Implementing Croson: Applying Illogic to the Elusive and Concluding the Obvious

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IMPLEMENTING CROSON: APPLYING ILLOGIC TO THE ELUSIVE AND CONCLUDING THE OBVIOUS

Ken Nickolai†

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INTRODUCTION

In *City of Richmond v. J.A. Croson Co.*, the Supreme Court held that a Richmond, Virginia ordinance setting aside thirty percent of city subcontracts for minority-owned firms violated the equal protection clause of the Constitution. The Court held that equal protection had been denied because racial classifications had been used without evidence of past discrimination against those who would benefit, because race-neutral alternatives had not been considered, and because the remedy had not been narrowly tailored to minimize adverse affects on other groups.

The standards articulated by the Court in *Croson* require a more stringent level of analysis for race- or gender-based state and local purchasing preference programs than had been applied to similar federal government programs, but they do not forbid the use of those classifications by states and cities. The standards do, however, place a substantial evidentiary burden on the use of race or gender classifications.

Minnesota’s purchasing preference statute set aside a portion of the state’s purchasing budget for acquisitions from small businesses and allowed the grant of a 5% pricing preference in competitive bidding. Firms owned by racial minorities and females were among those eligible for the program. Suit was brought in Minnesota District Court challenging the stat-

2. Section 1 of the fourteenth amendment, the equal protection clause, states, in part: “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.
5. Section 5 of the fourteenth amendment states: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” U.S. CONST. amend. XIV, § 5.
6. *Croson*, 488 U.S. at 504. Justice O’Connor wrote: “While the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief.” *Id.* The city of Richmond failed to meet this burden of proof and thus did not have a compelling interest to apportion public contracts on the basis of race. *Id.*
8. See id. § 645.445, subd. 5, repealed by Act of May 3, 1990, ch. 541, § 31, 1990 Minn. Laws 1476; see also id. § 645.445, subd. 5 (amending the 1980 definition to include specific references to racial minorities and women).
The state agreed to suspend the programs pending new legislative action. The Minnesota Legislature adopted a temporary race- and gender-neutral program to assist "economically disadvantaged" businesses and directed that a study be conducted to determine if there was evidence of discrimination against women- and minority-owned firms under the standards of the *Croson* decision. The Minnesota study, entitled *A Study of Discrimination Against Women- or Minority-Owned Businesses and Other Small Business Topics* (Study), was presented to the Legislature in January 1990. It found evidence of discrimination against women- and minority-owned businesses in its analysis of state purchasing, in the survey data collected, and in oral testimony presented to a special Legislative Commission.

The conclusions of the Study are not surprising. During the 1970s numerous articles were written regarding the struggle of minority businesses in Minnesota. In 1975, a white, male-dominated legislature included business owners who were socially or economically disadvantaged in a program qualifying the disadvantaged for set-asides or preferences in purchasing by state government. The programs were reviewed and amended by the Legislature four times between 1975 and 1988, and annual reports on their implementation were required by the implementing agencies.

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8. Sorenson Bros., Inc. v. Levine, No. CX-89-3463 (2d D. Minn. April 14, 1989) (Plaintiff sought an injunction to prevent denial of a road construction bid based solely on fact that bid did not allocate 5% of subcontracts to disadvantaged business enterprises.).

9. *Id.;* see Stipulation and Order for Dismissal, *Sorenson Bros., Inc.,* No. CX-89-3463.


14. *Minn. Stat. § 321 (1977)* (establishing a program for the Department of Transportation); *Minn. Stat. § 137.31 (1979)* (establishing a program for the Uni-
What is surprising is that the standard enunciated by the Supreme Court will require a large expenditure of public time and money to conclude, as the Kerner Commission did in 1968, and as numerous other studies have since, that racial minorities and females experience a disadvantage in a traditionally white, male-dominated society. The standard, adopted under the rubric of equal protection, will stand as a substantial barrier to fulfilling the goal of the fourteenth amendment by discouraging state and local jurisdictions from reaching beyond their self interest to assist groups without dominant political power in the community.

This article will first examine the Croson decision and the debate over its meaning. Next, it will discuss the application of the Court's evidentiary standards in the Minnesota study. Finally, this article will discuss possible alternative formulations of standards under the equal protection clause.


Segregation and poverty have created in the racial ghetto a destructive environment totally unknown to most white Americans. What white Americans have never fully understood—but what the Negro can never forget—is that white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it.

Id. at 2.


17. The impact on minority community members is already being felt. Although the numbers are not available for Minnesota, in Richmond, Virginia, minority-firm participation in state contracts fell from 32% to 11% after cessation of the set-aside program. In Illinois, minority participation in state contracts declined 50%. See Reidinger, Life After Croson, 76 A.B.A. J. 33 (Oct. 1990); Pear, Courts are Undoing Efforts to Aid Minority Contractors, N. Y. Times, July 16, 1990, at A1, col. 1 (To avoid suits, large agencies such as the Port Authority of New York and New Jersey, have voluntarily suspended their programs.).

Although many studies are underway, other jurisdictions are reluctant to undertake them for a variety of reasons. For example, in Rhode Island, a proposal to conduct a study has been tabled, in part, because of state budget problems. Interview with Charles Newton, Coordinator for Minority Business Affairs for Rhode Island, in Providence, R.I. (Aug. 1990).
I. THE STRICT SCRUTINY STANDARD

In *Croson*, the United States Supreme Court found that a race-based set-aside program for minority contractors adopted to increase the participation of nonwhite owned firms in the contracts awarded by the city of Richmond violated the requirements of the equal protection clause of the Constitution. The Court was concerned because the Richmond City Council had no evidence of prior discrimination against these businesses. In addition to this lack of evidence of discrimination, the Court found that race-neutral alternatives had not been considered and found to be inadequate, and that the remedy adopted by the city had not been narrowly tailored to minimize any adverse effects on other groups.

Richmond’s Minority Business Utilization Plan (Plan) required prime contractors for city contracts to subcontract at least 30% of the dollar amount of their contracts to one or more minority business enterprises (MBEs). An MBE was defined as a business which is at least 51% owned and controlled by black, Spanish-speaking, Oriental, Indian, Eskimo or Aleut citizens of the United States. The firms did not have to be located in the Richmond area to qualify.

The Plan had been adopted in April 1983, after a public hearing, and was to expire on June 30, 1988. A study was presented which showed that, while the general population of Richmond was 50% black, only .67% of the city’s prime construction contracts had been awarded to minority businesses from 1978 to 1983. It was also established that a majority of the local contractors’ associations had virtually no minority membership. Opponents questioned whether there were enough minority-owned firms in the area to satisfy the 30% set-aside requirement.

As adopted, the Plan was declared to be “remedial” in na-

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19. Id. at 507-10.
20. Id. at 477-79. The set-aside did not apply to city contracts awarded to minority-owned prime contractors. *Id.*
21. Id. at 478-79. An otherwise qualified MBE from anywhere in the United States could avail itself of the 30% set-aside.
22. Evidence developed during the adoption process included the testimony of seven members of the public. Two were in favor of the ordinance and five were opposed. *Id.* at 479.
23. Id. at 480-81.
ture and enacted for the purpose of “promoting wider participation by minority business enterprises in the construction of public projects.”24 The Director of the Department of General Services was authorized to grant waivers in limited circumstances, where there was a showing that sufficient, relevant minority firms were unavailable or unwilling to participate in the project.25

After adoption of the ordinance, the J.A. Croson Company became the only bidder on a plumbing project for the city jail. One minority vendor sought to participate as a subcontractor, but was unable to submit a quote within the time limit because his supplier required a lengthy credit check. The minority vendor submitted a late quote to Croson which was higher than a nonminority supplier. Croson sought a waiver from the city regarding the set-aside requirement or, alternatively, for the opportunity to increase the price due to the higher bid from the minority vendor. The city rejected both requests and elected to re-bid the project. Croson began legal proceedings in Federal District Court.26

Efforts designed to assist women-owned businesses have also been rejected by the Court on equal protection grounds. While the Court has, in the past, applied a less rigorous standard of review to gender-based classifications,27 in Michigan Road Builders Association, Inc. v. Milliken,28 it affirmed a lower court decision holding that a Michigan plan designed to benefit women-owned businesses violated the equal protection clause of the fourteenth amendment. The Michigan program to benefit women-owned businesses was not “substantially related to an important government function.”29

24. Id. at 479.
25. Id. “To this end, the Director promulgated Contract Clauses, Minority Business Utilization Plan (Contract Clauses).” Id. at 478.
26. Id. at 716. Croson argued that the Richmond ordinance was unconstitutional on its face and as applied in this case. Id.
27. See Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982). In applying the strict scrutiny test, the Court stated that the test must be “applied free of fixed notions concerning the rules and abilities of males and females.” Id. at 724-25. The Court further held that if the statutory objective is to protect members of a class because they are presumed to be traditionally handicapped, then the objective itself is illegitimate. Id. at 725.
28. 834 F.2d 583 (6th Cir. 1987).
29. Id. Because the Court concluded that Michigan lacked a “compelling” interest to support the racial and ethnic distinctions and an “important” interest to support the gender-based distinctions, the Court did not address whether the means
In 1981, the Michigan Road Builders Association challenged, on equal protection grounds, a 1980 Michigan statute which set aside a portion of state contracts for women- and minority-owned businesses. The Michigan statute set aside not less than 7% of state contracts for minority-owned businesses and not less than 5% for women-owned businesses. In reviewing this statute, the appeals court applied a less stringent standard of review to the program, but concluded:

Even under this less stringent standard of review, the WBE preferences in Public Act 428 cannot withstand constitutional attack since evidence of record that the state discriminated against women is non-existent. Defendants' reliance upon general assertions of societal discrimination are insufficient to satisfy their burden absent some indication that the 'members of the gender benefited by the classification actually suffered a disadvantage related to the classification.'

