

THE TIDE HAS FINALLY TURNED
AGAINST RACIAL PREFERENCE PROGRAMS

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Historical Perspective

Racial preference programs are programs adopted by state or local governments to establish goals — or quotas — for minority participation in public contracting. The theory behind these programs is that the favored minority groups have suffered a disadvantage in their ability to compete based on past and present discrimination, such that it is necessary to provide them with a preference, or a leg up, over non-minorities in order to eliminate the disadvantage caused by discrimination. Proponents of racial preferences generally argue that the preferences are necessary to equalize an unequal playing field.

Although this purpose is noble on its face, the concept of racial preferences contains several inherent flaws. First, although taxpayers certainly pay a high price for preferential contracting programs, both through the enormous administrative expenses of the programs and through the increased cost of projects caused by skewing the usual low bid requirement, the main burden of racial preferences is born by private, non-minority prime and subcontractors, who are forced to carry the burden of the governmental

programs even though they are innocent of discrimination themselves (and if they are guilty, then civil rights laws provide powerful redress against them).

Second, the justification underlying racial preferences -- that an unequal playing field exists for all members of certain minority groups which is or was caused by discrimination — is far from a proven fact in most jurisdictions. Even where minority contractors can truly be shown to be underutilized by other than a disingenuous manipulation of statistics, which is actually quite rare (especially in Northern jurisdictions), reaching the conclusion that any underutilization must have been caused by discrimination is often an improper jump in logic. Objective analysis shows that barriers to entry in today's marketplace are more likely caused by the size of the firm and its experience level, which factors affect minority and non-minority firms alike. Certainly, a large percentage of the minority enterprises that actually receive preferences may hardly be classified as disadvantaged, such that the preference is not really a leg up, but rather a windfall (given at the expense of the non-minority contractors, based solely on their race).

Indeed, the most essential flaw in all racial preference programs is that, by definition, they classify individuals, and withhold or bestow benefits, based solely on the color of the individual's skin or place of birth. Such governmental classification of individuals based on race or ethnicity -- even for purported noble purposes -- is contrary to the notions of equality upon which our Constitution is based. Indeed, it is precisely the evil the programs are supposedly designed to overcome.

As Justice Clarence Thomas wrote recently in his concurring opinion in the Supreme Court case of *Adarand Contractors v. Pena*:

There can be no doubt that the paternalism that appears to lie at the heart of [racial preferences] is at war with the inherent equality that underlies and infuses our Constitution. . . . classifications [based on race or ethnicity] ultimately have a destructive effect on the individual and our society . . . So called benign discrimination teaches many that . . . minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are entitled to preferences. . . . government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple.

Despite their many inherent flaws, racial preference programs exploded during the decades of the 1970's and 1980's. With wide support from policymakers who had been indoctrinated with the ideals of liberal socialism (and its attendant paternalistic mindset, that government must act affirmatively to right all perceived wrongs) and race guilt during the 1960's, powerful pressure from emerging minority political coalitions, and little organized opposition, politicians across the country were quick to jump on the racial preference bandwagon, with little apparent thought for the moral, equitable, or legal conflicts presented. No statistics exist as to exactly how many programs were adopted across the country, but estimates range from several hundred to several thousand state and local programs, not including the scores of programs which were also adopted by the Federal government.

Although experience proved that the preference programs generally created more divisiveness than they remedied (and gave more of a windfall to established minority contractors than a leg up to disadvantaged contractors), and though the justifications behind the programs, which were dubious to begin with, became even more questionable by the late 1980's and 1990's, very few local governments took any steps towards voluntarily dismantling their racial preference programs. A vast bureaucracy whose livelihoods depended on continuation of the programs vigorously resisted any changes. Further, despite a marked shift in public opinion -- evidenced by ballot initiatives outlawing affirmative action which passed in California and Washington, and subsequently proposed legislation in Michigan and several other states to curtail all affirmative action on a statewide basis -- local politicians generally viewed maintaining the status quo of racial preferences in public contracting as the most politically expedient route. This was especially true since most incumbent politicians had at one time or another voted in favor of racial preferences during the rush to political correctness of the prior decades, and politicians generally find it very awkward to change their positions, particularly on hot-button issues. Thus, little impetus existed for change without judicial intervention.

