

STATE & LOCAL LAW NEWS

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Concrete Works v. Denver: A Mile High Reversal in Affirmative Action Trends

By Franklin M. Lee

Higher education admission policies have galvanized the national debate over affirmative action in recent years. In particular, the University of Michigan cases decided by the Supreme Court last June stirred up a blizzard of argument, attracting over ninety *amici curiae*. Even the president weighed in forcefully, condemning the use of race as a factor in admissions.

Important as they are, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003), and *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003), have not resolved the legality of the remedial use of race in all areas of public life in the United States. In particular, affirmative action practiced by academia is different from that employed by state and local governments in the dispensing of public contracts. Michigan's central argument—that the measured use of race as one factor in the admission of students is justified by the social and educational benefits of a diverse student body—cannot be persuasively applied to the building of sewers. The wrongs government seeks to redress in contracting are somewhat different from those the admissions office struggles to remedy, and so, too, are the remedial approaches. Despite the Supreme Court's ruling in *Bollinger*, the question of how to defeat discrimination and disparity in public contracting without tripping over the Equal Protection Clause remains largely unanswered.

Fortunately, an historic appellate court ruling last February provided city and state governments with a detailed road map for solving this dilemma. The decision by the Tenth Circuit

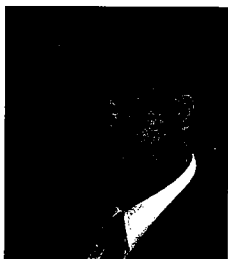
Court of Appeals in *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), illustrates how a government may comply with the Fourteenth Amendment and offer tailored preferences to groups that, according to credible data, have been or are discriminated against in the private sector of the marketplace. *Concrete Works* is the first appellate court decision to uphold the constitutionality of a local government minority business enterprise program based upon the merits of trial record evidence. On November 17, 2003, the U.S. Supreme Court declined to disturb this Tenth Circuit decision by denying appellant *Concrete Works*' petition for certiorari.¹

The Justices' refusal to take the case may stem from the decision's strong answer to the challenges put forth in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), in which the Supreme Court nearly closed the door on race-based preferences in public contracting. *Croson* reviewed the constitutionality of a minority business enterprise ordinance adopted by the City of Richmond, Virginia City Council to overcome past and present discrimination in the construction industry. The law required that 30 percent of a given city contract be subcontracted to minority-owned businesses. Predictably, the

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The court found that the voter pamphlets prescribed by law are limited public fora. It found that Seattle's limiting the pamphlet to discussion of one's own qualifications fit the purpose of the candidate statement that was only to introduce candidates to the voters and provide brief biographical information. The court further held that the limitation of content did not amount to censorship because there were substantial alternative forums for wide open campaigning. *Cogswell v. Seattle*, 347 F.3d 809 (9th Cir. 2003). The case sustaining the touch-screen voting system, despite the fact that it lacked the paper trail to allow for voter verification, is *Weber v. Shelley*, 347 F.3d 1101 (9th Cir. 2003).

Res Judicata—Collateral Estoppel—Takings Claims.

This is a case in which a takings plaintiff won a battle but lost the war. Evandro Santini's plans for development of homes in Connecticut were, allegedly, effectively thwarted when the Connecticut Hazardous Waste Management Service announced that his site was one of three under consideration for location of a low-level radioactive waste disposal facility. Although the court found that the claim was cognizable in federal court, it nonetheless dismissed the suit on the merits. Santini had alleged, in a parallel state court action, that his property had been taken without compensation. When he sued seeking compensation under the federal constitution, he was met with arguments that under the Rooker-Feldman Doctrine, and under principles of collateral estoppel, he could not raise issues in federal court whose facts had essentially been litigated in the state court action.

In response, the Second Circuit stated that Santini had only raised a state law takings claim initially in state court because under *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), his federal takings claim did not ripen until he had been denied just compensation in a state court. The panel then held that a takings plaintiff who involuntarily litigates a takings claim in state court under *Williamson* may reserve the federal claims for later determination by a federal court. In allowing this reservation procedure, the Second Circuit departed from the holdings of other circuits that have not allowed relitigation of the facts regarding a federal takings claim when those facts essentially are identical to the facts concerning a state takings claim.

Santini lost on the merits, however. The Second Circuit found that the mere announcement of potential use of the site for radioactive waste did not take the property, even if it substantially interfered with Santini's efforts to market his development. Accordingly, while the plaintiff won his day in court, he lost his case. *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118 (2d Cir. 2003).