The United States Supreme Court affirmed the court of appeals decision in Michigan Road Builders.

Since Croson established the evidentiary basis for use of race-based classifications, standards required for gender-based programs will be no higher than those required to satisfy the Croson tests. Thus, the critical articulation of the applicable evidentiary standards is found in the Croson decision.

In Croson, Justice O'Connor applied the strict scrutiny standard of review: "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."

Justice O'Connor was concerned with more than the determination of whether the use of racial classifications was remedial or invidious. She was also concerned that, without identified discrimination, there was no logical stopping point

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30. Id. at 584.
32. Michigan Road Builders Assoc., 834 F. 2d at 595 (quoting Mississippi Univ. for Women, 458 U.S. at 728).
34. Croson, 488 U.S. at 495.
to the remedy.\textsuperscript{35} In other words, evidence of discrimination was necessary to first trigger a determination whether a racial classification could be used, and second, it was necessary to identify a specific remedy. The nature of the evidence is then used to determine eligibility and to limit the nature of the remedy.\textsuperscript{36}

The evidentiary standard, established in \textit{Croson}, used to support the use of racial categories is that the evidence must "approach . . . a prima facie case of constitutional or statutory violation."\textsuperscript{37} This establishes the predicate facts upon which remedial action can be based. Once these facts are established, the focus of the inquiry changes to the nature of the remedy adopted to assure that there are no sufficient race-neutral alternatives and that the remedy adopted is narrowly tailored to achieve that remedial purpose.\textsuperscript{38}

\section*{II. Who Must Have Discriminated?}

For there to have been discrimination, a person or group of people must act or fail to act against another identified individual or group. Although the specific extent to which the evidence must establish that discriminatory conduct is raised in \textit{Croson}, it is not completely answered. Justice O'Connor rejects the argument that the government itself must have actively discriminated before it can provide a remedy to victims of discrimination. In discussing the scope of a city's authority to adopt legislation designed to address the effects of past dis-

\begin{itemize}
  \item \textsuperscript{35} \textit{Id.} at 498.
  \item \textsuperscript{36} \textit{Fullilove} v. \textit{Klutznick}, 448 U.S. 448 (1980) \textit{Fullilove} involved the Minority Business Enterprise provision of the Public Works Employment Act of 1977, Pub. L. 95-28, 91 Stat. 116 (Act). The Act required at least 10\% of federal funds granted for local public works projects to be used to procure services or supplies from minority-owned businesses. \textit{Id.} at 448. Evidence relied upon by Congress included the fact that, while 16\% of the population was nonwhite, only 3\% of businesses were owned by nonwhites and that nonwhite-owned businesses accounted for less than 1\% of total gross business receipts. The House Report concluded: "These statistics are not the result of random chance. The presumption must be made that past discriminatory systems have resulted in present economic inequalities." \textit{Fullilove}, 448 U.S. at 465.
  \item \textsuperscript{37} \textit{Croson}, 488 U.S. at 500. Contrast this with the language in \textit{Fullilove}, where the Court stated: "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings." \textit{Fullilove}, 448 U.S. at 478.
  \item \textsuperscript{38} \textit{Croson}, 488 U.S. at 506. The Court concluded that it is impossible to assess whether the Richmond Plan is "narrowly tailored to remedy prior discrimination." \textit{Id.}
\end{itemize}
The Court in *Fullilove* had sustained a flexible minority set-aside program, adopted by Congress in the Public Works Employment Act of 1977, without such evidence. The Court distinguished *Fullilove* on the basis that the fourteenth amendment enhances congressional enforcement power in this area and serves as a restraint on the exercise of authority by state and local governments. 41 Justice O'Connor also rejected the argument that *Wygant v. Jackson Board of Education* 42 controlled, a precedent which would have required specific proof that the city of Richmond itself had discriminated. The court in *Wygant* had concluded that "some showing of prior discrimination by the governmental unit involved" 43 must be proven. While the state or local government must be more than an observer in the discrimination before it can provide a race-based remedy, the answer to the question who may benefit from the remedy is less clear.

Legal scholars disagree about the need for evidence of specific discrimination to meet *Croson*’s strict scrutiny standard. Former Solicitor General Charles Fried argues, in response to a statement issued by a group of constitutional scholars, that:  

_Croson_ is significant. For the first time a majority of the
Court holds unequivocally that all racial classifications . . . must pass strict scrutiny and be justified by a compelling governmental purpose. . . . How far one must go in showing that the identified discrimination was also 'purposeful' and what 'purposefulness' means in this context are genuinely difficult and controverted issues. I do suggest, however, that the Court's recent jurisprudence makes it risky, to say the least, for local authorities to rely on the scholars' confident reassurance that the conditions for justifying racial preferences in this regard are not now quite rigorous.

The constitutional scholars respond:

Fried suggests that Croson signals a substantial change in the law of affirmative action because in that case a Supreme Court majority adopted, for the first time, a test of strict scrutiny for all racial classifications. But this overstates the implications of the case. As noted above, Supreme Court majorities, or Justices whose votes were crucial to majorities, have applied strict scrutiny, and upheld affirmative action programs, on many occasions. . . . Discrimination against members of minority groups must overcome what is virtually a conclusive presumption of unconstitutionality. Affirmative action programs, even under strict scrutiny, need not do so . . . . To think that Croson imposes a national constitutional barrier—to be enforced by federal judges—to such programs would be to read it as a startling departure from the Court's cautious approach to the difficult problem of remedying the long legacy of discrimination against members of minority groups. We prefer to see Croson as the pragmatic and particularistic opinion that it is.

Whether the Croson case ultimately proves to be the "particularistic" opinion the constitutional scholars believe it is or the watershed described by Professor Fried, it cannot be doubted that Croson has changed the legal, and thus the political, environment for affirmative action programs. Significantly, that change has placed a heavy evidentiary burden on state and lo-


46. The Court itself is widely divided over the breadth of its decision in Croson. In Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990), the Court sustained two FCC policies intended to increase minority ownership of broadcast facilities. The majority distinguished the decision from Croson, arguing that congressional approval of the policies took the case outside of the strict scrutiny standards of Croson. Id. at
cal governments which seek to provide race- or gender-based affirmative action programs to members of their communities.

Following Croson, the Western District of Washington in Coral Construction Co. v. King County sustained a challenge to the King County set-aside program for construction purchasing which had been re-enacted after hearings held in response to the Croson decision. The Court applied Croson language so as to limit its impact. The Court in Coral Construction concluded that evidence of discrimination provided by “several dozen people” was adequate to meet the Croson standards. While the decision is a hopeful one, its cavalier treatment of the evidentiary requirements of Croson is not easily reconciled with the requirements established by the Supreme Court.

III. REQUIREMENTS OF A CROSON STUDY

The initial quandary posed by the Croson case for those engaged in gathering and examining evidence of discrimination required by the case is caused by the Court’s lack of clarity. From the language of the case, it seems clear that a governmental unit seeking to use race or gender criteria would be prudent to establish:

1. Discrimination against persons in the class of individuals to be assisted by the program;
2. Government participation in the discrimination, or passive participation in the otherwise established discrimination;
3. Consideration of non-race or gender-based alternatives, remedies and the reasons for their rejection; and
4. Evidence sufficient to focus a remedy with a limited duration to benefit groups experiencing discrimination and to minimize adverse impact on those affected by the
remedy. 51

In *Croson*, the Court indicated that it expects the use of statistical measures similar to those used by the courts in employment discrimination cases to determine whether minority-owned business firms are being under-used. The Court quoted the well-known *Hazelwood School District v. United States* 52 decision stating, "[W]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination." 53

The statistical disparity that must be shown, according to *Croson*, is the disparity between the available qualified pool of minority-owned firms and their actual rate of employment. Justice O'Connor wrote: "[W]here special qualifications are necessary, the relevant statistical pool for purposes of demonstrating exclusion must be the number of minorities qualified to undertake the task." 54

The key to determining the relevant statistical pool is the definition of the market. 55 However, the Court did not articulate how narrowly it intended to interpret the requirement of identifying firms with "special qualifications." Justice O'Connor found the city of Richmond's comparison between the percentage of blacks in the city population and the value of the city's prime contracts awarded to black-owned businesses inadequate to justify a program designed to aid minority subcontractors. Would it be sufficient to identify the percentage of the total number of businesses in the jurisdiction owned by racial minorities and compare that to the value of contracts awarded? If a narrower cut were taken, would using broad categories such as construction, retail and agriculture be adequate, even though the construction category would include every business ranging from single family home construction, or bridge and tunnel construction to electrical and insulating work? If Justice O'Connor's language about special qualifica-

51. *Id.* at 509.
52. 433 U.S. 299 (1977). The Court in *Hazelwood* held that the proper comparison was between "the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market," not between the teaching staff and the student population. *Id.* at 308.
54. *Id.*
55. A disparity may not be found in two situations: 1) where the firms are being used roughly in proportion to their availability; or 2) where there is not a significant number of firms available with owners having specified race or gender characteristics.
tions is to be taken seriously, it seems unlikely that a statistical comparison which includes electrical contractors in the same category with bridge contractors or highway contractors would be considered valid.

