CITY OF RICHMOND v. CROSON (1989)

The City of Richmond, Virginia, adopted a Minority Business Utilization Plan requiring that prime contractors award city construction contracts to subcontract at least 30 percent of the total dollar amount of each contract to one or more Minority Business Enterprises (MBEs), which the city defined to include a business from anywhere in the country at least 51percent of which is owned and controlled by black, Spanish-speaking, Oriental, Indian, Eskimo, or Aleut citizens. Although Richmond declared that the plan was "remedial" in nature, the city adopted it after a public hearing at which no direct evidence was presented that the city had discriminated on the basis of race in awarding contracts or that its prime contractors had discriminated against minority subcontractors.

JUSTICE O'CONNOR delivered the opinion of the Court. . . .

In this case, we confront once again the tension between the Fourteenth Amendment's guarantee of equal treatment to all citizens, and the use of race-based measures to ameliorate the effects of past discrimination on the opportunities enjoyed by members of minority groups in our society. In *Fullilove v. Klutznick*, we held that a congressional program requiring that 10% of certain federal construction grants be awarded to minority contractors did not violate the equal protection principles embodied in the Due Process Clause of the Fifth Amendment. Relying largely on our decision in *Fullilove*, some lower federal courts have applied a similar standard of review in assessing the constitutionality of state and local minority set-aside provision under the Equal Protection Clause of the Fourteenth Amendment. . . .

The principal opinion in *Fullilove*, written by Chief Justice Burger, did not employ "strict scrutiny" or any other traditional standard of equal protection review. The Chief Justice noted at the outset that although racial classifications call for close examination, the Court was at the same time, "bound to approach [its] task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the . . . general Welfare of the United States' and 'to enforce by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment." . . . The principal opinion asked two questions: first, were the objectives of the legislation with the power of Congress? Second, was the limited use of racial and ethnic criteria a permissible means for Congress to carry out its objectives within the constraints of the Due Process Clause? . . .

The Chief Justice . . . turned to the constraints on Congress' power to employ race-conscious remedial relief. His opinion stressed two factors in upholding the MBE set-aside. First was the unique remedial powers of Congress under Section 5 of the Fourteenth Amendment:

"Here we deal . . . not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that *in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with the competence and authority to enforce equal protection guarantees."* . . .

Because of these unique powers, the Chief Justice concluded that "Congress not only

may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to *declare certain conduct unlawful*, it may, as here, authorize and induce state action to avoid such conduct."

The second factor emphasized by the principal opinion in *Fullilove* was the flexible nature of the 10% set-aside. Two "congressional assumptions" underlay the MBE program: first, that the effects of past discrimination had impaired the competitive position of minority businesses, and second that "adjustment for the effects of past discrimination" would assure that at least 10% of funds from the federal grant program would flow to minority businesses. The Chief Justice noted that both of these "assumptions" could be "rebutted" by a grantee seeking a waiver of the 10% requirement . . . Thus a waiver could be sought where minority businesses were not available to fill the 10% requirement or, more importantly, where an MBE attempted "to exploit the remedial aspects of the program by charging an unreasonable price, i.e. a price not attributable to the present effects of prior discrimination." . . . The Chief Justice indicated that without this fine tuning to remedial purpose, the statute would not have "pass[ed] muster". . . .

Appellant and its supporting *amici* rely heavily on *Fullilove* for the proposition that a city council, like Congress, need not make specific findings of discrimination to engage in race-conscious relief. Thus, appellant argues "[i]t would be a perversion of federalism to hold that the federal government has a compelling interest in remedying the effects of racial discrimination in its own public works program, but a city government does not."

What appellant ignores is that Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to "enforce" may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations. . . .

That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate. . . .

It would seem equally clear, however, that a state or local subdivision (if delegated the authority from the State) has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction. This authority must, of course, be exercised within the constraints of Section 1 of the Fourteenth Amendment. . . .

The Equal Protection Clause of the Fourteenth Amendment provides that "[N]o State shall . . . deny to *any person* within its jurisdiction the equal protection of the laws" (emphasis added). As this Court has noted in the past, the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Shelley v. Kramer* . . . (1948). The Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. To whatever racial group these citizens belong, the "personal rights" to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.

Absent searching judicial inquiring into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. . . .

Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility . . . We thus reaffirm the view expressed by the plurality in *Wygant* that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification. . . .

