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Legal Research Digests are issued to provide early awareness and encourage application of research results emanating from NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs." These Digests contain supplements and new papers that are periodically compiled as addenda to the treatise, *Selected Studies in Highway Law*, published by the Transportation Research Board.

Areas of Interest: IA Planning and Administration, IC Transportation Law, IIIB Materials and Construction, V Aviation, VI Public Transit, VII Rail

Supplement to

Minority and Disadvantaged Business Enterprise Requirements in Public Contracting

A report prepared under NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the agency conducting the research. The report was prepared by Orrin F. Finch. James B. McDaniel, TRB Counsel for Legal Research, was the principal investigator when this study was concluded. Robert Cunliffe and Ross D. Netherton served as principal investigators during the study.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report supplements and updates a paper in Volume 3, *Selected Studies in Highway Law* (SSHL), entitled "Minority and Disadvantaged Business Enterprise Requirements in Public Contracting," pp. 1582-N1 to 1582-N62.

This supplement will be published in a future addendum to SSHL. Volumes 1 and 2 deal primarily with the law of eminent domain and the planning and regulation of land use. Volume 3 covers government contracts. Volume 4 covers environmental and tort law, inter-governmental relations, and motor carrier law. An expandable format permits the incorporation of both new topics as well as supplements to published topics. Updates to the bound volumes are issued by addenda. The 5th Addendum was published in November 1991. Addenda are published on an average of every three years. Between addenda, legal research digests are issued to report completed research. Presently the text of SSHL totals over 4,000 pages comprising 75 papers.

Copies of SSHL have been sent, without charge, to NCHRP sponsors, certain other agencies, and selected university and state law libraries. The officials receiving complimentary copies in each state are: the Attorney General and the Chief Counsel and Right-of-Way Director of the highway agency. Beyond this initial distribution, the 4-volume set is for sale through the Transportation Research Board ($185.00).

APPLICATIONS

The foregoing research should prove helpful to highway and transportation administrators, their legal counsel, contractors, federal administrators, civil rights officials, policy and planning staff, and others involved in implementing affirmative action plans and the disadvantaged, minority, and female business enterprise programs. Officials are urged to review their practices and procedures to determine how this research can effectively be incorporated in a meaningful way. Attorneys should find this paper especially useful in their work as an easy and concise reference document in Federal requirements for public contracts.

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Supplement to

MINORITY AND DISADVANTAGED BUSINESS ENTERPRISE REQUIREMENTS IN PUBLIC CONTRACTING

SUPPLEMENTARY MATERIAL

Editor's note: Supplementary material to the paper "Minority and Disadvantaged Business Enterprise Requirements in Public Contracting" is referenced to topic headings therein. Topic headings not followed by a page number relate to new material.

SPLIT SPLINTERED AND STRUGGLING SUPREME COURT [1582-N11]

The first four affirmative action plan (AAP) decisions of the United States Supreme Court in the article being supplemented covered a period of six years. It revealed a court evenly divided into three distinct points of view: Three justices never saw an AAP that did not pass constitutional muster; three justices rarely found an AAP that was constitutional; and three justices provided the swing votes, twice invalidating the programs and twice upholding them on very tenuous differences.

In the intervening seven years since the original paper was prepared, the Court has filed opinions in nine more AAP cases. The Justices remain as sharply divided as before except that the middle group of three justices, which had previously provided the deciding swing votes, are now more inclined to support the more conservative members of the Court. This has resulted in more 5–4 splits on the Court with an increased emphasis on a strict scrutiny of race-conscious programs rather than the previous 3-way splits with plurality opinions.

This is partly a result of the appointment of Justice Scalia following the retirement of Chief Justice Burger and the appointment of Justice Kennedy replacing Justice Powell. Justice Stevens in the earlier cases was very skeptical of all AAPs except those devised by a court. In all the subsequent cases except one, he joined with the three most liberal justices voting to uphold the AAPs. Justice Powell continued in his role of providing the swing vote until replaced by Justice Kennedy who appears to be solidly opposed to most AAPs based on race. Justice White who earlier tended to uphold AAPs has in the later decisions been opposed to them except for the Court's most recent decision upholding the Federal Communications Commission's (FCC) minority preference policies regarding television broadcast licenses.[1] Opinions authored by Justice O'Connor since the original paper was written reveal that she is decidedly aligned with Justices Scalia and Kennedy and Chief Justice Rehnquist in applying strict scrutiny standards to all racial preference programs.

Even though the court has become more polarized on the issue, as evidenced in the recent *Croson* decision, they have persisted in the proliferation of separate opinions. Even in *Croson* where for the first time a solid 6–3 judgment invalidated the City of Richmond's AAP, six of the nine justices wrote separately.

Each of the nine cases handed down since the main article was written is discussed herein except that the chronological order is dispensed with in favor of directing emphasis first to the three most significant of these decisions in *Wygant, Croson,* and the most recent *FCC* cases.

The *Wygant* Case [1582-N21]

Nearly two years after its decision in the *Stotts* case, the High Court once again addressed the issue of apportioning layoffs as a means of preserving the effects of an affirmative action hiring policy. In *Wygant v. Jackson Board of Education,*[2] as in *Stotts,* more tenured white teachers were laid off in preference to retaining probationary minority teachers in order to maintain affirmative action gains in minority hirings. This time the layoff provision was tested as against the Equal Protection Clause rather than the Civil Rights Act, with the same conclusion that the provision unconstitutionally discriminated against white workers.

In *Wygant,* the collective bargaining agreement with the teachers' union included a layoff provision retaining teachers with the most seniority except when the percentage of minority teachers laid off exceeded the percentage of minority personnel employed at the time of the layoff. Later, when it was necessary for the school board to institute layoffs, it became apparent that probationary minority teachers would be retained at the expense of tenured nonminority teachers. Rather than adhere to the collective bargaining provision the school board retained the tenured teachers and laid off the probationary minority teachers.

Initially, the union and two minority teachers filed suit in state court[3] against the school board claiming violations of the Equal Protection Clause and the Civil Rights Act, and for breach of the collective bargaining agreement. The state court ruled that the school board had breached its contract and that the layoff preference based on race did not violate the Civil Rights Act. The state court determined that there had been no history of overt past discrimination by the parties to the collective bargaining agreement, but upheld the preferential layoff provision as a permissible attempt to remedy the effects of past societal discrimination.

Thereafter the school board adhered to the layoff provision, retaining minority teachers in preference to more tenured nonminority teachers. The displaced nonminority teachers then instituted a federal action alleging violations of the Equal Protection Clause and the Civil Rights Act.

On summary judgment the federal district court ruled that as to the equal protection claim, the racial preference need not be based on findings of past discrimination. Societal discrimination and the desire to provide "role models" for minority students were sufficient to justify the preferential layoff provision against constitutional attack. The Court of Appeals agreed with this rationale.

The Supreme Court reversed, 5–4, with Justice Powell writing what was again a plurality opinion, joined by Chief Justice Burger and Justice Rehnquist. Justice O'Connor concurred in part and concurred in the judgment as did Justice White. The remaining four Justices dissented.

Justice Powell set forth the constitutional analysis that was later to serve as the basis for Justice O'Connor's deciding opinion in the *Croson* case. This rationale requires that the classification based on race be subjected to a strict scrutiny test involving an examination of whether the racial classification is justified by a compelling state interest, and that the means chosen to effectuate that purpose is "narrowly tailored."

Applying these principles, Justice Powell concluded that providing minority role models was not a compelling state interest and that reliance on societal discrimination fails to provide the needed factual predicate of evidence of prior acts of discrimination. Nor was the means chosen to accomplish the school board's race-conscious purpose specifically and narrowly tailored to accomplish that purpose.

Interestingly, Justice O'Connor writing separately analyzed the various opinions of the other justices in other AAP cases in what appears to be an attempt to rationalize the divergent views expressed up to that time suggesting the possibility of a consensus of views:

> Although Justice Powell's formulation may be viewed as more stringent than that suggested by Justices Brennan, White, Marshall, and Blackmun, the disparities between the two tests do not preclude a fair measure of consensus. . . . The Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program. . . .[4]

Contrary to a position she later adopted in *Croson*, Justice O'Connor expressed the view that contemporaneous finding of actual discrimination need not be adopted as long as the public entity has a firm basis for believing that remedial action is required:

> In sum, I do not think that the layoff provision was constitutionally infirm simply because the School Board, the Commission or a court had not made particularized findings of discrimination at the time the provision was agreed upon. . . .[5]

Justice White also concurred in the judgment but was unable to join in the plurality opinion. Apparently he viewed the issue with regard to a layoff situation in a more simplistic fashion:

> . . . Whatever the legitimacy of hiring goals or quotas may be, the discharge of white teachers to make room for blacks, none of whom has been shown to be a victim of any racial discrimination is quite a different matter. I cannot believe that in order to integrate a work force, it would be permissible to discharge whites and hire blacks until the latter comprised a suitable percentage of the work force. . . .[6]

Three of the dissenters framed the central constitutional issue quite differently: Whether the Constitution prohibits a union and a school board from developing a collective bargaining agreement that apportions layoffs between two racial groups as a means of preserving an AAP that has not been challenged.

Justice Stevens, dissenting separately, did not believe it necessary to find that the board had been guilty of past discrimination, particularly since he viewed this as a voluntary AAP adopted by the union membership to preserve the existing ratio of black and white teachers, and that it served a valid public purpose.

As in the earlier *Stotts* decision, the impact of layoffs to preserve affirmative action was viewed quite differently than in hiring situations. The plurality opinion expressed this as follows:

> Significantly, none of the cases discussed above involved layoffs. . . . We have previously expressed concern over the burden that a preferential layoffs scheme imposes on innocent parties. [Citations omitted.] In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job.[7] (Emphasis in original.)

The major significance of *Wygant* is in expressing the strict scrutiny standard of review in testing an AAP in terms of a factual predicate of prior acts of discrimination and a narrowly tailored remedy, as well as a rejection of the concept of societal discrimination as justification for the lack of a factual predicate. This opinion represented only a plurality decision but these concepts ultimately flourished as a majority opinion two and one-half years later in the *Croson* case.

The *Croson* Case [1582-N21]

Two months after its *Wygant* decision, the Supreme Court granted certiorari in *J.A. Croson Co. v. City of Richmond* and at the same time vacated the decision of the Fourth Circuit upholding the City of Richmond's bidding preference program and remanded the case to the lower appellate court with directions to reconsider its decision in light of the recent *Wygant* decision.[8]

The City of Richmond, Virginia, advertised for competitive bids to refurbish the plumbing fixtures in its city jail. The city by ordinance had established a minority preference program that required nonminority-owned prime contractors to subcontract at least 30 percent of the total contract to minority business enterprises (MBEs). J. A. Croson submitted the only bid and provided no minority participation, although several minority suppliers had been contacted without success. Croson requested a waiver of the MBE requirement, which the city denied.

A major portion of the contract involved the purchase of plumbing fixtures, so Croson next arranged for a minority supplier of the fixtures, but at a price higher than the original supplier relied upon in the bid. A higher contract price to accommodate the MBE supplier was also rejected by the city.

In the litigation that followed, the federal district court upheld the city's minority plan in all respects. The Court of Appeals initially affirmed,[9] but on remand following the Supreme Court order directing reconsideration in light of its intervening *Wygant* decision, the Circuit Court in a split decision reversed the judgment on the basis that the ordinance violated the Equal Protection Clause of the United States Constitution.[10] The Supreme Court again granted certiorari, and this time affirmed the Circuit Court's ruling.[11]

In many ways the *Croson* case is a watershed decision. Leading up to this decision the Court was split to such a degree that it was often difficult

for a majority to agree on one opinion involving an AAP. For the first time, a majority agreed that racially based preferential programs will be subject to the constitutional strict scrutiny test. Until this case, Justice White had favored an intermediate scrutiny test. Also Justice Kennedy, in his first opportunity to review an AAP, favored application of the strict scrutiny test.

In addition, this case reinforced the Court's earlier plurality ruling in *Wygant* that reliance on "societal discrimination" will not suffice. The effect of these two principles of strict scrutiny and inability to rely on societal discrimination means that classifications based on race will be presumed invalid. The three dissenters contended that the more traditional "substantial relationship" standard should apply as it would in ordinary equal protection cases.

Technically, Justice O'Connor's opinion, which was divided into six distinct parts, represented the majority views of the Court on only three of those parts: Part I, Part III-B, and Part IV. As a practical matter, however, Justice Scalia's vote can be added to those favoring her opinion. In a concurring opinion he states:

> I agree with much of the Court's opinion, and, in particular, with Justice O'Connor's conclusion that strict scrutiny must be applied to all governmental classifications by race, whether or not its asserted purpose is "remedial" or "benign." [Citation omitted.] I do not agree, however, with Justice O'Connor's dictum suggesting that, despite the Fourteenth Amendment, state and local governments may in some circumstances discriminate on the basis of race in order (in a broad sense) "to ameliorate the effects of past discrimination." [Citation omitted.][12]

Viewed in this fashion, most of Justice O'Connor's opinion represents a 6–3 judgment of the Court, and only Part II failed to achieve majority support. This part dealt with the applicability of the *Fullilove* decision, previously discussed in the main paper, as to whether it provides authority for local legislative bodies to adopt an AAP without independent findings of past discrimination.

Part I of the majority opinion[13] sets forth the facts in light of the Court's earlier *Wygant* ruling against reliance on "societal discrimination" and concludes as follows:

> There was no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors. . . . ([The public witnesses] indicated that the minority contractors were just not available. There wasn't a one that gave any indication that a minority contractor would not have an opportunity, if he were available").[14]

Extensive quotation from the District Court of Appeals majority opinion following reconsideration is also relied on to the effect that the city council had not established a record or findings of prior discrimination and that the 30 percent set-aside was chosen arbitrarily and not narrowly tailored.

The city in its arguments relied heavily on *Fullilove v. Klutznick*[15] previously discussed in the paper being supplemented. In that case Chief Justice Burger writing a plurality opinion concluded that Congress in establishing a 10 percent MBE federal set-aside program was not required to establish a record or adopt findings of past discrimination. The City of Richmond contended that *Fullilove* was controlling and provided the City with "sweeping legislative power to define and attack the effects of prior discrimination in its local construction industry."[16]

In distinguishing the *Fullilove* opinion, Justice O'Connor viewed sections 1 and 5 of the Fourteenth Amendment as limitations on the powers of the states and an enlargement of the power of Congress to identify and redress the effects of societal discrimination:

> . . . We simply note what should be apparent to all—§ 1 of the Fourteenth Amendment stemmed from a distrust of state legislative enactments based on race; § 5 is, as the dissent notes, " 'a *positive* grant of legislative power' " to Congress. [Citations omitted.] Thus, our treatment of an exercise of congressional power in *Fullilove* cannot be dispositive here. . . .[17] (Emphasis in original.)

This part of the opinion was supported only by Chief Justice Rehnquist and Justice White and does not represent the views of the majority of the Court on this point. Justice Scalia, however, in concurring in the judgment adopted Justice O'Connor's rationale for recognizing broader congressional authority on this subject:

> . . . As Justice O'Connor acknowledges . . . it is one thing to permit racially based conduct by the Federal Government—whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment, see U. S. Const. Amdt. 14, § 5—and quite another to permit it by the precise entities against whose conduct in matters of race that Amendment was specifically directed, see Amdt. 14, § 1. . . . I do not believe our decision in that case [*Fullilove*] controls the one before us here.[18]

In his first AAP case since joining the Court, Justice Kennedy joined in all of Justice O'Connor's opinion except for Part II dealing with *Fullilove*. He concluded that the City of Richmond's action violated the Equal Protection Clause and that it would equally constitute a violation if enacted by Congress:

> . . . With the acknowledgment that the summary in Part II is both precise and fair, I must decline to join it. The process by which a law that is an equal protection violation when enacted by a State becomes transformed to an equal protection guarantee when enacted by Congress poses a difficult proposition for me; but as it is not before us, any reconsideration of that issue must await some further case. . . .[19]

Thus, Justice Kennedy preferred to reserve judgment as to the future viability of the *Fullilove* plurality opinion and saw no necessity to distinguish the holding. In this light, Justice Kennedy's refusal to join in Part II should not be viewed as detracting from the overall significance of the majority's holding in *Croson*.

