1991

Set-aside Programs in Minnesota: The Effects of City of Richmond v. J.A. Croson Co.

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INTRODUCTION

Subsequent to the 1989 United States Supreme Court decision in *City of Richmond v. J.A. Croson Co.*,¹ the Minnesota Legislature embarked on a review of small business procurement programs in the

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state. In declaring Richmond’s minority business set-aside program unconstitutional, the Supreme Court inflicted a lethal blow to state and municipal minority business set-aside programs. For the first time, a majority of the Court applied a strict scrutiny standard of review to determine the constitutionality of affirmative action based on race. The Court’s holding in Croson is in sharp contrast to its 1980 decision in Fullilove v. Klutznick, where virtually identical federally mandated set-asides were held to be constitutional. As a result of Croson, the Minnesota Legislature adjusted its small business set-aside programs. It also instituted a commission to study the set-aside issue and to propose legislation that meets the Croson requirements. On the basis of the commission’s report, the Legislature enacted legislation to revise Minnesota’s set-aside programs in May 1990.

The purpose of this comment is to examine the effects of Croson on small business set-aside programs in Minnesota. The comment will briefly state the history of affirmative action plans and minority business set-asides before Croson. The comment will then review the Supreme Court decisions in Fullilove and Croson. Finally, the comment will examine the report of the commission and the new legislation.

I. History

A. Origin of Affirmative Action Plans

Affirmative action plans are “public or private actions or programs which provide or seek to provide opportunities or other benefits to persons on the basis of, among other things, their membership in a specified group or groups.” The publicly perceived goal of an affirmative action plan is to remedy the effects of past discrimination against minorities and women by enhancing their opportunities for
employment and government programs.9

The genesis and evolution of affirmative action has been the subject of much controversy. To bolster their respective positions, proponents and opponents of affirmative action present different interpretations of presidential and congressional efforts to advance racial equality.10

The term “affirmative action” emerged in 1965 with President Johnson’s Executive Order Number 11246.11 The order declared that the policy of the federal government is “to provide equal opportunity in [f]ederal employment for all qualified persons, to prohibit discrimination in employment because of race, creed, color, or national origin.12 This goal would be fully realized through a positive, continuing program in each executive department and agency.”13 The Executive Order required that government agencies include an “affirmative action” provision in every contract the government entered. During the contract period, the contractor agreed it would not discriminate against its employees and applicants.14 In addition, the contractor had to promise to “take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.”15

12. Id.
13. Id.
14. Id. § 201.
15. Id. Johnson was not the first president to prohibit discrimination in federal contracts. In ordering an end to discriminatory practices in federal construction con-
Executive Order Number 11246 also authorized the Secretary of Labor to ensure that government contractors comply with non-discrimination provisions in employment. The Secretary created the Office of Federal Contract Compliance (OFCC) to oversee the non-discrimination provision. Due to the nature of the construction industry, however, the OFCC was unable to develop an effective method of ensuring minority employment in construction contracts.

The OFCC developed special area plans to deal with employment discrimination in construction contracts. Between 1966 and 1969, plans were instituted in Cleveland and Philadelphia. When the Philadelphia plan was challenged in federal courts, the Third Circuit upheld the plan. Subsequent challenges to goals and timetables in the construction industry were also unsuccessful.

Although the Executive Order attempted to facilitate minority participation in government contracting activities, it did not achieve its goal. Thus, in 1977, Congress enacted the Public Works Employment Act which provided that ten percent of certain federal contracts be reserved for minority contractors. This statute was the basis for the litigation in Fullilove.
Congress also required that “[l]ocal governments receiving federal funding for certain projects must comply with regulations mandating affirmative action in awarding contracts for construction and purchasing.”26 To qualify for federal funds, local governments established “programs which set aside a percentage of the local government’s contracts or contract funds for minority business enterprises.”27 The set-aside programs established guidelines for government purchasing and government construction contracts to minority-owned businesses.28 Before Croson, thirty-six states and nearly two hundred cities were administering some sort of racial or gender and racial based business set-aside program.29

Generally, state and local governments established two types of set-aside programs. The first type of program requires a certain percentage of the total number of government contracts awarded each year to be set-aside for minority-owned businesses.30 The second type requires all prime contractors bidding on a contract to spend a percentage of the contract price in subcontracting to minority-owned businesses.31 Although the details of the programs vary, the goal of each program is to establish a method for awarding contracts to minority-owned businesses.

Affirmative action plans have been challenged on fourteenth amendment (equal protection) grounds and under Title VII of the

In the years from 1896 to the early 1950s, color-conscious legislation provided for separate but equal benefits. More recently, affirmative action has been seen as “a modern effort to ensure that the end of segregation is not also the demise of participation by blacks in the bounties of the country.” Id. at 392. In the early 1970s, Congress required affirmative action for the handicapped in legislation including the 1973 Rehabilitation Act and the Vietnam Era Veterans Readjustment Act. See Rasnic, supra note 9, at 177.


27. Id.

28. See id. at 338.


31. See, e.g., City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989). The first type has been referred to as a “pure” set-aside; the second type is called a “subcontractor goal” set-aside. See Comment, supra note 26, at 337-38.

32. The equal protection clause of the fourteenth amendment applies to state action. The text reads in pertinent part: “[N]o state shall ... deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, cl. 1. The due process clause of the fifth amendment subjects the federal government to equal protection principles. Bolling v. Sharpe, 347 U.S. 497, 500 (1954). Affirmative action plans have been successfully attacked on the grounds that such plans are based

Published by Mitchell Hamline Open Access, 1991
1964 Civil Rights Act.33 Opponents of affirmative action contend that the programs result in reverse discrimination against non-minorities, while proponents insist the programs are necessary to remedy the effects of discrimination against minorities.34 The Supreme Court first confronted the issue of the legality of affirmative action programs in 1978.35 The Court rendered ten decisions on affirmative action programs. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 319-20 (1978).


34. See generally Lally-Green, Affirmative Action: Are the Equal Protection and Title VII Tests Synonymous? 26 DUQ. L. REV. 295 (1988) (arguing that the tests for Title VII and equal protection challenges are identical, and that courts, in fashioning a Title VII remedy, should "narrowly tailor" it to eliminate the identical discrimination); Walthew, Affirmative Action and the Remedial Scope of Title VII: Procedural Answers to Substantive Questions, 136 U. PA. L. REV. 625 (1987) (positing that discrimination and reverse discrimination are not substantively identical and that the Supreme Court "should, at a minimum, restructure proof requirements to put discrimination and reverse discrimination plaintiffs on an equal footing in light of the differing effects of group harm versus individual harm"); Woodside, Walking the Tightrope Between Title VII and Equal Protection: Public Sector Voluntary Affirmative Action After Johnson and Wygant, 20 URB. 367 (1988) (arguing that affirmative action programs implemented by public employers are constitutional so long as they do not offend the equal protection clause of the fourteenth amendment and that the decision in Johnson v. Transportation Agency, 480 U.S. 616 (1987), sent a strong "negative signal" to reverse discrimination claimants relying on the equal protection clause to defeat the very purpose of Title VII, i.e. to encourage equal opportunity); Note, Voluntary Affirmative Action Plans by Public Employers: The Disparity in Standards Between Title VII and the Equal Protection Clause, 56 FORDHAM L. REV. 403 (1987) (presenting the view that courts should give affirmative action plans implemented by public employers the same deference as Title VII claims).

35. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). Bakke, a white male, was refused admission to the University of California Davis Medical School under the school's affirmative action plan. He sued the university alleging that its admissions program discriminated against whites and, thus, violated equal protection guarantees. The Court ordered the medical school to admit Bakke. Four members of the Court, led by Justice Brennan, found the use of racial quotas in medical school admissions unconstitutional. One Justice found the practice unconstitutional. The remaining Justices found it invalid on statutory grounds.
tive action programs between 1978 and 1989.\textsuperscript{36} Two of these opinions, \textit{Fullilove} and \textit{Croson}, dealt with minority business set-asides.

\textbf{B. Minnesota Small Business Procurement Programs Before Croson}

Minnesota's business set-aside programs have never been exclusively racially based. Instead, the Minnesota plans have always included women and other socially or economically disadvantaged persons. In 1975, the Minnesota Legislature enacted the Small Business Procurement Act (Act).\textsuperscript{37} The Act directed the Minnesota Department of Administration to set aside a certain percentage of state contracts to be awarded, where possible, to small businesses owned and operated by socially or economically disadvantaged (SED) persons.\textsuperscript{38} Similar SED programs were adopted by the legislature and affected the Minnesota Department of Transportation, the University of Minnesota and metropolitan agencies.\textsuperscript{39}


\textsuperscript{39} These set-aside programs ceased operation in April 1989 and were subsequently replaced with programs benefiting only economically disadvantaged businesses. See Act approved June 2, 1989, ch. 352, 1989 Minn. Laws 3169, amended by.
A "socially and economically disadvantaged person" was defined as:

[one] who has been deprived of the opportunity to develop and maintain a competitive position in the economy because of social or economic disadvantage. This disadvantage may arise from cultural, social or economic circumstances or background, physical location if the person resides or is employed in an area declared as a labor surplus area by the United States department of commerce, or other similar cause.40

This definition, which was not racial or gender specific, was amended in 1980 to include "racial minorities, women, or persons who have suffered a substantial physical disability."41 In 1985, the definition was amended to include "sheltered workshops and work activity programs."42 In 1988, the definition was further amended to include persons "employed in a county in which the median income for married couples is less than 70% of the state median income for married couples."43 To participate in the program, a business had to meet the statutory SED definition, as well as the definition of a small business.44

Under the 1988 statute, the Department of Administration was required to award 9% of total purchases to businesses eligible under the set-aside program.45 To reach this goal, the Department was required to set-aside at least 3% of all procurements for bidding only by "small businesses owned and operated by socially or economically disadvantaged persons."46 The Department was empowered to award a 5% price advantage in bidding on certain purchases.47 The program also required prime contractors on construction contracts exceeding $200,000 to subcontract 10% of the contracts to eligible


44. A small business was defined as one that has 20 or fewer full-time employees or has one million dollars or less annual gross sales and was not a branch, affiliate or subsidiary of a large company. MINN. STAT. § 645.445, subd. 2 (1980).

45. MINN. STAT. § 16B.19, subd. 5 (1988).

46. Id.

47. Id. The five percent price advantage is known as preference bidding.
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SED businesses.48

The legislature mandated a procurement program for the Department of Transportation in 1977,49 and for the University of Minnesota in 1979.50 The 1977 program set aside 2% of the Department of Transportation's road construction projects for small businesses, SED small businesses or contractors that guaranteed they would use such small businesses as subcontractors.51 The 1979 program required that 3% of the University of Minnesota's purchases made with state appropriations be awarded to eligible SED businesses.52

Several metropolitan agencies participated in a set-aside program that was implemented on January 1, 1989.53 The goal of the agencies was to award 9% of all purchases to eligible businesses either through set-asides or through a 5% preference in the amounts bid by eligible businesses. Six percent of all consultant, professional or technical services contracts was to go to eligible businesses.54 For contracts over $200,000, the agencies were required to try to subcontract 10% of each contract to eligible businesses.55

In Minnesota, set-aside programs were never purely for businesses owned by racial minorities. Small businesses owned by females, handicapped and white males residing in labor-surplus areas participated in the programs.56 The set-aside programs were intended to help ensure that businesses owned and operated by disadvantaged individuals received a fair share of state business.57 In 1988, 621 businesses were certified by the State Department of Administration as socially or economically disadvantaged. One-hundred-forty-four of those businesses were owned and operated by minorities, 186 by fe-

48. Id. § 16B.19, subd. 6.
50. Act approved May 14, 1979, ch. 86, sec. 1, 1979 Minn. Laws 118 (codified as amended at Minn. Stat. § 137.31 (1990)).
52. Act approved May 14, 1979, ch. 86, sec. 1, 1979 Minn. Laws 118 (codified at Minn. Stat. § 137.31, subd. 1 (1980) and subsequently amended several times). Fifteen percent of the 20% set-aside for small business must go to SED businesses. Id. (codified at § 137.31, subd. 3).
55. Id. § 473.142(b).
56. See supra accompanying notes 37-44.
males, and 283 in federally designated labor-surplus areas.\textsuperscript{58}

Before 1989, the constitutionality of the set-aside programs was not challenged in Minnesota appellate courts. After the 1980 Supreme Court decision in \textit{Fullilove}, it was reasonable to assume set-aside programs were constitutional. Thus, when a minority contractor brought action against the State of Minnesota for failure to set aside a contract, the constitutionality of the set-aside program was not in issue.\textsuperscript{59}

II. \textbf{SUPREME COURT CASES}

\textbf{A. Fullilove v. Klutznick}

\textit{Fullilove v. Klutznick}\textsuperscript{60} was the Supreme Court's first cut at minority business set-aside programs. In \textit{Fullilove}, the Court considered the constitutionality of the set-aside program established by the Public Works Employment Act of 1977.\textsuperscript{61} Under Section 103(f)(2) of the Act, at least 10\% of the federal funds granted for local public works projects must be used to employ minority-owned businesses.\textsuperscript{62} The Court held that Congress' findings of past discrimination in the construction industry were sufficient to support a race-conscious affirmative action program.\textsuperscript{63} Nonetheless, \textit{Fullilove} did not conclusively determine the constitutionality of all set-aside programs. \textit{Fullilove} dealt with only pure set-asides and did not address the validity of subcontractor goal set-asides. In addition, the Court did not agree on an appropriate standard of review.

