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The Constitutionality of New York State's Affirmative Action Law

John J. Sullivan

THE CONSTITUTIONALITY OF NEW YORK STATE'S AFFIRMATIVE ACTION LAW

I. Introduction

The term "affirmative action" has different meanings for different people. Some may view it as a procedure whereby minorities and minority groups receive public assistance to help compensate for years of past public and private discrimination.[1] Others, however, may view the concept as a policy that discriminates against non-minorities to achieve a politically correct racial balance in the workforce and business world.[2] What arguably began as a goal to eradicate the lingering effects of racial segregation[3] has evolved into complex national, state, and municipal programs. These programs accord special financing and instructional assistance to small and minority businesses, require non-minorities to use good faith efforts to hire minorities, and most importantly for purposes of this Note, set aside certain percentages of public contracts for various minority groups.

The Fourteenth Amendment to the United States Constitution prohibits states from denying individuals the equal protection of the laws.[4] In *City of Richmond v. J. A. Croson Co.*,[5] the United States Supreme Court attempted to locate the intersection of equal protection guarantees and state laws that mandate or authorize affirmative action programs in public contracting.

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1. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 396-97 (1978) (Marshall, J., concurring).

2. Perhaps the most noted opponent of affirmative action programs in the 1992 Presidential election was Republican Pat Buchanan. In his campaign for the Republican nomination, Buchanan vowed to go through the federal government "department by department and agency by agency, and root out the whole rotten infrastructure of reverse discrimination, root and branch." Ralph Z. Hallow, *Buchanan Vows Purge of Affirmative Action*, WASH. TIMES, Feb. 21, 1992, at A1.

3. The term "affirmative action" was first used in the Kennedy Administration's Executive Order 10,925, which established the President's Committee on Equal Employment Opportunity in 1961. Section 301(1) forbade all government contractors from discriminating against any employee or applicant for employment on the basis of race and required all contractors to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin." 3 C.F.R. §§ 448, 450 (1959-63 comp.). The term was used again in Section 706(g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1989), and in President Johnson's accompanying Executive Order 11,246, 3 C.F.R. § 339 (1964-65). *See* James E. Jones, Jr., *The Origins of Affirmative Action*, 21 U.C. DAVIS L. REV. 383, 395-99 (1988).

4. U.S. CONST. amend. XIV, § 1.

5. 488 U.S. 469 (1989).

The Court in *Croson* struck down an affirmative action law enacted by the city of Richmond, Virginia.[6] The Richmond plan required all prime contractors receiving public construction contracts to subcontract at least thirty percent of the contract's dollar amount to Minority Business Enterprises (MBEs).[7] The Supreme Court held that the plan violated the constitutional guarantee of equal protection because the plan excluded non-minority contractors from a fixed percentage of public contracts without first showing that the city had previously discriminated against minorities in its public contracting.[8] The Court subjected Richmond's plan to the rigorous standard of strict scrutiny,[9] stating that "benign" racial classifications, as remedial measures,[10] must be narrowly tailored

6. *Id.* at 485-86.

7. The plan defined an MBE as a firm at least 51% owned and controlled by members of one or more of the following minority groups: Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts. The plan made no restriction on the state or municipality from which the MBE must come, only that the owners had to be United States citizens. *Id.* at 478-79.

8. *Id.* at 505.

9. In evaluating whether a statute violates the Fourteenth Amendment, the least strenuous standard of review is often referred to as rational basis review, where the government action need only rationally serve a legitimate governmental interest. *See* Washington v. Davis, 426 U.S. 229, 246 (1976) (employing lowest level scrutiny where no discriminatory purpose is shown and the statute is racially neutral on its face but may adversely affect only certain racial groups); *see also* City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (applying rational basis review to a zoning ordinance that prevented construction of home for the mentally retarded in a residential neighborhood); San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (utilizing lowest level scrutiny when analyzing a state school financing plan whereby students from wealthier neighborhoods benefitted from higher expenditures than students from areas with less valuable property).

Intermediate review requires the legislation to be substantially related to an important state interest. *See* Metro Broadcasting, Inc. v. Fed. Communications Comm'n, 497 U.S. 547, 564-65 (1990) (holding that benign race-conscious measures authorized by Congress, whether remedial or not, are constitutional if they serve important governmental objectives and are substantially related to the achievement of those objectives); *see also* Craig v. Boren, 429 U.S. 190 (1976) (applying intermediate review to classifications by gender). Finally, strict scrutiny applies whenever a state classifies by race or ethnicity. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) (opinion of Powell, J.).

10. At least one circuit has analogized affirmative action plans to structural injunctions, such as those that ended school segregation and mandated busing and district gerrymandering, stating that as with relief for other constitutional violations, the scope of the remedy must depend upon the scope of the violation. O'Donnell Constr. Corp. v. District of Columbia, 963 F.2d 420, 425 (D.C. Cir. 1992) (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971)).

to address a compelling state interest, such as rectifying the effects of identifiable racial discrimination.[11]

The state of New York has attempted to implement its own statewide affirmative action plan since 1988, when it first enacted Executive Law Article 15-A.[12] However, it has since been constrained by *Croson*. Article 15-A is the codification of the state's affirmative action law for public works contracts; it seeks to increase minority and female participation in the state's contracting process.[13] Enforcement of the New York plan depends largely upon administrative regulation rather than upon the language of the statute.[14] The state's Office of Minority and Women's Business Development (OMWBD),[15] the agency responsible for enforcement, promulgated enforcement regulations soon after enactment of Article 15-A.

The regulations remained in effect until 1990, when a non-minority owned contractor successfully sought a preliminary injunction to prevent enforcement of the plan.[16] Although neither Article 15-A nor the original regulations called for statewide minimum participation requirements or quotas, such as those struck down in *Croson*,[17] their constitutionality was nevertheless questioned. Several contractors challenged the law on equal protection grounds when their inability to meet project-specific requirements that they

11. Justice O'Connor, who delivered the opinion of the Court, stated in a portion of her opinion not joined by a majority of the Court, that strict scrutiny would apply to any review of state-enacted race conscious measures. 488 U.S. at 493. In *Metro Broadcasting*, 497 U.S. 547, the Court's majority opinion by Justice Brennan tacitly recognized that strict scrutiny now applies to state and municipal measures. *Id.* at 565. Furthermore, the lower federal courts have adopted this standard in assessing the constitutionality of the various state and local affirmative action statutes. *See, e.g.*, Harrison & Burrowes Bridge Contractors, Inc. v. Cuomo, 981 F.2d 50, 62 (2d Cir. 1992); Coral Constr. Co. v. King County, 941 F.2d 910, 916 (9th Cir. 1991); Cone Corp. v. Hillsborough County, 908 F.2d 908, 913 (11th Cir. 1990).

12. N.Y. EXEC. LAW §§ 310-318 (McKinney 1993).

13. *Id.* § 311(3)(a); *see also* Legislative Findings and Declaration, 1988 N.Y. LAWS, ch. 261, § 62.

14. *See infra* part III.

15. Article 15-A created the OMWBD and the position of Director of OMWBD. The statute empowers the Director to issue rules and regulations necessary for its enforcement. N.Y. EXEC. LAW § 311(1); *see infra* part III.

16. *See* Harrison & Burrowes Bridge Contractors, Inc. v. Cuomo, 743 F. Supp. 977 (N.D.N.Y. 1990) [*Harrison I*].

17. The Richmond plan had required all prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar value of the contract to MBEs. 488 U.S. at 477; *see infra* notes 27-51 and accompanying text. The New York law allows the individual state agencies to set minority participation goals for each project or contract. N.Y. EXEC. LAW § 313; *see infra* notes 125-127 and accompanying text.

employ women- and minority-owned enterprises (W/MBEs) jeopardized their public contracts.[18]

OMWBD repealed the original compliance regulations, citing both the litigation and the Supreme Court's decision in *Croson*.[19] Because *Croson* requires a state to make findings of prior discrimination before implementing an affirmative action plan,[20] the director of the OMWBD[21] promulgated emergency regulations that suspended the participation goals of Article 15-A pending a final determination of the constitutionality of the plan.[22] New York now claims that it has made the proper findings to support its aggressive affirmative action plan, and, in July 1992, the state issued another version of the compliance regulations,[23] which may or may not withstand an equal protection challenge under the Fourteenth Amendment.

In addition to New York, a number of states and the District of Columbia have enacted various forms of affirmative action legislation that have been challenged on equal protection grounds.[24] The success of the complainants in these suits has varied in both the form of the legislation and the court hearing the case. Consequently, the federal courts have yet to agree on a uniform standard of what constitutes a finding of past discrimination sufficient to support a plan. Some courts have reasoned that the *Croson* Court failed to enunciate a clear standard and only responded to the plan it struck down.[25] Furthermore, a number of courts have avoided

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18. *See Harrison I*, 743 F. Supp. at 978; *see infra* notes 136-144 and accompanying text.

19. *See* Harrison & Burrowes Bridge Contractors, Inc. v. Cuomo, 1991 U.S. Dist. LEXIS 13962, Oct. 1, 1991, at *11 (N.D.N.Y.), *aff'd* 981 F.2d 50 (2d Cir. 1992) [*Harrison II*].

20. 488 U.S. at 505.

21. *See supra* note 15.

22. *See Harrison II*, 1991 U.S. Dist. LEXIS 13962, at *12.

23. N.Y. COMP. CODES R. & REGS. tit. IX §§ 540-44 (1992).

24. *See, e.g.*, O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420 (D.C. Cir. 1992) (striking down District of Columbia's plan requiring 35% of all construction work to be set aside for MBEs); Coral Constr. Co. v. King County, 941 F.2d 910 (9th Cir. 1991) (remanding county plan calling for separate MBE participation goals on each project for determination of compelling interest); Michigan Road Builders Ass'n v. Blanchard, 761 F. Supp. 1303 (W.D. Mich. 1991) (upholding Michigan plan in conjunction with federal set aside program using both federal and state funds).