By far the most significant part of the *Croson* majority opinion is Part III-A. For the first time in a majority holding, the Supreme Court

ruled that all classifications based on race, whether benefitting or burdening minorities or nonminorities, will be subject to strict scrutiny. This ruling means as a practical matter that all such classifications by states and local governments will be presumed invalid:

> . . . We thus reaffirm the view express[ed] by the plurality in *Wygant* that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification. . . .[20]

Justice Marshall in his dissent would apply strict scrutiny in cases of classifications that discriminate against minorities but not racial classifications designed to remedy the effects of past discrimination:

> Racial classifications "drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism" warrant the strictest judicial scrutiny because of the very irrelevance of these rationales. [Citation omitted.] By contrast, racial classifications drawn for the purpose of remedying the effects of discrimination that itself was race-based have a highly pertinent basis . . .[21]

Justice O'Connor questioned the logic behind Justice Marshall's position:

> . . . How the dissent arrives at the legal conclusion that a racial classification is "designed to further remedial goals," without first engaging in an examination of the factual basis for its enactment and the nexus between its scope and that factual basis we are not told. However, once the "remedial" conclusion is reached, the dissent's standard is singularly deferential, and bears little resemblance to the close examination of legislative purpose we have engaged in when reviewing classifications based either on race or gender. [Citation omitted.] . . .[22]

Justice Stevens joined with the majority in invalidating the Richmond plan but refused to join in this part of the majority opinion:

> [I]nstead of engaging in a debate over the proper standard of review to apply in affirmative-action litigation [fn. No. 5], I believe it is more constructive to try to identify the characteristics of the advantaged and disadvantaged classes that may justify their disparate treatment. . . .[23]

In footnote No. 5, Justice Stevens quotes from *Craig v. Boren*,[24] which reveals the legal logic behind his position:

> "There is only one Equal Protection Clause. . . . It does not direct the courts to apply one standard of review in some cases and a different standard in other cases."

Justice Scalia, on the other hand, adopted the view that " 'discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.' "[25] In addition he quotes from *Plessy v. Ferguson*[26] that the "principle embodied in the Fourteenth Amendment [is] that '[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens.' "[27]

Thus, Justice Scalia adopts a standard of *per se* invalidity of all remedial programs based on racial classifications adopted by the states with very few exceptions:

> In my view there is only one circumstance in which the States may act *by race* to "undo the effects of past discrimination": where that is necessary to eliminate their own maintenance of a system of unlawful racial classification. If, for example, a state agency has a discriminatory pay scale compensating black employees in all positions at 20% less than their nonblack counterparts, it may assuredly promulgate an order raising the salaries of "all black employees" to eliminate the differential. Cf. *Bazemore v. Friday*, 478 U.S. 385, 395–396 (1986). This distinction explains our school desegregation cases . . .[28] (Emphasis in original.)

Justice Kennedy was inclined to join with Justice Scalia's view of *per se* invalidity but opted for the case-by-case analysis of each racial-based plan with the view that it will provide the same result:

> The moral imperative of racial neutrality is the driving force of the Equal Protection Clause. Justice Scalia's opinion underscores that proposition, quite properly in my view. . . . His opinion would make it crystal clear to the political branches, at least those of the States, that legislation must be based on criteria other than race.
>
> Nevertheless, given that a rule of automatic invalidity for racial preferences in almost every case would be a significant break with our precedents that require a case-by-case test, I am not convinced we need adopt it at this point. On the assumption that it will vindicate the principle of race neutrality found in the Equal Protection Clause, I accept the less absolute rule contained in Justice O'Connor's opinion, a rule based on the proposition that any racial preference must face the most rigorous scrutiny by the courts. . . .[29]

Part III-B of the majority opinion is likewise a critical part of the decision for determining whether future AAPs will survive constitutional muster. Here the court sets forth the requirements that the "factual predicate" underlying the AAP be supported by adequate findings of past discrimination without reliance on generalized assertions of past discrimination:

> We think it clear that the factual predicate offered in support of the Richmond Plan suffers from the same two defects identified as fatal in *Wygant*. . . . Like the "role model" theory employed in *Wygant*, 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. . . .[30]

The Richmond City Council attempted to establish a factual predicate by relying on the exclusion of blacks from skilled construction trade unions and training programs, and on statements by proponents of the plan that there had been past discrimination in the industry and that minority business had received less than one percent of the prime con-

tracts from the city while minorities represented 50 percent of the city's population. But as viewed by the majority this was wanting:

> None of these "findings," singly or together, provide the city of Richmond with a "strong basis in evidence for its conclusion that remedial action was necessary." *Wygant*, 276 U.S., at 277 (plurality opinion). There is nothing approaching a prima facie case of a constitutional or statutory violation by *anyone* in the Richmond construction industry. [Citations omitted.][31] (Emphasis in original.)

This part of the majority opinion is must reading for anyone attempting to qualify or challenge an affirmative action plan based on bidding or subcontracting preferences. One factor that cannot be ignored is that the city was rigidly applying its preferential program as a strict quota rather than attempting to apply its provisions as a goal. For example, Croson was a sole bidder who demonstrated what could be described as good faith efforts to secure a minority supplier both before and after the bidding. Thus, the city was left with having to defend its program as a racial quota:

> While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia. Like the claim that discrimination in primary and secondary schooling justifies a rigid racial preference in medical school admission, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.[32]

The Court concluded that "none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry" and ruled that as a consequence "the city has failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race."[33]

In a parting shot, Justice O'Connor criticized the random preferential inclusion of Spanish-speaking, Oriental, Indian, Eskimo, and Aleut as well as blacks in the Richmond plan with "*absolutely no evidence* of past discrimination" against those minorities.[34] (Emphasis in original.)

In the next section, Part IV, the Court observed that without the specificity needed to identify the past discrimination it was almost impossible to assess whether the Richmond Plan was narrowly tailored. But in any event the 30 percent quota was not viewed by the majority as being narrowly tailored to any legitimate goal. On this score Justice O'Connor noted the failure of the city to consider any alternatives to the race-based quota system and its rigid adherence to the 30 percent quota and reticence in granting any waiver.

> Given the existence of an individualized procedure, the city's only interest in maintaining a quota system rather than investigating the need for remedial action in particular cases would seem to be simple administrative convenience. But the interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification. . . . Under Richmond's scheme, a successful black, Hispanic, or Oriental entrepreneur from anywhere in the country enjoys an absolute preference over other citizens based solely on their race. We think it obvious that such a program is not narrowly tailored to remedy the effects of prior discrimination.[35]

Not to be underestimated is the significance of Part V of the majority opinion's concern with the failure of the city to explore possible "race-neutral devices" to increase contracting opportunities for small contractors of all races:

> Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination or neglect. Many of the formal barriers to new entrants may be the product of bureaucratic inertia more than actual necessity, and may have a disproportionate effect on the opportunities open to new minority firms. . . .[36]

The majority emphasized that "[n]othing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction."[36] At the same time the Court noted the importance of adequate findings necessary for establishing the factual predicate:

> Proper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects. Such findings also serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself. Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics. . . .[37]

The full impact of the *Croson* decision needs to be carefully sorted out. Minority preference programs exist at the local, state, and federal levels. More than 190 local governments and 36 states had public contract minority preference programs at the time of the decision.[38] Like the City of Richmond, most relied on the *Fullilove* decision as confirming full legislative authority supported at most with generalized statements and findings of past discrimination within the construction industry based on societal discrimination.

As a consequence of *Croson*, some local governments have terminated or suspended their preferential contracting programs, and some have attempted to retrofit existing plans. Are the existing programs invalid? Is so, can they be retrofitted or does *Croson* mean that all race-based preference programs in the awarding of public contracts will be unconstitutional?

A few observations seem evident; others will have to await further Supreme Court rulings. Several consequences seem apparent: (1) fixed quotas will be *per se* invalid; (2) preferential programs will be tested on a case-by-case basis; and (3) racial preference programs will be subject to strict scrutiny suggesting that they will be the exception rather than the rule.

A group of law school deans, professors, and constitutional scholars from the nation's leading law schools published what is titled "Constitutional Scholars' Joint Statement on Affirmative Action After *City of Richmond v. Croson.*" Remarkably the "statement" does not once refer to the strict scrutiny requirements or that it was for the first time adopted by a majority of the Court. Instead the Scholars insist that the decision does not require that affirmative action programs be dismantled:

> In light of the Supreme Court's January 1989 decision in *City of Richmond v. Croson,* some have recently argued that race-conscious remedies by local and state governments should be regarded as conflicting with the Constitution. As long-time students of constitutional law, we regard this assessment as wrong. The Supreme Court has insisted that affirmative action programs be carefully designed—not dismantled. A call for fairness and flexibility in affirmative action programs should never be equated with a call for retrenchment and retreat. It would defy not only the Supreme Court's decisions but the fundamental purposes of the Equal Protection Clause to conclude that the Constitution forbids all such inclusive remedial measures, or requires that such measures be treated in exactly the same way as the invidious discrimination of the nation's past.[39]

The Scholars concluded their statement with the following appeal to the courts:

> While cities should be responsible in modifying their programs to fit the Court's ruling in *Croson,* courts should follow the practical and sensible rule, adopted in analogous constitutional contexts, that would allow local governments the time to establish the relevant factual record if their programs are challenged while those local governments are engaged in a good faith effort to reevaluate their programs in light of *Croson.*[40]

Harvard Professor Charles Fried, the Solicitor General of the United States during the period many of these affirmative action cases were reviewed by the Supreme Court, authored a Response to the Scholars' Statement:

> *Croson* is not a disaster to be deplored and explained away. It is a firm and noble affirmation that in this area, too, the end does not justify the means; that every time the government compels the use of race in the distribution of burdens and benefits a deep value of our constitutional policy is affronted. It is just this principle that the scholars deny by their invocation of the distinction between "inclusive" and "exclusionary" measures, and by their celebration of "forward-looking" justifications for racial preferences. . . .
>
> *Croson* is also a welcome clarification and coming together by this Court under its new leadership of some themes that have been troubling the Court for more than a decade. The Court makes clear that a governmental unit may act to remedy not only its own past discrimination but that of identified others within its jurisdiction. But of greatest importance is the unequivocal affirmation that the equal protection clause protects all equally, and that all invocations of governmental power in racial terms, even those designated as benign, must overcome the highest burdens of scrutiny. . . .[41]

The Scholars added their Reply to Professor Fried concluding that he had overstated the implications of *Croson* in suggesting that the case signals a substantial change in the law of affirmative action.[42]

An overall reading of the *Croson* opinions indicates that local preferential programs based on race must be supported by a strong factual predicate, with a presumption of invalidity. No longer can reliance be placed on societal discrimination. Race neutral programs must first be explored and perhaps tried. Racial preferences will be approved only as a demonstrated last resort. Fixed quotas will be per se invalid. Each program will however be tested on a case-by-case basis.

Questions left unanswered by *Croson* include whether *Fullilove* is still good law for federal minority programs. If it is good law, does federal participation in local disadvantaged business enterprise (DBE) and minority preference programs suffice or must the states and locals establish independent factual predicates? Does strict scrutiny apply to gender-based preferences and can existing race-based programs be retrofitted with findings to insure their viability?

The *FCC* Cases [1582-N21]

The Supreme Court left two questions unanswered in the *Croson* decision: Whether its ruling would apply to affirmative action plans adopted by Congress and whether state and local entities may in turn rely on a federal-funding program to justify minority preferences as suggested by the plurality decision in *Fullilove. Croson* distinguished but did not overrule *Fullilove* in this regard.

Shortly after the *Croson* decision, the High Court vacated the judgment of an Eleventh Circuit ruling in *H. K. Porter, Inc. v. Metropolitan Dade County*[43] that relied on federal funding under the Surface Transportation Assistance Act of 1978 to justify an MBE requirement that would otherwise contravene *Croson.* In vacating the judgment, the Court remanded the case for reconsideration in light of *Croson.*

This remand suggested to many that a majority of the Supreme Court was preparing to overrule the plurality opinion in *Fullilove* as a repetition of the procedural history of the *Croson* case. The Eleventh Circuit, however, sent the case back to the district court, and the next cases to come before the High Court challenging a federal AAP were two Federal Communications Commission (FCC) cases. In a consolidated review, a 5–4 majority surprisingly upheld two FCC minority preference licensing programs and in addition refused to apply the strict scrutiny standards of *Croson.* Both cases came from the District of Columbia Circuit with opposite holdings.

In *Winter Park Communications, Inc. v. FCC* (consolidated with *Metro Broadcasting, Inc. v. FCC),*[44] Metro and Rainbow Broadcasting filed competing applications for a new television station in the Orlando, Florida, area. In conducting comparative licensing proceedings, FCC policies provide for an "enhancement" for minority ownership. The Review Board found that Rainbow's minority ownership credit outweighed Metro's local residence and civic participation advantage and awarded

the license to Rainbow. In a challenge by Metro, the Court of Appeals upheld the minority preference favoring Rainbow against a constitutional attack.

The companion case, *Shurberg Broadcasting of Hartford, Inc. v. FCC*,[45] involved a race preference in the "minority distress sale" policy of the FCC. This policy allows licensees whose renewal applications have been designated for a qualification hearing to transfer their licenses at a discounted "distress-sale" price to a minority-controlled firm rather than face the risk of losing the license at the renewal hearing. A divided Court of Appeals held the distress sale policy unconstitutional.

On review of the consolidated cases the Supreme Court in an unexpected 5–4 decision rejected the strict scrutiny standard and upheld both minority preference policies against constitutional attack.[46] Justices White and Stevens joined with the three most liberal members of the court to form the majority. Justice Brennan, who left the court shortly thereafter, wrote for the majority holding that benign race-conscious policies mandated by Congress are constitutionally permissible where they serve the legitimate governmental objectives within the power of Congress to promote diversity of programming by increasing minority ownership of broadcasting stations.

Justices O'Connor and Kennedy wrote separate dissenting opinions that vehemently asserted that strict scrutiny was the appropriate standard for holding true to the constitutional command of racial equality.

The majority relied upon the plurality opinion of *Fullilove* in giving "appropriate deference" to Congress, as a co-equal branch and in refusing to apply the strict scrutiny test:

> We hold that benign race-conscious measures mandated by Congress—even if those measures are not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.[47] (Footnote omitted.)

Justice Brennan also noted that *Croson* "does not prescribe the level of scrutiny to be applied to a benign racial classification employed by Congress."[48]

> We hold that the FCC minority ownership policies pass muster under the test we announce today. First, we find that they serve the important governmental objective of broadcast diversity. Second, we conclude that they are substantially related to the achievement of that objective.
>
> . . . [M]uch 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. . . .[49]

Justice Stevens joined with the majority opinion and also wrote separately. He had dissented in *Fullilove*, and had concurred in *Croson*. His short, two-paragraph concurring opinion expressed his view of the exceptional nature of this case:

> I remain convinced, of course, that racial or ethnic characteristics provide a relevant basis for disparate treatment only in extremely rare situations and that it is therefore "especially important that the reasons for any such classification be clearly identified and unquestionably legitimate." [Quoting from his dissent in *Fullilove*.] . . . In addition [The Majority] Court demonstrates that this case falls within the extremely narrow category of governmental decisions for which racial or ethnic heritage may provide a rational basis for differential treatment. . . .[50] (Footnote omitted.)

Justice Kennedy in his dissent complained of the 50-page length of the majority opinion, but this was nearly matched by Justice O'Connor's dissent. In *Croson* she had studiously distinguished the *Fullilove* plurality opinion. But now she was prepared to apply her *Croson* principles to the federal government and Congress as well as to the states and local governments:

> The Constitution's guarantee of equal protection binds the Federal Government as it does the States, and no lower level of scrutiny applies to the Federal Government's use of race classifications. . . .
>
> Nor does the congressional role in prolonging the FCC's policies justify any lower level of scrutiny.[51]

She also observed that while a majority in *Fullilove* did not apply strict scrutiny, six members of the Court did reject intermediate level of scrutiny in favor of some more stringent form of review. She also complained that "benign racial classification is a contradiction in terms."

