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CONGRESSIONAL RATIFICATION OF OTHERWISE UNCONSTITUTIONAL LOCAL AFFIRMATIVE ACTION: CAN CONGRESS OVERRIDE *CROSON?*

INTRODUCTION

There are specific instances in which Congress may authorize and ratify a state action which would be unconstitutional if taken by the state alone.[1] For example, Congress may ratify what normally would be an unconstitutional state tax on a federal entity.[2] Likewise, the Supreme Court has upheld state action taken pursuant to congressional authorization even though it previously invalidated similar state action as unconstitutionally infringing on interstate commerce.[3] Despite this ability to ratify otherwise unconstitutional state actions, it seems clear that Congress cannot authorize a state to violate an individual's constitutional rights.[4]

Certain individual rights, however, may derive not from a particular substantive grant of the Constitution, but from whether the individuals affected by the law have been adequately represented in the legislative process. For instance, in *McCulloch v. Maryland*,[5] the Court held that since the government may not tax those whom it does not represent, the federal structure demanded that the states could not tax the federal government.[6] Likewise, it has been suggested that the rights derived from the equal protection clause are not necessarily a specific substantive right, but a guarantee that the individual and class affected by any particular piece of legislation have an adequate chance to change the legislation through the democratic process.[7]

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1. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-33 (2d ed. 1988).

2. *See generally id.* §§ 6-30, 6-31, and 6-33.

3. *See, e.g.*, Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 437-39 (1946) (upholding a state tax on foreign insurance companies assessed under authorization of the McCarran Act).

4. L. TRIBE, *supra* note 1, § 6-33, at 521; *see also* Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966) (Congress has no power to restrict, abrogate, or dilute the guarantees of the fourteenth amendment despite its plenary power to enforce the provisions of that amendment). For a discussion of *Morgan*, see *infra* text accompanying notes 112-28.

5. 17 U.S. (4 Wheat.) 316 (1819).

6. *Id.* at 436. *See also* L. TRIBE, *supra* note 1, § 6-30, at 512 (noting the potential for abuse in allowing each state to levy its own tax on a federal entity laid out in *McCulloch*); J. ELY, DEMOCRACY AND DISTRUST 85-86 (1980) (finding that the Constitution's primary concern in preserving liberty and ensuring representation are accomplished by structuring decision-making processes at all levels of government).

7. J. ELY, *supra* note 6, at 100-01.

Under such a "process-based" view of the equal protection clause, it may be possible for Congress to ratify state action which, of itself, may violate the equal protection clause. This would be possible where a particular individual or class interest is more adequately guarded on the national legislative level as opposed to the local level.

With a focus on *City of Richmond v. J.A. Croson & Co.*,[8] this Note will discuss the possibility of congressional authorization of local affirmative action programs which were held to violate the equal protection clause. In *Croson*, the United States Supreme Court, by a six-to-three vote, struck down a locally enacted affirmative action plan as violating the equal protection clause of the United States Constitution.[9] The plan required prime contractors to subcontract at least thirty percent of the dollar amount of city-awarded construction contracts to one or more "minority business enterprise" (MBE) subcontractors.

The decision in *Croson* was noteworthy for at least two reasons. It was the first time that a majority of the Court agreed that so-called "benign" racial classifications,[10] when enacted by state and local legislatures absent congressional mandate, would be subject to strict scrutiny. Additionally, the program that was found to be unconstitutional was substantially similar to the MBE set-aside program enacted by Congress in 1977, which the Court had upheld in *Fullilove v. Klutznick*.[11] Since the only substantial difference between the two programs was that *Croson* involved a local enactment and *Fullilove* was a congressional enactment, a plurality of the Court in *Croson* found it necessary to emphasize that Congress, under section five of the fourteenth amendment, could enact benign racial classifications subject to a far less stringent standard of review than similar local classifications.[12]

The Court did not address the question of whether Congress can empower localities to enact affirmative action programs which, if undertaken by themselves, would be unconstitutional. Thus, the question remains whether *Croson* may be overruled by Congress. The answer is uncertain because of three unclear areas of the Court's fourteenth amendment jurisprudence: (1) the full extent and nature of Congress' enforcement power under section five of the fourteenth amendment; (2)

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8. 488 U.S. 469 (1989).

9. The relevant portion of the fourteenth amendment states that "[n]o state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of its laws." U.S. CONST. amend. XIV, § 1.

10. "Benign" racial classifications are those explicitly race-conscious statutes enacted to remedy the effects of prior discrimination or to achieve certain non-oppressive social goals. Bohrer, *Bakke, Weber and Fullilove: Benign Discrimination and Congressional Power to Enforce the Fourteenth Amendment*, 56 IND. L.J. 473, 483 (1981).

11. 448 U.S. 448 (1980).

12. *Croson*, 488 U.S. at 486-93.

the actual extent and nature of the fourteenth amendment's equal protection clause as applied to the federal government through the due process clause of the fifth amendment; and (3) the question of whether the equal protection clause is a substantive clause prohibiting race-based classifications, or whether it is a "process-based" clause, which derives its meaning from the effect of classifications on the ability of minorities to fully represent themselves and protect their interests in the normal political processes.

Part I of this Note analyzes and compares the Court's decisions in *Fullilove* and *Croson*. Part II discusses the history of Congress' power to enforce the fourteenth amendment, as well as the history of the Court's attempts to apply the equal protection clause to the federal government. Part II argues that *Fullilove* and *Croson* can only stand simultaneously if Congress is not subject to the same equal protection standard as the states. It further concludes, however, that while Congress may enact benign classifications subject to less rigid scrutiny than the states, congressionally ratifying such state classifications remains problematic because such ratification seems to result in Congress undercutting the fourteenth amendment's strict standards for the states. Part III attempts to answer this concern by discussing the two different perspectives of the equal protection clause. It concludes that if a process-based view of the clause is adopted, then state action taken pursuant to congressional authorization does not necessarily constitute a violation of equal protection, even though the same action would be unconstitutional when taken without such authorization.

This Note concludes that Congress' power to enforce the equal protection clause—while being free from the strictures of that clause—allows it to ratify otherwise unconstitutional benign state action. Such a ratification, however, is only legitimate in a constitutional framework that adopts a "process-based" view of equal protection. Congress' actions may be seen as the nationwide majority burdening itself, and thus allowing a remedy within the normal political processes. Similar state action, however, must, at least initially, be presumed to entail local majorities burdening minorities in ways which cannot be remedied in the local political process.

I. *FULLILOVE V. KLUTZNICK* AND *CITY OF RICHMOND V. J.A. CROSON & CO.*

A. *Fullilove*

Fullilove v. Klutznick[13] involved a challenge to a provision of the

13. 448 U.S. 448 (1980).

