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WHAT JUSTIFIES REVERSE DISCRIMINATION IN DENVER'S PUBLIC WORKS CONTRACTING?

By Paul Farley

Honoring Jefferson or Orwell?

When a political community amends the principle of "All created equal" to read "Some are more equal than others," it has left the safety of the Declaration of Independence for the dangers of George Orwell's Animal Farm. Not a change to be made lightly, for the consequences are hardly abstract.

Substituting a group preference formula for free-market competitive bids in public works contracting, for example, guarantees undeserved penalties for some, unearned rewards for others, higher costs to the taxpayer, lesser quality control, bitter lawsuits, disruptive overturning of legislation by judges, increased incentive to break the law, and decreased confidence in impartial justice.

Why would any community entangle itself with so bad a bargain? Because government power is routinely abused except where constitutions bar the way.

This issue paper examines what the U.S. Constitution says (or more precisely, what the courts say it says) about the proper and improper uses of "unequal equality" to correct previous discrimination by government on the basis of race or gender.

Attorney Paul Farley, experienced in this field of law, shows that the stakes reach far beyond economic considerations. The ultimate question is whether Denver as a city and Colorado as a state will hold themselves to the standard of a truly just society -- or be content to operate as a mere power system where might makes right.

-- The Editors

IN BRIEF

* Denver this year renewed and expanded a 1983 law setting goals (in practice, quotas) for the share of public works contracts that will go to firms owned by minorities (25%) and women (12%).

* But the program is vulnerable to public disapproval and judicial overturning since it fails the tests imposed by recent U.S. Supreme Court and appeals court rulings.

* There are no findings of past governmental discrimination as required by the Wygant case.

* There are no tailored remedies for separately wronged groups as required by the Croson case.

* The 37% set-aside does not conform with the 11% scope of relevant labor market as required by the Teamsters and Hazelwood cases.

* Lacking the above, the program smacks of a political spoils system to guarantee certain groups $600 million of work on the $1.6 billion new airport.

* Past discrimination is a real and serious problem in Colorado, but reverse discrimination is not the answer. This plan should be rewritten to replace its crude patronage features with constitutionally valid, remedial ones.

I. INTRODUCTION

On July 11, 1988, the Denver City Council adopted Council Bill 332, which extended for another five years the City's public works contracting affirmative action program. The program sets participation "goals" for minority- and women-owned businesses in the provision of City goods and services. The new ordinance has a 25% goal for Minority Business Enterprises (MBEs), and a 12% goal for Women Business Enterprises (WBEs), thereby ensuring that 37% of City public works contracting dollars will go to firms owned and operated by members of certain preferred groups.

The ostensible justification offered by the City is that this program is necessary in order to remedy discrimination. However, despite the City's claims, public opinion and even media coverage have been almost unanimous in their assessment that the program is little more than a new twist on a very old and time-honored concept: a political spoils system.

Though few argue with the desirability of a society free from discrimination, the perception is now widespread that affirmative action does nothing to remedy past discrimination. It is a fact of life that these programs exist, and will continue to exist. What is especially disturbing is that these programs, many if not most of which are simply political footballs, have the imprimatur of law. They are not only politically expedient, we are told, but are constitutionally mandated. The benefits, deserved or not, must be awarded to persons possessing certain overt physical characteristics.

II. LEGAL BACKGROUND

How did the United States, constitutionally committed to equal protection of the laws, get into this situation of widespread official favoritism? Why do we have affirmative action in this country, and what are its objectives? The history of public works contracting affirmative action programs began with the Supreme Court's decision in Fullilove v. Klutznick (1980), in which it ruled that Congress could require 10% of all federal public works construction dollars be awarded to minority firms.1/ Congress had determined that there was prevalent discrimination in the award of public works contracts, and that it was a national problem which needed to be remedied. The Court found that Congress had made "findings" which established discrimination, and that it also had the power to enact a remedy.

1/ Fullilove v. Klutznick, 448 U.S. 448 (1980).

However, the reasoning was, and remains, unclear; the Court was fragmented and produced no majority opinion. As a result, the consequences for state and local governmental programs were impossible to predict. Justice Powell recognized this in his concurring opinion: "The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of the governmental body."2/ This decision led to the adoption of set-aside plans by dozens of cities, counties, and states, all modeled on the Fullilove framework.3/

The next major decision did not come for six years. In Wygant v. Jackson Board of Education (1986), the Supreme Court ruled that:

(a) In the context of affirmative action, racial classifications must be justified by a compelling state purpose, and the means chosen by the state to effectuate that purpose must be narrowly tailored;

(b) Societal discrimination alone is insufficient to justify a racial classification; and,

(c) If the purpose is to remedy prior discrimination, to be constitutionally valid there must be a factual determination that there is a strong basis in evidence for the conclusion that remedial action is necessary.