\textit{Fullilove}, with its five separate opinions, failed to provide a standard for evaluating the constitutionality of set-aside programs. Chief Justice Burger, writing for the plurality, stated that preventing the perpetuation of the effects of past discrimination was a legitimate congressional objective.\textsuperscript{64} The Chief Justice stated that any program using racial criteria to accomplish these goals must be "narrowly tailored to the achievement of that goal."\textsuperscript{65} The plurality declined to adopt a standard, but stated that the set-aside provision survived "a most searching examination to make sure that it does not conflict

\textsuperscript{58} 1988 DEPT. OF ADMIN., MINN. SMALL BUS. PROCUREMENT PROGRAM ANN. REP. 3.

\textsuperscript{59} See \textit{Khalifa}, 397 N.W.2d at 385-88. The court of appeals held that, although the plaintiff's expectation that a contract would be awarded to him under the state set-aside program was reasonable, the expectation was "not a constitutionally protected property interest." \textit{Id.} at 389.

\textsuperscript{60} 448 U.S. 448 (1980).


\textsuperscript{62} \textit{Id.} § 6705(f)(2).

\textsuperscript{63} \textit{Fullilove}, 448 U.S. at 475.

\textsuperscript{64} \textit{Id.} at 473-76.

\textsuperscript{65} \textit{Id.} at 480.
with constitutional guarantees." Three Justices concurred in the result, but preferred that an "intermediate" standard be applied to determine whether the set-aside provision was substantially related to the achievement of important governmental objectives. Three Justices dissented, two stating that the set-aside provision violated the fourteenth amendment of the Constitution.

Justice Powell, who concurred in the plurality judgment, and joined Chief Justice Burger's opinion, wrote a separate opinion stating that in the past the Court had applied a "strict scrutiny" standard to racial classifications. Justice Powell, however, concluded that "the Enforcement clauses of the Thirteenth and Fourteenth Amendments confer upon Congress the authority to select reasonable remedies . . . ." Justice Powell stated that Congress' "choice of a remedy should be upheld . . . if the means selected are equitable and reasonably necessary to the redress of identified discrimination."

Courts have developed the following three-part test to measure the constitutionality of affirmative action legislation. First, the legislative body establishing the program must have the authority to implement such a program; second, the legislative body must make adequate findings of past discrimination to ensure that the program's remedies address effects of past discrimination; and third, the program must be narrowly tailored to ensure that the set-aside program extends no further than needed to remedy discrimination.

66. Id. at 491.
67. Id. at 519 (Marshall, J., Brennan, J., and Blackmun, J., concurring). The proper standard of review for programs using racial criteria is whether they "serve important governmental objectives and are substantially related to achievement of those objectives." Id.
68. Id. at 531 (Stewart, J. and Rehnquist, J., dissenting).
69. Id. at 507.
70. Id. at 510 (emphasis added).
71. Id.
72. The three-part test was adopted in the following cases: South Fla. Chapter of the Associated Gen. Contractors of America v. Metropolitan Dade County, 723 F.2d 846, 851-52 (11th Cir. 1984) (affirmative action plan for county contracts contained in county ordinance); Ohio Contractors Ass'n v. Keip, 713 F.2d 167, 176 (6th Cir. 1983) (minority business enterprise statute sufficiently narrow to satisfy constitutional requirements found controlling in Fullilove); Associated Gen. Contractors of Cal. v. City of San Francisco, 619 F. Supp. 334, 339 (N.D. Cal. 1985) (ordinance
In *Fullilove*, the Supreme Court established that properly structured set-asides are constitutional. *Fullilove* inspired the Richmond City Council to adopt the set-aside program that was challenged in *Richmond v. Croson*.73

**B. City of Richmond v. J.A. Croson Co.**

The city of Richmond, Virginia, considered implementing a minority set-aside program in 1983. The Richmond City Council held a public hearing concerning the plan. The City Council heard testimony that, although the population of Richmond was fifty percent black, less than one percent of the city's prime construction contracts had been awarded to minority businesses from 1978 to 1983. Evidence presented at the hearing showed that many contractors' associations had virtually no minority-owned businesses as members. A city council member testified that race discrimination was widespread in the construction industry in the Richmond area, Virginia, and the nation. The city's legal counsel stated that the proposed ordinance was constitutional under *Fullilove*.74

The Richmond City Council adopted the Minority Business Utilization Plan. When the city awarded construction contracts to prime contractors, the plan required that the contractors subcontract at least thirty percent of the dollar amount of the contract to one or more minority business enterprises (MBEs). Waivers of this requirement would be granted only if the contractor could demonstrate that "'every feasible attempt has been made to comply, and . . . that sufficient, relevant, qualified Minority Business Enterprises . . . are unavailable or unwilling to participate in the contract . . . ."75 The plan was intended to be "remedial" in nature, and was enacted "for the purpose of promoting wider participation by minority business enterprises in the construction of public projects."76

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74. *Id.* at 714.

75. *Id.* at 713 (quoting Minority Business Utilization Plan (Contract Clauses) § D, Exhibit 24, p. 1).

76. *Id.* (citing *RICHMOND, VA., CODE § 12-158(a)*).
Four months after the plan was adopted, Richmond invited bids on a project concerning plumbing fixtures at the city jail. J.A. Croson Company was the only bidder on the contract. Croson determined that, to satisfy the 30% quota, the fixtures would have to be supplied by an MBE. An MBE gave Croson a quotation for the fixtures that was substantially higher than the price Croson had included in its bid to the city. Richmond refused Croson’s request for a waiver of the MBE requirement. The city also refused to raise the contract price. The city re-bid the project.\(^7\)

Croson sued Richmond in federal district court, arguing that Richmond’s plan violated the Constitution. The court upheld the plan. The Fourth Circuit Court of Appeals affirmed.\(^78\) The Fourth Circuit relied on the Supreme Court’s approval of the federal set-aside plan in \emph{Fullilove}.\(^79\)

When Croson sought certiorari from the Supreme Court, the Court granted the writ, vacated the Fourth Circuit’s opinion, and remanded the case.\(^80\) On remand, the Fourth Circuit struck down the set-aside plan, holding that it violated the fourteenth amendment.\(^81\) The Fourth Circuit found that the city council’s hearings failed to establish a compelling governmental interest.\(^82\) It also held that the percentage of contracts set aside for minority businesses was not narrowly tailored to accomplish a remedial purpose, but was instead “chosen arbitrarily.”\(^83\) The Supreme Court affirmed.\(^84\)

The Supreme Court’s opinion was written by Justice O’Connor, and joined by Chief Justice Rehnquist and Justice White. Justices Stevens and Kennedy joined in part and filed separate concurring opinions. Justice Scalia concurred only in the judgment and filed a separate concurrence. Justice Marshall, joined by Justices Brennan and Blackmun, dissented.\(^85\)