Public Works Employment Act of 1977[14] (the "Act"), which requires that at least ten percent of the federal funds granted under the Act for local public works projects be set aside to procure services or supplies from minority business enterprises. A minority business enterprise was defined as "a business at least 50 percentum of which is owned by minority group members or, in case of a publicly owned business, at least 51 percentum of the stock of which is owned by minority group members."[15] Minority group members were defined as "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."[16]

The plaintiffs in *Fullilove* were several associations of construction contractors and subcontractors and a firm engaged in heating, ventilation, and air conditioning work. The plaintiffs brought an action in the Southern District of New York seeking declaratory and injunctive relief to prevent the Secretary of Commerce, as program administrator, the State of New York, the City of New York, the Board of Higher Education, the Board of Education, and the Health and Hospitals Corporation of New York, as potential grantees under the program, from enforcing the MBE set-aside provision.[17]

The district court upheld the constitutionality of the MBE provision.[18] District Judge Werker applied a strict scrutiny standard, holding that the Act must be shown to advance a compelling state interest, and that no other less discriminatory method was available to accomplish the objective.[19] The plaintiffs conceded that a compelling state interest was present "if the racial classification is intended to remedy the vestiges of present and/or past discrimination,"[20] but claimed that no such purpose was ever articulated by Congress.[21] The court, however, found that even though the recorded legislative history did not explicitly state

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14. Pub. L. No. 95-28, 91 Stat. 116 (1977).

15. *Fullilove*, 448 U.S. at 454 (citation omitted).

16. *Id.*

17. Fullilove v. Kreps, 443 F. Supp. 253, 254 (S.D.N.Y. 1977), *aff'd*, 584 F.2d 600, 601 (2d Cir. 1978), *aff'd sub nom.* Fullilove v. Klutznick, 448 U.S. 448 (1980).

18. Plaintiffs also challenged the Act as a violation of various provisions of the Civil Rights Acts of 1866 and 1946. *Id.* at 262. The district court held, however, that measures intended to correct invidious discrimination must necessarily be race-sensitive. *Id.* Accordingly, it found that the MBE requirement accorded with the intent of the Civil Rights Acts. *Id.* The statutory issue was not raised on appeal. Fullilove v. Kreps, 584 F.2d 600, 603 (2d Cir. 1978), *aff'd sub nom.* Fullilove v. Klutznick, 448 U.S. 448 (1980).

19. *Fullilove*, 443 F. Supp. at 257.

20. *Id.* (quoting Plaintiff's Memorandum in Support of Preliminary Injunction at 10).

21. *Id.*

such a purpose,[22] the remedial purpose could easily be found by examining the legislative history in light of other empirical data and legislative findings related to other legislation.[23] These findings showed that the lack of minority participation in government contracts was due to the effects of prior discrimination against minority businesses who sought to participate in government contracting.[24]

In answer to the plaintiffs' contention that the means chosen were not the least discriminatory method of achieving the objective of the Act, the district court found that the alternatives suggested by the plaintiffs would be ineffective,[25] and that in light of the consistent failure of less intrusive attempts to nurture the growth of minority enterprises, the ten percent set aside was necessary to achieve Congress' goal of ending the effects of prior discrimination.[26]

The Second Circuit affirmed, finding "that even under the most exacting standards of review the MBE provision passes constitutional muster."[27] Upholding the lower court's conclusions and reasoning, the court of appeals noted that, even in the case of strict scrutiny, "[t]he rule for ascertaining what the purpose of Congress was in enacting a statute . . . is more deferential than the rule which would be applied to test a state statute."[28] Thus, the court of appeals approved the district court's use of outside data and legislative findings for other bills in clarifying Congress' intent.[29] The Supreme Court granted certiorari[30] and, in a divided opinion, affirmed the district court's decision by a vote of six to three.[31]

Chief Justice Burger, joined by Justices White and Powell, approached the Act with a high degree of deference to Congress.[32] They found the Act to be a permissive application of Congress' spending power[33] which properly achieved its regulatory objectives through Congress' commerce

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22. *Id.* at 258.

23. *Id.*

24. *Id.* at 259.

25. *Id.* at 260-62.

26. *Id.* at 262.

27. Fullilove v. Kreps, 584 F.2d 600, 603 (2d Cir. 1978), *aff'd sub nom.* Fullilove v. Klutznick, 448 U.S. 448 (1980).

28. *Id.* at 604.

29. *Id.* at 604-06.

30. 441 U.S. 960 (1979).

31. *Fullilove,* 448 U.S. at 452.

32. *Id.* at 472-73.

33. *Id.* at 473. *See also* U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have power . . . to pay the Debts and provide for the common Defence [sic] and general Welfare of the United States . . . .").

power[34] and its power to enforce the guarantees of the fourteenth amendment.[35] However, in order to avoid complications arising from certain limitations placed on Congress' power to regulate the actions of state and local governments by *National League of Cities v. Usery*,[36] the Chief Justice looked almost exclusively to the power of Congress under section five of the fourteenth amendment.[37]

Having determined that Congress had legitimate objectives in both regulating commerce and enforcing the fourteenth amendment, Burger then proceeded to determine whether the use of racial or ethnic classifications by Congress violated the equal protection component of the due process clause of the fifth amendment.[38] Although Burger recognized the need for "careful judicial evaluation" in order to assure that the program was narrowly tailored to remedy the present effects of past discrimination,[39] he limited the judicial inquiry and deferred greatly to congressional judgment.

The Chief Justice first emphasized that Congress is not required to act

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34. *Fullilove*, 448 U.S. 475-76. *See also* U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have the power to regulate Commerce . . . among the several States . . . .").

35. *Fullilove*, 448 U.S. at 476-78. *See also* U.S. CONST. amend. XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.").

36. 426 U.S. 833 (1976). In *Usery*, the Court held that the 1974 amendments to the Fair Labor Standards Act, extending the Act's minimum wage and maximum hour provisions to State employees, was an impermissible exercise of Congress' power under the commerce clause. *Id.* at 851. The Court found that, insofar as the 1974 amendments operated directly to displace the states' abilities to structure employer-employee relationships in areas of traditional governmental functions, such as fire prevention, police protection, sanitation, public health, and parks and recreation, they were not within the authority granted Congress by the commerce clause. *Id.*

37. *Fullilove*, 448 U.S. at 476 (citing National League of Cities v. Usery, 426 U.S. 833 (1976)). Given that *Usery* involved the direct imposition on state governments of federal minimum wage standards, the Court found this intrusion on state sovereignty unconstitutional, even in light of Congress' broad commerce clause powers, but left open the conditioning of federal funds on meeting such standards. *Usery*, 426 U.S. at 852 & n.17. Thus, it is arguable that *Usery* had no bearing on the MBE program in *Fullilove*. In any event, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 557 (1985), explicitly overruled *Usery*.

38. *Fullilove*, 448 U.S. at 480. Although the equal protection clause of the fourteenth amendment applies only to the states, the Court has held that "discrimination may be so unjustifiable as to be violative of due process." Bolling v. Sharpe, 347 U.S. 497, 499 (1954). This has come to be known as the "equal protection component of the Fifth Amendment." *See, e.g.*, Davis v. Passman, 442 U.S. 228, 234 (1979); Washington v. Davis, 426 U.S. 229, 239 (1976).

