ARTICLES

New Light on Racial Affirmative Action

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This Article examines several important, recent Supreme Court decisions materially affecting the emerging constitutional standards governing racially conditioned affirmative action programs. The focus is on identifying the emerging standards, locating their potential scope of application and burdens, and preliminarily evaluating their constitutional efficacy. The Article also discusses unresolved issues generated by the decisions.

INTRODUCTION

The United States Supreme Court decided three racial affirmative action cases[1] last Term, and has decided one such case this Term.[2]

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*Professor of Law, University of Washington. It is my great pleasure to participate in this celebration honoring Edward L. Barrett, Jr. — an extraordinary legal scholar, a superb dean, and an all around fine and gentle man.

[1] Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842 (1986), primarily tests the constitutional validity of affirmative action protection against layoffs. Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 106 S. Ct. 3063 (1986), holds that a court-approved consent decree is not a court "order" within Title VII of the Civil Rights Act of 1964. Local 28 of the Sheet Metal Workers' Int'l Ass'n v. Equal Employment Opportunity Comm'n, 106 S. Ct. 3019 (1986), holds that neither Title VII nor the equal protection component of the fifth amendment's due process clause preclude a court, in appropriate circumstances, from ordering exclusionary affirmative action hiring plans benefiting individuals who were not actual victims of discrimination. For a discussion focusing on the cases' "sin-based rationales," see Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 78-98 (1986).

[2] While this Article was going to press, the Supreme Court decided United States v. Paradise, 107 S. Ct. 1053 (1987). For a discussion of that decision, see *infra* notes 236-83 and accompanying text.

These cases conclusively demonstrate that the Court now believes each side of the affirmative action controversy has legitimate concerns. The Supreme Court's focus on affirmative action has shifted from deciding whether racial affirmative action is ever constitutional to generating rules that will govern affirmative action. It will balance the interests of persons burdened by, but innocent of, racial discrimination against minorities' interests in overcoming a history of discrimination and achieving equal opportunity.

In last Term's cases, the Court rejected the claim that either section 706(g) of Title VII[3] or the Constitution's Equal Protection Clause[4] permit racial preferences only when beneficiaries are themselves victims of past discrimination.[5] The fundamental question is no longer whether affirmative action is lawful, but rather identifying the circumstances that justify use of racial preferences. The answer to this question is still uncertain and incomplete.[6]

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[3] Pub. L. No. 88-352, 78 Stat. 241, 253-66 (1964) (codified as amended at 42 U.S.C. § 2000e-5 (1982)). The Act became effective on July 2, 1965. Civil Rights Act of 1964, § 716(a), Pub. L. No. 88-352, 78 Stat. 241, 266. Title VII was extended to public employers by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, and codified in scattered sections of 42 U.S.C. §§ 2000e - 2000e-17 (1982). Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), upheld Title VII coverage of state and local governments as within Congress' power under § 5 of the fourteenth amendment. Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964), and Katzenbach v. McClung, 379 U.S. 294 (1964), upheld Title VII, and, by implication, the entire Civil Rights Act's general constitutional validity under the commerce clause.

[4] U.S. CONST. amend. XIV, § 1.

[5] *Wygant*, 106 S. Ct. 1842 (1986); *Sheet Metal Workers*, 106 S. Ct. 3019 (1986).

[6] In addition to controversy within the Supreme Court, affirmative action has been the subject of considerable philosophical and legal debate. *See generally A Symposium:* Regents of the University of California v. Bakke, 67 CALIF. L. REV. 1 (1979); DeFunis *Symposium*, 75 COLUM. L. REV. 483 (1975). Selections from the extensive philosophical literature include: R. DWORKIN, A MATTER OF PRINCIPLE 293-334 (1985); R. DWORKIN, TAKING RIGHTS SERIOUSLY 223-39 (1977); R. FULLINWIDER, THE REVERSE DISCRIMINATION CONTROVERSY: A MORAL AND LEGAL ANALYSIS (1980); A. GOLDMAN, JUSTICE AND REVERSE DISCRIMINATION (1979); B. GROSS, DISCRIMINATION IN REVERSE: IS TURNABOUT FAIR PLAY? (1978); T. NAGEL, MORTAL QUESTIONS, ch. 7 (1979); EQUALITY AND PREFERENTIAL TREATMENT (M. Cohen, T. Nagel, and T. Scanlon eds. 1977); Rosenfeld, *Affirmative Action, Justice, and Equalities: A Philosophical and Constitutional Appraisal*, 46 OHIO ST. L.J. 845 (1985); *Symposium on Reverse Discrimination*, 90 ETHICS 81 (1979).

Selections from the extensive legal literature include: Choper, *The Constitutionality of Affirmative Action: Views from the Supreme Court*, 70 KY. L.J. 1 (1981-82); Ely, *Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); Karst & Horowitz, *The* Bakke *Opinions and Equal Protection Doctrine*, 14 HARV. C.R.-C.L. L. REV. 7 (1979); Mishkin, *The Uses of Ambivalence: Reflections on the*

I. AFFIRMATIVE ACTION

The term "affirmative action" apparently originated in labor relations.[7] It is a vague, generic term[8] encompassing a wide variety of diverse, possibly conflicting, programs.[9] However, all affirmative action programs contain the element of a preference that is used to award a benefit. This focus manifests itself when persons in authority favorably

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Supreme Court and the Constitutionality of Affirmative Action, 131 U. PA. L. REV. 907 (1983); Morris, *The* Bakke *Decision: One Holding or Two?*, 58 OR. L. REV. 311 (1979); Morris, *Constitutional Alternatives to Racial Preferences in Higher Education Admissions*, 17 SANTA CLARA L. REV. 279 (1977); Morris, *Equal Protection, Affirmative Action and Racial Preferences in Law Admissions*, 49 WASH. L. REV. 1 (1973); O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 YALE L.J. 699 (1971); Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653 (1975); Tribe, *Perspectives on* Bakke: *Equal Protection, Procedural Fairness, or Structural Justice?*, 92 HARV. L. REV. 864 (1979).

[7] *See, e.g.*, Labor Management Relations Act, 29 U.S.C. § 160(c) (1971).

[8] Rosenfeld, *supra* note 6, at 847, states:

> The inconclusiveness of the philosophical debate over the justice of affirmative action, the uncertainty of its constitutional status, and the aura of imprecision surrounding the concept of equality all contribute to create the impression that evaluations of affirmative action cannot ultimately rise above the realm of political passion. This impression does not appear to favor either the proponents or the opponents of affirmative action.

Moreover, "affirmative action" can include programs having many differing, sometimes conflicting, ends.

[9] For example, in *Bakke*:

> There were several purposes of Davis' special admissions program, some clearly distributive, others at least partially compensatory; some assimilationist, others consistent with prevailing group differentiations. One of those purposes was to integrate the medical profession, a clearly distributive and assimilationist goal. A second purpose was to counter discrimination, a broadly compensatory and perhaps also distributive goal. The third purpose, to increase the number of physicians willing to work in underserved areas, reveals a sensitivity to cultural differences and an awareness of the reality of segregated residential patterns. Underlying this third purpose may have been a desire to equalize, for each group, the ratio between accessible physicians and the total number of individuals who belong to the group, thereby, through group-regarding equalization, producing for each individual, regardless of his or her group affiliation, equal access to a physician. The final purpose, different in kind from the others, was to "obtain the educational benefits that flow from an ethnically diverse student body." It may be argued that all but the last of these purposes advance the goals of the postulate of equality. The last purpose may further educational ideals, but it does not address the equality issue at all.

Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 893 (1978) (footnotes omitted).

increase, maintain, or rearrange an identified group's number or status. This Article concerns programs that award a preference to one person over another solely because of race.

Affirmative action programs are frequently coupled with "goals" and timetables. For example, an employer may "affirmatively" use a racial preference to produce a workforce within a specified time period that has a specified percentage of minorities — usually the percentage of minorities found in the relevant labor market. Because timetables and goals can become rigid, mandatory ends in themselves, commentators have attacked them as racial quotas.[10]

Affirmative action programs using racial preferences, especially when coupled with timetables and "goals," are highly controversial. Some argue that racial preferences are unjustified because the antidiscrimination principle judges individuals on their merits, and race is irrelevant to merit.[11] Even so, the Supreme Court has held that many racially preferential affirmative action programs are lawful. A program's legal validity depends upon a number of factors, including the necessity for affirmative action, the consequences to innocent persons, and the distribution of affirmative action's burdens.

A. Benign and Preferential Uses of Racial Classification: A Policy Versus Remedial Perspective

One may use a racial classification benignly without using it preferentially. Thus it is possible to have a racial classification without an affirmative action program. An example is busing in certain contexts.

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[10] *See infra* text accompanying note 227.

[11] Substantive beliefs support this argument; a reliance on the equal protection clause or the concept of equality whereby all equals are treated equally does not. That principle of formal justice begs the question because it fails to provide any standard that identifies persons as equals. It lacks a substantive standard. Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982). Because the formal justice principle does not determine the respect in which one person is equal to another, it amounts to a principle that only requires strict consistency, given any substantive standard. C. PERELMAN, THE IDEA OF JUSTICE AND PROBLEM OF ARGUMENT 20-21 (1963). Consequently, the principle of formal justice is equally compatible with a substantive standard declaring that people are radically different, or one declaring that people are not significantly different, because of their race or sex. Thus, depending on whatever substantive standard is actually used, affirmative action opponents can claim to stand for equality (Justice Stewart in Fullilove v. Klutznick, 448 U.S. 448, 526 (1980)) as can its proponents (Justice Blackmun in *Bakke*, 438 U.S. 265, 407 (1978)). Because so many differing substantive standards are involved in debates about equality, covertly or overtly, the term can lose coherence in extreme situations, but obviously, it need not. *See* A. GUTTMAN, LIBERAL EQUALITY ix (1980).

In *Swann v. Charlotte-Mecklenburg Board of Education*,[12] Chief Justice Burger stated that school authorities "are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole," and that to "do this as an educational policy is within the broad discretionary powers of school authorities."[13]

Presumably school authorities need show only a reasonably important educational objective. "[A]bsent a finding of a constitutional violation, however, that would not be within the authority of a federal court."[14] Thus in certain situations, school authorities may promote important educational policy by using a racial classification, even under circumstances in which federal courts could not make such a classification absent a constitutional violation. This analysis identifies another key feature of affirmative action. Affirmative action programs differ from "policy" in that all affirmative action is remedial, looking backwards and presupposing a prior wrong. Affirmative action's responsive, remedial character sharply distinguishes it from future-oriented policy, such as busing in certain contexts.

In the "policy" kind of educational program envisioned in *Charlotte-Mecklenburg*, all school children are within the school system and the racial classification does not prefer, disadvantage, or exclude any. Assuming busing equally burdens school children of all races, and assuming all schools afford equal educational opportunity, this use of a racial classification is benign.[15]

The antidiscrimination principle prohibits using racial classifications that displace judgments based on merit, irrespective of whether the racial classification is hostile or beneficial to minorities.[16] Only a few racial classification uses are valid under the antidiscrimination princi-

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[12] 402 U.S. 1 (1971).

[13] *Id.* at 16.

[14] *Id.*

[15] "Benign" is indiscriminately used to describe all kinds of affirmative action plans. Its meaning is: "Of a gentle disposition; gracious," or "Manifesting kindness and gentleness; kindly," or "Of a mild character." WEBSTER'S NEW COLLEGIATE DICTIONARY 81 (2d ed. 1956). Surely in racially exclusionary affirmative action plans, the use of a racial classification does not qualify as "benign."

[16] However, see Rosenfeld, *supra* note 6, at 921, for an argument from a substantive, not merely formal, theory of equal protection that exclusionary "affirmative action appears to satisfy the antidiscrimination principle . . . ."

ple.[17] The principle permits a race-based remedy after a court formally finds prior illegal racial discrimination. However, the court's order must benefit only identified victims of past discrimination. Further, the court's order must place the burdens on those guilty of racial discrimination[18] or on those innocent persons who benefited from the past discrimination.[19]

B.. Inclusionary and Exclusionary Affirmative Action

Affirmative action programs can be divided into two general types — inclusionary and exclusionary. Inclusionary affirmative action programs use a racial preference to include persons within a system, but do not exclude anyone. Exclusionary affirmative action programs employ a racial preference to include favored persons, but with the consequence of excluding nonpreferred innocent persons.

1. Inclusionary Affirmative Action

Inclusionary affirmative action is exemplified by racial preferences in recruitment and training programs. Racial classification is used to award a preference, which increases the pool of qualified minority — but only minority — members.[20] Benefits accrue to all qualified minority group members. These programs are remedial, seeking to redress past societal discrimination generally.

Under inclusionary affirmative action programs, racial preference plays no role in the ultimate decision to hire, promote, or fire. Yet the program's racial preference is selective, applying only to members of the favored race. Surely there are whites who could benefit from recruitment or training programs. Nevertheless, inclusionary affirmative action plans are widely accepted, probably because their burdens are widely distributed. Inclusionary affirmative action involves basic societal fairness and affirms the American ideal of equality of opportunity

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[17] Although McDaniel v. Barresi, 402 U.S. 39 (1971), used race to redraw school district lines for previously segregated schools, it seems that for integrated schools to redraw school lines to achieve the *Charlotte-Mecklenburg* policy would be another example of policy consistent with the antidiscrimination principle.

[18] Remedial justice classically has been understood as requiring compensation from a wrongdoer to her victim. *See, e.g.*, ARISTOTLE, NICHOMACHEAN ETHICS 405 (McKeon ed. 1947).

[19] *See, e.g.*, United Air Lines v. Evans, 431 U.S. 553 (1977); Teamsters v. United States, 431 U.S. 324 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).

[20] For a short discussion, see TRB, *True Affirmative Action*, THE NEW REPUBLIC, Sept. 16, 1985, at 4 & Sept. 23, 1985, at 49.

without severely impacting innocent persons.

2. Exclusionary Affirmative Action

In exclusionary affirmative action plans, decisionmaking is based on racially preferential grounds at the expense of an innocent nonminority. Exclusionary affirmative action programs are zero-sum games. Race determines the winners and losers. If only one job or only one promotion is available, race is the ultimate ground for the decision.[21] The person of the nonpreferred race loses and is excluded. Exclusionary affirmative action programs are highly controversial.