25. *See, e.g., Harrison II*, 981 F.2d at 61-62 ("*Croson* made only broad pronouncements concerning the findings necessary to support a state's affirmative action plan and generally provided that the plan had to be narrowly tailored, but left the validity of particular plans to be assessed on a case-by-case basis"); Cone Corp. v. Hillsborough County, 908 F.2d 908, 913 (11th Cir. 1990). In *Cone Corp.*, the Eleventh Circuit stated that *Croson* did not "provide a set of standards or guidelines describing the

resolution of the constitutional issues altogether by dismissing equal protection challenges on the grounds of lack of standing.[26] A workable standard is necessary to complete any evaluation of New York's latest attempt to codify a policy of affirmative action in the awarding of public contracts.

This Note examines the present state of affirmative action jurisprudence to determine whether the amended version of New York's compliance regulations accompanying Article 15-A survives constitutional scrutiny. Part II examines the *Croson* decision and its impact in the lower federal courts and in the states. Part III looks at Article 15-A, its history, its associated administrative regulations, and the case law that has reviewed it. Part IV evaluates the statute and the present compliance regulations in light of the interpretations of *Croson* in the lower federal courts, recommends the appropriate standard, and concludes, with some exceptions, that Article 15-A will survive constitutional scrutiny.

II. Constitutional Background

A. *Croson*

In *City of Richmond v. J. A. Croson Co.*,[27] the Supreme Court assessed the validity of a Richmond, Virginia ordinance that required all contractors receiving public construction contracts to subcontract to MBEs at least thirty percent of the dollar amount of the contract.[28] The controversy arose when the city, after first awarding a contract on a municipal construction project to a nonminority owned firm, revoked the contract when the firm was unable to procure materials from a qualified MBE.[29] Following an

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kind of MBE plan that would pass constitutional muster. . . . The Court described an outer perimeter of unacceptable behavior; plans which fall inside of that perimeter are clearly unconstitutional, while the constitutionality of plans which fall on or outside the perimeter apparently depends on the contours of the individual plan." *Id.* *See also* Nina Farber, Comment, *Justifying Affirmative Action After* City of Richmond v. J.A. Croson*: The Court Needs a Standard for Proving Past Discrimination*, 56 BROOK. L. REV. 975, 981 (1990) ("although the particular outcome in *Croson* was proper, the Court failed to establish a clear standard for determining when a government agency has made sufficient findings of past discrimination to support a compelling governmental interest in remedying racial discrimination").

26. Cone Corp. v. Florida Dep't of Transp., 921 F.2d 1190 (11th Cir. 1991); Capeletti Bros., Inc. v. Broward County, 738 F. Supp. 1415 (S.D. Fla. 1990).

27. 488 U.S. 469 (1989).

28. *See supra* notes 5-11 and accompanying text.

29. 488 U.S. at 483.

arduous series of appeals,[30] the Supreme Court affirmed the Court of Appeals decision striking down the plan.[31] The Supreme Court expressed skepticism about the true nature of the program, saying that "searching judicial inquiry" is necessary to ensure that race-based measures are indeed remedial rather than motivated by "illegitimate notions of racial inferiority or simple racial politics."[32]

In defense of the affirmative action ordinance, Richmond had claimed that the plan was an attempt to remedy the effects of past discrimination exhibited both in Richmond and nationwide.[33] The city cited a number of sources to support its claims. It relied on a study that showed a wide discrepancy between the amount of Richmond's public contracting work performed by minority-owned contractors and the size of the local black population.[34] Richmond also referred to Congressional findings of nationwide discrimination to infer similar violations within its own boundaries.[35] Furthermore, the city claimed that the extremely low MBE

30. Upon initially addressing J.A. Croson's challenge, the district court upheld all aspects of the plan, and a divided court of appeals affirmed. 779 F.2d 181 (4th Cir. 1985). The court of appeals held that it was reasonable for Richmond to conclude that the nationwide findings of discrimination used to support the Public Works Employment Act of 1977, 42 U.S.C. §§ 6701, 6705-6708, 6710 (1994), were sufficient to serve as the cause of low minority participation in Richmond's construction industry. *See infra* note 35.

Following the court of appeals decision, the Supreme Court rendered its decision in Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986), which struck down an employment agreement between local school authorities and a teachers union that tied layoffs to the racial makeup of the student body. The Court reversed a lower court holding that the need for role models for minority students was a sufficient interest to justify the plan. A plurality of the Court indicated that the equal protection clause required a "showing of prior discrimination by the government unit involved." *Id.* at 274.

Subsequent to its decision in *Wygant*, the Court granted J.A. Croson's petition for certiorari and vacated the opinion of the court of appeals. The Court remanded the case and instructed the court of appeals to further consider the plaintiff's claim in light of the decision in *Wygant*. J.A. Croson Co. v. City of Richmond, 478 U.S. 1016 (1986). On remand, a divided panel of the Fourth Circuit struck down Richmond's plan, citing the city's unjustified reliance on claims of historical discrimination as the basis for its compelling interest. 822 F.2d 1355, 1357 (4th Cir. 1987).

31. *Croson*, 488 U.S. at 511.

32. *Id.* at 493.

33. *Id.* at 498.

34. The study showed that minority businesses received only .67% of prime contracts from the city although minorities constituted 50% of the city's population. *Id.* at 499.

35. Richmond and the district court that first approved the plan relied on Congressional findings used to support a set-aside provision in the Public Works Employment Act of 1977, 42 U.S.C. §§ 6701, 6705-6708, 6710 (1994), upheld by the Court in Fullilove v. Klutznick, 448 U.S. 448 (1980). *Croson*, 488 U.S. at 499.

membership in a local contractors' association was another indicator of discrimination.[36]

In applying the strict scrutiny test,[37] the Court rejected Richmond's justification for the requirement that contractors set aside thirty percent of all subcontracting work for MBEs. Specifically, the Court held that generalized assertions of past discrimination in an industry are insufficient to justify affirmative action;[38] general allegations of past societal discrimination[39] supported by questionably relevant statistics[40] would not support the exclusion of nonminority businesses from a substantial percentage of public contracting work solely on the basis of race. The Court also invalidated the municipality's use of Congress's findings of nationwide discrimination,[41] stating that when a state or municipality seeks to enact such a race-conscious measure, it must find discrimination within its borders—discrimination in one jurisdiction cannot be inferred from a finding of discrimination in another.[42] In sum, the state or municipality must have " 'a strong basis in evidence for its conclusion that remedial action [is] necessary.' "[43]

The Court also criticized Richmond's use of a thirty percent set aside provision for MBEs.[44] First, it stated that the city should have employed alternative race-neutral remedies before enacting a race-conscious measure, because many of the barriers to market entry existed independent of race.[45] In addition, the Court found

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36. 488 U.S. at 503.

37. *See supra* notes 9-11 and accompanying text.

38. 488 U.S. at 498.

39. *Id.* at 498.

40. *Id.* at 501.

41. *See supra* note 35. In *Croson*, the Court held that Congress was entitled to use more generalized assertions in support of its program because it had specific authority under Section 5 of the Fourteenth Amendment to enforce its mandate of equal protection for all. 488 U.S. at 490. Because the Fourteenth Amendment was enacted as a limit on states' powers, it did not follow that the states possess similar independent remedial authority. *Id.*

42. 488 U.S. at 505.

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

44. *Id.* at 508.

45. *Id.* at 507. At least one commentator views these measures as "failed alternatives." *See* Mary C. Daly, *Rebuilding the City of Richmond: Congress's Power to Authorize the States to Implement Race-Conscious Affirmative Action Plans*, 33 B.C. L. REV. 903, 929-30 (1992). Professor Daly argues that race-neutral programs do not help remedy discrimination once the state or local government has decided to enact race-conscious legislation. At this point, the governing body has already determined that neutral measures will not be as effective as race conscious legislation. *Id.*

the plan's strict waiver allowances[46] troublesome. Unlike the Congressional plan previously upheld in *Fullilove v. Klutznick*,[47] Richmond would not waive the thirty percent requirement even upon an affirmative showing that an MBE's higher bid did not result from prior discrimination.[48] Finally, the combination of the Court's perception that the plan was over-inclusive[49] and the fact that the City Council that enacted the plan was made up of a majority of African-Americans,[50] led the Court to doubt whether Richmond really intended to ameliorate the effects of discrimination, as it had claimed.[51]

B. *Croson* In Action

Although the *Croson* Court explained why the Richmond plan was unacceptable, it did not affirmatively describe the parameters of a satisfactory plan.[52] Several lower federal courts have proposed model affirmative action plans to which to compare actual state and municipal plans to determine their constitutionality. In particular, the Ninth Circuit in *Coral Construction Co. v. King County*,[53] relying primarily on the Eleventh Circuit,[54] has fashioned a detailed prototype that a statute should resemble before passing constitutional muster; the court specified the types of findings of discrimination that establish a compelling governmental interest and described the characteristics of a narrowly tailored plan.

1. Compelling Interest

The application of the strict scrutiny standard in reviewing the constitutionality of an affirmative action statute requires that the state have a compelling interest in enacting race-conscious legisla-

46. The contracting agency could only waive the 30 percent requirement if there was a showing that an insufficient number of MBEs were available to meet it. *Croson*, 488 U.S. at 508.

47. 448 U.S. 448 (1980); *see supra* note 35.

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

49. Richmond's meager findings only applied to African-Americans; there was absolutely no evidence of discrimination against the other minority groups included in the plan. *Id.* at 506.

50. *Id.* at 495 (opinion of O'Connor, J.).

51. "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." *Id.* at 506; *see also supra* note 32 and accompanying text.

52. Cone Corp. v. Hillsborough County, 908 F.2d 908, 913 (11th Cir. 1990); *see supra* note 25.

53. 941 F.2d 910 (9th Cir. 1991).

54. *Cone Corp.*, 908 F.2d 908.

tion.[55] The interest in this context is the remedying of prior actual and identifiable systematic discrimination in the public contracting process.[56] Unless the state actually perpetuated the discrimination, either actively in its awarding of contracts, or tacitly through its dealings with firms that discriminate, no wrong exists to be remedied.[57] To support a claim of discrimination, the state or municipality must first establish through concrete findings the existence of the racial bias within its own borders.[58] As the Court stated conclusively in *Croson*, general assertions of society-wide discrimination will not suffice.[59]

According to the Ninth Circuit's *Coral Construction Co.* model, the findings produced by the state should ideally include some combination of statistical and anecdotal evidence that conclusively establishes discrimination.[60] At a minimum, the state must include statistics showing that minority-owned contractors have been awarded a disproportionately small number of contracts compared to the number of minority-owned contractors qualified to perform the work for which the contracts called.[61] When the statistical disparities are especially egregious, statistical evidence may stand alone to support a plan,[62] but the disparities will be subject to close examination because such evidence "often does not fully account for the complex factors and motivations guiding employment decisions, many of which may be entirely race-neutral."[63] A complementary presentation of anecdotal evidence[64] clarifies the statistics

55. *Coral Constr. Co.*, 941 F.2d at 916; *see supra* text accompanying notes 9-11.

