Washington and Lee Law Review

Volume 45 | Issue 2 Article 14

Spring 3-1-1988

V. Constitutional Law

V. CONSTITUTIONAL LAW

J.A. Croson Co. v. City of Richmond: *Nonfederal Government Entities May Use Racial Classifications Only to Remedy Prior Government Discrimination*

The fourteenth amendment of the United States Constitution prohibits states from denying any person the equal protection of the laws.[1] The United States Supreme Court has found that racial classifications have denied members of minority groups the equal protection of the laws.[2] To overcome the effects of prior discrimination that has deprived minorities of the equal protection of the laws, public and private entities voluntarily have implemented affirmative action programs.[3] Affirmative action programs, however, often grant preferences to minorities that impair the competitive position of nonminorities.[4] Courts, therefore, have interpreted the equal protection clause to require that racial preferences in affirmative action programs serve a remedial purpose.[5] To comport with the equal protection clause, an

---

1. U.S. CONST. amend. XIV, § 1.

2. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493-95 (1954) (rejecting, in context of public education, application of separate but equal doctrine). Prior to *Brown v. Board of Educ.*, courts approved of policies and laws segregating members of different races, provided that affected persons received substantially equal facilities. *Id.* at 488. In *Brown*, however, the Supreme Court rejected the notion that separate educational facilities could be substantially equal. *Id.* at 494-95.

3. *See, e.g.*, United Steel Workers v. Weber, 443 U.S. 193, 197 (1979) (setting aside for minority participation one-half of private employer's positions in craft training program); Associated Gen. Contractors v. Metropolitan Dade County, Fla., 723 F.2d 846, 849 (11th Cir.) (setting aside percentage of county construction project for exclusive bidding by minority firms), *cert. denied* 469 U.S. 871 (1984); Ohio Contractors Assoc. v. Keip, 713 F.2d 167, 169 (6th Cir. 1983) (requiring prime contractors to set aside percentage of contracts that state entered for exclusive bidding by minority firms); Detroit Police Officers' Assoc. v. Young, 608 F.2d 671, 681 (6th Cir. 1979) (accelerating eligibility of black patrolmen for promotion to sergeant ahead of eligibility of white patrolmen for promotion), *cert. denied* 452 U.S. 938 (1981).

4. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 270-71 (1986) (plurality opinion) (describing collective bargaining agreement that provided for school district to lay off nonminority teachers with greater seniority than minority teachers whom school district retained); Fullilove v. Klutznick, 448 U.S. 448, 514 (1980) (Powell, J., concurring) (acknowledging that 10% set aside placed burden on nonminority contractors); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 289 (1977) (opinion of Powell, J.)(stating that medical school admissions precluded white applicants from competing for 16 of 100 positions for entering class).

5. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986) (plurality opinion) (stating that court must determine whether race-based action serves to remedy prior discrimination); Fullilove v. Klutznick, 448 U.S. 448, 480 (1980) (plurality opinion) (acknowledging Congress' power to use racial preferences to remedy prior discrimination); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 301-02 (1977) (opinion of Powell, J.) (discussing racial preferences as judicially imposed remedies for prior discrimination); Associated Gen. Contractors, Inc. v. City of San Francisco, 813 F.2d 922, 930 (9th Cir. 1986) (limiting use of racial preferences by local government to remedying governmental discrimination); J. Edinger & Son, Inc. v. City of Louisville, Ky., 802 F.2d 213, 216 (6th Cir. 1987) (requiring proof of prior

affirmative action program must fulfill two requirements.[6] The Supreme Court requires, first, that a public entity support an affirmative action program with a finding of prior discrimination.[7] The Supreme Court requires, second, that a public entity limit the scope of racial preferences to remedying the effects of prior discrimination.[8] In *J.A. Croson Co. v. City of Richmond*,[9] the United States Court of Appeals for the Fourth Circuit recently considered whether a Richmond city ordinance that set aside thirty percent of the dollar amount of city construction contracts for minority owned subcontracting firms violated the equal protection clause.[10]

In *Croson* the Richmond City Council (Council) adopted the Minority Business Utilization Plan (Richmond Plan) after a public hearing.[11] The Richmond Plan required contractors who wished to bid on Richmond construction contracts to subcontract thirty percent of the dollar amount of all construction contracts to minority business enterprises (MBE's).[12] To

---

discrimination to justify use of racial preference); Associated Gen. Contractors v. Metropolitan Dade County, Fla. 723 F.2d 846, 851-52 (11th Cir. 1984) (requiring that racial preference serve to remedy prior discrimination).

6. *Wygant*, 476 U.S. at 274 (plurality opinion); *id.* at 284-85 (O'Connor, J., concurring). In *Wygant* the United States Supreme Court recognized that the strict scrutiny standard of review requires a public entity to show that the challenged action pursues an objective that a compelling governmental interest justifies and that the effect of the challenged action does not exceed the compelling governmental interest. *Id.* at 274 (plurality opinion); *id.* at 284-85 (O'Connor, J., concurring). *But cf. id.* at 301-02 (Marshall, J., dissenting) (stating that racial classifications that substantially are related to achieving important governmental objectives satisfy strict scrutiny review).

