

An independent municipal water-supply district was incorporated under the applicable laws of a state. The district was created solely to supply water to an entirely new community in a recently developed area of the state. That new community is racially, ethnically, and socioeconomically diverse, and the community has never engaged in any discrimination against members of minority groups.

The five-member elected governing board of the newly created water-supply district contains two persons who are members of racial minority groups. At its first meeting, the governing board adopted a rule unqualifiedly setting aside 25% of all positions on the staff of the water-supply district and 25% of all contracts to be awarded by the district to members of racial minority groups. The purpose of the rule was "to help redress the historical discrimination against these groups in this country and to help them achieve economic parity with other groups in our society." Assume that no federal statute applies.

In a suit by appropriate parties challenging the constitutionality of these set-asides, what is the most appropriate ruling based on applicable United States Supreme Court precedent?

- A. The set-asides are constitutional, because the function and activities of the water-supply district are of a proprietary nature rather than a governmental nature and, therefore, are not subject to the usual requirements of the Fourteenth Amendment.
- B. The set-asides are constitutional, because they would assure members of racial minority groups the equal protection of the laws.
- C. The set-asides are unconstitutional, because they would deny other potential employees or potential contractors the equal protection of the laws.
- D. The set-asides are unconstitutional, because they would impermissibly impair the right to contract of other potential employees or potential contractors.

Explanation:

Permissible race-based affirmative action

SCOTUS precedent	Discriminatory action	Government interest
<i>Richmond v. J.A. Croson Co.</i>	Minority set-asides for government employment/contracts	Remedying its own history of racial discrimination
<i>Freeman v. Pitts</i>	Race-based student assignments in public elementary/high schools	Remedying past intentional racial segregation in public schools
<i>Grutter v. Bollinger</i>	Race-based admissions policy in state universities	Achieving diverse student body in higher education

SCOTUS = Supreme Court of the United States.

All race-based classifications imposed by the government are subject to **strict scrutiny** under the equal protection clause—even when those classifications are designed to promote racial equality. That is because race is a **suspect class** that has historically faced discrimination. As a result, the government must prove that its racially discriminatory actions are **necessary** to achieve a **compelling government interest**.

Here, the water-district board developed an affirmative action program that sets aside a percentage of its employment positions and contracts for racial minorities (ie, minority set-asides). And in *Richmond v. J.A. Croson Co.*, the Supreme Court held that these discriminatory programs can only survive strict scrutiny if the government proves that:

- it has a compelling interest in remedying its *own* history of discrimination against the favored group *and*
- the discriminatory program is necessary because race-neutral methods are unavailable or insufficient to further that interest.

But since the water-district board created this program to address the *country's* broader history of discrimination against racial minority groups—not its *own* specific history of racial discrimination—the board's set-asides cannot survive strict scrutiny. Therefore, the most appropriate ruling is that the set-asides are unconstitutional because they would deny other (non-minority) potential employees and contractors the equal protection of the laws.

(Choice A) All state and municipal actions—whether proprietary or governmental in nature—must comply with the Fourteenth Amendment equal protection clause.

(Choice B) The set-asides do not *assure* racial minority groups the equal protection of the laws. Instead, they *prefer* racial minority groups and deny other potential employees and contractors the equal protection of the laws.

(Choice D) The [contracts clause](#) of the U.S. Constitution restricts state and municipal legislatures' ability to impair *existing* contracts. But actions that affect *future* contracts (as seen here) are not subject to this clause.

Educational objective:

All race-based classifications imposed by the government must survive strict scrutiny. This requires the government to prove that these classifications are necessary to achieve a compelling government interest—eg, to remedy its *own* history of racial discrimination.

References

- U.S. Const. amend. XIV (equal protection clause).
- *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 504 (1989) (holding that racially-based set-asides for government employment or contracts must satisfy strict scrutiny).

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