And that's it for this quarter.

Editors' Note: David G. Tucker, the author of the *News'* lead article in its fall issue, "The SEC Sends a Message to Miami," can be reached at Miller, Canfield, Paddock and Stone's Pensacola office, and not its Miami office as printed.

Concrete Works

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set-aside provision attracted a lawsuit from a company that had lost a city contract for failing to comply. Croson's lawyers contested the ordinance on the basis that it violated the majority-owned company's rights under the Equal Protection Clause, and the Court agreed.

For the first time, the Court imposed the "strict scrutiny" standard for reviewing state and local government race-based preferences in public contract awards. The problem, Justice O'Connor wrote in her decision, was that Richmond had not adequately defined the wrong itself, as it failed to provide a "strong basis" in evidence to establish that beneficiaries of the preference were experiencing ongoing effects of present or past discrimination in the award of public contracts. Moreover, the law was not "narrowly tailored" to remedy the identified discrimination.

At the end of her decision, however, O'Connor offered affirmative action proponents an opening:

Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise. . . . Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria. . . . In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.

Croson, 488 U.S. at 509 (citations omitted).

Thus, even as the court struck down Richmond's ordinance, it suggested that other governments might succeed where Richmond had failed. Yet, a thicket of lower court decisions following *Croson* had utterly failed to provide clarity on how state and local governments might successfully satisfy the Supreme Court's "strict scrutiny" standard in the context of minority business programs. Not a single appellate court decision in the nation based upon a full trial record had held that a state or local government had satisfied this "strict scrutiny" standard for implementing a race- and gender-conscious MBE program. But after a decade-long legal battle, Denver has done just that. Upholding Denver's minority business enterprise program, the Tenth Circuit's February decision provides detailed guidance on how to craft an efficacious and constitutional affirmative action public contracting policy.

In 1992, Concrete Works, a white-owned Denver construction company, sued in federal district court, claiming that Denver's minority business enterprise (MBE) subcontracting goals ordinance violated its rights under the Equal Protection Clause. Denver's MBE program had been established in 1990 and set an annual goal of 16 percent for construction dollars to be spent with MBE subcontractors, and 12 percent to be spent with women business enterprise (WBE) subcontractors.² Specific contract spending goals varied according to the availability of MBEs and WBEs of-

fering the relevant commodities and services. Concrete Works allegedly lost three contracts with Denver because, as a prime contractor, it had failed to comply with spending goals enforced under the ordinance. After the city's motion for summary judgment was first granted and then, on appeal, rejected, the case went to trial in 1999. At issue were the constitutionality of the 1990 ordinance and the revisions of the law passed by Denver in 1996 and 1998. The district court sided with Concrete Works and enjoined the city from enforcing the three affirmative action laws, leading to the appeal before the Tenth Circuit.

In its 99-page decision last February, the Tenth Circuit held that "[t]o withstand [Concrete Works'] challenge, the race-based measures in the challenged ordinances must serve a compelling governmental interest and must be narrowly tailored to further that interest." *Concrete Works*, 321 F.3d at 957. To demonstrate its interest is compelling, the court insisted, Denver must meet two criteria: "First, it must identify the past or present discrimination 'with some specificity.' . . . Second, it must also demonstrate that a 'strong basis in evidence' supports its conclusion that remedial action is necessary." *Id.* at 958 (citations omitted). Citing *Croson*, the Court stated that Denver need not *prove* discrimination, but may rely on empirical and anecdotal evidence of disparity to *infer* it. Moreover, the city did not need to show that it directly discriminated against minority- or women-owned firms; even if it played a passive role in an industry plagued with racial and gender discrimination, it could take tailored, remedial action.

The City of Denver met this burden by investing enormous resources in developing the factual predicate upon which it based its contracting policy. Moreover, the city spared no expense in vigorously defending its MBE program through eleven years of litigation. The end result was a stout trial record over 10,000 pages long that thoroughly convinced the Tenth Circuit that the City of Denver had established a compelling interest to remedy the effects of marketplace discrimination, and that its MBE program was narrowly tailored to remedy ongoing effects of that discrimination upon city contracting. In building its defense, the city relied upon three progressively sophisticated disparity studies, as well as an abundance of innovative and credible expert testimony at trial that provided particularized quantitative and qualitative evidence of various forms of discrimination affecting the Denver construction industry.