\(^{77}\) \textit{Id.} at 715.
\(^{78}\) \textit{J.A. Croson Co. v. City of Richmond}, 779 F.2d 181 (4th Cir. 1985).
\(^{79}\) \textit{Id.} at 186-93. The Fourth Circuit accorded great deference to the city council’s findings just as the Supreme Court had accorded deference to congressional findings of discrimination in \emph{Fullilove}. \textit{Id.} at 188.
\(^{80}\) \textit{Croson}, 109 S. Ct. at 716. The Court remanded \textit{Croson} in light of \textit{Wygant} v. Jackson Bd. of Educ., 476 U.S. 267 (1986). In \textit{Wygant}, the Court held that absent evidence of past discrimination by the district, a public school could not use racial preferences in its layoff decisions. The Court also ruled that findings of societal discrimination must be supported by evidence of prior discrimination by the government unit involved. \textit{Id.} at 274.
\(^{81}\) \textit{J.A. Croson Co. v. City of Richmond}, 822 F.2d 1355 (4th Cir. 1987).
\(^{82}\) \textit{Id.} at 1358.
\(^{83}\) \textit{Id.} at 1360.
\(^{84}\) \textit{Croson}, 109 S. Ct. at 717.
\(^{85}\) \textit{Croson} is characteristic of the Supreme Court’s recent tendency in discrimination cases to issue decisions with a principal opinion, multiple concurrences and a strong dissent. \textit{See, e.g.}, \textit{Wygant} v. Jackson Bd. of Educ., 476 U.S. 267 (1986); \textit{Fullilove}.\(^79\)
The majority opinion distinguished *Fullilove* on the grounds that, while Congress could regulate the practices of prime contractors on federally funded local construction projects under the commerce clause, state and local governments lack such authority. Justice O'Connor stated that a state or local government does not have the authority to eradicate the effects of past discrimination, unless there is "some showing of prior discrimination by the governmental unit involved." The majority also determined that courts must apply the strict scrutiny standard of review to these state and municipal set-aside programs. Justice O'Connor observed that strict scrutiny was particularly appropriate in this case in view of the political power wielded by blacks in the city of Richmond.

The Court noted that the Richmond City Council failed to find that the local government discriminated against minority-owned businesses. Justice O'Connor stated that the council's findings of widespread discrimination in the construction industry "cannot justify a rigid racial quota . . . ." The Court rejected the city's reliance on the disparity between the percentage of contracts awarded to minority contractors and the percentage of minorities living in the city of Richmond. The Court noted that the percentage of contracts awarded to minority firms should be compared to the percentage of qualified minority contractors. Justice O'Connor also stated that the set-aside was not narrowly tailored to remedy prior discrimination. The Court observed that "there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation" and that the program's waiver procedure was inflexible.

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*Croson* also illustrates the split between the recent conservative appointees and the senior liberal Justices. See Hoogland & McGlothen, *supra* note 29, at 7.

86. *Croson*, 109 S. Ct. at 719. Justice O'Connor observed that the fourteenth amendment was actually intended to constrain state power. Her opinion concluded that framers of the fourteenth amendment "desired to place clear limits on the states' use of race as a criterion for legislative action, and to have the federal courts enforce those limitations." *Id.*

87. *Id.* at 720 (citing *Wygant*, 476 U.S. at 274).

88. *Id.* at 720. Justice O'Connor reaffirmed "that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited . . . ." *Id.* (citing *Wygant*, 476 U.S. at 279-80).

89. *Id.* at 721-22. In Richmond, blacks made up half the population and five of the nine city council seats were held by blacks. Apparently, the Court did not take kindly to the fact that the set-aside program was adopted by a black majority. *Id.* at 722.

90. *Id.* at 724. The Court said that the 30% quota had no reasonable relation to any injury suffered by anyone. *Id.*

91. *Id.* at 725.

92. *Id.* at 728-29.
Justice Marshall criticized the majority’s adoption of the strict scrutiny standard and the majority’s analysis of the evidence presented by Richmond. In his dissent, Justice Marshall observed that the great disparity between the use of minority contractors and the presence of minorities in the general population was so great that more detailed statistics were unnecessary. He argued that the Court should show greater deference to the city council’s deliberations and that “when the legislatures and leaders of cities with histories of pervasive discrimination testify that past discrimination has infected their industries, armchair cynicism like that exercised by the majority has no place.” Finally, Justice Marshall criticized the Court’s reliance upon the fourteenth amendment to distinguish Fullilove. He stated that the fourteenth amendment does not suggest the states could not work “alongside the Federal Government in the fight against discrimination and its effects.”

After Croson, it became clear that minority set-aside programs established by state and local governments would have to pass the strict scrutiny standard. The Croson Court artfully limited Fullilove solely to set-aside plans enacted by Congress, while it seriously eroded the ability of state and local government to enact similar programs.

III. A STATE OR LOCAL GOVERNMENT’S BURDEN AFTER CROSON

Under the strict scrutiny standard required by Croson, state and local governments face an onerous burden. In adopting a race-conscious set-aside program, a legislative authority must ensure that the program meets the high standards of validity established in Croson. First, a state or local government must demonstrate a compelling state interest to justify a race-conscious program. The Supreme Court has established that remedying present effects of past discrimi-

93. Id. at 752-53. Rather than the “daunting” strict scrutiny standard, Marshall prefers to examine only whether the set-aside program served “‘important government objectives’” and was “‘substantially related to the achievement of those objectives.’” Id. at 743 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 359 (1978)).
94. Id. at 749.
95. Id. at 757.
96. See Hoogland & McGlothen, supra note 29, at 16. The strict scrutiny test imposes a burden of proof similar to that faced by plaintiffs under Title VII of the Civil Rights Act of 1964. Id. at 6. After sustaining their prima facie burden, Title VII plaintiffs always bear the ultimate burden of persuasion, and they must refute defendant’s theories and explanations by a preponderance of evidence. Id. at 15. Likewise, a state or local entity must not only make out its own prima facie case based upon past discrimination but must also refute alternative race-neutral measures to remedy affects of past discrimination.
nation is a compelling purpose.97 However, the legislative body may not act upon general knowledge of societal discrimination. Rather, the government must find that the government itself discriminated against minority businesses in the past and that effects of past discrimination persist.98

Second, the legislative body must produce adequate findings of past discrimination. This burden may be satisfied by statistical proof which will be subjected to close scrutiny. The relevant labor market for set-asides is the business community, not the general population.99 Therefore, an adequate finding must compare the percentage of all businesses owned by minorities and the percentage of minority businesses receiving government contracts.100

Third, race conscious preferences must be narrowly tailored to remedy the effects of prior discrimination.101 The state or local entity should consider: (1) the effectiveness of race-neutral alternatives; (2) the relationship between the set-aside goal and the percentage of minority businesses; (3) the adequacy of waiver provisions; (4) the duration of the program; and (5) the program’s effect on nonminority contractors.102

