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Looking Back at *City of Richmond v. J.A. Croson Co.*: Its Effects on State and Local Set-Aside Programs

I. INTRODUCTION

In January 1989, the Supreme Court issued a controversial opinion in *City of Richmond v. J.A. Croson Company*.[1] The opinion was the first from the Supreme Court to deal with racially based set-aside programs implemented by state and local governments. The *Croson* Court struck down Richmond's set-aside program for violating the Equal Protection Clause. Set-aside programs generally require contractors to set-aside a certain percentage of each general contract they receive for business subcontractors. Set-asides are very controversial, and emotions run high on both sides of the debate. Politicians from both political extremes have used the debate to create or retain constituencies.[2]

Soon after the *Croson* decision, NAACP Executive Director Benjamin L. Hooks advised NAACP branches in cities where minority set-aside programs were in effect to "use their resources to make certain elected officials stand by minority set-aside programs and do not yield to panic or intimidation."[3] By August 1989, Hooks, accompanied by the Reverend Jesse Jackson, AFL-CIO President Lane Kirkland, Southern Christian Leadership Conference President Joseph Lowery, and Black Leadership

1. 488 U.S. 469 (1989).

2. In response to an internal Washington D.C. legal memorandum stating that Washington D.C.'s minority set-aside program probably would not withstand legal challenge, former Mayor Marion Barry said, "We're going to fight to the death. I heard about [the memorandum] today. I kicked a table over." Mayor Barry also expressed a willingness to go to jail for contempt rather than follow a court order to dismantle the District's set-aside program. Tom Sheerwood, *Memo Questions Legality of D.C. Minority Pacts; Proposed Law Changes Infuriate Barry*, WASH. POST, July 21, 1989, at C1; *see also* Steven Watsky, *House Approves Set-Aside Measure After Divisive Debate*, UPI, March 2, 1989, *available in* LEXIS, Nexis Library, UPI File. On the other extreme, David Duke, former KKK leader, won a special election to the Louisiana House after campaigning on a platform of abolishing set-asides.

3. *NAACP Instructs Branches to Hold Firm on Set-Asides*, PR Newswire, Mar. 1, 1989, *available in* LEXIS, Nexis Library, Wires File.

Forum President Dorothy I. Height, declared, "[we are] marching once more to protest the legal lynching of black America's hope for a chance to become full partners in the American dream."[4] Hooks' comment was made during a 35,000 person protest march on the Capitol to protest *Croson* and three other Supreme Court rulings.[5] Later, in 1989, during the forty-fourth annual meeting of the National Council of Negro Women, the *Croson* decision was considered so devastating that it was discussed in "almost every session" of the meeting.[6]

On the other hand, many applaud the Court's *Croson* ruling. Carolyn Wake, a member of the Richmond City Counsel who voted against the *Croson* set-aside program, feels that set-asides may actually lead to increased racism. She writes:

> To say blacks must have a different 'playing field' is to immediately insinuate inferiority. This is unfair and, as many successful blacks are proving, untrue.
>
> . . . .
>
> Minority firms can compete with others, but they should learn to sell themselves through their work product and not by placing handicaps on others.
>
> These handicaps create hostility and actually increase racism.[7]

Others applaud *Croson* because they feel that it "turn[s] the law towards equal treatment for all, irrespective of race . . . ."[8]

Section II of this note analyzes the *Croson* decision, pointing out why the Supreme Court held the Richmond set-aside statute unconstitutional and providing guidelines for the creation of constitutionally valid state or local government set-aside programs. Section III then briefly addresses *Croson*'s effect on current state and local set-aside programs. Section IV reviews recent cases that apply *Croson*. Finally, the note will conclude that

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4. John M. Broder, *Thousands Stage Silent March on Capitol; Civil Rights Gathering Protests Recent Supreme Court Decisions*, L.A. TIMES, Aug. 27, 1989, at 4.

5. *Id.* In addition to *Croson*, the march also protested the Supreme Court's rulings in Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989), Martin v. Wilks, 490 U.S. 755 (1989), and Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

6. Jacqueline Trescott, *Community of Conventioneers; Around the Country, Black Professionals Meet*, WASH. POST, Dec. 2, 1989, at C1.

7. Carolyn Wake, *Level the Playing Field for All the Competitors*, USA TODAY, Mar. 15, 1989, at 8A.

8. Bruce Fein, *The Court Is Right to Stop Pampering Minorities*, NEWSDAY, July 3, 1989, at 41.

Croson may not be as big a victory for those opposed to minority set-asides as many may think, in light of recent court decisions indicating that *Croson* may indeed shield future set-aside programs from legal attack.

II. *City of Richmond v. J.A. Croson*

A. *Facts of* Croson

On April 11, 1983, the Richmond, Virginia City Council adopted a minority set-aside program that required prime contractors be awarded city construction contracts "to subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises (MBEs)."[9] An MBE was defined as "[a] business at least fifty-one [] percent of which is owned and controlled . . . by minority group members."[10] According to the ordinance "minority group members" were "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts."[11] Waivers to the set-aside program were only to be granted in "exceptional circumstances."[12] For example, "[t]o justify a waiver, it [had to] be shown that every feasible attempt had been made to comply, and it must have been demonstrated that sufficient, relevant, qualified Minority Business Enterprises . . . [were] unavailable or unwilling to participate in the contract to enable meeting the . . . 30% MBE goal."[13] Once the city's Director of General Services made the final decision on whether to grant a waiver to the set-aside program, "[t]here was no direct administrative appeal."[14]

In September 1983, the J.A. Croson Co. (Croson) submitted a bid for installing "stainless steel urinals and water closets in the city jail."[15] Because the fixtures amounted to seventy-five percent of the total contract price, Croson decided that they would have to be supplied by a minority contractor.[16]

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9. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 477 (1989).
10. *Id.* at 478 (quoting RICHMOND, VA., CODE, § 12-23 (1985)).
11. *Id.*
12. *Id.*
13. *Id.* at 478-79 (citing J.A. Croson Co. v. City of Richmond, 779 F.2d 181, 197 (4th Cir. 1985) (*Croson I*)).
14. *Id.* at 479.
15. *Id.* at 481.
16. *Id.* at 482. This is an example of how set-asides may actually require more minority participation than purported. This is especially true of smaller construction