One of these studies, conducted in 1990, analyzed the availability and use of minority- and women-owned construction and design firms for Denver bond projects from the 1970s and 1980s. This analysis employed "disparity indices," a statistical tool that measured participation of minority- and women-owned firms against their availability and other factors. A disparity index of one indicated "full" participation (proportionally), whereas indices below one indicated varying degrees of underutilization. The report found disparity indices of less than .63 for MBEs and less than .29 for WBEs for bond projects undertaken between 1972 and 1976. For 1985 housing bond projects, disparity indices were .43 for MBEs and .09 for WBEs. Based on such data, the city deter-

mined that its affirmative action efforts before 1990 had failed and that a stronger ordinance was necessary.

The city conducted similar studies in 1991, 1995, and 1997, all of which found substantial disparities between the availability of MBEs and WBEs and the city's use of them. The reports also found that minorities in the construction industry were less likely to be self-employed in Denver, and, when they were self-employed, made less money than whites. Unlike the City of Richmond in *Croson*, Denver was able to back up its claims of discrimination with credible, detailed studies of the public contracting industry.

Moreover, the city's lawyers presented to the court anecdotal evidence, such as the testimony of an executive at a white-owned construction firm who claimed that he received "credible complaints" from minority- and women-owned firms that they were subject to different standards than their majority-owned counterparts. This executive also spoke of observing racially charged graffiti and of his personal belief that many white firms refused to hire minority- or women-owned subcontractors due to perceived incompetence. In its decision, the Tenth Circuit also cited harassment of minorities and women at construction sites:

Women were called "bitches" and Blacks were called "nigger" or "dumb nigger." One seventy-three year old truck driver was called a "dumb, f-ing Mexican." Even more disturbing was the testimony that minority and female employees working on construction projects were physically assaulted and fondled, spat upon with chewing tobacco, and pelted with two-inch bolts thrown by males from a height of eighty feet.

Id. at 969-70.

Despite Concrete Works' objections, the Tenth Circuit found that evidence of general "marketplace" discrimination was relevant to the government's effort to meet strict scrutiny. For example, evidence that minorities could not form businesses or obtain capital from lenders as readily as whites supported Denver's position that affirmative action was needed and justified. Although Concrete Works argued that minority-owned firms are often smaller and less qualified than those owned by whites—that they are underused because of race-neutral reasons—the Court sided with Denver's contention that size and ability are not at all race-neutral variables. If minority-owned firms are smaller and less skilled, it is in part because of the racial discrimination pervading the industry.

Furthermore, while Concrete Works argued that the government itself had not directly discriminated against anyone and therefore had no standing to enforce remedial measures, the appellate court held that no such criteria needs to be met. It was enough that Denver had "indirectly" contributed to a discriminatory marketplace by regularly giving work to contractors who, in turn, refused to hire minority- and women-owned firms. Following language from the Supreme Court's decision in the *Croson* case, the Tenth Circuit held that the government had a compelling interest to ensure that it was not a "passive participant" in such private sector discrimination, and that its tax dollars did not serve to finance "the evil of private prejudice." In support of its "passive participant" basis for remedying the discrimination, the city meticulously

introduced evidence at trial showing that specific prime contractors that had discriminated against MBEs in private sector contracts also had received city contract dollars.

The lesson for state, city, and county governments is that detailed analysis of public spending in a given sector, broken down according to race or gender and supplemented with anecdotal evidence of discriminatory practices, can justify race-conscious remedial measures. As the Court noted: "The record contains extensive evidence supporting Denver's position that it had a strong basis in evidence for concluding that the 1990 Ordinance and the 1998 Ordinance were necessary to remediate discrimination against both MBEs and WBEs." *Id.* at 990. The studies provided by the city demonstrated clear disparities between the use of minority- and women-owned firms and their availability in Denver. Such data, along with strong anecdotal evidence, convinced the Tenth Circuit that a race-based measure was justified. Concluding also that Denver's ordinances were "narrowly tailored" to the past and present discrimination, the appellate court found in favor of the city.