39. *Fullilove*, 448 U.S. at 480.

in a wholly "color-blind fashion" when pursuing a remedial goal.[40] Citing cases in which the use of race-based measures by federal courts to remedy civil-rights violations were upheld,[41] the Chief Justice explicitly distinguished between the nonplenary power of the federal courts, which "require[s] [it] to tailor 'the scope of the remedy' to fit the nature and extent of . . . the violation,"[42] and the "broad remedial powers of Congress."[43] The Chief Justice went on to state: "It is fundamental that in no organ of government, state or federal; does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees."[44]

The Chief Justice gave little weight to the specific charge that the MBE program impermissibly deprived nonminority businesses of access to at least some of the government contracting opportunities,[45] finding that the actual burden shouldered by nonminority firms was "relatively light,"[46] and that "such 'a sharing of the burden' by innocent parties is not impermissible."[47] Again deferring to Congress, the Chief Justice stated:

> [A]lthough we may assume that the complaining parties are innocent of any discriminatory conduct, it was within congressional power to *act on the assumption* that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities.[48]

In respect to the claim that the MBE program impermissibly limited its scope to specific minority groups, rather than extending to all businesses whose access to government was impaired by the effects of "disadvantage or discrimination,"[49] the Chief Justice found "no basis to

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40. *Id.* at 482.

41. *Id.* at 482-83.

42. *Id.* at 483 (citing Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 419-20 (1977); Milliken v. Bradley, 418 U.S. 717, 783 (1974); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971)).

43. *Id.*

44. *Id.*

45. *Id.* at 484.

46. *Id.*

47. *Id.* (quoting Franks v. Bowman Transp. Co., 424 U.S. 747, 777 (1976)).

48. *Id.* at 484-85 (emphasis added).

49. *Id.* at 485.

hold that Congress is without authority to undertake the kind of limited remedial effort represented by the MBE program. Congress, not the courts, has the heavy burden of dealing with a host of intractable economic and social problems."[50]

Finally, in response to the plaintiffs' claim that the MBE program was overinclusive,[51] the Chief Justice turned to the administrative waiver and exemption scheme devised by the Department of Commerce in its regulations implementing the Act. These regulations allowed a waiver to be granted to a contractor who, having contacted MBEs, has no "meaningful choice" but to accept a price that is unreasonably high for the relevant market area. However, the price must not be merely the result of the MBE "trying to cover his costs because the price results from disadvantage which affects the MBE's cost of doing business or results from discrimination."[52] Moreover, if a grantee[53] could demonstrate that there were not "sufficient, relevant, qualified minority business enterprises whose market areas include the project location," the grantee could obtain a waiver of the ten percent set-aside requirement.[54]

The Chief Justice again deferred to Congress and found that the administrative waiver provisions were sufficient to save the program from the challenge of overinclusiveness.[55] Thus, a plurality of three Justices

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50. *Id.* at 486. The Chief Justice left open the possibility that "very special facts" might allow a challenge based upon the exclusion of an identifiable minority group that had been discriminated against to an "equal or greater" degree than the groups identified by Congress. *Id.*

51. Plaintiffs claimed that the program benefitted minority businesses which did not suffer from the effects of prior discrimination. *Id.*

52. *Id.* at 477 (citation omitted).

53. The grantees, the local government agencies receiving funds, were the defendants in this action. The Court held, however, that waiver procedures made available only to the grantees did not invalidate the program, since there was a grievance mechanism which allowed contractors to assert that a grantee had failed to seek an appropriate waiver. *Id.* at 489.

54. *Id.* at 494.

55. *Id.* The Court specifically stated:

> That the use of racial and ethnic criteria is premised on assumptions rebuttable in the administrative process gives reasonable assurance that the application of the MBE program will be limited to accomplishing the remedial objectives contemplated by Congress in that misapplications of the racial and ethnic criteria can be remedied. In dealing with this facial challenge to the statute, doubts must be resolved in support of the congressional judgment that this limited program is a necessary step to effectuate the constitutional mandate for equality of economic opportunity. The MBE provision may be viewed as a pilot project, appropriately limited in extent and duration, and subject to reassessment and reevaluation by the Congress prior to any extension or re-enactment.

found that, as an act of *Congress*, the set aside was constitutional. However, it left open the question of whether such a set aside would be constitutional if enacted locally.[56] Three other Justices, however, answered that question in the affirmative. Using an intermediate standard of equal protection analysis for benign racial classifications, Justice Marshall, joined by Justices Brennan and Blackmun, found that the set aside served important governmental objectives and was substantially related to the achievement of those objectives. Thus, it passed constitutional muster.[57]

B. *Croson*

Given the silence of Burger's opinion with respect to locally enacted affirmative action programs, it is not surprising that in the wake of *Fullilove*, a number of state and local governments enacted MBE set asides modeled after the federal program in *Fullilove*.[58] One such program was enacted by the City of Richmond, Virginia in 1983. The plan required prime contractors to subcontract at least thirty percent of the dollar amount

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Id. at 489.

56. Justice Powell, while joining Chief Justice Burger's plurality opinion, also wrote a concurring opinion in which he found that the MBE provisions would survive under the standard he announced in University of California Regents v. Bakke, 438 U.S. 265, 299 (1978). *Fullilove*, 448 U.S. at 495.

57. *Fullilove*, 448 U.S. at 517-21 (using the same standard applied to state action by four Justices in *Bakke*, 438 U.S. at 324-79). The clear implication that they would uphold a similar local set aside was borne out in *Croson*, when the same three Justices, this time in dissent, voted to uphold Richmond's set aside. "Race conscious classifications designed to further remedial goals 'must serve important governmental objectives and must be substantially related to achievement of those objectives' in order to withstand constitutional scrutiny. Analyzed in terms of this two-prong standard, Richmond's set aside, like the federal program [in *Fullilove*] on which it was modeled is 'plainly constitutional.'" City of Richmond v. J.A. Croson, 488 U.S. 469, 535 (1989) (citations omitted).

58. According to an amicus brief submitted by the National League of Cities, U.S. Conference of Mayors, National Association of Counties and International City Management Association in support of the City of Richmond, there were 36 state and 190 local government programs in the United States at the time, many modeled after the *Fullilove* program. Brief for Appellant at 4-5, *Croson* (No. 87-998). Despite this, there were still substantial doubts as to the validity of such an extension of *Fullilove*'s reasoning to the States. *See, e.g.*, Days, *Fullilove*, 96 YALE L.J. 453, 454 (1987) (voicing concern whether Congress and the Supreme Court, in enacting and approving the minority set aside at issue, established standards for the formulation and judicial review of such programs in light of our national sensitivity to racial classifications); Note, *Judicial Review of Congressional Section Five Action: The Fallacy of Reverse Incorporation*, 84 COLUM. L. REV. 1969, 1975-83 (1984) (arguing that the current tendency of courts to subject state and congressional action to identical equal protection is illegitimate in cases where this treatment conflicts with the text, history, and structure of the Constitution).

of city-awarded construction contracts to one or more MBEs. The set aside did not apply to city contracts awarded to minority-owned prime contractors.[59] The plan defined "MBE" and "minority" almost exactly as Congress had in the program upheld in *Fullilove*.[60] The program had a five-year limit and, like the *Fullilove* program, provided for administrative waivers.[61]

J.A. Croson Company (Croson), a mechanical plumbing and heating contractor,[62] brought suit in the federal district court for the Eastern District of Virginia.[63] Croson had been denied its request for either a waiver of the set-aside requirement or an increase in the contract price to cover the cost increase resulting from a late bid of the MBE subcontractor, the acceptance of which would allow it to meet the plan's requirements.[64]

The suit alleged that the MBE plan was unconstitutional on its face and as applied in this particular case.[65] The district court upheld the plan, and a divided panel of the Fourth Circuit, relying on *Fullilove* and *Bakke*, affirmed.[66] The Supreme Court granted certiorari, vacated the court of appeals' opinion, and remanded the case for further consideration in light of the Supreme Court's intervening decision in *Wygant v. Jackson Board of Education*.[67]

In *Croson*, on remand, a divided panel of the court of appeals struck down the Richmond set aside.[68] The city appealed and the Supreme

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59. *Croson*, 488 U.S. at 477-78.