Six days after the bids for a subcontractor were opened and after contacting five or six MBEs, Croson submitted a request for a waiver of the set-aside.[17] Croson had not received a bid for supplying the fixtures from any MBE including the only one interested in the contract, Continental Metal Hose (Continental).[18] After learning of Croson's waiver request, Continental submitted a bid to Croson[19] and informed the city that it could supply the fixtures.[20] Continental's bid, however, was seven percent higher than the market price for the fixtures.[21] The city subsequently denied Croson's request for a waiver and warned the company that it had ten days to submit a form that would show compliance with the set-aside program or its bid could be considered unresponsive.[22] Croson argued that Continental was not an authorized dealer of the specified fixtures, that Continental's bid was subject to credit approval, and that the bid was substantially higher than any other bid they had received.[23] Additionally, Croson asked the city to raise the overall contract price to cover the additional cost of setting-aside the fixture subcontract to Continental.[24] The city denied the waiver again along with Croson's request for an increase in the contract price and decided to rebid the project.[25] Since the city's decision was unreviewable at the administrative level, Croson brought a 42 U.S.C. § 1983 action in federal district court "arguing that the Richmond ordinance was unconstitutional on its face and as applied in this case."[26]

The district court upheld Richmond's set-aside plan in its

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contracts, as in *Croson*, where there are few separable obligations required to perform the contract. In *Croson* it appears that there were only two separable contractual obligations—supplying the fixtures and installing them. Since supplying the fixtures amounted to 75% of the contract price, Croson had no other choice but to have an MBE supply at least part of the fixtures. Since it would have been inefficient to have a minority contractor supply part of the fixtures and another contractor supply the rest, the 30% set-aside requirement became a *de facto* 75% set-aside requirement for Croson.

17. *Id.*

18. *Id.*

19. Incidentally, Continental submitted its bid "21 days after the prime bids were due." *Id.* at 483.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

entirety.[27] Originally, the Court of Appeals for the Fourth Circuit affirmed,[28] relying upon the Supreme Court's opinion in *Fullilove v. Klutznick*.[29] The Fourth Circuit held that national findings of discrimination in the construction industry coupled with results of a study demonstrating that only .67% of the city's prime construction projects had been awarded to minority businesses allowed the city to conclude that the "low minority participation in city contracts was due to past discrimination . . . ."[30] The court continued, holding that the thirty percent requirement in the Richmond statute, although not related to the number of MBEs in Richmond, was reasonable because minorities constituted fifty percent of the population of Richmond.[31] The Supreme Court granted certiorari and remanded the case for further consideration in light of *Wygant v. Jackson Board of Education* which held that a school board's race-based layoff system violated the Equal Protection Clause of the Fourteenth Amendment.[32]

On remand, the Fourth Circuit struck down the ordinance "as violating both prongs of strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment."[33] The court held that to justify the type of set-aside program in *Croson* a municipality could not rely on broad findings of societal discrimination but only on findings regarding "'prior discrimination *by the government unit involved*.'"[34] The court then held that the record did not show any prior discrimination by the city in awarding its contracts.[35] Finally, the Fourth Circuit held that the thirty percent set-aside was "'chosen arbitrarily'" and therefore was not "narrowly tailored to accomplish a remedial purpose."[36]

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27. *Id.*
28. *Id.* at 483-84 (citing *Croson I*, 779 F.2d 181).
29. 448 U.S 448 (1980) (plurality opinion) (holding that a set-aside created by federal law did not violate the Equal Protection Clause).
30. City of Richmond v. J.A. Croson Co. 488 U.S. 469, 484 (1989).
31. *Id.* at 485.
32. *Id.* (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (plurality opinion)).
33. *Id.* (citing J.A. Croson Co. v. City of Richmond, 822 F.2d 1355 (4th Cir. 1987) *aff'd*, 488 U.S. 469 (1989)) (*Croson II*)(holding that Richmond's set-aside was not justified by a compelling interest nor was the set-aside narrowly tailored).
34. *Id.* (quoting Wygant, 476 U.S. at 274).
35. *Id.* at 485 (citing *Croson II*, 822 F.2d at 1358).
36. *Id.* at 486 (citing *Croson II*, 822 F.2d at 1358).

Richmond appealed the Fourth Circuit decision,[37] and the Supreme Court affirmed.[38]

B. *Reasoning of the Court*

Justice O'Connor wrote what was partially a majority opinion and partially a plurality opinion for the Court.[39] Because only parts of Justice O'Connor's opinion represent a majority of the Court, *Croson* is difficult to evaluate. However, *Croson* does clarify the Court's position on affirmative action.[40]

1. *Strict scrutiny for equal protection clause review of race-conscious remedial measures*

Perhaps the most important way in which *Croson* clarifies the Court's stand on affirmative action is by adopting "strict scrutiny as its standard of Equal Protection Clause review of race-conscious remedial measures."[41] In Part III(A) of her plurality opinion, Justice O'Connor indicated that without strict scrutiny there would be "no way of determining what [racial] classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."[42] The use of strict

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37. *Id.*

38. *Id.*

39. *Id.* at 476. Justices Stevens and Kennedy concurred in part and concurred in the judgment while Justice Scalia concurred in the judgment. *Id.* at 511, 518, 520. Justices Marshall, Brennan and Blackmun dissented. *Id.* at 528.

40. *See, e.g.*, Carol D. Rasnic, City of Richmond v. J.A. Croson Co., *What Does it Portend for Affirmative Action*, 23 CREIGHTON L. REV. 19, 42 (1990).

41. *Croson*, 488 U.S. at 551 (Marshall, J. dissenting, joined by Brennan and Blackmun JJ.).

42. *Id.* at 493 (O'Connor, J. joined by Rehnquist, C.J., White, and Kennedy JJ.). On "racial inferiority" Justice O'Connor quoted Justice Powell's *Bakke* opinion. "[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth." *Id.* at 493-94 (quoting Regents of the University of California v. Bakke, 438 U.S. 265, 298 (1978)); *see also id.* at 517 (Stevens, J., concurring in part and concurring in judgment) ("[E]ven though it is not the actual predicate for this legislation, a statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race.") (quoting Fullilove v. Klutznick, 448 U.S. 448, 545 (1980)).

On "racial politics" Justice O'Connor noted that blacks comprised 50% of the population of Richmond and controlled five of the nine city council seats. Thus, even if the Court had adopted a level of scrutiny that would vary according to whether

scrutiny would thus assure "that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."[43] Although Part III(A) of Justice O'Connor's opinion only received four votes, Justice Scalia, in his concurrence, agreed with the "conclusion that strict scrutiny must be applied to all governmental classification by race."[44]

a. Compelling interest requirement.

1. Generalized claims of past discrimination. In applying the strict scrutiny standard to the facts of *Croson*, the Court held that "an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota."[45] To allow generalized industry-wide claims of past discrimination to be "identified discrimination" and thus justify state or local set-asides would be to "give local governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor."[46] Thus, from the city's generalized findings the Richmond City Council could only speculate "how many minority firms there would be in Richmond absent past societal discrimination."[47]

2. Passive participant requirement. Second, the Court clarified its holding in *Wygant v. Jackson Board of Education*,[48] by concluding that the court of appeals had erred in holding that *Wygant* prevented a state or local government from administering a remedial set-aside program unless that particular governmental entity had been guilty of prior discrimination.[49] The Court held "that a state or local subdivi-

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the classification benefitted the majority or a minority racial group, the Court would still have to apply the stricter standard in this case. *Id.* at 495-96.