7. *Id.* at 277 (plurality opinion); *see id.* at 292 (O'Connor, J., concurring) (stating that public entity must have firm basis to conclude that affirmative action is appropriate). The Supreme Court in *Wygant* noted that unless a public entity provides findings to show that the public entity previously discriminated against a minority group, courts cannot ascertain whether a racial classification serves a remedial objective. *Id.* at 277-78 (plurality opinion). Before the Supreme Court decided *Wygant*, courts had permitted public entities to implement racial preferences upon findings which showed that unidentified parties had discriminated against minorities. *See Fullilove*, 448 U.S. at 477-78 (permitting Congress to use racial preference to prevent perpetuation of effects of prior general discrimination); Associated Gen. Contractors, Inc. v. Metropolitan Dade County, Fla., 723 F.2d 846, 853 (11th Cir. 1984) (stating that findings of discrimination not traceable to county actions justified county's adoption of racial preference).

8. *Wygant*, 476 U.S. at 279-80 (plurality opinion).

9. 822 F.2d 1355 (4th Cir. 1987).

10. J.A. Croson Co. v. City of Richmond, 822 F.2d 1355, 1356 (4th Cir. 1987).

11. *Id.* at 1362-63 (Sprouse, J., dissenting). In *Croson* the Council heard public statements responding to the proposed Richmond Plan at a public hearing held on April 11, 1983. *Id.* At the hearing, five representatives from contractors' and estimators' associations made statements opposing the Richmond Plan. *Id.* at 1363 n. 6. Four community members, however, spoke in favor of the Richmond Plan. *Id.* After hearing testimony, the Council discussed a nationwide background of remedial programs and heard assertions that discrimination existed in Richmond's public contracting. *Id.* at 1363 & n. 7. The Council also reviewed statistics showing that although MBE's received less than one percent of the dollar amount of city contracting in a five-year period, minorities comprised fifty percent of the Richmond population. *Id.* at 1363.

12. *Id.* at 1356.

enforce the MBE requirement, the Richmond Plan required all bidders on city construction contracts to submit with the contract bids a UP-1 form to the Richmond Department of General Services (General Services).[13] General Services would deem contractors who failed to submit the UP-1 form within ten days after the bid opening date to be in noncompliance with the Richmond Plan.[14] If General Services found that no other bidder for the contract could comply with the MBE requirement, however, General Services could approve a waiver of the MBE requirement.[15] For General Services to grant a waiver, the Richmond Plan required a contractor who could not comply with the MBE requirement to submit a request for waiver within ten days after the date on which Richmond opened the bids.[16]

On September 30, 1983, J.A. Croson Company (Croson) received an invitation to bid on a contract to install new sanitary fixtures in the Richmond city jail.[17] To comply with the Richmond Plan, Croson attempted to locate an MBE, but failed to find an MBE to participate in the contract.[18] On October 12 Croson submitted a bid to General Services.[19] On October 13 Richmond officials opened the sealed bids and found that the Croson bid included a non-MBE quote for the plumbing fixtures.[20] On October 19

---

13. Richmond, Va., Ordinance No. 83-69-59 (April 11, 1983) (revised July 12, 1983). In *Croson* the Richmond Plan required the bidder to list on the UP-1 form the names of MBE's that the prime contractor intended to employ and the ownership percentage of those MBE's. *Id.* The Richmond Plan also required the prime contractor to state on the UP-1 form the dollar amount and percentage of the contract awarded to each MBE. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* In *Croson*, to justify a waiver of the MBE requirement, the Richmond Plan required a contractor to show that the contractor had made every feasible attempt to comply with the MBE requirement and that sufficient, relevant, qualified MBE's to meet the thirty percent set aside were unavailable or unwilling to participate. *Id.* The Richmond Plan also required the waiver request to indicate the efforts that the contractor had made to locate an MBE, the names of firms and organizations that the contractor had contacted, and the reasons why MBE's had declined. *Id.*

17. J.A. Croson Co. v. City of Richmond, 779 F.2d 181, 183 (4th Cir. 1985), *vacated*, 106 S. Ct. 3327 (1986).

18. *Id.* In *Croson* Croson's regional manager in Richmond, Eugene Bonn, determined that Croson could meet the MBE requirement for the Richmond city jail project only by subcontracting the supply of the plumbing fixtures to an MBE. *Id.* Bonn telephoned five or six MBE's on September 30 to obtain price quotes on the fixtures. *Id.* Bonn claimed also to have contacted Continental Metal Hose (Continental), the only MBE located in Richmond, on September 30. *Id.* Melvin Brown, the president of Continental, claimed Bonn did not contact Continental until October 12. *Id.* On October 12, Bonn again contacted several MBE's, including Continental. *Id.* Brown subsequently informed Bonn that Continental wished to participate in the project. *Id.*

Continental contacted two suppliers of the fixtures needed for the project, but failed to obtain any price quotes. *Id.* One supplier refused to quote to Continental because the supplier already had provided a quote to Croson. *Id.* The other supplier refused to quote to Continental until Continental underwent a credit check, which would take thirty days. *Id.* Continental relayed these problems to Bonn on October 13. *Id.* At that time, Bonn encouraged Continental to continue to seek a supplier for the plumbing fixtures. *Id.*

19. *Id.*

20. *See id.* (noting that Croson submitted only bid on Richmond city jail project).