60. *Id.*

61. *Id.* at 478.

62. *Id.* at 481.

63. *Id.* at 483.

64. *Id.*

65. *Id.*

66. City of Richmond v. J.A. Croson & Co., 779 F.2d 181 (4th Cir. 1985), *vacated & remanded*, 478 U.S. 1016 (1986).

67. *Croson*, 478 U.S. at 1016 (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986)). In *Wygant*, the Court, by a vote of five to four, had found a provision of a collective bargaining agreement between the Jackson, Michigan Board of Education and a teachers' union to be unconstitutional. The agreement provided for layoffs outside the traditional reverse seniority order in order to keep the percentage of minority teachers in the system at or above its current level. *Wygant*, 476 U.S. at 270-71. As a result, nonminority teachers were laid off, while minority teachers with less seniority were retained. *Id.* at 272. All three Justices who had voted to uphold the affirmative action plan in *Fullilove*, solely as an exercise of congressional power (Chief Justice Burger joined Justice Powell's plurality opinion, and Justice White concurred in the judgment), voted to overturn the local program. *Id.* at 267.

68. J.A. Croson Co. v. Richmond, 822 F.2d 1355 (4th Cir. 1987), *aff'd*, 488 U.S.

Court affirmed.[69] Justice O'Connor wrote the opinion of the Court, but was joined only by Chief Justice Rehnquist and Justice White. Justices Stevens and Kennedy joined in selected parts of the opinion. Justice Scalia concurred, but did not join any part of Justice O'Connor's opinion.

After the initial statement of facts, Justice O'Connor reaffirmed Chief Justice Burger's determination in *Fullilove* that Congress had unique powers under section five of the fourteenth amendment, which allowed it to enact race-conscious remedies.[70] Justice O'Connor, however, continued by stating that the fourteenth amendment did not give similar powers to the states.[71] Thus, in response to the appellant's argument that it would pervert federalism if the federal government was found to have a compelling interest in remedying the effects of racial discrimination in its own public works program, while city governments did not, Justice O'Connor stated:

> What appellant ignores is that Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment . . . .
>
> That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate. Section 1 of the Fourteenth Amendment is an explicit *constraint* on state power . . . .[72]

In reply to Justice Marshall's criticism that this view constituted a federal preemption in matters of race, Justice O'Connor allowed that states would have authority to remedy the effects of identified discrimination within their jurisdictions. For example, a city could take affirmative steps to dismantle a system of racial exclusion in which it had become a passive participant.[73]

In Part IIIA of the opinion, which Justice White joined, Justice O'Connor set out the terms of the level of review to be applied in the case.[74] Not only must classifications based on race be narrowly tailored to achieve a compelling government interest,[75] but the only compelling

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469 (1989).

69. *Croson*, 488 U.S. 469 (1989).

70. *Id.* at 487-90.

71. *Id.* at 490-91.

72. *Id.* at 490 (emphasis in original).

73. *Id.* at 491-92.

74. *Id.*

75. *Id.* at 493.

goal justifying such classifications are those "strictly reserved for remedial settings."[76] Further, this remedial setting cannot simply remedy the effects of "societal discrimination."[77] The government will have a compelling interest in favoring one race over another only when remedying "wrongs worked by specific instances of racial discrimination," evidence of which must be supplied by "judicial, legislative or administrative findings of constitutional or statutory violations."[78]

In Part IIIB of the opinion, Justice O'Connor, joined by Chief Justice Rehnquist and Justices White, Stevens, and Kennedy, subjected the Richmond MBE program to a level of strict scrutiny as demanding as Chief Justice Burger's scrutiny of the *Fullilove* program was deferential. This lower level of scrutiny had allowed the Court in *Fullilove* to uphold the congressional program based on a few statements made by supporters of the provision from the floor of the House of Representatives,[79] combined with the findings of congressional committees in the context of entirely different legislation geared "to achieve the goal of equality of economic opportunity."[80] The majority in *Croson*, however, held that the city council's finding that it was remedying the "present effects of past discrimination in the construction industry" was "a generalized assertion that there has been past discrimination in an entire industry," and provided no guidance in determining the precise scope of the injury the council sought to remedy.[81]

The Court found that estimating the number of Richmond's minority firms, had there been no past societal discrimination, would be "sheer speculation."[82] The Court stated that "[d]efining these sorts of injuries as 'identified discrimination' would give local governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor."[83] Even after considering the following facts: the ordinance's declared remedial purpose; the 1977 congressional determination that effects of past discrimination had stifled minority participation in the construction industry nationally; the factor

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76. *Id.* It was this limitation of race-based classifications to strictly remedial settings that was the cause of Justice Stevens' refusal to join in this part of the opinion. *Id.* at 511 & n.1.

77. *Id.* at 497.

78. *Id.* at 496-97 (quoting University of California Regents v. Bakke, 438 U.S. 265, 308-09 (1978)).

79. *See* Fullilove v. Klutznick, 448 U.S. 448, 458-61 (1980).

80. *See id.* at 490.

81. *Croson*, 488 U.S. at 498.

82. *Id.* at 499.

83. *Id.*

that minority businesses in Richmond received 0.67% of contracts from the city while minorities constituted fifty percent of the city's population; the existence of very few minority contractors in state contractors' associations; and the statement that there had been past discrimination in the construction industry, the Court found there was insufficient evidence to provide Richmond with a "strong basis" to conclude that remedial action was necessary.[84]

While the *Fullilove* Court searched for possible legislative intent in the absence of almost any congressional findings or debate on the issue, the majority in *Croson* used any possible nondiscriminatory explanation as a basis for invalidating the legislation.[85] Thus, the gross disparity between the number of prime contracts awarded to minority firms and the minority population of the City of Richmond (0.67% of prime contracts from the city to minority businesses; minority population of fifty percent) was not considered probative of the existence of discrimination. Hence, the Court found "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value."[86] Thus, the *Croson* Court concluded that "without any information on minority participation in subcontracting, it is quite simply impossible to evaluate overall minority representation in the city's construction expenditures."[87]

Likewise, the evidence of low MBE membership in local contractors' associations was not considered to be probative of any discrimination in the local construction industry:

> There are numerous explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial choices. Blacks may be disproportionately attracted to industries other than construction. . . . The mere fact that black membership in these trade organizations is low, standing alone, cannot establish a prima facie case of discrimination.[88]

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

85. *Cf.* Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1732 (1989) (test applied in *Croson* "appears as an abstract, detached, and purely formal procedure rather than as a substantially fair and practically oriented means to resolve conflicting claims").

86. *Croson*, 488 U.S. at 501 (quoting Hazelwood School Dist. v. United States, 433 U.S. 299, 308 n.13 (1977)).

87. *Id.* at 502-03.

88. *Id.* at 503.