The Court made clear that there must be convincing evidence of prior discrimination by the governmental unit involved before allowing limited use of racial classifications to remedy such discrimination. Societal discrimination, without more, is too

2/ Justice Lewis F. Powell, Jr., served on the Supreme Court from 1972 to 1987. His sensible, moderate approach earned him the reputation as a pragmatic jurist who attempted to balance competing interests to achieve a fair result. He was widely regarded as the Court's most respected and influential member in this area of the law.

3/ According to one survey, there are 192 such plans in effect across the nation. "Report of the Minority Business Development Legal Defense and Education Fund on Minority Business Enterprise Program of State and Local Governments," available from the Academy for State and Local Government, 444 N. Capitol St. N.W., Suite 349, Washington, D.C. 20001.

amorphous a basis to justify race-conscious state action, and imposing a racially classified remedy.4/ The Court also made clear that strict judicial review of racial distinctions "does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination." In other words, if the Constitution is to be truly color-blind, there cannot be two standards--one for minorities, and one for non-minorities.

A. The Necessity of Findings

The effect of Wygant in the area of public works contracting has been immediate and widespread. Within a short time the affirmative action programs of Louisville, Kentucky, San Francisco, California, and Richmond, Virginia, were all declared unconstitutional.5/ In addition, the State of Michigan's program has also just recently been stricken down.6/ In each of these cases, the courts have focused on the absence of identified past discrimination by the government enacting the program.

Recognizing that under Wygant, societal discrimination is inadequate, the courts have demanded proof of prior misconduct not by an individual or industry, but rather by the government itself. The courts have insisted upon such findings because it is the only way to prevent affirmative action programs from becoming, in the words of the Fourth Circuit Court of Appeals, "bald dispensations of public funds and employment based upon the politics of race."

4/ Wygant v. Jackson Board of Education, 476 U.S. 267 (1986), involved a collective bargaining agreement between a school board and a teacher's union which immunized minority teachers from layoffs. Mountain States Legal Foundation represented Wendy Wygant, a non-minority teacher, in her suit against the school board.

5/ J. Edinger & Son, Inc. v. City of Louisville, 802 F.2d 213 (6th Cir. 1986); Associated General Contractors of California v. City and County of San Francisco, 813 F.2d 922 (9th Cir. 1987); and J.A. Croson Co. v. City of Richmond, 822 F.2d 1355 (4th Cir. 1987), prob. juris. noted, ___ U.S. ___, 108 S. Ct. 1010, 98 L.Ed. 2d 976 (Feb. 22, 1988)(No. 87-998). The Croson case is now before the Supreme Court. Its outcome will, in all likelihood, determine the necessity of findings in public works contracting.

6/ Michigan Road Builders Association, Inc. v. Milliken, 834 F.2d 583 (6th Cir. 1987), appeal filed, 56 U.S.L.W. 3806 (May 11, 1988)(No. 87-1860).

Fundamentally, the only reason we have affirmative action is to remedy past wrongs. Therefore, the threshold question is whether such wrongs have been perpetrated. However, to simply make the obvious understatement that there has been discrimination in this country, is not enough. Wygant was clear that there must be "some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." This is because, in the Court's words, "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." Justice Powell succinctly summed up the reasoning behind this requirement: "In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future."7/ Findings are essential to the integrity of affirmative action plans.

B. Determining the Adequacy of Findings

If a governmental body decides to make findings, then we need to be able to decide when the past misconduct has been sufficiently substantiated. The Supreme Court in Wygant determined that a government "must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted." As a guide, the courts have adopted the concept of the `relevant labor market.` Simply put, this means that before a court will jump to the conclusion that discrimination has been or is being practiced, it will carefully evaluate the statistical evidence.

Supreme Court cases under the Civil Rights Acts have gone to some lengths to underscore the importance of this idea. In International Brotherhood of Teamsters v. United States (1977), the Court ruled that there is "no requirement that a work force mirror the general population." And in Hazelwood School District v. United States (1977), the rule was further clarified: "When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value."

7/ We have already begun to see this trend. In the Michigan Road Builders case, the State of Michigan attempted in part to justify its minority set-aside by looking to "the history of the western world for the past 2000 years."