Croson submitted to General Services a request for waiver of the MBE requirement.[21] Richmond later informed Croson that because Continental Metal Hose (Continental), an MBE, could quote on construction materials for the project, Richmond had withheld approval of the request for waiver.[22] Croson, consequently, submitted a second waiver request and sought to raise the contract price by $7,663.16 to cover the added expense of awarding the subcontract to Continental.[23] Richmond, however, refused to raise the contract price and denied the second request for waiver.[24] On November 18 Richmond informed Croson of Richmond's intent to rebid the Richmond city jail project and invited Croson to submit a new bid.[25]

Croson, consequently, filed suit in the United States District Court for the Eastern District of Virginia.[26] Croson alleged, among other things, that the MBE requirement of the Richmond Plan violated the equal protection clause of the fourteenth amendment.[27] The district court, however, upheld the Richmond Plan.[28] Croson unsuccessfully appealed the district court's decision to the Fourth Circuit.[29] The Supreme Court, however, vacated the

---

21. *Id.* In *Croson* the request for waiver of the MBE requirement characterized Continental as unqualified and stated that other MBE's were nonresponsive or unable to quote a price for the plumbing fixtures. *Id.*

22. *Id.* In *Croson* Continental on October 27 contacted another plumbing fixture supplier who was willing to quote on the fixtures to Continental. *Id.* On the same day, Continental informed General Services that Continental could provide the fixtures. *Id.* Richmond, subsequently, informed Croson that the Human Relations Commission withheld approval of Croson's request for waiver of the MBE requirement. *Id.* At that time, Richmond gave Croson ten days to submit a UP-1 form complying with the set aside provision and warned that if Croson did not submit a UP-1 form demonstrating compliance, Richmond would consider Croson's bid nonresponsive. *Id.* at 183-84.

23. *Id.* at 184.

24. *Id.*

25. *Id.* In *Croson* Croson requested General Services to review Richmond's decision to rebid the project. *Id.* General Services denied review of Richmond's decision to rebid the project because the Richmond City Code only provided review of decisions to award a contract to another party, and not of decisions to rebid a project. *Id.* at 184 & n. 5.

26. *Id.* In *Croson* Croson initially filed suit in the Circuit Court of the City of Richmond. *Id.* at 182, n. 1. The suit subsequently was removed to the District Court for the Eastern District of Virginia. *Id.*

27. *Id.* at 184.

28. *Id.*

29. *Id.* at 183-94. On appeal to the Fourth Circuit in *Croson*, Croson argued that Richmond had no power to enact the Richmond Plan under Virginia state law, that the Richmond Plan was contrary to Virginia public policy, that the Richmond Plan violated Art. I, § 11 of the Virginia Constitution, and that the Richmond Plan violated the equal protection clause of the fourteenth amendment. *Id.* at 184. The Fourth Circuit found, however, that because the Richmond Plan would increase the future number of subcontractors available and, consequently, facilitate competitive principles, Virginia law permitted the Council to enact the Richmond Plan. *Id.* at 185. Treating the equal protection provision in the Virginia Constitution as equivalent to the equal protection clause of the fourteenth amendment, the Fourth Circuit also found that the Council made adequate findings to support the constitutionality of the Richmond Plan. *Id.* at 188-90. The Fourth Circuit noted that the Council determined that the Richmond record of contracting with MBE's was part of a national problem. *Id.* at 189. The

Fourth Circuit's decision and remanded the case to the Fourth Circuit[30] for reconsideration in light of the Supreme Court's decision in *Wygant v. Jackson Board of Education*.[31]

On remand, the Fourth Circuit held that the MBE requirement violated the equal protection clause.[32] The Fourth Circuit recognized that to withstand constitutional attack, racial preferences must serve a compelling governmental interest.[33] The *Croson* court noted that findings of prior societal discrimination do not demonstrate a compelling governmental interest.[34] The Fourth Circuit required, instead, that to show a compelling governmental interest, findings must show that the governmental unit that has adopted a racial preference previously discriminated against the group that a racial preference will benefit.[35] The *Croson* court found that the Council relied upon statistics that did not show prior discrimination by the appropriate governmental unit.[36] The Fourth Circuit concluded, therefore, that the factual basis on which the Council relied did not demonstrate a compelling governmental interest to remedy the effects of prior discrimination.[37] The Fourth Circuit found, further, that the Council's record supporting the Richmond Plan was inadequate.[38] The *Croson* court stated, however, that the Council did not need to engage in the extensive factfinding that a federal district court would undertake.[39]

Fourth Circuit found, further, that the statistical disparity between the minority population in Richmond and the percentage of contracting awarded to MBE's supported the Council's determination that Richmond shared in the national problems faced by MBE contractors. *Id.* at 190.

30. J.A. Croson Co. v. City of Richmond, 106 S. Ct. 3327 (1986) (mem.).

31. 106 S. Ct. 1342 (1986); *see also infra* notes 45-52 and accompanying text (discussing *Wygant*).

32. J.A. Croson Co. v. City of Richmond, 822 F.2d 1355, 1357 (4th Cir. 1987).

33. *Id.*

34. *Id.* at 1358.

35. *Id.*

36. *See id.* at 1359 (stating that statistics should compare percentage of available minority contractors to percentage of contracting dollars awarded to minority contractors). In *Croson* the Fourth Circuit concluded that statements made at the Council hearing were too general to support an inference that Richmond formerly had discriminated against minority contractors. *Id.* at 1358. The *Croson* court noted, also, that the Council never heard any allegation that Richmond previously had passed over minority firms submitting low bids. *Id.* at 1359. The Fourth Circuit stated, further, that the Council's reliance on general population statistics suggested that the Council enacted the Richmond Plan for political reasons, rather than for remedial purposes. *Id.* at 1358-59.

