contracting opportunities; and

4. provide a factual basis for drafting narrowly tailored set-aside programs to be implemented by the Authority, if supported by the results of the disparity study, or if set-aside programs are not justified by the results of the disparity study, to recommend any needed improvements or revisions to the Authority's existing M/WBE programs.

Selection Criteria

1. Project Approach (20 pts.): What methodology would the consultant employ to complete the study? What steps would be taken and in what order? Would the "capacity" of a firm to perform work at the airport be taken into consideration or just census data on availability?

2. Experience of Staff Assigned to Project (20 pts.): Does the staff have related experience? Have they participated in similar projects?

3. Firm Experience in Similar Projects (20 pts.): What is the firm's experience in conducting disparity studies on airports? Is the firm familiar with airport administration and aviation management issues?

4. Budgetary Estimate (15 pts.): Can we afford the study?

5. Quality of Response (10 pts.): What does the proposal look like? Was is a complete document? Did it appear to have been tailored to our RFP?

6. References (10 pts.): Were other clients (with similar projects) satisfied with the work of the firm?

7. Current Workload (5 pts.): Will we be in competition with other clients for the firms time? Will the firm be accessible to us?

PREPARING FOR THE STUDY

Physical Preparation

1. Get your files in order!: the longer it takes the consultant to "fish" through files to retrieve information, the longer the study will take.

   * review files to make sure sub-contractors are readily identifiable

   * organize files

2. Collect historical information:

   * old M/WBE registers

   * procurement policies/procedures/practices (handbooks, M/WBE plans, standard operating procedures)

   * identify current employees (and locate former employees) who can answer questions about contracting and purchasing practices

Staff Preparation

1. Identify employees who should participate on the "Policy Committee."

2. Educate staff on the purpose, focus and mechanics of the study.

MONITORING THE STUDY

Quality Control

1. Open and frequent communication between the consultant and the organization.

2. An established work plan with regular reporting to the organization.

3. Immediate identification of problem areas for rapid resolution.

4. Editorial examination of written material is essential given extensive numerical documentation.

5. Project budget, with line items for each task, guide progress as the study progresses.

Policy Committee

A "Policy Committee" comprised of key Authority staff members was established in order to receive information and respond to requests from the consultant. The Policy Committee served as a clearinghouse and helped to facilitate on-going communication between the consultant and the Authority.

"Straight Talk-Disparity Studies: Five Years After *Croson*"
Sheraton Imperial Hotel, November 4, 1994, 8:30 am
Research Triangle Park, North Carolina

RACE NEUTRAL PROGRAMS
by

Lewis H. Myers
President, LHM Associates

The Croson decision urged government agencies to implement race neutral programs prior to adopting race based initiatives. What are race neutral programs? Why are they important? Can they really help ameliorate disparity?

Race neutral programs are usually grouped into four categories. They include 1) access to information, usually about contract opportunities; 2) financing; 3) bonding; and 4) technical assistance.

Accessing information is critical because any work begins only by being aware of contract opportunities. Most MBEs are not a part of the "good old boy network". For example, they do not have relationships with the architects or engineers that would afford them an opportunity to comment on the plans and specifications. They usually find out about jobs when they read about it in the paper or receive a card requesting a bid from a contractor performing a good faith effort. MBEs are almost never aware of opportunities in the private sector where public notices are not required. MBEs in particular need information early on since it is more difficult (impossible??) for them to arrange financing and bonding.

MBEs are not without some blame in accessing information. Too often, they choose not to join trade associations, such as the AGC, that provide regular information about contract opportunities. It is especially important for MBEs to be members since they are too small to have a person dedicated to business development or marketing.

Much has already been written about the problems of accessing financing and bonding. Hopefully, the State of North Carolina will adopt legislation that will provide state-supported bonding and contract financing programs.

Technical assistance comes in many forms and through many agencies. Both the university and community college systems have extensive technical assistance programs through the Small Business and Technology Development Centers and the Small Business Centers, respectively. The Division of Purchase and Contract sponsors periodic workshops on how to do business with

state government. NC DOT has a contract with a private firm to provide technical assistance. A host of other public and private agencies - chambers of commerce, minority business leagues, et. al. - provide a variety of assistance.

For the construction industry, prime contractors must become more involved in the process. There is growing evidence that mentor-protege programs are important to move MBEs to the level where they can become primes. Many of the technical assistance programs mentioned above have staff members with little actual experience in the construction industry.

Race neutral programs are important because they complement the market opportunities generated by goals programs. It is important that all of the resources be in place at the same time. For example, the construction market in North Carolina is exploding. Charlotte-Mecklenburg Schools alone will put $162 million of school construction on the market between January and August of 1995. This is a tremendous opportunity for all construction firms. However, if an MBE cannot get bonding or working capital to finance the work, the opportunities created by the goals programs might as well not exist.

This has happened all too often. It is critical that the work, bonding, financing and trained labor come together simultaneously if MBEs are to maximize the available opportunities. For MBE capacity to increase, we must expand existing firms and grow new ones.

Only by increasing the capacity of MBEs can we expect to increase their utilization.

"Straight Talk-Disparity Studies: Five Years After *Croson*"
Sheraton Imperial Hotel, November 3, 1994
Research Triangle Park, North Carolina

Excerpted from the Presentation by Claretha Wallace

DEVELOPMENT AND REVITALIZATION FUND (DARF)

Purpose:

To provide public resources for investment in partnerships for the purpose of promoting economic development in four approved redevelopment areas (Beatties Ford Road, Wilkinson Boulevard, South Boulevard, and West Morehead Street) and the Pocket of Poverty when such partnerships do not incur a negative long-term liability on tax dollars and when such partnerships directly benefit one of the following targeted groups:

- Low income, unemployed, or underemployed county residents;
- Minority and/or women small business enterprises;
- Unique of indigenous enterprises which have significant economic value to the community.

Primary Objectives:

- To create jobs which have the potential for upward mobility, and for adequate pay which allows an individual or family to become self-sustaining;
- To promote revitalization efforts in areas targeted by public policy to include, but not be limited to:
  1) Enterprise areas from the 2005 Plan;
  2) The Pocket of Poverty;
  3) Approved area plans which include a commercial focus.
- To promote the development of projects which support redirection of growth policies;
- To retain a unique or indigenous enterprise;
- To participate in the funding of business projects that offer a significant number of employment opportunities.

General Policies:

- The City seeks to finance a business project as the lender of last resort. Therefore, the City can only provide the financial gap as determined by a "necessary and appropriate" analysis. The City's financial participation should be minimized where feasible.
- The interest rate is negotiable from 3% to 9% based on ability to repay.
- The term is negotiable based on need and ability to repay.
- The City requires a clear demonstration that "But For" the DARF loan, the project could not take place.

Eligible Activities/ Applicants:

- Acquisition of real property;
- Construction, rehabilitation, or installation of:

  1) Commercial or industrial buildings and structures;
  2) Equipment and fixtures which are part of the real estate;
  3) Commercial industrial property improvements.

- Applicant must meet at least one of the following:

  1) Either operate or want to operate a business in an area eligible for assistance;
  2) Live in an area eligible for assistance and either operate or want to operate a business outside the eligible area;
  3) Operate a business located close enough to provide services and jobs to low and moderate income citizens living in eligible areas;
  4) Create jobs that pay adequate wages and offer upward mobility and advancement.

Clearances: Economic Development Review Committee* which is made up of several City department directors, the Economic Development Revolving Loan Fund Committee** and City Council approvals are required.

*The Economic Development Review Committee is comprised of the following departments: Budget & Evaluation, Finance, City Manager's Office, Planning, Employment & Training, Community Development, and Economic Development.

**The Economic Development Revolving Loan Fund Committee is comprised of ten citizens: seven bankers, one Chamber representative, and two small business operators.

ECONOMIC DEVELOPMENT REVOLVING LOAN FUND (EDRLF)

Purpose:

To provide capital for startup or expansion of small and/or minority businesses located primarily within the Pocket of Poverty in order to create business and employment opportunities for individual from low to moderate income households.

Primary Objectives:

- To create new jobs for persons needing employment that will result in self-sufficiency;
- To foster economic development within the Pocket of Poverty for promotion of job creation, removal of slum and blighting influences, and expansion of the City's tax base.

General Policies:

- The City seeks to finance a business project based on the following financing basis:

  A. Program regulations require that a financial analysis be made on a case basis to determine the financial gap for the proposed project before the amount, interest rate, and terms of loan assistance are established. The City can only provide the financial gap as determined by a "necessary and appropriate" analysis. The City's financial participation should be minimized where feasible.

  Program emphasis will still concentrate on creating new jobs to assist low-to-moderate income persons' self-sufficiency, and the guidelines will continue to be one new job for each $15,000 of City loan funds. A hiring schedule is required.

- The City seeks to stimulate business startups and expansions by providing subordinate financing which creates an incentive for private participation.

Eligible Activities/Applicants:

1) The acquisition, construction, reconstruction, or installation of commercial or industrial buildings, structures, and other real property, equipment and improvements, including railroad spurs or similar extensions;

2) The provision of assistance to private for-profit businesses including, but not limited to, grants, loans, loan guarantees, interest supplement, technical assistance, and other forms of support for any other activity necessary or appropriate to carry out an economic development project.

Source of Funding: Federal Community Development Block Grant funds. The loan fund is a revolving fund, therefore, repayments are used to make other loans. The interest earned is contributed to the Department's Program Income.

Clearances: All loans are approved by the Economic Development Loan Committee* and City Council.

*The Economic Development Loan Committee is comprised of ten citizens - seven bankers, one Chamber of Commerce person, and two small business operators. Appointments are made by the City Manager.

ECONOMIC DEVELOPMENT REVOLVING LOAN

° LOAN APPLICATION CONTENTS AND REQUIREMENTS:

Before a loan or other investment shall be approved, the applicant with the staff's assistance shall have completed a loan package which shall include:

EXHIBIT A. Economic Development Loan Application;

EXHIBIT B. Brief narrative of the business, its history and goals; brief statement regarding the purpose of the loan and the impact of your business activity, i.e., job creation, removal of slum and blighting influences, and increase in City tax base, etc.

EXHIBIT C. Brief statement detailing the exact uses of the loan proceeds;

EXHIBIT D. Schedule of all installment debts, contracts, notes and mortgages payable, showing to whom payable, original amount, original date, present balance, rate of interest, maturity date, monthly payment, security and whether current or delinquent. (Amounts on this schedule shall agree with the figures on the applicant's financial statement.)

EXHIBIT E. If construction is involved, a statement of the estimated cost. Preliminary plans and specifications must also be submitted for lender's approval prior to commencement of construction,.

EXHIBIT F. Where purchase of machinery and equipment are involved, a detailed list of items to be purchased and the actual cost thereof as well as verification of useful life of any M & E;

EXHIBIT G. Resume' of each person in "Management" - information included in the resume should include, but not necessarily be limited to name, address, Social Security number, date of birth, education, work experience, etc.;

EXHIBIT H. Balance sheets for the past three (3) fiscal years, if an existing business;

EXHIBIT I. Balance sheet dated within sixty (60) days from date of application;

EXHIBIT J. Profit and Loss statement for the past three (3) fiscal years and for as much of current year as is available (if operating statements are not available, explain why and enclose corresponding federal income tax returns in lieu thereof);

EXHIBIT K. If a new business, earnings projections (estimated profit and loss statement) for at least one (1) year;

EXHIBIT L. Personal financial statements of each borrower;

EXHIBIT M. Statement of details of any pending litigation, whether applicant be plaintiff or defendant, or any litigation that involves management of the applicant; statement will be provided for your signature; information will also be obtained from the Charlotte Police Department and the Clerk of Court regarding police records and possible outstanding warrants;

EXHIBIT N. Description of each job to be available in the business along with plans for implementing hiring. If the loan is approved, the borrower will be required to sign a commitment to hire neighborhood strategy or assisted area residents to fill such jobs, whenever feasible;

EXHIBIT O. Credit report;

EXHIBIT P. Commitment letter from a financial institution on 50% of required project cost stating the terms and conditions of the loan;

EXHIBIT Q. Legal description and appraisal of real estate to be used as collateral for the loan, as well as a list of equipment serving as collateral including a detailed inventory with model, serial numbers, and value or cost, whichever is applicable;

EXHIBIT R. Copy of existing or proposed lease or purchase agreements, construction contracts, etc.

o LOAN PROGRAM GUIDELINES IN A NUTSHELL

1. The City's loan amount is based on the "gap" of the total amount needed. We assist the borrowers in obtaining a private lender with equity paid from the borrower's personal funds.

2. An Origination Fee of 1% shall be charged on the city's loans.

3. Loans are made primarily to create jobs for individuals from low to moderate income households located within the City of Charlotte.

4. One job must be created for each $15,000 loaned by the City.

Example: Total project cost - $100,000

Bank participation	$30,000
City participation	40,000
Borrower cash	30,000
Total	$100,000

A minimum of 3 jobs must be created and filled by the expiration of the loan which is usually 5 years.

"Straight Talk-Disparity Studies: Five Years After *Croson*"
Sheraton Imperial Hotel, November 3, 1994
Research Triangle Park, North Carolina

Excerpted from the Presentation by Sherri White

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1993

H 1

HOUSE BILL 1440

Short Title: Minority Bond Pilot Program Funds. (Public)

Sponsors: Representatives McAllister; Alphin, Braswell, D. Brown, Cummings, Cunningham, DeVane, Fitch, Flaherty, Gottovi, Hackney, Hensley, H. Hunter, Kinney, Kuczmarski, Michaux, B. Miller, Oldham, Richardson, Spears, Wainwright, and Wright.

Referred to: Appropriations.

May 17, 1993

A BILL TO BE ENTITLED

AN ACT TO APPROPRIATE FUNDS TO THE DEPARTMENT OF INSURANCE TO INSTITUTE A PILOT PROGRAM TO PROVIDE SURETY BONDS TO MINORITY CONTRACTORS.

The General Assembly of North Carolina enacts:

Section 1. There is appropriated from the General Fund to the Department of Insurance the sum of one million dollars ($1,000,000) for the 1993-94 fiscal year to develop a pilot program to provide surety bonds to minority contractors.

Sec. 2. The pilot program created with the funds appropriated in Section 1 of this act shall:

(1) Outline specific criteria for the minority bonding program.

(2) Identify staff resources within State government to provide prescreening of applications for bonding applicants.

(3) Provide opportunities for small and disadvantaged minority contractors to secure bonding assistance.

(4) Include flexibility and promote mentoring and support by public and private technical support services.

(5) Monitor projects and financial plan development in program criteria.

(6) Develop and ~~promote joint ventures~~ and partnerships where appropriate ~~to facilitate bondability.~~

(7) Seek public and private representation input on the development of the program.

Sec. 3. The Department of Insurance shall report to the 1995 General Assembly on the expenditure of the funds appropriated in Section 1 of this act and the implementation of the program outlined in Section 2 of this act.

Sec. 4. This act becomes effective July 1, 1993.

Remarks by Secretary Katie Dorsett
"Straight Talk-Disparity Studies: Five Years After *Croson*"
Sheraton Imperial Hotel, November 4, 1994, 10:00 am
Research Triangle Park, North Carolina

Thank you, Andrea. It's a pleasure to join you at the Closing Session of our **Symposium, "Straight Talk-Disparity Studies: Five Years After the *Croson* Decision."** This symposium has been very informative and enlightening. A number of issues have been covered. There have been discussions about the series of events that prompted disparity studies; the type of information needed for a good disparity study; and, the steps taken in several of our North Carolina cities and counties where disparities have been documented in completed studies.

There are many opinions on disparity studies -- Do we need them? Will the results prompt any real changes? With other groups suffer if special provision are made for others? These are all valid concerns, and I believe we as local and state officials have an obligation to learn as much as we can about disparity studies, and we can in symposia like this one. I feel we can all take comfort in the Supreme Court ruling of the ***City of Richmond v. J. A. Croson***. This ruling says before we make changes in our contracting policy or institute new programs, we must find out if there is any evidence of discrimination. In essence, before we fix anything, we need to find out if there's a problem.

Disparity studies provide a basis for us to address conditions that may be hampering some people from doing business with a government institution. As taxpayers and citizens in our state, cities, and counties, people have a right to a fair chance at winning contracting and business opportunities from their governmental bodies.

I have been serving the State of North Carolina as Secretary for the Department of Administration for nearly two years. Within my department we do a number of things, including issuing contracts for the construction of our state buildings, purchase of our state's goods and services, and issuance of leases for other state buildings. The Department of Administration houses the State Construction Office, the Division of Purchase and Contract, and the State Property Office. As Secretary for the department, and as a former Guilford County Commissioner and Greensboro City Council member, I have worked hard to make sure that all segments of our community get their fair share of our government contracts.

The State of North Carolina purchases in excess of $1.8 billion annually in goods and services, and oversees approximately $400 million through our state's capital improvement program. That is about $2.2 billion a year in contracts for services such as cleaning buildings; painting rooms; laying brick; installing air conditioning and heating systems; renovating facilities; repairing roofing; providing landscaping; supplying pencils, paper, and office equipment; building offices and prisons; acting as a consultant for numerous needs; etc. The needs of the state are great and there are many opportunities for all segments to take advantage of this need. That is why I was very pleased this year when the General Assembly appropriated

funding for a disparity study to examine our history of awarding contracts in state government to certain segments of our population.

The state's disparity study has been in progress since March and is looking at whether disparity exists in our contract awards to minorities, women, and persons with disabilities, known by the state as historically underutilized businesses (hubs). The Department of Administration is overseeing the study, which is being conducted by MGT of America, based in Tallahassee, Florida. Steve Humphrey, who is with me today, is MGT's executive-in-charge. Steve's firm is being assisted by four HUBs: Liz Mills, Ltd. in Charlotte; Basic Technologies International in Bethesda, Maryland; Monarch Services, Inc. and LHM Associates in Durham.

We are reviewing contract awards over the past five years at state agencies, community colleges, state universities, and public schools. We are reviewing records, conducting interviews, telephone surveys, holding focus group meetings and public hearings. We are trying to determine what our history has been in utilizing HUBs. We are trying, also, to assess the availability of HUBs in the state that can serve as prime contractors and subcontractors. We are also trying to find out if previous state programs have worked effectively in helping HUBs obtain contracting and procurement.

Once all the data is gathered, MGT of America will analyze the information and suggest recommendations if problem areas are discovered. There are a lot of people working hard to make this a comprehensive study, one that will bring about substantive changes in our state's contracting policy. As I said, work on this study began in March, 1994, and will conclude at the end of December with a report on the findings. If disparities are found, the report will also include recommendations and a proposed plan to remedy any inequities. The Department of Administration will present any recommendations to the General Assembly when it reconvenes next January. We hope that if measures are needed, they will be approved by the Legislature before it adjourns.

But, whether we have a disparity study or not, we need to look at diversifying our vendor base and finding ways to allow more persons who are qualified to do business with the state. We need to listen to what business owners are telling us about obstacles that prevent them from doing business with our governmental bodies. We need to look at what we can do to improve services for our vendors. We must expand our selections of vendors beyond the same group of companies.

We live in a diverse community and we need to consider other companies when deciding on contract awards. There is strength in diversity. If we allow more of it in our procurement and contracting processes, it will help produce jobs and maintain a healthy economy throughout **all our communities.** Small business owners will be able to make a living and hire other persons to work for them. A strong economy statewide will benefit all of us in less money needed for social programs, unemployment benefits, and prison construction.

Thank you.