43. *Id.* at 493.

44. *Id.* at 520 (Scalia, J., concurring in the judgment).

45. *Id.* at 499 (O'Connor, J., joined by Stevens and Kennedy, JJ.).

46. *Id.* In one of the plurality sections of her opinion, Justice O'Connor argues that to allow the states or their subdivisions to "redress the effects of society-wide discrimination . . . . would be to cede control over the content of the Equal Protection Clause to the 50 state legislatures and their myriad of political subdivisions." *Id.* at 490 (O'Connor, J., joined by Rehnquist C.J., and White, J.).

47. *Id.* at 499.

48. 476 U.S. 267 (1986).

49. *Croson*, 448 U.S. at 492 (O'Connor J., joined by joined by Rehnquist C.J., and White, J.); *see also supra* note 33 and accompanying text. Although this part of Justice O'Connor's opinion only received three votes, the dissenters who would have approved Richmond's set-aside believed that the city had an "interest in eradicating

sion (if delegated the authority from the state) has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction."[50] All that is necessary to justify a city taking steps to dismantle local discriminatory practices is a showing "that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local . . . industry."[51] Given the extensiveness of past and even present discrimination in the United States, it might be difficult to find many governmental entities that have not been at least "passive participants" in "systems of racial exclusion." Thus, the "passive participant" requirement may not be much of a requirement at all.

3. Factors necessary to provide a strong basis in evidence to justify remedial action. The Court also disapproved of the facts the district court used to justify Richmond's set-aside. It noted that "[t]he 30% quota cannot in any realistic sense be tied to any injury suffered by anyone."[52] According to the majority, none of the five "predicate 'facts'" relied upon by the district court in approving the thirty percent quota, taken "singly or together," gave the City of Richmond "'a strong basis in evidence for its conclusion that remedial action was necessary.'"[53] First, the Court held that the city's designation of the set-aside as "remedial" was insignificant: "[T]he mere recitation of a 'benign' or legitimate purpose is entitled to little or no weight."[54] Second, the majority held that a "conclusory statement" by one of the plan's supporters that there had been discrimination in the local construction industry was of "little probative value" in finding evidence of construction discrimi-

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the effects of past racial discrimination." *Id.* at 536 (Marshall, J., dissenting, joined by Brennan and Blackmun, JJ.). Also, in his concurrence Justice Kennedy stated "the State has the power to eradicate racial discrimination and its effects in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself." *Id.* at 518 (Kennedy, J., concurring in part and concurring in the judgment). Thus, there were probably at least seven votes that would have allowed a state or local subdivision to take remedial measures to dismantle systems of racial discrimination in local industries.

50. *Id.* at 491-92 (footnote omitted) (O'Connor J., joined by Rehnquist, C.J. and White, J.).

51. *Id.* at 492.

52. *Id.* at 499.

53. *Id.* at 500 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986)).

54. *Id.* at 500.

nation in Richmond.[55] Third, the Court concluded that "[r]eliance on the disparity between the number of prime contracts awarded to minority firms and the minority population of the city of Richmond is similarly misplaced."[56] The relevant statistical pool to show discriminatory exclusion should have been the number of minorities qualified to "undertake prime or subcontracting work in public construction projects."[57] Fourth, evidence that minority membership in local contractors' associations was low could not "establish a prima facie case of discrimination."[58] Fifth, the majority held that Congress' findings of nation-wide construction industry discrimination also could not justify the thirty percent quota.[59] Thus, Richmond failed to "demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race."[60]

b. Narrowly tailored requirement

Next, the Court held that the Richmond set-aside program was "not narrowly tailored to remedy the effects of prior discrimination."[61] First, the plan included minorities other than blacks for whom there was "*absolutely no evidence* of past discrimination."[62] In fact, the Court held that "[i]t may well be that Richmond has never had an Aleut or Eskimo citizen."[63] Since the plan provided "remedial relief" for minorities from all over the country who have not only never been discriminated by the Richmond construction industry but also never even lived in Richmond, the plan was not "narrowly tailored."[64]

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55. *Id.*
56. *Id.* at 501.
57. *Id.* at 502.
58. *Id.* at 503. The Court did, however, state that "[i]f the statistical disparity between eligible MBEs and MBE membership were great enough, an inference of discriminatory exclusion could arise." *Id.* Thus, if a city could show a disparity between MBEs eligible for membership in an association and actual MBE membership in the association, it might be able to use that disparity to justify an MBE set-aside plan.
59. *Id.* at 504; *see also supra* text accompanying notes 48-50.
60. *Id.* at 505.
61. *Id.* at 508.
62. *Id.* at 506 (emphasis in original).
63. *Id.*
64. *Id.* at 508.

In addition, the Richmond plan did not first consider "the use of race-neutral means to increase minority business participation in city contracting" when it could have.[65] For example, since MBEs may "lack capital or cannot meet bonding requirements, a race-neutral program of city financing for small firms would, *a fortiori*, lead to greater minority participation."[66] Thus, Richmond should have at least considered race-neutral alternatives to their race-based quota.[67]

Finally, the Richmond set-aside was not narrowly tailored because it made "the color of an applicant's skin the sole relevant consideration."[68] The Court noted that in the set-aside program upheld in *Fullilove v. Klutznick*,[69] a contractor could receive "a waiver of the set-aside provision where an MBE's higher price was not attributable to the effects of past discrimination."[70] In Richmond's plan, waivers were available only if MBEs from anywhere in the country were unavailable. Although a set-aside program that does not require an individualized showing of past discrimination may be easier to administer, it "cannot justify a rigid line drawn on the basis of a

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65. *Id.* at 507.
66. *Id.*
67. Although the Court requires a city or state to consider race-neutral alternatives to a racial quota, it does not specifically require state and local governments to employ those methods first. However, state and local governments should try to employ race-neutral solutions first. Otherwise, they would be unable to determine whether race-neutral remedies could work in their jurisdictions. If the Court will not allow localities to use generalized past societal discrimination to justify MBE set-asides, it probably would not find that a city had "considered" race-neutral means if the city only found that generally in other jurisdictions race-neutral means had failed to remedy the effects of past jurisdiction.