II. Models of Justice: Individual or Group Justice?

The antidiscrimination principle and racially preferential affirmative action are fundamentally opposed to each other.[22] Each has a corresponding underlying model of justice. The antidiscrimination model focuses on justice for the individual. Racially preferential affirmative action focuses on justice for groups.[23] Although superficially each model can coexist with the other, in its ultimate requirements each model precludes the other. Thus, rigorously and simultaneously applying both models is impossible.[24]

A. The Model of Justice for the Group: Affirmative Action

The group model is offered only as a temporary expedient, justified as necessary for a limited time to correct the debilitating current circumstances of blacks, and to a lesser extent, American Indians and Hispanics. The continuing effects of the appalling brutalities of legally authorized slavery, segregation, and poverty are prevalent.[25] Rat-infested

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[21] In addition to the preferential use of race in hiring, promotion, and firing decisions, exclusionary affirmative action programs exist in many other areas. These areas include, for example, university admissions, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), and government set-asides in contracting, Fullilove v. Klutznick, 448 U.S. 448 (1980).

[22] *But cf.* Rosenfeld, *supra* note 6.

[23] *See, e.g.*, Blumrosen, *The Group Interest Concept, Employment Discrimination, and Legislative Intent: The Fallacy of* Connecticut v. Teal, 20 Harv. J. on Legis. 99 (1983); Fiss, *Groups and the Equal Protection Clause*, 5 Phil. & Pub. Aff. 107 (1976); Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 Minn. L. Rev. 1049 (1978).

[24] For further discussion, see Fallon & Weiler, Firefighters v. Stotts: *Conflicting Models of Racial Justice*, 1984 Sup. Ct. Rev. 1.

[25] *See, e.g.*, Fry, *The End of Affirmative Action*, 23 Bus. Horizons 34 (1980).

ghetto slums exist in all major American cities, and the tragedies of racial discrimination found in rural backwaters persist as well. Black cultures of poverty and ignorance are unique, just as being black is unique in this society. Professor Wasserstrom puts it cogently:

> Race does not function in our culture as does eye color. Eye color is an irrelevant category . . . it is not an important cultural fact . . . . It is important to see that race is not like that at all . . . . In our culture to be nonwhite — and especially to be black — is to be treated and seen as a member of a group that is different from and inferior to the group of standard, fully developed persons, the adult white males . . . . That is simply part of the awful truth of our cultural and social history, and a significant feature of the social reality of our culture today.[26]

American black subcultures differ from most other minority groups. They were created by intentional, express, discriminatory governmental policy, and therefore being black in America has important dimensions not found in other racial or ethnic groups.[27] Even today, the average income of black families is barely more than half of the average income for white families.[28] In 1984 "white householders had a median net worth of $39,140, while the figure for Black householders was $3,400."[29]

Thus America has developed a self-perpetuating underclass.[30] The

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Professor Fry, of Bradley University, engaged 17 experts in his study. Using the Delphi technique, the experts predicted that it will take until the year 2025 for women to become fully integrated into the workforce, and that minorities will not be fully integrated into the workforce until the year 2040. *Id.* at 40. The Delphi technique involves obtaining opinions from experts with differing experiences and backgrounds. The experts independently respond to questions, which are summarized, and then returned to the expert to be answered again. Usually this is done four times before the researcher declares a consensus of opinion.

[26] Wasserstrom, *Racism, Sexism and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581, 586-87 (1977) (footnotes omitted).

[27] Indeed, a scholarly claim has been made that white America simply will never voluntarily eliminate employment discrimination against blacks. *See* Williams-Myers, *Biological Differences, Social Inequality, and Distributive Goods: An Exploratory Argument*, 13 J. OF BLACK STUDIES 399, 413 (1983).

[28] A year after Title VII came into force, the ratio of median black to white family income was 58% in 1966. It reached a high of 65% in 1975, but by 1982, probably because of the recession, it had dropped to 55%. *See* Bureau of Census, Current Population Reports, Series P-60, No. 142 Money Income of Households, Families and Persons in the United States (1982).

[29] Bureau of Census, Current Population Reports, Series P-70, No. 7, Household Wealth and Asset Ownership: 1984, at 4 (1986).

[30] Black youth unemployment rates are double those of whites. *See* Economic Report of the President 188 (1984). Although not the exclusive cause, economic deprivation has had a staggering impact on black family structure. By the early 1980's the proportion

temporary use of affirmative action programs[31] can partially break down the sociological and economic determinants of this underclass. In this capacity, the case for affirmative action for blacks is strong, and one can also make a case for American Indians and Hispanics in the Southwest.[32] Recognizing the continuing deleterious consequences of past racial discrimination, Professor Bittker writes that "we can have a color-blind society in the long run only if we refuse to be color-blind in the short run," and "the remedy, in short, is some hair of the dog that bit us."[33]

The model of justice underlying affirmative action is characterized by two basic elements: (1) use of a racial preference to include or exclude, and (2) reliance on the group as its fundamental entity. The group model of affirmative action is offered as a proper guide for interpreting Title VII and the fourteenth and fifteenth amendments, and underlies a number of important Supreme Court cases.[34]

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of female-headed, single-parent families was 40% for blacks but only 12% for whites. The children of these families make up the bulk of black children living in poverty. *See* Jencks, *Discrimination and Thomas Sowell*, N.Y. REV. OF BOOKS, Mar. 3, 1983, at 35. In an important sense, these indices of economic deprivation record the causes and effects of profound dislocations in America's social structure. For a carefully considered discussion tracing today's urban black underclass to the sharecropper of the South a generation ago, and pointing out that the recent flights of middle class blacks from urban ghettos has left a disastrously isolated and disintegrated underclass, see W. WILSON, THE DECLINING SIGNIFICANCE OF RACE 62-87 (2d ed. 1980); Lemann, *The Origins of the Underclass*, THE ATLANTIC, June 1986, at 31-55.

[31] For discussion of affirmative action programs based on the group concept, see Blumrosen, *supra* note 23; Fiss, *The Fate of an Idea Whose Time Has Come: Antidiscrimination Law in the Second Decade After* Brown v. Board of Educ., 41 U. CHI. L. REV. 742 (1974); Fiss, *supra* note 23. Fiss identifies two conditions — one objective and one subjective — that a group must satisfy before it can justifiably make a claim for group justice: (1) a long standing social practice, legal or otherwise, regarding the group that makes it reasonable to "talk about the group without reference to the particular individuals who happen to be its members at any one moment," *id.* at 148, and (2) group psychological interdependence whereby group members see their "identity and well-being" linked together with the status and well-being of the group as a whole, *id.* at 148-49.

[32] Cases applying the group-based, exclusionary model of affirmative action develop this picture. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 522-28 (1980) (Stewart, J., dissenting); United Steelworkers v. Weber, 443 U.S. 193, 202-07 (1979); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 363, 369 (1978). However, affirmative action, by itself, may not be adequate for blacks and other minorities during the 1980's and 90's. *See Civil Rights Developments [Symposium]*, 37 RUTGERS L. REV. 667-1130 (1985).

[33] B. BITTKER, THE CASE FOR BLACK REPARATIONS 120 (1973).

[34] *See supra* note 32.