Legal Standards Emerged Slowly

Legal challenges to racial preference programs were slow to meet with any degree of success. The judiciary struggled to reconcile the concepts of color-blindness inherent in our Constitution with the color-focus inherent in racial preferences, yet victories for opponents of preference programs were few

and far between (one such victory being a suit brought by this author's firm against the State of Michigan resulting in invalidation of an early version of Michigan's MBE set-aside program). Lawsuits were always uphill battles, and no clear judicial consensus emerged. Trial courts looked to appellate courts for guidance, but appellate decisions were sharply divided. Suits were routinely dismissed based on findings that the challengers lacked standing to sue, and courts rarely looked critically at the evidence local governments advanced in support of their programs, which often consisted of nothing more than bare conclusions that discrimination existed which must be remedied. Most early opinions upholding programs from challenge accepted as a given that discrimination had indeed altered the playing field, thus justifying the extreme remedy of benign discrimination to level it out. Exactly who had practiced the discrimination, when it had occurred, and what its true effects were was never squarely addressed.

The Landmark Croson Decision

In 1989, the United States Supreme Court issued its opinion in *J.A. Croson v City of Richmond*. As with many momentous opinions, the facts in *Croson* were really quite trivial. *Croson* was the only bidder on a small contract for the installation of urinals in Richmond's city jail. When it sought a minority subcontractor to comply with Richmond's 30% minority participation goal, the only subcontractor who responded quoted a price which would have caused Croson to lose money on the contract. Croson sought a waiver from the goal, Richmond denied it, and Croson sued. After five years of litigation, the Supreme

Court finally determined that Richmond's program was unlawful. In so doing, the Court set forth legal standards that finally established a clear test for determining the validity of state and local affirmative action programs — and paved the way for their ultimate demise.

Under *Croson*, a local government seeking to defend an affirmative action program from attack must prove that the program: 1) serves the compelling governmental interest of remedying only identified discrimination in its own jurisdiction; and 2) is narrowly tailored to remedying only the discrimination found, with minimal benefit to those who had not in fact suffered from discrimination and minimal harm to innocent third parties. This analysis is called strict scrutiny. Prior opinions had indicated that strict scrutiny should be applied, but *Croson* fleshed out the analysis and emphasized that only *specifically identified* discrimination in the local government's *own jurisdiction* could support a valid affirmative action program, and only limited programs tailored closely to remedying *only that discrimination found*, and no more, were permissible. In determining whether discrimination occurred, local governments could rely on statistical disparity studies (examining the utilization of minorities in relation to their percentage in the local population), but, significantly, the Court cautioned that *only minority contractors who were qualified, ready, and able to contract could be factored into the analysis*. The Court also stressed that, even when discrimination was legitimately found, governments had to first attempt race neutral alternatives, such as providing education to minorities in bidding processes and efficient techniques, relaxing bonding requirements, and

otherwise attempting to eliminate barriers to entry, before adopting race based set-asides. Finally, even when preferences were deemed necessary as a last resort, the Court cautioned that they had to be limited in duration, re-evaluated periodically, and contain the seeds of their own termination (i.e. some provision for discontinuance once the discrimination found had been eliminated).

Even though the Supreme Court's pronouncement was quite clear, the first several lower court decisions issued after *Croson* were very disappointing. The courts still did not conduct very searching inquiries into the evidence offered in support of programs (e.g. the findings of discrimination), but instead found that, as long as any disparity study was presented which appeared to prove the existence of discrimination, that was adequate.

As a result, a cottage industry in disparity studies emerged, with local governments across the country rushing to commission expensive studies to attempt to insulate their programs from attack under *Croson*. One commentator has determined that as much as \$60 million in taxpayer dollars was spent by local governments between 1989 and 1999, solely for disparity studies. The mindset of the local governments, influenced by the first few decisions after *Croson*, was that *Croson* has been a nuisance, but not a showstopper. Fortunately, history has shown that mindset to be seriously misinformed. As it turns out, the large sums of taxpayer dollars spent on disparity studies was money that was not well spent.