Finally, the Court concluded that Congress' findings of nationwide discrimination in the construction industry were almost irrelevant to Richmond's determination that there had been discrimination in its local construction industry. Ironically, the very existence of the waiver procedure which had sustained the *Fullilove* program[89] was fatal to Richmond's finding of discrimination. "By its inclusion of a waiver procedure in the national program addressed in *Fullilove*, Congress explicitly recognized that the scope of the problem would vary from market area to market area."[90] Similarly, Richmond's adoption of the congressional definition of "minority" was found by the majority to result in "gross overinclusiveness:"

> There is *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo or Aleut persons in any aspect of the Richmond construction industry. . . . The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination.[91]

In Part IV of the opinion, five Justices attempt, rather unsuccessfully, to distinguish the Richmond program from the one upheld in *Fullilove* in ways other than its local enactment. First, the majority found that there did not appear to be any consideration of race-neutral means to increase minority business participation in city contracting. The majority conclusorily stated that "[t]he principal opinion in *Fullilove* found that Congress had carefully examined and rejected race-neutral alternatives before enacting the MBE set aside."[92] A review of the relevant part of the *Fullilove* opinion, however, reveals no such consideration and rejection.[93]

Second, the Court faulted the Richmond plan's waiver system since it focused solely on the availability of MBEs without any inquiry into "whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors."[94] In an attempt to distinguish this from the *Fullilove* waiver provision, the majority stated that "the congressional scheme upheld in

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89. *See supra* text accompanying notes 51-54.

90. *Croson*, 488 U.S. at 504.

91. *Id.* at 506 (emphasis in original).

92. *Id.* at 507.

93. Fullilove v. Klutznick, 448 U.S. 448, 463-67 (1980).

94. *Croson*, 488 U.S. at 508.

Fullilove allowed for a waiver of the set-aside provision where an MBE's higher price was not attributable to the effects of past discrimination."[95] This interpretation, however, is a mischaracterization of the MBE waiver provision as set forth in the *Fullilove* decision.[96]

Finally, in Part V of the opinion, Justice O'Connor, joined by Chief Justice Rehnquist and Justices White and Kennedy, attempted to leave open the possibility that state or local entities could take action to "rectify the effects of identified discrimination within its jurisdiction."[97] Justice O'Connor, however, effectively limited using any race-based classifications to extreme cases where it might be necessary for "some form of narrowly tailored racial preference . . . to break down patterns of deliberate exclusion."[98]

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95. *Id.*

96. Although in *Fullilove* Chief Justice Burger stated that "waiver is available to avoid dealing with an MBE who is attempting to exploit the remedial aspects of the program by charging an unreasonable price, *i.e.*, a price not attributable to the present effects of past discrimination," the provisions of the waiver program as set forth in the opinion say something quite different. *Fullilove*, 448 U.S. at 470, 488. The hypothetical provided in the technical bulletin issued by the Economic Development Agency stated as follows:

> *Question*: Should a request for a waiver of the 10% requirement based on an unreasonable price asked by an MBE ever be granted?
>
> *Answer*: It is possible to imagine situations where an MBE might ask a price for its product or services that is unreasonable and where, therefore, a waiver is justified. However, before a waiver request will be honored the following determinations will be made:
>
> (a) The MBE's quote is unreasonably priced. This determination should be based on the nature of the product or service of the subcontractor, the geographic location of the site and of the subcontractor, prices of similar products or services in the relevant market area, and general business conditions in the market area. Furthermore, a subcontractor's price should not be considered unreasonable if he is merely trying to cover his costs because the price results from disadvantage which affects the MBE's cost of doing business or results from discrimination.
>
> (b) The contractor has contacted other MBEs and has no meaningful choice but to accept an unreasonably high price.

Id. at 470 (citation omitted).

Thus, similar to Richmond's waiver system, the waiver provision in the *Fullilove* program was in fact based on the availability of MBEs. Further, an unreasonable price was *not* defined as one in which prices were not attributable to the effects of past discrimination. Rather, a normally unreasonable price would be considered reasonable if the price was attributable to past discrimination. *Id.* There is no indication that a price which was normal for the market area would be considered unreasonable because it was not based on past discrimination. In fact, the question of past discrimination did not arise until the price was deemed unreasonable based on factors solely related to the relevant market. *Id.*

97. *Croson*, 488 U.S. at 509.

98. *Id.*

II. *FULLILOVE*, *CROSON*, AND THE FOURTEENTH AMENDMENT

Despite the attempt in *Croson* to distinguish *Fullilove*,[99] it seems clear that the only meaningful distinction between the cases is the source of their respective enactments. Therefore, in order for the two decisions to stand simultaneously, Congress must be subject to a *far less strict* standard than the states when reviewing benign racial classifications. The *Croson* and *Fullilove* pluralities justified this result on what they viewed as the plenary nature of Congress' enforcement powers under the fourteenth amendment. However, this, in itself, would not justify a lesser standard unless Congress was explicitly free of the strictures of the equal protection clause.[100] In fact, the equal protection clause only applies to the states. Recent Supreme Court decisions, however, have attempted to subject Congress to the same standard as the states via the fifth amendment's due process clause.[101] In light of *Croson*, this no longer seems viable. In order to determine the exact extent of Congress' power and its limitations, particularly after *Croson* and *Fullilove*, it is necessary to discuss the history of congressional enforcement power under the fourteenth amendment, as well as the recent attempts to apply the equal protection clause to Congress.

A. *Congressional Enforcement Power Under Section Five of the Fourteenth Amendment*

The history of the adoption of the fourteenth amendment indicates that its framers desired to alter Congress' relationship to other branches of the federal and state governments in at least two ways. One was to give Congress, rather than the courts, the power to enforce the provisions of the amendment.[102] The second purpose, after the Civil War, was to give Congress broad powers to effectuate attainment of equality for the recently

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99. *See supra* text accompanying notes 92-98.

100. This is not strictly true in the sense that the equal protection clause may apply equally to the states and Congress, but the different settings of the respective lawmakers produce differing results for the same programs. This could be true if a process-based theory is adopted. Thus, Congress, because it represents a nationwide constituency, may validly enact a law that would be invalid if enacted by a state legislature. In other words, it might be said under a process-based view that the same equal protection clause applies to both the states and Congress, but it results in a much stricter standard of review (at least in some cases) for state enactments. It is hard to see, however, that such a distinction could be made for substantive equal protection theories.

101. *See infra* text accompanying notes 131-42.

102. This was a response to the Supreme Court's decision in Scott v. Sanford, 60 U.S. (19 How.) 393, 452 (1856), which ruled that Congress did not have the power to declare slavery illegal in the territories of the United States.

freed slaves.

The dual purposes of the amendment were recognized in the first case before the Supreme Court to deal specifically with section five, *Ex parte Virginia*.[103] In this case, the Court upheld a provision of the Civil Rights Act of 1875, under which a county court judge in Virginia was imprisoned for excluding otherwise qualified persons from jury lists on account of their "race, color and previous condition of servitude."[104] In regard to the amendments, the Court stated:

> One great purpose of the amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States. They were intended to take away all possibility of oppression by law because of race and color. They were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress.[105]

And, specifically regarding section five, the Court continued:

> All of the amendments derive much of their force from this latter provision. It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation . . . . Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.[106]

This expansive reading of section five was relatively short-lived and,

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103. 100 U.S. 339 (1879). *See also* Bohrer, *supra* note 10, at 483 (commenting on the Court's first interpretation of section five in *Ex parte Virginia*).