The use of statistics to infer intentional discrimination against a class has always been subject to careful scrutiny by the courts. Statistics may be manipulated and will not necessarily reveal otherwise demonstrable innocent explanations of discrepancies. Careful attention must be paid not only to the geographic area used, but also to the number of eligible workers or firms. In the arena of contracting set-asides, the courts have repeatedly found that the absence of minority businesses is not due to race, but market factors. Typically, advocates of these programs will point to the disparity between the minority population and the number of minority firms, or the amount of business done by the minority firms, and claim it proves discrimination.

What the cases have shown is that a city's contracting procedures, or market forces in general, discriminate against small businesses attempting to break in. While it is true that most minority businesses are smaller, this does not amount to a racial bar. A good example of this is the case of Equal Employment Opportunity Commission v. Sears, Roebuck & Co., decided by the Seventh Circuit Court of Appeals earlier this year. The EEOC claimed that Sears discriminated against women in the hiring of commission sales staff. In support of that claim, the EEOC pointed to the immense disparity between the number of male and female sales clerks.

Sears proved that the disparity was not due to discrimination, but rather that men, for whatever reason, tended to prefer the high-risk, high earning potential of selling big-ticket items (appliances, etc.) on commission. It turned out that the women generally preferred such non-commission items as clothing, jewelry, and cosmetics, in part because of the increased social contact. Women also had a greater dislike of the pressure, risk, and odd hours associated with commission sales. The Sears case illustrates why courts have been wary of broad assumptions or claims of discrimination when the sole evidence presented is statistical or circumstantial.

We must be equally cautious when dealing with general, indistinct allegations of discrimination in the construction industry. Public works contracting has always been a competitive business, and established firms with solid reputations have traditionally won the lion's share of contracts. The failure of minority firms to be equally represented in this area does not prove there is or has been discrimination. What it does prove is that it has been, and continues to be, difficult for a small business to break into the market and compete on equal terms with

established firms. Race is not the issue. Economic status is.8/

C. Who Should Bear the Burden?

One of the cornerstones of permissible affirmative action has been that the burden of these programs should be borne by those most responsible for the misconduct. Though this would appear to be an uncontroversial, common sense approach, many state and local governments have failed to grasp its importance. It prevents governments from seeking to use these programs as a means of giving special entitlements to certain key constituencies. It defeats ill-conceived or improper attempts to attack entire industries (such as construction contractors), on the basis of generalized charges of "discrimination."

Wygant characterized this concept as "narrow tailoring." That is, the program must be focused on the wrongdoing revealed by the findings, and must be designed to minimize the imposition upon third parties. Without this requirement, whole segments of society may be essentially indicted and convicted of discrimination in absentia. If a government wishes to redress its own misconduct, it must address that wrongdoing in a program which puts the primary burden upon itself, the illegal actor, and minimize its imposition upon innocent third parties. If the misconduct is on the part of private parties, the civil and criminal provisions of the Civil Rights Acts have, over the years, proven equal to the task.

Once proper findings have been made, and a program has been adopted which primarily burdens the government, incidental burdens upon others may be expected. This was recognized by the Supreme Court in Fullilove: "When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a `sharing of the burden` by innocent parties is not impermissible." However, the prerequisites to a "sharing of the burden" are (1) adequate findings of the government's own misconduct; (2) a program which is narrowly tailored to address the misconduct so identified; and (3) the burden to be shared by third parties must be minimized.

D. A Landmark on the Horizon

8/ It must be noted that the legal morass surrounding racial preferences can usually be avoided by simply emphasizing economic rather than racial criteria. This would ensure that minorities who have suffered most will benefit, while at the same time not excluding others in equal need of assistance.

Now pending before the Supreme Court is a case which, in the absence of some unforeseen development, appears destined to be a major case in this area. J.A. Croson Co. v. City of Richmond has resulted from the 30% minority business set-aside created by the City of Richmond, Virginia for the award of all city contracts. Croson was the low bidder on a city construction contract, but failed to locate competent minority suppliers or subcontractors in sufficient quantities to satisfy the 30% target. The city decided to re-bid the job, and Croson sued in federal court. Croson lost both at the district court and the Fourth Circuit Court of Appeals.

Upon announcing its decision in Wygant, the Supreme Court vacated the Fourth Circuit's decision and remanded the case to be reconsidered. In light of the Supreme Court's action, the court of appeals decided that the program violated the Fourteenth Amendment as an illegal distinction based upon race. The City appealed, and the Supreme Court agreed to hear the case. Oral argument was held on October 5, 1988, and a decision is expected sometime in the early spring of 1989.