37. *See id.* at 1359 (stating that Council made no showing of prior discrimination). The *Croson* court suggested that in the construction industry, a disparity between the dollar percentage of contracts awarded to minority contractors and the percentage of minority contractors available, taking into account the contractors' specialties and experience, might show prior discrimination. *Id.*

38. *Id.* at 1360. Although the Fourth Circuit in *Croson* did not formulate a concise standard to judge whether a given factual record showed a compelling governmental interest, the Fourth Circuit compared the factual record on which the Council acted to the factual records supporting other remedial programs employing racial preferences. *Id.* The Fourth Circuit found that the Council's factual record was grossly deficient. *Id.*

39. *Id.*

After determining that the Council did not rely on an adequate factual basis, the Fourth Circuit ruled that the Council did not tailor the Richmond Plan to remedial goals.[40] The *Croson* court found that the thirty percent figure for the set asides was arbitrary and unnecessarily impeded the rights of non-minorities.[41] The Fourth Circuit decided, also, that because the Richmond Plan classified as MBE's certain minority groups about which the Council had made no findings of prior discrimination, the definition of the term "MBE" in the Richmond Plan was overbroad.[42] The Fourth Circuit found that although certain provisions of the Richmond Plan limited intrusion on the rights of innocent parties, the provisions did not overcome the Richmond Plan's deficiencies.[43]

In holding that a finding of prior discrimination must support implementing a racial preference and that a public entity must tailor the racial preference to serve remedial purposes, the Fourth Circuit relied on the reasoning of the United States Supreme Court in *Wygant v. Jackson Board of Education*.[44] In *Wygant* the Supreme Court considered whether a layoff provision in a collective bargaining agreement between the Jackson Board of Education (Board) and the Jackson Education Association violated the equal protection clause.[45] The collective bargaining agreement provided that to retain a certain percentage of minority teachers, the Board would lay off nonminority teachers who had greater seniority than minority teachers.[46] A plurality of the Supreme Court recognized that racial classifications are inherently suspect and, consequently, trigger constitutional review under a strict scrutiny standard.[47] Applying the strict scrutiny standard, the *Wygant* plurality stated, first, that prior societal discrimination does not provide a

---

40. *Id.* at 1360.

41. *Id.* at 1360-61. The *Croson* court noted that subcontracting percentages might not always present a single subcontract to meet the 30% figure. *Id.* The Fourth Circuit concluded, therefore, that the Richmond Plan placed a greater burden on nonminority subcontractors than the 30% figure indicated. *Id.* The subcontract at issue in *Croson* represented 75% of the dollar amount of the contract. *Id.*

42. *Id.*

43. *Id.* The *Croson* court stated that the Richmond Plan's limited duration of five years and a provision for waiving the MBE requirement narrowed the Richmond Plan's scope. *Id.*

44. *Id.* at 1357-58; *see* Wygant v. Jackson Board of Educ., 476 U.S. 267, 274 (refusing to recognize a compelling governmental interest in remedying societal discrimination). The *Croson* court relied on the plurality opinion in *Wygant*. *Croson*, 822 F.2d at 1357, n. 1. The plurality opinion in *Wygant* garnered the votes of four justices. *Wygant*, 476 U.S. at 269. In a separate opinion, Justice White concurred in the judgment of the *Wygant* plurality. *Id.* at 294-95; *see infra* notes 45-52 and accompanying text (discussing fully *Wygant*).

45. *Wygant*, 476 U.S. at 273. In *Wygant* the collective bargaining agreement provided that unless a layoff based on seniority would raise the percentage of minorities laid off above the percentage of minority teachers that the district employed at the time of the layoff, the school district would lay off teachers according to seniority. *Id.* at 270-71. When the school district laid off nonminority teachers instead of minority teachers with less seniority, the nonminority teachers challenged the collective bargaining agreement on constitutional grounds. *Id.* at 271.

46. *Id.* at 270-71.

47. *Id.* at 273-74.

sufficient basis to demonstrate a compelling governmental interest in remedying prior discrimination.[48] The *Wygant* plurality ruled, instead, that to justify a racial preference, a public entity must show prior discrimination by the governmental unit involved.[49] The plurality in *Wygant* suggested, further, that to demonstrate prior discrimination, statistics should show a disparity between the percentage of minorities that an employer has hired and the percentage of minorities in the relevant labor market.[50] The plurality in *Wygant* found, second, that the layoff provision imposed upon nonminority teachers an excessively heavy burden.[51] The *Wygant* plurality concluded, therefore, that the Board did not tailor the layoff provision to accomplishing constitutional goals.[52]

The United States Supreme Court's requirement in *Wygant* that findings show that a public entity previously had discriminated against minorities differs from the analysis that the United States Supreme Court applied to contracting set asides in *Fullilove v. Klutznick*.[53] In *Fullilove* a three member plurality of the Supreme Court rejected a constitutional challenge to federal legislation that included an MBE set aside.[54] In the Public Works Employment Act of 1977 (PWEA),[55] Congress conditioned receipt of federal grants on compliance with a provision setting aside ten percent of the construction contracting funded by the federal grants for MBE's.[56] Although Congress compared the percentage of federal contracts that MBE's received to the

---

48. *Id.* at 274. The *Wygant* plurality found that societal discrimination was a concept too amorphous to provide a basis for remedial action. *Id.* at 276.

49. *Id.* at 274. The *Wygant* plurality found that because the groups that the statistics compared had no apparent relation to each other, the statistics did not support an inference that the Board had discriminated against minorities. *Id.*

50. *See id.* at 275 (discussing *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 (1977)). In *Hazelwood School District v. United States* the Supreme Court ruled that statistics should compare the minority percentage of the Hazelwood teaching staff to the minority percentage of available teachers in the area. *Hazelwood*, 433 U.S. at 308. The *Hazelwood* court recognized that statistics showed that although minorities comprised almost six percent of the available teachers, minorities comprised less than two percent of the Hazelwood teaching staff. *Id.* The Supreme Court found that the difference in the percentages was substantial on its face. *Id.* at 308-09. The *Hazelwood* court remanded the case, however, to allow the school district to rebut the statistical evidence at trial. *Id.* at 309.

51. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283 (stating that layoffs constitute serious disruption of worker's life).

52. *Id.* at 283-84. In *Wygant* the Supreme Court noted that the Board failed to explain why the Board had classified as disadvantaged minorities groups about which the Board had made no findings of prior discrimination. *Id.* at 284, n. 13.

53. 448 U.S. 448 (1980).

54. *See* Fullilove v. Klutznick, 448 U.S. 448, 459 (1980) (noting Congress' use of statistics that compared percentage of federal contracts received by minority businesses to percentage of minorities in population). In *Fullilove* the Supreme Court recognized that barriers to competitive access to public contracting could cause lack of minority business participation in public contracting. *Id.* at 478.

55. Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116 (codified as amended at 42 U.S.C §§ 6705-6708, 6710 (1977)).

56. *Fullilove*, 448 U.S. at 453-54.

percentage of minorities in the population,[57] the *Fullilove* plurality held that the PWEA did not violate the equal protection clause.[58] The *Fullilove* plurality explained that Congress could conclude that the low percentage of government contracts that MBE's received could result from the existence and maintenance of barriers that reduced MBE access to competitive bidding on government contracts.[59] The plurality in *Fullilove* recognized that even if no person discriminated against MBE's, traditional procurement practices could perpetuate the barriers to competitive access that MBE's faced.[60] The *Fullilove* plurality concluded, therefore, that the PWEA was a constitutionally valid exercise of Congress' spending power.[61] In considering whether Congress had tailored the PWEA narrowly to serve remedial objectives, the *Fullilove* plurality found that the PWEA imposed a relatively light burden upon nonminority firms.[62] The plurality in *Fullilove* found, further, that administrative provisions of the PWEA prevented the PWEA from unnecessarily impeding the rights of nonminorities.[63]

By requiring public entities to provide proper findings of discrimination with adequate evidentiary support, the *Wygant* plurality departed from the deferential standard of review that the Supreme Court applied in *Fullilove*

---

57. *See id.* at 459 (noting that sponsor of PWEA stated that although minorities comprised between fifteen and eighteen percent of population in 1976, MBE's received less than one percent of all federal procurement).

58. *Id.* at 490.

59. *Id.* at 478. In *Fullilove* the Supreme Court noted that Congress had heard reports that in gaining access to government contracts, MBE's faced major difficulties unrelated to intentional discrimination, including deficiencies in working capital, an inability to meet bonding requirements, a competitive disadvantage due to lack of experience, an unawareness of bidding opportunities, and an unfamiliarity with bidding procedures. *Id.* at 467.

60. *Id.* at 478.

61. *Id.* at 473. The *Fullilove* plurality found that Congress' authority under the Spending Power provision of article one of the United States Constitution is at least as broad as Congress' regulatory authority under the Commerce Clause of article one of the United States Constitution. *Id.* at 475; *see* U.S. CONST. art. I § 8 cl. 1 (authorizing Congress to provide for general welfare of United States). The *Fullilove* plurality concluded that under the Commerce Clause, Congress constitutionally could enforce the PWEA against prime contractors. *See Fullilove*, 448 U.S. at 476 (stating that as to prime contractors, Congress could have achieved objectives of PWEA under Commerce Clause); *see* U.S. CONST. art. I § 8 cl. 3 (authorizing Congress to regulate interstate commerce). The plurality in *Fullilove* concluded, further, that § 5 of the fourteenth amendment empowered Congress to enforce the PWEA against state and local governments. *See Fullilove*, 448 U.S. at 478 (stating that as to state and local grantees, Congress could have achieved objectives of PWEA under § 5 of the Fourteenth Amendment); *see also* U.S. CONST. amend. XIV § 5 (empowering Congress to enforce provisions of fourteenth amendment with specific legislation).

62. *Fullilove*, 448 U.S. at 484. The *Fullilove* plurality compared the scope of the PWEA's effect on available contracts to the overall amount of construction contracts available in the United States. *Id.* at 484-85 & n. 72. The *Fullilove* plurality concluded that the PWEA's 10% set aside accounted for only 0.25% of the annual expenditure on construction work in the United States. *Id.*

63. *See id.* at 486-88 (discussing administrative provisions for determining whether particular MBE is bona fide MBE and whether good faith efforts can locate MBE's to satisfy 10% set aside).

to Congressional action.[64] The Fourth Circuit in *Croson* properly applied the reasoning of the *Wygant* plurality, rather than the reasoning of the *Fullilove* plurality.[65] Because state and local governments lack the constitutional authority to remedy the lingering effects of prior discrimination that Congress may exercise under the spending power, courts should require state and local governments to make more specific findings of prior discrimination than courts would require of Congress.[66] Furthermore, political pressure to adopt racial preferences may have greater influence on a local government's decisionmaking than on Congress' legislative judgment.[67] By requiring a public entity to demonstrate that the public entity previously had discriminated against a minority group, courts can prevent local governments from adopting racial preferences to gain the political support of minority groups.[68] The greater danger of political abuse that is present at a local level of government supports the requirement that local governments make findings that the government entity specifically has discriminated against minorities.[69] The distinction between federal and nonfederal government entities provides a solid basis for courts to require local governments to satisfy the stringent findings requirement that the *Wygant* plurality employed.[70]

In applying *Wygant's* requirement of sufficient findings, the *Croson* court recognized that a public entity may base findings of prior discrimi-

---

64. *See* Associated Gen. Contractors, Inc. v. City and County of San Francisco, 813 F.2d 922, 930 (9th Cir. 1987) (acknowledging that although Congress may remedy prior societal discrimination, *Wygant* plurality required local instrumentality of government to show that instrumentality previously had discriminated against minorities).