104. *Ex parte Virginia*, 100 U.S. at 340.

105. *Id.* at 344-45.

106. *Id.* at 345-46 (emphasis in original).

with the Court's decision four years later in *The Civil Rights Cases*,[107] Congress' plenary "power" to promote objectives of the fourteenth amendment was limited to the protection of citizens against state action.[108]

> [U]ntil some state law has been passed, or some state action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the fourteenth amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity . . . .[109]

Congress' section five powers were thus relegated to a purely defensive mechanism against state action for the next eighty years.[110] This interpretation, however, was discarded in the voting rights cases decided by the Court in 1966.[111] The third of these cases, *Katzenbach v. Morgan*,[112] became the leading case in section five jurisprudence.[113] In *Morgan*, the Court, by a 7-2 vote in an opinion authored by Justice Brennan, once again adopted a broad reading of section five. The Court found that section five empowered Congress in the Voting Rights Act of 1956 to forbid the states from implementing certain literacy requirements for voters even though such literacy requirements did not violate the equal protection clause,[114] thus overruling *The Civil Rights Cases*.[115]

Justice Brennan's opinion relied on two alternate theories.[116] The first was simply that the particular prohibition by Congress was an appropriate means to the legitimate end of securing for minorities "nondiscriminatory treatment by government—both in the imposition of voting qualifications and the provision or administration of government services, such as public schools, public housing and law enforcement."[117] As a result, minorities would be better enabled "to obtain 'perfect equality of civil rights and the

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107. 109 U.S. 3 (1883).

108. Bohrer, *supra* note 10, at 483-84.

109. *The Civil Rights Cases*, 109 U.S. at 13.

110. Bohrer, *supra* note 10, at 484.

111. South Carolina v. Katzenbach, 383 U.S. 301 (1966); United States v. Guest, 383 U.S. 745, 755 (1966); Katzenbach v. Morgan, 384 U.S. 641 (1966).

112. 384 U.S. 641 (1966).

113. L. TRIBE, *supra* note 1, § 5-14, at 342.

114. *Morgan*, 384 U.S. at 646-47, 658.

115. Bohrer, *supra* note 10, at 487-89.

116. L. TRIBE, *supra* note 1, § 5-14, at 341.

117. *Morgan*, 384 U.S. at 652.

equal protection of the laws.'"[118] As such, the legislation met the "rationality test"[119] of *McCulloch v. Maryland,*[120] in which the Court reasoned: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter are constitutional."[121] This view was reaffirmed in *Fullilove,*[122] and later in *Croson.*[123]

The second theory upon which Justice Brennan relied was found by Justice Harlan to not only give Congress broad power to enforce the equal protection clause, but also to give Congress the power to interpret the clause and to define its substance, independent of judicial interpretation.[124] Justice Brennan found that it was "enough that we perceive a basis upon which Congress might predicate a judgment that [the state law] constituted an invidious discrimination in violation of the equal protection clause."[125] Justice Harlan disagreed, objecting that if Congress could make such a judgment, then there was no reason why Congress "should not be able as well to exercise its § 5 'discretion' by enacting statutes so as in effect to dilute equal protection and due process decisions of the Court."[126]

In a rather conclusory footnote, Justice Brennan stated: "Contrary to the suggestion of the dissent section five does not grant Congress power to exercise discretion in the other direction . . . section 5 grants Congress no power to restrict, abrogate, or dilute these guarantees."[127] Professor Tribe has depicted Justice Brennan's description of Congress' section five as fixing "a ratchet-like restraint on the power of Congress to interpret the fourteenth amendment substantively."[128]

Neither *Fullilove* nor *Croson* fully joined this issue. *Fullilove* involved only a federal program and thus, arguably came solely within the pure enforcement powers of Congress.[129] *Croson* involved merely a local law

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118. *Id.* at 653.

119. L. TRIBE, *supra* note 1, § 5-14, at 341.

120. 17 U.S. (4 Wheat.) 316 (1819).

121. *Id.* at 421.

122. *Fullilove*, 448 U.S. at 472.

123. *Croson*, 488 U.S. at 490.

124. Katzenbach v. Morgan, 384 U.S. 641, 668 (1966) (Harlan, J., dissenting).

125. *Id.* at 656.

126. *Id.* at 668 (Harlan, J., dissenting).

127. *Morgan*, 384 U.S. at 651 n.10.

128. L. TRIBE, *supra* note 1, § 5-14, at 343.

129. *Cf.* L. TRIBE, *supra* note 1, § 5-14, at 344 & n.54 (*Fullilove* reinforces the notion "that Justice Brennan's first justification for the *Morgan* holding—that Congress may devise

unauthorized by Congress. The question that remains is whether such a statute would in fact "dilute" any equal protection decision of the Court. This question must be confronted directly, for if Congress, under its section five powers, were to authorize localities to enact programs like Richmond's, this would seem to be a case of "Congress . . . enacting statutes so as in effect to dilute equal protection . . . decisions" of the Court.[130] As this Note argues, at least one view of the equal protection clause may allow such an overruling of *Croson* without "diluting" the equal protection clause.

B. *The Application of the Equal Protection Clause to Congress*

The second gray area of the Court's jurisprudence, highlighted by the numerous opinions in *Fullilove* and *Croson*, is the nature and extent of application of the equal protection clause to the federal government through the due process clause of the fifth amendment ("reverse incorporation").[131] Although the equal protection clause, by its terms, does not apply to the federal government, prior to 1954, the Court had entertained in dicta the possibility that discrimination by the federal government might rise to such a level as to be violative of the due process clause of the fifth amendment.[132] It was not until *Bolling v. Sharpe*,[133] however, that the Court actually found a federal law unconstitutional on these grounds. In *Bolling v. Sharpe*, a companion case to *Brown v. Board of Education of Topeka*,[134] the Court held that segregation in the Washington, D.C. school system was "discrimination . . . so unjustifiable as to be violative of due process."[135] The equal protection clause did not apply directly to the congressionally governed District of Columbia, but a desire to maintain consistency, in light of *Brown*, led the Court to finally

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its own remedies to shield individuals from violations of federal rights—remains secure").

130. *Morgan*, 384 U.S. at 668 (Harlan, J., dissenting).

131. J. ELY, *supra* note 6, at 32-33; Note, *supra* note 58, at 1969.

132. *See, e.g.*, Detroit Bank v. United States, 317 U.S. 329, 338 (1943) ("Even if discriminatory legislation may be so arbitrary and injurious in character as to violate the due process clause of the Fifth Amendment, . . . no such case is presented here."); Currin v. Wallace, 306 U.S. 1, 13-14 (1939) ("If it be assumed that there might be discrimination of such an injurious character as to bring into operation the due process clause of the Fifth Amendment, ... [f]or that contention we find no warrant."); Steward Machine Co. v. Davis, 301 U.S. 548, 585 (1937) (finding the act of Congress to be valid, though assuming "that discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment.").

133. 347 U.S. 497 (1954).

134. 347 U.S. 483 (1954).