IV. AFTERMATH OF CROSON IN MINNESOTA

Croson had a devastating impact on set-aside programs nationwide. Because of Croson, many programs were overturned or suspended by courts. Many city, county, and state governments re-evaluated or simply suspended their set-aside programs.103

The Minnesota Department of Administration initially reacted to Croson by stating that, due to differences between the Richmond plan

98. See Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 272 (1986). In Wygant, the Court confirmed that any racial classification, even if it favors minorities, must be subject to "'a most searching examination to make sure that it does not conflict with constitutional guarantees.' " Id. at 273-74 (quoting Fullilove, 448 U.S. at 491). The Wygant Court, however, stopped short of adopting the strict scrutiny test.
99. Id. at 275.
100. In Wygant, the Court stated that statistical evidence of prior discrimination should involve the percentage of qualified workers in the relevant labor market. Id. at 510-14. These factors are not exhaustive or exclusive and have been used by the courts only as guidelines. See, e.g., South Fla. Chapter, Associated Gen. Contractors of America, Inc. v. Metropolitan Dade County, 723 F.2d 846, 855 n.11 (11th Cir. 1984) (factors serving as a helpful guide in determining whether statute violates equal protection clause, regardless of which standard of review is used), cert. denied, 469 U.S. 871 (1984); see also Associated Gen. Contractors of Cal. v. City of San Francisco, 619 F. Supp. 334, 341 (N.D. Cal. 1985), aff'd in part, rev'd in part, 813 F.2d 922 (9th Cir. 1987).
101. Fullilove, 448 U.S. at 498 (Powell, J., concurring).
102. Id. at 510-14. These factors are not exhaustive or exclusive and have been used by the courts only as guidelines. See, e.g., South Fla. Chapter, Associated Gen. Contractors of America, Inc. v. Metropolitan Dade County, 723 F.2d 846, 855 n.11 (11th Cir. 1984) (factors serving as a helpful guide in determining whether statute violates equal protection clause, regardless of which standard of review is used), cert. denied, 469 U.S. 871 (1984); see also Associated Gen. Contractors of Cal. v. City of San Francisco, 619 F. Supp. 334, 341 (N.D. Cal. 1985), aff'd in part, rev'd in part, 813 F.2d 922 (9th Cir. 1987).
and the Minnesota set-aside program, the Minnesota plan would not be affected by the Supreme Court decision.\textsuperscript{104} Then, on March 7, 1989, the Supreme Court affirmed a Sixth Circuit Court of Appeals’ decision that invalidated a Michigan set-aside program similar to Minnesota’s program. In \textit{Michigan Road Builder’s Association v. Milliken},\textsuperscript{105} the Sixth Circuit applied a strict scrutiny test to Michigan’s racially-based program and a less stringent intermediate test to the gender-based program.\textsuperscript{106}

When the Supreme Court affirmed \textit{Milliken},\textsuperscript{107} it was obvious that the Minnesota program would not pass constitutional muster. Thus, the Minnesota Legislature replaced the state set-aside programs with an interim program based not on gender or race, but rather based on the economic status of the business.\textsuperscript{108}

The legislation enacted in June 1989 created a Small Business Procurement Commission to propose changes to conform to the recent United States Supreme Court decisions.\textsuperscript{109} The Small Business Procurement Commission was required to assure that minority and women’s businesses knew of the existence and purpose of the commission, to determine the need for race- and gender-based business assistance programs, to recommend appropriate statutory or regulatory changes, and to recommend programs targeted to small businesses in need of assistance.\textsuperscript{110} The legislation also established a race- and gender-neutral program for economically disadvantaged small businesses (EDSBs).\textsuperscript{111} The Department of Administration implemented the set-aside for Economically Disadvantaged Businesses


\textsuperscript{105} 834 F.2d 583, 594-95 (6th Cir. 1987), aff’d, 109 S. Ct. 1333 (1989).

\textsuperscript{106} The intermediate test first requires establishing through findings of discrimination that an important governmental interest is served by the legislation. These findings need not be as detailed as those supporting a race-based program. The Sixth Circuit did not address the second requirement that the legislative means be “narrowly tailored” and “substantially related” to the goal of “eradicating the present effects of prior discrimination.” \textit{Id.} at 595 n.15.

\textsuperscript{107} The Supreme Court affirmed the decision without a written opinion. \textit{Milliken v. Michigan Rd. Builders Ass’n}, 109 S. Ct. 1333 (1989). In declaring the set-aside program unconstitutional, the court of appeals found no evidence that the state had discriminated against women in the awarding of public contracts. \textit{Milliken}, 834 F.2d at 595.

\textsuperscript{108} Act approved June 2, 1989, ch. 352, sec. 14, 1989 Minn. Laws 3178 (amending \textit{MINN. STAT.} § 161.321, subd. 2 (1988)).

\textsuperscript{109} \textit{Id.} sec. 1, subd. 1.

\textsuperscript{110} \textit{Id.} The Commission was to report its findings and recommendations for legislative action to the governor and the legislature by January 31, 1990. It ceased to function after that date. \textit{Id.} sec. 1, subd. 3.

\textsuperscript{111} \textit{Id.} sec. 14, subd. 2. Under this program, qualified businesses were awarded a five percent preference in the amount bid on state contracts and purchases. \textit{Id.} The Department of Administration may also set goals requiring prime contractors to sub-
(EDBs) while awaiting the report of the Small Business Procurement Commission.\textsuperscript{112}

V. \textbf{REPORT OF MINNESOTA LEGISLATIVE COMMISSION ON SMALL BUSINESS PROCUREMENT}

The Small Business Procurement Commission submitted its report to the Minnesota Legislature on January 31, 1990.\textsuperscript{113} The commission recommended that the legislature enact a race- and gender-based program.\textsuperscript{114} The Commission’s main task was to gather sufficient data to support its findings and recommendations. Minority and female business owners and representatives of groups such as business development organizations, trade associations, and civil rights agencies testified at the Commission’s public hearings. The Commission also received the Department of Administration's study, affidavits, and other documentation that showed discrimination.\textsuperscript{115} The evidence received by the Commission was of two types: anecdotal evidence and statistical evidence.

\textit{A. Anecdotal Evidence}

Persons testified via direct testimony and affidavits on the pervasiveness of discrimination in Minnesota's business industry. The wit-
nesses represented Indians, Aleuts, Asians, Hispanics, blacks and women. The witnesses described their personal experiences of discrimination based on race or gender. Witnesses identified discrimination within the construction, commodities and service industries. Racial minorities and women owning construction-related businesses identified prime contractors as the major source of discriminatory treatment. Other sources of discrimination identified include government agencies, bonding agents, lending institutions, suppliers and trade unions. Witnesses also spoke of exclusion because of race or gender from "the informal but vital networks" through which white, male-owned businesses obtain work opportunities.