_Croson_ does not answer this question. The Court noted that this is the approach utilized to establish a presumption of discrimination in Title VII employment cases. In _Wards Cove Packing v. Atonio_, decided after _Croson_, the Court examined the nature of appropriate measures for statistical comparison in Title VII cases, and narrowed the scope of that comparison. A brief examination of the arguments in _Wards Cove_ reveals the quagmire that states and cities may now be falling into as they seek to develop the evidence required by _Croson_. In _Wards Cove_, one of the issues discussed was how to determine the available work force for noncannery seasonal employment. The Court rejected a statistical comparison showing that the cannery workforce was over 50% nonwhite while the noncannery workforce (better paid and living in separate and better accommodations) was predominantly white. Justice White wrote:

> Moreover, isolating the cannery workers as the potential labor force for unskilled noncannery positions is at once both too broad and too narrow in its focus. Too broad because the vast majority of these cannery workers did not seek jobs in unskilled noncannery positions; there is no showing that many of them would have done so even if none of the arguably “deterring” practices existed. . . . Conversely, if respondents propose to use the cannery workers for comparison purposes because they represent the “qualified labor population” generally, the group is too narrow because there are obviously many qualified persons in the labor market for noncannery jobs who are not cannery workers.

In dissent, Justice Blackmun stated that the structure of the cannery industry renders any statistical comparison, other than the internal workforce comparison offered, meaningless. In a separate dissent, Justice Stevens further examined the question of appropriate statistical comparisons. He wrote:

> An undisputed requirement for employment either as a can-

57. _Id._ at 653-54.
58. _Id._ at 679 (Blackmun, J., dissenting) (noting statistical proof in the cannery case is impossible to obtain).
nery or noncannery worker is availability for seasonal employment in the far reaches of Alaska. Many noncannery workers, furthermore, must be available for preseason work. Yet the record does not identify the portion of the general population in Alaska, California, and the Pacific Northwest that would accept this type of employment. This deficiency respecting a crucial job qualification diminishes the usefulness of petitioners' statistical evidence. In contrast, respondents' evidence, comparing racial compositions within the work force, identifies a pool of workers willing to work during the relevant times and familiar with the workings of the industry. Surely this is more probative than the untailored general population statistics on which petitioners focus. 59

Justice Stevens stated his view that prior precedent held that the Court should not strive for "numerical exactitude at the expense of the needs of the particular case" when reviewing statistical evidence. 60 The implication of Justice Steven's dissent is that he believed the Court had established a new, more rigid standard for statistical comparisons.

Whether this stricter standard of defining relevant comparisons adopted by the Court in Wards Cove for Title VII cases will be applied to affirmative action cases reviewed under the equal protection clause is unknown. However, such a result appears likely since Justice O'Connor outlined the Title VII standards in her discussion of evidence necessary to satisfy the equal protection clause. The crucial question in the future will be how narrowly a jurisdiction will be required to define these categories to meet the constitutional test when seeking to determine if there is evidence of discrimination. The breadth of the definition for comparison will be an important determinant of the ability of state and local governments to overcome the practical problems in complying with the Croson requirements. The nature of these problems can be seen by reviewing the manner in which the Minnesota study was prepared.

IV. THE MINNESOTA STUDY

The experience in Minnesota illustrates the immediate impact of the Croson changes. Shortly after the Croson decision, the Minnesota laws were challenged. Minnesota statutes re-

59. Id. at 676 (Stevens, J., dissenting) (citation and footnote omitted).
60. Id. at 674.
quired specified units of government to use set-aside and preference programs to direct a portion of state procurement to small businesses with ownership having certain characteristics. Racial minorities and females were included. Suit was brought in state district court and, in settling the case, the state agreed to suspend existing state programs based on race or gender classifications pending further legislative action.

Because of the similarity of the Minnesota statute to that struck down in Michigan Road Builders, the Minnesota Attorney General's office advised settlement of the claims. The Legislature then adopted a temporary race- and gender-neutral program for economically disadvantaged businesses. Businesses which qualified under the race and gender criteria for set-aside or preference programs were asked to re-apply under new criteria. In addition to the temporary program, the Legislature directed completion of a study to determine if there was evidence sufficient under the Croson decision to support a race- and gender-based program. The Management Analysis Division of the Minnesota Department of Administration, together with a Legislative Commission on Small Business, conducted the seven month, legislatively mandated study at a cost in excess of $100,000.

A. Market Definition

The Minnesota study approached the question of special qualifications by seeking to identify the market segments as discretely as the data would allow. The basis for definition

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61. See Minn. Stat. § 645.445 (5) (1988), repealed by Act of May 3, 1990, ch. 541, § 31, 1990 Minn. Laws 1476. The statute defined socially or economically eligible businesses for the programs. The eligible businesses included those whose owners lived or worked in a labor surplus area or an area having a county with 70% or less than the state-wide average of racial minorities, women and individuals with substantial physical disability. Id.


63. Id. See Stipulation and Order for Dismissal at 4-5.

64. Small Business Procurements Commission, ch. 352, §§ 1, 22, 1989 Minn. Laws 3169, 3183 (The legislation also created a Small Business Procurements Commission to gather evidence on discrimination and make recommendations to the Legislature.).

65. Id. See A Foot in the Door, supra note 11.

66. The assumption of the study was that if a future program were challenged, Minnesota could show that every effort was made to secure detailed information. If the information proved to be unavailable or unreliable, this would justify using less discrete classifications.
was the Standard Industrial Classification Manual (SIC Manual) which is arranged to allow categorization on a number of ever more distinct characteristics.67

The Minnesota study sought to identify available data suitable for statistical comparison using four-digit SIC codes. It was possible to secure purchasing data from government files which could be re-organized into SIC codes, but it was not possible to estimate the proportion of women- and minority-owned firms on anything smaller than the three-digit industry codes. Thus, the Minnesota study was based on a market, or special qualification definition, based on three-digit SIC codes.68

B. Firm Availability

The second piece of necessary information is the estimate of the proportion of women- and minority-owned firms available in each of these markets. No current, reliable data exists on this point.69 The Minnesota study estimated the proportion of available firms which were women- and minority-owned through a random sample survey of state firms doing business in forty-one major SIC codes. Based on discussions with state officials, the codes selected were those including firms most likely to be doing business with the government.70 Because

67. EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, STANDARD INDUSTRIAL CLASSIFICATION MANUAL (1987) [hereinafter SIC MANUAL]. For example, Division C is construction. Within that division are three major groups: Group 15: Building construction; Group 16: Heavy construction other than building construction contractors; and Group 17: Construction, special trade contractors. In turn, each major group is divided. Under Group 17 is industry group 179 - Miscellaneous Special Trade Contractors. A subdivision of that industry group is Industry No. 1793, Glass and Glazing Work. Another subdivision is Industry No. 1794, Excavation Work. Id. at 61.

68. State government purchasing data, when it was maintained in a computerized database, was coded with over 2,500 different product codes to identify the type of purchase. These codes were unrelated to the SIC method of coding. It was necessary to aggregate them to have them conform to the SIC manual to develop usable purchasing data.

69. The 1982 Census of Women- and Minority-owned businesses is old and the estimates of women-owned firms are biased upward due to the method of counting used. The 1987 Census data is not yet available. When it becomes available, it will be published using broad categories such as construction and retail, thus creating reliability problems.

70. Prior Minnesota state law required the use of set-asides or preference purchasing by state government, the University of Minnesota, and metropolitan agencies, such as the Metropolitan Airports Commission. Purchasing information was obtained from each of these governmental units.
the sampling needed to be stratified by SIC code, it was necessary to survey over fifteen thousand business firms. Three-digit SIC codes were selected and the survey was conducted statewide. The limited number of firms operating in some markets and areas of the state made it impossible to develop a sufficiently large sample to allow additional geographic or SIC code detail.