United Steelworkers v. Weber[35] provides a useful example. The company hired only union craftworkers, and because the craft unions excluded blacks, the company's craftworkers were almost exclusively white. The company was threatened with a racial discrimination suit under Title VII. The union and the employer agreed to a collectively bargained contract, under which the employer established an apprentice program to train production workers for craft openings using a group-based, exclusionary affirmative action plan. Apprentices were selected for training on the basis of seniority, but with blacks constituting at least 50 percent of the trainees until the percentage of black skilled craftworkers approximated the percentage of blacks in the local labor force. Although not strongly emphasized in the Court's opinion,[36] the employer had engaged in prior racial discrimination that most likely would have justified a temporary affirmative action remedy favoring black employees.[37]

Brian Weber, a white, sued under Title VII, claiming that the exclusionary affirmative action plan resulted in junior black employees receiving apprenticeship training in preference to more senior white employees. Thus, Weber claimed discrimination against himself and others similarly situated. It is critically important to note that *Weber* involved a *private, voluntary* affirmative action plan. Weber's claim against his employer was based exclusively on sections 703(a)[38] and

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[35] 443 U.S. 193 (1979).

[36] *But see* Justice Blackmun's concurrence supplying the fifth majority vote, in which the nature of the dilemma confronting the company is identified. *Id.* at 209-16.

[37] *Weber* involved Kaiser Aluminum's plant in Gramercy, Louisiana, where it followed the same labor practices as in its other Louisiana plants. Kaiser had previously been involved in litigation challenging its employment practices at its plants in Baton Rouge and Chalmette, Louisiana. The Baton Rouge litigation was resolved by a consent decree under which Kaiser paid $225,000 to plaintiffs. *See* Burrell v. Kaiser Aluminum & Chem. Corp., No. 67-86 (M.D. La. Feb. 24, 1975). In Chalmette, plaintiff established a prima facie case of hiring discrimination against blacks for craft positions using statistics that were very much like the statistics existing for Kaiser's Gramercy plant just before Kaiser instituted *Weber*'s affirmative action program. *See* Parson v. Kaiser Aluminum & Chem. Corp., 575 F.2d 1374, 1389-90 (5th Cir. 1978). Also before Kaiser instituted *Weber*'s program, the Department of Labor, on authority of Executive Order No. 11, 246, 3 C.F.R. 339 (1964-65), reprinted in 42 U.S.C. § 2000e, at 28-31 (1982), requiring nondiscrimination from federal governmental contractors such as Kaiser, had pressured Kaiser to increase its black work force. Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 226 (5th Cir. 1977).

[38] Title VII § 703(a), 42 U.S.C. § 2000e-2(a) (1982), provides:

> (a) It shall be an unlawful employment practice for an employer
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his com-

(d)[39] of Title VII. The claim involved neither section 703(h)[40] regarding bona fide seniority or merit systems, nor section 706(g)[41] regarding the limitations on court-ordered affirmative action relief under Title VII — both of which played pivotal roles in *Memphis Firefighters v. Stotts*,[42] discussed in the next section.[43]

By a 5-2 vote the Supreme Court upheld *Weber*'s group-based exclusionary affirmative action plan.[44] The Court emphasized the narrow-

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pensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

[39] Title VII § 703(d), 42 U.S.C. § 2000e-2(d) (1982), provides:
It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

[40] Title VII § 703(h), 42 U.S.C. § 2000e-2(h) (1982), provides that:
[I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

[41] Title VII § 706(g), 42 U.S.C. § 2000e-5(g) (1982), provides:
If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate . . . . No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of § 704(a) of this title.

[42] 467 U.S. 561 (1984).

[43] *See infra* notes 63-76 and accompanying text.

[44] United Steelworkers v. Weber, 443 U.S. 193 (1979). For criticism of the case, see Meltzer, *The* Weber *Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. CHI. L. REV. 423 (1980).

ness of its inquiry into a voluntary plan designed "to eliminate conspicuous racial imbalance in traditionally segregated job categories,"[45] thus recognizing the factual predicate of past racial discrimination. The only question was "the narrow statutory issue of whether Title VII *forbids* private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences in the manner and for the purpose provided in the Kaiser-USWA plan."[46]

Then, confronted with sections 703(a) and (d),[47] which embody the antidiscrimination principle with unusual clarity, the Court practically conceded that Weber's claim was supported by a literal reading of Title VII. But the Court concluded that Weber's claim was contrary to the Act's spirit and purpose, as revealed by its legislative history.[48] Congress' overriding aim was "to open employment opportunities for Negroes in occupations which have been traditionally closed to them"[49] — an aim that embraced this voluntary affirmative action plan designed to open up "traditionally segregated job categories."[50] The Court concluded that Congress "did not intend wholly to prohibit private and voluntary affirmative action efforts,"[51] and that Weber's claim, if upheld, would prohibit private parties from voluntarily opening employment opportunities for blacks.

The Court then commented on the plan's burdens. *Weber*'s affirmative action plan did not "unnecessarily trammel the interests of the white employees" for it did not "require the discharge of white workers and their replacement with new black hires," nor did it "create an absolute bar to the advancement of white employees."[52] Moreover, "the

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[45] *Weber*, 443 U.S. at 209. This emphasis permits a restricted interpretation of *Weber* as a case applying only to voluntarily agreed-upon affirmative action plans in job areas suffering from traditional racial discrimination, for example, the craft unions.

[46] *Id.* at 200 (emphasis in original).

[47] *See supra* notes 38-39.

[48] Justice Brennan quoted the late Senator Humphrey and observed:

> It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long," . . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

Weber, 443 U.S. at 204 (quoting 110 CONG. REC. 6552 (1964) (remarks of Sen. Humphrey)).

[49] *Id.* at 203.

[50] *See supra* note 45 and accompanying text.

[51] *Weber*, 443 U.S. at 204.

[52] *Id.* at 208.

plan is a temporary measure" intended "to eliminate a manifest racial imbalance."[53] This implies that courts might strike an exclusionary affirmative action plan that too severely burdens innocent persons, such as a plan to discharge whites and replace them with later-hired blacks. Plainly, *Weber*'s interpretation of Title VII accords with the model of justice for a group.[54] The case upheld the voluntary use of a racial preference designed to open up "traditionally segregated job categories"[55] in a private employment setting in which illegal racial discrimination previously existed.

B. The Model of Justice for the Individual: The Antidiscrimination Principle

In the individual justice model, the individual is the ultimate entity and the antidiscrimination principle — "the general principle disfavoring classifications and other decisions and practices that depend on the race (or ethnic origin) of the parties affected"[56] — is its core. The individual justice model holds human beings equally entitled to exercise autonomy to develop their achievement and merit — which probably will result in social and economic inequalities.[57]

In the United States, this model of individual justice is meritocratic, relying on the availability of equal opportunity. But it does not include a thoroughgoing egalitarianism producing an equality of results; only equality of opportunity is required. Thus, the antidiscrimination principle is compatible with considerable social and economic inequality. This model of individual justice animated the Civil Rights Movement of the 1960's[58] and is the cornerstone of Title VII.[59] Recognizing this, the Supreme Court declared: "The statute's focus on the individual is unambiguous,"[60] and declared that Congress specifically framed Title VII to protect the "individual."[61] The fourteenth amendment itself fo-

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[53] *Id.*

[54] Fullilove v. Klutznick, 448 U.S. 448 (1980) is an example of a constitutional case decided in accord with the model of group justice.

[55] *See supra* note 45 and accompanying text.

[56] Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976).

[57] For a discussion, see Reynolds, *Individualism v. Group Rights: The Legacy of* Brown, 93 YALE L.J. 995 (1984).

[58] *Id.* at 999-1001.

[59] *See, e.g.*, Comment, *Developments in the Law — Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1166 (1971).

[60] Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 708 (1978).