If the Court would not allow cities to use evidence of the general failure in other jurisdictions of race-neutral means to remedy past discrimination, then it would be requiring cities to waste money on measures that are already proven to be failures. It seems that once a city or state has found that it is afflicted with the same past societal discrimination found in other jurisdictions, it should not be afflicted again by being forced to first employ cures that have already proven to be ineffective.

On the other hand, if the Court would allow state and local governments to consider race-neutral alternatives by citing their ineffectiveness in other jurisdictions, it would be requiring cities and states to jump an invisible hurdle on their way to constitutional MBE set-asides because even the Court has acknowledged that race-neutral means are ineffective. *See id.* ("[B]y the time Congress enacted [the MBE set-aside] in 1977, it knew that other remedies had failed to ameliorate the effects of racial discrimination in the construction industry." (quoting Fullilove v. Klutznick, 448 U.S. 448, 511 (1980) (Powell, J., concurring))).
68. *Id.* at 508.
69. 448 U.S. 448 (1980).
70. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 508 (1989).

suspect classification."[71]

2. *Proper measures to remedy past discrimination*

In the final section of her opinion Justice O'Connor suggests measures that state and local governments could use to remedy past discrimination in their jurisdictions.[72] Some of these measures are race-neutral and could be used "in the absence of evidence of discrimination."[73] These race-neutral measures include: "[s]implification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races."[74] However, before beginning any race-based remedial measures, a state or local government should have "evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities."[75] This evidence would be "a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors . . . ."[76] When a locality has this kind of evidence it may take action against the particular individuals "who discriminate on the basis of race or other illegitimate criteria."[77] Plus, "[i]n the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion."[78]

3. *Summary of* Croson

In summary, the *Croson* court held that strict scrutiny is

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71. *Id.*
72. *Id.* at 509-11 (O'Connor, J., joined by Rehnquist, C.J., White and Kennedy, JJ.). This final section of O'Connor's opinion, Part V, only received four votes from the Court. However, since the dissenters would have approved the Richmond set-aside program, it is probably fair to say that they would also approve of state or local remedial programs based on this final section of O'Connor's opinion. Since one of the three dissenting Justices is still on the Court, there would probably be at least five votes to justify a set-aside based on this last section.
73. *Id.* at 509 (O'Connor, J., joined by Rehnquist, C.J., White and Kennedy, JJ.).
74. *Id.* at 509-10 (O'Connor, J., joined by Rehnquist, C.J., White and Kennedy, JJ.).
75. *Id.* at 509.
76. *Id.*
77. *Id.*
78. *Id.*

the standard for Equal Protection Clause review of race-based measures. The Court held that only if a state or local government is merely a "passive participant" in local discriminatory practices it may take remedial measures. However, generalized claims of nation-wide discrimination do not justify a local entity taking remedial measures to correct possible racial discriminatory practices in the locality. Also, neither labeling a program "remedial" nor basing a set-aside on a few conclusory statements by interested individuals that discriminatory practices exist in a local industry could justify a local set-aside. Finally, low minority membership in a local industry association also fails to justify local set-asides.

To actually create a state or local constitutionally sound set-aside, a locality should first have a "strong basis in evidence . . . that remedial action [is] necessary."[79] In collecting this evidence localities should remember that the relevant statistical pool to find discriminatory exclusion is the number of minorities qualified to work or perform contracts in a particular industry and not the percentage of the minority in the population at large.

Second, before establishing a racial set-aside program, local governments should consider race-neutral methods of remedying the discrimination. Experimentation with race-neutral methods will probably be the best way to convince courts that race-neutral methods have actually been considered.

Third, after considering race-neutral remedies, a state or local government may in the "extreme case" employ a "narrowly tailored" racial preference to "break down patterns of deliberate exclusion."[80] To be "narrowly tailored" a racial set-aside must benefit only racial groups that have been victims of identified discrimination.

Finally, the set-aside should be flexible enough to allow for waivers when an MBE's higher price is not attributable to past discrimination.

Croson therefore has clarified the court's position on affirmative action in many ways and has given some clear signals to state and local governments regarding the steps

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79. *Id.* at 500 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986) (Powell, J., joined by Burger, C.J., Rehnquist and O'Connor, JJ.)).
80. *Id.* at 509.

necessary to create constitutionally sound minority set-aside programs.

III. IMPACT OF *CROSON*

A. *Nationwide Effect on MBE Set-Asides*

Soon after the *Croson* opinion was issued, its effects began to spread across the nation. Many state and local governmental entities suspended their racial set-aside programs in order to avoid costly lawsuits.[81] Many others considered suspending their programs,[82] while still others found themselves defending their MBEs in court.[83] Some cities and states decided to fund the expensive studies necessary in order to find the "strong basis in evidence" needed to justify race-based remedial relief at the local level.[84] Finally, some cities have actually

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81. *See* Robert Pear, *Courts Are Undoing Efforts to Aid Minority Contractors*, N.Y. TIMES, July 16, 1990, at A1 (the Port Authorities of New York and New Jersey as well as the New Orleans school board voluntarily repealed their minority set-aside plans); *see also* Dawn Garcia, *Ruling May Undercut Some Programs*, S.F. CHRON., Feb. 6, 1990, at A7 ("[Fifteen] cities, counties and states reported having decided to close down their minority business programs because of the decision [Croson] . . . ."); Eve Holberg, *State Suspends Mandate in Minority Hiring Rules*, ROCHESTER BUS. J., Sept. 17, 1990, at 4 (New York state as well as the city of Rochester suspended set-aside programs.); *Airports Authority Establishes Voluntary Affirmative Action Plan*, UPI, July 11, 1989, *available in* LEXIS, Nexis Library, UPI File (Metropolitan Washington [D.C.] Airports Authority suspends affirmative action guidelines in response to *Croson*.).

82. Garcia, *supra* note 81 (thirty-five state and local governments were still evaluating the status of their set-aside plans as of February 6, 1990).

83. *Id.* (twenty-seven cities, counties and states were facing legal challenges to their set-asides as of February 6, 1990). *See also*, Pear, *supra* note 81 (courts have struck down set-aside programs in San Francisco, Atlanta, Philadelphia, Birmingham, Alabama, Jacksonville, Florida, Dayton, Ohio and Michigan).