Several potential problems arose when developing data on this basis. The random sample of firms was based on a computer generated random sampling by SIC code of the list maintained by the Department of Jobs and Training. The Minnesota Department of Jobs and Training has personnel who are trained to examine information submitted to the Department and classify the firm in the SIC code of its primary operation. Many firms conduct operations that may fall into more than one SIC code classification. Thus, the actual number of firms available for a particular type of work may have differed substantially from those reflected in the SIC code listing. However, no other data source provided a more reliable estimate. Another problem was that of job and firm size. The survey of firms sought information on firm size which could be correlated to race and gender of ownership characteristics. However, no way was found to correlate that information with the information available on purchasing opportunities.

Finally, it was not possible to develop information which reflected the geographic markets within the state. An attempt was made to develop statistically valid samples by the economic zones within the state. In many instances, however, there were too few firms in each zone for practical use of sampling.

C. Purchasing Information

The third piece of information necessary to perform the statistical comparison is the proportion of total dollars spent on women- and minority-owned firms in that market. Attempts to secure reliable information about the private market proved

71. The Minnesota Department of Revenue also maintains a database of businesses. Preliminary investigation indicated the information would be unreliable for the study purposes. For example, some multi-location operations filed tax forms separately while others filed on a consolidated basis.
unsuccessful. As a result, the study focused on and analyzed government purchasing.\footnote{The most intractable problem proved to be the inconsistent manner in which data was kept. For example, the University of Minnesota's purchases were not computerized and were filed in numerical sequence. Thus, the situation made it impossible to sample by the market-type of transaction. Fortunately, many other data sources were computerized or maintained in paper files by the market-type of the transaction.}

While the \textit{Croson} Court discussed the proper comparison in terms of the proportion of dollars received by minority firms,\footnote{City of Richmond \textit{v. J.A. Croson Co.}, 488 U.S. 469, 500-03 (1989) (Information on minority participation in the relevant market is necessary in order to evaluate overall minority representation in city expenditures.).} that comparison may be misleading. There may be situations where one or two firms are receiving large dollar contracts and the remainder of the minority firms are being excluded from the process altogether.\footnote{Interview with Helen Slessarov, social scientist employed by Chicago City Attorney, in Chicago, Ill. (Sept. 20, 1989).} As a result, the Minnesota study gathered information to allow comparison of the proportion of purchasing opportunities secured by women- and minority-owned firms as well as the proportion of dollars. The final report's recommendations were based on comparisons of firms to dollars awarded, since the differences between the two measures in Minnesota were insignificant.

\textbf{D. Results of the Statistical Comparisons}

The overall occurrence of underutilization is shown in Table 1. It is easiest to understand by way of example. When the category of nonresidential building construction was examined in the records of the Minnesota Department of Administration, an underutilization of female-owned firms was found. Table 1 shows that a disparity in the use of female-owned businesses occurred 100\% of the time in the category of nonresidential building construction in the databases examined. The table shows that no disparity was found in the category for black- or Hispanic-owned businesses; 40\% of the databases reflected disparity for American Indian-owned firms, and 80\% for Asian-owned firms.
### Table 1
Percentage Incidence of Disparity in Government Purchasing, by Product Category

<table>
<thead>
<tr>
<th>Type of Government Purchasing</th>
<th>Ownership of Business</th>
<th>Hispanic</th>
<th>Indian</th>
<th>Asian</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nonresidential building construction</td>
<td>Female</td>
<td>100</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>Black</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Highway and street construction</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Heavy construction, except highway</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Plumbing, heating, A/C</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Painting, paper hanging</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Electrical work</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Masonry</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Carpentry and floor work</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Roofing, siding and sheetmetal</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Concrete work</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Water well drilling</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Miscellaneous special trade contractors</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Printing trade services</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Trucking and courier services</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Passenger transportation arrangers</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Freight transportation arrangers</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Telephone communications</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Motor vehicle parts and supplies</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Furniture/furnishings</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Professional/commercial equipment</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Electrical goods</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hardware, plumbing and heating equipment</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Miscellaneous durable goods</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Paper and paper products</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Groceries and related products</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hotels/motels</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Laundry and cleaning</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mailing, reproduction and stenography</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Services to buildings</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Miscellaneous equipment rental and leasing</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Computer and data processing services</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Auto repair 100 33 33 0 0
Auto services, except repair 100 0 0 0 0
Reupholstery and furniture services 100 100 0 0 0
Medical and dental labs 100 0 0 0 0
Engineering and architectural services 100 20 80 0 100
Accounting services 100 0 0 0 0
Research and testing services 100 0 0 0 0
Management and public relations services 80 80 20 0 100

E. Other Evidence

The Minnesota study sought additional sources of information to identify specific problems encountered by women- and minority-owned firms. Problems identified included whether underutilization was a systemic problem that could be addressed through the development of nonrace- or nongender-based programs. The Minnesota study looked for information which would identify differences between the experiences of women- and minority-owned firms and those owned and operated by white males and would provide evidence of discriminatory impact.76

F. Testimony and Affidavits

In addition to the statistical study, a series of hearings were conducted around the state of Minnesota to gather testimony and affidavits on discrimination. Seventy-five individuals either presented testimony or submitted affidavits at these hearings. A summary of the testimony was prepared and submitted to the legislature.77

76. Concerns about the Croson definition of relevant markets and the variability in the purchasing data available for the statistical comparisons prompted a decision to seek broader measures of discrimination through survey techniques. The survey used data gathered by the University of Minnesota Survey Research Center. The reliability of this type of survey evidence has been sustained by courts in discrimination cases. See, e.g., Keith v. Volpe, 858 F.2d 467 (9th Cir. 1988). In Keith, the Court of Appeals for the Ninth Circuit upheld the district court's findings regarding the discriminatory effect of a city's actions. The district court relied upon a 1980 census data survey. The 1980 survey was a door-to-door and telephone survey of residents in the relevant census tracts. The district court also used information contained in the State Department of Transportation files which included data on the residents' race, income and housing preferences.

77. See generally A Foot in the Door, supra note 11.
G. Survey Data

A database containing the responses of white, male business owners to questions about their experiences starting firms in Minnesota was identified. In order to develop evidence on the incidence of discrimination by means of comparison, many of the questions from the survey form used for that study were repeated in a survey of identified women- and minority-owned firms. The results of the survey and its comparison with the responses of white, male business owners show the existence of extensive discrimination, with substantial variations between race and gender categories.

More than one-third of those business owners responding to the survey stated a belief that their businesses had been subjected to discrimination because of their race or gender. Nineteen percent said they had been discouraged from beginning their businesses because of their race or gender. The extent of reported discrimination varied by race or gender (Table 2). A larger percentage of black business owners reported experiencing discrimination than did other groups. Black business owners also reported more separate incidents of discrimination.

<table>
<thead>
<tr>
<th>Ownership of Business</th>
<th>Hispanic</th>
<th>Indian</th>
<th>Asian</th>
</tr>
</thead>
<tbody>
<tr>
<td>Those Reporting Race or Gender Discrimination</td>
<td>30</td>
<td>57</td>
<td>41</td>
</tr>
<tr>
<td>Reported Instances of Discrimination</td>
<td>2</td>
<td>6</td>
<td>0</td>
</tr>
<tr>
<td>0-5</td>
<td>68</td>
<td>39</td>
<td>44</td>
</tr>
<tr>
<td>5-10</td>
<td>11</td>
<td>11</td>
<td>31</td>
</tr>
<tr>
<td>More than 10</td>
<td>19</td>
<td>44</td>
<td>25</td>
</tr>
</tbody>
</table>


79. The survey, conducted by the University of Minnesota Survey Research Center, was based on firms identified through government certification lists, trade lists and other association lists.

80. Study of Discrimination, supra note 11, at 47.
Business owners who reported discrimination were asked to identify the primary sources of that discrimination. As Table 3 indicates, these responses also show considerable variation by race and gender.

**Table 3**

**Percentage of Reported Frequency of Sources of Discrimination**

<table>
<thead>
<tr>
<th>Source of Discrimination</th>
<th>Ownership of Business</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Hispanic</td>
</tr>
<tr>
<td>Purchasing (nongovernment)</td>
<td>23</td>
</tr>
<tr>
<td>Purchasing (government)</td>
<td>29</td>
</tr>
<tr>
<td>Prime contractors</td>
<td>32</td>
</tr>
<tr>
<td>Subcontractors</td>
<td>18</td>
</tr>
<tr>
<td>Lending institutions</td>
<td>33</td>
</tr>
<tr>
<td>Bonding</td>
<td>5</td>
</tr>
</tbody>
</table>

In an effort to gain more specific information, business owners were asked to respond to questions about the nature of the reported discrimination (Table 4).