56. *Coral Constr. Co.*, 941 F.2d at 916.

57. *Id.*

58. *Id.*

59. *See supra* text accompanying note 38.

60. 941 F.2d at 919; *accord* O'Donnell Constr. Corp. v. District of Columbia, 963 F.2d 420, 427 (D.C. Cir. 1992).

61. 941 F.2d at 919.

62. *Id.* at 918.

63. *Id.* at 919. Obviously, not all observers agree that numbers alone can ever prove discrimination. Senator Hatch illustrated during Justice Ginsburg's confirmation hearings before the Senate Judiciary Committee how statistics can deceive. The Senator posed a hypothetical where a small business had hired fifty employees in the past thirteen years, none of whom were black. He asked the Justice if she thought that such numbers indicated discriminatory hiring practices, to which she responded in the affirmative. Hatch then told her that since her appointment to the Court of Appeals for the D.C. Circuit in 1980, "you've not had a black clerk of the fifty that you've hired. I know that's not discrimination." Mike Kirkland, *Senate Panel Opens Ginsburg Nomination Hearing*, PROPRIETARY TO THE UNITED PRESS INTERNATIONAL, July 20, 1993.

64. The court in *Coral Construction Co.* referred approvingly to testimony by various local contractors who claimed to have suffered from discriminatory practices at

and enhances their impact, especially when statistical disparities are observable but not outrageous;[65] anecdotal evidence alone, however, is flawed.[66]

Despite the unequivocal language in *Croson* requiring the determination of discrimination *before* enactment of race-conscious relief,[67] the Ninth Circuit did not consider the timing of the findings too crucial to the legitimacy of an affirmative action plan. It did recognize that a state or municipality ideally should produce all findings before the enactment of such a measure. The court in *Coral Construction Co.* stated that a jurisdiction "must have *some* concrete evidence . . . before it may adopt a remedial program . . . [A]ny program adopted without some legitimate evidence of discrimination is presumptively invalid."[68] The court concluded, however, that the statute at issue did not fail simply because the locality produced the balance of the evidence after enactment.[69] In the Ninth Circuit's view, a court may evaluate the legitimacy of the program based on all the evidence presented, regardless of when the government obtained it.[70]

While the timing rule that the *Coral Construction Co.* court enunciated was quite clear, the rule's origins are rather murky. Although *Croson* unequivocally requires that "[s]tates and their subdivisions . . . must identify [the] discrimination . . . with some specificity *before* they may use race-conscious relief,"[71] the Ninth Circuit held that to disqualify post-enactment findings from review

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the hands of prime contractors performing work for the County. For example, one contractor testified that his firm had been in line to receive work on a pool construction project for the Goodwill Games, but lost the contract when the County relaxed its MBE requirements. 941 F.2d at 918. The Eleventh Circuit in *Cone Corp.* referred to testimony that some prime contractors who received estimates from MBEs, refused to submit those estimates with their bids. 908 F.2d at 916. That court also cited evidence that material suppliers would frequently give discounts to non-minority firms only, to the exclusion of MBEs. *Id.*

65. *Coral Constr. Co.*, 941 F.2d at 919.

66. "While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a systematic pattern necessary for the adoption of an affirmative action plan . . . . Without a statistical foundation, the picture is incomplete." *Id.*

67. *See Croson*, 488 U.S. at 504.

68. 941 F.2d at 920.

69. *Id.* at 921.

70. *Id.* at 920-21. The court specifically refused to limit judicial review to findings provided before enactment, *Id.* at 920, and instead remanded the case to the district court to evaluate all the evidence that the county had since gathered. *Id.* at 922.

New York accepts the Ninth Circuit's rule without reservation and even purports to find support for the rule in *Croson*. *See infra* notes 215 - 217.

71. 488 U.S. at 504 (emphasis added).

would conflict with a state's affirmative duty to correct its own denial of equal protection to minorities.[72] If a state or municipality possessed evidence of its own discriminatory practices, it could face constitutional culpability for failing to act.[73] Assuming that remedial action is eventually found to be justified, the court stated that its approach would eliminate the dilemma facing a state or municipality in choosing between moving prematurely or waiting for detailed findings, which could possibly exacerbate the effects of systematic discrimination.[74]

In formulating its timing rule, the court in *Coral Construction Co.* relied on a pair of companion Supreme Court cases, *Village of Arlington Heights v. Metropolitan Housing Corp.*[75] and *Mount Healthy School District v. Doyle.*[76] The Ninth Circuit interpreted these cases as standing for the proposition that state action that might violate civil rights is not absolutely forbidden if the state can show an otherwise legitimate reason for the conduct.[77] In *Arlington Heights*, the Court refused to reverse a municipality's refusal to rezone residential land for low- and moderate-income housing, despite allegations that the municipality's decision may have been motivated in part by a racially discriminatory purpose.[78] The Court noted that if the complainants had made a threshold showing that the denial of rezoning was in fact partially motivated by race, the burden of proof would shift to the municipality to show that it would have made the same decision absent any influence from a discriminatory purpose.[79] Similarly, in *Mount Healthy* the Court held that the district court should have granted the defendant school district, which was accused of wrongfully firing a teacher for the exercise of his First Amendment rights, the opportunity to

72. " '[T]he State has the power to eradicate racial discrimination and its effects in both public and private sectors, and the *absolute duty* to do so where those wrongs were caused intentionally by the State itself.' " *Coral Constr. Co.*, 941 F.2d at 920 (alteration in original) (quoting *Croson*, 488 U.S. at 518 (Kennedy, J., concurring)).

73. *Coral Constr. Co.*, 941 F.2d at 921.

74. *Id.*

75. 429 U.S. 252 (1977).

76. 429 U.S. 274 (1977).

77. *Coral Constr. Co.*, 941 F.2d at 921.

78. The Court adopted the findings of the District Court that the municipality was motivated "by a desire 'to protect property values and the integrity of the Village's zoning plan,' " 429 U.S. at 259 (quoting Metro. Hous. Dev. Corp. v. Village of Arlington Heights, 373 F. Supp. 208, 211 (N.D.Ill. 1974)), not by race, and held that the plaintiffs had not in fact proven a racially discriminatory intent, required before heightened scrutiny will apply. *Id.* at 270-71; *see* Washington v. Davis, 426 U.S. 229, 248 (1976); *supra* note 9.

79. 429 U.S. at 270 n.21.

show that it would have terminated the plaintiff even if he had not engaged in the protected conduct.[80]

The court in *Coral Construction Co.* analogized the decisions by the zoning board in *Arlington Heights* and by the school district in *Mount Healthy* to the enactment of an affirmative action plan by a state or municipality.[81] Just as the school district and zoning board should have been granted the opportunity to rebut claims that they had acted with an improper purpose, King County should have been allowed to justify its plan by producing facts that objectively supported the need for the plan, regardless of the time frame in which the facts were gathered.[82] Furthermore, in the interest of fairness, the Ninth Circuit stated that district court should have granted the complainants the opportunity to contest the findings of the County.[83]

Although no circuit court has specifically rejected the Ninth Circuit's timing rule, the D.C. Circuit essentially ignored it in *O'Donnell Construction Co. v. District of Columbia*.[84] The circuit court reversed the denial of a preliminary injunction that sought to enjoin the enforcement of the District's set-aside program.[85] The set-aside plan called for a thirty-five percent minority participation and sought to achieve this goal by instituting "sheltered markets"[86] in which only certified MBEs could bid. The District claimed that it had a compelling interest to establish the plan and used both statistical[87] and anecdotal evidence[88] to show that MBEs faced multiple institutional barriers that did not appear to hinder the success of non-minorities. Although the district court accepted the findings as sufficient evidence of past discrimination, the court of

80. *Id.* at 287.

81. 941 F.2d at 921.

82. *Id.*

83. *Id.*

84. 963 F.2d 420 (D.C. Cir. 1992).

85. *Id.* at 429.

86. "In a sheltered market, agencies set aside contracts and subcontracts for 'limited competition' in bidding among MBEs, to the exclusion of all others. Only MBEs certified by the [city] are permitted to participate in the sheltered markets." *Id.* at 422 (citing D.C. CODE ANN. § 1147(b)).

87. The city awarded only 3.4% of all its construction contracting work to MBEs, while the city somehow thought that MBEs were capable of performing 34%, a conclusion that puzzled the court. *O'Donnell Constr. Co.*, 963 F.2d at 426.

88. The city heard testimony from several witnesses concerning the difficulty they faced as minority contractors, including testimony about discrimination by white firms. *Id.* at 427.

appeals dismissed them as conclusory.[89] It stated that the city did not compile the statistics to demonstrate systematic discrimination, but rather to show that the desired participation goal was attainable.[90] The court determined that much of the anecdotal testimony dealt with structural impediments, such as bonding and finance requirements, that any new or small business would face.[91] Furthermore, the court held that evidence of discrimination in the private sector alone would be insufficient to support a system-wide remedy.[92]

The court of appeals did not need to comment on whether the city could use post-enactment findings to support the plan at issue, as the appeal was taken from the denial of a preliminary injunction, rather than a final judgment on the merits. In holding that an injunction was proper, however, the court found a strong likelihood that the plaintiff would prevail on the equal protection challenge to the set-aside plan.[93] It arguably assumed, without deciding, that the rule enunciated in *Croson* would require the factual basis to accompany rather than follow the legislation.[94]

2. *Narrowly Tailored Remedy*

The second prong of strict scrutiny requires that the remedial measure be narrowly tailored to address the compelling interest. The Ninth Circuit in *Coral Construction Co.* identified three factors that indicate when an affirmative action plan is narrowly tailored to remedy past discrimination. First, the state or municipality must exhaust race-neutral measures before or in conjunction with implementing race-conscious alternatives;[95] second, it must adopt a flexible plan[96] to allow for varying scenarios; and third, it must limit the plan in geographic scope to firms operating within its boundaries.[97]

89. "The idea that discrimination caused the low percentage is nothing more than a hypothesis. . . . The hypothesis was never tested. There are many other possible explanations for the . . . figure." *Id.* at 426.