SECTION 3

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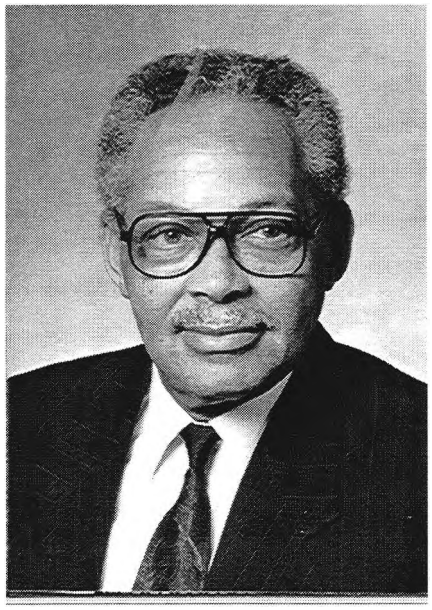
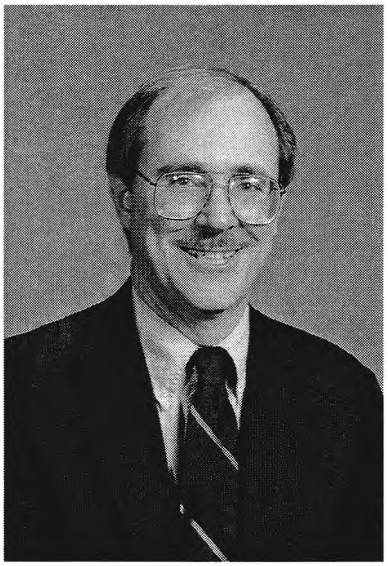
PARREN J. MITCHELL is the founder and current Chairman of the Minority Business Enterprise Legal Defense and Education Fund in Washington, DC. This follows a distinguished career in the United States House of Representatives which began in 1970 with his election as Maryland's first Black Congressman. In 1950 he filed suit to compel the University and to enroll him as its first Black graduate student, where he completed his master's degree in sociology. He was the first Black faculty member at Western Maryland University, and has also taught at his alma mater, Morgan State University. During his tenure in Congress, he was instrumental in establishing the powerful Congressional Black Caucus. It was during the Carter Administration (1976) that then Congressman Mitchell attached an amendment that compelled state, county and municipal governments who sought federal monies to set aside 10% of such contracts to hire minority firms as contractors and subcontractors. This amendment eventually became Public Law 95-507. His work in the Congress has led the fight in legislating programs which would help to get the minority segment of America into the economic mainstream, thus earning him accolades as "Godfather of Minority Business Development" and "Mr. Minority Enterprise." Mr. Mitchell considers integration of the marketplace to be the second phase of the civil rights struggle. He firmly believes that economic development of the minority community is essential to equality of opportunity and justice in this country, and that the public sector is obligated to share the economic opportunities it generates with all segments of the business community.

NATHAN T. GARRETT, Esquire, CPA, received his BA degree from Yale University, followed by post-baccalaureate studies in business and accounting at Wayne State University and the awarding of a Juris Doctorate from North Carolina Central University. He was a charter member of the Accounting Education Change Commission and served six years on the North Carolina State Board of CPA Examiners. He is former president of the National Association of Minority CPA firms and past President of the National Association of State Boards of Accountancy. In addition to serving on the faculty of the School of Business at North Carolina Central University in Durham, North Carolina, he is a licensed attorney specializing in business law and community economic development.





JOHN C. "JACK" BOGER is a professor of law at the University of North Carolina at Chapel Hill (UNC-CH). He presently teaches constitutional law, racial discrimination law, poverty law and education. He holds a BA from Duke University, a Master's from Yale Divinity School, and a Juris Doctorate from UNC-CH. From 1974-78, Mr. Boger practiced in the litigation department of a private law firm in New York City. From 1978-1990, he was an assistant counsel with the NAACP Legal Defense Fund, Inc. (LDF) in New York where he headed the Capital Punishment Project and, after 1986, the Poverty & Justice Project. He is currently chair of the Poverty & Race Research Action Council.

ANTHONY M. ROBINSON, Esquire is the current president of the Minority Business Enterprise Legal Defense and Education Fund in Washington, DC, which was established in 1980 to serve as national advocate and legal representative for the minority business community. This followed a distinguished academic and professional career. He received a BS degree in political science from Morgan State University and a Juris Doctorate from the American University School of Law. He has specialized in civil rights cases, particularly employment discrimination and in minority business legal and advocacy issues.

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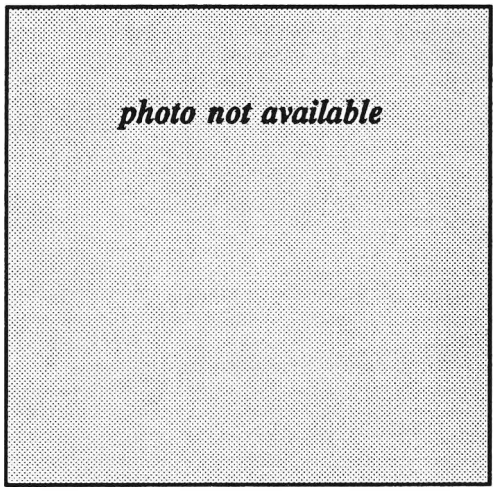
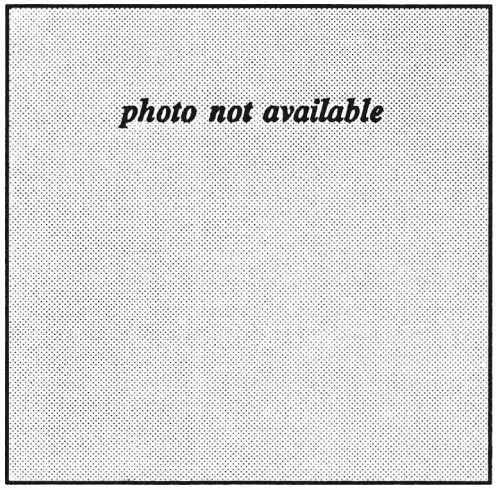
Among other posts held, Mr. Robinson has been Advisor to the Constitution and Civil Rights Committee of the US House of Representatives on the effects of the *Croson* decision and lecturer to the Constitutional Committee of the African National Congress, Union of South Africa; consultant to the US Department of Defense on the Implementation of the 5% Goal Program (Section 1207, Public Law 95-661); and advisor/lecturer to the National Black Council of Local and Elected Officials (NBC-LEO) in economic development programs.



STEVEN HUMPHREY, Senior Partner, MGT of America, Inc. received his BS degree in finance from Carson-Newman College and a MS in Transportation from the University of Tennessee and over 20 years of management consulting experience in both the private and public sectors. He has served as executive-in-charge on many disparity studies throughout the United States (Florida, North Carolina, Georgia, California, and Kansas, among others). His direct relevant experience includes extensive project management of analyst teams conducting operational evaluations for numerous state and municipal agencies in determining resource needs, operational efficiency and service effectiveness.

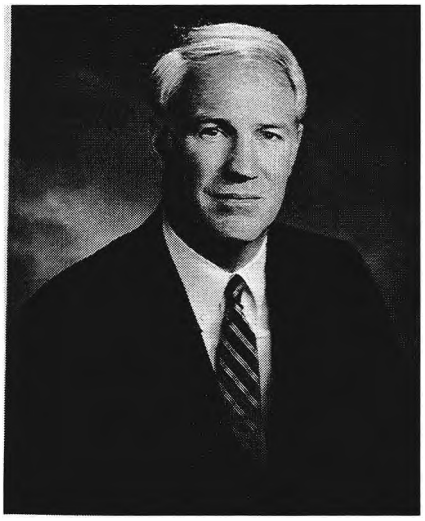
J. VINCENT EAGAN, Research Manager, DJ Miller & Associates, Inc. holds a Juris Doctorate from Harvard Law School and a Ph.D. in economics from Georgia State University. He is an attorney and economist with a significant practical and theoretical background in minority business development and the economics of discrimination. Dr. Eagan has worked on disparity studies in Houston, Memphis, Dallas, Raleigh-Durham, and New York, providing both substantive review and actual research for all areas of the studies.



While practicing corporate and tax law at Dorsey & Whitney, the largest law firm in the upper Midwest, He advised corporate clients on federal and local MBE issues. Dr. Eagan assisted in the drafting of the MBE legislation for the City of Phoenix. He is Senior Investigator on a national study of MBE programs sponsored by the US Department of Commerce. A former member of the graduate faculty of Howard University, Dr. Eagan has taught courses in statistics, public policy and urban economics. He has published numerous articles and papers in the areas of minority business and public policy.

JOHN SULLIVAN is an attorney who has researched and written about disparity studies since 1990. With his colleague, Dr. George LaNoue, Mr. Sullivan has published in the *Columbia Human Rights Law Review*, the *Journal of Policy History*, and the *Public Administration Review*. His articles have appeared in newspapers around the country (one of his most recent is reproduced in this document). He has served as a consultant in litigation involving disparity studies in Dade County, Florida; New York City; Philadelphia; Cleveland; and Columbus, Ohio. He is the Associate Director of the Project for Civil Rights in Public Contracting, which houses the largest collection of disparity studies in the nation.

FRAYDA S. BLUESTEIN holds a BA from the University of California/Berkeley and a Juris Doctorate from the University of California/Davis. She is an assistant professor at the Institute of Government of the University of North Carolina at Chapel Hill, where she specializes in teaching, researching and writing about purchasing and contracting for local government officials. Prior to joining the Institute of Government's faculty, she worked for four years in private loan practice, specializing in municipal and land use law, and for one year in the Legislative Drafting Division of the North Carolina General Assembly.

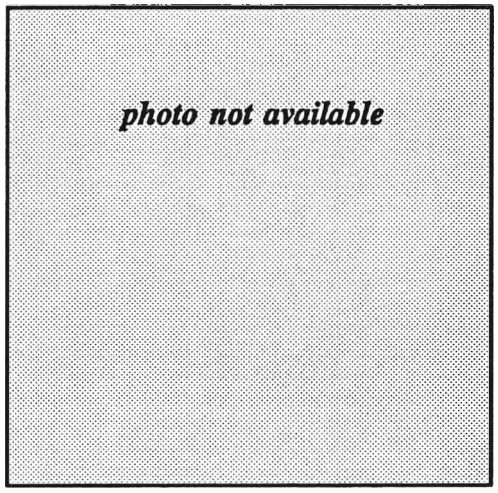


RICHARD J. VINROOT was elected mayor of Charlotte, North Carolina in 1991, having previously served eight years as a member of the Charlotte City Council. He received both his BS degree in business administration and his Juris Doctorate from the University of North Carolina at Chapel Hill, where he was a Morehead Scholar and a member of the varsity basketball team. Among other civic and voluntary activities, he has served as Co-Chair of Focus 2010, a member of the Board of Directors for Charlotte's Afro-American Cultural Center, and on the Commission on the Future of the South.

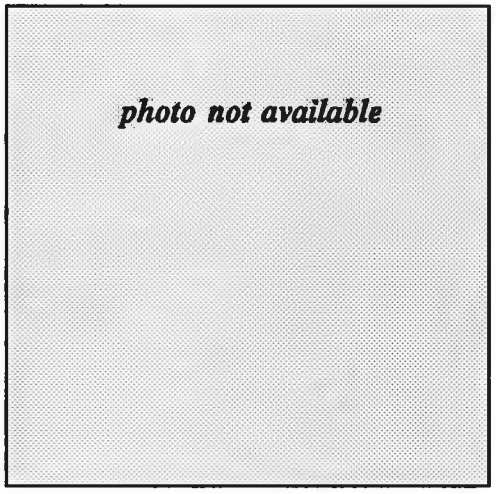
FRED AIKENS serves as the Deputy Secretary of the North Carolina Department of Transportation, a post he has held since 1993. He received a BA in sociology from the University of North Carolina at Wilmington and a MA in City and Regional Planning from Chapel Hill. Aikens served as senior staff liaison during the disparity study conducted on the Department of Transportation in 1992, and as a member of the committee to review proposals for the statewide disparity currently underway. He has recently completed the Harvard University Management Program for Senior Government Officials. He is active on many community and governmental organizations.

ISAAC A. ROBINSON holds a BA in sociology from North Carolina Central University, a MA in social work from the University of North Carolina at Chapel Hill, and a PhD in education from North Carolina State University. Currently, he is serving as Mayor Pro-Tem and serving a second term as a member of the Durham City Council. His major focus areas have been on inner city revitalization (housing); economic development within the African American community; minority contracting with city government; and unemployment and crime. He has worked closely with the Council and city staff to assure that the Affirmative Action Office remains an integral part of city government. In addition to his work with the Council, he is a professor of sociology at North Carolina Central University and Director of the university's Social Work Program. His major teaching and research areas include urban poverty and African American migration. He is active on numerous civic and professional boards and commissions.

BECKY JO PETERSON-BUIE is a Deputy City Attorney with the City of Greensboro. She received her BA from Spelman College and her Juris Doctorate from North Carolina Central University School of Law. After pursuing the general practice of law in Winston-Salem, NC, she joined the Greensboro City Attorney's staff where she has been responsible for both in-house educational programs as well as training activities with other city and county agencies regarding the Greensboro M/WBE Program and the Greensboro Minimum Housing Code. Her in-house lectures have covered such topics as equal employment opportunity, affirmative action, and sexual harassment, among others.



ANDREW L. ROMANET, JR. currently is General Counsel for the North Carolina League of Municipalities, headquartered in Raleigh, North Carolina.



JAMES A. SCHENCK, IV is a partner in the firm of Patton Boggs, L.L.P., Raleigh and Greensboro, North Carolina, which concentrates on Construction and Commercial Law in the areas of civil litigation and all forms of alternative dispute resolution (certified mediator in NC Superior Courts). His expertise covers design, materials supply, equipment leasing and construction contracts, environmental remediation, surety bonds and construction finance, and small business incorporation and capitalization (including experience with the Small Business Administration's Loan Guarantee Program. He is co-author of *Construction & Design Law*, a treatise on American construction law, and has authored articles for the *Wake Forest Law Review* and the *Construction Law Advisor*. He has been President of the National Institute of Construction Law since 1983, and is past chair of the Construction Law Section of the North Carolina Bar Association. He received his BA and Juris Doctorate degrees from the University of North Carolina at Chapel Hill. He also received a MA in public policy from Duke University.

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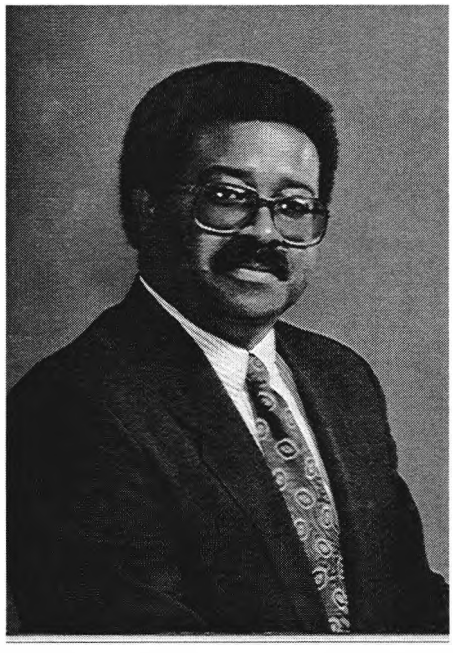
RONALD G. SEEBER received his BA from Hamilton College, his Juris Doctorate from Duke University, and his MRP from the University of North Carolina at Chapel Hill. He has been City Attorney for Winston-Salem for over 20 years, working in the areas of purchasing and construction. He has presented construction and purchasing law to the NC/SC Purchasing Agents' Association and has taught Municipal Law at Wake Forest Law School. He fashioned an M/WBE program for the City of Winston-Salem in 1983 and worked with the North Carolina General Assembly to obtain special local legislation for the City in this area. Winston-Salem's W/MBE program is a voluntary goals program with good faith effort requirements.



REGINALD L. WATKINS is Senior Deputy Attorney General and Director of the Civil Division of the North Carolina Attorney General's (AG) Office. A Law School graduate of the University of North Carolina at Chapel Hill, this 15-year veteran of the AG's office directs nearly 50 attorneys, as well as overseeing and participating in significant litigation involving the Departments of Administration, Labor, Transportation, Revenue and the Division of Motor Vehicles. He has successfully defended state officials in numerous complex cases in state and federal courts, including, but not limited to, those involving interstate banking, political discrimination, and civil rights claims. Most recently, he served with a team of attorneys from the AG staff in successfully defending the Department of Transportation in a state court action challenging its program for enhancing minority- and women-owned business participation in state-funded highway construction projects. Further, he advises on diverse issues, such as state taxation, condemnation actions, public procurement and contract matters, workplace safety disputes arising under the aegis of OSHA, and retaliatory discharges.

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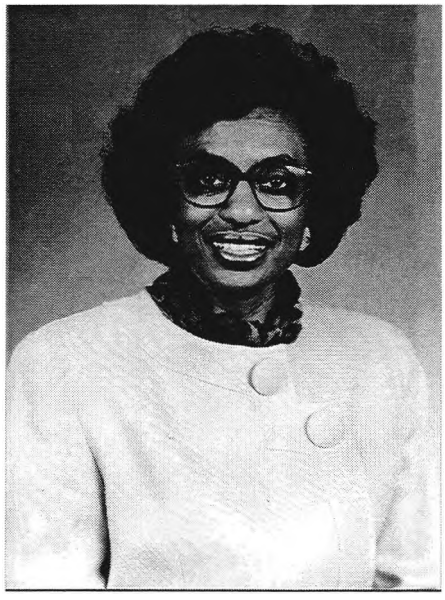
C. BETINA MORRIS currently serves as Vice President for Research at the North Carolina Institute of Minority Economic Development (the Institute). Her primary areas of responsibility in this non-profit research, public policy and resource expansion organization involve research and minority business development issues. She has previously held positions as public policy analyst for the Institute and as policy development analyst for the Office of the Governor in Raleigh. She has been an instructor at the Institute of Government of the University of North Carolina at Chapel Hill. Ms. Morris holds a MA degree in Public Policy and a MBA from Duke University.

NEDRA FARRAR-LUTEN received a BA in speech communication from North Carolina State University and has received certification in basic Public Personnel Administration and Quality Circles from the Institute of Government at the University of North Carolina at Chapel Hill and NCSU, respectively. She is currently President-elect for the North Carolina Chapter of the International Personnel Management Association, served as Program Committee Chair for the National Forum for Black Public Administrators and is affiliated with the Airports Minority Advisory Council, a professional association of airport executives and disadvantaged business owners which seeks development of laws, regulations and policy changes that will ensure continued growth of minority- and women-owned businesses and effect the real and substantial inclusion of DBEs in airport business opportunities. She is currently the Human Resources Manager and Disadvantaged Business Enterprise Liaison Officer for the Raleigh-Durham Airport Authority, where she has completed a revision of the outdated MBE application to incorporate existing federal legislation and expedite the certification process. She is currently providing liaison to complete a disparity study at RDU International Airport.



CHERYL J. DOBBINS holds a BA in criminology and economics from the University of Maryland and a MA in public administration with emphasis in urban finance from Howard University. She has more than 20 years experience in policy and economic analysis; program and project development, management, and evaluation; quality assurance; and public relations, marketing, communication, and sales promotions. Her company, Basic Technologies International, specializes in academic program development in energy and environmental management as well as assessment of environmental technologies for development commercialization.

LEWIS H. MYERS has diverse and broadbased experience with small business and minority economic development, spanning more than 20 years. He was vice president of The Soul City Company, helping to develop the largest rural economic development project ever undertaken by a minority-owned company in North Carolina. As Assistant Secretary for the NC Department of ce, he directed the Minority Business Development Agency and has been at the forefront of the development and implementation of the Institute as well as many other minority business proams currently operating in the state.

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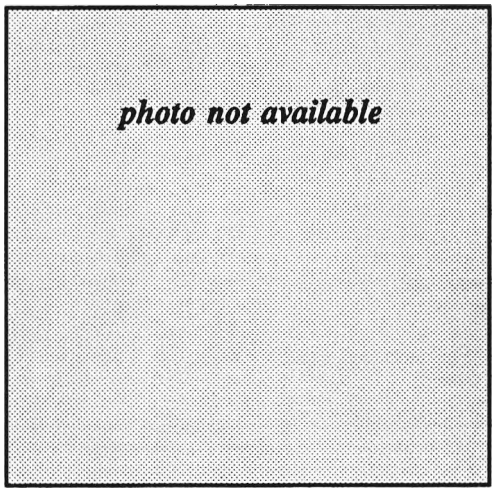
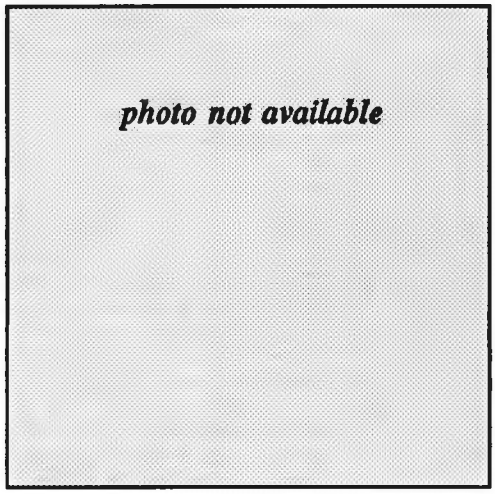
JANICE D. DAVIS is the daughter of parents who owned their own small business in Raleigh, North Carolina, and thus, has been around and with entrepreneurs all of her life. After graduating from Meredith College, Mrs. Davis was a public school teacher for 20 years, most of which were spent in teaching vocational education. During this time, she was also an active, working officer in a business owned by her and her husband. After completing graduate work at North Carolina State University, Mrs. Davis began employment at Robeson Community College, working in various positions in the Continuing Education Department. She assumed the regional directorship of the Small Business Centers Network in September, 1986. She is now in the position to further one of her aims -- to provide technical assistance to help businesses succeed, whether through additional training, one-on-one counseling, or providing the contacts and information needed to reach one's goals. Mrs. Davis is energetic, enthusiastic, and has a real desire to be of assistance to small business owners and would-be owners.