> The Court's emphasis on "benign racial classifications" suggests confidence in its ability to distinguish good from harmful governmental uses of racial criteria. History should teach greater humility. Untethered to narrowly confined remedial notions, "benign" carries with it no independent meaning, but reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable. The Court provides no basis for determining when a racial classification fails to be "benevolent."[52]

Justice Kennedy's dissent, joined by Justice Scalia, noted the parallel with *Plessy v. Ferguson*[53] where 100 years earlier the Court had upheld the "equal but separate" accommodations for rail passengers on the basis that it was reasonable because it served the governmental interest of increasing the riding pleasures of railroad passengers:

> The interest the Court accepts to uphold the Commission's race-conscious measures is "broadcast diversity." Furthering that interest, we are told, is worth the cost of discriminating among citizens on the basis of race because it will increase the listening pleasure of media audiences. In upholding this preference, the majority exhumes *Plessy's* deferential approach to racial classifications. . . .[54]
>
> Once the Government takes the step, which itself should be forbidden, of enacting into law the stereotypical assumption that the race of owners is linked to broadcast content, it follows a path that becomes ever more tortuous. It must decide which races to favor. . . .[55]

Justice Kennedy viewed the strict scrutiny test as essential to maintaining racial equality: "Strict scrutiny is the surest test the Court has yet devised for holding true to the constitutional command of racial equality."[56]

Justice White had joined with Chief Justice Burger in the *Fullilove* plurality opinion and he also had joined with Justice O'Connor in every part of her *Croson* opinion. He did not write separately regarding any of these three decisions, but we must assume that he would apply *Croson* only to state and local AAPs.[57] Other distinctions do exist to possibly account for his position on these two cases. For example, *Croson* involved competitive bidding of construction work whereas the *FCC cases* concerned subjective, comparative negotiations in conferring exclusive broadcasting licenses to operate in a more social setting.

The viability of the *FCC cases* must also be questioned in light of the retirement of Justice Brennan and the extremely narrow reasoning offered by Justice Stevens in supporting Brennan's opinion. He had dissented in *Fullilove* and cannot be counted on to support any particular philosophical position in this area.

Professor Devins in a comment highly critical of the *FCC* decision, attributed this to "Brennan's ability to build coalitions that sacrifice doctrinal purity to achieve the desired outcome."[58]

Assuming *Fullilove* survives another Supreme Court test one still cannot rule out the possibility that a majority may require any state or local entity seeking the umbrella of the federal AAP to provide its own factual predicate as with any other local program. For example, the Surface Transportation Assistance Act of 1982 (STAA)[59] and the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA)[60] require the transportation or highway agency of each state to establish its DBE goals. Congress has provided that not less than 10 percent of all funding shall be to DBEs (including women) with provisions for waivers. The Supreme Court could require that each state provide the factual predicate justifying its statewide and project goals within the standards of *Croson*. Further answers must await later decisions.

Supreme Court Cases Between *Wygant* and *Croson* [1582-N21]

The *Wygant* decision was filed by the Supreme Court on May 19, 1986, and *Croson* on January 23, 1989. Five other AAP cases were ruled on in the interim between these two decisions. As a consequence these intervening cases have taken on positions of lesser importance. These interim cases plus *Martin v. Wilkes* filed shortly after *Croson* are treated here briefly in the chronological order of the Supreme Court rulings.

Basemore v. Friday[61]

This case preceded Justice Scalia's appointment to the Court, but it does represent the one circumstance where he recognized that the states may establish a race-conscious remedy to undo the effects of their own past discrimination "where that is necessary to eliminate their own maintenance of a system of unlawful racial classification."[62]

In the *Friday* case the state of North Carolina Agricultural Extension Service was responsible for the state's "4-H" program. Historically the Extension Service maintained two separate racially segregated branches and paid black employees less than white employees. To comply with federal law the two branches were merged but some salary disparities continued. A unanimous Supreme Court ruled this was a violation of Title VII, and that it was an error to have rejected the petitioners' regression analysis designed to demonstrate that blacks were paid less than similarly situated whites.

Up to this point the Court was unanimous in agreeing with Justice Brennan's opinion. Beyond this however, Justice White, writing for a majority including Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor, ruled that the Extension Service was not operated in a discriminatory manner where the segregated 4-H club policy was discontinued following the Civil Rights Act of 1964 and all existing and newly formed clubs were opened to eligible persons regardless of race. The majority found no evidence of discrimination and concluded from the District Court's finding that any racial imbalance was "the result of wholly voluntary and unfettered choice of private individuals."[63] The opinion distinguished the necessity for affirmative action programs through busing: "While school children must go to school, there is no compulsion to join 4-H [Clubs] . . ."[64]

Justices Brennan, Marshall, Blackmun, and Stevens dissented to this second part of the judgment on the basis that "[i]t is absurd to contend that the requirement that States take 'affirmative action' is satisfied when the Extension Service simply declares a neutral admissions policy and refrains from illegal segregative activities. . . ."[65]

Sheet Metal Workers v. EEOC[66]

In a particularly egregious factual setting, the High Court again split on whether the federal district court could establish a 29 percent nonwhite "goal" or "quota" for apprentices. The trial court had concluded that the union was engaged in a pattern and practice of discriminating against non-whites in recruiting, selection, training, and admission into the union. The court established the 29 percent minority membership requirement based on the percentage of non-whites in the relevant labor pool in New York City. The union was held in contempt several times for its failure to comply with court orders. The union contended that the membership goal exceeded the scope of remedies available under Title VII because the race-conscious preferences were extended to benefit individuals who were not identified victims of the unlawful discrimination.

The majority ruled that the correctness of the 29 percent figure was not before them because that had been the subject of a prior appeal that never reached the Supreme Court. The contempt orders were found to be civil in nature designed to coerce compliance with the court's orders, rather than to punish for contemptuous conduct.

The union, joined by the Solicitor General, argued that the membership goal and other court orders that required preferential treatment to non-

whites were expressly prohibited by Section 706(g) of Title VII[67] on the basis that this section authorized judicially ordered preferential relief only to the actual victims of unlawful discrimination. In a plurality portion of Justice Brennan's opinion this argument was rejected.

Section 706(g) expressly provides that in case of intentional unlawful employment practices "the court may enjoin . . . such . . . practice, and order such affirmative action as may be appropriate." The plurality also concluded that statements made in the congressional debates to the effect that Title VII would not require employers or unions to adopt quotas or racial preferences were not intended to limit relief under Section 706(g) but to provide assurance that quotas or racial balancing would not be required to avoid being charged with unlawful discrimination:

> [W]hile Congress strongly opposed the use of quotas or preferences merely to maintain racial balance, it gave no intimation as to whether such measures would be acceptable as *remedies* for Title VII violations.[68] (Footnote omitted, emphasis in original.)

At the same time Justice Brennan emphasized that judicially created AAP's are not always the proper remedy:

> In particular, the court should exercise its discretion with an eye towards Congress' concern that race-conscious affirmative measures not be invoked simply to create a racially balanced work force. In the majority of Title VII cases, the court will not have to impose affirmative action as a remedy for past discrimination, but need only order the employer or union to cease engaging in discriminatory practices and award make-whole relief to the individuals victimized by those practices.[69]

The plurality opinion also denied the union's contention that the membership goal violated the equal protection component of the Due Process Clause of the Fifth Amendment but acknowledged that the proper test had not been agreed on:

> We have consistently recognized that government bodies constitutionally may adopt racial classifications as a remedy for past discrimination. [Citations omitted.] We have not agreed, however, on the proper test to be applied in analyzing the constitutionality of race-conscious remedial measures. [Citations omitted.] We need not resolve this dispute here, since we conclude that the relief ordered in this case passes even the most rigorous test—it is narrowly tailored to further the Government's compelling interest in remedying past discrimination.[70]

Justice Powell concurred in part and concurred in the judgment. He expressed the view that the particularly egregious conduct of the union made injunctive relief insufficient, justifying imposition of the numerical goal within the purview of Section 706(g). Regarding the constitutional challenge, he reiterated his position expressed in *Wygant* that any preference based on race "must necessarily receive the most searching examination."[71] Applying this strict scrutiny standard he concluded that the union's outrageous violations of Title VII "establishes, without doubt, a compelling governmental interest sufficient to justify the imposition of a racially classified remedy."[72] Justice Powell then focused intensely on the issue of whether the district court's remedy was narrowly tailored, and the factors to be considered.

Justice Powell concluded that the judicially tailored AAP did pass constitutional muster, but cautioned that this was viewed as an exceptional situation:

> My view that the imposition of flexible goals as a remedy for past discrimination may be permissible under the Constitution is not an endorsement of their indiscriminate use. Nor do I imply that the adoption of such a goal will always pass constitutional muster.[73] (Footnote omitted.)

Justice O'Connor concurred in part and dissented in part. She would have reversed the judgment on statutory grounds and would not have reached the constitutional issue, although she viewed the "goal" as a rigid racial quota. She interpreted Section 703(j) as limiting the remedial authority of the district court where it states:

> *Nothing contained in this title shall be interpreted to require* any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin. . . .[74] (Emphasis in original.)

Justice White in his dissent noted the general policy of Title VII to limit judicial relief for racial discrimination in employment to actual victims of the discrimination. In addition he concluded that the net effect of the AAP was a strict racial quota:

> [T]he cumulative effect of the revised affirmative-action plan and the contempt judgments against the union established not just a minority membership goal but also a strict racial quota that the union was required to attain. We have not heretofore approved this kind of racially discriminatory hiring practice, and I would not do so now. . . .[75]

Justice Rehnquist, joined by Chief Justice Burger, dissented based on Section 706(g):

> I express my belief that § 706(g) forbids a court to order racial preferences that effectively displace nonminorities except to minority individuals who have been the actual victims of a particular employer's racial discrimination. . . .[76]

The unique features of this case are first, the flagrant conduct of the union which repeatedly ignored and defied orders of the court regarding its membership practices, and, second, the fact that the district court's AAP did not disadvantage or displace any existing union member. As Justice Powell noted: "In contrast to the layoff provision in *Wygant*, the goal at issue here is akin to a hiring goal" where the burden is diffused to a considerable extent among society generally.[77]

Firefighters v. Cleveland[78]

The *City of Cleveland* firefighters' case, argued and decided by the Supreme Court on the same day as the *Sheet Metal Workers'* case, also involved interpretation and application of Section 706(g). The question here, however, was whether the prohibitions of that section regarding orders of the court establishing hiring or promotion goals applied to a consent decree.

The majority, with Justices White and Rehnquist and Chief Justice Burger dissenting, ruled that an AAP set forth in a voluntary settlement embodied in a consent decree was not within the orders referred to in Section 706(g) even though the firefighters' union representing the affected non-minority firefighters was not a party to the settlement or the consent decree:

> [W]e hold that whether or not § 706(g) precludes a court from imposing certain forms of race-conscious relief after trial, that provision does not apply to relief awarded in a consent decree. . . .[79] (Footnote omitted.)

Constitutional questions regarding the AAP were not before the court, thus Justice Brennan writing for a clear majority was free to rely on the *Weber* case reviewed previously in the main text, which involved a contractual AAP between private parties and thus not subject to Fourteenth Amendment review.

In the *Cleveland* case an organization known as the Vanguards, representing black and Hispanic firefighters, had filed a complaint against the city charging discrimination based on race in the hiring, assignment, and promotion of firefighters. The firefighters' union representing most of the non-minority firefighters intervened seeking an injunction requiring all promotions based on examination results.

The city and the Vanguards proposed a consent decree to implement a promotional AAP later modified and adopted by the federal district court as a consent decree over the objection of the intervening union. The decree required one-half of the 66 initial promotions to Lieutenant go to minority firefighters with goals specified for other ranks as well.

The majority noted that Section 706(g) does not restrict the ability of employers or unions to enter into voluntary AAPs which include race-conscious remedial action. Likewise, the majority treated the consent decree as a voluntary settlement of litigation rather than as a court order subject to Section 706(g):

> To be sure, consent decrees bear some of the earmarks of judgments entered after litigation. At the same time, because their terms are arrived at through mutual agreement of the parties, consent decrees also closely resemble contracts. [Citations omitted.]. . . .
>
> Because this Court's cases do not treat consent decrees as judicial decrees in all respects and for all purposes, we think that the language of Section 706(g) does not so clearly include consent decrees as to preclude resort to the voluminous legislative history of Title VII. . . . [T]he use of the verb "require" in Section 706(g) suggests that it was the coercive aspect of a judicial decree that Congress had in mind. . . .[80]

Nor did the majority deviate in its position even though the consent decree provided broader relief than the court could award following a trial and was subject to modification by the court over objections of a consenting party. Nor was lack of consent of the union critical because the decree does not impose any obligations on third parties.

Justice O'Connor joined with the majority but wrote separately to emphasize her view "that the Court's holding is a narrow one."[81] Justice White in dissenting expressed the view that an employer cannot choose to discriminate against either blacks or whites in either hiring or promotion to achieve a racially balanced work force without violating Title VII.[82] He also criticized the majority's reliance on *Steelworkers v. Weber* where the company's prior discriminatory conduct provided the predicate for the temporary remedy favoring black employees. "Th[at] case did not hold that without such a predicate, an employer, alone or in agreement with the union, may adopt race-conscious hiring practices without violating Title VII."[83] Justice White also expressed the view that the district court may not enter a consent decree that exceeds what the court could order following a contested trial. Thus, he concluded that the consent decree itself was not immune from the restrictions of Section 706(g).

Justice Rehnquist's dissent first viewed this case as having been decided in *Firefighters v. Stotts* with the only distinction being that this case involved a consent decree structured almost entirely by the parties as opposed to the *modification* of an existing decree. Second, he relies on the literal language of Section 706(g) that no order of the court shall require promotion of an individual except where the failure to receive the promotion was the result of prohibited discrimination. In the absence of a finding that the minority firemen who will receive preferential promotions were the victims of racial discrimination and awarding competitive seniority to the victim as held in *Stotts,* Justice Rehnquist would have reversed the court below.

The Paradise Case

On February 25, 1987, the Supreme Court decided *United States v. Paradise.*[84] This was another 5–4 decision with the plurality opinion authored by Justice Brennan, joined by Justices Marshall, Blackmun, and Powell. Justice Stevens concurred in the judgment and the four remaining jurists dissented.

The issue in *Paradise* involved a court-ordered AAP requiring the Alabama Department of Public Safety to promote one black trooper for each white trooper promoted and the question whether this violated the Equal Protection guarantee of the Fourteenth Amendment. The initial action was filed in 1972 by the National Association for the Advancement of Colored People (NAACP) challenging the discriminatory hiring practices of the Department, which had never hired a black trooper in all its 37-year history. The United States was joined as a plaintiff and Phillip Paradise, Jr. intervened on behalf of a class of black plaintiffs.

The district court judge ordered the Department to hire one black for each white trooper hired until the blacks constituted approximately 25

percent of the state's trooper force. This was appealed, but affirmed by the Fifth Circuit as a temporary hiring requirement.[85]

The plaintiffs returned to court several times seeking further relief from the Department's tactics to delay or frustrate compliance with the court-ordered AAP. This led to consent decrees in 1979 and 1981 pertaining to the Department's failure to promote a single black trooper to the rank of corporal or above. The Department agreed to develop a promotional procedure that would not discriminate against black troopers.

In 1983 the plaintiffs obtained an order requiring that blacks be promoted to corporal at the same one-for-one rate at which they had been hired until the promised promotional procedure was developed and implemented by the state. Certain white applicants for promotion intervened to oppose any quota, but the court imposed a 50 percent promotional quota provided there were qualified black candidates until the particular rank was composed of 25 percent black troopers.