90. *Id.* at 427.

91. *Id.*

92. *Id.*

93. *O'Donnell Constr. Co.*,963 F.2d at 428.

94. "[The District's] legislation must rest on evidence at least approaching a *prima facie* case of racial discrimination in the relevant industry." *Id.* at 424. " '[T]he states and [municipalities] must identify that discrimination, public or private, with some specificity *before* they may use race-conscious relief.' " *Id.* at 425 (quoting *Croson*, 488 U.S. at 504); *see supra* note 67.

95. *See infra* notes 98-101 and accompanying text.

96. *See infra* notes 102-104 and accompanying text.

97. *See infra* notes 105-107 and accompanying text.

a. Race Neutral Alternatives

The court in *Coral Construction Co.* recommended such race-neutral options as training sessions and information programs, elimination of bonding requirements, and relaxed credit for small businesses.[98] These alternatives would allow the state to increase minority participation without attaching the stigma of inferiority that may arise when members of society receive preferential treatment based on considerations other than merit.[99] Furthermore, race-neutral measures can remedy many of the problems encountered by minority contractors, which tend to be small, less established firms that experience difficulties common to all new businesses.[100] The court emphasized that in enacting these types of measures, the state or municipality should not exceed its legal authority—for example, the state constitution or other legislation may prohibit the relaxing of bonding requirements—and the state need not "exhaust *every* alternative, however irrational, costly, unreasonable, and unlikely to succeed such alternative might be."[101]

b. Program Flexibility

A strong sign of flexibility is the use of minority participation goals on a case-by-case basis rather than rigid system-wide numerical quotas.[102] Another important requirement for flexibility is a system that allows the state to waive the goals when, despite the contractor's good faith efforts, compliance is impracticable. Examples of impracticability include scenarios where qualified MBEs actually affected by past discrimination are not available or when the lowest bid by an MBE is significantly higher than a bid by a non-minority firm.[103] Furthermore, the Ninth Circuit in *Coral Construction Co.* stated without elaboration that no state's or munici-

98. *Coral Constr. Co.*, 941 F.2d at 923.

99. *Id.* at 922. Various Justices on the Supreme Court have voiced the fear that racial classifications, whether benign or otherwise, carry a danger of promoting notions of inferiority. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (opinion of O'Connor, J.); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978) (opinion of Powell, J.) ("[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth.").

100. *Coral Constr. Co.*, 941 F.2d at 922-23 n.12.

101. *Id.* at 923.

102. *Id.* at 922. Furthermore, "a quota 'rests upon the completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population.' " *Id.* at 924 (quoting *Croson*, 488 U.S. at 507).

103. *Coral Constr. Co.*, at 922

pality's plan should ever set participation requirements higher than fifty percent of a project's contracting dollars.[104]

c. Limited Geographic Scope

The coverage of the plan should be limited to the geographic boundaries of the jurisdiction enacting it.[105] Therefore, if municipality "A" enacts an affirmative action plan, only those MBEs that do business within municipality "A" may qualify for set-aside requirements.[106] Whether firms operating in different jurisdictions have suffered discrimination is irrelevant, because the plan can only remedy the effects of discrimination within its own jurisdiction. Firms from outside municipality "A," which may have suffered discrimination in their respective areas of operations, are not within the class found to have suffered discrimination within "A."[107]

III. New York's Affirmative Action History and Article 15-A

The origins of New York's current program can be traced to the 1970s, when the New York State Legislature began enacting small-scale affirmative action programs, usually related to specific agencies and projects. For example, through Article 8 of the Public Authorities Law,[108] the state created various agencies empowered with the authority to use set-aside contracts.[109] As facially neutral statutes,[110] these provisions of the Public Authorities Law have not

104. *Id.* The court gave no explanation for the 50% limit, but merely cited *Cone Corp.*, 908 F.2d 908, 917 for the proposition. The Eleventh Circuit in *Cone Corp.* took the fifty percent limit from the affirmative action plan that it was addressing.

105. *Id.* at 925.

106. *Id.*

107. The court in *Coral Construction. Co.* struck down part of the County's plan that allowed outside firms that were found to have suffered discrimination within their sphere of operation to qualify for preferential treatment in King County. "Since the County's interest is limited to the eradication of discrimination within King County, the only question that the County may ask is whether a business has been discriminated against *in King County*." *Id.* at 925.

108. N.Y. PUB. AUTH. LAW §§ 1690-1699 (McKinney 1981).

109. Article 8 of the Public Authorities Law created the Dormitory Authority of the State of New York (DASNY), *id.* at § 1691, and allowed DASNY to employ set-aside programs in its contracting work at specific State University of New York (SUNY) and City University of New York (CUNY) schools. The act specifically authorized set-asides only for disadvantaged small businesses, *id.* at § 1697, while also including a definition of minority business enterprises which may or may not qualify as disadvantaged small business. *Id.* at § 1695. DASNY did use set-aside contracts for its expansion of Hostos Community College in the South Bronx and for City College in Manhattan.

110. *See* N.Y. PUB. AUTH. LAW §§ 1690-1699.

been challenged. Furthermore, in order to comply with federal programs requiring set-aside goals, New York has granted the Department of Transportation (DOT) the capacity to employ set-asides on projects that use federal funds.[111] The DOT's program withstood a facial and an as-applied challenge with respect to contracts using federal funds, but when the DOT attempted to institute a similar program on projects funded exclusively by the state, a New York State appellate court struck the program down.[112] The court held that as an agency within the executive branch of the state government, the DOT was not allowed to unilaterally institute an affirmative action program without specific legislative authority.[113]

In 1988, the state legislature enacted Article 15-A, entitled "Participation by Minority Groups Members and Women with Respect to State Contracts."[114] The act defined a number of important terms relevant to its provisions, including the qualifications for a firm to be considered a Minority Business Enterprise and Minority Group Member. A "Minority Business Enterprise" is defined as a corporation, partnership or sole proprietorship, which is at least fifty-percent substantially and continuously owned and controlled by one or more minority group members and which is authorized to do business in the state.[115] A "certified business" is a business verified by the newly created Office of Minority and Women's Business Development's[116] regulatory process as a minority- or women-owned enterprise.[117] The term "minority group member" en-

111. *See, e.g.*, N.Y. HIGH. LAW § 85 (McKinney 1979 & Supp. 1993), and N.Y. TRANSP. LAW § 428 (McKinney 1975 & Supp. 1993), which require the Dep't. of Transportation (DOT) to comply with Federal law. The applicable Federal law includes: Public Works Employment Act of 1977, 42 U.S.C. §§ 690 (1988); Surface Transportation Assistance Act of 1977 FSTAA), Pub. L. No. 97-424, § 105 (1988); Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. No. 100-17 § 106(c) (1988).

112. Rex Paving v. White, 531 N.Y.S.2d 831, 835-36 (App. Div. 1988).

113. *Id.* A state trial court had previously struck down a plan by the Commissioner of the DOT to enforce the MBE requirements by imposing sanctions on firms who tried to circumvent the requirements. Callanan Indus. v. White, 500 N.Y.S.2d 487 (Sup. Ct. 1986). Both *Rex Paving* and *Callanan Industries* relied on Fullilove v. Beame, 48 N.Y.2d 375 (1979) (per curiam), holding that the state's Human Rights Law, N.Y. EXEC. LAW § 296 (McKinney 1982), prohibited the Mayor of New York City from unilaterally imposing regulations that required firms engaged in construction contracts with the city to submit affirmative action hiring plans.

114. N.Y. EXEC. LAW §§ 310-318 (McKinney Supp. 1993).

115. *Id.* § 310(7).

116. *See infra* notes 121-124 and accompanying text.

117. N.Y. EXEC. LAW §§ 310(1), 314(1).

compasses African-Americans,[118] Hispanics, Native Americans and Alaskans, and Asians and Pacific Islanders.[119] A "women-owned business enterprise" is defined as a sole proprietorship, partnership, or corporation that is at least fifty-percent substantially and continuously owned by one or more female United States citizens or resident aliens and is authorized to do business in the state.[120]

Article 15-A also created the Office of Minority and Women's Business Development (OMWBD), which is headed by a Director having broad discretion to enforce the provisions of the act.[121] Most importantly, Article 15-A grants the Director significant rulemaking authority intended to facilitate the administration of its policies.[122] It also allows the Director to review the activity of the various state agencies to ensure compliance with the statute and any regulations promulgated thereunder.[123] The Director also has the authority to resolve disputes arising from the Act or from any rules or regulations that he or she promulgates.[124]

Article 15-A itself does not mandate quotas or other specific participation levels for MBEs.[125] The statute uses more general language that appears to be designed to monitor minority participation on state projects and to identify problem areas:

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118. *Id.* § 310(8). The statute specifically identifies "black African-Americans" as minority group members, presumably in contrast to Afrikaaners and Arab African-Americans, who go unmentioned.

119. *Id.*

120. *Id.* § 310(15).

121. *Id.* § 311(1).

122. The rulemaking authority is designed to "ensure that Certified businesses shall be given the opportunity for meaningful participation in the performance of state contracts and to identify those state contracts for which certified businesses may best bid . . . so as to facilitate the award of a fair share of state contracts to such businesses." N.Y. EXEC. LAW § 313(1).

123. *Id.* § 311(3)(d).

124. In the case of an alleged violation by a contractor that cannot otherwise be resolved, the Director can refer the case to the American Arbitration Association. The Association will make recommendations of whether a violation has in fact occurred, and what sanctions, fines, or penalties, if any, should be imposed. The Director is then free to adopt the recommendations or make a new one provided that the Director does not impose a more severe sanction. *Id.* § 316.

125. Although Article 15-A does not mandate or specifically authorize the use of such minimum requirements, it does contemplate their use by the compliance regulations and the various state agencies: "nothing in this section shall authorize the director or any contracting agency to impose any requirement on a contractor or subcontractor except with respect to a state contract." *Id.* § 313(2); *see also id.* § 313(8) (a contracting agency may file a complaint with the Director of OMWBD if it feels that "a contractor is failing or refusing to comply with the minority and women-owned business participation requirements as set forth in the state contract").