Witnesses also gave examples of discriminatory practices. Prime contractors were accused of setting different bid requirements for a minority-owned firm than for others, using "good faith" postcards and phone calls to give the appearance of nondiscrimination, and sending late bid solicitations. Other problems facing minority-owned businesses include finding qualified professional

116. Id. at 9.
117. Warren McLean, Executive Vice President of the Metropolitan Economic Development Association, an association providing business consulting services to minority-owned businesses, spoke of two instances in 1989 in which his association helped clients reverse discriminatory decisions by government agencies. Id. Jan Morlock, Vice President of Business Development for Chart/WEDCO, an organization providing business consulting, education, and loan packaging to women, also testified regarding discrimination experienced by women, especially minority women. Id. at 10.
118. Id. at 11.
119. Id. at 11-12. The testimony reflected the link between the opportunity to learn a trade or business and entrepreneurial potential in that field. Id. at 12.
120. Id. at 11-12. Minority and female contractors consistently had a more difficult time getting bonded and securing loans from financial institutions. Suppliers also discriminated by charging higher prices to minority firms. See generally id. at 10-24.
121. Id. at 11. An informal network was referred to as the "good old boys network" by a Hispanic contractor. He stated that it is difficult to prove that this network is a source of discrimination because the perpetrators protect themselves very well. Id. at 18.
122. Id. at 11. A black contractor testified that in the pipe-fitters local union, 90% of the minority members are unemployed compared to only 6% of the white members. Id. at 12.
123. Id. at 13.
124. These contractors never intend to use a minority-owned firm; the calls are made only to create a record demonstrating a "good faith effort" to use an SED. Id. at 16. A contractor who receives late bid solicitations is at a disadvantage in developing a timely proposal. The project director of the Indian Business Development Center of the Minnesota Chippewa Tribe stated that a sampling of letters received by the center in the spring of 1989 revealed that 66% of the letters arrived within eight days or less of the bid-letting. Id.
employees; obtaining equity, debt and start-up financing; and securing liability insurance and bonding. 126 Many witnesses also stated that they only received government contracts through the SED programs. Since the SED program was suspended, bid solicitations from government agencies had significantly declined. 127

The Commission also identified employment discrimination and exclusion from construction opportunities as reasons for the inability of minorities and women to form businesses. 128 Minorities were hired primarily to fill minority quotas, but as soon as layoffs became necessary, minorities and women were the first to be laid off. 129 Minorities and women were also grossly under-represented in union membership and state-sponsored apprenticeship programs. A study conducted by the Minneapolis Civil Rights Department revealed that the disparities are the result of discriminatory patterns and practices within the construction industry. 130 In addition, female contractors complained of not being taken seriously in the construction industry. They were often required to have a man cosign on their loan requests. They also complained of having to work twice as hard to prove they could do the job. 131

Minority- and female-owned firms dealing in commodities and services reported virtually the same type of discrimination experienced by contractors. 132 In addition, government buyers, private sector buyers and purchasing agents have greater opportunities to discriminate. 133 Minority-owned firms are also disadvantaged by their lack of purchasing power. Thus, it is more difficult for them to compete with large nonminority-owned suppliers who are able to offer volume discounts. 134

126. Id. at 18.
127. Id.
128. Id. at 24-27. "No leap of faith is needed to understand that a person denied the opportunity to learn a particular trade or skill is not very likely to start up and run a firm in that trade or skill area." Id. at 24.
129. Id. at 26.
130. Id. at 25 (citing MINNEAPOLIS CIVIL RIGHTS DEPARTMENT, BARRIERS TO PROGRESS: PEOPLE OF COLOR AND WOMEN AND MINNEAPOLIS CONSTRUCTION OCCUPATIONS 1989).
131. Id. at 21.
132. Id. at 27. A witness testified that buyers are not interested in purchasing from minorities. Contracts go to friends, fellow club members, or whomever they favor. Id. at 27-29. A black business owner testified that he submitted a low bid on a services contract with the University of Minnesota. He was not awarded the contract and, believing the contract was denied because of his race, he retained an attorney and eventually received the contract. Id. at 34. An Asian owner of a computer systems and services business stated that organizations were reluctant to buy high technology products from minority-owned firms. Id. at 29.
133. Id. at 27-28.
134. Id. at 28.
B. Statistical Evidence

The Commission gathered statistical evidence from the Department of Administration, trade association membership and apprenticeship programs, a report prepared by the Hubert H. Humphrey Institute’s Regional Issues Forum, and other data reflecting the societal experiences of women and minorities that affect their competence to form and run businesses.

1. The Department of Administration Study

The Department of Administration submitted a report for the fiscal year 1988 which provided a breakdown of set-asides, preferences, and purchases awarded to socially or economically disadvantaged (SED) businesses. The report revealed that the total dollar amount awarded under the set-asides and preference programs exceeded the goals set in the programs. Nonetheless, of the 10.07% dollar amount awarded to SED vendors, 1.5% was awarded to minorities, 2.27% to females and 6.19% to businesses in labor surplus areas.

In response to four questions posed by the Legislature, the Department found: (1) there is sufficient evidence of discrimination, both in government purchasing and private activities, to justify a narrowly tailored purchasing program for the benefit of socially disadvantaged groups; (2) the definition of small business should be revised to recognize the different competitive conditions within the various types of business; (3) while there are alternative programs to stimulate growth opportunities for small businesses, the effective-

136. Id. at 2. Of the total volume procured, 12.9% was awarded to SED vendors, 4.08% to minorities, 4.43% to females and 4.00% to businesses in labor surplus areas. Id.
137. See supra note 112.
138. Foot in the Door, supra note 112, at 38. The report showed, however, that the reported discrimination differed among gender and racial groups and for each category of product or service. The study also found that, although past set-aside programs benefitted minority- and female-owned firms in several ways, the programs did not have a larger impact on government underutilization of those firms because firms located in labor surplus areas received a disproportionate share of the contracts let under the programs. Id. at 39. To increase opportunities for government contract awards, the study suggested raising the purchaser preference for firms qualifying under race and gender standards to a level higher than the preference granted to firms qualifying under the labor surplus or county median income standards. Id. at 40.
139. Id. The Department of Administration believed that an industry-specific definition of small business would provide a more accurate identification of firms that are considered small within a particular industry. Id.
ness of such programs is not clear;\textsuperscript{140} and (4) it is feasible to estab-
lish a preference program incorporating urban and rural areas of
high unemployment even where such areas are smaller than cities or
counties.\textsuperscript{141}

Finally, the Department of Administration recommended that the
legislature enact a race- and gender-based program.\textsuperscript{142}

2. \textit{Trade Association Membership and Apprenticeship Programs}

The report compared the proportions of female- and minority-
owned firms in Standard Industrial Classification (SIC) codes with
minority and female membership in trade associations.\textsuperscript{143} For exam-
ple, the report showed that the proportion of female-owned firms in
selected SIC codes ranges from about 19\% to more than 30\%. Compare these ratios with the female-membership in trade associa-
tions which ranges from zero to slightly greater than 12\%.\textsuperscript{144}