[61] Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation

cuses on the individual, providing that "[n]o state . . . shall . . . deprive *any person* of life, liberty or property without due process of law; nor deny to *any person* within its jurisdiction the equal protection of the laws."[62]

The Supreme Court relied on the individual justice model in *Memphis Firefighters v. Stotts*.[63] A consent decree between the city and class action black plaintiffs included an exclusionary affirmative action hiring plan. Later, during a financial exigency, Memphis officials began layoffs in reverse seniority order, thereby honoring the collective bargaining contract.

Because such layoffs fell disproportionately on minorities, Stotts asked a federal district court for an injunction and modification of the consent decree due to "changed circumstances." The court granted the injunction, ordering that Memphis retain the proportional representation of blacks in the fire department. Thus, the district court's injunction directly conflicted with Memphis' seniority system,[64] giving higher competitive seniority to recently hired blacks at the expense of innocent nonminorities.

The Supreme Court rejected the position that the injunction did no more than enforce the consent decree.[65] The decree revealed no intent to depart from the existing seniority system, nor to deal with layoffs or demotions.[66] Justice Stevens, concurring, only would have enforced a strict "changed circumstances" standard for modifying consent decrees.[67] Five Justices rested squarely on Title VII because the consent decree was not the only foundation for the court's order:

> The Court of Appeals held that even if the injunction is not viewed as compelling compliance with the terms of the decree, it was still properly entered because the District Court had inherent authority to modify the decree when an economic crisis unexpectedly required layoffs which, if carried out as the City proposed, would undermine the affirmative action outlined in the decree and impose an undue hardship on respondents. This was true, the court held, even though the modification conflicted with a bona fide seniority system adopted by the City.[68]

Plans v. Norris, 463 U.S. 1073, 1080 (1983).

[62] U.S. CONST. amend. XIV, § 1 (emphasis added).

[63] 467 U.S. 561 (1984).

[64] *See supra* note 40.

[65] Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 575-76 (1984).

[66] *Id.* at 574-75.

[67] *Id.* at 590 (Stevens, J., concurring).

[68] *Id.* at 576.

Section 703(h)[69] routinely permits applying a bona fide seniority system for layoffs, absent discriminatory intent. The Court previously held in *Teamsters v. United States*[70] that "mere membership in the disadvantaged class is insufficient to warrant a seniority award."[71] Because the black beneficiaries in *Stotts* were not victims of past discrimination, but only members of a generally disadvantaged class, the Court found that the district court's order conflicted with *Teamsters*.[72] This was enough to decide the case.

The Supreme Court further considered the court order in light of section 706(g),[73] which generally controls a court's power to order Title VII litigation remedies. The Court ruled that *Teamsters* "is consistent with the policy behind section 706(g) of Title VII litigation remedies."[74] The Court continued: "That policy, which is to provide make-whole relief only to those who have been actual victims of illegal discrimination, was repeatedly expressed by the sponsors of the Act during the congressional debates."[75] Thus, the *Stotts* Court ruled that the district court's order not only violated *Teamsters*, but also violated "the policy behind § 706(g) as well."[76]

Even if seen as a holding, courts must construe the section 706(g) ruling against *Stotts*' particular facts. However, *Stotts* is a prime example of interpreting Title VII in accordance with the model of individual justice and the antidiscrimination principle.

C. Stotts *and* Weber

At one level, *Stotts* and *Weber* are reconcilable because *Stotts* involved sections 703(h) and 706(g), while *Weber* involved sections 703(a) and (d). But at a deeper level, *Stotts* and *Weber* are incompatible because they embody sharply conflicting models for interpreting Title VII and the Constitution. For example, selecting either model to exclusively govern section 706(g) in all cases would preclude the other. But even so, if the Court decided that the individual justice model exclusively controlled section 706(g), *Weber* might remain unaffected. *Weber* did not involve a court order subject to section 706(g). The Court would

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[69] 42 U.S.C. § 2000e-2(h) (1982). For the text of § 703(h), see *supra* note 40.
[70] 431 U.S. 324 (1977).
[71] *Stotts*, 467 U.S. at 579 (citing *Teamsters*, 431 U.S. at 367-71).
[72] *Id.* at 579-80.
[73] 42 U.S.C. § 2000e-5(g) (1982). For the text of § 706(g), see *supra* note 41.
[74] *Stotts*, 467 U.S. at 579.
[75] *Id.* at 580.
[76] *Id.* at 582-83.

have to choose between the necessary independence or interdependence of section 706(g) and the rest of Title VII, especially section 703. The Court made that choice last Term.[77] The underlying models have played a significant role in interpreting civil rights statutes, and because the Court assimilates its statutory and constitutional affirmative action rulings, the models are related to constitutional interpretation.

III. Constitutional Dimensions of Affirmative Action

Racially preferential affirmative action programs instituted by private employers, such as in *Weber*,[78] do not involve governmental action. Such programs directly raise questions only under Title VII, not the Constitution. But the constitutionality of racial preferences arises in at least two other contexts: (1) when a court orders race-based affirmative action,[79] and (2) when a public employer voluntarily adopts racial preferences. Last Term, in *Wygant v. Jackson Board of Education*,[80] the Supreme Court held that the Equal Protection Clause prohibits voluntary collectively bargained agreements under which preferential treatment against layoffs is extended solely because of race.

In 1972, the school board of Jackson, Michigan, reacting to community racial tensions and a threatened lawsuit from the NAACP, entered into a collective bargaining contract. The contract contained a racially preferential affirmative action plan prescribing a hiring policy goal of "at least the same percentage of minority racial representation on each individual staff as is represented by the student population of the Jackson Public Schools," and requiring that:

> In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, *except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of layoff.* In no event will the number given notice of possible layoff be greater than the number of positions to be eliminated. Each teacher so affected will be called back in reverse order for positions for which he is certified maintaining the above minority balance.[81]

In 1981, the school board laid off ten nonminority school teachers,

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[77] *See infra* note 174 and accompanying text.

[78] *See supra* note 35 and accompanying text.

[79] *See infra* note 174 and accompanying text.

[80] 106 S. Ct. 1842 (1986).

[81] *Id.* at 1845 (emphasis added). Article VII of the Collective Bargain Agreement defined "minority group personnel" as "those employees who are Black, American Indian, Oriental, or of Spanish descendancy." *Id.* at n.2.

including Wendy Wygant, while retaining minority teachers with less seniority. Wygant and others sued in federal court, alleging that the affirmative action layoff plan violated the Equal Protection Clause[82] and Title VII.[83] Plaintiffs lost in both the district court and the court of appeals,[84] which upheld the plan "as an attempt to remedy societal discrimination by providing 'role models' for minority school children."[85]

By a 5-4 vote the Supreme Court reversed *Wygant*, issuing five opinions. Although there was no opinion for the Court, eight Justices agreed on one proposition: remedying past or present illegal racial discrimination caused by a governmental entity warrants the voluntary use of a proper, carefully constructed, and not overly burdensome affirmative action program.

A. Strict Scrutiny of Racially Preferential Affirmative Action

After quickly establishing that school district collective bargaining agreements constitute state action,[86] the Court next examined the constitutional standard of review for affirmative action racial classifications. Writing explicitly for only four Justices,[87] Powell held that strict scrutiny is required. After squarely ruling that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination,"[88] Powell further ruled that for all race-based affirmative action programs the "level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination."[89]

Strict judicial scrutiny of affirmative action requires finding that (1) a racial classification is justified by a "compelling" governmental interest and (2) the racial classification is "narrowly tailored" to this interest (meaning that a less drastic alternative would not achieve the gov-

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[82] "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[83] *See* 42 U.S.C. §§ 2000e - 2000e-17 (1982).