CLARETHA WALLACE has been a Neighborhood Development Specialist in Charlotte's Office of Community Development since 1991. She evaluates business and housing development loan proposals from both profit/non-profit organizations, individuals and public/private partnerships seeking financial assistance from the City of Charlotte. This office provides technical assistance to non-profit neighborhood-based organizations whose goal is to build capacity to carry out targeted community revitalization. She helps coordinate land acquisition and disposition for affordable housing developments. She holds a BS in Business Administration and Economics from North Carolina Central University and has worked toward a master's degree in public administration at Rutgers University.



SHERRI WHITE has been Special Assistant in the Office of the Chief Deputy Commissioner, Department of Insurance, for the State of North Carolina since 1993. Prior to accepting this position, Ms. White was and continues to be active in national, state, and local political and civic organizations: she served as US Congressman Martin Lancaster's Director of Constituents from 1991-1993; she is Liaison to the 3rd Congressional District Minority Council, and a member of the Southeastern Regional Advisory Council for the North Carolina Council for Women; and chair of the Sampson County Voters' League. She holds a BS from Howard University, and attended Graduate School at NC A & T State.

W. PERCY RICHARDSON, JR. was named Chief of Auxiliary Programs in the NC Department of Administration's Division of Purchase and Contract this past summer, following a 20-year career in state government which included a stint as organizer and trainer during the establishment of Administration's Purchasing Office. Under Auxiliary Programs falls all non-State Agency purchases, the Quality Acceptance Inspection Program, the state's HUB program, as well as agency training and compliance, and on-going promotion of good relations. Mr. Richardson received a BS degree from NC A & T University, and worked as a self-employed farmer in Spring Hope prior to joining state government.



CORA COLE-McFADDEN is the current Director of the City of Durham's Affirmative Action Program and President of the North Carolina M/WBE Coordinators' Network. A native of Durham, North Carolina, Ms. Cole-McFadden received her BS and MA degrees from North Carolina Central University, and has done post-graduate study at the University of North Carolina at Chapel Hill School of City and Regional Planning. She has also completed the Executive Development Program at the Institute of Government at UNC.

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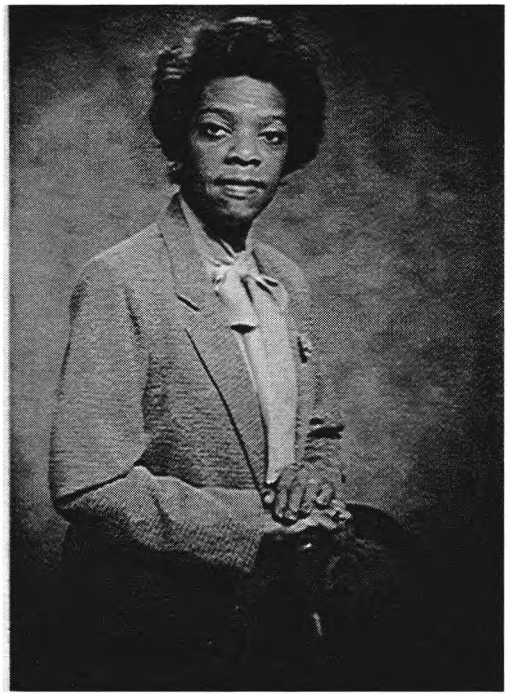
JOYCE ASHBY earned her BS of Commerce from North Carolina Central University and has performed additional studies in Economic Development at the University of North Carolina/Charlotte and North Carolina State University. She has 20 years of experience with state government and presently serves as Director of the Historically Underutilized Business (HUB) Program in the Division of Purchase and Contract, State of North Carolina. This program is responsible for ensuring that HUBs have an opportunity in public contracting with State government. Her office also oversees the state certification program and monitors the utilization of HUBs and problem resolutions.



ELIZABETH N. "LIZ" MILLS is a pioneer in the development, implementation, staff training, and monitoring of M/WBE and Affirmative Action Programs to bring equal opportunity, access, and inclusion for ethnic minority groups and women. She developed the first Affirmative Action Program for the State University of New York (College at Brockport), and created the first MBE Program for the City of Rochester, NY. Ms. Mills has most recently developed and managed the M/WBE Program for the City of Charlotte, North Carolina from 1984 to 1993, when she formed Liz Mills, Ltd., a Charlotte-based firm to provide training and technical assistance to municipal governments and corporations in developing successful Minority and Women Business Enterprise Programs. The firm also provides consultation to minority and women entrepreneurs in writing business plans, loan proposals, and in developing market studies.

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PATRICIA K. MELVIN has worked with the New Hanover County government since 1973. Currently, she is the Assistant to the County Manager, responsible for the M/WBE Program, which include the airport facilities there. Her office provides maximum practicable opportunities for minority- and women-owned businesses to compete for and perform public contracts and gain/maintain employment. She also provides training and strategic planning education to county departmental personnel, as well as local citizenry and organizations, which includes EEO, AA and sexual harassment, cultural diversity, and other topics. Ms. Melvin holds a BA in sociology from the University of North Carolina at Wilmington and a MA in human resource development and management from Webster University. She is a certified Parity Program Administrator and a graduate of the Municipal and County Administration Program of UNC-CH's Institute of Government.

KATIE G. DORSETT was appointed by Governor Jim Hunt as secretary of the North Carolina Department of Administration, becoming the first African American female to hold a state Cabinet post in North Carolina. As Secretary of Administration, she oversees state building construction, purchases and contracts, vehicle administration, property management, and auxiliary services such as the sale of state and federal surplus property. In addition, her department houses several advocacy groups: the NC Human Relations Commission, the Governor's Advocacy Council for Persons with Disabilities, the Commission of Indian Affairs, the Council for Women, and the Youth Advocacy and Involvement Office.

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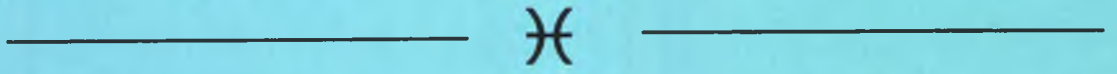
ANDREA HARRIS **has considerable experience in administration of non-profit change organizations. In the aftermath of the *Croson* decision, she championed stronger state and local MBE programs. Under her leadership, the first analysis of municipal M/WBE programs in North Carolina was commissioned. She holds a BA from Bennett College, and for the past four years has been president of the North Carolina Institute of Minority Economic Development. In addition to her service on several boards and committees, she continues a strong advocacy for community economic development strategies and initiatives.**

SECTION 4



NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CITY OF RICHMOND *v.* J. A. CROSON CO.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 87–998. Argued October 5, 1988—Decided January 23, 1989

Appellant city adopted a Minority Business Utilization Plan (Plan) requiring prime contractors awarded city construction contracts to subcontract at least 30% of the dollar amount of each contract to one or more "Minority Business Enterprises" (MBEs), which the Plan defined to include a business from anywhere in the country at least 51% of which is owned and controlled by black, Spanish-speaking, Oriental, Indian, Eskimo, or Aleut citizens. Although the Plan declared that it was "remedial" in nature, it was adopted after a public hearing at which no direct evidence was presented that the city had discriminated on the basis of race in letting contracts or that its prime contractors had discriminated against minority subcontractors. The evidence that was introduced included: a statistical study indicating that, although the city's population was 50% black, only 0.67% of its prime construction contracts had been awarded to minority businesses in recent years; figures establishing that a variety of local contractors' associations had virtually no MBE members; the city's counsel's conclusion that the Plan was constitutional under *Fullilove* v. *Klutznick*, 448 U. S. 448; and the statements of Plan proponents indicating that there had been widespread racial discrimination in the local, state, and national construction industries. Pursuant to the Plan, the city adopted rules requiring individualized consideration of each bid or request for a waiver of the 30% set-aside, and providing that a waiver could be granted only upon proof that sufficient qualified MBEs were unavailable or unwilling to participate. After appellee construction company, the sole bidder on a city contract, was denied a waiver and lost its contract, it brought suit under 42 U. S. C. § 1983, alleging that the Plan was unconstitutional under the Fourteenth Amendment's Equal Protection Clause. The Federal District Court upheld the Plan in all respects, and the Court of Appeals affirmed, applying a test derived

from the principal opinion in *Fullilove*, *supra*, which accorded great deference to Congress' findings of past societal discrimination in holding that a 10% minority set-aside for certain federal construction grants did not violate the equal protection component of the Fifth Amendment. However, on appellee's petition for certiorari in this case, this Court vacated and remanded for further consideration in light of its intervening decision in *Wygant* v. *Jackson Board of Education*, 476 U. S. 267, in which the plurality applied a strict scrutiny standard in holding that a race-based layoff program agreed to by a school board and the local teacher's union violated the Fourteenth Amendment's Equal Protection Clause. On remand, the Court of Appeals held that the city's Plan violated both prongs of strict scrutiny, in that (1) the Plan was not justified by a compelling governmental interest, since the record revealed no prior discrimination by the city itself in awarding contracts, and (2) the 30% set-aside was not narrowly tailored to accomplish a remedial purpose.

Held: The judgment is affirmed.

822 F. 2d 1355, affirmed.

JUSTICE O'CONNOR delivered the opinion of the Court with respect to Parts I, III–B, and IV, concluding that:

1. The city has failed to demonstrate a compelling governmental interest justifying the Plan, since the factual predicate supporting the Plan does not establish the type of identified past discrimination in the city's construction industry that would authorize race-based relief under the Fourteenth Amendment's Equal Protection Clause. Pp. 22–31.

(a) A generalized assertion that there has been past discrimination in the entire construction industry cannot justify the use of an unyielding racial quota, since it provides no guidance for the city's legislative body to determine the precise scope of the injury it seeks to remedy and would allow race-based decisionmaking essentially limitless in scope and duration. The city's argument that it is attempting to remedy various forms of past societal discrimination that are alleged to be responsible for the small number of minority entrepreneurs in the local contracting industry fails, since the city also lists a host of nonracial factors which would seem to face a member of any racial group seeking to establish a new business enterprise, such as deficiencies in working capital, inability to meet bonding requirements, unfamiliarity with bidding procedures, and disability caused by an inadequate track record. Pp. 23–24.

(b) None of the "facts" cited by the city or relied on by the District Court, singly or together, provide a basis for a prima facie case of a constitutional or statutory violation by *anyone* in the city's construction industry. The fact that the Plan declares itself to be "remedial" is insuffi-

cient, since the mere recitation of a "benign" or legitimate purpose for a racial classification is entitled to little or no weight. Similarly, the views of Plan proponents as to past and present discrimination in the industry are highly conclusory and of little probative value. Reliance on the disparity between the number of prime contracts awarded to minority businesses and the city's minority population is also misplaced, since the proper statistical evaluation would compare the percentage of MBEs in the relevant market that are qualified to undertake city subcontracting work with the percentage of total city construction dollars that are presently awarded to minority subcontractors, neither of which is known to the city. The fact that MBE membership in local contractors' associations was extremely low is also not probative absent some link to the number of MBEs eligible for membership, since there are numerous explanations for the dearth of minority participation, including past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial choices. Congress' finding in connection with the set-aside approved in *Fullilove* that there had been nationwide discrimination in the construction industry also has extremely limited probative value, since, by including a waiver procedure in the national program, Congress explicitly recognized that the scope of the problem would vary from market area to market area. In any event, Congress was acting pursuant to its unique enforcement powers under § 5 of the Fourteenth Amendment. Pp. 24–29.

(c) The "evidence" relied upon by JUSTICE MARSHALL's dissent—the city's history of school desegregation and numerous congressional reports—does little to define the scope of any injury to minority contractors in the city or the necessary remedy, and could justify a preference of any size or duration. Moreover, JUSTICE MARSHALL's suggestion that discrimination findings may be "shared" from jurisdiction to jurisdiction is unprecedented and contrary to this Court's decisions. Pp. 29–30.

(d) Since there is *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the city's construction industry, the Plan's random inclusion of those groups strongly impugns the city's claim of remedial motivation. Pp. 30–31.

2. The Plan is not narrowly tailored to remedy the effects of prior discrimination, since it entitles a black, Hispanic, or Oriental entrepreneur from anywhere in the country to an absolute preference over other citizens based solely on their race. Although many of the barriers to minority participation in the construction industry relied upon by the city to justify the Plan appear to be race neutral, there is no evidence that the city considered using alternative, race-neutral means to increase minority participation in city contracting. Moreover, the Plan's rigid 30%

quota rests upon the completely unrealistic assumption that minorities will chose to enter construction in lockstep proportion to their representation in the local population. Unlike the program upheld in *Fullilove*, the Plan's waiver system focuses upon the availability of MBEs, and does not inquire whether the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors. Given the fact that the city must already consider bids and waivers on a case-by-case basis, the city's only interest in maintaining a quota system rather than investigating the need for remedial action in particular cases would seem to be simply administrative convenience, which, standing alone, cannot justify the use of a suspect classification under equal protection strict scrutiny. Pp. 31–33.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE and JUSTICE WHITE, concluded in Part II that if the city could identify past discrimination in the local construction industry with the particularity required by the Equal Protection Clause, it would have the power to adopt race-based legislation designed to eradicate the effects of that discrimination. The principal opinion in *Fullilove* cannot be read to relieve the city of the necessity of making the specific findings of discrimination required by the Clause, since the congressional finding of past discrimination relied on in that case was made pursuant to Congress' unique power under § 5 of the Amendment to enforce, and therefore to identify and redress violations of, the Amendment's provisions. Conversely, § 1 of the Amendment, which includes the Equal Protection Clause, is an explicit constraint upon the power of States and political subdivisions, which must undertake any remedial efforts in accordance with the dictates of that section. However, the Court of Appeals erred to the extent that it followed by rote the *Wygant* plurality's ruling that the Equal Protection Clause requires a showing of prior discrimination by the governmental unit involved, since that ruling was made in the context of a race-based policy that affected the particular public employer's own work force, whereas this case involves a state entity which has specific state-law authority to address discriminatory practices within local commerce under its jurisdiction. Pp. 11–17.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE KENNEDY, concluded in Parts III–A and V that:

1. Since the Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely on their race, *Wygant*'s strict scrutiny standard of review must be applied, which requires a firm evidentiary basis for concluding that the underrepresentation of minorities is a product of past discrimination. Application of that standard, which is not dependent on the race of those burdened or benefited by the racial classification, assures that the city is pursuing a reme-

dial goal important enough to warrant use of a highly suspect tool and that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype. The relaxed standard of review proposed by JUSTICE MARSHALL's dissent does not provide a means for determining that a racial classification is in fact "designed to further remedial goals," since it accepts the remedial nature of the classification before examination of the factual basis for the classification's enactment and the nexus between its scope and that factual basis. Even if the level of equal protection scrutiny could be said to vary according to the ability of different groups to defend their interests in the representative process, heightened scrutiny would still be appropriate in the circumstances of this case, since blacks comprise approximately 50% of the city's population and hold five of nine seats on the City Council, thereby raising the concern that the political majority may have acted to disadvantage a minority based on unwarranted assumptions or incomplete facts. Pp. 17–22.

2. Even in the absence of evidence of discrimination in the local construction industry, the city has at its disposal an array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races who have suffered the effects of past societal discrimination, including simplification of bidding procedures, relaxation of bonding requirements, training, financial aid, elimination or modification of formal barriers caused by bureaucratic inertia, and the prohibition of discrimination in the provision of credit or bonding by local suppliers and banks. Pp. 34–35.

JUSTICE STEVENS, although agreeing that the Plan cannot be justified as a remedy for past discrimination, concluded that the Fourteenth Amendment does not limit permissible racial classifications to those that remedy past wrongs, but requires that race-based governmental decisions be evaluated primarily by studying their probable impact on the future. Pp. 1–8.

(a) Disregarding the past history of racial injustice, there is not even an arguable basis for suggesting that the race of a subcontractor or contractor on city projects should have any relevance to his or her access to the market. Although race is not always irrelevant to sound governmental decisionmaking, the city makes no claim that the public interest in the efficient performance of its construction contracts will be served by granting a preference to minority-business enterprises. Pp. 2–3.

(b) Legislative bodies such as the City Council, which are primarily policymaking entities that promulgate rules to govern future conduct, raise valid constitutional concerns when they use the political process to punish or characterize past conduct of private citizens. Courts, on the

other hand, are well equipped to identify past wrongdoers and to fashion remedies that will create the conditions that presumably would have existed had no wrong been committed, and should have the same broad discretion in racial discrimination cases that chancellors enjoy in other areas of the law to fashion remedies against persons who have been proven guilty of violations of law. Pp. 3–4.

(c) Rather than engaging in debate over the proper standard of review to apply in affirmative-action litigation, it is more constructive to try to identify the characteristics of the advantaged and disadvantaged classes that may justify their disparate treatment. Here, instead of carefully identifying those characteristics, the city has merely engaged in the type of stereotypical analysis that is the hallmark of Equal Protection Clause violations. The class of persons benefited by the Plan is not limited to victims of past discrimination by white contractors in the city, but encompasses persons who have never been in business in the city, minority contractors who may have themselves been guilty of discrimination against other minority group members, and firms that have prospered notwithstanding discriminatory treatment. Similarly, although the Plan unquestionably disadvantages some white contractors who are guilty of past discrimination against blacks, it also punishes some who discriminated only before it was forbidden by law and some who have never discriminated against anyone. Pp. 4–8.

JUSTICE KENNEDY concluded that the Fourteenth Amendment ought not to be interpreted to reduce a State's power to eradicate racial discrimination and its effects in both the public and private sectors, or its absolute duty to do so where those wrongs were caused intentionally by the State itself, except where there is a conflict with federal law or where, as here, a state remedy itself violates equal protection. Although a rule striking down all racial preferences which are not necessary remedies to victims of unlawful discrimination would serve important structural goals by eliminating the necessity for courts to pass on each such preference that is enacted, that rule would be a significant break with this Court's precedents that require a case-by-case test, and need not be adopted. Rather, it may be assumed that the principle of race neutrality found in the Equal Protection Clause will be vindicated by the less absolute strict scrutiny standard, the application of which demonstrates that the city's Plan is not a remedy but is itself an unconstitutional preference. Pp. 1–3.

JUSTICE SCALIA, agreeing that strict scrutiny must be applied to all governmental racial classifications, concluded that:

1. The Fourteenth Amendment prohibits state and local governments from discriminating on the basis of race in order to undo the effects of past discrimination, except in one circumstance: where that is necessary

Syllabus

to eliminate their own maintenance of a system of unlawful racial classification. Moreover, the State's remedial power in that instance extends no further than the scope of the constitutional violation, and does not encompass the continuing effects of a discriminatory system once the system itself has been eliminated. Pp. 1–6.

2. The State remains free to undo the effects of past discrimination in permissible ways that do not involve classification by race—for example, by according a contracting preference to small or new businesses or to actual victims of discrimination who can be identified. In the latter instance, the classification would not be based on race but on the fact that the victims were wronged. Pp. 6–9.

O'CONNOR, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III–B, and IV, in which REHNQUIST, C. J., and WHITE, STEVENS, and KENNEDY, JJ., joined, an opinion with respect to Part II, in which REHNQUIST, C. J., and WHITE, J., joined, and an opinion with respect to Parts III–A and V, in which REHNQUIST, C. J., and WHITE and KENNEDY, JJ., joined. STEVENS, J., and KENNEDY, J., filed opinions concurring in part and concurring in the judgment. SCALIA, J., filed an opinion concurring in the judgment. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, J., joined.

DISPARITY STUDIES CONDUCTED IN NORTH CAROLINA:
1989-1994

Asheville:

City of Asheville Disparity Study," Research & Evaluation Associates of Chapel Hill, 1992-93.

Charlotte:

"An MBE Disparity Study for the City of Charlotte," D. J. Miller & Associates, Inc., October 1993.

City of Durham and Durham County:

"A Disparity Study of Disadvantaged Business Enterprise Programs," North Carolina Institute of Minority Economic Development, July 1993.

Guilford County:

"Minority- and Women-Owned Business Enterprise Disparity Study for Guilford County," North Carolina Institute of Minority Economic Development, September 1994.

Greensboro:

"City of Greensboro Minority- and Women-owned Business Enterprise Program Disparity Study," North Carolina Institute of Minority Economic Development, July 1992.

North Carolina Department of Administration:

State-Wide Disparity Study of Purchasing in State Agencies, Universities, and Community Colleges (in process, November 1994).