Current Trends in the Law

Although the first few decisions issued after *Croson* continued with the prior judicial trend of rubber stamping evidence offered in support of racial preference programs, the tide has now turned, and it has turned in a big way. *Since 1996, not one single state or local racial preference program which has been challenged in court has been upheld.* Racial preference programs across the country are now dropping like flies: from Miami, to Jackson (Mississippi), to Atlanta, to Baltimore, to Philadelphia, to Columbus, to Chicago, to Denver, to Houston. Nor are state programs immune. State preference programs have been struck down in Florida, Texas, Oklahoma, Minnesota, and Ohio. Of particular significance, most of the programs which have been invalidated were supported by not just one, but by numerous supposed disparity studies, all at very great cost to the local governments which commissioned them.

The single biggest difference between the current cases and the earlier cases is that the courts are now conducting the kind of searching, skeptical analysis of the government's evidence that *Croson* mandated. Under the proper inquiry, conducted after full discovery and trial in which the plaintiff is allowed to call its own expert witnesses to flush out the usual statistical manipulations and to expose the flaws inherent in most studies (such as the inclusion in statistical pools of minority contractors who are not in fact qualified, ready or able to bid on contracts), even the most expensive and carefully drafted study usually proves inadequate to meet the strict scrutiny standard.

One reason the studies have proven easy to attack is because they were never designed to be objective. The studies were commissioned with a pre-ordained result in mind: find evidence of discrimination to support this program. If an initial study did not come back the way the city wanted, the consultants were often sent back to the drawing board. If anecdotal evidence was desired to provide further support, it was usually gathered by anonymous surveys, or elicited at hearings in which no specific details to corroborate the story were developed.

Further, the studies and the gathering of anecdotal evidence were often conducted or orchestrated by entities with a clear stake in the outcome. For example, the Minority Business Enterprise and Legal Defense and Educational Fund (MBELDEF) is one entity that cities frequently used to evaluate their studies, or to assist in gathering evidence of discrimination. The judge striking down the Columbus program was very critical of the city's having used the MBELDEF in these roles. In essence, it put the fox in charge of guarding the henhouse. Simply put, not one single study which has been subjected to the rigors of searching scrutiny at trial has passed muster.

Two further developments of great significance to the battle are only now emerging. Several Federal courts, including the Sixth Circuit (in which Michigan is located), are now starting to rule that post-enactment evidence of discrimination is inadmissible to prove the necessary compelling interest (i.e. the existence of discrimination) to support racial preference programs. In other words, a local government must have solid proof of the nature and extent of

discrimination in its jurisdiction *before* it may adopt a program; any disparity study or other evidence which was commissioned after the preference program was initially adopted is out the door, without even scrutinizing its merits. The other development is that courts are starting to hint that individual government officials may be held *personally liable* for adopting or continuing a program which clearly fails to meet constitutional standards. Although both of these principles are still in their infancy, if they are developed further, which appears likely, they will be the final nails in the racial preference coffin.

Conclusion

It is interesting to note that most of the recent cases which have now turned the tide and sounded the death knell for racial preference programs were brought by large construction associations, like AUC, that had the resources, organization, and determination to see the cases through the entire process. The successes did not happen by accident, nor is final victory assured without continued dedication and commitment to the cause by all.

Given the powerful arguments against racial preferences, and the recent and emerging trends in the law, it may well be that governmental bodies will finally wake up and realize that voluntary abandonment of outdated and illegal racial preference programs is the smart move. The more enlightened jurisdictions will opt, instead, for race neutral programs, with stronger enforcement against proven discriminators and increased efforts to reduce barriers for *all* small firms to participate in public contracting (such as by breaking down contracts into smaller units and/or relaxing bonding requirements). These

efforts may serve to shift more of the burden to the governments, but at least the burden will be born equally by all taxpayers (and proven wrongdoers), rather than by the innocent, non-minority contractors who are carrying the burden under the current regime. Until such enlightenment occurs, aggressive legal action remains our best course, and now it appears it is not such a difficult course.