**Table 4**

**Percentage of Reported Forms of Discrimination**

<table>
<thead>
<tr>
<th>Form of Discrimination</th>
<th>Ownership of Business</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Hispanic</td>
</tr>
<tr>
<td>Late notice</td>
<td>26</td>
</tr>
<tr>
<td>Bid not accepted</td>
<td>29</td>
</tr>
<tr>
<td>Shopping on bid**</td>
<td>29</td>
</tr>
<tr>
<td>Using higher bid</td>
<td>30</td>
</tr>
</tbody>
</table>

Business owners were asked whether they had reported any incidents of discrimination to organizations such as human rights offices or trade associations. The frequency with which such experiences were reported was quite low (Table 5).

---

81. *Id.* at 48.
82. *Id.* at 49.
83. "Shopping on bid" refers to the practice of using one firm's bid to secure more favorable quotations from other companies.
TABLE 5
PERCENTAGE REPORTING DISCRIMINATION

<table>
<thead>
<tr>
<th>Ownership of Business</th>
<th>His-</th>
<th>Female</th>
<th>Black</th>
<th>Indian</th>
<th>Asian</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percent Reporting that Action was Taken to Report the Discrimination</td>
<td></td>
<td>6</td>
<td>10</td>
<td>0</td>
<td>4</td>
</tr>
</tbody>
</table>

Women- and minority-owned firms also were asked a series of questions about the nature of the problems they faced when starting their businesses (Table 6).

TABLE 6
PERCENTAGE REPORTING EXPERIENCING MAJOR PROBLEMS

<table>
<thead>
<tr>
<th>Major Problem Area</th>
<th>Ownership of Business</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>His-panic</td>
</tr>
<tr>
<td>Equity Financing (1987: white male—42%)</td>
<td>26</td>
</tr>
<tr>
<td>Debt Financing (1987: white male—37%)</td>
<td>27</td>
</tr>
<tr>
<td>Banking Relations (1987: white male—21%)</td>
<td>17</td>
</tr>
<tr>
<td>Cash Flow (1987: white male—34%)</td>
<td>26</td>
</tr>
<tr>
<td>Securing Bonding (Not included in 1987)</td>
<td>13</td>
</tr>
<tr>
<td>Government Regulations (1987: white male—21%)</td>
<td>24</td>
</tr>
<tr>
<td>Finding Qualified Employees (1987: white male—24%)</td>
<td>26</td>
</tr>
</tbody>
</table>

Respondents who experienced these problems were asked the extent to which they had been able to resolve the problem. Business owners could report the problem as fully resolved, partially resolved or not resolved. Table 7 reflects the percentage of business owners who reported these major problems and considered the problem unresolved.

84. *Id.* at 49.
85. *Id.* at 50.
Table 7
Percentage Reporting Major Problems Not Resolved\textsuperscript{86}

<table>
<thead>
<tr>
<th>Major Problem Area</th>
<th>Ownership of Business</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Female</td>
</tr>
<tr>
<td>Equity Financing (1987: white male—22%)</td>
<td>30</td>
</tr>
<tr>
<td>Debt Financing (1987: white male—26%)</td>
<td>33</td>
</tr>
<tr>
<td>Banking Relations (1987: white male—9%)</td>
<td>16</td>
</tr>
<tr>
<td>Cash Flow (1987: white male—18%)</td>
<td>16</td>
</tr>
<tr>
<td>Securing Bonding (Not included in 1987)</td>
<td>31</td>
</tr>
<tr>
<td>Government Regulations (1987: white male—23%)</td>
<td>25</td>
</tr>
<tr>
<td>Finding Qualified Employees (1987: white male—30%)</td>
<td>24</td>
</tr>
</tbody>
</table>

H. Impact of Set-Aside and Preference Programs

Minnesota has had a set-aside and purchasing preference program for the benefit of socially and economically disadvantaged business owners since the mid-1970s. Data was collected to identify the impact of awards made under these programs on women- and minority-owned businesses.

The purchasing analysis examined the extent to which the set-aside and preference programs had increased the participation of women- and minority-owned businesses in government purchasing. When state purchases made by the Department of Administration with the use of set-aside or preference programs were removed from the totals, the number of categories with statistically significant disparities of black-owned firms increased. In many cases, the removal increased the size of the disparity in other categories as well.

In other databases, the removal of data regarding contracts using set-aside or preference programs did not change the number of categories where underutilization existed, but did increase the amount of the disparity. This seemingly small effect on eliminating categories with a statistical disparity oc-

\textsuperscript{86} Id. at 51.
curred because white male-owned firms qualifying under the labor surplus or 70% median income designation received a disproportionately large share of set-aside or preference awards.

For example, of the ten SIC codes in the sample where set-aside and preference data was sufficient for statistical testing, white male-owned firms received a statistically significant higher proportion of the awards in four categories. In two categories, they received awards approximating their share of the market and, in four categories, they received a less than proportionate share. For the set-aside or preference program to reduce the underutilization of women- and minority-owned firms in government purchasing programs, it is necessary for white male-owned firms to be awarded a less than proportionate share of set-aside or preference awards in all categories.

Information about the impact of the programs was also sought through the survey of women- and minority-owned businesses (Table 8). Of all respondents surveyed, 59% reported that they participated in purchasing preference programs. Forty-six percent reported that the preference program increased their nongovernment business. Almost 40% responded that they would be only marginally viable or not viable at all without the programs. Table 8 sets out the results of a series of questions, showing this pattern of experience by race and gender.

**Table 8**

**Impact of Preference/Set-Aside Programs, by Percentage Reporting**

| Questions                                                       | Ownership of Business |
|                                                               | Female | Black | Hispanic | Indian | Asian |
| Participated in preference or set-aside programs?             |        |       |          |        |       |
| Yes                                                            | 58     | 72    | 52       | 61     | 67    |
| If yes, awarded contracts or purchases because of programs?   |        |       |          |        |       |
| Yes                                                            | 62     | 57    | 74       | 69     | 56    |

87. *Id.* at 52.
Is the firm viable without the programs?

- Yes: 68, 33, 55, 42, 64
- Marginally: 21, 52, 32, 46, 32
- No: 11, 15, 14, 12, 4

Has the program enhanced firm profits?

- Yes, a lot: 15, 21, 36, 18, 25
- Yes, a little: 49, 47, 41, 56, 33
- No: 36, 31, 23, 27, 4

Has the program increased your nongovernment business?

- Yes, a lot: 10, 28, 36, 23, 29
- Yes, a little: 32, 33, 36, 32, 13
- No: 58, 40, 27, 46, 58

Despite the fact that the programs eliminated disparity in only a few instances, the survey shows that firms participating in the programs found that their financial viability was improved and, for at least 40%, it increased their nongovernment business.

V. RACE-NEUTRAL ALTERNATIVES AND A "NARROWLY TAILORED" REMEDY

Once the threshold evidence of discrimination is established through statistical and other evidence, the focus of the judicial inquiry under Croson shifts to the nature of the remedy adopted.88 Justice O'Connor noted several points regarding the remedy in Croson. First, there was no evidence that the Richmond City Council considered any alternatives to a race-based quota. O'Connor stated:

Many of the barriers to minority participation in the construction industry relied upon by the city to justify a racial classification appear to be race neutral. If MBEs disproportionately lack capital or cannot meet bonding requirements, a race-neutral program of city financing for small firms would, a fortiori, lead to greater minority participation.89

Second, O'Connor noted that the 30% quota adopted by Richmond was not narrowly tailored because it was not related to any goal except racial balancing.90 She rejected both the theory that minorities will select employment in proportion to

89. Id. at 507.
90. Id.
their representation in the local population and also any argument that the administrative ease of a quota helps justify its use. O'Connor stated: "Under Richmond's scheme, a successful black, Hispanic or Oriental entrepreneur from anywhere in the country enjoys an absolute preference over other citizens based solely on their race. We think it obvious that such a program is not narrowly tailored to remedy the effects of prior discrimination."91

The decision in Croson requires states and cities to examine race-neutral alternatives and to narrowly tailor any race-based remedies it uses. However, the guidelines are ambiguous. There are two interesting components to the problem. First, who may benefit from a narrowly tailored remedy? Justice O'Connor rejected including nonresident businesses in the plan. Does this mean that a black-owned firm with its principle place of business elsewhere in Virginia, or in another state, cannot be eligible without specific proof of discrimination occurring within the city of Richmond?92 Next, the Court failed to define relevant time periods. Does Croson prohibit any business formed after adoption of the statute or ordinance from being eligible on the grounds that the firm could not have experienced the historic discrimination being remedied? While such a result seems strained, if the Court is serious when it requires that evidence of historic discrimination be used to provide an "ending point" for the remedy, such a distinction may be necessary.