North Carolina Department of Transportation:

"Study of Minority and Women Business Participation in Highway Construction," MGT; Research & Evaluation of Chapel Hill,

Raleigh:

"Minority- and Women-Owned Business Enterprise Disparity Study for the City of Raleigh," North Carolina Institute of Minority Economic Development, September 1994.

RDU Airport:

RDU Airport Authority Study of Minority- and Women-owned Business Enterprise Disparities (in process, November 1994).

A more comprehensive list of disparity studies conducted throughout the United States can be found in *The Urban Lawyer: The National Quarterly on State and Local Government Law*, Chicago: American Bar Association, Summer 1994: *Volume 26, Number 3*, pp. 536-540.

Government Set-Asides, Minority Business Enterprises and the Supreme Court

By Mitchell F. Rice

Equal Opportunity

Government Set-Asides, Minority Business Enterprises, and the Supreme Court

Mitchell F. Rice, Louisiana State University

What is the constitutional status of government set-aside programs? That is an important question for those involved in the design or implementation of public sector efforts to promote minority business development through set-asides. The answer depends on which level of government establishes the program. Professor Rice provides a survey of three U.S. Supreme Court decisions relevant to set-aside programs: Fullilove *v.* Klutznick *(1980), the* City of Richmond *v. J.* A. Croson Co. *(1989), and* Metro Broadcasting *v.* Federal Communications Commission *(1990). While the* Fullilove *decision seemed to many to authorize set-aside legislation at all levels of government, the* Croson *case provided a stricter standard by which state and local programs were to be assessed. While maintaining the "strict-scrutiny" standard for state and local programs used in* Croson, *the* Metro Broadcasting *decision reinforces the Court's* Fullilove *finding that supports judicial deference to congressional power to identify and redress the effects of society-wide discrimination. Rice concludes with examples of recent studies being conducted in Atlanta and elsewhere that attempt to deal with the Court's criteria for establishing non-federal set-aside programs.*

Minority Business Enterprise (MBE) set-asides were created through the efforts of government, both federal and state, to encourage minority business ownership and success with the principal purpose of overcoming the continuing effects of past discrimination. Government set-asides in one form or another have been in existence for nearly three decades and their impetus can be traced to the support of President Lyndon B. Johnson through the Kerner Commission Report.[1] President Nixon issued Executive Order 11458 in 1969 establishing the Minority Business Development Agency (MBDA) in the U.S. Department of Commerce to preserve and strengthen minority businesses.[2] A subsequent Executive Order, 11625, issued by President Nixon strengthened the MBDA. The agency is the only one in the federal government created specifically to promote the creation and expansion of minority business. It is available to serve more than 700,000 minority businesses.[3]

Set-asides can be of two basic types: (1) pure set-asides which provide that a certain percentage of the total number of government contracts be allotted to minority-owned businesses and (2) subcontractor goal set-asides which require that a certain portion of a prime contractor's fee be spent with minority-owned contractors.[4] In *Fullilove* v. *Klutznick*, the U.S. Supreme Court upheld the use of federal set-asides for minorities which was contained in the Public Works Employment Act of 1977.[5] Following the Court's decision, set aside programs proliferated nationwide to include some 36 states and 190 localities by the late 1980s.[6]

Set-asides have had the impact of a major government spending program on the economic status of minority-owned businesses.[7] The federal government in the 1986 fiscal year, reported 4.4 billion dollars in contract awards to minority and disadvantaged businesses, including three billion dollars under the Section 8(a) set-aside program, and 1.2 billion dollars in contract awards to firms owned by women.[8] Over a six fiscal-year period from 1979 to 1985, the District of Columbia procurement to MBEs increased by more than 300 percent from 52 million dollars to 170 million dollars.[9]

Set-asides *have had the impact of a major government spending program on the economic status of minority-owned businesses.*

The City of Atlanta procurement to MBEs increased over the ten-year period, 1973 to 1983, from 42 thousand dollars to 43 million dollars.[10] By 1989, Atlanta had awarded more than 300 million dollars in contracts to minority and female-owned businesses.[11] Suggs observes that highway construction revenues of black-owned businesses rose 224 percent in constant dollars between 1977 and 1982.[12]

The course of set-asides took a dramatic turn on 23 January 1989 when the U.S. Supreme Court handed down a controversial decision in the case of *City of Richmond* v. *J. A. Croson Co.* The Court ruled 6 to 3 against a City of Richmond, Virginia, construction contracting program. Some sixty friend-of-the-court briefs were filed with more than fifty supporting the City of Richmond and nine supporting the J. A. Croson Company. Among the briefs supporting the City of Richmond were those filed by the American Civil Liberties Union, the City and County of San Francisco, the States of California, Connecticut, Illinois, Maryland, Massachusetts, New Jersey, Ohio, Oregon, Rhode Island, South Carolina, Washington, West Virginia, Wisconsin, Wyoming, and the District of Columbia, the International City Management Association, the National League of Cities, and the U.S. Conference of Mayors.[13] Among the briefs opposing the City of Richmond was one filed by the U.S. Department of Justice.[14] Yet, a year and a half later, on 27 June 1990, the Court upheld the Federal Communications Commission's (FCC) minority specific policies in *Metro Broadcasting* v. *Federal Communications Commission* as serving an important governmental objective, one of promoting broadcast diversity.

Why did the Court uphold the set-aside/minority-specific programs in *Fullilove* and *Metro Broadcasting*, but not in *Croson*? Was there a significant difference of justification in the application of the equal protection clause of the Fourteenth Amendment between federal and local set-asides based on the *Fullilove* and *Croson* decisions? The pervasive questions facing the Supreme Court in *Fullilove*, *Croson*, and *Metro Broadcasting* in the context of equal protection guarantees were: Should the strict scrutiny of racial classifications be relaxed when they are employed for the asserted purpose of aiding a minority? When may government be *color conscious* rather than *color blind*? May "benign" classifications—the use of racial classifications to benefit rather than burden particular racial or ethnic minorities—be used to remedy only the effects of past discrimination? This article will discuss these questions and explore how the Court's decisions will affect existing and future set-aside programs.

Standards of Review and the Fourtheenth Amendment

Equal Protection Guarantee

The Fourteenth Amendment commands that no person shall be denied equal protection of the laws by any state. This equal protection guarantee applies to both the state and federal governments although the restriction has two totally distinct bases. The equal protection clause of the Fourteenth Amendment by its own terms applies only to state and local governments. The applicable portion reads as follows:

> No state shall...deny to any person within its jurisdiction the equal protection of the laws.

There is no equal protection clause that applies to the actions of the federal government, and the Supreme Court has not attempted to make the clause itself applicable to federal acts. However, if the federal government classifies individuals in a way which would violate the equal protection clause, it will be held to contravene the due process clause of the Fifth Amendment. Nevertheless, the standard for validity under the due process and equal protection clauses is identical.[15]

Whether a classification meets the equal protection guarantee depends on the purpose attributed to the legislative act and the determination of whether there is a sufficient relationship between the asserted governmental end and the classification. It is rare that a classification can be so artfully drawn that it can be said to promote perfectly any but the most peculiar or narrowly defined ends. Therefore, the ultimate conclusion as to whether a classification meets the equal protection guarantee in large measure depends upon the degree of independent review exercised by the judiciary over the legislative line-drawing in the establishment of the classification. To the extent that the Supreme Court defers to the legislature's choice of goals or determination of whether the classification relates to those goals, the justices have in fact taken the position that it is the function of the legislature rather than the judiciary to make the equal protection determination as to the particular law.

Although the justices have agreed in majority opinions to only two standards of review of general applicability, there appear to be at least three standards of review that may be employed in equal protection decisions. The first standard of review is the *rational relationship test*. The Court will not grant very probing review of legislative decisions to classify persons in terms of general economic legislation. Thus, if a classification is of this type the Court will ask only whether it is conceivable that the classification bears a rational relationship to an end of government which is not prohibited by the Constitution. So long as it is arguable that the other branch of government had such a basis for creating the classification, a court will not invalidate the law.[16]

The second type of review under the equal protection guarantee is generally referred to as *strict scrutiny*. This test means that the justices will not defer to the decision of the

other branches of government but will instead independently determine the degree of relationship which the classification bears to a constitutionally compelling end. A court will not accept every permissible government purpose as sufficient to support a classification under this test, but will instead require the government to show that it is pursuing a "compelling" or overriding end, one whose value is so great that it justifies the limitation of fundamental constitutional values.[17]

The Court will use this standard of review under the equal protection guarantee in two categories of civil liberties cases: first, when the government act classifies people in terms of their ability to exercise a fundamental right; second, when the governmental classification distinguishes between persons, in terms of any right, upon some "suspect" basis. The reason for the difference in treatment of these two types of cases stems from the existence of an important judicial function in protecting certain fundamental rights and "discrete insular minorities."[18]

There now appears to be a number of cases in which the Court has given very little deference to legislative judgments when reviewing legislative classification, but in which the Court has not employed either the traditional rational basis or compelling interest standard. The only category of cases in which a majority of the Supreme Court justices have clearly adopted a standard of review falling between the two traditional ones is the category involving gender-based classification. A majority of the justices will uphold a gender classification only when the government can demonstrate that the classification it has employed is "substantially related" to an "important governmental objective."[19]

"Benign" Racial Classifications —Affirmative Action Programs

As Justice Brennan stated in dissent in *DeFunis* v. *Odegaard*,[20] "Few constitutional questions in recent years have stirred as much debate" as the question of "benign" discrimination—the use of racial classifications to benefit rather than burden particular racial or ethnic minorities. The Supreme Court has held that racial classifications which discriminate against minorities are inherently "suspect" and will be subject to "strict scrutiny" and upheld only if necessary to promote a "compelling" state interest. But, what standard of review should be applied to government action which discriminates *in favor* of racial or ethnic minorities?

Is strict scrutiny required under the equal protection clause only where legislation discriminates against a "discrete and insular" minority so that reasonable affirmative action programs are permissible? Alternatively, is the test designed to enforce a constitutional principle of race neutrality so that affirmative action programs violate a "color-blind" principle of the Fourteenth Amendment?

The debate on "affirmative action" has focused on three practices: using quotas in making public housing assignments to insure that housing is integrated; giving minority members preferential treatment in hiring and promotions to atone for past discriminatory actions; and adopting preferential admission programs for minority students at universities and professional schools. The controversy over the constitutionality of such programs stems largely from the apparent conflict between two equal protection goals: the removal of any remaining barriers to full racial equality and the requirement of governmental treatment of individuals on the basis of their personal merit rather than their race.[21]

When a program gives members of minority races clearly preferential treatment, such as guaranteeing them a minimum share of benefits, the problem becomes complex. The goals, in such instances, of racial equality for minorities and integration both seem to be effectively promoted by the affirmative action program. The issue is whether the use of a racial classification is prohibited because the Constitution prohibits limiting the opportunities of anyone on the basis of race.

Fullilove and the Rise of Statutory Federal Set-Aside

In 1977 Congress enacted the Public Works Employment Act (PWEA) (Public Law 95-28) making available four billion dollars in federal funds to state and local governments for public works projects. The act allocated ten percent of the funds to businesses ownded by minorities which were defined as Blacks, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts (see 42 United States Code Sections 6701-6710). The PWEA amended the Local Public Works Act Capital Development and Investment Act of 1976 (Public Law 94-369) which had authorized the expending of two billion dollars to state and local governments for public works projects. The "minority business enterprise" provision in PWEA was introduced by Representative Parren Mitchell and by Senator Edward Brooke. Both Houses acted expeditiously and passed the provision on the same day it was introduced (24 February 1977 in the House by a vote of 335 to 77 and 10 March 1977 in the Senate by a vote of 71 to 14).[22] The provision was enacted into law without hearings or committee reports, without empirical justification, and without serious opposition.[23] These actions were quite contrary to the distinct treatment provided by Congress to previous laws aimed at Blacks and other minorities.

The PWEA constituted the federal government's first statutory attempt to utilize expressed racial quotas in the administration of public works contracts.[24] The set-aside provision in the PWEA was constitutionally challenged in *Fullilove* v. *Klutznick*. Opponents of race-conscious affirmative action plans challenged the provision alleging it violated the equal protection clause of the Constitution. Specifically, the opponents consisting of several associations of contractors, alleged that the enforcement of the ten percent MBE requirement perpetuated an economic injury to them and that on its face the set-aside provision violated the equal protection clause of the Fourteenth Amendment. The Supreme Court, by a 6 to 3 vote, upheld the provision as constitutional and within the power of Congress to provide for the general welfare of the United States.

Chief Justice Burger, writing for the plurality, noted that although racial classifications require thorough examination, the judiciary must accord appropriate deference to Congress, a co-equal branch of the United States Government charged by the Constitution with the power to provide for the general welfare of the United States and to enforce by legislative enactment the equal protection guarantees of the Fourteenth Amendment.[25] In short, the Court held that the equal protection clause did not bar adoption of race-conscious measures aimed at terminating the perpetual effects of racial discrimination. Thus the *Fullilove* decision affirmatively answered the question of whether the federal government can appropriately consider race in awarding federal construction contracts.

In *Fullilove*, Congress did not have to make *specific* findings of past discrimination because it has broad authority and an affirmative duty to react to and address discrimination as a matter of national concern. Chief Justice Burger, writing also for Justices White and Powell, noted that congressional efforts over the past two decades prior to *Fullilove* to solve problems associated with discrimination against minority businesses provided "abundant historical basis" in support of the set-aside provision.[26] Justice Marshall, writing also for Justices Brennan and Blackmun in a concurring opinion, argued that racial classifications employed ostensibly for purposes of remedying past racial discrimination are constitutional if they "serve important governmental objectives and are substantially related to achievement of those purposes."[27] The majority of the Court, for the most part, seemed to have employed the "rational relationship" test. That is, whether it is conceivable that the classification bears a rational relationship to an end of government which is not prohibited by the Constitution. So long as it is arguable that the other branch of government had such a basis for creating the classification, the Court will not invalidate the law. Only Justice Powell, in a concurring opinion, contended that the set-aside provision had to be judged by "the most stringent level of review" (strict scrutiny) because it employed a racial classification.[28]

The *Fullilove* decision led numerous legal commentators and analysts to review the scope and implications of the ruling. Some argued that the Court only accorded constitutional protection to certain federal statutes while others considered the lack of substantive evidence presented by Congress supporting the need for such legislation and contended that the decision would be granted broader application.[29] More important, however, was the lower courts' interpretation of the *Fullilove* decision. Although some non-federal set-asides were struck down, numerous state and lower federal courts interpreted the language of the *Fullilove* decision as authorizing the creation of non-federal minority set-asides. As a result, state and local governmental jurisdictions and agencies patterned programs after the PWEA in an effort to assist and benefit minority enterprises. Set-aside programs were devised in such jurisdictions as: Atlanta (35%); State of Arkansas (10%); Birmingham (15%); Delaware Authority for Regional Transit (15%); Houston (12%); Massachusetts Bay Transit Authority (30%); State of Michigan (7%); Milwaukee (19%); State of Ohio (5%); New York City (10%); Pierce County, Washington (12%), State of Tennessee (7%); and Washington, D.C. (40%).[30]

Although some non-federal set-asides were struck down, numerous state and lower federal courts interpreted the language of the Fullilove decision as authorizing the creation of non-federal minority set-asides.

Further, Congress later enacted set-aside provisions in the Surface Transportation Assistance Act of 1982 (Highway Improvement Act) (Public Law 97-424) and the International Security and Development Assistance Authorization Act of 1983 (Foreign Assistance Act) (Public Law 98-151).[31] In the Highway Improvement Act, Representative Parren Mitchell was again the sponsor of the set-aside provision. The provision was aimed at "small business concerns owned and controlled by socially and economically disadvantaged individuals" (Public Law 97-424, 96 Statute, Section 105). Representative Mitchell specifically mentioned the judicial success of his previous set-aside provision in the PWEA. Congress went on to pass his latest provision with the same speed as in the PWEA and with no supporting hearings or records.[32]

The set-aside provision in the Foreign Assistance Act was added as an amendment in 1983 and was extended in the 1985 fiscal year by an amendment (Public Law 98-473). The provision was directed at "historically Black colleges and universities, and private and voluntary organizations which are controlled by individuals who are Black Americans, Hispanic Americans or Native Americans, or who are economically and socially disadvantaged..." (Public Law 98-151, 97 Statute, 970-71). In 1987 Congress enacted Section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act which made women a socially and disadvantaged class for purposes of the Disadvantaged Business Program. This was the first time Congress mandated a procurement program for women. Moreover, the U.S. Department of Defense has a five percent goal program to increase minority business participation in the procurement area.[33]

Croson and the Demise of Set Asides?

In the *Croson* decision, the Supreme Court, in a 6 to 3 vote, found that the City of Richmond's ordinance, requiring that thirty percent of the total dollar amount of city construction contracts go to minority-owned businesses, was unconstitutional because it violated the equal protection clause of the Fourteenth Amendment.[34] The general issue before the Court, as in *Fullilove*, was whether the use of race-conscious classifications to overcome the effects of past discrimination violated the equal protection guarantee.

In April 1983, the Richmond City Council (comprised of five Blacks and four whites), by a vote of 6 to 2 with 1 abstention, adopted a minority business utilization plan which required prime contractors awarded city construction contracts to subcontract at least 30 percent of a contract to one or more MBEs. An MBE, meeting the city's definition of what constituted an MBE, was eligible to hire from anywhere in the United States. Waivers to the set-aside requirement were available only in exceptional circumstances. A waiver had to be supported by a showing that every feasible attempt had been made to comply, and that sufficient, relevant, qualified MBEs are unavailable or unwilling to participate in the contract.

After a public hearing, the ordinance was adopted by the City Council. The following evidence was introduced at the hearing: (1) the city had a 50 percent black population and less than one percent of the city's prime construction projects went to MBEs in the last five years; (2) the City Council's conclusion that the ordinance was consistent with *Fullilove*; (3) the six local professional construction associations had virtually no minority members; and (4) supporters of the ordinance made certain statements indicating there had been widespread racial discrimination in local, state and national construction industries (however, no direct evidence was presented). The set-aside provision identified the same six minority groups for preferences as the ones that were at issue in *Fullilove* (Blacks, the Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts). The provision was limited to a five year period expiring on 30 June 1988. Opponents of the plan did note that the plan would result in a windfall to out-of-state MBEs and not promote local construction jobs. Opponents were most concerned that funds would go to out-of-state MBEs in California, Florida, Hawaii, Illinois and New York, since the largest number of MBEs were located in these geographic areas.[35]

The dispute arose when the J. A. Croson Company bid on a contract to install fixtures and plumbing at the city jail. Croson determined that to satisfy the 30 percent quota, the fixtures would have to be supplied by MBE. Croson initially made reasonable efforts to find an MBE that could supply the fixtures. The only MBE found that could supply the fixtures ultimately submitted a quotation that was substantially higher than another quotation Croson had received from a non-minority business. Croson was the low bidder for the project. However, after it received the MBE's unexpectedly high quote, Croson asked the city for a waiver or approval to raise the contract price. The city denied Croson's request and proceeded to re-bid the project.

Croson sued the city under 42 U.S.C. Section 1983, arguing that the plan was unconstitutional under the Fourteenth Amendment. The District Court upheld the plan and the Fourth Circuit Court of Appeals affirmed. Both courts relied on the Supreme Court's approval of the federal set-aside plan in *Fullilove*. The Fourth Circuit accorded great deference to the generalized City Council's findings, just as the Supreme Court had accorded deference to generalized congressional findings of discrimination in *Fullilove*.

The Supreme Court granted Croson's certiorari petition and vacated and remanded in light of the Supreme Court's decision in *Wygant* v. *Jackson Board of Education*.[36] On remand, the Fourth Circuit held that the program violated both prongs of the strict-scrutiny test under the equal protection clause of the Fourteenth Amendment because the city's hearings had failed to establish a compelling governmental interest, and the quota was not narrowly tailored to accomplish a remedial purpose, but was "chosen arbitrarily." The city then filed a certiorari petition, which the Court granted.

In *Wygant*, the Supreme Court confirmed that any racial classification, even if it favors minorities, must be subject to "a most searching examination to make sure that it does not conflict with constitutional guarantees." Therefore, the Court held that a public school district could not use racial preferences in its layoff decisions, absent evidence of *past discrimination* by the district.[37] However, the *Wygant* Court stopped short of adopting the strict-scrutiny test, and until the ruling in *Croson*, there was no clear pronouncement by the Court of a standard of review which should be applied to cases involving benign classification.