However, it is unlikely that Croson will answer all the questions posed by these programs. For example, Richmond did not make any findings, and it will be enough for the Court simply to invalidate the ordinance on that basis. The adequacy of findings when they are made is an issue which must await resolution in later cases. The law in this area is rapidly developing and emerging as the new battleground in the continuing public debate over the future of affirmative action. It is against this backdrop that the Denver program must be evaluated.

III. THE DENVER PROGRAM

When first enacted in 1983, the Denver program had goals of 20% MBE and 5% WBE. The City, in authorizing the program for a period of five years, made no findings of its own past discrimination. In 1984, Mayor Federico Pena by executive order determined that the requirements should be increased to 30% and 6%, respectively. In 1988 the ordinance was up for renewal. The City, having read Wygant, Croson, and other cases, saw the handwriting on the wall and decided that it should try to make findings which would enable the program to survive the Supreme Court's decision in Croson. The result is a document over six inches thick, compiling personal testimony from dozens of local businessmen, as well as other information.

With this record, the City felt safe in extending and expanding the program. However, a review of the cases in this

area suggests Denver's findings do not meet the stringent test set out in Wygant. The Supreme Court made it clear that any governmental body wishing to implement such a program must provide convincing evidence of its own discriminatory conduct. The "findings" made by the City only refer, in the vaguest of terms, to societal discrimination. At best, some testimony hints at discrimination within the Colorado contracting industry.9/ Remarkably, the only testimony of actual discrimination by the City was allegations that the affirmative action office discriminated in the administration of the program. That is, the record concludes that any discrimination which might be present in the City's contracting policies is a direct result of having the program in the first place.

Of course, such "findings" are absolutely inadequate. Furthermore, even if the findings were correctly made, the courts have been quite clear that these programs are a last resort. Obviously, if Denver has been discriminating, the first action should be to restructure city contracting procedures, make personnel changes, and otherwise burden the City with correcting the problem, before imposing draconian measures upon the contracting industry. The "narrowly tailored" approach required by Wygant seems to have gotten lost in the rush by Denver politicians to design a sweeping and lucrative (for preferred groups) entitlement program.

If discrimination exists or has existed in the contracting industry, the courts are open for victims to prosecute their claims against offenders. The effect of Denver's continually growing program is not to remedy or eliminate discrimination, but rather to create and foster a whole new brand of discrimination, one "based upon the politics of race."10/

It is fair to infer that at least some proponents of the Denver program have their eyes on the estimated $1.6 billion in contracts associated with the construction of Denver's proposed new airport. Under the old plan, minorities would have been

9/ Several witnesses described incidents where they were "sure" they lost work because a non-minority prime contractor refused to consider their bid, or they had "heard" that the prime had accepted a higher non-minority bid.

10/ Women and minority-owned firms constitute no more than 11% of available contractors. Since 1984, minority and women-owned firms were awarded 29% of the available public works contracts---almost three times the amount which could be justified, had sufficient findings been made.

guaranteed $400 million. The new program increases that take to almost $600 million, without any indication that this program is necessary, desirable, or even legal. Mayor Pena defended this course of action by saying:

> The philosophy of the program was that there has been discrimination against minority companies that has resulted in minority business people not being able to form companies . . . . We as a society have to compensate for that.

Obviously, the Mayor has not read Wygant, or he would understand that first, the wrongdoing must be proven, and that societal discrimination is wholly inadequate.

The arbitrariness of the program is shown by the list of persons selected for preference: Blacks, Hispanics, Asian-Americans, American Indians, and women. Under the terms of the statute, there exists an irrebuttable presumption that these groups, and these groups alone, have suffered discrimination at the hands of the City. Indeed, it appears that the City has been quite discriminating in its discrimination. Is it realistic to suppose that the preferred groups have each suffered identical discrimination at the hands of the City, such that they may be lumped together? Wygant and subsequent cases have said that the City must identify discrimination as to each group, and tailor the program to reach that discrimination. That is, there should be separate findings, goals, and timetables for each group.

The Court of Appeals in Croson did not mince words: "Moreover, respondents have never suggested--much less formally found--that they have engaged in prior, purposeful discrimination against members of each of these minority groups." That is, "prior discrimination against blacks by a governmental unit would not justify a remedial plan that also favors other minority races." This means that the City and County of Denver is obligated to demonstrate wrongdoing vis a vis each of these groups, and then tailor the program to address the specific harm found. In the absence of a truly remarkable coincidence in the findings, there ought to be separate goals for each of the selected groups, as no doubt over the years some groups have had a harder time of it than others. Yet the City did not even address this issue, nor could it have on the basis of the available evidence. The broad brush assumptions made by Denver simply fall far short.