[84] Wygant v. Jackson Bd. of Educ., 746 F.2d 1152 (6th Cir. 1984).

[85] *Wygant*, 106 S. Ct. 1842, 1846 (1986).

[86] *Id.* at n.4 (citing Abood v. Detroit Bd. of Educ., 431 U.S. 209, 218 n.12 (1977)).

[87] For himself and Justices Rehnquist, Burger, and O'Connor. Justice White concurred separately.

[88] *Wygant*, 106 S. Ct. at 1846 (quoting from his opinion in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978)).

[89] *Id.* (quoting from Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 n.9 (1982)).

ernment's interest).[90] In *Wygant*, the questions became whether the state's interest in providing "role models" for minority children constituted a "compelling" interest, and whether the means chosen — the layoff plan — was "narrowly tailored" to accomplish that result.

On the first question, Justice Powell concluded that the state's interest in providing minority students with minority faculty as role models did not constitute a compelling interest. Powell insisted that the "Court never has held that societal discrimination alone is sufficient to justify a racial classification," but rather that "the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination."[91] In short, the Constitution requires a specific factual predicate for exclusionary affirmative action programs. Further, Powell wrote that even if the Board could have supplied a compelling interest by establishing prior racial discrimination, "the layoff provision was not a legally appropriate means of achieving even a compelling purpose."[92] In other words, *Wygant*'s affirmative action program, seen as a means to a compelling end, was inappropriate and insufficiently "narrowly tailored."[93]

Powell's ruling requiring strict scrutiny was not precedential because only four Justices voted on that ground. Justice White did not, although his vote in *Bakke*,[94] like Powell's, was for strict scrutiny of all racially preferential affirmative action programs. On this basis, I conclude that five Justices would require[95] strict constitutional scrutiny of all racially preferential affirmative action programs. However, the five votes have never been cast in a way to become a firm precedent. Thus for this four-Justice plurality, exclusionary racially preferential affirmative action is necessarily remedial and subject to strict scrutiny. Strict scrutiny requires proven past racial discrimination by the governmental unit involved — a factual predicate — thus limiting racially preferen-

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[90] *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429, 432 (1984); Fullilove v. Klutznick, 448 U.S. 448, 480 (1980); Loving v. Virginia, 388 U.S. 1, 11 (1967).

[91] *Wygant*, 106 S. Ct. at 1847.

[92] *Id.* at 1849.

[93] *See infra* note 120 and accompanying text.

[94] In *Bakke*, in a footnote, Justice White stated: "I also join Part . . . III-A . . . of Mr. Justice Powell's Opinion." 438 U.S. at 387 n.7. In Part III-A Powell developed his strict scrutiny standard for *Bakke* restated in *Wygant*. This also explains White's vote in Fullilove v. Klutznick, 448 U.S. 448 (1980).

[95] The five votes are those of former Chief Justice Burger and Justices Powell, Rehnquist, O'Connor, and White. For a discussion of Justice Scalia's replacement of Chief Justice Burger, see *infra* note 119 and accompanying text.

tial affirmative action programs to remedying only that governmental unit's own prior racial discrimination.[96]

The plurality's required factual predicate necessitates, at a minimum, that a trial court must make careful findings of fact on this subject before deciding whether any state agency is justified in instituting a voluntary remedial plan. However, this plurality does not accept the full sweep of the antidiscrimination principle and constitutionally limit affirmative action to only proven victims of past illegal discrimination.

A remedial purpose is legitimate so long as the state actor has a strong evidentiary basis for believing that voluntary, remedial affirmative action is necessary. After *Wygant*, a prudent governmental unit will accompany any voluntarily initiated affirmative action program with carefully assembled contemporaneous evidence of the nature and scope of its past, actual racial discrimination.

Evidentiary support for a voluntarily instituted affirmative action plan becomes crucial when nonminority employees challenge the plan. Although the state employer must show that it "had a strong basis in evidence for its conclusion that remedial action was necessary," the "ultimate burden remains with the plaintiff-employees to demonstrate the unconstitutionality of the affirmative action program."[97] Thus, *Wygant* creates an anomalous situation. Plaintiffs attacking affirmative action now must prove that past school board action was not illegal racial discrimination, or that prior racial discrimination was not the board's. The school board is put in the opposite and unusual position of defending its remedial affirmative action by proving that it is guilty of past racial transgressions. Justice O'Connor suggested a school board, or court, should ask: Is there "demonstrable evidence" of past school board racial discrimination "sufficient to support a prima facie Title VII pattern or practice claim?"[98] If so, that "would lend a compelling basis for a competent authority such as the School Board to conclude that implementation of a voluntary affirmative action plan is appropriate to remedy apparent prior employment discrimination."[99] The Court has yet

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[96] Powell relied on Hazelwood School Dist. v. United States, 433 U.S. 299 (1977), a Title VII "pattern or practice" case, as demonstrating "this Court's focus on prior discrimination as the justification for, and the limitation on, a State's adoption of race-based remedies." *Wygant*, 106 S. Ct. at 1847.

[97] *Wygant*, 106 S. Ct. at 1848.

[98] *Id.* at 1856.

[99] *Id.*

> The "pattern or practice" language in § 707(a) of Title VII, . . . was not intended as a term of art, and the words reflect only their usual meaning. Senator Humphrey explained:

to identify the exact character of the predicate that would justify a voluntarily instituted exclusionary affirmative action program.[100]

1. Justice Stevens' "Policy" Analysis

Justice Stevens' dissent did not apply strict scrutiny to *Wygant*'s racial classification. He held that the program was not remedial, and therefore not subject to standards governing an affirmative action program.[101] "Rather than analyze a case of this kind [*Wygant*] by asking

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> " [A] pattern or practice would be present only where the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature. There would be a pattern or practice if, for example, a number of companies or persons in the same industry or line of business discriminated, if a chain of motels or restaurants practiced racial discrimination throughout all or a significant part of its system, or if a company repeatedly and regularly engaged in acts prohibited by the statute.
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> . . . .
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> "The point is that single, insignificant, isolated acts of discrimination by a single business would not justify a finding of a pattern or practice . . . ."

Teamsters v. United States, 431 U.S. 324, 336 n.16 (1977) (quoting 110 CONG. REC. 14,270 (1964)).

[100] The Court could use a pending case, Johnson v. Transportation Agency, Santa Clara County, California, 748 F.2d 1308 (9th Cir. 1984), *aff'd*, No. 85-1129, slip op. (Mar. 25, 1987), to clarify this matter. Santa Clara County, California, adopted a sex-based affirmative action plan for its transportation agency after finding that the work force was 100% male. There is no evidence of direct, intentional discrimination, nor of persistent or egregious sex discrimination. The case involves statistics. Because of the plan, Paul Johnson lost out on a promotion to a woman who scored several points lower than he on the agency's civil service test.

The case potentially raises two issues. The first regards the constitutional doctrines governing the application of affirmative action plans to sex discrimination, raising the issue of the proper character of an affirmative action predicate in the area of sex discrimination. The second issue is the status of affirmative action plans involving promotions. In this Term's race case, United States v. Paradise, 107 S. Ct. 1053 (1987), the Court did not fully resolve all aspects of the promotion issue. Last Term the Court held that affirmative action plans for hiring can be acceptable, but that affirmative action involving layoffs are not. The burden on those who are laid off is much heavier than the burden on someone who simply does not receive a job, the Justices have said. But notwithstanding United States v. Paradise, it remains unclear where promotions fall on the scale.