Even were we to accept a reading of the guarantee of equal protection under which the level of scrutiny varies according to the ability of different groups to defend their interests in the representative process, heightened scrutiny would still be appropriate in the circumstances of this case. One of the central arguments for applying a less exacting standard to "benign" racial classifications is that such measures essentially involve a choice made by dominant racial groups to disadvantage themselves. If one aspect of the judiciary's role under the Equal Protection Clause is to protect "discrete and insular minorities" from majoritarian prejudice or indifference, . . . some maintain that these concerns are not implicated when the "white majority" places burdens upon itself.

In this case, blacks comprise approximately 50% of the population of the City of Richmond. Five of the nine seats on the City Council are held by blacks. The concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case. . . .

While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia. Like the claim that discrimination in primary and secondary schooling justifies a rigid racial preference in medical school admissions, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota. . . .

Because the city of Richmond has failed to identify the need for remedial action in the awarding of its public construction contracts, its treatment of its citizens on a racial basis violates the dictates of the Equal Protection Clause. Accordingly, the judgment of the Court of Appeals for the Fourth Circuit is

Affirmed.

JUSTICE SCALIA, concurring in the judgment. . . .

I agree with much of the Court's opinion, and, in particular, with its conclusion that strict scrutiny must be applied to all governmental classification by race, whether or not its asserted

purpose is "remedial" or "benign." . . . I do not agree, however, with the Court's dicta suggesting that, despite the Fourteenth Amendment, state and local governments may in some circumstances discriminate on the basis of race in order (in a broad sense) "to ameliorate the effects of past discrimination." The difficulty of overcoming the effects of past discrimination is nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency—fatal to a nation such as ours—to classify and judge men and women on the basis of their country of origin or the color of their skin. . . .

We have in some contexts approved the use of racial classifications by the Federal Government to remedy the effects of past discrimination. I do not believe that we must or should extend these holdings to the States. . . .

A sound distinction between federal and state (or local) action based on race rests not only upon the substance of the Civil War Amendments, but upon social reality and governmental theory. It is a simple fact that what Justice Stewart described in *Fullilove* as "the dispassionate objectivity [and] the flexibility that are needed to mold a race-conscious remedy around the single objective of eliminating the effects of past or present discrimination"….are substantially less likely to exist at the state or local level. The struggle for racial justice has historically been a struggle by the national society against oppression in the individual States. . . .

JUSTICE STEVENS, concurring in part and dissenting in part. . . .

The ordinance is . . . vulnerable because of its failure to identify the characteristics of the disadvantaged class of white contractors that justify the disparate treatment . . . The composition of the disadvantaged class of white contractors presumably includes some who have been guilty of unlawful discrimination, some who practiced discrimination before it was forbidden by law, and some who have never discriminated against anyone on the basis of race. Imposing a common burden on such a disparate class merely because each member of the class is of the same race stems from reliance on the stereotype rather than fact or reason.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, dissenting. . . .

It is a welcome symbol of racial progress when the former capital of the Confederacy acts forthrightly to confront the effects of racial discrimination in its midst. In my view, nothing in the Constitution can be construed to prevent Richmond, Virginia from allocating a portion of its contracting dollars for businesses owned or controlled by members of minority groups. Indeed, Richmond's set-aside program is indistinguishable in all meaningful respects from—and in fact was patterned upon—the federal set-aside plan which this Court upheld in *Fullilove v. Klutznick*. . . .

. . . [T]oday's decision marks a deliberate and giant step backward in this Court's affirmative action jurisprudence. Cynical of one municipality's attempt to redress the effects of past racial discrimination in a particular industry, the majority launches a grapeshot attack on race-conscious remedies in general. The majority's unnecessary pronouncements will inevitably discourage or prevent governmental entities, particularly States and localities, from acting to

rectify the scourge of past discrimination. . . .

Today, for the first time, a majority of this Court has adopted strict scrutiny as its standard of Equal Protection Clause review of race-conscious remedial measures. . . . This is an unwelcome development. A profound difference separates governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism or to prevent neutral governmental activity from perpetuating the effects of such racism. . . .

In concluding that remedial classifications warrant no different standard of review under the Constitution than the most brute and repugnant forms of state-sponsored racism, a majority of this Court signals that it regards racial discrimination as largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice. . . .

While I agree that the numerical and political supremacy of a given racial group is a factor bearing upon the level of scrutiny to be applied, this Court has never held that numerical inferiority, standing alone, makes a racial group "suspect" and thus entitled to strict scrutiny review. . . .