65. *See infra* notes 66-70 and accompanying text (discussing possibility of abuse of racial classifications at local level of government).

66. Fullilove v. Klutznick, 448 U.S. 448, 515-16 n. 14 (1980) (Powell, J. concurring). Justice Powell noted in *Fullilove* that the degree of specificity in findings may vary with the nature and authority of different governmental bodies. *Id.* Justice Powell remarked, further, that Congress has greater remedial power than any other instrumentality of government. *Id.* at 516-17.

67. *See* Associated Gen. Contractors, Inc. v. City and County of San Francisco, 813 F.2d 922, 929 (9th Cir. 1987) (stating that federal structure protects individual rights from political interference); THE FEDERALIST No. 10, at 22 (J. Madison) (2d ed. Johns Hopkins Univ. Press 1966) (stating that likelihood of political pressure increases as number of individuals comprising majority decreases).

68. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 310 (1978) (stating that by recognizing societal discrimination as sufficient basis for remedy, courts would allow institutions to distribute privileges to any group that institution perceived as victim of discrimination); J. A. Croson Co. v. City of Richmond, 822 F.2d 1355, 1357-58 (4th Cir. 1987) (stating that if courts allow local governments to adopt racial preferences to remedy prior societal discrimination, local governments may adopt racial preferences according to politics of race); *Associated General Contractors*, 813 F.2d at 932 n. 17 (noting that beneficiaries of set asides in county ordinance might outnumber nonbeneficiaries).

69. *See Associated General Contractors*, 813 F.2d at 930 (discussing likelihood that local government may respond to political pressures unrelated to justice and general welfare).

70. *See id.* (stating that distinction between federal and nonfederal governments reconciled different findings requirements that Supreme Court applied in *Wygant* and *Fullilove*).

nation either on specific allegations of discrimination or proper statistics.[71] Because employers typically are reluctant to admit specific instances of prior discrimination,[72] statistical findings are a necessary means for demonstrating that the employer previously discriminated against minorities.[73] To demonstrate prior discrimination, statistics must show a disparity between the number of minorities available for employment in the relevant labor market and the number of minorities that the public entity has employed.[74] General population statistics, however, may reflect inherent societal disparities unrelated to intentional discrimination.[75] For example, the percentage of minorities available to apply for employment or bid for a contract with a public entity may be significantly lower than the percentage of minorities in the general population.[76] Because general population statistics may not support an inference of prior discrimination, general population statistics fail to demonstrate that a compelling government interest exists.[77] Because the Council incorrectly used general population statistics to represent the relevant labor market, the Fourth Circuit in *Croson*, therefore, correctly held that the Council had failed to show that Richmond previously had discriminated against minorities.[78]

The *Croson* court required that a public entity demonstrate findings of prior discrimination in an adequate record.[79] Statistical evidence of prior

---

71. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 292 (1986) (O'Connor, J., concurring) (stating that disparity between percentage of minorities hired and percentage of qualified minorities available may demonstrate prior discrimination); J. A. Croson Co. v. City of Richmond, 822 F.2d 1355, 1358-59 (4th Cir. 1987) (discussing both statements made before Council and statistics presented to Council); Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 267 (1971) (stating that admission by decision maker may prove prior discrimination).

72. *See* Fiss, *supra* note 71, at 267 (stating that social mores disapproving of discriminatory conduct discourage employers from admitting prior discriminatory practices).

73. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 340 n. 20 (1977) (stating that statistics frequently are only means of showing covert employment discrimination).

74. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 275 (1986) (plurality opinion); *see* Hazelwood School Dist. v. United States, 433 U.S. 299, 308 (1977) (finding that comparison of minority percentage of teachers on faculty to minority percentage of applicants available in area supports inference of prior discrimination).

75. *See* J. Edinger & Son, Inc. v. City and County of Louisville, Ky., 802 F.2d 213, 216 (6th Cir. 1986) (stating that social, economic, personal, and demographic factors may affect population statistics).

76. *See* J.A. Croson Co. v. City of Richmond, 822 F.2d 1355, 1358-59 (4th Cir. 1987) (stating that although minority percentage of Richmond population was large, percentage of minority-owned contractors was small).

77. *See Wygant*, 476 U.S. at 274 (requiring showing of prior discrimination by public entity to justify racial preference); *see also supra* notes 75-76 and accompanying text (discussing failure of population statistics to show prior discrimination). *But cf.* J. Edinger & Son, Inc. v. City and County of Louisville, Ky., 802 F.2d 213, 215 (6th Cir. 1986) (indicating that if general populace represents pool of available applicants, population statistics may show prior discrimination).

78. *See Croson*, 822 F.2d at 1358-59 (discussing Council's reliance on general population statistics); *see also supra* notes 74-77 and accompanying text (discussing impropriety of using population statistics instead of statistics concerning relevant labor market).