[101] The *Wygant* Court did not preclude the constitutional validity of using racial classification for reasons other than remedying past discrimination. *See Wygant*, 106 S. Ct. 1842 (5-4 decision). Justice Stevens' dissent affirms that "the public interest in educating children for the future" could justify *Wygant*'s plan as a matter of policy. *Id.*

whether minority teachers have some sort of special entitlement to jobs as a remedy for sins that were committed in the past," he stated, "I believe we should first ask whether the Board's action advances the public interest in educating children for the future." If so, "I believe we should consider whether that public interest, and the manner in which it is pursued, justifies any adverse effects on the disadvantaged group."[102] He offered no reason for viewing *Wygant* in this perspective rather than a remedial one. He believed that the collectively bargained contract stated a valid public purpose — the "recognition of the desirability of multi-ethnic representation on the teaching faculty" — and thus "a policy of actively seeking minority group personnel" was rational.[103]

For Stevens, *Wygant*'s program, even though exclusionary, was simply a matter of educational policy, similar to the voluntary busing policy approved in *Swann v. Charlotte-Mecklenburg*.[104] But Stevens offered no standard for identifying when a state actor's race-based program is a prospective matter of "policy" governed by reasonable judicial scrutiny, and when the program is "remedial." If the program is remedial, Stevens held that the state must demonstrate "the most exacting connection between justification and classification."[105] *Wygant* seems to fall into the remedial category. The facts clearly involved an historical focus and a racial preference in an exclusionary affirmative action context. The racial preference produced clear winners and losers solely on racial grounds in "an attempt to remedy the effects of societal discrimination."[106]

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at 1867. In dissent, Marshall, joined by Brennan and Blackmun, indicated that a policy rationale rather than a remedial rationale might suffice; i.e., "the state purpose of preserving the integrity of a valid hiring policy — which in turn sought to achieve diversity and stability for the benefit of *all* students — was sufficient . . . to satisfy the demands of the Constitution." *Id.* at 1863 (Marshall, J., dissenting) (emphasis in original). Justice O'Connor, the fifth Justice addressing this point, stated that the *Wygant* Court had not "foreclose[d] the possibility" that "governmental interests," other than remedying past illegal discrimination, might justify use of affirmative action policies [such as a racial classification]. *Id.* at 1853 (O'Connor, J., concurring). She distinguished the rejected "goal of providing 'role models' " from "the very different goal of promoting racial diversity among the faculty." *Id.* at 1854 n.*.

[102] *Id.* at 1867 (Marshall, J., dissenting) (basically following format in his concurrence in Cleburne v. Cleburne Living Center, 105 S. Ct. 3249, 3261-62 (1985)).

[103] *Id.* at 1868.

[104] 402 U.S. 1 (1971); *see supra* note 12 and accompanying text.

[105] Fullilove v. Klutznick, 448 U.S. 448, 537 (1980).

[106] *Wygant*, 106 S. Ct. at 1845 (Justice Powell reporting conclusions of prior cases litigating *Wygant*'s affirmative action program).

On the merits, Justice Stevens simply ignored the issues and arguments about the role-model theory. He first sought to identify whether the school board had a valid public purpose for its "policy." He observed that a school board "may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all white or nearly all white faculty."[107] He continued that white children are really the beneficiaries:

> For one of the most important lessons that the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous "melting pot" do not identify essential differences among the human beings that inhabit our land. It is one thing for a white child to be taught by a white teacher that color, like beauty, is only "skin deep," it is far more convincing to experience that truth on a day to day basis during the routine, ongoing learning process.
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> In this case, the collective-bargaining agreement between the Union and the Board of Education succinctly stated a valid public purpose — "recognition of the desirability of multi-ethnic representation on the teaching faculty," and thus "a policy of actively seeking minority group personnel." . . . Nothing in the record — not a shred of evidence — contradicts the view that the Board's attempt to employ, and to retain, more minority teachers in the Jackson public school system served this completely sound educational purpose. Thus, there was a rational and unquestionably legitimate basis for the Board's decision to enter into the collective-bargaining agreement, that petitioners have challenged, even though the agreement required special efforts to recruit and retain minority teachers.[108]

Stevens' assessment is weak. First, the school board consistently justified its program as ameliorating prior racial discrimination by providing minority students with minority faculty role models. Stevens advanced a wholly different rationale — that white children, not minority children, are the true beneficiaries of teaching by minority faculty.[109]

Second, Stevens' analysis is based on the same standard of mere reasonableness that resulted in *Plessy v. Ferguson*'s approval of the sepa-

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[107] *Id.* at 1868.

[108] *Id.*

[109] Moreover, whether a white (or other) child actually concludes from having a minority teacher, as Justice Stevens would have her conclude, that color is only skin deep and does "not identify essential differences among . . . human beings" depends on the character and quality of the relationship the child has with the teacher, plus the quality of the teacher, plus the student's perceptiveness and character. *Id.* This judgment involves a very complex intellectual and psychological state of affairs, unexplored by Stevens, including the student's ultimate judgment that color is or is not only skin deep, and is a product of much more than her interaction with minority teachers. It at least includes her full life experiences, especially her relations with fellow students, minority and nonminority, and others similarly situated.

rate but equal doctrine.[110] All other Supreme Court Justices have rejected the mere reasonableness standard when judging an exclusionary racial classification "[b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate,"[111] and because "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification."[112]

Third, if Stevens really accepts the propriety of a school board's racial assignment of minority teachers to nonminority student classes, then he must accept a school board's racial assignment of all teachers if that will promote learning by all students. This could lead to a system similar to the one condemned in *Brown*. He has not adequately explained why one is permissible but the other not. Suppose evidence existed showing that strictly racially segregated classes taught by members of their own race within an "integrated" school building led to better academic achievement for all students. Using Stevens' analysis, could a board adopt a program of segregated classes within an integrated school? Stevens answers in the negative because there is a "critical difference between a decision to *exclude* a member of a minority race because of his or her skin color and a decision to *include* more members of the minority in a school faculty for that reason."[113] That is true, but irrelevant because the hypothetical program does not exclude minority students or minority teachers from the school's faculty or building. It excludes only minority teachers from teaching classes with nonminority students. Moreover, students have no constitutional right to teachers of a different race (or their own race), nor do teachers have constitutional rights to students of a different race (or their own race), and Stevens does not advocate finding such constitutional rights.

After concluding that the Board's affirmative action purpose was valid, Stevens assessed the gravity of the harm to the laid-off teachers by considering two items. One regarded the fairness of the procedures producing the collectively bargained agreement, and the other was "the nature of the harm itself." First, Stevens concluded that "there can be

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[110] *See* Plessy v. Ferguson, 163 U.S. 537 (1896). However, Justice Stevens undoubtedly would not use it in such a way.

[111] Fullilove v. Klutznick, 448 U.S. 448, 533-35 (1980) (Stevens, J., dissenting) (footnotes omitted).

[112] *Id.* at 537.