84. Professor Gary Charles Leedes, chairperson of Richmond's new study commission, states, "[u]nfortunately a good consultant will charge a fee ranging between $100,000 and $500,000." Gary Charles Leedes, *The Richmond Set-Aside Case: A Tougher Look at Affirmative Action*, 36 WAYNE L. REV. 1, 33 (1989); *see also* Pat Foran, *Study Reignites Debate Over Race-Based Hiring*, BUS. J.-MILWAUKEE, Mar. 19, 1990, at 1 (Milwaukee spent $283,000 for a study planned to provide the strong basis in evidence necessary to pass *Croson*.); Pamela E. Foster, *City Draws Fire for Hiring Advisor on Discrimination*, BUS. FIRST-COLUMBUS, July 8, 1991, at 1 (reporting that after spending $166,000 for one study to show history of past discrimination, Columbus, Ohio decided to spend another $250,000 on another study because it doubted that the results of the first would stand up in court); Howard Schneider, *Minority Plan Studied*, WASH. POST, Oct. 16, 1989, at E5 (Maryland agrees to pay up to $300,000 for study to determine whether its MBE set-aside passes *Croson*.); Emory Thomas Jr., *New MBE Scheme on Tap: City Considers More Bureaucracy, Extra Paperwork*, ATLANTA BUS. CHRON., Aug. 20, 1990, at 1A (Atlanta spent

followed the Court's advice and have abandoned race-based set-asides in favor of race-neutral measures.[85]

B. *Effect on MBEs*

Because many cities and states are abandoning MBE set-asides, at least some minority businesses have experienced large decreases in their workload.[86] One Atlanta MBE contractor reported that the value of his work in progress declined from thirteen million dollars at the time of the *Croson* decision to only five million dollars eighteen months later.[87] In Richmond, Virginia, the percentage of city construction contracts

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$500,000 for a 1,128 page study designed to overcome *Croson.*); *Justice, by the Numbers*, ENGINEERING NEWS-REC., Sept. 2, 1991, at 26 (reporting that about 60 state and local governments will have spent more than 13 million dollars on studies required by *Croson*).

Sen. John Kerry (D-Mass) has suggested the possibility of Congress providing state and local governments with funds to pay for these expensive studies. *Contract Policy, Kerry Weighs Options for State, Local Set-Aside Programs to Pass Croson Test*, Daily Rep. Executives (BNA) No. 151, at A-4 (Aug. 6, 1990).

For discussions on the types of facts study commissions should investigate to determine past discrimination in a particular locality, see Patrick Halligan, *Minority Business Enterprises and Ad Hoc Hypotheses: Guidelines for Studies by Local Governments*, 23 URB. LAW. 249 (1991); Leedes, *supra* at 33-37, and William Dobrovir, *Creating a Program That Passes the Croson Test*, LEGAL TIMES, May 1, 1989, at 32.

85. Pear, *supra* note 81 (Minneapolis has adopted a plan which allows for preferences for emerging small businesses.).

86. At least two reasons could account for this decreased workload. First, as soon as contractors were no longer required to set-aside part of each government contract to MBEs, the contractors returned to their previous prejudice against minorities. Of course if this is true, it is now more difficult to argue that MBE set-asides can actually help cure the prejudice that underlies discriminatory contracting practices. Second, it may be possible that post-*Croson* MBE business has decreased because the now unconstitutional set-aside programs did not really prepare MBEs to compete. If MBE set-asides do not actually prepare MBEs to compete in the market, then the remedial purposes of MBE set-asides might never actually be met. The factual situation in *Croson* supports the second possibility because the MBE in *Croson* was merely planning on providing unnecessary middleman services by supplying Croson with fixtures from companies who were willing to supply the fixtures directly to Croson. *See supra* note 16 and accompanying text.

87. Pear, *supra* note 81. This same contractor stated "[s]ome general contractors decided because of the Richmond decision, they do not need to seek out minority subcontractors or minority joint venture partners on their projects." *Id.* This statement seems to contradict the market notion that suppliers of services generally have to seek out business themselves and cannot totally rely on consumers of services to seek them out. Thus, the Atlanta MBE set-asides may not have prepared this minority subcontractor to compete in the competitive construction market.

awarded to MBEs rose from less than one percent[88] to thirty-nine percent in 1986 because of the Richmond program. After the Fourth Circuit struck down Richmond's set-aside, the figure dropped dramatically and has continued to fall.[89]

C. *Assessment by Legal Scholars*

Croson soon became a favorite topic of law review articles[90] and casenotes.[91] The articles range from scholarly statements that are more statement than scholarship[92] to articles dealing only with the Justice's narrative styles in *Croson.*[93] Generally, legal scholars agree about many of the effects of *Croson*. Nearly all scholars place the greatest significance on the fact that the Supreme Court has finally made strict scrutiny its standard for review for race-based affirmative action measures.[94] Many also believe that the Court in some ways

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88. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499 (1989).

89. Leedes, *supra* note 84, at 16 n.77.

90. *See, e.g.*, Jennifer M. Bott, *From* Bakke *to* Croson*: The Affirmative Action Quagmire and the D.C. Circuit's Approach to FCC Minority Preference Policies*, 58 GEO. WASH. L. REV. 845 (1990); Kenneth Casebeer, *Running on Empty: Justice Brennan's Plea, the Empty State, the City of Richmond, and the Profession*, 43 U. MIAMI L. REV. 989 (1989); Neal Devins, *Affirmative Action After Reagan*, 68 TEX. L. REV. 353 (1989); J.R. Franke, Richmond v. Croson*: The Setting Aside of Set-Asides?*, 34 ST. LOUIS U. L.J. 603 (1990); Charles Fried, *Affirmative Action After* City of Richmond v. J.A. Croson Co.*: A Response to the Scholars' Statement*, 99 YALE L.J. 155 (1989); Gary Charles Leedes, *supra* note 84; Carol D. Rasnic, City of Richmond v. J.A. Croson Co.*: What Does It Portend For Affirmative Action?*, 23 CREIGHTON L. REV. 19 (1989); Michael Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729 (1989); Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381 (1989); Douglas D. Scherer, *Affirmative Action Doctrine and the Conflicting Messages of* Croson, 38 KAN. L. REV. 281 (1990); *Joint Statement: Constitutional Scholars' Statement On Affirmative Action After* City of Richmond v. J.A. Croson Co., 98 YALE L.J. 1711 (1989); *Scholars' Reply to Professor Fried*, 99 YALE L.J. 163 (1989) [hereinafter Joint Statement].

91. *See, e.g.*, Martha J. Hess, Casenote, *Benign Classifications Based on Race Must Be Narrowly Tailored to Achieve A Compelling Governmental Interest*, 21 ST. MARY'S L.J. 493 (1989); John L. Schilling, Comment, *An Analysis of the New Legal Model for Establishing Set-Aside Programs for Minority Business Enterprise: the Case of* City of Richmond v. J.A. Croson, 25 GONZ. L. REV. 141 (1990); Jill B. Scott, Casenote, *Will the Supreme Court Continue to Put Aside Local Government Set-Asides As Unconstitutional? The Search for an Answer in* City of Richmond v. J.A. Croson Co., 42 BAYLOR L. REV. 197 (1989); Tammy J. Spivac, Note, *Supreme Court Adopts Strict Scrutiny Standard to Review the Constitutionality of Affirmative Action Measures*, 20 SETON HALL L. REV. 205 (1989).