79. J. A. Croson Co. v. City of Richmond, 822 F.2d 1355, 1360 (4th Cir. 1987).

discrimination may form part of an evidentiary record that supports a public entity's finding of prior discrimination.[80] An evidentiary record provides courts with facts needed to determine whether a public entity appropriately adopted a racial preference to remedy prior discrimination.[81] Because the record that supported the Richmond Plan did not support an inference that Richmond acted pursuant to a compelling governmental interest,[82] the *Croson* court correctly concluded that the record supporting the Richmond Plan was deficient.[83] In *Croson*, the Fourth Circuit implied, further, that the record of prior discrimination should include extensive investigations into relevant, prior governmental practices.[84] The Supreme Court in *Wygant* indicated, however, that the factual record needs to show only that the public entity had a firm basis to conclude that the public entity had discriminated against minorities.[85]

An evidentiary record that demonstrates that a public entity properly has compiled statistics showing a pattern of prior discrimination may provide a sufficient basis for a public entity to conclude that a public entity previously has discriminated against minorities.[86] By requiring public entities to provide an extensive record of findings of prior discrimination, the *Croson* court would discourage public entities from voluntarily adopting affirmative action programs.[87] An extensive factual record, furthermore, may not increase the likelihood that a racial preference will survive a

---

80. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 292-93 (1986) (O'Connor, J., concurring) (indicating that evidence of disparity between percentage of minorities hired and percentage of minorities available may form part of basis for enacting racial preference).

81. *See id.* at 277 (stating that when nonminority employees challenge remedial program, evidentiary support for public entity's conclusion is crucial). The plurality in *Wygant* recognized that nonminority employees who challenge a remedial program bear the burden of proving that the remedial program is unconstitutional. *Id.*

82. *See supra* notes 72-77 (discussing failure of general population statistics to demonstrate compelling governmental interest). The record that supported the Richmond Plan consisted primarily of improper statistics. *See Croson*, 822 F.2d at 1359 (stating that testimony offered at public hearing did not overcome deficiency of statistical evidence); *supra* note 11 (detailing facts that Council developed at public hearing).

83. *See Wygant*, 476 U.S. 267, 277 (requiring public entity to justify adopting racial preference with evidentiary support); *Croson*, 822 F.2d at 1360 (finding that record supporting Richmond Plan was deficient); *supra*, notes 71-78 and accompanying text (discussing failure of Council's record to support inference of prior discrimination).

84. *See Croson*, 822 F.2d at 1360 (discussing cases in which public entities had referred to reports by Office of Civil Rights of Department of Health, Education, and Welfare, reports of legislative task forces, and reports of legislative committees).

85. *Wygant*, 476 U.S. 267, 292 (O'Connor, J., concurring).

86. *Id.* In *Wygant* Justice O'Connor suggested that statistics that would be sufficient to support a Title VII claim that a public entity previously had engaged in a pattern of discrimination would provide a firm basis for remedial action. *Id.*; *see* Hazelwood School Dist. v. United States, 433 U.S. 299, 308-09 & n. 14 (discussing sufficient statistical showing in Title VII claim).

87. *See Wygant*, 476 U.S. at 290 (O'Connor, J., concurring) (stating that disincentive to voluntary compliance with civil rights obligations outweighed value that contemporaneous findings of prior discrimination had as evidentiary safeguard).

challenge under the equal protection clause.[88] The content of an evidentiary record, rather than the extent of the evidentiary record, determines whether a racial preference will survive a constitutional challenge.[89] In finding that the Council's evidentiary record was deficient in comparison to more extensive evidentiary records, the *Croson* court misconstrued the Supreme Court's discussion in *Wygant* of the importance of an evidentiary record.[90]

In addition to providing a basis for judicial review of a public entity's asserted purpose, an adequate factual record may aid courts in determining whether a public entity sufficiently has tailored a racial preference to meet *Croson's* requirement that the racial preference not unduly burden nonminorities.[91] Because government bodies may adopt racial preferences only to remedy prior discrimination, racial preferences must benefit only those minorities against which a particular government body has discriminated.[92] A minority set aside program that includes in its definition of minorities racial groups against which the government body has not discriminated fails under strict scrutiny because the program has an effect broader than its constitutional purpose.[93] Because the Richmond Plan included in the definition of the term "MBE" minority groups about which the Council had made no findings, the Fourth Circuit correctly found that the definition of the term "MBE" was unconstitutionally broad.[94]

---

88. *See* Associated Gen. Contractors of Cal., Inc. v. City and County of San Francisco, 813 F.2d 922, 933 (9th Cir. 1987) (finding that extensive data that public entity had compiled did not support inference of prior discrimination). In *Associated General Contractors* San Francisco relied on a 172-page report containing information about the procurement practices of 56 departments of San Francisco's government. *Id.* at 931. The Ninth Circuit focused, nevertheless, on statistics that San Francisco had prepared and found that the statistics did not demonstrate that San Francisco previously had discriminated against minorities. *See id.* at 933 (stating that findings must rest on more accurate data than city had compiled).

89. *See supra* note 88 (illustrating how extensive factual record may fail to show prior discrimination).

90. *See supra* notes 86-89 and accompanying text (discussing extent of evidentiary record necessary to show prior discrimination).

91. *See Croson*, 822 F.2d at 1360-61 (discussing burden of Richmond Plan on nonminorities); *cf. Wygant*, 476 U.S. at 280, n. 6 (stating that to determine whether classification is unconstitutionally broad, courts determine whether classification fits asserted remedial purposes); *see also infra* note 93 and accompanying text (illustrating how absence of specific findings may render racial preferences unconstitutional).

92. *See Wygant*, 476 U.S. at 284, n. 13 (stating that definition of term "minority" that included minority groups about which school district had made no findings was overinclusive); Fullilove v. Klutznick, 448 U.S. 448, 537 (1980) (Stevens, J. dissenting) (stating that history of discrimination against black citizens did not justify classification of other minority groups as disadvantaged).