The difference between Justice Brennan's opinion and the dissenters was based on whether the ordered relief met the strict scrutiny test. Justice Brennan did not concede the applicability of the test but took the position that the judicially tailored AAP met the higher standard:

> [A]lthough this Court has consistently held that some elevated level of scrutiny is required when a racial or ethnic distinction is made for remedial purposes, it has yet to reach consensus on the appropriate constitutional analysis. We need not do so in this case, however, because we conclude that the relief ordered survives even strict scrutiny analysis: it is "narrowly tailored" to serve a "compelling [governmental] purpose."[86] (Citation and footnote omitted.)

As in the *Sheet Metal Workers* case, the relief ordered by the district court "was imposed upon a defendant with a consistent history of resistance to the District Court's orders, and only *after* the Department failed to live up to its court-approved commitments."[87]

The one-for-one promotion quota was also determined to be narrowly tailored:

> In determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties. [Citations omitted.] When considered in light of these factors, it was amply established, and we find that the one-for-one promotion requirement was narrowly tailored to serve its several purposes, both as applied to the initial set of promotions to the rank of corporal and as a continuing contingent order with respect to the upper ranks.[88]

The majority did not view the one-for-one requirement as a goal in itself but rather as the rate or speed at which the 25 percent black goal or quota was to be achieved. Unlike *Wygant* the one-for-one promotion requirement did not involve the discharge of white troopers and thus was viewed by the majority as not resulting in disproportionate harm to the interests or rights of innocent parties. Lastly, the majority viewed the judicial remedy as temporary and flexible.[89]

Justice Stevens concurred in the judgment but not in Justice Brennan's opinion. In his view, district court judges have broad, flexible authority to remedy racially discriminatory actions by the state and should not be subjected to a strict scrutiny standard of review.[90] He would apply the broad judicial authority for fashioning race-conscious remedies found in the school desegregation cases, particularly in *Swann v. Charlotte-Mecklenburg Board of Education*:[91]

> [A] school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interest, the condition that offends the Constitution.
>
> In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system.[92] (Citation omitted.)

Justice Powell joined in Justice Brennan's plurality opinion and wrote separately to emphasize his position that court-ordered as well as government-adopted affirmative action plans "must be most carefully scrutinized,"[93] which the Court properly did in its opinion:

> In determining whether an affirmative-action remedy is narrowly drawn to achieve its goal, I have thought that five factors may be relevant: (i) the efficacy of alternative remedies; (ii) the planned duration of the remedy; (iii) the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force; (iv) the availability of waiver provisions if the hiring plan could not be met; and (v) the effect of the remedy upon innocent third parties. [Citation omitted.] The Court's opinion today makes clear that the affirmative action ordered . . . was narrowly drawn to achieve the goal of remedying the proven and continuing discrimination. . . .[94]

Also Justice Powell made special note that the effect of the court-ordered AAP will have little impact on innocent white troopers.[95]

Justice O'Connor writing for the dissenters acknowledged the " 'pervasive, systematic, and obstinate discriminatory conduct' "[96] of the Department, and the court's obligation to fashion a remedy to end its egregious history of discrimination against blacks. But in doing so Justice O'Connor does not view the majority opinion as applying the strict scrutiny test:

> The plurality today purports to apply strict scrutiny, and concludes that the order in this case was narrowly tailored for its remedial purpose. Because the Court adopts a standardless view of "narrowly tailored" far less stringent than required by strict scrutiny, I dissent.[97]
>
> Given the singular *in terrorem* purpose of the District Court order, it cannot survive strict scrutiny. . . . The District Court had available several alternatives that would have achieved full compliance with the consent decrees without trammeling on the rights of nonminority troopers. . . .[98] (Emphasis in original.)

The dissent also viewed the one-for-one promotion quota as exceeding anything justified by the record.[99]

Johnson v. Transportation Agency

The *Johnson* case[100] concerned a voluntary AAP adopted by the Santa Clara County, California, Transportation Agency favoring the promotion of minorities, females, and the handicapped. The petitioner, Paul Johnson, a male employee in the road maintenance department, was passed over for promotion to dispatcher in favor of a female maintenance worker, Diane Joyce, even though it was determined he was more qualified.

Regarding the job classification relevant to the case, none of the 238 employees in that skilled position was a woman. The stated long-term goal of the AAP adopted by the Agency was to attain a work force of minorities and women in proportion to the overall area labor force. Thus, in this skilled category the Agency's goal was an eventual 36 percent women.

The district court found that the sex of Joyce was the "determining factor in her selection" and that the AAP failed to satisfy the criterion of the *Weber* case that the plan be temporary. The Ninth Circuit reversed holding that the absence of an express termination date was not dispositive.

Justice Brennan once again delivered the judgment of the Supreme Court and expressed the views of the majority of the Court in unholding the AAP as against a Title VII challenge by Johnson under the authority of the *Weber* decision. No Equal Protection challenge was made by Johnson, therefor the *Weber* decision involving a private AAP pertaining to promotional opportunities was considered controlling.

Initially, the majority opinion articulated the burden of proof regarding the invalidity of an AAP:

> As a preliminary matter, we note that petitioner bears the burden of establishing the invalidity of the Agency's Plan. . . . Once a plaintiff established a prima facie case that race or sex has been taken into account in an employer's employment decision, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision. . . . If such a plan is articulated as the basis for the employer's decision, the burden shifts to the plaintiff to prove that the employer's justification is pretextual and the plan is invalid. . . . The burden of proving its invalidity remains on the plaintiff.[101]

The majority concluded that a manifest imbalance must exist to justify taking sex or race into account and found that such an imbalance did exist when compared with those in the labor force who possess the relevant qualifications. Significantly, Justice Brennan disagreed with Justice O'Connor's concurring opinion that would require the imbalance be sufficient to support a prima facie discrimination case against the employer. He also disagreed with Justice Scalia's dissenting statement that "we [the majority] do not regard as identical the constraints of Title VII and the Federal Constitution on voluntarily adopted affirmative action plans."[102]

> Justice Scalia's dissent maintains that the obligations of a public employer under Title VII must be identical to its obligations under the Constitution, and that a public employer's adoption of an affirmative action plan therefore should be governed by *Wygant*. . . . The fact that a public employer must also satisfy the Constitution does not negate the fact that the *statutory* prohibition with which that employer must contend was not intended to extend as far as that of the Constitution.[103] (Emphasis in original.)

In upholding the plan, the majority recognized that women were most egregiously underrepresented in the skilled craft job category and viewed the plan as providing direction rather than goals or quotas. Numerous factors were to be taken into account in making promotional decisions including the qualifications of female applicants for particular jobs that were proportionately underrepresented. Hiring was not based on statistics nor were the long-term goals treated as quotas.

Nor did Justice Brennan view the AAP as unnecessarily trammeling the rights of male employees:

> In addition, petitioner had no absolute entitlement to the road dispatcher position. Seven of the applicants were classified as qualified and eligible, and the Agency Director was authorized to promote any of the seven. Thus, denial of the promotion unsettled no legitimate firmly rooted expectation on the part of the petitioner. Furthermore . . . he retained his employment with the Agency, at the same salary and with the same seniority, and remained eligible for other promotions.[104] (Footnote omitted.)

Finally, the majority opinion emphasizes that the AAP sought to "attain" a balanced work force not "maintain" one, indicating that there is no intent to maintain a permanent racial and sexual balance in the work force.

Justice Stevens, concurring but writing separately, wished to emphasize his view that the majority opinion did not set the outer limit for voluntary AAPs and that both *Bakke* and *Weber* control:

> Bakke and Weber have been decided and are now an important part of the fabric of our law. . . .
>
> The logic of antidiscrimination legislation requires that judicial constructions of Title VII leave "breathing room" for employer initiatives to benefit members of minority groups. If Title VII had never been enacted, a private employer would be free to hire members of minority groups for any reason that might seem sensible from a business or a social point of view. . . .[105]

Justice O'Connor concurred in the judgment, but her opinion sounded more like a dissent. She was not on the court when *Weber* was decided, but, even though reluctant, felt constrained by *stare decisis* to apply it in this Title VII case:

> I concur in the judgment of the Court in light of our precedents. I write separately, however, because the Court has chosen to follow an expansive and ill-defined approach to voluntary affirmative action by

public employers despite the limitations imposed by the Constitution and by the provisions of Title VII. . . .[106]

At the same time Justice O'Connor viewed the application of the *Weber* decision in this case to be consistent with her views in *Wygant* that reliance cannot be placed solely on "societal discrimination" without more:

> While employers must have a firm basis for concluding that remedial action is necessary, neither *Wygant* nor *Weber* places a burden on employers to prove that they actually discriminated against women or minorities. . . . A requirement that an employer actually prove that it had discriminated in the past would also unduly discourage voluntary efforts to remedy apparent discrimination. . . . Evidence sufficient for a prima facie Title VII pattern or practice claim against the employer itself suggests that the absence of women or minorities in a work force cannot be explained by general societal discrimination alone and that remedial action is appropriate.[107]

She agreed in principle with Justice Scalia's dissent that an AAP that automatically and blindly promotes marginally qualified candidates falling within a preferred race or gender or involves a permanent plan or proportionate representation would violate Title VII. But she concluded that this lawsuit was not "such a case."[108]

The major dissenting opinion written by Justice Scalia points to the absence of findings of past or present discrimination by the Agency against minorities or women; asserts that the majority failed to properly apply the rulings of *Weber* and *Wygant;* and points out that until now *Weber* has applied only to private and not public employers.

On the first point Justice Scalia notes that "the plan's purpose was assuredly not to remedy prior sex discrimination by the Agency."[109] As emphasized by the dissent, Johnson was the leading candidate; he had earlier placed second on the promotional list and took a voluntary demotion to gain certain experience to improve his future promotional opportunities even though in earlier years he had been a road dispatcher for 17 years with a private firm; he was assigned to work out of class full-time to fill the vacant position for nine months until the permanent selection was made; and failed to be selected only because of the intervention of the Affirmative Action Coordinator. In addition, the trial court had determined that except for her sex Joyce would not have been promoted.

The dissent noted that in *Weber* there was a conscious prior exclusion by the employer of blacks from the training program essential for promotion, and that here we have a societal segregation based on longstanding social attitudes in that it has not been regarded by women themselves as desirable type of work.[110]

Lastly, Justice Scalia would not expand *Weber* to include public employers. "Another reason for limiting *Weber* to private employers is that state agencies, unlike private actors, are subject to the Fourteenth Amendment."[111] Beyond *Weber* he sees the majority opinion as requiring certain employers to discriminate in their employment practices.[112] He concludes with the following impassioned plea on behalf of all the "Johnsons" across the country:

> In fact, the only losers in the process are the Johnsons of the country, for whom Title VII has been not merely repealed but actually inverted. The irony is that these individuals—predominately unknown, unaffluent, unorganized—suffer this injustice at the hands of a Court fond of thinking itself the champion of the politically impotent. I dissent.[113]

Chief Justice Rehnquist and Justice White joined in this dissent except that Justice White did not join in the last part of Scalia's dissent opposed to the extension of *Weber* from private to public employers. Justice White would have overruled *Weber* in its entirety.[114]

In light of the severe limitations placed on this decision by Justice O'Connor and the departures of Justices Powell, Brennan, and Marshall from the Court, one must question the current viability of this Title VII ruling particularly if it should come before the Court again as an Equal Protection challenge.

Martin v. Wilks[115]

In the *Wilks* case decided June 12, 1989, a group of white firefighters brought suit against the City of Birmingham, Alabama, alleging that they were being denied promotions in favor of less qualified blacks. The City admitted to making race-conscious promotional decisions but contended this was "mandated" by two consent decrees entered into between the City and a group of black firefighters.

The district court concluded that the city's actions were indeed required by the terms of the consent decrees and precluded the white firefighters from challenging the city's employment decisions. The decrees resulted from Title VII litigation commenced by the NAACP and several black individuals alleging that the city was engaging in racially discriminatory hiring and promotion practices in various public service jobs.

The white firefighters were not parties to the prior litigation but other white firefighters had opposed the consent decrees at the district court's "fairness hearing," and had unsuccessfully sought to intervene and to enjoin enforcement of the decrees. Both the denial of intervention and the denial of injunctive relief were affirmed in an earlier appeal.

In the *Wilks* appeal by the white firefighters, the Eleventh Circuit reversed, concluding that because the white firefighters were neither parties nor privy to the consent decrees their independent Title VII claims of unlawful discrimination were not precluded.

The Supreme Court granted certiorari and in another 5–4 ruling agreed with the Eleventh Circuit holding that joinder as a party is required rather than knowledge of the prior lawsuit and an opportunity to intervene.

Chief Justice Rehnquist writing for the majority did not review the merits of the reverse discrimination claims but limited the decision to the procedural question raised by the presence of the consent decrees and sent the case back for a hearing on the merits. The contention that the district court had already decided the issue on the merits upholding the

racial quotas as against a Title VII complaint was summarily disposed of by the Chief Justice:

> Petitioners point to language in the District Court's findings of fact and conclusions of law which suggests that respondents will not prevail on the merits. We agree with the view of the Court of Appeals, however, that the proceedings in the District Court may have been affected by the mistaken view that respondents' claims on the merits were barred to the extent they were inconsistent with the consent decree."[116]

Justice Stevens, who has traditionally favored judicially fashioned remedies for past discrimination, authored the dissent joined by the more predictable Justices, Brennan, Marshall, and Blackmun. Initially, Justice Stevens conceded that the white firefighters could not be deprived of their legal rights by the earlier cases because they were neither parties nor interveners:

> In this case the Court quite rightly concludes that the white firefighters who brought the second series of Title VII cases could not be deprived of their legal rights in the first series of cases because they had neither intervened nor been joined as parties. The consent decrees obviously could not deprive them of any contractual rights, such as seniority, or accrued vacation pay, or of any other legal rights, such as the right to have their employer comply with federal statutes like Title VII. [Citations omitted.] There is no reason, however, why the consent decrees might not produce changes in conditions . . . that, as a practical matter, may have a serious effect on their opportunities for employment or promotion even though they are not bound by the decrees in any legal sense.[117]

The difference between the two opinions rests on the narrow but significant divergent approaches. The majority ruled that the valid consent decrees would not preclude or defeat an otherwise valid reverse discrimination action by one not a party or otherwise bound by the decree. The dissent viewed the issue, not from the standpoint of the white claimants but in recognition that an order of the court can impact promotional opportunities of those not otherwise bound by the decree.

In the absence of any basis for collaterally attacking the consent decrees as collusive, fraudulent, or transparently invalid, Justice Stevens questioned how compliance with the terms of the valid decree remedying Title VII violations could itself result in a violation of Title VII or the Equal Protection Clause.

The Supreme Court Score Card [1582-N21]

Comparing the Supreme Court's "score card" for the last nine AAP cases (see Appendix, p. 28) with the four cases reviewed earlier reveals few dramatic differences. The AAPs in one-half of the cases were upheld, as before; the Court continues to average about five separate opinions per case; and most of the rulings are still determined by a single justice.

One notable contrast is the frequency of decision. The first four cases, from *Bakke* to *Stotts*, covered a time period of six years. The next nine cases from *Wygant* to the *FCC* cases were decided in less than four years.

Bare statistics, however, do mask the ideological shift that should be apparent from the qualitative analysis of the opinions. The initial four cases presented relatively "clean" issues with little factual clutter that might otherwise detract from the central issue. The same cannot be said for the subsequent cases reviewed in this Supplement. Particularly, the egregious conduct present in the *Sheet Metal Workers* and *Paradise* cases and the absence of equal protection challenges in the *Cleveland* and *Johnson* cases may have influenced at least some of the justices. Nor does the chart reflect the conservative shift of the Court with the addition of Justices O'Connor, Scalia, Souter, and now Thomas, since the *Fullilove* decision in 1980.

The Appendix sets forth the statistical score card update.