The second ambiguous area is the extent to which Croson requires evidence that race-neutral alternatives are not an adequate remedy. In Coral Construction, the district court addressed the question in its review of the MBE plan of King County, Washington.93 The plaintiffs argued that the county did not consider several possible race-neutral alternatives. The court stated; "Croson does not compel the county to consider every imaginable race-neutral alternative, nor to try alter-

91. Id. at 509-10.
92. See Coral Constr. Co. v. King County, 729 F. Supp. 734 (W.D. Wash. 1989). The Coral Construction court side-stepped the question by concluding: "Some of the present record refers to evidence of discrimination outside King County and/or the construction industry. . . . Even when all such evidence is disregarded, however, the remaining evidence is fully sufficient to support the county's finding of past discrimination in the King County construction industry." Id. at 737 n.6.
93. Id. at 739.
natives that would be plainly ineffective."\textsuperscript{94} Every race-neutral alternative may not have to be considered under \textit{Croson}. However, the question remains whether the \textit{Croson} standard requires that race-neutral efforts will have to be attempted prior to the use of race or gender classifications. If, for example, studies showed that black-owned firms were hampered by a lack of working capital, would the Court require the city or state to adopt and evaluate a neutral program increasing working capital before it could use a race- or gender-based alternative?

In Minnesota, the data allows the question of neutral alternatives to be finessed because there is no statistical relation between the level of business problems and underutilization. Female-owned businesses consistently reported the lowest level of major problems and problems remaining unsolved. Yet, the statistical disparity showing underuse was found in almost every line of business examined. Thus, there does not appear to be a correlation between the level of specific problems and the extent of underutilization shown by the \textit{Croson} test. A troubling question is whether a court will allow that finding to be applied by a legislature to racial minorities. Again, if a court strictly applies the requirement to narrowly tailor any remedy, it may require prior experimentation with race-neutral alternatives to correct the disparity for racial minorities before race-based programs can be adopted. The court could then argue that there is no evidence that underutilization will not be cured for firms owned by racial minorities.

VI. Conclusions from the Minnesota Study

Several conclusions can be reached applying the \textit{Croson} standards, ambiguous though they may be, to the data from the Minnesota study. The Minnesota sample showed most consistently the underutilization of women-owned firms in government purchasing. It also revealed underutilization of minority-owned firms which varied by market, race and gender.\textsuperscript{95} The study established that there was statistical evidence of underutilization.

\textsuperscript{94} \textit{Id.}

\textsuperscript{95} The cause of this variation is not explained by the \textit{Croson} test. The variation may exist because minority-owned firms are being used by the government relative to their availability in the markets, or because of the absence of minority-owned firms in these markets.
IMPLEMENTING CROSON

The utilization of women- and minority-owned businesses in government purchasing but that the extent of underuse varied by market, race and gender category.

The survey results also established that many individuals were discouraged from entering business because of their race or gender. Firms that have experienced multiple incidents of discrimination and firms owned by racial minorities generally experienced a higher level of business problems and greater difficulty in solving those problems than white, male business owners. The study also showed that while prior set-aside and preference programs eliminated the disparity in only a few instances, the programs assisted many of these business owners by increasing their financial viability and ability to obtain nongovernment business.

Finally, and significantly, the study showed that women-owned businesses experienced the lowest level of business problems, yet faced the most consistent underutilization. This illustrates the intractable nature of a problem that probably cannot be "fixed" by addressing specific business problems. In other words, the link between specific business problems and the rate of underutilization implied by Justice O'Connor in requiring examination and rejection of race neutral alternatives does not appear to exist.

VII. THE INAPPROPRIATE STANDARD OF CROSON

The results of the Minnesota study are not surprising. Racism and sexism remain prevalent in American society. What is surprising is the Supreme Court's decision which invalidates efforts by duly elected legislative officials to find ways to assure that more opportunities are given to those who are not white males. The problems with the Croson standards occur at several levels: technical, practical and philosophical.

A. Technical Problems with the Croson Test

Two technical questions arise in analyzing the statistical tests formulated in Croson: First, how accurate is the measure, and second, is the measure being taken of the correct question?

96. See, e.g., McFadden, A Row House is Set Afire; Bias is Cited, N.Y. Times, Feb. 9, 1990 at B1, col. 5.
The statistical measure outlined in *Croson* will understate the extent of discrimination in the business world for several reasons. First, understatement occurs because of the chilling effect that discrimination has in deterring business entrants. The Minnesota study shows that 20% of women business owners had been discouraged from entering their businesses because of their gender. Thirty-two percent of black business owners and 26% percent of the Hispanic business owners reported having been discouraged from entering business because of their race. These business owners reporting proceeded despite this discouragement and were counted in determining the statistical disparity. But those who were discouraged, and did not persevere, could never be considered under the Court’s statistical approach.

The underestimate of discrimination also occurs in a second way. White males, white females and minorities tend to enter different lines of business. In her analysis of the 1987 New Firms Study database, Brenda Miller, University of Minnesota, Center for Urban and Regional Affairs (CURA), concluded: "Firms owned by racial minorities were more likely to be in the service category, both producer and consumer services, and less likely in retail. In contrast, female-owned businesses were underrepresented in manufacturing."98

This conclusion was corroborated by the survey of fifteen thousand Minnesota businesses in the forty-one major SIC codes. The lines of business having the highest proportion of black-owned businesses were: services to buildings; automobile services, except repair; reupholstery and furniture repair; telephone communications; medical instruments and supplies; and heavy construction, except highway. In each of these categories, black-owned businesses made up at least 1.5% of the total number of firms. In eleven of the forty-one major SIC codes, the survey identified no black-owned firms. Similarly, in a varying number of major SIC codes, no Hispanic-, Asian- or Indian-owned firms were identified.99

These findings raise the question of the reasons behind this
difference. The Minnesota study made no independent attempt to answer that question. However, John Heywood, writing in the *Review of Black Political Economy*, found that because the retail and service sectors are the most competitive, and market power is the least concentrated, discriminatory barriers cannot be maintained in these markets. In his study, he found the share of black ownership in the most competitive industries to be almost ten times the black ownership in industry groups that are highly concentrated and the least competitive. Heywood pointed out that the less competitive and more concentrated industries are the most profitable, and thus economic theory would expect more entrants to those fields.\(^\text{100}\) He concluded that blacks are not entering those potentially more profitable lines of business because of residual discrimination.

If, in fact, women and minorities are being discouraged from entering business and, in particular, face discriminatory barriers in certain industry groups, requiring legislative bodies to rely on statistical disparities based on currently available firms will only prevent legislative action to eliminate discrimination.\(^\text{101}\) Justice O’Connor has stated that there is sufficient nexus between government’s passive participation in a discriminatory market and the discrimination to allow state affirmative action under the equal protection clause.\(^\text{102}\) Yet, the test O’Connor subscribes to as a measure of that discrimination assures that such discrimination will be consistently underestimated.

That underestimation will be exacerbated if the market definition, eventually required by *Croson* for statistical comparison, follows the narrow construction of *Wards Cove Packing Co. v. Atonio*.\(^\text{103}\) For example, in the eleven SIC codes in the Minnesota study where no black-owned firms were identified, the sta-

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101. A statistical disparity may not be found for two reasons: (1) if the firms are being used roughly in proportion to their availability; or (2) there are no significant numbers of firms available with owners having specified race or gender characteristics. If, for example, there are no black business owners in electrical contracting because of discrimination, a strict application of the *Croson* statistical test will not permit race-based legislative action to correct that discrimination.

102. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989). Justice O’Connor further stated that the city should take affirmative steps to dismantle the system of racial exclusion. *Id.*

tistical test will show no underutilization. If the test must be drawn that narrowly, a legislature will not be able to take affirmative action with respect to black-owned firms operating or seeking to operate in those lines of business because it will not have evidence of prior discrimination in those markets. This will be true even though the legislature has survey data indicating firms have been discriminated against generally and that black-owned firms experience a higher level of business problems. If Justice O'Connor is to be taken literally, survey evidence not specifically tied to a line of business (e.g. construction), may not, standing alone, be adequate evidence of discrimination. Since the survey identified no black-owned firms currently operating in that line of business, there is no statistical disparity and hence no evidence of past discrimination. Thus, the more narrowly the Court requires the market to be defined to establish a statistical disparity, the more undercounting can occur.

Another technical problem with the test, as the Court has established it, is its reliance on the proportion of dollars, rather than opportunities, awarded to minority firms. As discussed previously, one or two firms may secure an award with a large dollar value which would eliminate the disparity in the market when the Court's test is used. However, if the rest of the minority firms were consistently excluded from purchasing decisions in the market, that fact would be masked by the test selected by the Court. As a result, a test based both on the population dollars awarded and on the number of opportunities provided assures that the opportunities to participate in the business are actually available, as well as measuring the

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104. It is important to note that the survey of women and minority business owners includes answers from owners operating in all lines of business. In a state with relatively few minorities, obtaining and identifying a large enough sample of firms within each line of business would be extremely difficult.