This all changed in *Croson*, for in Part III-A of the decision which was joined by Justices Rehnquist, White and Kennedy, Justice O'Connor made the critical constitutional determination that the strict-scrutiny standard of review must be applied to state and municipal set-aside programs enacted by states and municipalities.[38] She reasoned that strict scrutiny was necessary because "there is simply no way of determining what classifications are 'benign' or remedial and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." In other words, she was concerned that unless racial classifications are "strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to politics of racial hostility." Justice O'Connor observed that strict-scrutiny was particularly appropriate in *Croson* because of the political power wielded by blacks in the City of Richmond, where 50 percent of the population was black and five of the nine City Council seats were held by blacks. Thus, the Richmond set-aside was found not to be analogous to the federally legislated set-aside upheld in *Fullilove*.

The Court was most concerned with the lack of showing of prior discrimination by the City of Richmond. Justice O'Connor stated: "[I]f the city could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, we think that the city could take affirmative steps to dismantle such a system."[39] The Richmond set-aside plan suffered from a generalized assertion that there had been past discrimination in the construction industry. The Court went on to find fault with Richmond's generalized findings of discrimination: (1) the 30 percent quota had no reasonable relation to any injury suffered by anyone; (2) the comparison of the use of minority contractors to the city's general minority population did not reflect the percentage of qualified minority contractors in the population; (3) the city did not even know how many MBEs in the relevant market were qualified

to be prime contractors or subcontractors; (4) the city did not know the percentage of total city construction dollars minority firms received as subcontractors; (5) the low numbers of minority members in the local contractors associations did not show a disparity between eligible MBEs and MBE membership; and (6) the city abritrarily included minority groups (Eskimos and Aleuts) that were not in its geographic region (the plan was not narrowly tailored).[40] These concerns led the Court to conclude that there were two major defects in the plan: the City of Richmond had failed to demonstrate a compelling governmental interest, particularly not showing any *prima facie* evidence; and the City of Richmond presented no evidence of having considered alternative, race-neutral methods that could have been effective in increasing minority participation in municipal construction.[41]

The *Croson* Court's Treatment of *Fullilove*

After discussing the facts in Part I of her decision, Justice O'Connor distinguished *Fullilove* v. *Klutznick*, in Part II, which was joined by Justices Rehnquist and White. The Court had upheld a *congressional* minority set-aside program against a Fourteenth Amendment due process challenge. In *Fullilove*, the Court held that *Congress's* commerce power allowed it to regulate the practices of prime contractors on federally funded local construction projects. Also, *Congress* could mandate local government compliance with the program and adopt racial preferences under Section 5 of the Fourteenth Amendment, which grants Congress the authority to enforce that amendment. That section of the Fourteenth Amendment provides that "congress shall have power to enforce, by appropriate legislation, the provisions of this article."

In *Croson*, Justice O'Connor distinguished *Fullilove* based on the ground that state and local governments lack such authority. In fact, she observed that Section 1 of the Fourteenth Amendment actually was intended to restrain state power. Justice O'Connor concluded that:

> The mere recitation of a benign or compensatory purpose for the use of a racial classification would essentially entitle the states to exercise the full power of Congress under Section 5 of the Fourteenth Amendment and insulate any racial classification from judicial scrutiny under Section 1. We believe that such a result would be contrary to the intentions of the framers of the Fourteenth Amendment, who desired to place clear limits on the state's use of race as a criterion for legislative action, and to have the federal courts enforce those limitations.[42]

Simply stated, the City of Richmond could not rely upon indices of the nationwide industry or of societal discrimination to enact a racial preference. Further, in *Fullilove* Congress, according to the Court, had full "comprehensive remedial power."[43]

The great irony of *Croson* is that Richmond was found to have violated the Fourteenth Amendment for adopting a set-aside program inspired by the federal set-aside program approved in *Fullilove*. However, by distinguishing *Fullilove* on the basis of Section 5 of the Fourteenth Amendment, the Court has exempted congressional programs from the strict-scrutiny standard of review under Title VII. Congress, thus, survives as the sole governmental entity that can enact racial preferences without having to meet the stringent requirements of the strict-scrutiny test. Interestingly, however, leaving federalism issues aside, there were two significant differences between the federal set-aside in *Fullilove* and the non-federal set-aside in *Croson*. First, in *Croson* there was a 30 percent set-aside, while in *Fullilove* the set-aside was only 10 percent. Second, in *Fullilove* the relevant minority population represented between 15 percent and 18 percent of the total U.S. population, while in *Croson* it represented 50 percent of the City of Richmond's population. A year later the Court would uphold the use of federal minority-specific programs at the Federal Communications Commission.

The FCC's Minority-Specific Policies and the Court

The FCC was empowered by Congress through the Communications Act of 1934 (Public Law 73-416) to exclusively grant licenses based on "pubilc convenience, interest or necessity" to persons wishing to construct and operate radio and television broadcast stations in the United States. However, since that time few members of minority groups have held broadcast licenses. In 1971, minorities owned only 10 of approximately 7,500 radio stations and no television stations. By 1978 minorities owned less than 1 percent (about 85 in number) of all radio and television stations. This had increased to 2.1 percent by 1986 (about 250 in number).[44]

In May 1978, in an effort to increase minority ownership of stations, the FCC outlined two elements of a minority ownership policy: a tax certification policy and a distress sale policy.[45] A few years earlier, lower federal courts in *TV9* v. *FCC* approved the use of a policy that would aid minorities in securing ownership and management of media facilities.[46] Even with the courts' rulings, the FCC a few years later acknowledged in its *1978 Statement of Policy on Minority Ownership of Broadcast Facilities* that its prior efforts were successful.[47] The FCC's tax certification policy defers capital gains taxes to sellers who sell their properties to minority ownership,[48] and its distress sale policy allows broadcast license holders facing disciplinary proceedings to sell out to a minority business at a price not exceeding 75 percent of the fair market value.[49]

FCC's minority policies were challenged in two cases—*Metro Broadcasting* v. *Federal Communications Commission* and *Astroline Communications Company* v. *Shurberg Broadcasting of Hartford*. The Court combined the cases and rendered a decision in *Metro Broadcasting*. Metro Broadcasting (Metro) and Rainbow Broadcasting were the two leading contenders to operate a VHF television station in the Orlando, Florida area. Metro's ownership consisted of one minority partner who owned about 20 percent of the

company. Hispanics owned 90 percent of Rainbow.[50] Following proceedings which first awarded the license to Metro and then to Rainbow, Metro filed suit asking for a rehearing of its application.

In Hartford, Connecticut, Shurberg Broadcasting (a white owned firm) opposed the sale of a local television station to Astroline Communications Company (a minority-owned firm) under the FCC's distress sale policy. Shurberg opposed the sale on a number of grounds, including a violation of equal protection. Upon appealing the FCC's decision to support the distress sale policy, the U.S. Court of Appeals, invalidated the Commission's minority distress sale policy. The Court of Appeals ruled that the policy violated the equal protection clause of the Fifth Amendment because it was not narrowly tailored to remedy past discrimination or to promote programming diversity and because it was not reasonably related to a compelling government end.[51]

The Supreme Court, in a 5-4 decision reversed and held that the FCC's minority policies do not violate equal protection and are substantially related to the achievement of the important governmental interest of broadcast diversity. The majority opinion, delivered by Justice Brennan, noted that FCC's minority ownership programs have been approved and mandated by Congress and the Court has approved of benign racial classifications in *Fullilove* v. *Klutznick*. Further, using *Fullilove*, the Court argued that Congress has the power to identify and redress the effects of society-wide discrimination and the strict scrutiny approach use in *Croson* involving a municipality, does not prescribe the level of scrutiny to be applied to benign racial classification employed by Congress.[52] The *Metro Broadcasting* ruling reaffirmed the Court decision's in *Fullilove* that Congress has the power to require that set-aside programs be adopted in federal programs and that benign race-conscious programs can be mandated by Congress.

Conclusion

Lawful adoption or continuation of state and local government set-aside programs, undoubtedly, will be more difficult after the Supreme Court's decision in *Croson*. It is very likely that most of the plans currently in place will be unable to survive the strict-scrutiny standard of review. It indeed seems ironic that a measure enacted to protect a minority from adverse treatment, i.e., the Fourteenth Amendment, could also be used to bar programs designed to remedy past discrimination. The *Croson* decision has made it easier for whites to challenge non-federal set-aside provisions. The immediate aftermath of *Croson* led to the judicial dismantling of set-asides in at least five jurisdictions and the voluntary termination/suspension of at least seventeen programs.[53] By May 1990, over 50 cases had been filed involving challenges to federal and non-federal minority set-aside programs and some 46 jurisdictions had abandoned their programs.[54]

The *Croson* decision has spelled out the criteria for justifying the adoption or continuation of set-asides. Under the Court's strict-scrutiny approach in *Croson*, a state or municipality's burden consists of the following: (1) it must demonstrate a compelling state interest by establishing a *prima facie* case of past discrimination and/or discrimination by the local construction industry; (2) it must demonstrate that other race-neutral alternatives were carefully considered, and the set-aside program it adopted was narrowly tailored to remedy the effects of past discrimination. However, the problem with these criteria is the inordinate amount of effort required to document a set-aside's justification and the exhaustive steps required in examining race-neutral measures. Further, the Court did not provide clear guidance on the analytical process(es) to be used. In other words, the Court did not indicate how to determine minority business capacity, ethnic classifications and subgroups, and market discrimination.[55] As a result, defending set-aside programs through disparity studies has become the latest strategy.

Lawful adoption or continuation of state and local government set-aside programs, undoubtedly, will be more difficult after the Supreme Court's decision in Croson.

Defending set-aside programs involves preparing a "disparity study that statistically documents how minorities and minority-owned firms have been discriminated against in government contracting."[56] The City of Atlanta hired a highly respected economic consulting firm to document and prove discrimination in the letting of government contracts. The 1,100 page, eight-part report written by Andrew F. Brimmer and Ray Marshall (former Secretary of Labor under President Carter) took nearly a year to compile. It concluded that in Atlanta, minority entrepreneurs have a lower success rate in obtaining loans and bonding and procuring contracts regardless of their levels of education, training, and business-related experience.[57]

The report consisted of evidence gathered through historical (dating back to Reconstruction) and economic research and confidential, in-depth interviews of individuals with knowledge of Atlanta's marketplace.[58] The study presented economic data with respect to income between Blacks and Whites in Atlanta and noted that Blacks who represented nearly 67 percent of the population received only about 41 percent of Atlanta's total income. It showed that, in 1982, Black-owned businesses made up only about 3 percent of the total business sales in the city. Using a "Utilization Percentage Ratio" as a measure of discrimination in determining the amount of contract dollars going to Black businesses, the study uncovered marketplace discrimination in bidding opportunities and bonding, bid manipulation, price discrimination by suppliers, customer/end user discrimination, discrimination in financing, and stereotypical attitudes of customers and professional buyers. It revealed that specific

discrimination has occurred in construction, professional services (real estate, legal, architectural, accounting, engineering), commodity sales, security consulting, and energy industries. Statistical data also documented discriminatory financial disparities between Black-owned and white-owned businesses.[59]

In addition to the Atlanta study, some 40 other studies are underway or have been completed including such cities as Baltimore, Chicago, Denver, Houston, Milwaukee, Newark, New York, San Francisco, Seattle, and the states of Louisiana, Maryland, Minnesota, and Hillsborough County, Florida.[60] As more studies are completed, more sophiscated models may emerge for other jurisdictions to follow. However, the model(s) will eventually be reviewed by the Supreme Court.

In the final analysis, a comparison of *Fullilove*, *Croson*, and *Metro Broadcasting*, shows that the Court continues to search for a middle ground between explicit racial quotas and color-blind public policy. Arguably, there is no such thing. As noted in the *National Review*, "either race is a relevant factor in structuring society or it is not."[61] If it is only "sometimes" as reflected in the *Fullilove*, *Croson*, and *Metro Broadcasting* decisions, the Court will be continually evaluating race-conscious measures on an ad hoc basis. This approach will place a heavy burden on public policymakers seeking to address constructively one of the major and most persistent socio-economic and political cleavages in American life.

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Notes

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8. See *Federal Procurement Data System, Standard Report FY 1986, Fourth Quarter*, cited in Suggs, "Rethinking Minority Business Development Strategies," p. 112, note 54.
9. Suggs, "Rethinking Minority Business Development Strategies," p. 112, note 55.
10. *Idem*.
11. Q. Sabir, "Affirmative Action Watch." *Black Enterprise* (October 1990): 24.
12. Suggs, "Rethinking Minority Business Development Strategies," p. 113.
13. On these points see T. Eastland, "Racial Preferences in Court (Again)." *Commentary* (January 1989): 32-38.
14. C. H. Davis and D. D. Jackson, "The Sunset of Affirmative Action? *City of Richmond* v. *J. A. Croson Co.*" *National Black Law Journal* 12 (1990): 73-87.
15. See *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).
16. See *Ktsanes* v. *Underwood*, 467 F. Supp. 1002, 1007 N.D. Ill (1979).
17. See *Horton* v. *Califano*, 472 F. Supp. 339, 343 W.D. Va. (1979).
18. See *United States* v. *Carolene Products Co.*, 304 U.S. 152 (1938).
19. See *Craig* v. *Boren*, 429 U.S. 190 (1976).
20. *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974) at 350.
21. On these points see K. Greenawalt, "Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions." *Columbia Law Review* 75 (April 1975): 559-602.
22. See U.S. Congress, *Congressional Record-House* 123 (February 23, 1977): 12,943 and U.S. Congress, *Congressional Record-Senate* 123 (March 10, 1977): 13,256-57.
23. D. S. Days, "Fullilove." *The Yale Law Journal* (January 1987): 453-499. Congressman Parren Mitchell did introduce evidence which showed that past discrimination in the construction industry nationwide had reduced minority participation in federal contracting (see *Congressional Record-House*, 1977).
24. Days, "Fullilove," p. 453. See also, Martin Tolchin, "Officials in Cities and States Vow to Continue Minority Contractor Programs." *New York Times* (January 25, 1989): A18; B. Drummond Ayres, Jr., "Court Ruling Is A Bitter Irony for Richmond Blacks." *New York Times* (January 25, 1989): A1; and Bob Sablatura, "Minority Businesses: Getting A Piece of the City Pie." *Houston Business Journal* (December 1, 1986): 1, 6.
25. *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980) at 472.
26. *Ibid.*, at 478.
27. *Ibid.*, at 519.
28. *Ibid.*, at 496.
29. See, for example, *Comment*, "Federal Efforts to Assist Minority Construction Contractors: The Need for Comprehensive Planning." *University of California Davis Law Review* 14 (1980): 125-161.
30. Days, "Fullilove," pp. 454-455.
31. *Ibid.*, pp. 472-473.
32. U. S. Congress, *Congressional Record-House* (December 6, 1982).
33. U. S. Congress, *Minority Business Development Act of 1988 - H.R. 1769*, p. 57.
34. *City of Richmond* v. *J. A. Croson Co., United States Law Week* 57 (January 24, 1989): pp. 4132-4157. The *Croson* decision generated voluminous legal and social commentary. See, for example, Comments, "Affirmative Action Minority Set-Asides: Future Justification for Implementation at the State and/or Local Government Level." *Mississippi Law Journal* 59 (Spring 1989): 189-208; Douglas D. Scherer, "Affirmative Action Doctrine

and the Conflicting Messages of *Croson*." *The University of Kansas Law Review* 38 (Winter 1990): 281-341; Kenneth Casebeer, "Running on Empty: Justice Brennan's Plea, the Empty State, the *City of Richmond* and the Profession." *University of Miami Law Review* 43 (1989): 989-1019; Edward I. Koch, "Equal Opportunity - Without Minority Set-Asides." *New York Times* (February 20, 1989): A19; Ronald Smothers, "Affirmative Action Booms in Atlanta." *New York Times* (January 27, 1989): A10; Linda Greenhouse, "Court Bars A Plan Set Up To Provide Jobs Minorities." *New York Times* (January 24, 1989): A1, A19; Jonathan P. Hicks, "Why Minority Contractors See 'a Giant Step Backward'." *New York Times* (January 29, 1989): E4; Daniel Weeden, "*City of Richmond* v. *J. A. Croson* and the Aborted Affirmative Action Plan." *Southern University Law Review* 16 (1989): 73-100; Joel Selig, "Affirmative Action in Employment After *Croson* and *Martin*: The Legacy Remains Intact." *Temple Law Review* 63 (1990): 1-29; and Michel Rosenfield, "Decoding *Richmond*: Affirmative Action and the Elusive Meaning of Constitutional Equality." *Michigan Law Review* 87 (1989): 1729-1794.

35. C. M. Ollerman, "Recent Developments - Constitutional Law: Equal Protection and Affirmative Action in Local Government Contracting - *City of Richmond* v. *J. A. Croson Co.*" *Harvard Journal of Law and Public Policy* 12 (1989): 1069-1081.
36. *Wygant* v. *Jackson Board of Education*, 476 U.S. 267 (1986).
37. In *Wygant*, the Court struck down as unconstitutional a layoff provision of a collective bargaining agreement between the Jackson, Michigan, Board of Education and a teacher's union. Under the provision, the teachers having the most seniority were to be retained during a layoff except when the percentage of teachers who were minorities exceeded the percentage of minority teachers employed at the time of the layoff (see 476 U.S. at 273-284).
38. Justice O'Conner delivered the opinion of the Court. She was joined by Chief Justice Rehnquist and Justice White. Justices Stevens and Kennedy each filed separate opinions concurring in part and concurring in judgment. Justice Scalia filed an opinion concurring in judgment. Justice Marshall, the only Black on the Court, led the dissent and was joined by Justices Brennan and Blackman.
39. *U. S. Law Week*, 57, p. 4138.
40. K. A. Hoogland and C. McGlothlen, "*City of Richmond* v. *Croson*: A Setback for Minority Set-Aside Programs." *Employee Relations Law Journal* (Summer 1989): 5-19.
41. See Ollerman, "Recent Developments."
42. *City of Richmond* v. *J. A. Croson Co.*, *United States Law Week* 57 (January 24, 1989), p. 4138.
43. *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980) at 483.
44. See *Metro Broadcasting* v. *Federal Communications Commission*, *U. S. Law Week* 58 (June 26, 1990): 5053-5070.
45. *U. S. Law Week* 58, pp. 5054-5060.
46. See *TV9* v. *F.C.C.*, 495 F. 2d 929 D.C. Cir. (1973).
47. Laurence B. Alexander, "An Update on Minority Preference at the Federal Communications Commission." *National Black Law Journal* 10 (1989): 249-260.
48. It has been estimated that some 233 stations have been sold to minorities under the tax certification policy. See Stephen H. Braunginn, "Broadcast Views." *Black Enterprise* (November 1990): 31.
49. See Alexander, "An Update on Minority Preference at the Federal Communications Commission," pp. 252-254. Over the past twelve years only 38 stations have been sold as distress sales. Four of these occurred during the Reagan Administration. See Braunginn, "Broadcast Views," p. 31.
50. *U.S. Law Week* 58, pp. 5054-5056.
51. *Ibid.*, pp. 5054-5058.
52. *Ibid.*, pp. 5054-5059.
53. National Urban League, *The State of Black America* (NY: National Urban League, 1990). The City of Atlanta's MBE plan, perhaps among the most successful in the country, was struck down by the Georgia Supreme Court following the *Croson* decision (see *American Subcontractors Association, Georgia Chapter* v. *City of Atlanta*, 376 S.E. 2d 6621, Ga. [1989]),. As a result of the *Croson* ruling, Atlanta's Minority business participation fell from 37 percent in 1989 to 24 percent for the first half of 1990. See Sabir, "Affirmative Action Watch," p. 24. A federal district court in Wisconsin cited the *Croson* case in enjoining a state program that set aside 4 million dollars in state highway contracting monies for socially and economically disadvantaged businesses (see *Milwaukee County Pavers Association* v. *Fiedler*, 707 F. Supp. 1016, W.D. Wis. [1989]).
54. Margaret C. Simms, "Rebuilding Set Aside Programs." *Black Enterprise* (September 1990): 33.
55. Simms, p. 33.
56. E. Perlman, "Minority Set-Aside Programs Back on Track." *City and State* (November 5-18, 1990): 4.
57. See Sabir, "Affirmative Action Watch," p. 24 and Andrew F. Brimmer, "A Battleplan for Fairness." *Black Enterprise* (November 1990): 45-46.
58. Brimmer, pp. 45-46.
59. *Idem.*
60. See Sabir, "Affirmative Action Watch," p. 24 and Perlman, "Minority Set-Aside Programs Back on Track," p. 4.
61. "Court in the Middle," *National Review* (February 1989): 14.