After *Croson*, many state and local governments scaled back or scrapped their minority business enterprise programs. *Concrete Works* now clarifies how a government may justify new affirmative action policy and promote racial justice without failing the Constitution. The Tenth Circuit's forceful ruling offers considerable encouragement to many state and local governments across the country that have sought to enhance market access for minority businesses through public contracting affirmative action. For other jurisdictions, however, the initial enthusiasm for use of such race-conscious remedies will undoubtedly be tempered by the enormous time and expense of compiling a record of the quality and depth produced by the City of Denver in this case. (The city has reported its total tab for disparities and litigation expenses at approximately \$2.5 million.) The fate of billions of dollars in local government contracts will apparently continue to hang in the very delicate balance of the Fourteenth Amendment Equal Protection Clause for many years to come.

Endnotes

1. *Concrete Works of Colorado, Inc. v. City and County of Denver*, No. 02-1673, 72 U.S.L.W. 3343 (Nov. 17, 2003). This is the second consecutive time the Supreme Court has declined to hear an appeal of a Tenth Circuit decision upholding the constitutionality of an affirmative action contracting program. The Supreme Court previously granted and then dismissed *certiorari* as improvidently granted, in a case upholding a federal disadvantaged business enterprise program. *Adarand Constructors, Inc. v. Mineta*, 532 U.S. 967 (2001), *certiorari granted*; 534 U.S. 103 (2001), *dismissed*.

2. Under the terms of the 1990 ordinance, Denver required prime contractors to make good faith efforts to attain the subcontracting goals. However, prime contractors were not required to use unqualified MBEs, WBEs, or, in the event that good faith efforts failed, to attain the goals. During the course of this litigation, this ordinance was repealed and revised in 1996 and 1998 based upon additional evidence of racial and gender discrimination in Denver's construction industry.

Washington's Labyrinthine Ways

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some 1,300 low-income students in poorly performing schools. Unless changed, when the omnibus appropriations act is finally enacted next year, it provides for some \$13 million extra for public schools, a similar amount for charter

schools, and authorization to provide roughly \$7,500 per student for a private school voucher program to be used for tuition, books, and transportation. While a five-city experiment was originally contemplated, the D.C. program is the only one that survived. The D.C. mayor and school board president have argued for the measure. It is opposed by D.C. Congressional Delegate Eleanor Holmes Norton, teacher unions, public school administrators, and civil rights advocates concerned about breakdown of separation of church and state. The opposition is fueled by fears that this might be the start of a national trend. A threatened filibuster against this provision prevented passage of the \$545 million federal appropriation to the city.

□ **Consumer Protection Measures Enacted.** Following up on "do-not-call" lists, Congress has authorized the Federal Trade Commission to control spam e-mails. In light of the FTC's limited ability to police the industry, bulk "mailers" who agree to industry self-policing provisions are exempted. In addition, the Fair and Accurate Credit Transactions Act was enacted creating a national fraud-alert system. Consumers will only need to make one call to report fraudulent activity. A report of possible fraud against them will be maintained in their credit report for seven years. The FTC reports some 27.3 million have been subjected to identity theft over the last five years, with 9.9 million just in 2003. Consumers will now be able to get a free credit report annually from each of the three major bureaus and specialty reporting agencies. Importantly, advance notice of submission of negative credit information must be given consumers, and they will now be able to get their credit scores for a reasonable fee, and if applying for mortgage loans, for no cost. Some provisions will not take effect until 2006.

□ **Despite Republican Complaints, Few Bush Judicial Nominations Rejected.** While Miguel A. Estrada withdrew after failing numerous times to obtain more than 54 of the needed 60 senators to vote for cloture to force consideration of his nomination, very few White House judicial nominees have been opposed. Estrada was one of only six nominees for appellate judgeships that Democrats have successfully opposed. In Bush's three years, of slightly more than 200 persons nominated, thirty have been approved for appeals courts, and another 139 for other federal courts. The others are still awaiting Judiciary Committee action. Democrats claim Republicans bottled up some sixty nominees in the Clinton years. As some say, what goes around, comes around. Senate Republicans responded with a thirty-nine-hour "Talkathon" to trash Democratic "obstructionism" and dramatize what Republicans feel is unseemly resistance to their nominees. Half the time was allocated to Democrats, who talked instead about Bush's failure to create jobs. Afterwards, Democrats opposed two cloture votes on court of appeals' nominees characterized by Senator Ted Kennedy as "Neanderthals" and by other Democrats as too ideologically rigid in their conservatism regarding abortion, civil rights, and worker protections. Three of the five remaining appeals court nominees unable to get a vote are women.

Your correspondent