> Contracting agencies shall include or require to be included with respect to state contracts . . . (a) provisions requiring contractors to make a good faith effort to solicit active participation by . . . certified businesses . . . (b) [provisions] requiring the parties to agree as a condition of entering into such contract, to be bound by the [Director's regulatory] provisions of section three hundred sixteen of this article.[126]

In addition, the statute requires bidding contractors to submit MBE utilization plans before receiving contracts.[127] A utilization plan is

> a plan prepared by a contractor and submitted in connection with a proposed state contract. The utilization plan shall identify certified minority and women-owned business enterprises, if known, that have committed to perform work in connection with the proposed state contract as well as any such enterprises, if known, which the contractor intends to use in connection with the contractor's performance of the proposed state contract.[128]

The act also provides for a waiver system whereby the state agency receiving any bids for public contracts could grant waivers of future contract goal requirements upon a showing by participants of good faith efforts to comply.[129] The agency may also consider other evidence in granting a waiver, such as unavailability of certified businesses qualified to perform the work, the size and scope of the contract, and the availability of uncertified businesses qualified to perform.[130]

Despite these numerous provisions and the Legislature's aggressive goals, the legislative findings that accompanied the statute made no reference to findings of discrimination or to an intent to remedy specific past discrimination.[131] The findings contained general assertions of New York State policy to promote equal opportunity in employment and state contracting.

> It is hereby found and declared that it has been and remains the policy of the state of New York to promote equal opportunity in employment for all persons, without discrimination on account of race, creed, color, national origin, sex, age, disability or marital status, to promote equality of economic opportunity for minority group members and women, and business enterprises

126. *Id.* § 313(2).
127. *Id.* § 313(4)(a).
128. N.Y. EXEC. LAW § 310(9).
129. *Id.* § 313(5).
130. *Id.*
131. *See Harrison I*, 743 F. Supp. at 998.

> owned by them, and to eradicate through effective programs the barriers that have unreasonably impaired access by minority and women-owned business enterprises to state contracting opportunities.[132]

The findings did not include any statistical or anecdotal evidence of prior state-perpetuated discrimination.

Pursuant to Section 311(1) of Article 15-A,[133] the Director of OMWBD promulgated a set of compliance rules directed at the various state agencies.[134] The rules allowed the individual state agencies to set their own W/MBE participation goals for each contract. The agencies were to base their goals on several criteria, including the number of certified W/MBEs available to perform the work, the number of certified W/MBEs in the area as a percentage of total contractors, and the known success or failure of W/MBEs in obtaining state contracts.[135]

In *Harrison & Burrowes Bridge Contractors, Inc. v. Cuomo*,[136] (*Harrison I*), two construction companies challenged Article 15-A and its accompanying compliance rules, claiming that they violated Fourteenth Amendment equal protection guarantees, both facially and as applied. The construction company's inability to meet DOT participation goals threatened its state contracts. The contractors sued the Governor and the DOT to prevent them from enforcing the project-specific set-aside provisions.[137] The district court granted a preliminary injunction prohibiting the DOT from enforcing Article 15-A, the compliance regulations, or the DOT provisions against the contractor.[138] Before granting the injunction, the court found that the plaintiff had been exposed to a risk of incurring serious harm and had showed a likelihood of success on the merits.[139] In determining whether this likelihood existed, the court assessed the constitutionality of the statute in light of *Croson*'s standard of review.[140]

The court first examined the purported compelling state interest underlying the statute but failed to discern any evidence that the legislature had made findings of past discrimination by either the

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132. 1988 N.Y. Laws, ch. 261, § 62.
133. *See supra* note 122 and accompanying text.
134. N.Y. COMP. CODES R. & REGS. tit. 9, §§ 540-544 (1990).
135. *Id.* § 543.2.
136. 743 F. Supp. 977 (N.D.N.Y. 1990).
137. *Id.* at 978.
138. *Id.* at 1005.
139. *Id.* at 995.
140. 743 F. Supp. 997.

state or the firms with which the state had contracted.[141] The only evidence to support the program consisted of generalized and wholly conclusory assertions that there had been discrimination,[142] evidence similar to that which the *Croson* Court dismissed as inadequate to support such a plan.[143] Furthermore, the statute and the compliance regulations applied to all state contracts, indicating to the court that the state's goal was to achieve racial balancing rather than to remedy the effects of past discrimination.[144] The court did not determine whether the program was narrowly tailored, because the plan failed the first prong of strict scrutiny analysis.

Following the court's decision to grant the preliminary injunction, the OMWBD issued emergency regulations suspending both the enforcement of any outstanding participation goals and the imposition of sanctions for failing to meet the goals on pending DOT projects.[145] The emergency regulations were to remain in effect indefinitely, or until the OMWBD could determine that there was a firm factual basis to support the enforcement of the requirements.[146] The OMWBD then directed all state agencies to cease the enforcement of any set-aside requirements.[147]

Notwithstanding DOT's suspension of the participation goals, the plaintiffs[148] continued their constitutional challenge to Article 15-A. In *Harrison II*,[149] the District Court conducted a hearing to make a final disposition of the dispute over enforcement of the DOT participation requirements. The court held that the suspension of the requirements rendered the as-applied challenge moot because the plaintiffs could not be presently harmed by them.[150] The court then considered the facial invalidity challenge and determined that Article 15-A did not mandate preferences for W/MBEs but merely encouraged efforts to increase participation by W/MBEs in state contracting.[151] Based on such language and the

141. *Id.* at 1001.

142. *Id.*

143. *Croson*, 488 U.S. at 498-99.

144. 743 F. Supp. at 1001.

145. *See* Harrison & Burrowes Bridge Contractors, Inc. v. Cuomo, 1991 U.S. Dist. LEXIS 13962, Oct. 1, 1991, at *12 (N.D.N.Y Oct. 1, 1992), *aff'd* 981 F.2d 50 (2d Cir. 1992) (*Harrison II*).

146. *Id.* at *13.

147. *Id.*

148. A second plaintiff joined the suit after issuance of the preliminary injunction, seeking the same relief as Harrison.

149. *Harrison II*, 1991 U.S. Dist. LEXIS 13962, at *13.

150. *Id.* at *20.

151. *Id.* at *25.

wide latitude granted to the OMWBD in enforcing the statute,[152] the court held that Article 15-A was not facially unconstitutional.[153]

The Second Circuit affirmed the district court's ruling in all respects.[154] The Court of Appeals agreed with the district court[155] that the repeal of the compliance regulations rendered the plaintiffs' as applied attack on Article 15-A moot because enforcement against the plaintiffs remained indefinite and uncertain.[156] Regarding the facial challenge, the court of appeals focused on the general language of Article 15-A, which did not require minimum participation in all circumstances but merely authorized the solicitation of minority participation.[157] The court of appeals specifically refused to characterize Article 15-A as mandating the use of set-aside contracts. It stated that unless the statute mandated the implementation of regulations requiring set-asides, a court could not view it as mandating any racial preferences.[158] Nevertheless, the court, noting the pendency of the state's new findings,[159] acknowledged that the constitutionality of the statute could become an issue again if the state decided to re-implement the use of set-aside provisions.[160]

IV. The Constitutionality of the New Regulations

In July 1992, the New York Division of Minority and Women's Business Development (DMWBD), formerly OMWBD and now under the auspices of the state's Department of Economic Development,[161] issued findings, titled "Opportunity Denied!,"[162] detailing what it considered to be strong evidence of discrimination in the state's public contracting process. Along with the findings, DMWBD re-issued the compliance regulations[163] in basically the

152. *Id.* at *24. The court relied on Cone Corp. v. Florida Dep't of Transp., 921 F.2d 1190 (11th Cir. 1991), which upheld a plan enforced through administrative regulation.

153. *Harrison II*, 1991 U.S. Dist. LEXIS 13962, at *25.

154. *Harrison II*, 981 F.2d at 62.

155. *See supra* note 150.

156. *Harrison II*, 981 F.2d at 59.

157. *Id.* at 60.

158. *Id.*

159. *See infra* part IV.

160. *Harrison II*, 981 F.2d at 59.

161. N.Y. ECON. DEV. LAW § 115-120 (McKinney Supp. 1994).

162. DIVISION OF MINORITY AND WOMEN'S BUSINESS DEVELOPMENT, OPPORTUNITY DENIED!: A STUDY OF RACIAL AND SEXUAL DISCRIMINATION RELATED TO GOVERNMENT CONTRACTING IN NEW YORK STATE, Apr. 1992 [hereinafter OPPORTUNITY DENIED].

163. N.Y. COMP. CODES R. & REGS. tit. 9, §§ 540-544 (1992).

same form as the 1990 regulations.[164] Thus, the constitutional issue once again ripened:[165] does the failure to award a state contract to a non-minority contractor on the basis of the race of its ownership and management deny that contractor the guarantees of the Equal Protection Clause of the Fourteenth Amendment?

A. Do Findings Show a Compelling Interest?

Under *Croson*, a state or its subdivision must show by concrete findings of past discrimination in the contracting process a compelling state interest in remedying discrimination.[166] According to the Ninth Circuit in *Coral Construction Co.*, a combination of statistical and anecdotal evidence of discrimination comprises an ideal foundation for proving a compelling interest.[167] For Article 15-A and the new compliance regulations to survive strict scrutiny, therefore, the findings made by the DMWBD should contain meaningful statistical analysis supported by relevant anecdotal evidence.

1. Statistical Evidence

The DMWBD report on discrimination in New York's contracting process includes statistics[168] compiled by DMWBD's Office of Management Information Systems (MIS Report) that reflect the utilization of minority and women-owned businesses in state projects for fiscal year 1990-91, the period during which the original compliance regulations were suspended.[169] DMWBD stated that its numbers were designed to be as conservative as possible by always using the higher of any conflicting minority partici-

164. N.Y. COMP. CODES R. & REGS. tit. 9, §§ 540-544 (1990).

165. *See supra* note 160 and accompanying text.

166. *See supra* note 11.

167. *See supra* notes 60-66 and accompanying text.