93. *See* Associated Gen. Contractors of Cal., Inc. v. City and County of San Francisco, 813 F.2d 922, 934 (9th Cir. 1987) (finding that definition of term "MBE" that included minorities about which city offered no evidence of prior discrimination was unconstitutionally broad).

94. *See Croson*, 822 F.2d at 1361 (finding that Richmond Plan contained unconstitutionally broad definition of term "minority"); *see also supra* notes 92-93 (discussing unconstitutionality of overinclusive racial classifications).

To be constitutional, a racial preference furthermore must not impose an unnecessarily heavy burden upon nonminorities.[95] In ruling that the thirty percent set aside was arbitrary, the *Croson* court suggests that to limit the effect of a set aside to constitutional purposes, the Council should have chosen a set aside figure that matched the percentage of MBE's available.[96] The percentage of MBE's available to participate in Richmond's contracting is, however, an unnecessarily narrow measure of the permissible scope of a set aside.[97] The set aside figure in *Croson* represents not the ultimately desired level of MBE participation, but, instead, the rate for attaining the goal of increased minority participation in public contracting.[98] To determine whether racial preferences impose an unnecessarily heavy burden upon nonminorities, courts have measured the impact of racial preferences in terms of the percentage of available contracting from which set asides exclude nonminority participation.[99] Because contracting available in the Richmond area included, in addition to Richmond's public contracting, privately financed projects, the actual impact of the thirty percent set aside upon nonminority contractors is less than thirty percent.[100] By departing from the analysis that measures the impact of a set aside upon nonminorities in relation to the percentage of available contracting, the *Croson* court overrepresents the burden that the set aside placed upon innocent nonminority contractors.[101]

In holding that the Richmond Plan was unconstitutionally broad, the *Croson* court recognizes that findings of prior discrimination are necessary for courts to determine whether a public entity has limited the effect of a racial preference upon nonminorities to remedying prior governmental dis-

---

95. *See Wygant*, 476 U.S. at 283 (stating that racially based layoff programs place unconstitutionally heavy burden on innocent parties); *cf. Fullilove*, 448 U.S. at 484 (noting that burden which PWEA placed on nonminority construction firms was relatively light).

96. *See Croson*, 822 F.2d at 1360 (stating that 30% figure was not tied to showing that minorities owned 30% of Richmond subcontracting firms).

97. *See* J. A. Croson Co. v. City of Richmond, 822 F.2d 1355, 1367 (4th Cir. 1987) (Sprouse, J., dissenting) (stating that to encourage growth of number of MBE's, set aside figure must exceed percentage of MBE's available).

98. *Croson*, 822 F.2d at 1367 n. 14 (Sprouse, J., dissenting); *see also* United States v. Paradise, 107 S. Ct. 1053, 1071 (1987) (stating that 50% set aside represented rate at which Alabama Department of Public Safety would reach ultimate goal of 25% minority participation). In *Croson* the Richmond Plan automatically would have expired five years after the Council adopted the Richmond Plan. *Croson*, 779 F.2d at 183; *cf. Associated General Contractors*, 813 F.2d at 924 (describing San Francisco ordinance that would not expire until MBE's received 30% of San Francisco's contracts).

99. *See infra* note 100 (discussing courts' determinations of percentage of contracting that set asides remove from nonminority participation).

100. *Cf. Fullilove*, 448 U.S. at 484, n.72 (finding that 10% set aside in PWEA accounted for only 0.25% of national volume of contracting); Associated Gen. Contractors, Inc. v. Metropolitan Dade County, Fla., 723 F.2d 846, 855 (11th Cir. 1984) (finding that 100% set aside of single county construction project represented less than one percent of county's annual construction expenditures).

101. *See supra* note 100 and accompanying text (discussing impact of set asides measured in relation to volume of available contracting).

crimination.[102] Without specific findings of prior discrimination, courts cannot ascertain whether a public entity actually has discriminated against the beneficiaries of racial preferences.[103] In suggesting that public entities must choose a set aside according to the number of minorities available in the relevant labor market, however, the Fourth Circuit unnecessarily restricts the authority of public entities to fashion remedial measures.[104] The number of minority firms that are available in a specific labor market is crucial, nevertheless, for determining whether statistics support an inference that a public entity previously has discriminated against minority businesses.[105] Because racial preferences are a form of discrimination, public entities may employ racial preferences only to remedy prior governmental discrimination.[106] Statistical evidence must show, therefore, that the public entity previously has discriminated against the beneficiaries of a racial preference.[107] By adhering to the rule that a local government may remedy only governmental, and not societal, discrimination, the Fourth Circuit reduces the possibility that local governments might adopt a discriminatory remedy in the absence of any prior discrimination.[108]

ANDREW MILNE

102. J.A. Croson Co. v. City of Richmond, 822 F.2d 1355, 1360-61 (4th Cir. 1987).

103. *See supra* notes 81, 91 (discussing judicial review of findings of discrimination).

104. *See supra* notes 91-94 and accompanying text (discussing *Croson* court's analysis of burden imposed by 30% set aside).

105. *See supra* notes 72-76 and accompanying text (discussing statistics as basis to infer public entity previously discriminated against minority groups).

106. *See supra* notes 47-49 and accompanying text (discussing proper limitation of racial preferences to remedy prior discrimination).

107. *See supra* notes 48-50, 74-77 (discussing *Wygant*'s effect on statistical proof of prior discrimination).

108. *See supra* notes 66-70 and accompanying text (discussing rationale for requiring more stringent findings of local governments than of Congress).