Joint Statement

Constitutional Scholars' Statement on
Affirmative Action After City of
Richmond v. J.A. Croson Co.*

I. General Principles

Remedying the lingering effects of racial discrimination has long been one of the most profound moral and constitutional challenges facing our nation. Where discrimination has been so pervasive that it has prevented many Americans from enjoying the basic privileges of citizenship—an equal opportunity to buy homes, attend schools, attain government contracts and find jobs—serious progress can be achieved only through strong efforts to include minorities in areas from which historically they have been excluded.

During the last several decades, the American public, acting through democratic and representative processes, has concluded time and again that serious remedial efforts sometimes require race-conscious programs designed to incorporate members of minority groups into areas from which they have too often been excluded. Remedial efforts of this sort have occurred in government at the federal, state, and local levels, in a

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* In the wake of the Supreme Court's decision in City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989), municipal governments throughout the nation rushed to re-examine, or in some instances to dismantle, their affirmative action programs. The Organization for a New Equality (ONE), a non-profit organization concerned with expanding economic opportunity for minorities, believed that many cities were in danger of acting precipitously and with insufficient guidance as to Croson's meaning. To meet that perceived need for expert guidance, the Reverend Charles Stith, ONE's President, asked Professor Laurence Tribe to convene on short notice a Constitutional Scholars' Conference on Affirmative Action. That conference took place at Boston's historic African Meeting House on March 30, 1989. The following statement, with only minor changes, was unanimously released by the conference. Eighteen of the thirty signatories were able to attend personally, all at their own expense; the others participated by telephone.
variety of institutional settings. These efforts should be seen in their historical context, and for their underlying purpose—not as a return to the exclusionary practices of the past but, on the contrary, as an attempt to include all Americans as first-class citizens. Such remedial measures involve not a simple trade-off among individuals in different racial groups, but rather a patriotic effort by all Americans to hasten the day when we can truly say that we have become a color-blind nation.

In light of the Supreme Court's January 1989 decision in City of Richmond v. J.A. Croson Co., some have recently argued that race-conscious remedies by local and state governments should be regarded as conflicting with the Constitution. As long-time students of constitutional law, we regard this assessment as wrong. The Supreme Court has insisted that affirmative action programs be carefully designed—not dismantled. A call for fairness and flexibility in affirmative action programs should never be equated with a call for retrenchment and retreat. It would defy not only the Supreme Court's decisions but the fundamental purposes of the equal protection clause to conclude that the Constitution forbids all such inclusive remedial measures, or requires that such measures be treated in exactly the same way as the invidious discrimination of the nation's past.

Therefore, while it would be irresponsible for local governments to avoid whatever steps are necessary to adjust their minority contract programs to the Supreme Court's ruling in the Croson decision, it would be equally irresponsible for others to claim that this opinion casts doubt on the overall constitutionality of properly constructed race-conscious remedies.

II. Current Law

On at least four noteworthy occasions (Croson, Wygant, Fullilove, and Bakke), the Supreme Court has made clear that affirmative action remedies, if carefully devised, can be entirely constitutional. And while this sensitive area of law will always contain areas of uncertainty, constitutional scholars whose views span a wide spectrum can agree on certain fundamental principles.

One: The equal protection clause of the Constitution was designed to combat racial subordination and ensure that no one is ever subjugated to a position of second-class citizenship simply because of racial identity. Measures that are designed to bring excluded groups into the societal mainstream—to ensure equal citizenship for all Americans—promote the goals of the equal protection clause and cannot be viewed as inherently contrary to the Constitution simply because such inclusive measures must at times take account of racial realities. While the Supreme Court has stated that all governmental uses of race are subject to strict scrutiny, nearly all members of the Supreme Court have recognized that there is a critical moral
and constitutional difference between governmental interests in employing race to correct historic discrimination—or even to promote diversity—and governmental interests in using race to advance debilitating stereotypes and the perpetuation of racial exclusion.

Two: While the Supreme Court has concluded that societal discrimination by itself cannot justify most race-conscious programs, the Court has also rejected the notion that local governments may implement such remedial programs only if they bear the tortuous and often divisive burden of documenting specific incidents of purposeful past discrimination on identified occasions. Rather, the Court has recognized the permissibility of basing flexible race-conscious remedial goals upon relevant statistical comparisons. Nothing in *Croson* should be seen to alter this principle, established in *Wygant v. Jackson Board of Education*.

Three: The Supreme Court has rejected the notions that race-conscious affirmative action measures adopted by a local government or other body must as a constitutional matter be limited to redressing the effects of that government’s or body’s own past discrimination, or to making whole the actual victims of identified incidents of past discrimination. In addition, although the Court’s opinions have been less than clear on the subject, the Supreme Court has not held that minority set-aside programs initiated before the *Croson* decision must be dismantled simply because the facts justifying such programs had not been fully developed at the time those programs were put in place.

Four: In some social and economic contexts, race-conscious affirmative action is justified not only as a means of rectifying past discrimination, but also as a forward-looking way of promoting racial harmony and ensuring that discrimination will be eliminated in the future. In educational settings particularly, ever since *Brown v. Board of Education*, the Supreme Court has recognized not only the crucial role of racial integration in facilitating equal opportunity but also the positive educational value of assuring racial diversity and facilitating multiracial experiences. Some Justices have explicitly treated this value as a sufficiently compelling governmental interest to justify race-conscious measures in education. And the Supreme Court as a whole has not yet resolved the issue of what goals other than overcoming historic discrimination may provide permissible grounds for race-conscious measures in areas outside education.

Five: The Supreme Court has required that race-conscious remedies be both effective and fair for the entire community. As Justice Powell states in *Wygant*, race-conscious remedies should in general be viewed more favorably when the incidental burdens entailed by such remedies are spread equitably. Such remedies should rely neither on rigid quotas nor on empty gestures of good faith, but on flexible goals, genuinely pursued.
III. Guidelines for Development of Future Standards

In developing further the constitutional standards for affirmative action, we believe it is important that courts and governmental officials keep in mind the following principles.

First: Pervasive discrimination does not merely operate at the application stage; its more subtle and perhaps more serious consequence is to deter and discourage members of minority groups from even seeking to enter the market for occupations, business opportunities or homes in certain neighborhoods. This consequence is an especially appropriate target of remedial policies. When courts seek to determine the existence and extent of past discrimination by making statistical comparisons to relevant labor pools, it is critical that such courts recognize the extent to which such discrimination may itself have produced smaller numbers in the comparable minority population. This may be especially important in the area of contracting or subcontracting, where the perceived demand for minority subcontractors may be the determinative factor in minority business formation. Without such consideration of deterrence, courts might well create a Catch-22 for cities seeking to implement sound affirmative action policies for subcontracting.

Second: When asking local governments to establish a factual record of past discrimination, it is essential not to deter voluntary efforts by forcing such governments to point fingers needlessly or to make compromising public admissions in order to establish the necessary predicate for race-conscious remedies. To do so would be to reopen old wounds, not to heal them. And this is a time for healing.

Third: While cities should be responsible in modifying their programs to fit the Court’s ruling in Croson, they should be allowed sufficient time to engage in good faith efforts to reevaluate their program in light of that decision. If their programs are challenged during the period of reevaluation, courts should follow the practical and sensible rule, adopted in analogous constitutional contexts, that would permit local governments adequate time to establish the relevant factual record needed to respond to such a challenge.

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