Missed Opportunities [1582-N22]

The article being supplemented discussed opportunities "missed" by the Supreme Court to clarify issues following the *Fullilove* decision, particularly whether the rationale of this plurality opinion would be limited to congressionally mandated programs or would be expanded to include local and state programs and those created by federal agencies.

Croson appeared to have answered that question in the negative with a strong implication that a majority of the Court was prepared to reexamine the plurality decision in *Fullilove*, which afforded Congress virtually unfettered authority to fashion minority preference programs. The *Metro Broadcasting* decision in the FCC cases, however, has now created a new climate of uncertainty as a result of Justice Brennan's farewell opinion applying an intermediate level of scrutiny to minority preference programs generated by a federal commission and with the more conservative Justice Thomas replacing Justice Marshall. Since the *Metro* decision, the Supreme Court has again side-stepped three recent opportunities to accept cases from the circuit courts to clarify the constitutional status of United States Department of Transportation minority preference programs as administered by the states and by local government.

On January 7, 1991, the Eleventh Circuit in *S.J. Groves & Sons Co. v. Fulton County*[118] concluded that "[a]lthough the issue is hardly free from doubt, our reading of *Metro Broadcasting* leads us to conclude that the Supreme Court would utilize an intermediate level of scrutiny in evaluating the DOT [bid preference] regulations."[119]

The very next day, on January 8, 1991, in *Cone Corp. v. Florida Dept. of Transportation*,[120] the same circuit court reversed a district court decision invalidating a state DBE program unless federal funds were included. The reversal, however, was based on a lack of standing by the complaining contractors to raise constitutional issues of equal protection because the Florida statute, closely patterned after the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), does not on its face direct the state secretary of transportation to deny equal protection in the award of contracts.

The third case, *Milwaukee County Pavers Assn. v. Fiedler*,[121] from the Seventh Circuit issued an opinion on January 15, 1991, involving a Wisconsin DBE program administered both with and without federal

funding similar to the *Cone* case. The federal district court invalidated the state's bid preference program based on race because of *Croson,* but it refused to enjoin the state from administering the federal program as agent for FHWA. The Circuit Court of Appeals, unlike the *Cone* decision, affirmed the district court ruling without discussing questions relating to standing.

All three of these cases were before the Supreme Court on petitions for *Certiorari* at the same time and were all denied review within the period of one week. One can debate whether these were "missed opportunities" or not. The *Cone* and *Milwaukee County Pavers* decisions presented inconsistent opinions on federal standing. A further split in the High Court over this subsidiary issue would result in something less than a definitive ruling. In addition these two cases challenged the federal minority preference program without the presence or participation of the federal agency in the litigation.

The *S.J. Groves* case was not contaminated with these side issues.[122] The contractor had been denied a contract on its low bid for an airport runway repair project based on a lack of good faith efforts to increase its MBE participation. The project was funded 90 percent with federal funds, which carried with it MBE requirements, and USDOT was included as a defendant along with the county that had rejected the low proposal.

The appellate court concluded that the county had violated Georgia's low bid statute in awarding the contract to other than the monetary low bidder. The county however raised the defense of federal preemption, that the USDOT regulations preempted the state's low bid statute. The court agreed, but noted that only if the USDOT regulations are constitutional can they preempt state law. This caused the court to examine FAA authority to adopt minority preference measures and the standard of review in light of *Metro Broadcasting.*

The court found sufficient authority in the Airport and Airways Development Act of Congress, but concluded that the district court had applied the wrong standard for review. In empathizing with the lower court's difficulty in determining the correct standard, the opinion stated as follows:

> Our assessment of relevant case law tells us that the resolution of the proper standard to be applied to the DOT regulations is difficult. After wading through the morass of often conflicting majority, plurality and dissenting opinions that deal with race-conscious affirmative action programs issued by the members of the Supreme Court, we conclude that the district court, quite understandably, applied the incorrect standard."[123]

In conducting its own review of the various Supreme Court opinions, it analyzed the confused state of affairs and appeared to invite the Supreme Court to accept the challenge of this case:

> If *Croson* were the Supreme Court's latest word on this question [of strict scrutiny], we would probably agree that the district court, in applying the strict scrutiny standard to the DOT regulations, had proceeded correctly. However, *Croson* is not the Court's most recent treatment of affirmative action. On the final day of the Court's last Term, *Metro Broadcasting, Inc. v. FCC* [citation omitted], was decided. Although the issue is hardly free of doubt, our reading of *Metro Broadcasting* leads us to conclude that the Supreme Court would utilize an intermediate level of scrutiny in evaluating the DOT regulations. . . .[124]

The Eleventh Circuit remanded the case for reconsideration in light of the appropriate judicial standard, which it described as follows:

> Therefore, it seems to us that the Court has created a dual inquiry for evaluating affirmative action programs. First, we must determine whether a state or local government has developed the program, or whether Congress has authorized the program's creation. If the former, a court must strictly scrutinize the program. That is, the means chosen must be narrowly tailored to achieve a compelling governmental interest. If the latter, however, then an intermediate level of scrutiny is appropriate. . . .[125]

Of the three cases the *S.J. Groves* decision did seem to present the best opportunity for the Supreme Court to revisit *Metro Broadcasting* in a more traditional contract setting. At the same time if one sought to rationalize the High Court's denial of review, it could rest with the fact that the case is still alive on remand to the district court and can be reviewed again on appeal similar to the procedural history of *Croson,* to decide whether *Metro Broadcasting* has indeed affirmed the plurality opinion in *Fullilove.*

AFFIRMATIVE ACTION IN THE LOWER COURTS

Fullilove Applied by the Lower Courts [1582-N25]

The District Court opinion in *Michigan Road Builders Ass'n. v. Milliken,* discussed in the article being supplemented, was reversed by the Sixth Circuit.[126] The Michigan state statute mandated set-asides of 7 percent of state contract funds for MBEs and not less than 5 percent for WBEs. The Court of Appeals struck down the state statute based on *Wygant* because of legislative reliance on societal discrimination rather than evidence of prior discriminatory acts in the award of the state's contracts.

Even under the less severe mid-level scrutiny for gender-based classifications, the court ruled that the 5 percent WBE preference also failed to withstand constitutional muster. The Supreme Court without opinion affirmed this Sixth Circuit holding.[127]

Based on *Fullilove* the federal district court judge in another case, *Milwaukee County Pavers III,*[128] in part upheld a state statute establishing the "Wisconsin Department of Transportation Disadvantaged Business Development and Training Program." The minority set-aside requirements included in the program were held valid only to the extent they were employed to implement the federal DBE provisions in section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 referred to as "STURAA."[129] This was recently affirmed by the Seventh Circuit on appeals taken by both the contractors' association and by the state.[130]

At the same time the judge invalidated the state statute to the extent that it applied to exclusively state-funded projects or to subcontractor DBE requirements on contracts set aside for disadvantaged prime contractors. Under STURAA money spent on projects awarded to disadvantaged prime contractors is counted toward the DBE goals. "It is only when the prime contractor is not a disadvantaged business that the status of the subcontractors become relevant under the federal regulations."[131]

Also invalidated was the sunset provision of the statute extending the duration of the state program beyond the limits of STURAA, expiring in 1991:

> The constitutionality of the state's program depends on its character as an implementation of the federal program. To the extent that the state steps beyond the boundaries of this federal authority, it is acting on its own authority and must base its action on specific findings of identifiable prior discrimination. Congress has authorized the disadvantaged business program in the 1987 Surface Transportation Act through 1991. It is within the power of the Wisconsin legislature to extend its set-aside program beyond 1991, but it can not do so on the basis of Congress's authority to find prior discrimination. Therefore, I conclude that [the Wisconsin statute] is unconstitutional in this respect to the extent that it authorizes the existence of the set-aside program beyond the date through which the disadvantaged business enterprise program in the 1987 Surface Transportation Act is authorized.[132]

The federal district court refused to rule on plaintiffs' claims that the state's administration of the DBE program violates Wisconsin's competitive business statute, its antidiscrimination statue, and the Wisconsin Constitution.[133]

Interestingly, plaintiffs argued to the court that as a consequence of *Fullilove* it was incumbent upon the state to establish its own independent factual predicate supporting the state's DBE goals:

> Instead of arguing that the state's administration of the 1987 Surface Transportation Act is governed by *Croson*, plaintiffs argue now that a state must make findings of past discrimination in order to ensure that the federal program it administers is narrowly tailored under *Fullilove*. Pointing out that *Fullilove* . . . did not address the constitutionality of a state's implementation of that statute, plaintiffs argue that *Fullilove* requires defendants to use findings of past discrimination in the state as a benchmark in setting overall goals under the 1987 Surface Transportation Act, in certifying disadvantaged business, in setting individual project goals, and in granting good faith waivers to prime contractors.
>
> Plaintiffs' position is not without textual support. . . .[134]
>
> Despite the clear emphasis in *Fullilove* on remedying prior discrimination, it would be inconsistent with the reasoning of the overall [*Fullilove*] opinion to adopt plaintiffs' interpretation. . . .[135]

The three published opinions of the trial judge provide an excellent overview of the operations and procedures of the federal DBE program as administered by FHWA and Wisconsin DOT under STAA of 1982 and STURAA of 1987 as well as implementation of federal regulations.[136]

In affirming the district court on appeal, the circuit court ruled that the state cannot be enjoined insofar as it is merely complying with federal law and is acting as the agent of the federal government, which has broader authority to engage in affirmative action. The appellate court noted that the contractors were not challenging section 106(c) of STURAA establishing the 10 percent federal set-aside either on its face or as applied. Rather "they argued that *Croson* prevents the state from playing the role envisaged for it by the Act and regulations unless the state is able to show that the set-aside program, as implemented in Wisconsin, is necessary to rectify invidious discrimination."[137] In rejecting this argument the court noted the broader authority conferred on the federal government:

> 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.[138]

Surprisingly, the opinion makes no reference to *Metro Broadcasting* handed down six months earlier by the Supreme Court upholding the authority of the FCC to formulate minority preference policy.

The Inconsistent Ninth Circuit [1582-N26]

It would now appear that the latest Ninth Circuit AAP decision cited with approval no less than three times in *Croson* would resolve the inconsistency of the Ninth Circuit noted in the original text. In *Associated General Contractors of California, Inc. v. City and County of San Francisco,*[139] the city's complex AAP called for set-asides of 10 percent and 2 percent for MBEs and WBEs, respectively. It also provided 5 percent bidding preferences to MBEs, WBEs, and local business enterprises (LBEs) with a 10 percent maximum bidding advantage for local MBEs and WBEs. In addition the ordinance established an overall goal of 30 percent of the city's contracting dollars to MBEs and 10 percent to WBEs.

The Ninth Circuit ruled that the MBE provisions violated the Equal Protection Clause as well as the City Charter requirement for award to the lowest responsible bidder for contracts of $50,000 or more.

In rationalizing the plurality opinions in *Wygant* and *Fullilove,* the Court of Appeals refused to exempt the city from establishing a factual predicate justifying race-conscious remedial action and denounced its reliance upon societal discrimination:

> We recognize that the plurality opinion in *Wygant* commanded only four votes. Absent more definitive guidance, however, we consider the requirement that state and local governments act only to correct their own past wrongdoing a persuasive and principled way to reconcile *Wygant* and *Fullilove.* Moreover, we find the distinction a compelling one. . . .[140]

Applying a "mid-level" standard of scrutiny in analyzing the WBE

program, the Ninth Circuit found no constitutional violation by reason of the facial challenge to the ordinance:

> Although we find the city's WBE preference troubling, we uphold it against the challenge presented in this case. While the city's program may well be overinclusive, we believe it hews closely enough to the city's goal of compensating women for disadvantages they have suffered so as to survive a facial challenge. Unlike racial classification, which must be "narrowly" tailored to the government's objective, . . . there is no requirement that gender-based statutes be "drawn as precisely as [they] might have been" [Citations omitted.][141]

At the same time the Court reserved judgment of a different conclusion "if and when the WBE preferences are challenged as applied to an industry where women are not disadvantaged."[142] The LBE bidding preference was ruled to be valid in all respects.

The federal district court in *Coral Construction Co. v. King County*[143] upheld a state of Washington county's MBE and WBE bidding preference ordinance enacted after the *Croson* decision. The ordinance provided for a 5 percent bidding advantage to bidders who are MBEs or WBEs or will use minority or women-owned enterprises on the project. Coral Construction was the low bidder on a county guard rail construction contract, but the contract was awarded to an MBE with a higher bid, which was within 5 percent of the low proposal.

In upholding the award to the MBE, the district court viewed Justice O'Connor's *Croson* decision as a plurality opinion ignoring that a majority of justices had agreed on most issues including application of the strict scrutiny test in race-based classifications. At the same time the district court determined that the county's factual predicate was adequate within the application of the strict scrutiny test and declined to follow the Sixth Circuit's ruling in *Michigan Road Builders,* affirmed without opinion by the Supreme Court after *Croson,* which limited the required showing of past discrimination to past acts of government discrimination.

Based on *Croson's* strict scrutiny standards, the Ninth Circuit reversed the district court in part and remanded the case to allow the county to provide statistical evidence of discrimination, holding that anecdotal evidence was insufficient.[144] The appellate court ruled that "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 [ordinance]."[145]

The Ninth Circuit declined to follow the Sixth Circuit in applying the strict scrutiny test to gender-based preferential programs. Instead the court concluded "we find ourselves powerless to overrule *Associated General Contractors* [discussed above] on this point, even if we were so inclined."[146] Thus, the court employed intermediate scrutiny and concluded that the WBE preference program survived the facial challenge. The court also remanded for further consideration the contractor's claims for civil rights damages under 42 U.S.C. §§ 1981 and 1983.

Preliminary Injunctions [New]

The federal district court judge in *Milwaukee Pavers I*[147] enjoined the State of Wisconsin's disadvantaged business program by reason of the Supreme Court's decision in *Croson,* although the judge later significantly modified the preliminary injunction:

> In this case, the challenged Wisconsin statute, despite its worth, is constitutionally suspect. The statute appears to classify individuals on the basis of race, national origin, and gender. The state had not yet put forward the evidentiary showing necessary to find that the classifications are constitutional. Because I find that plaintiffs have a likelihood of success on the merits of their claim and because the other prerequisites to the granting of injunctive relief have been met, plaintiffs' motion for a preliminary injunction will be granted.[148]

The plaintiffs were highway contractors qualified to bid on Wisconsin highway construction projects except that the statute required the state to reserve $4 million in construction contracts for "disadvantaged" businesses. Responding to the statute, Wisconsin DOT identified four state highway projects on which only disadvantaged business enterprises could bid individually as prime contractors. Plaintiffs contended that the state's program was contrary to what *Croson* allowed "because it excludes plaintiffs from bidding on $4 million of state construction contracts on the basis of their race, gender, or national origin without reliance on any detailed factual finding of prior discrimination in the construction industry in Wisconsin."[149]

The state offered an ingenious argument that this was a social and economic disadvantage program and not based on the suspect classifications of race, gender, or national origin. The court rejected this position and concluded that "for all practical purposes all members of minority groups are irrebuttably presumed socially disadvantaged for purposes of the statute."[150] Likewise in *Contractor Assn. v. City of Philadelphia*[151] the federal district court held that "the DBE concept is a cosmetic endeavor designed to camouflage a race-, ethnicity-, and gender-based ordinance."

The court in *Milwaukee Pavers* concluded that plaintiffs have a likelihood of success on the merits and would suffer irreparable harm if the awards of the set-aside contracts and the statute were not enjoined:

> The wisdom and legitimacy of affirmative action has been hotly debated in the spheres of politics, social science, and law. While politicians and social scientists are free to come to their own conclusions on the matter, lower federal courts are bound by the United States Supreme Court's decision that affirmative action is permissible only within narrowly defined limits. In *Croson,* the Court determined that affirmative action programs not meeting the requirements articulated in that decision cannot be constitutional. . . .[152]

Three months later in *Milwaukee Pavers II*[153] the district court significantly modified its preliminary injunction. The state's motion to dissolve or modify the injunction offered new evidence and arguments that the presumptions against race-based preferences were rebuttable and that

the state was merely implementing the federal DBE program. The judge again rejected the rebuttable presumption contention but concluded that the strict scrutiny standards of *Croson* would not apply if the state program was "subsidiary" to a federal program:

> The applicable standard for analyzing the constitutionality of federal affirmative action programs that impose requirements on states is found in *Fullilove v. Klutznick*, [citation omitted], the only Supreme Court decision addressing a federally imposed minority preference.[154] (Footnote omitted.)