92. Joint Statement, *supra* note 90 (statement was more a plea to state and local governments not to abandon set-asides than a scholarly treatment of the case).

93. Ross, *supra* note 90.

94. Fried, *supra* note 90, at 156 ("for the first time a majority of the Court holds

made it easier for a city to use race-based set-asides because now there is no requirement that "affirmative action respond only to discrimination 'by the governmental unit involved.'"[95] At least one scholar has commented that *Croson* could lead not only to legal action against state and local governments with unconstitutional set-asides, but also to compensatory and even punitive damages against officials who enforce unconstitutional programs.[96] Another was disappointed by the Court's determination that the relevant statistical pool is based on the number of MBEs already in business rather than the number of potential MBEs.[97] In spite of the concerns of many MBE advocates, most scholars agree that MBE set-asides are still

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unequivocally that all racial classifications . . . must pass strict scrutiny . . . "); Leedes, *supra* note 84, at 1 ("*Croson* is a significant turning point; for the first time, the Court unequivocally held that mandatory affirmative action remedies must survive strict scrutiny."); Rasnic, *supra* note 90, at 43 ("What *Croson* has provided is a decisive standard—strict scrutiny—to be uniformly applied to all race-based directives."); Rosenfeld, *supra* note 90, at 1731 ("[a] majority on the Court for the first time has settled on a single standard—the strict scrutiny test—to determine the constitutionality of affirmative action based on race."); Charles M. Oellerman, Note, *Equal Protection and Affirmative Action in Local Government Contracting*, 12 HARV. J.L. & PUB. POL'Y 1069, 1077 (1989) (*Croson's* impact will be significant. "The Court's adoption of a strict scrutiny standard of review clearly casts a negative light on the validity of existing racial preference programs, particularly those involving public contracting, and the future enactment of racial quotas."). *Cf.* Devins, *supra* note 90, at 377-78 ("*Croson* . . . breaks little new ground . . . . Although this crystallization [adoption of the strict scrutiny standard] is of some practical and great symbolic importance, it should not be overstated.").

95. Devins, *supra* note 90, at 378 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986)); *see also* Oellerman, *supra* note 94, at 1078 ("The Court actually took a step back from the plurality's requirement in *Wygant* that past discrimination by the governmental unit itself must be demonstrated to justify a racial preference."); Ralph C. Thomas III, *Muscular MBE Plans to Rise in the Croson Era*, ENGINEERING NEWS-REC., Apr. 13, 1989, at 27 ("it is sufficient to show that local government had become a 'passive participant' in local system of racial exclusion.").

96. Leedes, *supra* note 84, at 16-17. Professor Leedes states:

> The consequences of set-aside plans that fail to satisfy *Croson's* strict scrutiny are chilling. State and local administrators, absent qualified immunity, might be personally liable for compensatory damages if they enforce clearly unconstitutional set-aside programs intended to benefit minority-owned or controlled business enterprises. Punitive damages might be assessed if local officials act in reckless or callous indifference to the federally protected rights of any person. State and local governments also risk prosecution and liability under section 1983, and under Title VI of the Civil Rights Act of 1964, which prohibits racial discrimination by instrumentalities receiving federal funds.

Id.

97. *See, e.g.*, Leedes, *supra* note 84, at 29.

constitutionally possible.[98] At least one has even argued that MBEs are potentially much stronger and more insulated from legal attack.[99]

IV. JUDICIAL TREATMENT OF *CROSON*

Soon after *Croson*, Ralph Thomas III, executive director of the National Association of Minority Contractors, predicted that "[s]tate and local minority business utilization programs will fall like dominoes because of the ruling."[100] Thomas, however, is not pessimistic about the effects *Croson* will have on minority contractors because he feels that *Croson* opens the door to new "muscular MBE plans" that will be much less prone to judicial attack.[101] The remainder of the note will review some post-*Croson* decisions to show how many MBEs have fallen "like dominoes" as well as how some have been able to avoid the "domino effect." Finally, the note will review one recent case that may lend support to Thomas' "muscular MBE plan" theory.

A. *Pre-*Croson *Set-aside Programs Held Unconstitutional*

1. Capeletti Bros., Inc. v. Metropolitan Dade County

In *Capeletti Bros., Inc. v. Metropolitan Dade County*,[102] a federal district court advised Dade County to voluntarily dismantle their current race-conscious set-aside and spend their tax resources trying to create a new constitutionally sound program.[103] The Dade County set-aside allowed the "county

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98. *See, e.g.*, Devins, *supra* note 90 at 377 (*Croson* should have no major impact on set-asides.); Leedes, *supra* note 84, at 44 ("there is virtually nothing that the Court did during the 1988 Term that cannot be restored by necessary, narrowly drawn, remedial legislation backed by a firm factual predicate."); Rasnic, *supra* note 90, at 42 ("The Court has not mandated an end to all such [set-aside] efforts."); Joint Statement, *supra* note 90 at 1712 ("it would be . . . irresponsible . . . to claim that [*Croson*] casts doubt on the overall constitutionality of properly constructed race-conscious remedies."); Hess, *supra* note 91, at 509 ("Governmental bodies that use relevant statistics to establish the existence of present effects of prior discrimination should be able to satisfy the requirement of a compelling governmental interest."); Spivac, *supra* note 91, at 226 ("Justice O'Connor clearly stated that *Croson* was not the death knell for affirmative action programs."); Thomas, *supra* note 95.

99. Thomas, *supra* note 95.

100. *Id.*

101. *Id.*

102. 735 F.Supp. 1040 (S.D. Fla. 1990).

103. *Id.* at 1044.

to set aside desiginated county contracts exclusively among Black contractors."[104] It also allowed the county to "require that a certain percentage of a contract's value be subcontracted to Black contractors."[105] The lawsuit was brought by nonminority contractors and subcontractors alleging that the set-aside was unconstitutional.[106] Dade County defended their program by relying in part on an earlier decision that held the set-aside plan constitutional.[107] The court, however, found that when "[f]aced with changing law, courts hearing questions of constitutional right cannot be limited by res judicata. If they were, the Constitution would be applied differently in different locations."[108] The court then reviewed *Croson* and found that it did represent constitutional change sufficient to bar the application of the doctrine of res judicata.[109]

Finally, the court set a date for a supplemental hearing to consider evidence which could support the set-aside.[110] The court did, however, advise the county that:

> [I]f a good faith assessment of the evidence reveals that there is no evidence to uphold the county's remedial legislation, the Court strongly suggests that the county consider stipulating to the entry of a permanent injunction and begin devoting its resources and the taxpayers' dollars to implementing a new program that would conform to the present constitutional standards rather than expending valuable resources opposing Plaintiffs' efforts to suspend the local program.[111]

Thus, *Capeletti Bros.* apparently holds that state and local governments cannot rely on res judicata to save existing MBE set-asides and might better spend tax resources acquiring evidence that would justify new "muscular MBE plans."