Certification Programs for Minority- and Women-Owned Businesses

Mark A. Messura

and

Local Government Minority- and Women-Owned Business Programs: Questions and Answers

Frayda S. Bluestein

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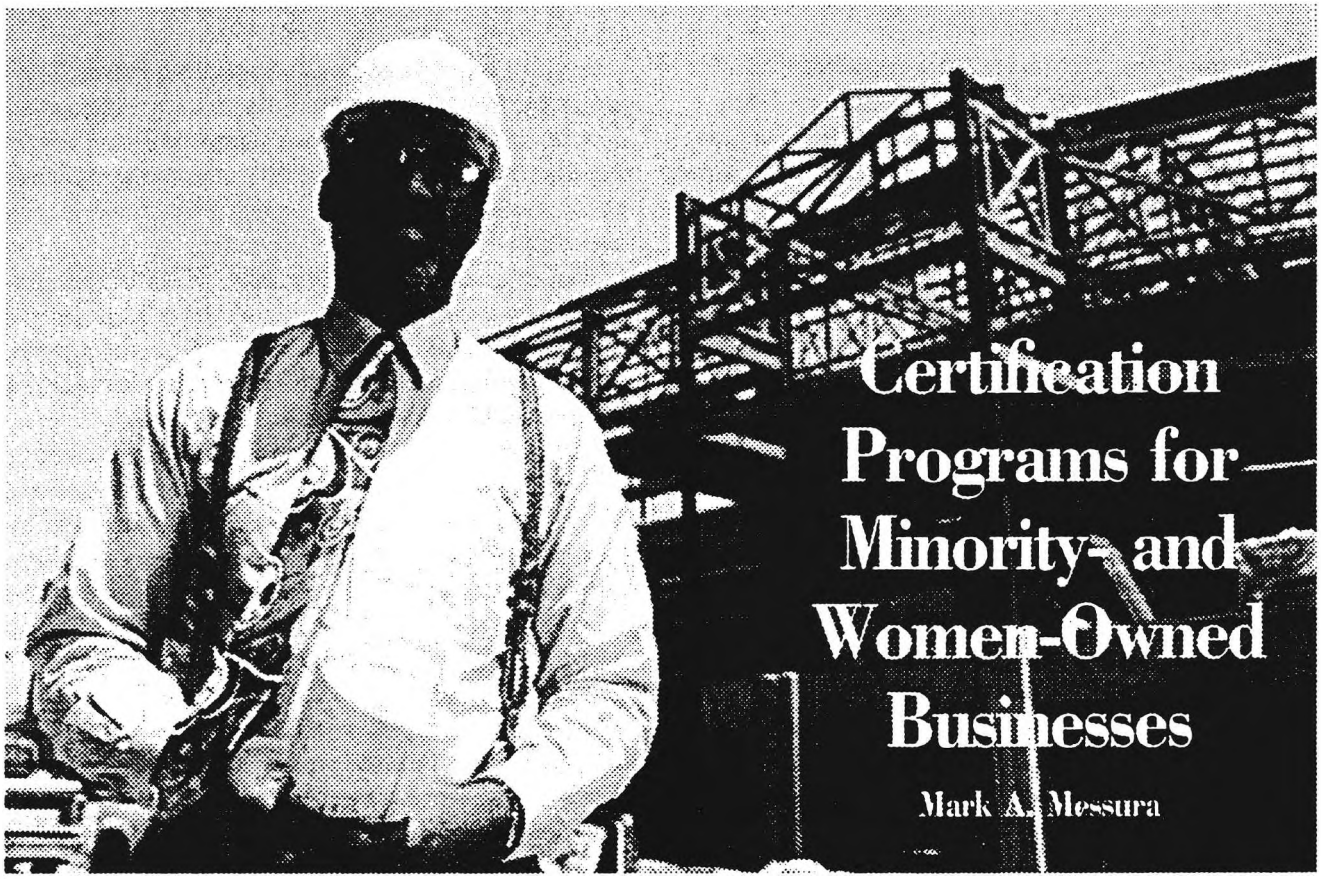

Certification Programs for Minority- and Women-Owned Businesses

Mark A. Messura

Marshall Isler, president of Unicon Contractors, Inc., stands in front of the new Durham ballpark, a municipal construction project. Isler's business, certified by the city of Durham as a "DBE" (Disadvantaged Business Enterprise), was awarded a subcontract to lay some of the concrete (sidewalks, etc.) for the project. Certification programs identify eligible businesses to promote minority participation in government contracting.

Throughout North Carolina, local governments take extra steps to help businesses owned by minorities and women participate in government contracting. Typically those extra steps are *not* set-asides or special preferences; they are simply good faith efforts to identify minority- and women-owned business enterprises (M/WBEs), to encourage those businesses to bid on government contracts, and to help them position themselves to compete for bid awards as the "lowest responsible bidder."

To focus the extra steps on *bona fide* minority- and women-owned businesses, many jurisdictions have developed certification programs. Certified businesses are then recognized by the local government and become eligible—without further paperwork or proof of status—for the government's extra efforts.

In November 1993 the North Carolina Institute of Minority Economic Development[1] commissioned a study designed to identify the similarities and differences of the various certification programs and to evaluate them as a means of encouraging minority-business participation in government contracting.[2] This article summarizes the results of that study.[3]

The study, which was not intended to be exhaustive, focused on eight certification programs in the state's larger metropolitan areas (with their consequently larger governmental purchasing markets): Asheville, Charlotte, Durham, Fayetteville, Greensboro, New Hanover County, Raleigh, and Winston-Salem. The study also included two certification programs operated by state agencies—the Department of Administration (DOA) and the Department of Transportation (DOT)—and certification programs in other states and municipalities outside North Carolina.[4]

Businesses Eligible for Certification

All certification programs are voluntary. Minority businesses are not required to obtain certification as a prerequisite for doing business with a government. Certification may be necessary, however, for businesses to qualify for the extra help that certification programs provide to eligible businesses. Certification programs typically cover one or more of three types of businesses:

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Minority-Owned Business Enterprises (MBEs). For purposes of this article, MBEs are businesses that are owned, managed, and controlled by minorities. For partnerships, joint ventures, or corporations, at least 51 percent of the ownership and voting rights must be held by minorities. This definition is consistent with the statutory definition of "minority-owned business" in the North Carolina statute that requires good faith efforts at including minority- and women-owned businesses in certain governmental building construction.[5] The term *minority* under that statute includes blacks, Hispanics, Asian Americans, American Indians, and Alaskan Natives.

Women-Owned Business Enterprises (WBEs). WBEs are owned, managed, and controlled by women. For partnerships, joint ventures, or corporations, at least 51 percent of the ownership and voting rights must be held by women. The North Carolina "good faith efforts" statute discussed above also includes women within the definition of minority.

Disadvantaged Business Enterprises (DBEs). DBEs are owned, managed, and controlled by citizens who are socially and economically disadvantaged. Socially disadvantaged individuals are defined as

> persons who have been subjected to racial or ethnic prejudice or cultural bias as a result of their identity as a member of a group, without regard to their individual qualities.[6]

Economically disadvantaged individuals are

> socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities, as compared to others in the same or similar line of business and competitive market area who are not socially disadvantaged.[7]

This classification is used in connection with governmental contracts involving federal money and is not typically used in local government certification programs. However, it is used by the city of Durham and by New Hanover County (the latter certifies businesses as either MBE or DBE).

Unlike other certifying agencies, the North Carolina Department of Administration uses a DBE classification for *disabled* business enterprises, a classification that includes businesses owned and controlled by individuals who are physically disabled.

Purposes of Certification Programs

Identification of eligible enterprises. Certification programs are intended primarily to allow governments to identify and categorize potential contractors as businesses eligible for the extra efforts governments make for businesses that have historically been underrepresented. A certification program allows a governmental unit to increase the size of the minority contractor pool; certification does not guarantee a business that it will receive or participate in government contracts.

Avoiding abuse. A second purpose of certification programs is to ensure that the extra efforts of local governments are focused on businesses that are in fact eligible. All of the program administrators interviewed for the Institute of Minority Economic Development study reported that they had encountered businesses applying for certification that were not legitimately owned and controlled by minorities or women. In such instances, information on the certification application may be deliberately manipulated, omitted, or misrepresented to make the business appear to be an MBE or WBE. Certification staff commonly refer to these businesses as "fronts."

The experience of the Office of Minority Business Development of the Commonwealth of Pennsylvania dramatically illustrates the problem with fronts. When the Pennsylvania certification process required only self-reporting by applicants, with little or no review or verification by program staff, more than 11,000 businesses were classified as MBEs. After the state implemented a rigorous certification process that included a detailed application form and site visits, the number dropped to less than 1,900. The program staff attributed most of the decline to a decrease in the number of fronts, which previously had taken advantage of the easy certification process.[8]

The Certification Process

Responsibility for the certification process may be located within any of several governmental departments, such as the purchasing office, the county or city manager's office, or the planning or economic development departments. (See Table 1 for the location of the programs in the Institute of Minority Economic Development study.)

The Application

The certification process begins with the application. To receive applications from as many eligible MBEs and WBEs as possible, certification program administrators often conduct outreach activities such as seminars, conferences, and advertising programs to inform the business community about certification.

The application forms of all programs in the study require information in three categories: general business

information and documentation, ownership-related information, and management-related information. Program administrators reported receiving a significant proportion of incomplete applications (some estimates run as high as 25 percent). They attributed this phenomenon largely to two factors. First, a front that is merely "testing the waters" may submit an incomplete application, deliberately omitting information that may lead to a denial of certification. Once it becomes apparent that the application will not be processed as submitted, the front typically will withdraw the application or simply never send additional information. Second, businesses sometimes are reluctant to reveal financial information. In almost all of these instances, the applications are completed after administrators explain the need for the information.

Applicants are notified by letter if any required information is missing. Most programs have a fixed response period within which applicants may forward the additional information. Applications that remain incomplete beyond the response period are removed from consideration or placed in an inactive file.

Approval or Denial

Program administrators review the completed applications for compliance with the program's criteria for MBE, WBE, or DBE status. In some instances—typically only where the information indicates a need for further scrutiny—program administrators may conduct a site visit to the business as part of the review process.

The decision to approve or deny the application is made in various ways. In some programs, such as Winston-Salem's, the decision rests with the program administrator. In others, the administrator recommends approval or denial to a review committee, which then makes the final decision. The programs in New Hanover County and the city of Asheville work this way.

The applicant is sent a letter with notification of the certification determination. In most instances, applicants denied certification may appeal through a formal appeal process.

Recertification

All certifying agencies require recertification, usually every two years. In general, recertification is less time consuming for both businesses and administrators, because the information requirements typically are minimal. Among the programs studied, only Winston-Salem requires applicants to resubmit the full application form.

Table 1
Characteristics of Certification Programs

Agency	Organizational Location	Certified Businesses[a]	Certification Staff[b]
Asheville	Community Development Div.	100	1
Charlotte	Purchasing Department	800–900	2
Durham	Affirmative Action Office	> 200	2
Fayetteville	Purchasing Department	N/A	1
Greensboro	City Manager's Office	500	1
New Hanover Cty.	County Manager's Office	195	1
Raleigh	Planning Department	350	1
Winston-Salem	Economic Development	500	1
N.C. DOA	Purchasing	1,200	4
N.C. DOT	Civil Rights/Business Development	130	6

a. The numbers are estimates provided by program administrators.

b. The number of certification staff includes the number of professional staff that are principally involved with the certification process. In all instances, these staff conduct certification in addition to many other job responsibilities.

Other certifying agencies use an abbreviated form or require only identification of changes that have occurred since submission of the original form.

Assistance Provided to MBEs and WBEs

Help in the application process. Many MBEs and WBEs need help right at the start, in compiling information and completing the application. Program administrators routinely assist applicants in organizing information such as business licenses, corporate documents, legal documents, tax records, and so on. Like all small business owners, MBE and WBE owners often work as manager, bookkeeper, salesperson, and production worker, so they do not have the time necessary to organize the paperwork that accompanies an active business.

Information services. Most certification programs regularly mail notices of upcoming bid opportunities to certified businesses. Many take additional steps. The city of Greensboro's program brochure, for example, cites the following services:

- referrals to both the public and private sector
- advance notice of contract opportunities with the city
- an annual contractors institute (a series of sessions designed to assist firms in the area of construction with skills vital to their businesses)
- an annual suppliers institute (a series of sessions designed to assist firms in the area of procurement with skills vital to their businesses)

- an annual contractors forum (to bring together prime contractors, subcontractors, and MBEs and WBEs to express concerns and to network)
- an M/WBE plan room (to provide an atmosphere conducive to working on bid estimates with the assistance of trained specialists)

Publication of directories. Most certifying agencies publish and distribute directories listing certified MBEs and WBEs, their services and products, and contact information. These directories are distributed widely among governmental agencies and private businesses seeking to contact minority- and women-owned businesses. Exposure through these directories may be the most important benefit many MBEs and WBEs receive from certification.

Facilitating contact. Certification programs encourage one-on-one personal contact between program administrators and business owners. The administrators believe that these meetings help them to learn about an applicant's business, to judge a firm's qualifications, and determine the types of governmental contracting opportunities that would be best suited to the business. These insights help administrators in introducing MBEs and WBEs to purchasing agents and in facilitating contact between owners and governmental agencies.

Post-award assistance. After a contract has been awarded and the MBE or WBE—along with subcontractors, perhaps—is engaged in performing the work, it is common for certification program administrators to monitor the progress of the contractor. This monitoring provides information that the contractor may find helpful and ensures that the MBE or WBE actually is participating in the contract and, in practical terms, is operating under minority ownership and control. This monitoring helps protect the integrity of the system and the integrity of legitimate MBEs and WBEs.

Evaluating Certification Programs

The Link between Intensity and Accuracy

Certifying agencies that use a more intensive certification process—one that requires more information in the application form and routinely involves a site visit to the applicant's place of business—are more likely to be reliable and accurate in the certification of MBEs and WBEs. One administrator discovered that a recently certified firm had been denied certification under a more intensive program in another municipality. "Had I known what [the other program] knew," the administrator said, "I wouldn't have certified the firm either." Several of the program administrators in the study commented on the necessity of asking for more information in the application process to protect the agency from legal challenges to its review and decision-making process. Some programs—including New Hanover, Fayetteville, and Asheville—require lawyers within the governmental unit to review the recommendations of the certifying agency before a final decision is made.

Yet requiring such detailed information and rigorous review may discourage some businesses from participating in certification programs. As mentioned earlier, businesses generally are reluctant to report financial information, and the application process often requires a substantial amount of financial data. More than 60 percent of the forms used by the agencies studied (and 44 percent of the out-of-state agencies contacted) require financial disclosure.

Administrators in the study generally did not consider the financial disclosure problem insurmountable. They pointed out that most of the information required is readily accessible to businesses (licenses, copies of tax returns, articles of incorporation, and the like). They also maintained that businesses that choose not to participate are not likely

1. to be in the business of supplying the types of goods and services purchased by government,
2. to pass the eligibility determination, or
3. to have the proper business licenses or qualifications to be considered for providing a service to government.

Furthermore, administrators said, "good" businesses will make the extra effort required by an expanded application process, because they recognize the marketing benefits associated with certification. And, finally, the administrators noted that they regularly assist businesses that ask for help in completing the application form.

At a minimum, certifying agencies should evaluate whether the financial information they require is critical in determining ownership and control. If it is not, the requirement should be deleted, as it may discourage MBEs and WBEs from applying and weaken the effectiveness of certification as a means of identifying minority businesses.

Modest Program Resources

Most certification programs operate with a very small staff, often just one person, working on certification applications in addition to other duties. Program administrators estimated the average total time spent on an

individual application to be anywhere from two to eight hours, depending on whether the administrator was familiar with the business, whether the applicant was local or from outside the jurisdiction, whether the application was submitted in complete form, and whether a site visit was conducted. Estimates for average review time were extremely variable and should not be used as a basis for measuring efficiency across programs.

Limited Measurement Ability

Certification does not provide a fully accurate measure of minority participation in government contracting. Because certification programs are voluntary, minority businesses have the option of *not* seeking certification. Governments that rely solely on the number of certified firms as a way to measure minority business participation in contracting will understate the extent of participation as long as legitimate, noncertified businesses receive contracts. Program administrators in the study said they do not consider undercounting a serious problem currently, because it appears that most MBEs and WBEs do apply for certification.

Lack of Reciprocity

There is no requirement that certification granted by one certifying agency be recognized by another certifying agency, and in practice, such reciprocity usually does not occur. (See Table 2.)

Reciprocity certainly would be helpful to MBEs and WBEs, promoting easier and wider market exposure for certified businesses. Without it, MBEs and WBEs must seek certification in each jurisdiction that operates a program, making the cumulative certification effort time consuming.

The most commonly cited reason for the lack of reciprocity is a concern about the reliability of certification programs in other agencies. As mentioned, there are marked differences in the review process, most notably in the intensity of the review. Some administrators review information in detail and conduct site visits frequently, while others are satisfied with a relatively less extensive review of an applicant's credentials.

Yet a strong case can be made for extending reciprocity. The study showed that application forms used by certifying agencies are very similar in style and content, requiring essentially the same information, usually with identically worded questions.[9] This similarity suggests that reciprocity could be facilitated by the use of a standard application form across the state. Such standardization would encourage greater minority-business participation in more contracting markets by reducing the cumulative time required for businesses to apply for certification with different certifying agencies.

Table 2
Reciprocity among Certification Programs in North Carolina

Program	Status*
Asheville	No
Charlotte	No
Durham	No
Fayetteville	Selective
Greensboro	No
New Hanover County	Selective
Raleigh	Selective
Winston-Salem	No
N.C. DOA	No
N.C. DOT	No

* Status indicates whether a program accepts certification from other agencies or only from select programs.

This type of standard form currently is used in other jurisdictions. The states of New York and New Jersey together use a single, comprehensive form that includes relevant information for many certification agencies in both states. Applicants fill out the form once and circulate it to a diverse group of agencies—including the state of New York, the Port Authority of New York and New Jersey, and the New York City School Construction Authority—for their *individual* certification decisions. The state of Ohio also uses a standard form, entitled "One-Stop Application for Certification," which is accepted by all state government agencies, state universities, and most counties in the state.

Surprisingly, the two agencies of North Carolina state government that conduct certification—the Department of Administration and the Department of Transportation—do not accept each other's certification. The DOT is apparently constrained by federal certification guidelines[10] and has little flexibility to change its process. The DOA, whose certification program appears to be less intensive, should provide reciprocity for DOT's certifications. DOA has considered reciprocity but has yet to adopt the practice.

If certification agencies in North Carolina decide to implement a standard application form, businesses should not view the convenience of reduced paperwork as a substitute for a personal meeting with certification staff. Businesses that want to expand their operating radius should indeed consider such a meeting and should regard the certification staff as potential customers—

these individuals offer an excellent point of contact for minority businesses.

The Need for Public Education

All administrators in the study noted that, ultimately, contracting decisions still are based on the lowest responsible bid. Certification does not provide an MBE or WBE with any type of special preference in the contracting process. Unfortunately, many businesses mistakenly believe that certification somehow ensures that government contracts will be awarded to certified firms. Business owners generally do not understand that the primary purpose of certification is to *identify* minority- and women-owned businesses, not to provide them with preferential treatment. This common misunderstanding was reported by many administrators, both in-state and out-of-state.

The misunderstanding suggests that administrators have a duty to take extra steps to ensure that business owners clearly understand the purpose of the certification program. This is particularly important for two reasons. First, certified businesses that expect to receive government contracts simply as a result of being certified may be lulled away from making an aggressive effort to compete for government contracts. These businesses must understand that, even with the extra help that certification programs can provide, all businesses must compete for the contracts on an equal footing. And second, the misperception that certification programs amount to "set-asides" hurts efforts to expand participation of minority businesses into the mainstream of vendors and suppliers. Several of the administrators and other professionals contacted in the study indicated that the labels MBE, WBE, and DBE often create a negative perception that the business somehow is different from or inferior to other businesses. Such connotations can hamper the ability of certified businesses to receive equal consideration in contracting.

Several administrators also cited the division of minority businesses into multiple classifications—MBE, WBE, and DBE—as potentially counterproductive. The more classifications and purchasing goals for each classification, it was argued, the more distraction there is from the primary purpose of identifying and encouraging minority participation in government contracting. Several administrators were concerned that having too many subgroups, each with its own purchasing goals, puts purchasing departments and certification programs in the difficult position of defending goals that are different for different minority groups.

Conclusion

Certification programs perform a valuable function in encouraging minority participation in government contracting. Policies designed to assure equal opportunity for minority businesses are difficult to implement without a reliable means of identifying the target groups, and the frequent cases of false representation by applicants reinforce the need for greater scrutiny of businesses that assert minority status, scrutiny that is most manageable through a certification process.