By footnote the judge rejected plaintiffs' argument that the plurality opinion of *Fullilove* had been modified by *Croson:*

> Their contention is refuted by the Court's frequent reliance on *Fullilove* in the *Croson* opinion and its explicit distinction between the standards to be applied to review of federal and state programs.[155]

The court also ruled that as long as most of the moneys are federal and not state moneys, reliance on the constitutionality of the federal program would control. The judge would not speculate as to what particular percentage of federal funds was required to be "primarily federal funded."[156]

The preliminary injunction was thus modified permitting the state to execute the three set-aside highway contracts because they were funded primarily with federal funds. The injunction remained in effect prohibiting the state from letting contracts under the state AAP that were not primarily funded with federal funds.

In *Northeastern Florida Chapter, AGC v. Jacksonville, Fla.,*[157] the federal Court of Appeals reversed the issuance of a preliminary injunction prohibiting enforcement of a city ordinance setting aside 10% of municipal contracting moneys to MBEs pending trial on Fourteenth Amendment issues. The Circuit Court had doubts that the set-aside would survive strict scrutiny but could find no irreparable injury to warrant the injunction."[158]

Similarly, in *F-M Asphalt, Inc. v. North Dakota State Highway Department*[159] a preliminary injunction was denied relying on the availability of an adequate monetary remedy for lost profits. Plaintiff's bid was rejected for failure to properly provide certain minority and WBE utilization information in a situation suggesting a strong possibility of success on the merits based on inconsistent past practices and procedures. The appellate court affirmed, based on no abuse of discretion by the trial court, but without reflecting any view on the merits of the litigation.

After the Supreme Court handed down the *Croson* decision and the Ninth Circuit had invalidated most of the City of San Francisco's AAP previously discussed in *AGCC v. City and County of San Francisco,*[160] the City adopted an entirely different plan limited to bidding preferences. Local business enterprises (LBEs) were given a 5 percent bidding preference and local MBEs and WBEs were given a 10 percent bidding advantage. The AAP was adopted following extensive studies and hearings as an effort to satisfy the predicate requirements of *Croson.*

This new AAP led to the filing of a second action known as *AGCC II* and a motion for preliminary injunction based on the likelihood of success following from the earlier action. This motion was denied.[161] The district court found that the bidding advantage "avoids any flat quota or set aside, imposes relatively little burden upon non-MBEs, and responds only to the identified discrimination."[162]

On appeal the Ninth Circuit affirmed the denial of a preliminary injunction based on the failure of AGCC to demonstrate probable success on the merits or that on balance the hardships that would be caused to women and minorities by issuance of a preliminary injunction is outweighed by any hardships incurred by AGCC.[163]

Effect of Affirmative Action on Competitive Bidding [1582-N29]

The Ninth Circuit in *AGCC v. San Francisco I,* previously discussed, also ruled that the city's AAP violated the city charter provision requiring contracts exceeding $50,000 be awarded to the lowest responsible bidder. As a result of this ruling, the city enacted a new AAP and also amended its charter to raise the threshold competitive bidding requirement from $50,000 to $10,000,000. This new AAP as well as the charter amendment are now being litigated in federal district court.[164]

In *Capelletti Bros., Inc. v. Broward County,*[165] the federal district court dismissed a suit brought by general contractors and subcontractors challenging the constitutionality of a Florida county's minority set-aside program. In a facial attack on the AAP, the court viewed the ordinance as setting forth guidelines for the award of contracts rather than as mandatory requirements. Thus, the court concluded that unlike the factual posture of the *Croson* case, here there was no application of the AAP being challenged and dismissed the case for "lack of standing, ripeness, and a case and controversy."[166]

In *J. Edinger & Son, Inc. v. City of Louisville, Ky.,*[167] the city by ordinance adopted a unique program that provided a 5 percent bidding advantage to minorities, women, and handicapped businesses anytime the total dollar expenditures by the city to specified classifications fell below a specific level. The Sixth Circuit affirmed the district court's holding that the city could not rely on the disparity between the percentage of minorities, women, and handicapped in the city population generally and the percentage of city dollars going to these groups:

> [T]he City's reliance upon general population statistics cannot withstand an equal protection challenge. The City is required to show some statistical disparity between the percentage of qualified minority business contractors doing business in Jefferson County and the percentage of bid funds awarded to those businesses. Defendant's reliance upon general population statistics is especially troubling given that bid systems, by definition, are inherently non-discriminatory. Thus, the City should be required to present evidence of invidious discrimination.[168]

Resolving AAP Issues by Summary Judgment [1582-N31]

In the recent appellate decision in *Cone Corp. v. Hillsborough County*[169] the Eleventh Circuit reversed a summary judgment invalidating a Hillsborough, Florida, county AAP containing MBE participation

goals of 25 percent. The appellate court, in reversing the lower court ruling, applied the *Croson* standards and contrasted the AAP with that of the City of Richmond that the Supreme Court had invalidated. The Hillsborough plan may serve as a paragon for structuring an AAP to apply the teachings of *Croson,* even though it was enacted prior to the Supreme Court ruling.

First of all, it provided for individual goals to be established on project-by-project bases taking into account the subcontractable opportunities available and requiring that at least three eligible MBE contractors be available for that work. Adequate time was required for preparation and submission of bids and subbids, and large projects were to be broken into smaller projects to facilitate small business participation. Seminars and workshops to acquaint MBEs with the county's bidding procedures and requirements were called for, and pre-bid conferences held to explain the project requirements including MBE obligations.

When bids are opened, award is to be made to the lowest bidder if the bid meets the MBE goal established for the project. If the low bidder fails to meet the goal, good faith efforts are reviewed for "responsiveness." Protest and appeal is available on the issue of "responsiveness." If the next lowest bid is either $100,000 or 15 percent higher than the low bidder the MBE goal is waived.

While some of the factors relied on in *Hillsborough County* were identical to those rejected by the Supreme Court in *Croson* others were found markedly different. The circuit court viewed the City of Richmond program as a strict quota plan that fatally relied on *Fullilove* to provide the necessary factual predicates:

> Even a cursory comparison of the Hillsborough County law and the Richmond plan demonstrates that the two are vastly different in critical areas. The County painstakingly crafted its law, and has carefully avoided the problems which caused the downfall of the Richmond plan. Under the County law, a contractor never faces the *Croson* situation, where in order to fill a rigid quota he or she is required to hire MBEs for a job that no MBEs are available, willing, or qualified to do. The County law incorporates all of the race-neutral measures which the *Croson* plurality recommended. . . .[170]

The court concluded that the studies and statistics relied on by the county were sufficient to provide a prima facie case of discrimination to avoid summary judgment and that it was narrowly tailored to remedy the prima facie discrimination to "warrant further development and scrutiny at a trial."[171]

In *American Subcontractors Assn. v. Atlanta,*[172] the validity of Atlanta's AAP was tested against the *Croson* standards on cross motions for summary judgment. In an earlier ruling, the Georgia Supreme Court never reached a decision on the merits, having determined that the city's AAP violated the charter provision that all contracts be awarded to the "lowest and/or best bidder."[173] The charter was subsequently amended to include award of contracts in compliance with the city's minority and female business participation program.

The trial court ruled the AAP valid except for the inclusion of non-black minorities, and required extensive findings by the city to continue the program. As to this directive to retrofit the program the Georgia Supreme Court stated: "We find no authority for the trial court's order requiring future findings by the city in order to continue to implement the program. . . ."[174]

In reviewing the summary judgment on appeal, the state supreme court applied the strict scrutiny test of *Croson* and despite two public hearings found that the city's AAP lacked the necessary factual predicates under its state constitution as well:

> The city failed to identify the need for a race-conscious program in the awarding of its public contracts and the program established by the city is in no way "narrowly tailored" for its asserted needs. Accordingly, Atlanta's MFBE cannot withstand the strict scrutiny analysis we have employed to test its compliance with equal protection under our state constitution.[175] (Footnote omitted.)

The federal district court in *Main Line Paving Co., Inc. v. Board of Education, School District of Philadelphia*[176] invalidated the school district's AAP on cross motions for summary judgment based on stipulated facts. By addendum to bid proposals for a demolition and asbestos removal project, goals of 15 percent for MBEs and 10 percent WBEs were added with provision for waivers if the goals were not attained. The low bidder, Main Line, failed to achieve the goals but later obtained sufficient participation. Main Line's bid was rejected as not responsible. In a Commonwealth Court action Main Line obtained a preliminary injunction preventing award to any other bidder. The school board then rejected all bids.

In the federal court action for declaratory relief and damages, summary judgment was granted to Main Line. The Court concluded that the school district's AAP failed to meet the strict scrutiny test of *Croson* in all particulars. As to the gender-based set-aside provisions, the court applied an intermediate level of scrutiny but concluded that it also failed to pass constitutional muster:

> While the joint stipulation reveals that significant barriers were faced by minorities attempting to penetrate the fold of contractors favored by the Board and its employees, the only mention of women is the fact that there were very few contracts awarded to them. The stipulation contains nothing to detail the cause of this disparity, or to say for certain that it was caused by gender discrimination, rather than other conditions in the general economy. . . .[177]

AAP APPLICATION AND BID DISPUTE LITIGATION

Supplemental AAP Information After Bid Opening [1582-N34]

The low bidder in *Gilbert Central Corp. v. Kemp*[178] failed to achieve the overall DBE goal of 14 percent in its proposal, but then learned after bid opening that one of its subcontractors' bid was based on subcontracting part of its work to a second tier MBE subcontractor, which

would provide compliance with 12 percent MBE and 2 percent WBE goals. This bid was rejected by the Kansas DOT based on a bidding requirement that the MBE/WBE information is not subject to revision after bid opening. Also as a matter of policy KDOT does not count second tier subcontracts toward MBE participation. Moreover, the department concluded that good faith efforts were lacking, where the bidder relied on "generic" solicitation letters which were "insufficiently specific" with inadequate "follow-up."

The federal district court agreed with KDOT's decision and concluded that it was justified in rejecting the supplemental DBE information:

> As to the question of timing, KDOT clearly had authority to require that all DB/WBE information be submitted at the time of plaintiff's bid. *See* 49 C.F.R. § 23.45(h)(1)(ii). The question thus becomes whether KDOT was reasonable in barring the revision of such information after the bids had been opened. In essence, KDOT views the MBE information as a matter of responsiveness, rather than responsibility. Without deciding whether it was reasonable for KDOT to treat the *identity* of MBE subcontractors as a matter of responsiveness, it is at least true that a bidder's *commitment* to meet the MBE participation goals is reasonably placed within the responsiveness category. . . .[179] (Emphasis in original.)

The court also noted that any different conclusion would provide the bidder with the option to repent its bid rather than cure the defect:

> Had plaintiff determined that its bid was *too* low, it could simply have chosen not to inform KDOT of the [second tier] subcontract. Pursuant to the applicable regulations, KDOT would then have rejected plaintiff's bid—exactly the outcome plaintiff would have desired. Plaintiff was thus well situated to decide *after* the bid opening whether to bind itself to the terms of its own bid. Such a rule would clearly undermine the integrity of the entire bidding process.[180] (Emphasis in original.)

REGIONAL BUSINESS AND EMPLOYMENT GOALS [1582-N38]

In *AGCC v. City & County of San Francisco,*[181] previously discussed, the contractors' association also contended that the city's 5 percent local business enterprise (LBE) bidding preference was unconstitutional since it promotes domestic businesses at the expense of nonresident competitors. But the appellate court held otherwise: "The city may rationally allocate its own funds to ameliorate disadvantages suffered by local business, particularly where the city itself creates some of the disadvantages."[182] (Footnote omitted.)

> In addition, the LBE preference is not a burden imposed 'discriminatorily . . . on nonresident corporations solely because they are nonresidents' [*Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 at 882 n. 10, 105 S. Ct. [1676] at 1684 n. 10], it is an attempt to remove or to lighten a burden San Francisco businesses must bear that is not shared by others. While the distinction is a fine one, and our ruling should not be read as granting constitutional immunity to all local preferences so long as they can be characterized in this fashion, we believe that the combination of ends and means employed by the city here falls well within the discretion permitted to it under the equal protection clause.[183]

Thus, the court ruled the city's 5 percent LBE bid preference valid as a "modest attempt to support local businesses and to induce other businesses to move there."[184]

CERTIFICATIONS: FRONTS, FRAUDS, FAKES, AND APPEALS

The Current Threat [1582-N42]

In *Gauvin v. Trombatore*[185] a black owner of a trucking business challenged goal-setting procedures, certifications, and award of contracts with less than 10 percent DBE participation on a particular Interstate project in California. The court ruled that the federal DBE program did not provide a private civil action to challenge certifications where the federal regulations provide administrative procedures for challenging and appealing certification decisions. The core of plaintiff's complaint was that an insufficient amount of subcontracting work was going to black DBEs where the local community was 52 percent black. "As the DBE goal does not specify figures for each identifiable racial group, but is an aggregate for all groups, CalTrans is not required to take into account local ethnic composition in setting individual contract goals."[186]

The Federal Regulations[187] [1582-N43]

Section 105(f) of the Surface Transportation Assistance Act (STAA) of 1982 setting forth the DBE program has been replaced by section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA):[188]

> Except to the extent that the Secretary [of Transportation] determines otherwise, not less than 10 percent of the amounts authorized to be appropriated under titles I, II, and III of this Act or obligated under titles I, II, and III (other than section 203) of the Surface Transportation Assistance Act of 1982 after the date of the enactment of this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.

One major change is that WBEs are now presumptively included within the class of socially and economically disadvantaged individuals:

> The term "socially and economically disadvantaged individuals" has the meaning such term has under section 8(d) of the Small Business Act (15 U.S.C. 637(d)) and relevant subcontracting regulations promulgated pursuant thereto; *except that women shall be presumed to be socially and economically disadvantaged individuals for purposes of this subsection.*[189] (Emphasis added.)

It also calls on the states to annually survey and compile a list of DBEs and their location in the state. It also requires the Secretary of Transportation to establish minimum uniform criteria for certifications:

> The Secretary shall establish minimum uniform criteria for State governments to use in certifying whether a concern qualifies for purposes of this subsection. Such minimum uniform criteria shall include but not be limited to on-site visits, personal interviews, licenses, analysis of stock

ownership, listing of equipment, analysis of bonding capacity, listing of work completed, resume of principal owners, financial capacity, and type of work preferred.[190]

Amendments to the DOT regulations were filed to implement the changes.[191] As a result of these changes only one DBE goal is established for each project and no longer are separate goals specified for WBEs. In addition, the definition of "Hispanic" was expanded to comply with SBA definition to include Portuguese-Americans. DOT determined that it was already administering uniform standards for certification and added only a requirement that recipients compile and update their DBE/WBE directories annually.[192] The credit toward DBE goals for DBE materials and supplies was increased from 20 percent to 60 percent.[193]

Section 106(c)(2)(A) of STURAA specifically limits DBE certifications to socially and economically disadvantaged concerns with average annual gross receipts not to exceed $14 million over the preceding 3 fiscal years, adjusted by DOT for inflation.[194]

Certification Denials, Challenges and Appeals [1582-N49]

Two recent decisions of the Seventh Circuit raise the specter that certification can result in a property right that can be terminated only by affording procedural due process to the recipient. In the first of these cases, *Baja Contractors, Inc. v. City of Chicago,*[195] the city established an MBE certification process by Executive Order patterned after the USDOT regulations. The plaintiff, Baja, applied for certification listing the nature of its business as "concrete contractor." It was certified in the city's MBE directory as a "concrete contractor" even though neither the city's Executive Order nor the USDOT regulations called for certification categories or classifications.