Other evidence, if interpreted generously, indicates that minority and women enterprises comprise 11% of all construction

firms.11/ That is, the "relevant labor market"12/ for public orks contracting in Denver is about 11%. The 37% program is completely outside of legal bounds. Walter Jones of the Minority Association of Contractors has said that the City's discriminatory policies can be shown by the low minority participation on City projects in past years.13/ However, this is meaningless without knowing the extent of minority availability at that time.

In this same vein, the City has further demonstrated that the program is not remedial by stressing the importance of current and future availability and growth potential of MBE/WBE firms.14/ There is absolutely no basis in the law for preferences based upon a desire to extend the program to accommodate future growth and earning capacity. In fact, just the opposite is the case. True affirmative action seeks to remedy the discrimination, so that preferences and set-asides become unnecessary. Over time, a legitimate program will never expand its coverage, but will instead contract as the remedy becomes effective. Denver's program sends a quite different message. Rather than a self-terminating corrective strategy aimed at restoring a free market and true equality, Denver's plan appears to be a scheme of economic force-feeding, designed to entrench these preferences in law and public policy.

Even assuming that there has been prior discrimination, the City is under an obligation to burden itself first. The most obvious question to ask is, "If the City has discriminated in its contracting, what has been done about it?" Has the City conducted an investigation, directed at rooting out bigoted decision-makers? Have oversight policies been implemented, so that officials cannot exercise their discretion in an improper fashion? Have the City's contracting procedures been revised so as to limit or eliminate opportunities for misconduct? Has a single City employee been shown to have discriminated in any way?

11/ There has been a great deal of controversy surrounding the accuracy of the City's figures in this regard, and they have since been revised down to 10.3%.

12/ See the Teamsters and Hazelwood cases cited in Section II B above.

13/ The June 1, 1988 edition of the Rocky Mountain News reported Jones as citing, as evidence of discrimination, participation of 5-1/2% in 1978 and 4% in 1979.

14/ Council Bill No. 332, Sec. 20-85 (a)(4) and (a)(5).

Or--is this all a pretext for redistributing wealth to key constituents of incumbent City politicians?

Again, appropriate findings and a narrowly tailored program would avoid these questions even being raised. What has so crippled the effectiveness of affirmative action in this country is the innuendos and insinuations precipitated by programs such as Denver's, deficient in justification and arbitrary in operation. The Denver program contributes to this perception by the unfettered discretion given to the Manager of Public Works in setting the annual goals. When the ordinance states that "the Manager . . . is hereby expressly delegated all discretionary and other necessary power to recommend annual remedial goals of at least twenty-five (25%) per cent of the dollars spent," citizens and businesses have the distinct and understandable impression that a group of opportunistic politicians are taking advantage of the public's trust, confidence, and money. The legitimacy and integrity so crucial to affirmative action's effectiveness are lacking, causing this program to be viewed as nothing more than a political spoils system.

IV. CONCLUSIONS AND RECOMMENDATIONS

The fundamental problem with Council Bill 332 is that it is political, rather than remedial, in nature. There are a number of avenues open to Denver if it wishes to bring its program within constitutional limits--and in the process salvage what goodwill remains. Further hearings should be held to determine to what extent, if any, the City has been responsible for discrimination. Then, the extent of the harm must be weighed and a narrowly tailored solution created.

Such a solution must focus its burden first and foremost upon the City itself, allowing only incidental impact upon third parties. Revising the City's contracting policies and procedures, along with disciplining the parties responsible, is the obvious starting place. Only after these alternatives have been exhausted, and proven ineffective, may a burdensome "goal" or quota plan be implemented. Even so, the findings must be made as to each group receiving a preference, and bear some relationship to the nature and extent of the preference given. Therefore, one would expect widely varying preferences, depending on the group in question and the demographics of the particular locale.

If the City wishes to rely upon the record as it now stands, there is no basis for the program. The current record would justify internal restructuring, or nominal "encouragement" of women and minority participation, but the rigid "goals" imposed by the program would be impermissible.

Affirmative action is supposed to create a level playing field--not permanently alter the landscape so as to compensate for some vague inarticulable injustice committed at an unknown time and place. It should protect the victims and burden the wrongdoers, rather than making sweeping assumptions and imposing burdens upon a large class of innocent persons. Until cities such as Denver begin acting responsibly, the noble objectives of affirmative action will continue to be obscured by "the politics of race."

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