106. This is the situation in at least one purchasing category identified by researchers for the Chicago City Attorney. In the Chicago study, one minority-owned firm received a large city contract, the dollar value of which was large enough to eliminate any statistical disparity. When the measure was opportunities, rather than dollars, the disparity was substantial. Interview with Helen Slesserav, social scientist employed by Chicago City Attorney, in Chicago, Ill. (Sept. 20, 1989). This was not the case in the Minnesota study where evidence was gathered for both opportunities and dollars. While different results occurred depending on the measure, the number of categories with statistical disparities did not increase when the measure was opportunities rather than dollars.
dollar value of awards which may be going only to a few firms.\textsuperscript{107}

\textbf{C. Appropriateness}

The statistical test established in \textit{Croson} calls for a comparison between two proportions. For example, the proportion of available black-owned firms in a market was compared with the proportion of dollars awarded to black-owned firms in that market.\textsuperscript{108} The difference between those two proportions is identified, and a statistical test is applied to determine the likelihood that the difference is the result of a random event.\textsuperscript{109} Thus, when the Court declared that the statistical test will raise the presumption of discrimination, the test actually concluded that there is a probability that the difference between availability and dollars awarded was not the result of a random event. In other words, something caused it, but the test could not identify that cause.\textsuperscript{110}

Recognizing this inherent limitation in the use of statistical tests, the \textit{Croson} test assumed that each purchasing decision is a random event.\textsuperscript{111} In \textit{Castaneda v. Partida},\textsuperscript{112} the Court discussed the use of binomial distribution modelling.\textsuperscript{113} A Mexican-American indicted by a grand jury alleged denial of due process and equal protection because of underrepresentation of Mexican-Americans on Texas grand juries. The Court compared the results under Texas' "key-man" system of jury selection to the probable results under a random selection method.\textsuperscript{114} It noted that a random selection method would

\textsuperscript{107} It is still possible that one or two firms could secure all the opportunities as well as the awards. However, performing the statistical tests on both dollar value of awards and the number of opportunities will increase the likelihood that the results reflect actual purchasing events.

\textsuperscript{108} \textit{Croson}, 488 U.S. at 492.


\textsuperscript{110} Similarly, Justice White, defending the majority opinion in \textit{Wards Cove} against Justice Blackmun's attacks, wrote: "Of course, it is unfortunately true that race discrimination exists in our country. That does not mean, however, that it exists at the canneries—or more precisely, that it has been proven to exist at the canneries." \textit{Id.} at 2126 n.4. See also P. MEIER, J. SACKS & S. ZADELL, \textit{Statistics and the Law} (1986).

\textsuperscript{111} The test assumes a binomial distribution where all the firms have an equal opportunity for each dollar awarded.

\textsuperscript{112} 430 U.S. 482 (1977).

\textsuperscript{113} \textit{Id.} at 496 n.17.

\textsuperscript{114} \textit{Id.} The "key-man" system relies on the jury commissioner to select prospective jurors from the community-at-large. Prospective jurors are drawn from a list
probably avoid most of the potential for abuse found in the more subjective "key-man" system.\textsuperscript{115}

In \textit{Hazelwood School District v. United States},\textsuperscript{116} the Court also addressed the use of statistical comparisons. In \textit{Hazelwood}, the federal government brought an action alleging the school district and various officials were engaging in a pattern of teacher employment discrimination. In discussing the role of statistics in employment discrimination cases, the Court stated that, "[w]here gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination."\textsuperscript{117} The test was premised on the assumption that "'absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.'"\textsuperscript{118}

The \textit{Hazelwood} Court determined the relevant comparison to be the racial composition of the qualified public school teacher population in the relevant labor market and the racial composition of Hazelwood's teaching staff.\textsuperscript{119} A binomial distribution requires an assumption that each certified teacher would have an identical chance for employment at Hazelwood. This assumption seems less likely to actually occur (and is perhaps less socially desirable) than the assumptions made in the case of grand juror selection. In \textit{Hazelwood}, it was used to create a rebuttable presumption.\textsuperscript{120}

A model based on random selection is necessary for the selection of grand jurors to assure all citizens an equal chance of

\textsuperscript{115} \textit{Id}. at 497 n.18.
\textsuperscript{117} \textit{Id}. at 307-08. The \textit{Hazelwood} Court validated the test later applied in \textit{Wards Cove}, comparing racial composition of the qualified persons in the relevant labor market and the persons holding at-issue jobs. \textit{See} Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 654 (1989).
\textsuperscript{118} \textit{Hazelwood}, 433 U.S. at 307 (quoting \textit{International Bhd. of Teamsters v. United States}, 431 U.S. 324, 340 n.20 (1977)).
\textsuperscript{119} \textit{Id}. at 308.
\textsuperscript{120} \textit{Id}. at 309.
being selected to serve.\textsuperscript{121} A random selection model can also be used to create a rebuttable presumption during the evidentiary portion of a trial. The model seems less appropriate when used, as suggested by \textit{Croson}, to establish a minimum standard which triggers legitimate, affirmative activity by a duly constituted legislative body.

When Justice O'Connor stated the evidence must "approach a prima facie case of constitutional or statutory violation,"\textsuperscript{122} she implied that the statistical disparities which give rise to presumptions of discrimination during employment will, when presented to a legislative body, allow that body to make race or gender classifications so long as they can be shown to be a narrowly tailored response to the evidence of discrimination. But the relevant model on which legislative action should be based is one which would show what the market and current purchasing decisions would look like if there had been no race or gender discrimination. Yet, that is precisely the question that Justice O'Connor rejected as being too speculative.\textsuperscript{123} While clearly more desirable, results of that model cannot be approximated by the statistical test outlined in \textit{Croson}.

Two problems then arise from the tests outlined in \textit{Croson}. First, requiring that legislative action occur only after determining the existence of a statistical disparity means that a legislature will be forced to rely on a test which understates the existence of discrimination. Second, the test answers the wrong question. The Court misses the point by examining the legitimacy of government seeking to increase participation in the economic and social life of the jurisdiction. The Court asks the question: Are we ninety-five percent confident that the difference between two proportions is not a random event?\textsuperscript{124} The question should be: What would a discrimination-free

\textsuperscript{121} In selecting jurors, it is socially beneficial for each member of the community to have an equal chance to sit on a jury, since a jury is to be a body of community peers. In \textit{Castaneda}, the Court stated, This Court has long recognized that it is a denial of the equal protection of the laws to try a defendant of a particular race or color under an indictment issued by a grand jury . . . from which all persons of his race or color have, solely because of that race or color, been excluded by the State . . . \textit{Castaneda}, 430 U.S. at 492; see \textit{Hazelwood}, 433 U.S. at 309.


\textsuperscript{123} \textit{Id.}

\textsuperscript{124} \textit{Id.} Justice O'Connor further stated that allowing speculative discrimination to be identified would allow local governments to "create a patchwork of . . . statistical generalizations about any particular field of endeavor." \textit{Id.}
marketplace look like and how far away are we? But that question is not reliable when examined by quantitative methods, particularly when the evaluation will be made in a legislative process and not in the structured world of courtroom practice.

VIII. PRACTICAL PROBLEMS WITH THE CROSON TEST

Under Croson, once a state or local government concludes there may be a problem with discrimination in its jurisdiction, it must gather evidence.125 This requires funding a study and specifying its methodology. Because of the ambiguity of the Croson decision, it may be that the several hundred thousand dollars spent by the cities of Seattle, San Francisco and the state of Minnesota126 will have been in vain if the Court ultimately concludes that, for example, the statistical comparisons have not been made with a fine enough gradation to constitute evidence of historic discrimination in a market.

Attempting to use the data gathered to fashion a narrowly tailored remedy presents another problem. There are two key questions here. First, by what standards will a conclusion that race- or gender-neutral alternatives are insufficient be judged by a reviewing court? In other words, how much evidence will be enough? For example, can the Minnesota Legislature assume that, since the highest level of underutilization and the lowest level of problems are found with women-owned firms, attempting to fix business problems on a gender-neutral basis will not eliminate the underutilization of women-owned firms? Secondly, by what standards will a remedy that is adopted be assessed by a reviewing court? Is it necessary that a remedy be tailored to each defined market by identifiable race and gender differences in that market, or will a broad remedy, based on the findings of discrimination in sampled markets, applicable to broadly-stated race and gender categories and broadly-stated lines of business be allowed?

In those SIC codes where the Minnesota study found no black-owned firms operating and thus no statistical disparity,

125. Id. at 505. (Prior to a state or local government taking action, "they must identify that discrimination, public or private, with some specificity . . . ").

126. A recent survey of jurisdictions with studies completed or underway conducted by the Office of Minority Business Affairs for the State of Rhode Island indicates a study cost range between $50,000 and $600,000, depending on the size of the jurisdiction and the complexity of the study. Interview with Charles Newton, Coordinator for Minority Business Affairs for Rhode Island, in Providence, R.I. (Aug. 1990).
may the Legislature include black-owned firms in those lines of business when granting a purchasing preference on the basis that a disparity was found against women and at least one other minority group in that category? Or, may the Legislature adopt a program providing set-asides and preferences in all lines of state purchasing, even though the Minnesota study used only specific government purchaser's records? Professor Fried's reading of Croson would prevent such inclusion. It is arguable that the constitutional scholars' reading would prevent such inclusion as well. Requiring deliberative legislative bodies to make such distinctions before they are allowed to benefit minority groups in their jurisdictions places significant barriers to their action.