Baja was working as an MBE subcontractor supplying concrete at a city airport project. Following a city investigation of the work, Baja was informed that it needed MBE certification as a "concrete supplier." The city rejected the new application based on further investigation from which it concluded that the qualifying minority was not running the operation. An appeal was filed with USDOT[196] and a lawsuit was filed in federal district court seeking civil rights damages under 42 U.S.C. Section 1983 and for injunctive relief. The district court granted a preliminary injunction based on findings that the initial certification as a concrete contractor included certification as a supplier, that the certification established a property right, and that there was a likelihood of success based on a denial of procedural due process.

On appeal the Circuit Court concluded the certification did result in a property right, but reversed the preliminary injunction on the basis that Baja had been afforded an adequate opportunity to submit additional information. The court held the injunction invalid despite its view that the city's review process was "hardly the model of a well-constructed administrative process. . . . 'What's painfully clear from the testimony is that the rules, if they can be called that, are changing on a continuing basis. They are sort of being made up as the defendants go along.' "[197]

Despite this inadequacy the appellate court concluded that with respect to whether Baja was operating as a front, the demands of due process had been satisfied and therefor it was not entitled to the preliminary injunction.

In a subsequent case, *Cornelius v. LaCroix,*[198] the same circuit, on a different set of facts, concluded that no property interest had resulted from a self-certifying MBE program. The sewerage district in the action originally required no formal MBE certification process. Instead it invited minority firms to register as purported MBEs, and this list was made available to prospective prime contractors with a disclaimer as to whether those listed were in fact qualified minority business enterprises.

Cornelius registered with the district as an MBE and served as a minority subcontractor on several projects until the district revised its certification policy " 'to reduce the potential for fraud and abuse.' "[199] Cornelius applied for certification based on his minority status and ownership of 51 percent of the business. The district denied the application, however, because he was the only minority member among the five board members, and because the principal business administrator was one of the white board members.

The district gave Cornelius a deadline to contest the findings without providing review procedures. Instead of seeking review he went directly to federal court alleging damages and deprivation of property without due process of law. The court concluded that unlike the *Baja* case no future certification was involved. At most it was a project-by-project certification program requiring each prime contractor to submit proof of MBE status. Unlike *Baja* Cornelius had not been certified for an indefinite timespan:

> Our conclusion is buttressed by this court's decision in *Baja Contractors.* The MBE program at issue in *Baja Contractors* involved a federally approved annual certification process. [Citation omitted.] The plaintiff was certified under that procedure; later that certification was rescinded. . . .
>
> By contrast, Cornelius was *never* certified by the District prior to the . . . denial of certification. It therefore had no legitimate entitlement to continued MBE status. Undoubtedly Cornelius desired MBE certification, but at that time there was no legal rule entitling it to certification, either indefinitely, as apparently is the case under present District policy, or for a fixed timespan, as in *Baja Contractors.*[200] (Emphasis in original.)

Contract Awards: Goals and Good Faith [1582-N52]

In *Glasgow, Inc. v. Federal Highway Administration,*[201] FHWA refused to concur in a Pennsylvania DOT award of contract resulting from the negotiated settlement of litigation with the low bidder regarding its good faith efforts. The Third Circuit concluded that this refusal to concur in award and participate in the $100 million interstate project was not an abuse of discretion.

The project called for a 12 percent DBE goal and the low bidder, Glasgow, achieved 7 percent DBE participation in its bid documents.

PennDOT's DBE Review Committee rejected Glasgow's good faith efforts as insufficient, and all the remaining bids were rejected for exceeding the Department's estimate. FHWA concurred in the rejection of all bids.

Glasgow challenged PennDOT's rejection of its bid in the Commonwealth Court. As a result of plaintiff's discovery efforts, PennDOT concluded that problems existed with its DBE process and that it had probably abused its discretion. By way of a settlement, PennDOT agreed not to oppose a preliminary injunction for an award to Glasgow if it would increase its DBE participation to 10.74 percent. Glasgow complied, and the preliminary injunction was entered. However, FHWA refused to concur in the award to protect the integrity of the bidding process. Glasgow then filed this action against FHWA contending that agency's refusal to concur was arbitrary and capricious. The appellate court ruled that FHWA had not abused its discretion:

> We cannot say that the FHWA's decision to withhold concurrence predicated on its conclusion that PennDOT's action in renegotiating the DBE goal tainted the bidding process was arbitrary. To the contrary, we think that the FHWA could have found that renegotiation of the DBE participation level damaged the integrity of the bidding process and was not consistent with "free, open and competitive bidding." *See* 23 C.F.R. § 635.104(a) (1987). As the FHWA suggests in its brief, DBE participation is a variable with which a contractor deals in preparing a bid as bidders increase their bids according to the percentage of minority participation announced as the goal for the contract. . . . Thus the FHWA could have reasonably concluded that in decreasing the DBE goal for Glasgow, PennDOT accorded it a definite economic benefit as well as an advantage over the other competitive bidders. . . .[202]

Significantly, the court also noted that the Commonwealth court had not determined in contested litigation that the low bid had been unlawfully rejected.

In a Louisiana federal district court action entitled *Nolan Contracting, Inc. v. Regional Transit,*[203] the lowest responsible bidder on a Regional Transit Authority project funded by UMTA was denied the opportunity to establish good faith efforts based on the terms of the specifications. RTA set an MBE goal of 30 percent and included the old conclusive presumption regulations issued during the Carter Administration.[204] These regulations provided that if a competitor offering a reasonable price meets the MBE goals, then it will be conclusively presumed that all competitors failing to meet the goal failed to exert reasonable efforts. The low bidder challenged the constitutionality of a 30 percent MBE requirement, which greatly exceeded the 10 percent UMTA minimum, as excessive and unreasonable, and the use of the conclusive presumption as arbitrary and unreasonable.

The court held otherwise. Even though the conclusive presumption was eliminated in 1981 the court noted that the current regulations do permit the recipient to "prescribe other requirements of equal or greater effectiveness in lieu of good faith efforts."[205] The regulations also authorize recipients to exceed the 10 percent federal minimum goal. Relying extensively on *Fullilove* and UMTA's approval of the higher level of MBE participation and use of the conclusive presumption, the court concluded that neither was "arbitrary, irrational or unreasonable."[206] The Fifth Circuit Court of Appeals affirmed on the basis of the district court's opinion.[207]

An earlier case, *S.A. Healy Co. v. Washington Metropolitan Transit Authority,*[208] involved an unsuccessful attempt to certify an MBE joint venturer after bid opening, questions of good faith compliance, and the right to substitute. Healy and Vanessa General Builders, a joint venture, submitted a low bid of $49.4 million on a federally funded subway project in the District of Columbia. The bid proposal indicated that the bidders would satisfy the 20 percent DBE goal by having Vanessa, a proposed MBE, perform 20 percent of the work.

Vanessa had not been previously certified, therefor the transit authority's Office of Civil Rights conducted a certification hearing and denied certification. The bidders offered to substitute five certified DBE subcontractors, which had been obtained prior to bid submission. As the result of a good faith hearing, however, the contracting officer determined Vanessa was not obligated by the joint venture agreement to perform any defined portion of the work; lacked adequate financial resources, bonding, and equipment; and concluded that Vanessa was to broker to others whatever work it would perform.

Vanessa individually, and Healy–Vanessa, as the joint venture, appealed their denials of certification to the Secretary of Transportation and filed this legal action challenging the good faith determination. While the case was pending, USDOT/UMTA affirmed the denial of the contract to Healy–Vanessa. On cross motions for summary judgment the court concluded that substitution was permissive and not mandatory under the terms of the bidding documents "in unusual situations upon submission by the successful bidder (Contractor) of a complete justification therefore."[209] In addition the court observed that a decision setting aside the ruling would provide the bidder an advantage over other bidders after bids were disclosed in being able to decide whether or not to pursue a substitution:

> For example, if Healy felt, after seeing other bids, that its bid was too low for its comfort, it would retain the practical option of forfeiting the contract by acquiescing in a challenge to Vanessa's qualifications and not attempting to substitute the subcontractors. . . .[210]

A Florida statute with a disadvantaged businesses program patterned after the federal DBE program was challenged by a low bidder denied two separate contracts in a consolidated action entitled *Capeletti Bros., Inc. v. Department of Transportation.*[211] The court affirmed the hearing officer's determination on both contracts. On one contract the hearing officer determined that because federal funds were not involved, the program lacked authority for WBE goals because the statute referred only to DBEs, and WBEs were not included, even though this may have been the result of a legislative oversight.

On the other contract the court did not reach the merits of the bidder's assertions regarding the WBE goal for failure to protest the plans and specifications within the requisite 72 hours of their receipt.

Contract Compliance: Substitutions and Sanctions [1582-N56]

In *G. Merlino Const. v. City of Seattle*[212] the city imposed a one-year debarment on the general contractor from bidding on city projects for violating a municipal code provision for underutilizing minority contractors. The Washington Supreme Court affirmed, determining *de novo* that the minority subcontractor did not perform a commercially useful function and was used merely as a prop for the prime contractor to do the work itself while appearing to comply with its minority and WBE requirements. The city was not required to follow the federal debarment regulations.[213]

Similarly, in *Adonizio Bros. v. D.O.T. Board of Review*[214] the contractor's bidding privileges were suspended for 90 days for failure of a listed DBE hauling subcontractor to perform a commercially useful function. The DBE owned only one truck. The rest were leased to him by the prime contractor who also procured the drivers and dispatched the trucks.

In reviewing the sanctions, the court stated that the burden of proof was on DOT to establish that a breach of the contract had occurred, but concluded that the evidence supported the conclusion that the contractor failed to abide by the terms of his agreement. The court found that the subcontractor was not "responsible for execution of a distinct element of the work" and did not participate "by actually performing, managing and supervising the work involved," as required by the contract. In addition, the court stated that, "The exercise of good faith or the lack of bad faith is irrelevant except perhaps for the penalty imposed."[215]

The plaintiff, a minority-owned paving contractor, in *Construction Associates, Inc. v. City of Des Moines*[216] filed suit against the city for civil rights violations and intentional interference with plaintiff's prospective business advantage. Plaintiff had submitted written subcontractor quotes for a city project awarded to a general contractor whose bid included subcontract work to be performed by a company owned by the wife of the general contractor.

Summary judgment in favor of the city was affirmed for failure to comply with the notice requirements of the Municipal Tort Claims Act. No contract existed with the plaintiff for this to be a contract claim, which in any event would also be time barred.

In *C. H. Barco Cont. v. State of Florida,*[217] Barco submitted low bids on three Florida road construction projects. All three specified DBE goals, but Barco listed zero percent participation on each bid and the awarding authority ruled the bids nonresponsive for failure to make good faith efforts to meet the goals.

Barco challenged the bid rejections asserting that the Department had not followed its prior applications and interpretations of good faith standards. For example, prior contracts had been awarded based on a 1 percent rule allowing a bidder to disregard DBE quotes that exceeded non-DBE quotations by 1 percent.

In a split decision the Florida court upheld the department's determination based on substantial evidence that revealed that Barco failed to solicit all certified DBEs performing the type of work to be subcontracted and that the low bidder in each instance relied on selectively solicited DBEs.

CONCLUSION

Despite 13 United States Supreme Court decisions spanning a time period of nearly 13 years, the constitutional limitations on affirmative action plans in competitively bid construction contracts are yet to be circumscribed. The failure of the Court to either invalidate all race-based preference programs as Justice Scalia advocates or apply the more traditional equal protection standard as advocated by Justice Brennan, leaves the Court with the task of analyzing each program on a case-by-case basis. This indicates that the arduous time-consuming judicial process will continue as it has in the past, allowing the lower courts to adopt what are clearly inconsistent results, based on their own interpretations of the Supreme Court decisions, with an occasional new Supreme Court opinion to rule a specific AAP "fair or foul."

A clear majority of the Court has agreed, however, on the application of the strict scrutiny standard of review for all race-based preference programs adopted by local and state governments. This standard calls for explicit findings if an AAP is to survive constitutional muster. But the *Croson* decision expressly left open the standard of review applicable to Congressional AAPs, and the viability of the plurality opinion in *Fullilove.*

The Supreme Court's latest *Metro Broadcasting* decision in the FCC cases unfortunately generated more confusion than clarity. The majority did reaffirm the *Fullilove* rationale, but in a noncompetitive bidding setting, if indeed this is considered to be a critical distinction. More significantly, Justice Brennan who wrote the *Metro* majority opinion has been replaced by Justice Souter whose legal views on affirmative action are as yet unexposed; and Justice Marshall who was part of the 5–4 majority has more recently been replaced by Justice Thomas.

Justice White, however, could still provide the pivotal key. He joined with Chief Justice Burger in the *Fullilove* plurality opinion, with Justice O'Connor in her *Croson* opinion, and with Justice Brennan in the *Metro* case. Significantly, since the *Fullilove* decision, Justice White has consistently expressed his views in opposition to the affirmative action plans except in the *FCC* decision. Uncharacteristic for him, he did not write separately to reveal the distinction he relied on in *Metro,* and whether it rested upon a different standard for review for federal AAPs.

The indications are that the Supreme Court is not prepared currently to write the final chapter on the constitutional limits on race-based bid preference programs or to clarify the conflicts among its opinions in *Fullilove, Croson,* and *Metro Broadcasting,* leaving the lower courts to fend for themselves. *Croson* is still good law for the proposition that state and municipal AAPs will be subject to strict judicial scrutiny, must

be narrowly tailored, and must be based on demonstrated acts of prior discrimination against the minority or group receiving the preference.

Metro Broadcasting came as a sudden surprise to most observers following the development of affirmative action law. On the surface it would appear to put to rest questions as to USDOT minority preference regulations authorized by Congress. Yet doubts persist. The High Court could limit the application of its *Metro* decision to race-based preference programs expressly created by congressional statute; or it could limit the decision to the rationale of the FCC minority preference program designed to promote diversity in First Amendment rights regarding ownership and control of the air waves to insure the dissemination of minority points of view to listeners or viewers, rather than as a remedial program to rectify for past acts of discrimination in the competition for public contracting opportunities.

Also, as a practical matter, the application of the intermediate level of review in the hands of a more conservative Court resulting from the departures of two of its most liberal members may become indistinguishable from strict scrutiny. This result can be seen where the dissenters in *Metro* vote to overturn that decision and are joined by other justices who are reluctant to overturn the decision but concur on the basis that the particular federal program fails even the lesser test.

In passing up recent opportunities to review conflicting rulings from the Circuit Courts, the High Court indicates that it has been presented with a dilemma, and probably the last thing the Court wants to see is a return to the pre-*Croson* days when divergent splits on the Court resulted often in three-way splits, six separate opinions, and plurality results. Certainly, Chief Justice Rehnquist would not wish to see this limited progress eroded.

Assuming that a majority of the Court is dissatisfied with the *Metro* holding, overruling the 5–4 decision is not easily accomplished, apart from the political implications that a reversal would have with a Congress that has already registered dissatisfaction with other cases viewed as hindering the ability of minorities and women to maintain lawsuits for discrimination in employment. If overruled, the Court must also deal with the *Fullilove* decision where Chief Justice Burger's plurality opinion gave a strong signal that the Supreme Court would defer to the Congress as a co-equal in this area of the law, and would not exact the same scrutiny that would be required of race-based preference programs created by lesser authorities.

Obviously, when the constitutionality of a congressional AAP next visits the Supreme Court the views of Justices White, Souter, and Thomas will become critical, as well as the always uncertain position of Justice Stevens who joined with the majority in *Metro* only on the basis that the particular facts of that case fell "within the extremely narrow category of governmental decisions for which racial or ethnic heritage may provide a rational basis for differential treatment."

[1] Metro Broadcasting, Inc. v. Federal Communications Commission, 497 U.S. ———, 110 S. Ct. 2997, 111 L.Ed.2d 445 (1990).

[2] 476 U.S. 267, 106 S. Ct. 1842 (1986).