With regard to apprenticeship programs, the Commission as-
sumed that there was a connection between access to training and
employment in the trades and the ability to start up and run busi-
nesses in those trades.\textsuperscript{145} The report, however, stated that the par-
ticipation rates of women and minorities in apprenticeship programs
fall short of the affirmative action goals adopted by the Minnesota
Department of Labor and Industry’s Voluntary Apprenticeship
Division.\textsuperscript{146}

3. \textit{Other Evidence}

A report prepared by the Hubert H. Humphrey Institute’s Re-
gional Issues Forum\textsuperscript{147} found that although minorities constitute

\begin{itemize}
\item \textsuperscript{140} \textit{Id.} at 41. The Department of Administration questioned the focus and par-
ticipation levels of alternative programs. \textit{Id.}.
\item \textsuperscript{141} \textit{Id.} at 42. The report suggested that firms located in such areas could be
granted the same kind of preference given to firms located in labor surplus areas and
counties below the median income. \textit{Id.}
\item \textsuperscript{142} \textit{Id.} at 39. For other recommendations by the Commission, see \textit{id.} at 39-42.
\item \textsuperscript{143} \textit{Id.} at 43-46. The Commission requested membership information by gender
and race from 33 construction trade associations in Minnesota, and nine responded.
\textit{Id.} at 43.
\item \textsuperscript{144} \textit{Id.}
\item \textsuperscript{145} \textit{Id.} at 46.
\item \textsuperscript{146} \textit{Id.} The Apprenticeship Division decided that participation rates in appren-
ticeship programs should be 11.6\% for minorities and 21\% for women. Between
1980 and 1988, women actually constituted 4.1\% of all persons who entered appren-
ticeship programs. Minority males comprised only 5.7\% of the total. The average
completion rate for all apprenticeship programs is 48\%. White females had the high-
est completion rate of 50\%. Thirty-two percent of the black males who entered the
programs completed them. Only 9\% of the black females completed their programs.
\textit{Id.} at 46-47.
\item \textsuperscript{147} The forum was established by the Northwest Area Foundation and it studied

http://open.mitchellhamline.edu/wmlr/vol17/iss2/12

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nearly 7% of the region’s population, “‘sales of minority-owned enterprises are only 0.1% to 0.8% of the total sales’ within each of the eight states.”148 The Institute’s report also compared Minnesota minority businesses to all businesses by industry.149 The data showed that while minority firms made up 1.5% of construction firms and 7.1% of service firms, their total sales for the particular industries were only 0.1% and 0.8% respectively.150

Other statistics reviewed by the commission included the Minnesota household income by racial groups, unemployment rate and school drop-out rate. Minority groups had lower average household income and higher unemployment rates than whites.151 Also, a comparison of school enrollments within each racial group, showed that minority students had higher drop-out rates than their white counterparts.152

The Commission also looked at programs in other jurisdictions. The Commission found most set-aside or preference programs enacted since Croson in other jurisdictions were of three basic types: (1) those targeted at all small businesses; (2) those targeted at economically disadvantaged businesses; and (3) facially neutral programs with race and gender used as a set-aside criteria.153

After Croson, race- and gender-based legislation was enacted in King County, Washington and San Francisco, California.154 Both jurisdictions found statistical evidence of underrepresentation of female- and minority-owned firms in government contracting and subcontracting.155 The King County legislation withstood challenges in federal district court.156
C. Commission Findings and Legislative Recommendations

The Commission's most significant finding is "[t]hat public and private purchasing agents, business owners, contractors, financial institutions, and surety agents have discriminated and do discriminate against female- and minority-owned businesses doing business with the State of Minnesota, on the basis of the gender and race of the owners of these businesses." 157 The Commission found that the program for economically disadvantaged businesses did not adequately benefit female- and minority-owned firms. The report concluded "[t]hat race and gender-neutral measures, by themselves will not eliminate the effects of discrimination by governmental agencies and private businesses." 158

Based on its findings, the Commission recommended that "[a] race- and gender-based program should be enacted by the Legislature that reflects the varying populations of female- and minority-owned firms by industry." 159 The Commission also recommended that "[f]irms qualifying under race and gender standards should be granted a 6- percent purchasing preference and firms qualifying under the labor surplus or county median income standards should be granted a 4- percent preference." 160 In addition, the Commission recommended various race- and gender-neutral measures geared towards assisting small businesses. 161

D. Are the Findings of the Small Business Procurement Commission Sufficient to Support a Race- and Gender-Based Program?

To satisfy Croson, before enacting a race- and gender-based set-aside program, the legislature must find a compelling state interest to remedy the effects of past discrimination, then narrowly tailor the program to serve that governmental interest. 162 The small business procurement report showed that the legislature has a compelling state interest in redressing prior discrimination, by disclosing evidence of such discrimination. The report contains testimony from individuals about their personal experiences of being discriminated against due to their race or gender. Individuals gave specific examples of discriminatory practices. Some witnesses testified they never received government contracts except on set-aside programs. 163 Additionally, the Department of Administration admitted that the record of government purchasing evinced discrimination.

157. Id. at 61.
158. Id. at 62.
159. Id.
160. Id.
161. Id. at 63-65.
162. See supra text accompanying notes 96-102.
163. See supra text accompanying notes 116-34 and accompanying text.
In further establishing a compelling state interest in remedying past discrimination, the Commission’s report noted a disparity between the percentage of minority businesses and the percentage of total sales by those minority industries. Specifically, the statistics show the disparity between the percentage of minority firms in the construction industry and the total percentage sales for the industry. Finally, the statistics show the disparity between the proportion of minority- and female-owned firms and minority and female membership in trade associations.

To ensure narrow tailoring of the set-aside programs, the Commission advised that the programs reflect the varying populations of female- and minority-owned firms by industry. The Commission also recommended basing the categories of purchasing that should qualify for a race- and gender-based procurement on the number of minority- and female-owned firms. The Commission did not propose rigid quotas, but only suggested percentage purchasing preferences. The Commission recommended that government agencies have discretion and flexibility in using preferences or set-asides and that any goal-setting process contain waiver provisions. Finally, the Commission advised that a biannual report on the implementation of purchasing programs should be submitted to the Legislature.

The Commission tailored its report to the requirements of Croson. Consequently, the new legislation was enacted without opposition. However, arguments do exist against adopting any race- and gender-based programs in Minnesota.

E. Arguments Against Adopting a Race- and Gender-Based Set-Aside Program

Opponents of race- and gender-based set-aside programs could argue that the Minnesota Legislative Commission Small Business Report does not show a compelling state interest in remedying the effects of past discrimination in Minnesota. The Commission accepted the testimony of witnesses without verifying the authenticity of the claimed discrimination. Most of the discrimination experienced by the witnesses came from private individuals and businesses instead of government agencies.
The statistical evidence in the report may not be sufficient grounds for imposing a percentage preference and the percentages recommended by the Commission may be somewhat arbitrary. Furthermore, the numbers may not be conclusive proof of prior discrimination since there might be other reasons for the disparity.