168. DMWBD summarized its statistical data using various populations. For example, one set of statistics surveys minority and women participation based on the *total dollar value of contracts outstanding*. *See, e.g.*, OPPORTUNITY DENIED, *supra* note 162, app. B at fig. 4.1. Another set uses total *dollar value of contracts awarded state-wide* as its population. *See, e.g., id.* fig. 5.1. A third set uses *total dollar expenditures* during the period studied. *See, e.g., id.* fig. 5.3. Still another set bases its findings on *number of contractors* rather than dollar values. *See, e.g., id.* tbl. 4.1 (emphasis added).

169. OPPORTUNITY DENIED, *supra* note 162, app. B at 5. The report also includes privately conducted studies that looked at the impact that discrimination in employment and admission to trade unions and organizations had on the formation of minority businesses. Because formation of a business often follows expertise in the field of that business, discrminatory hiring prevented minorities from gaining the expertise needed to even form a business, thereby leading to underestimation of MBE availability. *Id.* app. A at 33-41.

pation levels.[170] Because the report includes statistical analysis for only one fiscal year, a court may consider such a sample too small to demonstrate systematic discrimination constituting a compelling interest. This problem is potentially offset by a very large one year sample in addition to the annually renewable nature of the plan.[171]

The report states the total dollar value of contracts outstanding, and then breaks the data down among women and minorities generally.[172] According to those statistics, out of $4.803 billion in state contracts outstanding, MBEs received $265.97 million (5.54%) in contracts, and WBEs received $114.14 million (2.37%).[173] These results represented a substantial decline in participation percentages from fiscal year 1989-90, when Article 15-A enforcement was still in effect. In 1989-90, MBEs received approximately $223 million out of a $2.9 billion total (7.7%), while WBEs received $130 million (4.4%).[174] The report also breaks down the total contract expenditures by racial group and by non-minority and minority women.[175] As Table 1 demonstrates, the statistics show a large disparity between the number of minority contractors who are ready, willing, and able to perform on state projects and the number of contracts actually awarded to them; it details the disparity among blacks, Hispanics, Asians, and Native Americans.

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170. *Id.* app. A at 18.

171. The state agencies cannot fail to update their data and goals every year without violating the letter of the compliance regulations and the spirit of Article 15-A. New York's statistical sample will grow as the state gathers its annual data, and thus any new annual statistics will presumably support and influence any new annual goals, although such new data should not support previous years' participation levels. *See infra* note 203 and accompanying text.

172. *Id.* app. B at fig. 4.7; *see supra* note 168.

173. OPPORTUNITY DENIED, *supra* note 162, app. B at fig. 4.7.

174. *Id.* app. B at 81. The decline from 7.7% to 5.5% for MBEs represented a 28.6% drop, while the drop for women was 45.4%. *Id.* app. B at 82.

175. Of all expenditures to MBEs, Blacks received 39.8%; Asian-Americans - 17.3%; Hispanic Americans - 26.0%; Native Americans - .3%; other groups - 16.6%. Of expenditures to women-owned business enterprises, non-minority firms received 98.3% and minority firms received 1.7%. OPPORTUNITY DENIED, *supra* note 162, app. B at fig. 5.3.

Table 1

Minority Group	Available MBEs[176]	Utilized MBEs[177]	Ratio[178]
African-Americans	5.74%	1.84%	.32
Hispanics	2.93%	1.05%	.36
Asians	2.2%	1.96%	.89
Native Amer.	0.7%	0.88%	1.27
Minority Women	6.14%	0.15%	.02
Non-min. Women	6.9%	2.31%	.33
Total Women	13.04%	2.48%	.19

The first column represents the number of available and qualified minority contractors by race as a percentage of all contractors. For example, 5.74% of all qualified contractors are owned and operated by African-Americans. The second column reflects the amount of contracting dollars awarded to minority firms as a percentage of total contracting dollars. For example, African-American firms received 1.84% of all work for which they were qualified. The third column is simply the quotient of the second column divided by the first. A ratio of 1.0 reflects utilization exactly equal to availability, meaning that W/MBEs are receiving their proportionate share of state contracts. A ratio of less than 1.0 represents underutilization.

With the exceptions of Native American and Asian-American contractors, the data reflect wide disparity between availability and employment of W/MBEs. The divergence is particularly acute among minority women, where the rate of utilization was only two percent of availability. Non-minority women did not fare much better; utilization was less than one-third of availability. The disparity is also obvious among African-American and Hispanic firms, with ratios of 0.32 and 0.36 respectively. As the Ninth Circuit stated in *Coral Construction Co.*, such disparate results may alone support affirmative action classifications.[179]

Numbers mean little, however, unless they are placed in a proper context. In evaluating the statistics from New York, it may be helpful to look at cases that deal with discrimination in areas other

176. Availability is computed as a percentage of all qualified contractors statewide. *Id.* app. B at tbl. 3.1.

177. *Id.* app. B at tbl. 4.1.

178. The ratio is equal to the percentage of available MBEs to MBEs actually utilized. *Id.* app. B at tbl. 6.1; *see supra* note 168.

179. 941 F.2d at 918 (citing Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307-08 (1977)). On the other hand, Native Americans received a greater percentage of contracts than their available numbers would indicate; the findings would therefore not appear to support the use of set-aside provisions for that group.

than public contracting. In assessing disparities in public contracting, neither the Supreme Court nor the lower federal courts have laid out what statistical evidence will satisfy the compelling interest standard of *Croson*.[180] In her opinion in *Croson*, Justice O'Connor endorsed no specific statistical analysis that would satisfy the compelling interest standard. The opinion did refer, however, to the statistical analysis conducted in Title VII cases, which in turn relied on the analysis from jury discrimination cases.[181]

The Title VII and jury discrimination cases use a standard deviation analysis to examine statistical disparities and determine whether such disparities are statistically significant. To determine the standard deviation, one must compute the square root of the product of the total number in the sample (N), the probability of selecting a minority (P(x)), and the probability of selecting a non-minority (1-P(x)).[182] The probability of selecting a minority is

180. *See* Daron S. Fitch, Note, *The Aftermath of* Croson*: A Blueprint for a Constitutionally Permissible Minority Set-Aside Program*, 53 OHIO ST. L.J. 555, 572-74 (1992).

181. The court's opinion cited Hazelwood School District v. United States, 433 U.S. 299 (1977), a federal government Title VII suit against a school district in suburban St. Louis, Missouri. The government sought to establish prima facie evidence of the district's discriminatory hiring of minority teachers by showing gross statistical disparities. In addressing the government's statistical evidence, the *Hazelwood* Court in turn relied on Castaneda v. Partida, 430 U.S. 482 (1977), for a suitable test. *Castaneda* involved a habeus corpus petition, where a Mexican-American prisoner based his claim on the underrepresentation of Mexican-Americans on the grand jury that indicted him for rape. *Id.* at 483-84. *See* Fitch, *supra* note 180, at 572-82. Fitch proposes a complete statistical evaluation that includes multiple regression analysis, which may account for non-race considerations, such as bonding requirements. *Id.* at 581.

182. *Castaneda*, 430 U.S. at 496 n.17. This formula is applicable only to a binomial distribution whereby an occurrence can be assigned either a value of 0 or 1, depending on whether the occurrence is a failure or success. *See* GARY SMITH, STATISTICAL REASONING, 156-57 (1985). For example, every public contracting dollar goes either to a minority or non-minority firm, or to an African-American or non-African-American firm, and so on. Each minority group will have its own binomial distribution, with its own standard deviation.

Fitch did not employ the exact standard deviation analysis advocated by the *Castaneda* Court; he devised a formula that he called the standard deviation quotient, which requires actual numbers of contracts awarded. Fitch, *supra* note 180, at 578. New York also used a different test, the "t-test," to determine statistical significance. *See* OPPORTUNITY DENIED, *supra* note 162, app. B at 66-69. The t-test uses a distribution other than the binomial distribution to arrive at a t-statistic, another variation on the standard deviation. *See* DONALD L. HARNETT, STATISTICAL METHODS, 378-81 (3d ed. 1982). When the t-statistic is greater than 1.96, the discrepancy is statistically significant. SMITH, *supra*, at 306-07. New York computed a t-statistic of -41.21 for all MBEs, and -38.22, -25.57, and -3.84 for African-Americans, Hispanic-Americans and Asian-Americans respectively. OPPORTUNITY DENIED,

equal to the percentage of qualified minorities in the sample.[183] For large statistical samples, if the difference between the observed and expected values is greater than two or three standard deviations, a claim that the discrepancy is random would be "suspect."[184] When the randomness of a statistical distribution is suspect, it can be assumed that subjective factors influenced the distribution. Race would be considered such a subjective factor.

The standard deviation analysis can be applied to the statistics supplied by New York in support of the current compliance regulations. Table 2 illustrates the obvious discrepancies that cast doubt on a claim that New York's history of awarding public contracts has been completely random.

Table 2

MINORITY GROUP	kB$	P(x)	STANDARD DEVIATION	P(x) × K$	SDD
Total	265.97	.1157	22,158	555.71	13,044
Afr-Amer.	88.38	.0574	16,093	275.69	11,640
Hispanic	50.43	.0293	11,683	140.73	7729
Asian-Amer.	94.14	.022	11,527	105.67	1134

where:
k $ = actual contract dollars awarded to each group (millions).
P(x) = probability of being hired, based on percentage of population of qualified contractors.
P(x) x k $ = expected contract dollars for each group (millions).
SDD = number of standard deviations below expected contract dollars.

As Table 2 shows, total minorities represent 11.57% of the qualified contracting population. Based on $4.803 billion in public

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supra note 162, app. B at tbl. 6.3. A negative t-statistic represents underutilization. *Id.* app. B at 66-67. Because the t-statistic requires more detailed computations than is necessary here, and because the MIS report does not set forth the mathematical steps by which it computed the t-statistics, this Note will not rely on it.

The test employed in this Note computes its standard deviation from percentages of minorities receiving dollars, as the Court in *Castaneda* computed its standard deviation from percentages of Mexican-Americans in jury pools. In that case, Mexican-Americans made up 79.1% of the local population that was statutorily qualified to serve on a grand jury. The grand jury openings during the relevant time period totaled 870, so that the standard deviation was the square root of the product of 870, 0.791, and 0.209, which equals approximately 12:

$$(870 \times .791 \times .209 = 12).$$

The *Castaneda* Court may have oversimplified its standard deviation analysis, yet that test remains the law for jury and employment discrimination cases. Although the applicability of the test to dollar amounts may be open to debate, the discrepancies in New York are so large that whatever similar test that might be used would likely yield the same conclusion.