135. *Bolling*, 347 U.S. at 499.

use this "reverse incorporation."[136]

In his opinion for the Court, Chief Justice Warren emphasized: "[W]e do not mean to imply that [equal protection of the laws and due process of law] are always interchangeable phrases."[137] This distinction, however, was gradually ignored in later decisions.[138] Not until *Buckley v. Valeo*,[139] did the Court state: "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."[140] This equation has come under sharp scholarly attack.[141] Indeed, the holdings in *Fullilove* and *Croson* seem almost completely irreconcilable if one accepts the equation of fourteenth amendment equal protection and fifth amendment due process. There may be a move away from this equation, however, leaving room for a congressional override of *Croson*.[142]

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136. *Cf. id.* at 500 (stating "[i]n view of our decision that the Constitution prohibits the States from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."); *but see* J. ELY, *supra* note 6, at 33 (asking: "Unthinkable in what sense? Not in terms of the historical intent: the members of the Reconstruction Congress might well have trusted themselves and their successors in a way they didn't trust the existing and future legislatures of Southern States.").

137. *Bolling*, 347 U.S. at 499.

138. *E.g.*, Shapiro v. Thompson, 394 U.S. 618, 641-42 (1969).

139. 424 U.S. 1 (1975).

140. *Id.* at 93.

141. *See* J. ELY, *supra* note 6, at 32 (finding a "judicial unwillingness to hold the states to a higher constitutional standard than the federal government"); Bohrer, *supra* note 10, at 474-91 (discussing "confusion between fourteenth and fifth amendments' 'equal protection' guarantees"); Note, *supra* note 58, at 1970 (commenting that the fifth amendment contains no equal protection clause, yet courts have construed the due process clause of the fifth amendment as incorporating an equal protection guarantee that binds federal government to same extent that fourteenth amendment binds states).

142. While a majority of the Court adopted the equivalent of this equation in *Fullilove*, *Croson* appears to move away from it. Justice Stewart's dissent in *Fullilove*, joined by Justice Rehnquist, stated unequivocally:

> The equal protection standard of the Constitution has one clear and central meaning—it absolutely prohibits invidious discrimination by government. That standard must be met by every State under the equal protection clause of the Fourteenth Amendment. And that standard must be met by the United States itself under the due process clause of the fifth amendment.

Fullilove, 448 U.S. 448, 523 (1980) (Stewart, J., dissenting) (citations omitted).

Likewise, Justice Marshall, joined by Justices Brennan and Blackmun, concurred in *Fullilove* that "equal protection analysis in the fifth amendment area is the same as that under the fourteenth amendment." *Id.* at 517-18 n.2 (Marshall, J., concurring) (citing University of California Regents v. Bakke, 438 U.S. 265, 367 n.43 (1978)). Chief Justice Burger's plurality opinion, perhaps recognizing the conflict, made only the slightest reference to the equal protection "component" of the due process clause. 448 U.S. at 473.

III. THE PROBLEM OF AUTHORIZING STATE EQUAL PROTECTION VIOLATIONS: CONTENT-BASED VS. PROCESS-BASED THEORIES

It still seems that even a combination of Congress' plenary powers of enforcement under section five and its freedom from the equal protection constraints placed on the states would not give it enough power to effectively override the *Croson* decision, since it is axiomatic that "Congress may not authorize the States to violate the Equal Protection Clause."[143] This, however, begs the question alluded to earlier in this

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Justice Stevens in dissent allowed for some, but not much, difference. Referring to the due process clause of the fifth amendment, he stated:

> It performs the office of both the Due Process and Equal Protection Clauses of the Fourteenth Amendment in requiring that the federal sovereign act impartially . . . . "When the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest."

Id. at 548 & n.23 (quoting Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976)).

In *Croson*, it is interesting to note, however, that Chief Justice Rehnquist, by joining in Justice O'Connor's opinion, seems to have abandoned the absolute view of reverse incorporation. Justice Marshall, joined by Justices Brennan and Blackmun, also may have retreated from this view of full reverse incorporation. Rather than equating the two, Justice Marshall merely stated "the equal protection guarantee has largely been applied" to the federal government. *Croson*, 488 U.S. 469, 558 (1989) (Marshall, J., dissenting) (citing Bolling v. Sharpe, 347 U.S. 497 (1954)).

Justice Kennedy declined to address the issue in *Croson*, but appeared to assume reverse incorporation by stating: "The process by which a law that is an equal protection violation when enacted by a State becomes transformed to an equal protection guarantee when enacted by Congress poses a difficult proposition for me . . . ." *Id.* at 518 (Kennedy, J., concurring in part and concurring in judgment).

Justice Scalia appeared to acknowledge differing standards for the federal and state governments when he stated: "[I]t is one thing to permit racially based conduct by the Federal Government—whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment—and quite another to permit it by the precise entities against whose conduct in matters of race that Amendment was specifically directed." *Id.* at 521-22 (Scalia, J., concurring). However, Justice Scalia's passionate denunciation of race-based classifications makes it unlikely that he would be willing to extend Congress' powers in this regard: "Racial preferences appear to 'even the score' (in some small degree) only if one embraces the proposition that our society is appropriately viewed as divided into races . . . . Nothing is worth that embrace." *Id.* at 528 (Scalia, J., concurring).

Thus, while five Justices in *Fullilove* fully embraced reverse incorporation, after *Croson*, it is arguable that at least eight members of the present Court could, in the appropriate case, find that the federal government need not be bound by the same equal protection standard as the states. There still remains, therefore, at least the possibility of a congressional override of *Croson*.

143. *See* Shapiro v. Thompson, 394 U.S. 618, 641 (1969); *cf.* Katzenbach v. Morgan,

Note:[144] Does the equal protection clause demand a certain substantive content such as "color-blindness," of which Congress cannot authorize a violation?[145] Or does it simply demand a certain fairness in the processes of legislation or representation? The answer to these questions may determine whether a locally enacted equal protection violation may be cured by congressional authorization.

The exact nature of the equal protection clause has never been explicitly defined by the Court. The two alternatives presented above are represented in the Court's jurisprudence by two traditions, one finding its root in Justice Harlan's dissent in *Plessy v. Ferguson*,[146] and the other in Justice Stone's famous *Carolene Products'* footnote four.[147]

In *Plessy v. Ferguson,* Justice Harlan stated: "[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. *Our Constitution is color-blind,* and neither knows nor tolerates classes among citizens."[148] This aversion to *any* color classification finds its most recent explication in Justice Scalia's concurrence in *Croson*: "I share the view expressed by Alexander Bickel that '[t]he lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.'"[149]

Such a view would seem to necessitate the invalidation of all race-based classifications, either federal or state. It may be argued, however, that the Constitution intends the states to act in a color-blind manner while reserving the ability to classify on the basis of race for the federal government. If it is substantively and "inherently wrong" for the states to discriminate on account of race, then the Court's decision in *Fullilove* cannot stand. While Congress itself may be free from the constraints of equal protection (defined substantively as "color-blind"), a law which requires the states either directly or as a condition of receipt of federal

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384 U.S. 641, 651 n.10 (1966).

144. *See supra* text accompanying notes 1-4.

145. Of course, there are substantive visions of the equal protection clause that are not color-blind. *See, e.g.,* Tribe, *In What Vision of the Constitution Must the Law Be Color Blind?*, 20 J. MARSHALL L. REV. 201, 204-06 (1986) (there is no basis in the framing of the equal protection clause, nor in judicial interpretation, for the constitutional premise of absolute neutrality).