Finally, a set-aside program may be unnecessary because most of the problems identified by minority- and female-owned businesses are virtually the same problems facing all small businesses. Thus, critics could assert that race- and gender-neutral measures targeted towards all small businesses would suffice.

However, even if most of the discriminatory practices were perpetrated by private individuals and industries, the government is a passive participant in discriminatory practices because it awards contracts to industries that discriminate. Additionally, no statistics can specify with mathematical certainty the percentage preference or set-aside that would remedy the effects of past discrimination. The Legislature devised a reasonable percentage by using the statistics available. Finally, race-neutral measures recommended by the Commission cannot by themselves redress the effects of past discrimination.

VI. THE NEW PROGRAMS

As a result of the Small Business Procurement Commission’s report, the Legislature enacted a revised small business procurement program. The new Act established programs for public purchasing from the following types of businesses: small businesses; small consultant, professional and technical businesses; target group businesses; and businesses in economically disadvantaged areas. In proposing the bill, a member of the Small Business Commission stated:

I believe it is necessary for the legislature to enact a procurement program that remedies the discrimination brought to our attention by the report of the Small Business Procurement Commission. I believe that the program recommended in this bill, including race and gender conscious measures is necessary and narrowly tailored...
to remedy the discrimination found by the commission.\textsuperscript{176}

The program for purchasing from targeted group businesses contains race- and gender-conscious measures. Targeted groups include women, persons with disabilities and or specific minorities.\textsuperscript{177} The Commissioner may award small targeted group businesses a 6\% preference in bidding for specified goods or services.\textsuperscript{178} The Commissioner may set aside a purchase of goods or services for award only to small targeted group businesses.\textsuperscript{179} Also, in awarding a construction or services contract, the Commissioner may set goals that require prime contractors to subcontract a part of the contract to small targeted group businesses.\textsuperscript{180}

With regard to procurement from small businesses generally, the Commissioner must ensure that small businesses receive at least 25\% of anticipated total procurement of goods and services.\textsuperscript{181} Small businesses located in economically disadvantaged areas may also receive up to a 4\% preference in the amount bid on state procurement.\textsuperscript{182}

Although the program for targeted group purchasing contains race- and gender-conscious measures, the program does not set concrete guidelines for granting preferences to any particular group. In fact, most of the legislation in the new programs is permissive and gives the Commissioner of Administration immense discretion in applying the programs.\textsuperscript{183}

Also, the new programs are more narrowly tailored than former plans. Targeted group businesses are designated within a purchasing program if "there is a statistical disparity between the percentage of purchasing from businesses owned by group members and the representation of business owned by group members among all businesses in the state in the purchasing category."\textsuperscript{184} The Commis-

\textsuperscript{177}. \textsc{Minn. Stat.} § 16B.19, subd. 2b(a) (1990).
\textsuperscript{178}. \textit{Id.} § 16B.19, subd. 2c(a).
\textsuperscript{179}. \textit{Id.} § 16B.19, subd. 2b(a).
\textsuperscript{180}. \textit{Id.} § 16B.19, subd. 2c(c).
\textsuperscript{181}. \textit{Id.} § 16B.19, subd. 1.
\textsuperscript{182}. \textit{Id.} The Commissioner may designate targeted neighborhoods as economically disadvantaged areas. \textit{Id.}
\textsuperscript{183}. The Commissioner, however, is advised by a Small Business and Targeted Group Procurement Advisory Council which reviews Commission reports and hears complaints and grievances of small businesses in targeted groups. \textit{Id.} § 16B.20, subd. 3.
\textsuperscript{184}. \textit{Id.} § 16B.19, subd. 2b(a). The Commissioner must assure that the percentage of purchasing from each type of targeted group is proportional to its representation in the state. \textit{Id.} § 16B.19, subd. 2a. Furthermore, the definition of a small business is no longer a general definition. The statute requires the Commissioner to establish separate definitions for various sizes of businesses. \textit{Id.} § 16B.19, subd. 1a.
sioner may award preferences of up to 6% of the total bid amount in
discrete contracts for specified goods and services.185 Moreover, the
Commissioner may only limit bidding on contracts to target groups
where the Commissioner determines that at least three target busi-
nesses are likely to bid.186

Greater flexibility is another virtue of the new programs. When
placing their bids, prime contractors are no longer required to list
the names of minority- or female-owned businesses they would use.
Instead, the Commissioner may use financial incentives or penalties
for prime contractors who exceed or fail to meet the goals.187 Agen-
cies are encouraged to purchase from small targeted group busi-
nesses when making purchases that are not subject to competitive
bidding.188 Also, the authority to subcontract small business is no
longer limited to contracts in excess of $200,000.189 Of course, the
programs would not be complete without retaining race-neutral
measures that benefit all small businesses.190

Finally, the legislation requires an ongoing assessment of the pro-
grams. The Commissioner of Administration must submit annual
and quarterly reports on the progress being made toward the objec-
tives and goals of these programs.191 The Commissioner of Trade
and Economic Development and the Commissioner of Administra-
tion must also undertake various studies to evaluate the
programs.192

The Legislature has carefully enacted programs that can withstand
judicial scrutiny. However, the effectiveness of the new programs is
yet to be determined.

CONCLUSION

Instead of sounding the death knell for Minnesota’s race and gen-
der set-aside programs, Croson revived the state’s interest in ensuring

185. Id. § 16B.19, subd. 2c(a).
186. Id. § 16B.19, subd. 2c(b).
187. Id. § 16B.19, subd. 2c(c). Waiver provisions are also required in the event of
unavailability of qualified small targeted group businesses. Id.
188. Id. § 16B.07, subd. 6.
189. See Minn. Stat. § 16B.19, subd. 6 (1989), repealed by Act approved May 3,
1990, ch. 541, sec. 3, 1990 Minn. Laws 1457-61. The elimination of the $200,000
requirement provides more flexibility in the purchasing process.
190. The Bureau of Small Business was created in 1979 to provide information
and assistance to small businesses generally. The Bureau was also formed to award
contracts to businesses in targeted areas. These purposes remain unaffected. See
191. Id. § 16B.21. State agencies involved in the programs are also required to
submit reports. Id. § 16B.21, subd. 3.
192. Id. The studies were to be completed by January 15, 1991. Act adopted May
that minority- and female-owned businesses receive a fair share of state business. *Croson* prompted the Legislature to examine the small business procurement programs and to find their shortcomings. In spite of the shortcomings, set-asides are an important weapon used in the government's efforts to combat discrimination in the marketplace. Concerted efforts must be made to ensure that the new programs are administered in a fashion that promotes equality of business opportunities in the state. Minnesota must not back away from its commitment to end discrimination.