This increase of burdens placed on legislative bodies seeking to use race or gender classifications to confer a benefit on a minority group has the remarkably perverse effect of discouraging state governments from adopting programs to ameliorate the effects of race and gender discrimination. Now, if, for example, a Hispanic business group seeks assistance from the Legislature in the form of a purchasing set-aside to help businesses begin doing government business, three hurdles arise to legislative action: (1) providing statistical evidence of discrimination; (2) providing evidence as to why race-neutral programs will not suffice; and (3) narrowly tailoring a remedy. Legislators will be in a position to blame the Court for their inability to change the status quo. Since the fourteenth amendment was enacted to secure full participation in a society regardless of race, that result is particularly ironic. This discouragement occurs not only because the dollar and time costs of a Croson study are high, but because the ambiguity and inappropriateness of the tests raise the possibility that state expenditures to develop evidence will be wasted because the evidence developed may later be found to be insufficient. Study and litigation costs are not insignificant for governments battling with declining revenues and budget shortfalls.

IX. PHILOSOPHICAL PROBLEMS WITH THE CROSON TEST

Professor Fried and the constitutional scholars disagree as to whether Croson is a step toward a neutral reading of the equal

127. See generally Fried, Response, supra note 44; Comment, Scholars' Reply, supra note 45.
protection clause. In other words, will all racial classifications, whether made for discriminatory or remedial reasons, be subject to the same strict standard of review? The final answer to that critical question awaits further Supreme Court rulings. However, unless the Court backs away from Justice O'Connor's formulation of the applicable evidentiary tests for discrimination in future decisions, the Court has substantially increased the burden on state and local governments seeking to use racial classifications for remedial purposes.

The theoretical basis for this action is a belief that the fourteenth amendment is a limitation on state power to use racial categories for any purpose. This amendment, adopted to end laws disabling blacks in society, is now being used to increase burdens on efforts to ameliorate the residual effects of racism. Assuming, arguendo, that the amendment is a limitation on state power whenever racial categories are used, the next question is by what standards should that limitation be assessed. Are there some circumstances in which the state or local government can be better trusted than in others, which would allow greater judicial deference to state action? For example, if a racial category is used to bestow a benefit on a group which has minority status, can that state action be given greater latitude than when a political system controlled by a racial majority confers benefits on those belonging to the same majority racial group? The Court appears to answer that question in the negative. In other words, the rule is equally stringent regardless of purpose or conditions. Thus, the Croson Court seems to conclude that there are no circumstances when the legislative branches of state and local government may

128. See generally Fried, Response, supra note 44; Comment, Scholars' Reply, supra note 45.

129. Fried, Response, supra note 44, at 156; Comment, Scholars' Reply, supra note 45, at 163.

130. See J. R.AwLs, THE THEORY OF JUSTICE (1971). Rawls wrote: "The principles of justice are chosen behind a veil of ignorance. This ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances." Id. at 12.

131. See Croson, 488 U.S. at 469. Justice Stevens stated:

A central purpose of the Fourteenth Amendment is to further the national goal of equal opportunity for all our citizens. . . . I therefore do not agree with the premise that seems to underlie today's decision . . . that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong.

Id. at 511 (citations omitted).
be trusted to exercise wisely the use of race or gender classifications.\textsuperscript{132}

X. TOWARD A NEW STANDARD

The standard adopted by the \textit{Croson} Court is, on its face, appealingly simple. In all cases and at all times when a state or local government uses a racial category it must prove: (1) that discrimination against the group occurred historically; (2) that neutral alternatives have been considered and rejected as inadequate; and (3) that the remedy is narrowly tailored. While theoretically consistent, this standard will adversely affect the willingness of a dominant political majority to share the wealth of the economic system with those who participate less fully. This is precisely the result the fourteenth amendment sought to prevent.

The philosopher, John Rawls, in his work, \textit{The Theory of Justice},\textsuperscript{133} writes of establishing the ground rules of a society and its constitution from behind a veil of ignorance, where the participants do not know their race, gender, life plan or probability of success in the society.\textsuperscript{134} Using this concept, a reasonable constitutional rule would be one where benefits can be conferred on nondominant groups in society so long as the dominant group can use the political process to redress any excesses. The political minority needs to be protected from abuse, not excluded from sharing the fruits of societal success. On a similar point, Bruce Ackerman, in his recent article in the \textit{Yale Law Journal}, wrote:

Decisions made by the government occur daily, also under special constitutional conditions. Most important[ly], key decisionmakers must be held accountable at the ballot box for their performance; moreover, a structural effort is made to encourage them to deliberate seriously about the public interest and to constrain efforts by narrow but well-organized interests to use government to oppress especially vul-

\textsuperscript{132} In Fullilove v. Klutznick, 448 U.S. 448 (1980), the Court expressed caution in the exercise of judicial authority over matters resolved in the political process. To emphasize its point, the Court quoted Justice Jackson: "'The vice of judicial supremacy . . . has been its progressive closing of the avenues to peaceful and democratic conciliation of our social and economic conflicts.'" \textit{Id.} at 491 (quoting R. Jackson, \textit{The Struggle for Judicial Supremacy} 321 (1941)).

\textsuperscript{133} J. Rawls, \textit{The Theory of Justice} 136-42 (1971).

\textsuperscript{134} \textit{Id.} at 12.
nerable or poorly organized groups.\textsuperscript{135}

The debate over the standards by which state and local governments can use affirmative action under the fourteenth amendment needs to be over the allocation of responsibility between the political and judicial arms of government. When is it that the political and legislative branches of government can be trusted and when is it that they should not be trusted?

The Court in \textit{Croson} answers that question in a rigid and unyielding manner which has the effect of limiting efforts to redress inequality in the name of equality. It is unclear whether that is because it cannot see how to distinguish between actions which share society's success and those which deny opportunity, or whether the particular facts of \textit{Croson}\textsuperscript{136} caused the Court to fear that a black political majority was granting benefits to black businesses at the expense of a white political minority. In either case, the Court has established the wrong standard.

The fourteenth amendment limits the power of state and local government to disadvantage racial minorities. Strict scrutiny, as defined by the Court, is appropriately applied when nondominant groups are disadvantaged by a political majority. The standard of review, however, should be different when a political (race or gender) majority seeks to benefit nonmajority members, using race or gender classifications, by allowing them to share more fully in the economic or social life of the community. The majority voters in that community should decide if their political leaders have extended too many benefits to the nondominant groups in society.

The initial question in applying strict scrutiny should be whether the race/gender classification is being used to confer a benefit on the group as opposed to a detriment. If the answer reveals a detriment, the traditional strict scrutiny analysis should follow. If, however, the answer is that a benefit is conferred, the next question in the analysis should be whether the benefit is being conferred by a dominant political group to a group that is nondominant in the jurisdiction. If so, the strict scrutiny should end there. It should end there because the


\textsuperscript{136} In \textit{Croson}, 50\% of the city's population and a majority of the City Council were black. \textit{City of Richmond v. J.A. Croson Co.}, 488 U.S. 469, 495 (1989).
political majority can use the electoral process to judge whether its leaders have given more benefits than they should. On the other hand, if the political majority seeks to reach beyond itself, to more fully include nondominant race and gender groups into its social life, it should be permitted to do so without having extraordinary burdens placed upon it.

The Constitution allocates power within our political system. Clearly, there are occasions when race or gender categories are misused to the detriment of those groups. Strict scrutiny is necessary to assure that the power to make classifications is not abused. However, that does not mean that one analysis fits all situations. The ability of the political system to correct mistakes is substantially greater where a majority confers a benefit on a minority, than when a minority suffers a detriment at the hands of a political majority.

It is in our national interest to encourage the majority to include all members of society in the economic and social life of the community, just as it is in the national interest to discourage the majority from using classifications to the detriment of race or gender groups in the political minority. To achieve those results, differing standards of assessing past actions are necessary. The Supreme Court in Croson has failed to understand those differing purposes and the need for standards of review appropriate to achieving those objectives.

**Conclusion**

The Croson decision is seriously flawed in many respects. Those jurisdictions willing and financially able to attempt compliance will be faced with many practical difficulties in establishing factual evidence of the obvious—that racial minority and female business owners face hardships in their economic life that most white, male business owners do not face.

The standards for evaluating these programs set forth in the Croson case are inappropriate, both technically and philosophically. If the responsible political majority in jurisdictions working toward inclusiveness in an increasingly diverse country are to be permitted to continue, different standards for evaluating these programs must be adopted.