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104. *Id.* at 1041.
105. *Id.*
106. *Id.* at 1041.
107. *Id.* at 1042 (citing South Fla. Chapter of Ass'n. Gen. Contractors of Am. v. Metro Dade County, 552 F.Supp 909 (S.D. Fla. 1982)).
108. *Id.* at 1042 (quoting Parnell v. Rapides Parish Sch. Bd., 563 F.2d 180, 185 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978)).
109. Capeletti Bros., Inc. v. Metropolitan Dade County, 735 F. Supp. 1040, 1043 (S.D. Fla. 1990).
110. *Id.* at 1045.
111. *Id.* at 1044.

2. Ohio Contractors Association v. City of Columbus[112]

Although the reported decision of *Ohio Contractors* deals mainly with First and Fourteenth Amendment issues, it does state the underlying circumstances that led to a preliminary injunction against the city's use of a set-aside plan. The dispute in *Ohio Contractors* grew out of efforts by the city of Columbus to appease members of the black community who wanted part of the economic benefits that were to come from a future international floral exposition.[113] Because Columbus was under tight time constraints to prepare for the exposition, the city was particularly "vulnerable to political pressure."[114] At least one black leader threatened "to stir up opposition in the black community" and use "political influence and litigation to thwart the project unless 'in the spirit of harmony you . . . can resolve an equitable 35% set-aside arrangement for minority participation.'"[115]

The city eventually settled on a twenty-one percent set-aside for the exposition contracts.[116] At the same time, the Supreme Court decided *Croson* and shortly thereafter the contractors' association filed this lawsuit.[117] The district court had little trouble granting the preliminary injunction because the city failed to first determine "whether there was any evidence that construction contractors operating in the Columbus community had discriminated in the employment of black tradesman or laborers or that they were underrepresented in the ranks of such employees."[118] Thus, *Ohio Contractors Ass'n* is not only a good example of why the strict scrutiny standard is proper when reviewing set-asides in situations where the preferenced minority actually is a minority,[119] but it also illustrates how easily some pre-*Croson* set-

112. 733 F. Supp. 1156 (S.D. Ohio 1990).
113. *Id.* at 1159.
114. *Id.*
115. *Id.* (quoting Letter from Walter R. Cates, Sr. to the director of Ameriflora (Aug. 1, 1988)).
116. *Id.* at 1160.
117. Ironically, the city passed the set-aside the same day *Croson* was decided. Ohio Contractors Ass'n v. City of Columbus, Ohio, 733 F.Supp. 1156, 1162 (S.D. Ohio 1990).
118. *Id.* at 1161.
119. *Id.* at 1158-59. In Richmond the city council actually was controlled by blacks and the city population was 50% black. City of Richmond v. J.A. Croson Co., 488

asides can be attacked.[120]

B. *Pre-*Croson *Set-asides that Survived* Croson *Scrutiny*

1. Coral Construction Co. v. King County

Not all judicial challenges of pre-*Croson* MBEs have been successful. Although recently reversed in part,[121] *Coral Construction Co. v. King County*[122] provides one example of a pre-*Croson* MBE that was at least initially able to pass *Croson's* strict scrutiny.[123] In *Coral Construction Co.* the district court found that the King County MBE set-aside was much more flexible than the one in *Croson* because it was "tied to the availability of qualified [MBE] contractors, and not to the percentage of minorities . . . in the population in general."[124] The court also found that King County had the "strong basis in evidence" to show past discrimination in the county construction industry because it had relied on evidence from several dozen people regarding past discrimination and on evidence of discrimination in other jurisdictions that were included in or shared common borders with the county.[125]

U.S. 469, 495 (1989).

120. There are many other examples of Thomas's "domino" effect. *See, e.g.*, Milwaukee County Pavers Ass'n. v. Fiedler, 922 F.2d 419 (7th Cir.), *cert. denied*, 111 S.Ct. 2261 (1991) (although states need not find prior discrimination to adopt set-asides based on Surface Transportation Act, portion of state's use of MBE set-aside measure was outside of federal authority and therefore unconstitutional); Krupa v. New Castle County, 732 F. Supp. 497 (D. Del. 1990) (police department affirmative action program defeated on cross motion for summary judgment); Main Line Paving Co. v. Board of Educ., 725 F. Supp. 1349 (E.D. Pa. 1989) (MBE set-aside requirements violated Equal Protection Clause.).

121. Coral Constr. Co. v. King County, 941 F.2d 910 (9th Cir. 1991) (reversing the district court's grant of summary judgement and remanding back to the district court to determine if the county can show a compelling governmental interest).

122. 729 F. Supp. 734 (W.D. Wash. 1989) *modified by*, 941 F.2d 910 (9th Cir. 1991).

123. The King County set-aside program still may have the opportunity to pass *Croson's* strict scrutiny while on remand to the district court. *See infra* text accompanying note 127.

124. *Coral Constr.*, 729 F. Supp. at 739.

125. *Id.* at 737. The evidence from other jurisdictions that the court allowed came from Seattle and the Municipality of Metropolitan Seattle. Both are included in or share common borders with King County. *Id.* It would still be possible to argue that the evidence the county had still was not "extreme" enough to justify the set-aside. Justice O'Connor's opinion in *Croson* suggests that narrowly tailored racial set-asides might be necessary in the "extreme case." City of Richmond v. J.A. Croson Co., 488 U.S. 469, 509 (1989). Although the district court mentions O'Connor's "extreme case" language, *Coral Constr.*, 729 F. Supp. at 737, it does not explicitly state how the

According to the court, the county's set-aside was also "narrowly tailored."[126] Despite claims that race-neutral alternatives were not considered by the county, the court found that many race-neutral alternatives were considered but were "rejected because state law bars the county from implementing them."[127] Regarding other possible race-neutral alternatives the court found "*Croson* does not compel the county to consider every imaginable race-neutral alternative, nor to try alternatives that would be plainly ineffective."[128] Finally, the court cited the facts that the set-aside was flexible and that it denied benefits to groups that have not been discriminated against as factors showing that the program was "narrowly tailored."[129]

The Ninth Circuit Court of Appeals, however, did not approve of the county's use of anecdotal evidence of past discrimination nor did it approve of the use of statistics from an adjoining county.[130] But the court did leave open the possibility that a new study, conducted after the district court's decision, could justify the use of the set-aside even though the set-aside was implemented before the study took place.[131]

Additionally, the court held that the set-aside was geographically overbroad because it only required that participating MBE's be victims of discrimination in the geographical areas in which they operate and not necessarily in King County.[132] On remand King County will have to show that Coral Construction Company was a victim of discrimination in King

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situation in King County represents the "extreme case."