More intensive certification processes produce the most accurate and reliable identification of eligible businesses. Governments without certification programs—or those that rely on self-reporting by businesses—will not likely be in a position to evaluate minority business participation in purchasing and contracting. In these instances, minority participation almost always will be overstated. And governments that do not administer certification programs but recognize certification from other governments' programs are limited by the reliability and accuracy of those programs.

Minority businesses would benefit substantially from the establishment of some degree of reciprocity among certification agencies. Reciprocity would make it easier for legitimate minority businesses to expand their service areas and take advantage of marketing assistance provided through certification programs without having to spend time filling out multiple, redundant forms.

At a minimum, certification agencies in North Carolina should move immediately to develop and implement a standard form. This action can be accomplished with little or no cost and without compromising any agency's right to approve or deny certification.

Certification administrators should continue to actively promote their programs and recruit applicants in order to improve certification as a measurement tool and to improve the business community's understanding of the purpose and function of certification. The business assistance and outreach activities of many certification programs appear to be vital to the success of certification both as a measurement tool and as a means of promoting minority-business participation.

Will the need for certification programs eventually disappear? Many administrators expressed a long-term view that it would. As disparities in contracting disappear and more minority businesses participate, it stands to reason that the need to certify firms will recede. Until that point is reached, however, and while governments continue to adopt policies to promote minority involvement, certification programs will provide the best means

for identifying and measuring the participation of legitimate minority-owned businesses. ❖

Notes

1. The North Carolina Institute of Minority Economic Development is a private, nonprofit corporation that conducts research and provides information on the economic status of North Carolina's minority population.

2. A copy of the complete study is available from the Institute of Minority Economic Development, P.O. Box 1307, Durham, NC 27702.

3. Personal meetings and telephone interviews were conducted during November and December 1993 and January 1994 with certification administrators, business owners, and other professionals knowledgeable about certification programs and processes.

4. The study focused on certification programs in the public sector but included examinations of the private certification program administered by the Carolinas Minority Suppliers Development Council and a program administered by the Triangle Transit Authority.

5. N.C. Gen. Stat. § 143-128. See "Local Government Minority- and Women-Owned Business Programs: Questions and Answers," in this issue, page 19.

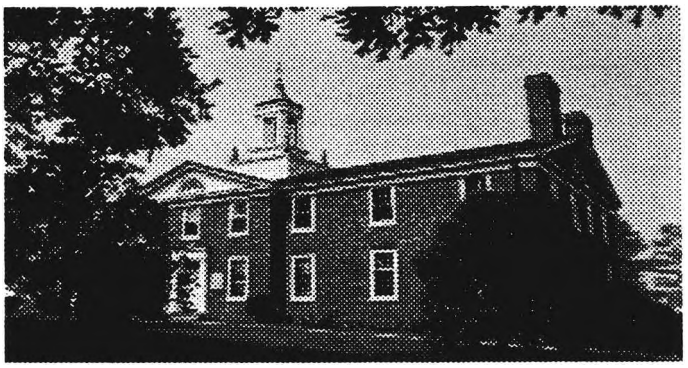
6. Congressional Research Services, *Federal Programs for Minority- and Women-Owned* Businesses (Washington, D.C.: CRS, Library of Congress, June 22, 1990), CRS-2 (hereinafter cited as *Federal Programs*).

7. *Federal Programs*, CRS-2.

8. Personal contact with staff from the Office of Minority Business Development of the Commonwealth of Pennsylvania, Nov. 24, 1993.

9. An exception is the application form used by Durham, which, though very similar to other forms, asks applicants to complete an additional component—a personal eligibility statement—not found in other forms. The forms used by programs in North Carolina are very similar to forms used by the out-of-state agencies studied.

10. Found in the Code of Federal Regulations, at 49 C.F.R. Part 23 (1993).



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Local Government Minority- and Women-Owned Business Programs: Questions and Answers

Frayda S. Bluestein

Question 1: Are North Carolina local governments required to have programs that provide for participation by minority- and women-owned business enterprises (M/WBEs) in public contracts?

Answer: Yes, but only if the unit will be awarding contracts for building projects for which the cost of the entire job exceeds $100,000.

Section 143-128 of the North Carolina General Statutes (hereinafter G.S.) sets specification requirements for construction or repair contracts involving buildings and estimated to cost more than $100,000. In 1989 the North Carolina General Assembly amended the statute to add an M/WBE program requirement. The statute by its explicit terms applies only to cities and counties, although school systems and other units of local government also generally have considered themselves bound by its requirements. Thus there is an M/WBE requirement for these local governments but only for contracts within the scope of G.S. 143-128. Some units have implemented additional or different programs under federal programs (see discussion under question 10) or by special authority granted in local acts. In addition, some units have other kinds of M/WBE programs without additional statutory authority (see discussion under question 11).

Question 2: What are local governments required to do with respect to M/WBEs?

Answer: Local governments must adopt a percentage goal for M/WBE participation in covered contracts and establish guidelines to ensure "good faith efforts" in recruiting and selecting M/WBEs.

The first step is to establish the goal. Following notice and a public hearing, local governments must adopt an "appropriate verifiable percentage goal" for participation by M/WBEs in the total value of the work for contracts awarded under the statute.[1] The statute can be interpreted to require that the goal be a percentage of a *particular contract*, of particular *kinds of contracts* (plumbing, electrical, general, HVAC—heating, ventilation, and air conditioning), or of *all contracts* awarded over a particular time period. Goals related to particular contracts or kinds of contracts probably are more reasonable than goals set for overall contracting, because the availability of M/WBEs varies for different kinds of work. The statutory term for M/WBE is "minority-owned business," defined in the statute as a business that is at least 51 percent owned as well as managed and controlled in its daily operations by a "minority." The statute defines minorities as blacks, Hispanics, Asian Americans, American Indians, Alaskan Natives, and women. A woman-owned business is a minority-owned business under North Carolina's statute.[2]

Once the goal has been established, the local government must adopt written guidelines specifying the actions that will be taken to ensure a *good faith effort* in the recruiting and selection of M/WBEs for participation in contracts awarded under the statute. *The statute does not require that the percentage goal actually be met, only that guidelines be established to ensure a good faith effort.* In the case of a single-prime contract (a single contract between the unit and a general contractor who subcontracts with other contractors), the general contractor must make good

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faith efforts when subcontracting work and must document those efforts to the awarding authority. For multiprime contracts (separate contracts between the unit and contractors for general, HVAC, plumbing, and electrical work), the good faith effort requirement falls upon the unit itself and also can be interpreted to require multiprime contractors to make good faith efforts in contracts with subcontractors and suppliers.[3]

Question 3: What constitutes good faith efforts?

Answer: The statute does not define "good faith efforts" but leaves to the awarding authority the responsibility for developing guidelines to ensure that good faith efforts will be made.

Guidelines adopted under the statute include steps to be taken by the local government and by contractors. Steps for the local government typically include

- obtaining, maintaining, and publishing for bidders a current list of available M/WBEs along with their areas of work;
- publicizing contracting opportunities in trade association and minority focus media;
- notifying M/WBEs of contracting opportunities;
- reviewing projects during the design stage to determine the feasibility of dividing contracts to increase opportunities for M/WBE bidders;
- holding prebid conferences and informational sessions regarding the unit's contracting process and M/WBE program;
- designating a contact person within the unit for M/WBEs;
- certifying M/WBEs; and
- evaluating and enforcing good faith effort requirements of prime contractors.

For prime contractors the steps typically include

- soliciting bids for subcontracts from M/WBEs;
- advertising the availability of subcontracting work in minority focus media;
- making prompt payment to contractors;
- reducing retained payments to ease contractors' cash flow difficulties; and
- providing documentation of good faith efforts with bids.

The statute gives no guidance to local governments on the question of what efforts are sufficient under the statute. This issue is discussed further in the answers to the next two questions.

Question 4: How does the good faith effort requirement fit in with the requirement to award contracts to the "lowest responsible bidder"?

Answer: The local government must still award contracts to the lowest responsible bidder. The statute implies, however, that a bid from a contractor who fails to make the good faith effort is not eligible for award.

The last paragraph of G.S. 143-128 states that nothing in the statute requires contractors or awarding authorities to award contracts to or make purchases from M/WBEs that do not submit the lowest responsible bids. That paragraph also states that contracts are to be awarded without regard to race, religion, color, creed, national origin, sex, age, or handicapping condition. Thus the M/WBE requirement does not modify the basic standard for awarding contracts.

The statute does not explicitly state what is to happen if a contractor fails to make any efforts or if the local government concludes that the efforts are insufficient. The statute requires contractors to document to the local government actions taken to ensure good faith efforts. Local governments generally require bidders to complete and submit with their bids a certificate or affidavit delineating their efforts.[4] Most local governments have interpreted submission of this documentation as an element of responsiveness and state in their specification that bids may be rejected for failure to submit the documentation. This interpretation seems reasonable, because the statute requires the local government to establish guidelines to ensure that a good faith effort is made. If the unit does not have the authority to enforce those guidelines by rejecting bidders who fail to comply, the requirement would become voluntary. On the other hand, a disappointed bidder who does not comply with the M/WBE guidelines might argue that if the unit rejects his or her bid, it will violate the requirement in the statute that contracts be awarded without regard to race or sex.

On balance it seems most reasonable to assume that local governments have the authority to reject bids that do not comply with the M/WBE guidelines and that such bids are simply not eligible for award. In addition, since the statute requires a good faith effort and not attainment of the goal, as long as all contractors comply with the M/WBE program guidelines, even if one contractor obtains a higher M/WBE participation than the lowest responsible bidder, the award must be made to the lowest responsible bidder—not the one with the highest M/WBE participation.

Question 5: Is North Carolina's M/WBE requirement constitutional?

Answer: No court has decided the issue, but it seems likely that contract award decisions under G.S. 143-128's M/WBE requirements, if challenged, would receive strict scrutiny by a court.

In 1989 the United States Supreme Court held that the city of Richmond's minority business enterprise program violated the Equal Protection Clause of the United States Constitution, because it discriminated against nonminority contractors.[5] The program required nonminority contractors to subcontract at least 30 percent of the dollar amount of contracts to minority-owned businesses. The court rejected the city's argument that the discrimination was for a "benign" purpose—to remedy past discrimination—and held that any kind of racial discrimination is subject to "strict scrutiny" under the Constitution. As such it must be justified by a compelling governmental purpose and be narrowly tailored to accomplish that purpose. The court held that the city could not rely on general societal discrimination as a justification for its program. The city would have to show that the city itself had discriminated in awarding contracts in the past (or had been a passive participant in a discriminatory contracting industry) and that there was a market of qualified minority contractors who had been denied contracts because of that discrimination. The Constitution requires specific evidence of past discrimination, along with a program narrowly tailored to remedy the discrimination.

The court invoked strict scrutiny in the Richmond case because Richmond's program *treated contractors differently on the basis of their race.* North Carolina's program is not a quota or set-aside in the same sense that Richmond's was, and it does not explicitly create a preference for one group of contractors over another. The good faith effort requirement, on its face, applies equally to all who compete for public contracts. As such it could be argued that it is not race-based and therefore not subject to strict scrutiny. While there is no case evaluating an M/WBE law exactly like North Carolina's, several courts have suggested that a less exacting degree of scrutiny should apply to such programs.[6] Nonetheless the majority of courts deciding cases after Richmond's have applied strict scrutiny when reviewing a variety of M/WBE programs, including some that function essentially like North Carolina's.[7] In the most recent United States Supreme Court case on the subject, which addressed the question of whether a contractors' association has standing to challenge M/WBE programs, the Court held that an M/WBE program discriminates on the basis of race if it creates any different requirements for white as opposed to minority- or women-owned businesses in their efforts to bid on public contracts.[8]

So, does North Carolina's requirement discriminate on the basis of race in a way that would invoke strict scrutiny? Suppose a contractor's bid is rejected because the contractor failed to make sufficient good faith efforts. The contractor, arguing that the rejection was unconstitutional, probably could demonstrate that the rejection was caused by a program designed to promote M/WBEs. But is that demonstration sufficient to prove that the program is race-based? After all, the requirements apply to all contractors.

The answer may well be that the program *is* sufficiently race-based to invoke strict scrutiny, because minority and women bidders usually are entitled to use their own status toward satisfaction of the good faith effort requirement. As such it can be argued that minority and women bidders are treated differently from white male bidders in a way that triggers strict scrutiny.[9] Indeed, it would seem odd not to allow M/WBEs to use their own status in bidding under a program designed to increase participation by just such firms. A recent federal court decision noted a difficulty inherent in this result, but ultimately the court was restrained by the precedent established in the Richmond case. The court stated:

> Although we believe that any affirmative action program which essentially forbids a beneficiary from accepting its benefits would be a meaningless program, it appears that by employing the "race-conscious" standard, the [Richmond] court meant for strict scrutiny to be applied to nearly all affirmative action.[10]

Thus, depending on how the program is implemented, developing case law in this area suggests that M/WBE programs under G.S. 143-128 may be subject to strict scrutiny.

Question 6: How can local governments implement the statutory requirements without violating the Constitution?

Answer: If the requirements of G.S. 143-128 are considered race-based and subject to strict scrutiny, they cannot be implemented constitutionally unless they are supported by evidence of past discrimination and are narrowly tailored to remedy that discrimination.

Local governments throughout the country have conducted disparity studies (discussed in more detail below) to establish the factual and legal support for M/WBE programs as required in the Richmond case and its prog-

eny. No comprehensive study was done before the enactment of North Carolina's M/WBE statute although several jurisdictions have since contracted for studies individually.[11] The majority of North Carolina local governments have relied on the presumptive validity of the statute and have implemented M/WBE programs without additional support. Some units, aware of potential constitutional challenges, have treated the requirements as voluntary and have refrained from rejecting bids that either do not contain evidence of a good faith effort, or that demonstrate only minimal or pro forma compliance.

At least two lawsuits have challenged the validity of M/WBE programs in North Carolina on constitutional and other grounds. One was filed against the Raleigh-Durham Airport Authority and the other against the State Department of Transportation.[12] In both cases contractors alleged that the contracting authority rejected bids for failure to make sufficient good faith efforts to meet the M/WBE goal. Neither lawsuit has resulted in a final decision on the constitutional question, and both jurisdictions have since conducted disparity studies.

Question 7: What are disparity studies, and are local governments required to have them?

Answer: Disparity studies are designed to document any past discrimination in the awarding of contracts by a particular jurisdiction as well as in the industry in general. Local governments are not required to have them, but they may work to support the constitutionality of a local government's M/WBE program.

Disparity studies have developed out of the Richmond decision as the mechanism for complying with the requirements of strict scrutiny. They are intended to establish the factual evidence of past discrimination that supports the local government's program to increase M/WBE participation. If a local government's M/WBE program is challenged on constitutional grounds, and if a court determines that the program is race-based, then the program must be supported by evidence of past discrimination in order to withstand strict scrutiny.

Greatly simplified, a disparity study evaluates the past contracting practices of a local government that proposes to implement an M/WBE program, the market area from which the contractors doing business with the unit are drawn, and the availability of qualified M/WBE contractors within that market area in the trades used by the unit. The study then analyzes whether there is a statistically significant disparity between the firms available to and those used by the local government. Such a disparity is evidence of discrimination. A disparity study also evaluates anecdotal evidence of discrimination in the trades generally to determine if the unit was a passive participant in industrywide discrimination. Evidence may be drawn from census data, the records of the unit being studied, federal studies, public hearings, surveys, and interviews.

A number of private consulting firms have developed expertise in conducting disparity studies. The studies can be costly (ranging from $50,000 to hundreds of thousands of dollars, depending on the size of the unit), time consuming, and demanding for local government staff. For example, assembling the unit's past contracting records can be difficult, and quite often those records do not identify the race or sex of the contractor. In addition, it can be an uncomfortable experience for a unit's officials and employees, and for the community as a whole, to oversee documentation of past discrimination within the jurisdiction. Another problem with the analysis of disparity is the inability to document discrimination that may have prevented minority businesses from coming into existence; that is, to account for the lack of available M/WBEs in the market being studied. It is also difficult to develop meaningful data for newly created entities, such as a recently merged school system.

It seems clear that not all disparity studies will satisfy the requirements of the Richmond case, but a number of studies that have been reviewed in the federal courts have met with approval.[13] Indeed in a recent United States Supreme Court case, Justice O'Connor (the author of the plurality opinion in the Richmond case), dissenting from the majority opinion, noted with approval the use of disparity studies and other efforts taken by the city of Jacksonville to satisfy the requirements enunciated in the Richmond case.[14]

Question 8: Can a local government rely on a disparity study conducted by a nearby unit?

Answer: It is unlikely that a unit could rely solely on another unit's disparity study to support a race-based M/WBE program.

One federal appellate court has approved a county's use of evidence from a city and other units having coterminous boundaries with the county but not evidence from an adjacent county.[15] The county in that case also developed evidence of its own, however. To justify its need for an M/WBE program and also to show that the program is narrowly tailored, a local government must present evidence about firms seeking work *in that unit* as well as the contracting practices of the unit. These requirements cannot be met by using another unit's study.

Question 9: Is there a requirement that M/WBEs be certified?

Answer: No, but the statute implicitly authorizes certification as a method of carrying out the statutory mandate.

Some local governments have established certification programs to identify M/WBEs that fall within the definition under the statute. Under most certification programs M/WBEs are required to provide information about the ownership and operation of the business so that contractors and the unit can ensure that the business legitimately qualifies as an M/WBE. M/WBEs that do not qualify or do not wish to become certified are still free, of course, to submit bids to general contractors and to the unit without being identified as M/WBEs.

There are advantages and disadvantages to certification programs. Certification can help guard against fraud and can generate an up-to-date source of available M/WBEs. The process of certification, however, adds to the effort of contracting for M/WBEs, sometimes requiring them to provide and thus expose financial information not required of other contractors. In addition, certification requirements are not uniform around the state. Local governments have different requirements for certification, although some recognize certification by other jurisidictions. Several state agencies also maintain M/WBE certification lists in connection with state M/WBE programs.[16]

For an analysis of certification programs in North Carolina, see "Certification Programs for Minority- and Women-Owned Businesses," page 27.

Question 10: Can local governments implement federal M/WBE programs required as a condition of receiving federal funds?

Answer: Yes.

A number of cases have held that the strict scrutiny standard of the Richmond case does not apply to local government implementation of M/WBE programs when the programs are required by the federal government as a condition of receiving federal funds.[17] The United States Supreme Court has held that programs under federal M/WBE set-aside laws do not require the same level of detailed proof of past discrimination as that required under the Richmond case. The federal government simply has greater authority under the Constitution to implement race-based programs than do local or state governments.[18] Thus state and local governments can rely on federal authority when implementing federal programs. Local governments are still subject to strict scrutiny for projects that involve only state or local funds, however, or if in implementing the federal M/WBE program they exceed the federal requirements. Thus local governments that receive federal money sometimes have both an M/WBE program for contracts under G.S. 143-128 involving state or local money and a separate M/WBE program (also called DBE—disadvantaged business enterprise) for contracts involving federal money. Cities and counties also have specific statutory authority to agree to and comply with federal M/WBE requirements and to incorporate compliance with such requirements into the criteria for awarding competitively bid contracts.[19]

Question 11: Assuming that a disparity study is either completed or determined by a court not to be necessary, can a local government implement an M/WBE program for contracts outside the scope of G.S. 143-128?

Answer: It is not clear whether local governments have the authority under state law to do so. A unit may need the express authorization of the General Assembly.

Suppose a local government has conducted a disparity study and has established the factual basis for remedying past discrimination in contracting. It may wish to include in its M/WBE program construction or purchase contracts that are not subject to G.S. 143-128 (like small building projects, road construction, or purchase of equipment). This proposition raises an issue of local government authority under state law rather than one of federal constitutional law. Local governments function under authority delegated by the General Assembly and can undertake only those activities expressly authorized or reasonably necessary or expedient to carry out those that are expressly authorized.[20] Although cities and counties have express general authority to contract,[21] the only specific authority for M/WBE programs in North Carolina is that contained in G.S. 143-128.