146. 163 U.S. 537 (1896).

147. United States v. Carolene Prod. Co., 304 U.S. 144, 152-53 n.4 (1938).

148. *Plessy*, 163 U.S. at 559 (emphasis added).

149. *Croson*, 488 U.S. at 521 (Scalia, J., concurring) (quoting A. BICKEL, THE MORALITY OF CONSENT 133 (1975)).

funds to act racially, is the purest example of Congress authorizing the states to violate the equal protection clause. The result in *Fullilove* would be the same as if Congress had conditioned the receipt of educational funds on the maintenance by the state of a racially segregated school system. But this is an absurd result.[150]

To make *Fullilove* and *Croson* consistent requires another view of equal protection. One such view is presented in *Carolene Products*:

> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation . . . .
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[151]

The distinguishing feature of this approach to judicial review is that it presumes the constitutionality of a state legislative act, but immediately subjects the law to stricter scrutiny for the enumerated reasons. The strict scrutiny then "smokes out" illegitimate uses of classifications by "assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool," and by ensuring that "the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for classification was illegitimate racial prejudice or stereotype."[152]

As it stands, however, this theory cannot, by itself, explain the use of strict scrutiny in the affirmative action context. Classifications which burden the "majority" for the benefit of the minority fall into none of the categories described by Justice Stone.[153] They are not directed at discrete

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150. *See* Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966) (Congress' power under section five of the fourteenth amendment is limited to adopting measures to enforce the guarantees of the amendment and does not grant Congress power to restrict, abrogate, or dilute these guarantees).

151. *Carolene Products*, 304 U.S. at 152 n.4.

152. *Croson*, 488 U.S. at 493.

153. *See* Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 727 (1974) ("special scrutiny" is an inappropriate standard of review for reverse

and insular minorities, nor do they curtail the operation of "those political processes ordinarily relied upon to protect minorities."[154] The majority may easily repeal the legislation. Thus, it seems that affirmative action would not demand "strict scrutiny."

This analysis is appealing, but it ignores a simple fact of demographics: population groups are not distributed evenly throughout the United States. Therefore, what may be a "minority" nationwide, may be a majority locally, and vice versa. This problem was recognized by James Madison and set forth by him as a reason for a national government:

> [T]he greater number of citizens and extent of territory which may be brought within the compass of republican . . . government . . . renders factious combinations less to be dreaded . . . . The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.[155]

But this defense of the national government left open the possibility for such oppression within the states or smaller subdivisions:

> The influence of factious leaders may kindle a flame within their particular States but will be unable to spread a general conflagration through the other States . . . . A rage for . . . any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it in the same proportion as such a malady is more likely to taint a particular county or district than an entire State.[156]

On this theory, an enactment by a state is normally more likely to be

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discrimination; allowing majority to discriminate against itself is neutral in principle and not constitutionally suspect).

154. *Carolene Products*, 304 U.S. at 154 n.4.

155. THE FEDERALIST PAPERS NO. 10, at 82-83 (J. Madison) (C. Rossiter ed. 1961).

156. *Id.* at 84.

based on prejudice, stereotype, or "faction" than will an equivalent enactment by Congress. Congress is obviously not immune from prejudice, stereotype, or faction. In the affirmative action context, however, the nationwide "majority" must, by definition, be the actual majority. Such acts therefore would not trigger strict scrutiny under a *Carolene Products* view. However, when a local law is enacted that burdens the nationwide "majority," there is at least a strong possibility that the enactment may be the result of a local majority (or substantial minority) burdening a local minority in a discriminatory fashion, consequently rendering them "discrete and insular" and foreclosing redress through the local political process.

Thus, Justice O'Connor's statement in *Croson*, in which three other Justices joined, is on point: "Absent searching judicial inquiry . . . 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."[157]

Given the history of race in this country, the *Croson* conclusion is correct: all race-based classifications, including "benign" classifications, enacted on the local level, must be suspect. Indeed, in *Croson*, such suspicion may have been justified: blacks comprise approximately fifty percent of the population of Richmond, and five of nine seats on the City Council were held by blacks.[158]

This process-based analysis allows both *Fullilove* and *Croson* to stand. Congress' power to enforce equal protection guarantees through "benign" classifications under section five is left intact, while, at the same time, a common, but not identical, "equal protection component" is identified. Congress may not enact legislation which would curtail political processes or enact legislation against discrete and insular minorities without triggering strict scrutiny. However, a deferential review should be accorded by the Court where a majority burdens itself. Locally, a different standard of review, albeit from the same "equal protection guarantee," will hold, and *all* race classifications will be suspect.

As to whether Congress may ratify *Croson*-like programs, the answer under this analysis is yes: If the nationwide majority determines that in

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157. *Croson*, 488 U.S. at 493.

158. *Id.* at 495. Justice O'Connor goes on to quote John Hart Ely: "Of course it works both ways: a law that favors Blacks over Whites would be suspect if it were enacted by a predominately Black legislature." *Id. See* Ely, *supra* note 153, at 739 n.58. The difficulty in stating the problem this way is that it would seem to lead to the counting of racial heads in local legislatures every time an affirmative action program was enacted. This would forever enshrine racial classifications in jurisprudence, not a welcome result. However, under the approach outlined here, and adopted in *Croson*, this head counting is unnecessary—all racial classifications by states and localities are suspect and, whether they survive or not, will be determined by whether they survive strict scrutiny.

order to fully attain the objectives of equal protection of the law, it is necessary to allow localities (within congressionally prescribed limits) to respond to local conditions with laws which burden the nationwide majority to the benefit of the nationwide minority. Furthermore, Congress might legitimately determine that to allow the nationwide minority more power locally in order to effectively participate in the government by the enactment of relatively broad remedial measures, will redound to the benefit of the entire country. For by allowing minorities more actual power within the society as a whole, Congress may thus achieve the equal protection of the laws it is charged with enforcing. In this sense, then, despite Justice Kennedy's concern,[159] what procedurally might be an equal protection violation if enacted by a locality acting alone, might indeed be transformed into an equal protection guarantee when enacted pursuant to congressional authorization.

CONCLUSION

The decision in *Croson* may be seen as a strong blow against affirmative action in the United States. Alternatively, as this Note suggests, it can be seen as an opportunity, in light of *Fullilove*, to clarify much jurisprudence in the area of the fourteenth amendment. If Congress were to attempt to ratify local enactments like Richmond's, the Court would be forced to enunciate more precisely what form of equal protection standard binds the federal government in the absence of an explicit constitutional mandate. In addition, the Court would need to focus on the exact nature of the rights protected by the equal protection clause.

This Note contends that Congress may constitutionally ratify *Croson*-like programs, but only in the context of a process-based view of the equal protection clause. Whether it is appropriate to adjust our view of the equal protection clause according to the desirability of overriding a Supreme Court decision, is not at issue here. At present, the Court has not been forced to make a specific statement as to the nature of the equal protection clause. Were Congress to use its power to enforce the guarantees of the fourteenth amendment to decide that locally enacted affirmative action programs were necessary to the goal of equality, the issue would at least be joined.

John J. Hayes

159. *See supra* text accompanying note 142.