126. *Id.* at 740.

127. *Id.* at 739. "The [Washington] state constitution prohibits gifts or loans of public funds to private entities." *Id.* (citation omitted). Washington statutes "restrict[] county bonding procedures." *Id.* (citation omitted).

128. *Id. But see supra* note 67.

129. *Id.* at 740.

130. Coral Constr. Co. v. King County, 941 F.2d 910, 917 (9th Cir. 1991).

131. *Id.* at 920. Although this seems to allow local governments to shoot first (by creating set-asides) and ask questions later (by funding studies to justify set-asides after their creation), it is unlikely that many jurisdictions will abuse this opportunity because if their post-set-aside studies fail to provide sufficient evidence of discrimination, the jurisdictions could be liable to businesses denied contracts under the set-asides. *See* Leedes, *supra* note 84 at 17 ("State and local governments [which do not comply with *Croson*] . . . risk prosecution and liability under section 1983, and under Title VI of the Civil Rights Act of 1964 . . . .").

132. Coral Constr. Co., 941 F.2d at 925.

County.[133] This, however, will be presumed if the county can show "malignant discrimination within the King County business community" and that Coral Construction Company had previously sought business in the county.[134]

Therefore, assuming that Coral Construction Company had previously sought to do business in King County, the case on remand will hinge on whether the discrimination study, begun and completed well after the set-aside program was implemented, can show malignant discrimination in the county's business community.

2. Milwaukee County Pavers Ass'n v. Fiedler

In *Milwaukee County Pavers Ass'n v. Fiedler*,[135] Judge Posner, writing for the Seventh Circuit, held that a Wisconsin set-aside program partially violated *Croson* but upheld the remainder of the program.[136] The program required the state to set-aside a portion of its highway contracts to "'disadvantaged business enterprises'" and required contractors to give preferential treatment to subcontractors so certified.[137] According to the state, "disadvantaged" meant "excluded from the mainstream of American economic life."[138] The state did, however, make a rebuttable presumption that blacks, Hispanics, Asians, American Indians, and women were disadvantaged.[139] The district court judge found that the program essentially provided for two types of set-asides: one in which the state was the principal because it received no federal highway funds and another in which the state was the disbursing agent of federal highway funds.[140] The court enjoined the former but refused to enjoin the latter.[141]

Appealing the injunction of part of the program, the state argued that although it had made no showing of past discrimination to justify the set-aside program, the set-aside did not violate *Croson* because the discrimination was based upon a

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133. *Id.*
134. *Id.*
135. 922 F.2d 419 (7th Cir.), *cert. denied*, 111 S.Ct. 2261 (1991).
136. *Id.* at 425 (citing Fullilove v. Klutznick, 448 U.S. 448 (1980)).
137. *Fiedler*, 922 F.2d at 421.
138. *Id.*
139. *Id.* at 421-22.
140. *Id.* at 421.
141. *Id.*

firm's "disadvantaged" status and not its racial status.[142] Judge Posner, however, affirmed the district court and held that even the presumption that certain minorities were "disadvantaged" was a form of racial discrimination prohibited by *Croson*.[143]

The court also affirmed the district court's refusal to enjoin the portion of the set-aside program in which the state was only the disbursing agent of the federal government. The court held this portion of the set-aside to be identical to the situation in *Fullilove*.

> The joint lesson of *Fullilove* and *Croson* is that the federal government can, by virtue of the enforcement clause of the Fourteenth Amendment, engage in affirmative action with a freer hand than states and municipalities can do. And one way it can do that is by authorizing states to do things that they could not do without federal authorization. That was *Fullilove*; it is this case as well.[144]

Thus, from *Fiedler*, it is clear that an otherwise race-neutral set-aside will probably not pass *Croson* if it presumes that certain racial minorities qualify for the set-aside, and that set-asides mandated by federal law will be evaluated by *Fullilove* and not *Croson* standards.

C. A Muscular MBE: Associated General Contractors, Inc. v. City and County of San Francisco

Because *Associated General Contractors, Inc. v. City and County of San Francisco*[145] is a post-*Croson* set-aside which closely follows *Croson*'s guidelines, it may be an example of what one scholar called a "muscular MBE plan."[146] The case arose when a contractors' association challenged a post-*Croson* MBE set-aside adopted by the city of San Francisco. Before adopting the MBE, the city hired a consulting firm to prepare a statistical report to identify any past discrimination in the city.[147] The report found that the availability of minority contractors was significantly greater than their actual participa-

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142. *Id.*
143. *Id.* at 421-22.
144. *Id.* at 423-24.
145. 748 F. Supp. 1443 (N.D. Cal. 1990).
146. Thomas, *supra* note 95.
147. *Id.* at 1445 n.3.

tion in local construction industry.[148] Before the city implemented the MBE, it tried at least one race-neutral remedy, which proved unsuccessful, and considered others.[149] Rather than use a rigid quota, the city employed a minority bid preference system whereby minority contractors, or nonminority contractors who enter into joint ventures with minority contractors, would receive preference over the lowest bidder if their bids were within five percent, or in some cases ten percent, of the lowest bidder.[150] The district court found that these factors not only showed the city had a "strong basis in evidence" to justify remedial action but also found that the bid preference plan was "narrowly tailored" according to *Croson*.[151]

V. Conclusion

The *Croson* decision clearly has been devastating to pre-*Croson* MBE set-asides and affirmative action plans. However, *Croson* provides state and local governments with new, more definite rules on how to create set-asides that will be upheld.

Croson also provides the nation with a unique opportunity to evaluate the effectiveness of race-based set-asides. Since so many state and local governments abandoned their set-aside programs soon after *Croson*, researchers can now compare and contrast prejudice and minority business participation in jurisdictions across the country for three different periods: before set-asides were created, while set-asides were in effect, andafter many set-asides were dismantled. Analysis of this information will assist the nation in determining if race-based set-asides can cure prejudice or increase the competitiveness of minority businesses.

Bryan B. Chambers

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148. *Id.* at 1450. Particularly, it found that Asian MBEs had an availability of 23.6% but only received 4.3% of the prime construction contract dollars, black MBEs had an availability of 13.3% but only received 2.2% of prime construction contract dollars, and hispanic MBEs had an availability of 11% but only received 3.4% of the prime construction contract dollars.
149. *Id.* at 1454.
150. *Id.* at 1446.
151. *Id.* at 1452-56.