An argument that local governments have implicit authority to establish more extensive M/WBE requirements is problematic. The presence of explicit M/WBE authority for only certain kinds of contracts—those under G.S. 143-128—suggests that there is no authority for M/WBE programs in other kinds of contracts. If local governments had implicit authority to implement M/WBE programs outside G.S. 143-128, then the specific authorization for those under G.S. 143-128 would not have been necessary. Also, if the General Assembly had intended to authorize such programs for other types

of contracts, it easily could have done so. On the other hand, it could be argued that the authority in G.S. 143-128 is simply a mandate for a minimum requirement that all units must implement and not a limitation on broader implementation.[22]

There is also the question of whether an M/WBE program conflicts with the "lowest responsible bidder" standard of award when that standard applies—that is, for contracts costing more than $5,000 either for construction or repair or for purchase of apparatus, supplies, materials, or equipment.[23] G.S. 143-128 implicitly authorizes rejection of bids for failure to comply with M/WBE requirements, but for contracts outside the scope of that statute, the lowest responsible bidder standard is the exclusive basis upon which contracts may be awarded. If an M/WBE program permits rejection of bids for failure to comply with the M/WBE requirements, the program arguably adds a basis for awarding contracts not present in the lowest responsible bidder standard. In contrast, when the General Assembly authorized local governments to implement anti-apartheid requirements, it specifically authorized altering the standard of award to include compliance with such requirements.[24]

A number of cases from outside North Carolina have held that M/WBE programs do conflict with state laws requiring contracts to be awarded to the lowest responsible bidder.[25] Cases from other jurisdictions have gone both ways on the question of whether local governments have the authority to include social responsibility in determining the lowest responsible bidder.[26] In these cases, courts evaluated all of the statutes affecting contracting along with more general statutes prohibiting discrimination or allowing affirmative action to determine whether there was authority for the M/WBE program. Although in North Carolina the General Assembly has enacted general laws expressing the state's policy of encouraging the use of M/WBE contractors,[27] this broad statement is probably insufficient to modify the more specific requirements in the competitive bidding laws.

For contracts to which lowest responsible bidder requirements do not apply, such as service contracts, local governments may have broader authority to implement M/WBE programs.

If a disparity study has been completed and has demonstrated past discrimination, the local government may believe that it has a constitutional mandate to implement an M/WBE program designed to remedy the past discrimination, even if the remedy would necessarily involve contracts outside the scope of G.S. 143-128. The local government may feel somewhat exposed (in the political if not the legal sense) if it does not implement a comprehensive program to address the results of the study. It is not clear whether a court would find that such a "constitutional mandate" would overcome the need for state statutory authority. A court might still hold that the state legislature has the responsibility to define as a matter of state law what type of program local governments may undertake. Of course, local governments can overcome a lack of statutory authority by seeking legislation authorizing a particular program.

Question 12: Given the legal issues here, aren't local governments better off just not getting involved in M/WBE programs of any kind?

Answer: No. G.S. 143-128 requires some involvement, and there are additional steps that can be taken with very little risk.

The General Assembly has declared that it is the policy of the state "to encourage and promote the use of small, minority, physically handicapped and women contractors"[28] and has shown its intent by making some involvement mandatory under G.S. 143-128. Indeed, the Richmond decision itself approved of the city's desire to avoid being even a passive participant in a discriminatory industry. The opinion states, "It is beyond dispute that any public entity . . . has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice."[29]

There is a clear need for, and there are clear benefits from, M/WBE programs. Disparity studies universally have shown some degree of inequity in past contracting practices, and past societal discrimination has resulted in disproportionately low numbers of successful, competitive, or even available minority- and women-owned firms. In addition, developing all sectors of the business community not only is good policy for local governments, it increases competition, which results in more reasonable prices on competitively bid public contracts.[30] It is also consistent with the notion that competitive bidding statutes are designed, in part, to ensure that all sectors of the taxpaying populace have an opportunity to compete for contracts through which those tax dollars are spent. Local governments have a responsibility to ensure that contracts are awarded fairly.

Nonetheless, the problems with M/WBE programs are daunting. They often disrupt traditional patterns of contracting, particularly in the construction industry, and thus sometimes are met with resistance. The programs must comply with constitutional and statutory requirements that are sometimes prohibitive. As in other

areas in which some kind of affirmative action is used, it is a challenge to develop programs to increase participation by specific groups without engendering antagonism toward those same groups. It is important to recognize that under the standard enunciated by the Supreme Court in the Richmond case, M/WBE programs must be limited in duration so that they do not remain in place any longer than necessary to eliminate the effects of past discrimination.[31] Certainly, eliminating the need for M/WBE programs is the ultimate goal of any such program.

Some steps can be taken at very little risk to promote participation by historically underutilized businesses. First, as the United States Supreme Court pointed out in the Richmond case, a local government can prohibit discrimination. It can also establish race-neutral programs designed to benefit small businesses generally, including both M/WBEs and small local businesses, which often are also a source of local government concern. Such programs can involve making special efforts to identify small businesses and make them aware of contracting opportunities, providing training opportunities to educate businesses about procedures for contracting with public entities, providing referrals for businesses seeking to subcontract or start joint ventures with small businesses, and providing incentives for such partnerships. Units can make a special effort to identify small contracts and projects that may provide more realistic contracting opportunities for small local businesses and M/WBEs than the larger projects under G.S. 143-128. Local governments also have some flexibility in waiving bid bonds and performance bonds, which sometimes are a barrier to new or small businesses that have difficulty obtaining bonding. The formal bidding statute provides that the governing body can waive the 5 percent bid bond requirement for purchase contracts under $100,000. The same statute authorizes the governing body to waive the performance and payment bond requirement for all purchase contracts.[32] Again, when this is done, it applies to all bidders and therefore is race-neutral. Finally, local governments can support community-based programs and others aimed at local and minority economic development. ❖

Notes

1. The statute establishes a 10 percent goal for contracts awarded by the state.

2. Goals may be established for each group or for M/WBEs collectively.

3. The statute is written in the passive, placing the burden on the unit to specify actions that "will be taken," but it does not specify by whom. *See* G.S. 143-128(c)(3).

4. In some cases the documentation is requested only after the bids are opened and then only from the apparent low bidder.

5. City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989).

6. Contractors Ass'n of Eastern Pennsylvania v. Philadelphia, 945 F.2d 1260, 1268 (3rd Cir. 1991) (Higginbotham, J., concurring); Concrete Works of Colorado v. Denver, 823 F. Supp. 821 (D. Colo., 1993).

7. *See* Contractors Ass'n v. City of Philadelphia, 6 F.3d 990 (3rd Cir. 1993) (applying strict scrutiny to the racial component of the program, intermediate scrutiny to the women-owned business component, and minimal scrutiny—the "rational relationship test"—to the handicapped-owned business component); Associated General Contractors of California v. Coalition for Economic Equity, 950 F.2d 1401 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1670 (1992); Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 875 (1992); Cone Corp. v. Hillsborough County, 908 F.2d 908 (11th Cir.), *cert. denied*, 111 S. Ct. 516 (1990); Associated General Contractors of Connecticut v. City of New Haven, 791 F. Supp. 941 (D. Conn. 1992).

8. Northeastern Florida Chapter of AGC v. City of Jacksonville, 113 S. Ct. 2297 (1993) (holding that the association has standing even without showing that any particular contractor was denied a contract, because the association demonstrated that the program prevents minority and nonminority contractors from competing on an equal basis).

9. *See* Cone Corporation v. Florida, 5 F.3d 1397 (11th Cir. 1993) (holding that because the percentage requirement was decreased for minority contractors who do more than 50 percent of their own work, the program was subject to strict scrutiny).

10. *Concrete Works of Colorado*, 823 F. Supp. at 830.

11. Units that have completed disparity studies include Durham (city and county), Greensboro, Charlotte, Asheville, Raleigh-Durham Airport Authority, and the State Department of Transportation.

12. Watco Corp. v. Raleigh-Durham Airport Authority, No. 92-CVS-09656 (Wake County Super. Ct. filed Sept. 16, 1992) (settled out of court); Dickerson Carolina, Inc. v. Harrelson, No. 93-10SC296 (N.C. Ct. App. May 17, 1994). In Dickerson, the North Carolina Court of Appeals affirmed the trial court's grant of summary judgment for the defendants (members of the N.C. Board of Transportation and officials in the Department of Transportation). The court held (1) plaintiff's equal protection claim is moot, because the department suspended and then modified the challenged M/WBE program after conducting a disparity study, and (2) the defendants cannot be sued in their official capacity under 42 U.S.C. § 1983 and are entitled to qualified immunity from individual liability for complying with a "presumptively valid state statute" (slip. op. at 12–13).

13. *See* AGC of California, Inc. v. City and County of San Fransisco, 950 F.2d 1401 (9th Cir. 1991); *Concrete Works of Colorado*, 823 F. Supp. 821.

14. Northeastern Florida Chapter of AGC v. City of Jacksonville, 113 S. Ct. at 2307–8 (1993) (O'Connor, J., dissenting).

15. Coral Construction Co. v. King County, 941 F.2d 910, 917 (9th Cir. 1991). *But see* City of Richmond v. J. A. Croson Co., 488 U.S. 469, 505 (1989) ("We have never approved the

extrapolation of discrimination in one jurisdiction from the experience of another.").

16. Separate certification programs are administered by the state Departments of Administration and Transportation.

17. *See* Harrison & Burrowes Bridges Constructors, Inc. v. Cuomo, 981 F.2d 50 (2nd Cir. 1992); Ellis v. Skinner, 961 F.2d 912 (10th Cir. 1992); Tennessee Asphalt Co. v. Farris, 942 F.2d 969 (6th Cir. 1991); Milwaukee County Pavers Ass'n v. Fiedler, 922 F.2d 419 (7th Cir. 1991).

18. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990); Fullilove v. Klutznick, 448 U.S. 448 (1980).

19. G.S. 160A-17.1(3a).

20. Homebuilders Ass'n of Charlotte, Inc. v. City of Charlotte, No. 93-133PA (N.C. April 8, 1994); G.S. 160A-4, 153A-4.

21. G.S. 160A-11, 153A-11.

22. *See Homebuilders*, slip op. at 10–11.

23. *See* G.S. 143-129 and 131.

24. *See* G.S. 160A-197, 153A-141. These statutes specifically alter the standard of award by providing that awards may be made to the lowest responsible bidder meeting the anti-apartheid requirements and other specifications. Similar language is used in G.S. 160A-17.1(3a) authorizing local governments to comply with federal MBE requirements.

25. Domar Electric v. City of Los Angeles, 23 Cal. Rptr. 2d 857 (Cal. App. 1993) (M/WBE outreach program established by executive order held invalid because inconsistent with charter provision requiring award to lowest and best regular responsible bidder); S. J. Groves & Sons v. Fulton County, 920 F.2d 752 (11th Cir.), *cert. denied*, 111 S. Ct. 2893 (1991); Owen v. Shelby County, 648 F.2d 1084 (6th Cir. 1981).

26. *Compare* Associated General Contracts of California v. City and County of San Francisco, 813 F.2d 922 (9th Cir. 1987) (social responsibility not encompassed in award standard), *with* S. N. Nielsen Co. v. The Public Building Commission of Chicago, 410 S.E.2d 40 (Ill. 1980) (social responsibility permissible consideration in awarding contracts).

27. G.S. 143-48(a).

28. G.S. 143-48(a).

29. City of Richmond v. J. A. Croson Co., 488 U.S. 469, 492 (1989).

30. Mullen v. Town of Louisburg, 255 N.C. 53, 33 S.E.2d 484 (1945).

31. *See Croson*, 488 U.S. at 510 (deviation from norm of equal treatment must be temporary); North State Law Enforcement Officers Ass'n v. City of Charlotte, 802 F. Supp. 1361 (W.D.N.C. 1992) (affirmative action promotion policy in city police department invalid after department reached 20 percent goal established in earlier consent order).

32. *See* G.S. 143-129(b), (c).

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M E M O R A N D U M

TO: **The Honorable Parren J. Mitchell**
Chairman, MBELDEF

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FROM: **Courtney M. Billups, Esquire**
Office of Chief Counsel, MBELDEF

DATE: **October 6, 1994**

RE: **Adarand Constructors, Inc. v. Pena, 16 F.3d 1537 (10th Cir. 1994); U.S. Supreme Court Grant of Certiorari**

The Supreme Court has decided to hear an appeal from the 10th Circuit that may have broad-reaching implications on the efficacy of Congressionally mandated minority business programs. The case is **Adarand Constructors v. Pena, et al., 16 F.3d 1537 (10th Cir. 1994)**. The Tenth Circuit affirmed the judgment of the District Court in upholding the **"Subcontracting Compensation Clause" (SCC)** implemented by the **Central Federal Lands Highway Division (CFLHD)** which is the basis of this challenge. **Adarand v. Pena, 790 F.Supp. 240 (D. Colo 1992).**

In its complaint, Adarand alleged that the use of race as a factor in awarding federal procurement contracts in Colorado, without any findings of past discrimination in the State, violated the **equal protection guarantees** of the **Fifth** and **Fourteenth Amendments** and the **privileges and immunities** guaranteed by **42 U.S.C. 1983** and **42 U.S.C. 2000d (Title VI).**

The courts have consistently held that the proper standard for review in determining the constitutionality of federal programs designed to provide contract awards for businesses owned by certain minority groups is found in **Fullilove v. Klutznick, 448 U.S. 448 (1980).** The Supreme Court in **Fullilove** held that if Congress has mandated a race-conscious program, the Court must apply a "lenient standard, resembling intermediate scrutiny," rather than the test set forth in **City of Richmond v. J.A. Croson, 488 U.S. 469 (1989),** which required a strict level of scrutiny for state and local minority preference programs. In addition, federal agencies need not make independent findings of past discrimination in order to justify the use of a race-conscious program implemented in accordance with Congressionally enacted federal law.

In **Fullilove**, the Supreme Court approved a ten percent minority business enterprise (MBE) set-aside mandated by Congress. In rejecting a facial challenge to the constitutionality of the statute authorizing the MBE program, the Court found that Congress acts within its unique and broad powers under the **Commerce Clause** and **Section 5 of the Fourteenth Amendment** when it imposes an affirmative action program to remedy nation-wide discrimination in the construction industry. Under **Fullilove**, if Congress has expressly mandated a race-conscious program, a court must apply a lenient standard, resembling intermediate scrutiny, in assessing the program's constitutionality.

The **Small Business Act** provides the statutory authority for federal agencies to develop and to establish certain utilization goals for disadvantaged small businesses. In compliance with **Section 502 of the Small Business Act, 15 U.S.C. § 644(g)**, the heads of the various federal agencies, including the **Department of Transportation**, must establish annual goals for small business participation in federal procurement contracts. These goals must present the "**maximum practicable opportunity**" for "**small business concerns, including those owned and controlled by socially and economically disadvantaged individuals,**" to participate in federal contracts.

Adarand asserts that the proper standard to be applied to the Congressionally mandated program is the strict scrutiny standard of review articulated by the Supreme Court in **City of Richmond v. J.A. Croson**, **488 U.S. 469 (1989)**, and not the more lenient standard espoused by the Court in **Fullilove v. Klutznick**, **448 U.S. 448 (1980)**. Relying on **Croson**, Adarand asserts that the CFLHD must make specific findings of past discrimination in order to justify its reliance on the Disadvantaged Business Enterprise (DBE) program which furnishes the necessary criteria for the federal agency's implementation of a race-conscious subcontracting compensation clause. Adarand's argument is based upon the fact that the race-conscious SCC program was fashioned by an agency and not by Congress; and, therefore, they must make "**particularized findings**" of past discrimination.

Adarand, however, cited no authority, nor did the Tenth Circuit know of any, to support the proposition that a federal agency must make independent findings to justify the use of a benign race-conscious program implemented in accordance with federal requirements. In contrast to the situation in **Croson**, no state procurement or minority business policy is implicated by Adarand's claims. **Adarand v. Pena**, **16 F.3d at 1545**. The Tenth Circuit went on to cite **Ellis v. Skinner**, **961 F.2d 912 (1992)**, stating that if particularized findings to justify implementation of a federal remedial program are not required of a state, they are clearly not required of a federal agency such as the CFLHD, and thus **Fullilove** controls. **Ellis** at 916.

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In **Metro Broadcasting, Inc. v. FCC**, 497 U.S. 547 (1990), the Supreme Court held that **Croson** cannot be read to undermine its decision in **Fullilove**. In fact, much of the language and reasoning in **Croson** reaffirmed the lesson of **Fullilove** that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments. **497 U.S. at 565.**

However, the **issue** before the Supreme Court in **Adarand** is whether Congress, through **Section 502 of the Small Business Act**, unconstitutionally delegated to federal agencies its authority to develop minority participation goals and means for achieving those goals. The Tenth Circuit decision and well-settled case law support the conclusion that equal protection requirements are not violated by a program that **does not require** MBE utilization; rather, such a program merely **induces** MBE utilization by offering incentive payments of up to 2 percent of an original contract amount to those prime contractors exceeding ten percent MBE subcontracting utilization on a prime contract.

The Tenth Circuit held that by its enactment of **Section 502**, Congress accorded broad discretion to agencies to implement the remedial goals of the **Small Business Act**. Although Congress did not dictate specific percentage goals for agencies to meet, the language of **Section 502** clearly contemplates that agencies will exceed the government-wide goal of "not less than 5 percent." The legislative history also evidences Congress' intention that each agency establish DBE goals above the 5 percent government-wide goal established by the President. The SCC program is promulgated pursuant to this specific Congressional delegation. In implementing the SCC program, the CFLHD thus did exactly what Congress explicitly directed it to do: provide a means to ensure "the maximum practicable opportunity" for disadvantaged small business participation in federal procurement.

The Court also appeared to disagree with Adarand's contention that Congress should mandate a specific percentage goal. The Court stated that this ignores the principle lesson of **Fullilove** in that the Supreme Court did not uphold the federal program because Congress mandated specific goals; rather, the program, even with its racial and ethnic preference, satisfied equal protection standards. Because Adarand stipulates that **Section 502** satisfies the evidentiary requirements of **Fullilove**, the Court held that the only question to be resolved was whether the SCC program implemented by the CFLHD was narrowly tailored to achieve the remedial purpose of **Section 502**.

The Court held that the SCC program was narrowly tailored because the program is not limited to members of racial and ethnic minority groups. Because the program is based on economic disadvantage, non-minority businesses are eligible to participate. Likewise, minority firms which do not meet the criteria are not eligible to compete. Furthermore, the Court held that the SCC program is "**appropriately limited in extent and duration**" because federal procurement and construction contracting practices are subject to "**reassessment and reevaluation by Congress.**" **See Fullilove, 448 U.S. at 489.**

Significantly, the Court in **Adarand** stated that the program does not require small business prime contractors to submit and adhere to a subcontracting plan with specific DBE goals. The prime contractor in this case had the option, not the obligation, of subcontracting with a DBE. Because the SCC program induces, rather than compels, it cannot be said to violate equal protection requirements. The Supreme Court in **Fullilove** clearly stated that it is not a constitutional defect that a federal program may disappoint the expectations of non-minority firms. **448 U.S. at 484.**

The U.S. Supreme Court must now decide the permissible scope of delegation of authority by the Congress to federal agencies in narrowly tailoring remedies that Congress has authorized. There are several possible scenarios for the Supreme Court's decision in the case. The Court could rule variously as follows:

1. The **Fullilove** standard applies to the **Small Business Act**, but it is not permissible for Congress to delegate its authority to narrowly tailor remedies for discrimination to federal agencies; therefore, the case is remanded to the District Court for trial on the issue of whether the federal agency has met the strict scrutiny standard in establishing goals and remedies under the **Fifth Amendment Due Process Clause**;

2. The **Fullilove** standard applies to the **Small Business Act**, and the federal agencies' implementation of the **Act** is also constitutional under the **Fullilove** standard; therefore, the Tenth Circuit decision is affirmed;

3. To the extent that federal agencies extend remedies beyond the minimum remedies provided by Congress in the **Small Business Act**, they are not insulated from strict scrutiny pursuant to Congressional authority under **Section 5 of the Fourteenth Amendment**;

4. Under the **Commerce Clause of Article I § 8**, Congress can properly delegate the regulation of interstate commerce to a federal agency. Accordingly, the Tenth Circuit decision is affirmed;

5. **The Small Business Act** is a different piece of legislation than was upheld in **Fullilove**. Accordingly, Congress must establish an independent factual predicate to satisfy intermediate scrutiny. The Congressional record is insufficient as to the basis for **Section 644(g)**; and, accordingly, it must be found unconstitutional. There is no known basis for Congress extending affirmative action goals across all industries and across federal agencies; and

6. **Fullilove** was incorrectly decided and is overturned, thereby subjecting all Congressionally enacted affirmative action programs (e.g. ICETEA, 8(a), Department of Defense, and Environmental Protection Agency) to strict scrutiny and ultimate suspension.

The Court may be heading towards a constitutional crisis if it decides to "unsettle" "well-settled" case law with respect to federal small business contracting and the broad powers of Congress under the **Commerce Clause** and its remedial powers under **Section 5 of the Fourteenth Amendment.**

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