183. *Castaneda*, 430 U.S. at 496 n.17.

184. *Id.*

contracting dollars,[185] the standard deviation is 22,158. Absent any subjective factors, minorities would be expected to receive $555.71 million in contracting, yet received only $265.97 million, or 13,044 standard deviations less. For individual minority groups, the discrepancies are similarly large. African-Americans received $88.38 million in contracts, 11,640 standard deviations below the expected total of $275.69 million. Hispanics and Asian-Americans received contracting totals that were 7729 and 1134 standard deviations respectively below expected. Recall that a discrepancy of more than two or three standard deviations renders the results racially suspect. In New York, the differences in standard deviations are in the thousands.

Other statistics also reflect discrepancies. For example, statewide utilization goals, rather than just availability, compared to results, also reveals a statistical imbalance. The utilization goals for MBEs among the various state agencies averaged 8.91% of contracting dollars.[186] The actual result, however, was that MBEs received only 62% of the goal (5.54% of contracting dollars).[187] The average goal for WBEs was 3.77%, while the result was only 63% of the goal (2.38% of contracting dollars).[188]

2. *Anecdotal Evidence*

In addition to the substantial supply of statistics, the state's findings also offer a considerable amount of anecdotal evidence. Most of the anecdotal evidence takes the form of interviews with, and the direct testimony of, more than two hundred fifty witnesses concerning numerous cases of actual discrimination against minorities and women in areas such as financing and securing supplies.[189] For example, several witnesses affiliated with firms, including individuals of each of the statutorily delineated minority groups, described how banks refused to make loans to them even though the same banks would loan to non-minority male firms of similar size.[190] The process was not necessarily infallible, for the testimony was not delivered in adversarial proceedings. Rather, New York's DMWBD conducted interviews and held public hearings whereby

185. *See supra* note 173 and accompanying text.
186. OPPORTUNITY DENIED, *supra* note 162, app. B at fig. 7.1.
187. *Id.*
188. *Id.*
189. *Id.* app. A at 57-62.
190. *Id.* app. A at 66-70. Other witnesses testified to similar treatment from suppliers, who would often agree to deals by phone, only to reject them once they had met the witnesses and found out he or she was a minority. *Id.* app. A at 71-74.

witnesses would be questioned by DMWBD employees.[191] Moreover, the state report contains no indication whether opponents to an affirmative action program were invited to testify, or whether any witnesses were subject to cross examination.[192] In addition, a large portion of the anecdotal evidence lends little support to a state-sponsored affirmative action program because much of the excerpted testimony concerns alleged discrimination by private parties, not by state agencies or employees.

The state, however, did receive limited testimony about discriminatory practices by its own agencies and employees. An African-American owner of a plumbing supply company, for example, related how he had inquired about bidding on two state projects; state employees turned him down, stating that he had to be "on the list," although he had personal knowledge that non-minority firms not on the list were routinely accepted.[193] Further, in the subcontracting process, prime contractors on state projects would not seek bids from MBEs or when they did, they would often send incomplete documentation or wait until the eleventh hour to contact MBEs, making feasible bids impossible.[194] This discrimination led to the outright failure of some firms and effectively deterred some individuals from commencing operations, preventing them from "making the traditional leap from laborers to entrepreneurs."[195]

In conducting and releasing these findings, the state has most likely corrected its earlier error by providing findings necessary to establish a compelling state interest. The statistics alone could possibly support some variation of an affirmative action plan, although the analysis only covers one year. The state did not stop there, however, as the supply of anecdotal evidence, including testimony about years of persistent use of double standards in various stages of the contracting process, compliments the numbers and gives them meaning. This combination of evidence would, in all probabability, satisfy the standard that the *King County* model advocates.

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191. OPPORTUNITY DENIED, *supra* note 162, app. A at 57-59.

192. Professor Wigmore, in his renowned treatise on evidence, stated that "[cross examination is] the greatest legal engine ever invented for the discovery of truth." 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367 (3d. ed. 1940).

193. OPPORTUNITY DENIED, *supra note 162, app. A at 80.* A number of witnesses also testified that state employers regularly scrutinized their work, while ordinarily approving similar work by white-owned firms. *Id.* app. A at 80-83.

194. *Id.* app. A at 87-90.

195. OPPORTUNITY DENIED, supra note 162, Executive Summary at ix-xi; *see Croson*, 488 U.S. at 498.

B. Is the Remedy Narrowly Tailored to the Violation?

In assessing whether the state's remedy is narrowly tailored under the *King County* standard, the state must first offer race-neutral solutions before or in conjunction with race specific measures.[196] In this respect, New York has sought to correct the racial imbalance through such activity. The state has sponsored numerous assistance programs aimed at helping W/MBEs to secure financing, to develop management skills, and to overcome market entry barriers.[197] Other programs have sought to ease financial barriers by developing financial assistance and bond elimination plans, and by giving tax credits to businesses from areas with high unemployment and poverty.[198] The race-neutral aid has not remedied racial imbalances to the satisfaction of the OMWBD however. Some measures can even be viewed as counterproductive. The bond elimination practices, for example, may allow contractors to qualify for state projects, but such waivers can result in a work stoppage on a project if the contractor should become bankrupt. Because the contractor does not hold a bond, its subcontractors have no guarantee that they will be paid, and consequently have no incentive to continue work.

The second indicator of a narrowly tailored remedy is program flexibility.[199] The language used in Article 15-A and the compliance regulations demonstrate such flexibility. Both the statute and the regulations use the phrase "participation goals" applicable to individual projects,[200] rather than system-wide requirements or quotas.[201] Nevertheless, the state does not escape closer scrutiny simply because it sets "goals" rather than "requirements" or "quotas."[202] The state has acknowledged this caveat, however, as all goals are set annually in response to the previous year's participation levels.[203] The plan's waiver system[204] reinforces its flexibility;

196. *See supra* notes 98-101 and accompanying text.

197. OPPORTUNITY DENIED, *supra* note 162, Executive Summary at xi.

198. *Id.*

199. *See supra* notes 102-104 and accompanying text.

200. N.Y. EXEC. LAW § 313(8); N.Y. COMP. CODES R. & REGS. tit. 9 § 542.2(a) (1992).

201. *Harrison I*, 743 F. Supp. at 980.

202. The term does not change the reality; the enforcement of the plan may still mandate the participation of minorities and women to the exclusion of white males. *See* O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420, 423-24 (D.C. Cir. 1992).

203. N.Y. COMP. CODES R. & REGS. tit. 9 § 541.3(a) (1992). If the state fails to update its goals annually, it violates its own compliance regulations. *See supra* notes 168-171 and accompanying text.

the statute authorizes state agencies to waive goal requirements upon a showing by the bidder that despite good faith efforts to comply, minority participation at goal levels is impracticable or impossible.[205] Unlike the faulty waiver system used by Richmond's unconstitutional plan in *Croson*,[206] New York will waive minority requirements where the state agency issuing the contract "determines there is not a reasonable availability of contractors on the list of certified businesses to furnish services for the project."[207] New York's waiver scheme is not ideal, however, as neither Article 15-A nor the compliance regulations specifically provide for a waiver upon a showing that a specific certified MBE that might receive preferential treatment has not suffered discrimination in New York.[208] New York instead relies on the discretion of the DMWBD to determine if a waiver is proper.

The third indicator of a narrowly tailored plan is that it is limited in geographic scope to the jurisdiction enacting it.[209] Under New York's plan, an MBE must be a "certified business" to qualify for any benefits that Article 15-A and the compliance regulations confer. The only requirements a firm must satisfy to be a "certified business" are minority ownership and control, and authorization to do business in New York State.[210] This definition is broad enough to expose the plan to some problems regarding certified firms that operate primarily outside of the state. If a firm historically has had little or no actual contact with New York other than receiving authorization to do business, and it performs most or all of its work in other states, New York would have difficulty in making a causal connection between discrimination in New York State and any injury to that firm.[211] Such a firm falls within the definition of certi-

204. *See supra* notes 129-130 and accompanying text; *see also*, N.Y. COMP. CODES R. & REGS. tit. 9 § 543.7 (1992).

205. *Id.*

206. *See supra* notes 46-48 and accompanying text.

207. N.Y. EXEC. LAW § 313(5). Richmond only granted waivers in "exceptional circumstances" where "every feasible attempt has been made to comply." *Croson*, 488 U.S. at 478-79.

208. In *Croson*, the Court criticized Richmond's waiver because it did not allow a waiver even upon an affirmative showing that higher bids submitted by MBEs did not result from any discrimination. 488 U.S. at 508.

209. *See supra* notes 105-107 and accompanying text; *see also* N.Y. COMP. CODES R. & REGS., tit. 9 § 543.8 (1992).

210. N.Y. EXEC. LAW § 310(7)(d).

211. The Ninth Circuit in *Coral Construction Co. v. King County* struck down the portion of the County's affirmative action plan that enabled any business, regardless of its operations within the County, that was the victim of discrimination within its particular geographical area of operation to participate in the program. The court

fied business, however. Thus, a firm that has not materially suffered from discrimination in New York could possibly profit from the plan at the expense of non-minority firms. Such an effect might invalidate the statute with respect to foreign corporations in this class, and could lead a court to doubt the legitimacy of New York's stated rationale for enacting the plan.