[3] Initially the Union and two minority teachers filed in federal court, but following a trial the district court *sua sponte* concluded that it lacked jurisdiction. Rather than appeal, plaintiffs instituted a suit in state court.

[4] 476 U.S. at 286.

[5] *Id.* at 293.

[6] *Id.* at 295.

[7] *Id.* at 282–283.

[8] 478 U.S. 1016, 106 S. Ct. 3327, 90 L.Ed.2d 260 (1986).

[9] 779 F.2d 181 (4th Cir. 1985).

[10] 822 F.2d 1355 (4th Cir. 1987).

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

[12] 488 U.S. at 520.

[13] See, Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia, 735 F.Supp. 1274, 1288–1292 (E.D. Pa. 1990), for an extensive discussion of Justice O'Connor's opinion by Chief Judge Bechtle.

[14] 488 U.S. 480.

[15] 448 U.S. 448, 100 S. Ct. 2758, 65 L.Ed.2d 902 (1980).

[16] 488 U.S. at 486.

[17] *Id.* at 491.

[18] *Id.* at 521–522.

[19] *Id.* at 518.

[20] *Id.* at 494.

[21] *Id.* at 552.

[22] *Id.* at 494–495.

[23] *Id.* at 514.

[24] 429 U.S. 190, 211–212 (1976) (Stevens, J., concurring).

[25] 488 U.S. at 521, quoting from A. Bickel, *The Morality of Consent* 133 (1975).

[26] 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

[27] 488 U.S. at 521.

[28] *Id.* at 524.

[29] *Id.* at 518–519.

[30] *Id.* at 498.

[31] *Id.* at 500.

[32] *Id.* at 499.

[33] *Id.* at 505.

[34] *Id.* at 506.

[35] *Id.* at 508.

[36] *Id.* at 509–510.

[37] *Id.* at 510.

[38] Brief of Amicus Curia of the National League of Cities *et al.* in *Croson*, Appendix I.

[39] 98 YALE L.J. 1711 (1989).

[40] *Id.*

[41] C. Fried, *Affirmative Action After City of Richmond v. J.A. Croson Co.: A Response to the Scholars' Statement*, 99 YALE L.J. 155, 160–161 (1989, footnotes omitted).

[42] *Scholars' Reply to Professor Fried*, 99 YALE L.J. 163 (1989).

[43] 825 F.2d 324 (11th Cir. 1987).

[44] 873 F.2d 347 (D.C. Cir. 1989).

[45] 876 F.2d 902 (D.C. Cir. 1989).

[46] Metro Broadcasting, Inc. v. Federal Communications Commission, 497 U.S. ———, 110 S. Ct. 2997, 111 L.Ed.2d 445 (1990).

[47] 110 S. Ct. at 3008–3009.

[48] *Id.* at 3009.

[49] *Id.*

[50] *Id.* at 3028.

[51] *Id.* at 3030.

[52] *Id.* at 3032–3033.

[53] 163 U.S. 537 (1896).

[54] 110 S. Ct. at 3044.

[55] *Id.*

[56] *Id.* at 3045.

[57] Professor Devins, in a comment *Metro Broadcasting, Inc. v. FCC: Requiem for a Heavyweight*, 69 TEX. L. REV. 125 (n. 6), attempts to explain Justice White's apparent flip-flop and his tendency to support federal action.

[58] Devins, *Metro Broadcasting, Inc. v. FCC: Requiem for a Heavyweight*, 69 TEX. L. REV. 125, 128 (1990).

[59] Pub. L. No. 97-424 (January 6, 1983).

[60] Pub. L. No. 100-17 (April 2, 1987).

[61] 478 U.S. 385; 106 S. Ct. 3000; 92 L.Ed.2d 315 (1986).

[62] City of Richmond v. Croson, 488 U.S. 469, 524.

[63] 478 U.S. at 407.

[64] *Id.* at 408.

[65] *Id.* at 414.

[66] Local 28 of the Sheet Metal Workers' International Association v. Equal Employment Opportunity Commission, 478 U.S. 421, 106 S. Ct. 3019, 92 L.Ed.2d 344 (1986).

[67] 42 U.S.C. § 2000e-5(g).

[68] 478 U.S. at 463.
[69] *Id.* at 475–476.
[70] *Id.* at 480.
[71] *Id.* at 484.
[72] *Id.* at 485.
[73] *Id.* at 488–489.
[74] *Id.* at 497–498.
[75] *Id.* at 499.
[76] *Id.* at 500.
[77] *Id.* at 488.
[78] Local Number 93, International Association of Firefighters v. City of Cleveland, 478 U.S. 501, 106 S. Ct. 3063, 92 L.Ed.2d 405 (1986).
[79] 478 U.S. at 515.
[80] *Id.* at 519.
[81] *Id.* at 530–531.
[82] *Id.* at 532.
[83] *Id.* at 533.
[84] 480 U.S. 149, 107 S. Ct. 1053, 94 L.Ed.2d 203 (1987).
[85] NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974).
[86] 480 U.S. at 166–167.
[87] *Id.* at 170–171.
[88] *Id.* at 171.
[89] *Id.* at 185.
[90] *Id.* at 190.
[91] 402 U.S. 1 (1971).
[92] 480 U.S. at 191.
[93] *Id.* at 189.
[94] *Id.* at 187–188.
[95] *Id.* at 189.
[96] *Id.* at 196.
[97] *Id.* at 196–197.
[98] *Id.* at 199–200.
[99] *Id.* at 198–199.
[100] Johnson v. Transportation Agency, Santa Clara County, California, 480 U.S. 616, 107 S. Ct. 1442, 94 L.Ed.2d 615 (1987).
[101] 480 U.S. at 626–627.
[102] *Id.* at 632.
[103] *Id.* at 627 n. 6.
[104] *Id.* at 638.
[105] *Id.* at 644–645.
[106] *Id.* at 648–649.
[107] *Id.* at 652–653.
[108] *Id.* at 656.
[109] *Id.* at 659.
[110] *Id.* at 668.
[111] *Id.* at 669.
[112] *Id.* at 675–676.
[113] *Id.* at 677.
[114] *Id.* at 657.
[115] 490 U.S. 755, 109 S. Ct. 2180, 104 L.Ed.2d 835 (1989).
[116] 104 L.Ed.2d at 849.
[117] *Id.* at 848–850.
[118] 920 F.2d 752 (11th Cir. 1991) *Cert. Den.* 59 U.S.L.W. 3810 (June 3, 1991).
[119] *Id.* at 766.
[120] 921 F.2d 1190 (11th Cir. 1991) *Cert. Den.* 59 U.S.L.W. 3792 (May 28, 1991).
[121] 922 F.2d 419 (7th Cir. 1991) *Cert. Den.* 59 U.S.L.W. 3810 (June 3, 1991).
[122] The Circuit Court did rule that the contractor had no standing to challenge a subsequent MBE county resolution establishing a bid preference program based on race. But also ruled that there was standing to challenge denial of the contract.
[123] S. J. Groves & Sons Co. v. Fulton County, 920 F.2d 752, 765 (11th Cir. 1991) *Cert. Den.* 59 U.S.L.W. 3810 (June 3, 1991).
[124] *Id.* at 766.
[125] *Id.* at 767.
[126] 834 F.2d 583 (6th Cir. 1987).
[127] 489 U.S. 1061, 109 S. Ct. 2238, 103 L.Ed.2d 804 (1989).
[128] Milwaukee County Pavers Association v. Fiedler, 731 F. Supp. 1395 (W.D. Wis. 1990). Milwaukee Pavers I, 707 F. Supp. 1016 (W.D. Wis. 1989) and Milwaukee Pavers II, 710 F. Supp. 1532 (W.D. Wis. 1989), concern the issuance of a preliminary injunction and its modification discussed *infra* under the new heading entitled "Preliminary Injunctions."
[129] Pub. L. No. 100-17, April 2, 1987.
[130] Milwaukee County Pavers Assn. v. Fiedler, 922 F.2d 419 (7th Cir. 1991).
[131] 731 F. Supp. at 1413.
[132] *Id.* at 1414–1415.
[133] *Id.* at 1415.
[134] *Id.* at 1409.
[135] *Id.* at 1410.
[136] See note 128, *supra.*
[137] Milwaukee County Pavers Assn. v. Fiedler, 922 F.2d 419, 423 (7th Cir. 1991).
[138] *Id.* at 423–424.
[139] 813 F.2d 922 (9th Cir. 1987).
[140] *Id.* at 930.
[141] *Id.* at 941–942.
[142] *Id.* at 942.
[143] 729 F. Supp. 734 (W.D. Wash. 1989).
[144] Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1991).
[145] *Id.* at 920.
[146] *Id.* at 931.
[147] Milwaukee County Pavers Association v. Fiedler, 707 F. Supp. 1016 (W.D. Wis. 1989).
[148] *Id.* at 1018.
[149] *Id.* at 1023.
[150] *Id.* at 1026.
[151] 735 F. Supp. 1274, 1293 (E.D. Pa. 1990).
[152] 707 F. Supp. 1016, 1033–1034 (W.D. Wis. 1989).
[153] Milwaukee County Pavers Association v. Fiedler, 710 F. Supp. 1532 (W.D. Wis. 1989).
[154] *Id.* at 1539–1540.
[155] *Id.* at 1540 n. 3.
[156] *Id.* at 1544 n. 6.
[157] 896 F.2d 1283 (11th Cir. 1990).
[158] *Id.* at 1286.
[159] 384 N.W.2d 663 (N.D. 1986).
[160] 813 F.2d 922 (9th Cir. 1987).
[161] *Associated General Contractors of California, Inc. v. City and County of San Francisco,* 748 F. Supp. 1443 (N.D. Cal. 1990).
[162] *Id.* at 1453.
[163] Associated General Contractors of California, Inc. v. Coalition for Economic Equity, 950 F.2d 1401 (9th Cir. 1991).
[164] *Id.*
[165] 738 F. Supp. 1415 (S.D. Fla. 1990).
[166] *Id.* at 1416.
[167] 802 F.2d 213 (6th Cir. 1986).
[168] *Id.* at 216.
[169] 908 F.2d 908 (11th Cir. 1990).
[170] *Id.* at 917.
[171] *Id.*
[172] 376 S.E.2d 662 (Ga. 1989).
[173] Georgia Branch v. City of Atlanta, 321 S.E.2d 325 (Ga. 1984).
[174] 376 S.E.2d at 663 n. 1.
[175] *Id.* at 667.
[176] 725 F. Supp. 1349 (E.D. Pa. 1989).
[177] *Id.* at 1363.
[178] 637 F. Supp. 843 (D. Kan. 1986).
[179] *Id.* at 848.
[180] *Id.*
[181] 813 F.2d 944 (9th Cir. 1987).
[182] *Id.* at 943.
[183] *Id.*
[184] *Id.* at 944.
[185] 682 F. Supp. 1067 (N.D. Cal. 1988).
[186] *Id.* at 1072 n. 4.
[187] For a good summary of the USDOT DBE regulations, see S.J. Groves & Sons Co. v. Fulton County, 696 F. Supp. 1480, 1482–1483 (N.D. Ga. 1987) *Rev'd* 920 F.2d 752 (11th Cir. 1991).
[188] Pub. L. No. 100-17 (April 2, 1987), § 106(c)(1).
[189] *Id.*, § 106(c)(2)(B).
[190] *Id.*, § 106(c)(4).
[191] 52 F.R. 39225–39231 (October 21, 1987).
[192] 49 C.F.R. Part 23, Subpart D, § 23.45 (October 21, 1987).
[193] *Id.* § 23.47.
[194] *Id.* § 23.62.
[195] 830 F.2d 667 (7th Cir. 1987).
[196] Baja appealed to USDOT apparently to protect its certification with regard to federally financed city projects. Federal regulations do not stay or enjoin a decertification and no ruling by USDOT had been issued on the appeal at the time of this opinion. See, 830 F.2d at 675 n. 7.
[197] *Id.* at 679.
[198] 838 F.2d 207 (7th Cir. 1988).
[199] *Id.* at 209.
[200] *Id.* at 211–212.
[201] 843 F.2d 130 (3rd Cir. 1988).
[202] *Id.* at 138.
[203] 651 F. Supp. 23 (E.D.La. 1986).
[204] 49 C.F.R. 23.45(i) (1980).
[205] 49 C.F.R. 23.45(h)(2)(i) (1985).
[206] 651 F. Supp. at 28.
[207] Nolan Contracting, Inc. v. Regional Transit, 809 F.2d 1053 (5th Cir. 1987).
[208] 615 F. Supp. 1132 (D.C.D.C. 1985).
[209] *Id.* at 1137.
[210] *Id.* at 1138.
[211] 499 So.2d 855 (Fla. App. 1 Dist. 1986).
[212] 741 P.2d 34 (Wash. 1987).
[213] 49 C.F.R. §§ 29.41–.55.
[214] 529 A.2d 59 (Pa. Cmwlth. 1987).
[215] *Id.* at 61.
[216] 375 N.W.2d 273 (Ia. App. 1985).
[217] 483 So.2d 796 (Fla. App. 1 Dist. 1986).

APPENDIX

UNITED STATES SUPREME COURT
AFFIRMATIVE ACTION CASES

CASE: JUSTICE	BAKKE	WEBER	FULLI-LOVE	STOTTS	WYGANT	FRIDAY	SHEET METAL	CLEVE-LAND	PARADISE	JOHNSON	CROSON	WILKS	FCC CASES	TOTAL
BRENNAN	+	+	+	+	+	+	+	+	+	+	+	+	+	13+
BLACKMUN	+	+	+	+	+	+	+	+	+	+	+	+	+	13+
MARSHALL	+	+	+	+	+	+	+	+	+	+	+	+	+	13+
STEVENS	-	0	-	-	+	+	+	+	+	+	-	+	+	8+
POWELL (KENNEDY)	-	0	+	-	-	-	+	+	+	+	(-)	(-)	(-)	5+
WHITE	+	+	+	-	-	-	-	-	-	-	-	-	+	4+
STEWART (O'CONNOR)	-	+	-	(-)	(-)	(-)	(-)	(-)	(-)	(+)	(-)	(-)	(-)	2+
BURGER (SCALIA)	-	-	+	-	-	-	-	-	(-)	(-)	(-)	(-)	(-)	1+
REHNQUIST	-	-	-	-	-	-	-	-	-	-	-	-	-	0+
JUDGEMENT	-	+	+	-	-	-	+	+	+	+	-	-	+	7+
NO. OPINIONS	5	4	5	4	5	4	5	4	5	5	6	2	4	58
DATE DECIDED	6/28/78	6/27/79	7/2/80	6/12/84	5/19/86	7/1/86	7/2/86	7/2/86	2/25/87	3/25/87	1/23/89	6/12/89	6/27/90	

\+ Vote to uphold the affirmative action plan
\- Vote against the affirmative action plan
0 Did not participate in the decision

ACKNOWLEDGMENTS

This legal study was performed under the overall guidance of NCHRP Project Committee SP20-6. The Committee is chaired by Delbert W. Johnson, Office of the Attorney General of Washington. Members are: Ruth J. Anders, Melbourne, Florida (formerly with Federal Highway Administration); Watson C. Arnold, Austin, Texas (formerly with Texas Office of the Attorney General); James M. Brown, George Washington University; Robert F. Carlson, Carmichael, California (formerly with California Department of Transportation); Kingsley T. Hoegstedt, Carmel, California; Michael E. Libonati, Temple University School of Law; Spencer A. Manthorpe, Pennsylvania Department of Transportation; Walter A. McFarlane, Office of the Governor, Commonwealth of Virginia; Joseph M. Montano, Denver, Colorado (formerly with Colorado Department of Highways); Lynn B. Obernyer, Colorado Department of Law; Jean G. Rogers, Federal Highway Administration; James S. Thiel, Wisconsin Department of Transportation; and Richard L. Tiemeyer, Missouri Highway and Transportation Commission. Edward V.A. Kussy provides liaison with the Federal Highway Administration, and Crawford F. Jencks represents the NCHRP Staff.

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