C. The Bottom Line: Does Article 15-A Pass Muster?

In evaluating the constitutionality of New York State's new regulations and the sufficiency of the findings underlying their enactment, a court should adopt the model advocated by the Ninth Circuit in *Coral Construction Co.*[212] The court in that case fashioned clear criteria for assessing the strengths and weaknesses of an affirmative action plan. It suggested a number of logical requirements for both prongs of the strict scrutiny analysis. The Ninth Circuit's rule that a state may support affirmative action legislation by producing findings of system-wide discrimination after enactment,[213] however, is troubling. It appears to conflict with the unequivocal language of *Croson*: "[s]tates and their subdivisions . . . must identify [the] discrimination . . . with some specificity *before* they may use race-conscious relief."[214]

New York accepts the Ninth Circuit's timing rule without any reservation and even cites *Croson* for the proposition that "[b]efore enacting such a remedial law, the State need not first make findings of past discrimination. See *Croson*, at 724 (quoting *Wygant*, 476 U.S. at 277. . . ."[215] Neither the pages in *Croson* that constitute the state's citation nor the case from which the state says *Croson* quotes, *Wygant v. Jackson Board of Education*,[216] contains such a provision. In fact, the Court in *Wygant*, as it did again in *Croson*, stated just the opposite: "a public employer . . . must en-

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required a showing that a participating MBE was "victimized by discrimination *within King County*." 941 F.2d at 925 (emphasis added). The court went on to state that an MBE could meet this burden by showing prior attempts to do business in the County, assuming the County had made the requisite findings of illegal discrimination. "[I]f systematic discrimination in the County is shown, then it is fair to presume that an MBE was victimized by the discrimination. For the presumption to attach to the MBE, however, it must be established that the MBE is, or attempted to become, an active participant in the County's business community." *Id.*

212. *See supra* notes 53-66 and accompanying text; *supra* notes 95-107 and accompanying text.

213. *See supra* notes 67-74 and accompanying text.

214. 488 U.S. 469, 504 (1989).

215. OPPORTUNITY DENIED, *supra* note 162, app. A at 10.

216. 476 U.S. 267 (1986).

sure that, *before* it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination."[217]

The Ninth Circuit in *Coral Construction Co.* thus went significantly beyond *Croson*. Consequently, the effectiveness of its model is strengthened by examining whether a plan is narrowly tailored rather than establishing whether past discrimination justifies the plan. If the plan is eventually held unconstitutional, on account of a lack of a compelling interest before enactment, the model only mandates suspension of the program and does not offer any remedy for non-minority businesses that are denied public contracts while awaiting the state's justification. Nevertheless, the Ninth Circuit, unlike the Supreme Court or the other federal circuits, has provided more guidance for establishing what constitutes a compelling interest.

Under the Ninth Circuit's *Coral Construction Co.* model, a state must provide concrete evidence of past discrimination, otherwise the race-conscious measure "is presumptively invalid."[218] Prior to 1991, New York had no legitimate evidence of discrimination, yet it enacted Article 15-A in 1988. In fact, the meager legislative findings that accompanied the original enactment strongly suggest that the state enacted the statute for political rather than remedial reasons.[219] Thus, until New York suspended enforcement in 1991, those provisions of Article 15-A and the compliance regulations that authorized the state agencies to set minimum participation requirements were "presumptively invalid." Nonetheless, because *presumptively* invalid does not mean *per se* invalid, the state had the opportunity to rebut the presumption. Thus, the 1991 repeal of the compliance regulations and the recent findings have justified the implementation of new compliance regulations and saved Article 15-A.

In contrast to the earlier dearth of supporting evidence, the measures that New York has since taken to comply with the strict criteria of *Croson* now indicate a strong intent to actually remedy the effects of past discrimination. The new study satisfies the constitutionally required compelling interest by thoroughly detailing discriminatory practices and effects through statistical and anecdo-

217. *Id.* at 277.

218. 941 F.2d at 920.

219. "[Article 15-A] appears to be aimed more at racial balancing than at rectifying the effects of identified discrimination." *Harrison I*, 743 F. Supp. at 1001.

tal studies. Without this evidence, New York could not have justified the continued enforcement of Article 15-A. Yet, the possibility remains that a one year statistical analysis does not constitute a sufficient sample to adequately demonstrate discrimination.[220] The nature of the standard deviation analysis,[221] however, which necessarily compensates for smaller samples as well as the large sample for fiscal year 1989-90, reduces the likelihood that a court would deem New York's statistical analysis inadequate.

In addition to showing a compelling interest, the state has, with one possible exception, satisfied the "narrowly tailored" requirement, due mostly to the flexibility allowed by its regulatory scheme. By its language, Article 15-A leaves much of its enforcement to administrative regulation. That alone may not have been enough to save it, for a facially neutral statute may still be invalid if the state enforces it in a discriminatory manner.[222] In New York's case, however, enforcement is not discriminatory because the compliance regulations, the means by which Article 15-A is applied, do not appear to require, authorize, or condone constitutionally impermissible racial preferences.[223] The state sets all preferences through its state agencies, on an annual, reviewable basis.[224] Furthermore, both Article 15-A and the compliance regulations provide for a system of waivers, whereby any annual agency or project participation goals may be suspended if they are not feasible in individual cases.[225]

The facts of the *Harrison* litigation[226] illustrate the overall flexibility of New York's plan. In that case, the state DOT delayed awarding the contract to Harrison & Burrowes ("Harrison") because Harrison failed to submit a satisfactory MBE utilization plan.[227] Rather than simply rejecting Harrison's bid, the regulations required the DOT to grant the Harrison the opportunity to show that it was legitimately unable to meet any MBE utilization requirements. When the DOT was satisfied that the firm had shown a good faith effort to comply, it waived the requirement and proceeded with the projects with Harrison as the contractor.[228]

220. *See supra* note 171 and accompanying text.
221. *See supra* notes 182-185 and accompanying text.
222. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 351 (1886).
223. *See supra* notes 200-205 and accompanying text.
224. *See supra* note 203 and accompanying text.
225. *See supra* notes 204-205 and accompanying text.
226. *See supra* notes 136-160 and accompanying text.
227. *Harrison I*, 743 F. Supp. at 986.
228. *Id.*

One area that remains problematic, however, is that the geographic scope of the plan may impermissibly exceed the limits of the *Coral Construction Co.* model. As discussed earlier, Article 15-A allows firms from outside the state to be certified as MBEs and enjoy the plan's preferences as if they were domestic firms as long as they are authorized to do business in New York.[229] The statute does not disqualify firms that have never actually attempted to do business in New York or enjoy success in other states. A foreign MBE thus might have suffered no discrimination in New York or the state in which it does most of its business. In either case, however, the foreign firm may still qualify for the preferences promulgated under the compliance regulations solely because of the race of its ownership.

Applying the facts of *Coral Construction Co.* to the New York plan reveals this problem. The plaintiff in that case, Coral Construction, was an Oregon corporation with a branch office in King County, Washington. Coral was the lowest bidder for a contract to install guardrails along several King County roadways, yet the county awarded the contract to an Oregon-based MBE.[230] The Ninth Circuit struck down the provision in King County's plan that allowed foreign MBEs to qualify for preferential treatment if they suffered discrimination where they operate.[231] The court held that a foreign MBE had to show that it suffered discrimination in King County. Discrimination could be presumed if the county could show systematic discrimination and the MBE could show that it was, or had attempted to become, "an active participant in the County's business community."[232]

Assume hypothetically that the *Coral Construction Co.* scenario occurred in New York rather than Washington State, that Coral is a New Jersey corporation with a branch office in New York, and that the MBE also is a New Jersey firm. A New Jersey MBE qualifies for the New York plan merely by being authorized to do business in New York; neither Article 15-A nor the compliance regulations require a foreign MBE to show that it had attempted to participate in New York business. If this New Jersey MBE has never previously bid on any project in New York, New York could not make the requisite causal connection between discrimination in

229. *See supra* notes 210-211 and accompanying text.

230. *Coral Constr. Co.*, 941 F.2d at 914.

231. *Id.* at 925.

232. *Id.*

New York and any injury to the New Jersey MBE.[233] In such a case, Coral would have a cause of action under the equal protection clause if it was qualified to perform the work required and if it submitted the lowest bid, yet lost the contract to the New Jersey MBE.

New York can remedy this defect. First, the legislature can amend the definition of certified business in Article 15-A to require that the MBE must have attempted to do business in New York. Currently, a certified business need only be certified by the DMWBD as minority-owned and operated and be authorized to do business in New York.[234] Article 15-A provides the DMWBD with very few guidelines for certification other than that the DMWBD "shall be responsible for verifying businesses as being owned, operated, and controlled by minority group members or women and for certifying such businesses."[235] The statute should state, for example, that the DMWBD may only certify an MBE after it has found that the MBE has attempted to do business in New York.[236]

Until the legislature acts, however, the DMWBD can ensure through the waiver process[237] that foreign MBEs that have not suffered from discrimination in New York do not receive special treatment. Whenever a non-minority firm can show that the available MBEs have not suffered from any discrimination in New York because they either have failed to attempt to do business in New York or have actually prospered in New York, DMWBD should waive any minority participation requirements.

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233. The defect might even be more pronounced if the foreign MBE has enjoyed significant success in its area of operations. Although success or failure outside of New York is irrelevant to whether the MBE has been injured in New York, success might prompt a non-minority firm to contest the award of a contract to a foreign MBE. Even if the complainant does not prevail, it can hardly be claimed that such litigation would have no effect on the contracting process.

234. *See supra* notes 115-119 and accompanying text.

235. N.Y. EXEC. LAW § 314(2).

236. "If systemic discrimination in the [jurisdiction] is shown, then it is fair to presume that an MBE was victimized by the discrimination. For the presumption to attach to the MBE, however, it must be established that the MBE is, or attempted to become, an active participant in the [jurisdiction's] business community." *Coral Constr. Co.*, 941 F.2d at 925.

237. *See supra* notes 53-74 and accompanying text; *supra* notes 95-107 and accompanying text.

V. Conclusion

New York has satisfied the first prong of strict scrutiny by demonstrating a compelling interest for enacting Article 15-A and the accompanying compliance regulations. It has also narrowly tailored most of its plan to remedy this interest. Nevertheless, New York's plan could still face a challenge in any of three ways. First, if the Supreme Court eventually overrules the Ninth and Second Circuits and holds that the compelling state interest must be completely demonstrated *before* enacting race-conscious measures, New York could be liable for any racial preferences enforced before the 1991 repeal of Article 15-A's authority. Second, the possibility remains that a one year statistical analysis does not constitute a sufficient sample to adequately demonstrate discrimination. The nature of the standard deviation analysis, however, which necessarily compensates for smaller samples, as well as the large sample for fiscal year 1989-90, reduce the likelihood that a court would deem New York's statistical analysis inadequate. Third, a non-minority contractor could challenge any contract awarded preferentially to a foreign MBE that has minimal past dealings with New York State. Nevertheless, New York has met its burden of showing that its statistical and anecdotal evidence adequately support the use of minority set-asides in public contracting, which Article 15-A and its accompanying compliance regulations authorize.

John J. Sullivan