[113] *Wygant*, 106 S. Ct. at 1869 (emphasis in original).

no question about either the fairness of the procedures used to adopt the race-conscious provision, or the propriety of its breadth,"[114] because the nonminority teachers voted on the collectively bargained contract. However, the contract included items other than the affirmative action program, such as salary, that could account for their votes. A procedure's fairness is quite different from, and independent of, the justice of the result. Fair procedures do not automatically result in justice.[115]

Second, on "the nature of the harm itself," Stevens concluded that although job loss is a serious harm, such loss was not unique to that program. He reasoned that:

> [T]he same harm might occur if a number of gifted young teachers had been given special contractual protection because their specialties were in short supply and if the Jackson Board of Education faced a fiscal need for layoffs. A Board decision to grant immediate tenure to a group of experts in computer technology, an athletic coach, and a language teacher, for example, might reduce the pool of teachers eligible for layoffs during a depression and therefore have precisely the same impact as the racial preference at issue here. In either case, the harm would be generated by the combination of economic conditions and the special contractual protection given a different group of teachers . . . .[116]

Stevens' examples are irrelevant to *Wygant*'s issue because none implicate heightened scrutiny under the fourteenth amendment and none involve a race-based harm. Some teachers may lose their jobs during financial emergencies because other teachers are retained, but *Wygant* questioned whether this consequence, achieved by deliberately using race as the decisive standard, was constitutional. Perhaps sensing his position's weakness, Stevens argued:

> The fact that the issue arises in a layoff context, rather than in a hiring context, has no bearing on the equal protection question. For if the Board's interest in employing more minority teachers is sufficient to justify providing them with an extra incentive to accept jobs in Jackson, Michigan, it is also sufficient to justify their retention when the number of available jobs is reduced.[117]

This position, too, is weak. Stevens ignores that excluding an applicant on racial grounds is less egregiously harmful than firing a tenured teacher of proven ability because of race.

Finally, Justice Stevens never considers *Wygant*'s all-important ratio. The Board's program required "at least the same percentage of minor-

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[114] *Id.*

[115] *See* R. DWORKIN, LAW'S EMPIRE 177 (1986).

[116] *Wygant*, 106 S. Ct. at 1870.

[117] *Id.* at n.14.

ity racial representation on each staff as is represented by the student population of the Jackson public schools."[118] Stevens never discusses, or even confronts, why that particular ratio of minority faculty to minority students correctly identifies the needed number of minority teachers in the district.

2. Justice Scalia

The Supreme Court will likely become more entrenched against affirmative action with the addition of Justice Scalia. Scalia has written:

> I am, in short, opposed to racial affirmative action for reasons of both principle and practicality. Sex-based affirmative action presents somewhat different constitutional issues, but it seems to me an equally poor idea, for many of the reasons suggested above. I do not, on the other hand, oppose — indeed, I strongly favor — what might be called (but for the coloration that the term has acquired in the context of its past use) "affirmative action programs" of many types of help for the poor and disadvantaged. It may well be that many, or even most, of those benefited by such programs would be members of minority races that the existing programs exclusively favor. I would not care if *all* of them were. The unacceptable vice is simply selecting or rejecting them *on the basis of their race.*[119]

From his writings, Scalia views governmental race-conscious affirmative action as inherently unconstitutional because all racial discrimination is invidious discrimination. Justice Powell's strict scrutiny position admits that race is a permissible constitutional criterion in some circumstances. Scalia denies this except, presumably, in a rigorously remedial court order correcting past illegal racial discrimination in accordance with the model of individual justice. No Justice in *Wygant* argued that all racially conditioned, remedial affirmative action programs must benefit only actually identified victims of past illegal racial discrimination. Eight Justices rejected that proposition.

B. The Constitutionality of Remedial Affirmative Action That Severely Burdens Innocent Persons

In part IV of *Wygant*, Powell wrote for himself, Rehnquist, and Burger. He ruled that in appropriate circumstances remedial affirmative action programs may use a racial classification as their means[120]

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[118] *Wygant*, 746 F.2d 1152, 1158 (6th Cir. 1984) (emphasis removed from original).

[119] Scalia, *The Disease as Cure: In Order to Get Beyond Racism, We Must First Take Account of Race*, 1979 WASH. U.L.Q. 147, 156 (emphasis in original); *see infra* text accompanying note 260.

[120] *Wygant*, 106 S. Ct. at 1850. "We have recognized, however, that in order to remedy the effects of prior discrimination, it may be necessary to take race into ac-

and that 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."[121]

However, the race-based means chosen to cure the effects of past racial discrimination cannot too greatly or too severely burden innocent parties. For example, these Justices considered it important that *United Steelworkers v. Weber*'s[122] voluntarily instituted, remedial affirmative action plan did not "unnecessarily trammel the interests of the white employees."[123] Nor did it "require the discharge of white workers and their replacement with new black hirees."[124] In *Fullilove v. Klutznick*,[125] Congress' ten percent set-aside of governmentally funded public works contracts for minority firms was upheld, in part, because the "actual 'burden' shouldered by nonminority firms is relatively light."[126] And, in *Memphis Firefighters v. Stotts*,[127] the Court expressed "concern over the burden that a preferential layoff scheme imposes on innocent parties."[128]

Powell distinguished valid affirmative action hiring plan burdens, characterizing them as "diffuse" and "often foreclosing only one of several opportunities," from layoff plan burdens that are specific and necessarily disrupt "settled expectations in a way that general hiring goals do not."[129] He divided the program's effect into a quantitative consideration and a qualitative consideration: (1) Is the plan's impact narrowly concentrated, burdening only a very few, and clearly identified, innocent persons, or is it widely diffused, burdening many, probably unidentified, persons?, and (2) Does the burden impinge on a very valuable and important interest or one of less importance and esteem? Powell concluded that "layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives."[130] Judging that burden as "too intrusive," the

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count." *Id.*

[121] *Id.* (quoting Fullilove v. Klutznick, 448 U.S. 448, 484 (1980), in turn quoting Franks v. Bowman Transp. Co., 424 U.S. 747 (1976)).

[122] 443 U.S. 193 (1979).

[123] *Id.* at 208.

[124] *Id.*

[125] 448 U.S. 448 (1980).

[126] *Id.* at 484.

[127] 467 U.S. 561 (1984).

[128] *Wygant*, 106 S. Ct. at 1851; *see Stotts*, 467 U.S. at 574-76, 578-79.

[129] *Wygant*, 106 S. Ct. at 1851.

[130] *Id.* at 1851-52. One question seems to be whether the burdens imposed by an exclusionary affirmative action program foreclose only one opportunity, leaving undisturbed other opportunities, or whether it forecloses all reasonable alternatives. Powell

three Justices held "that, as a means of accomplishing purposes that otherwise may be legitimate, the Board's layoff plan is not sufficiently narrowly tailored," because other "less intrusive means of accomplishing similar purposes — such as the adoption of hiring goals — are available."[131]

In a short concurrence, Justice White rested on underlying considerations similar to Powell's opinion.[132] Justice O'Connor agreed with Powell's focus on means, but differed in her analysis. She concentrated on *Wygant*'s goal of having "at least the same percentage of minority racial representation on each individual staff as is represented by the student population of the Jackson Public Schools."[133] Years before, in *Hazelwood School District v. United States*,[134] the Supreme Court had ruled that there "can be no doubt . . . that the . . . comparison of Hazelwood's teacher work force to its student population fundamentally misconceived the role of statistics in employment discrimination cases" and "that a proper comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market."[135] Characterizing the disparity between minority teachers and students as "not probative of employment discrimination," O'Connor concluded: "Because the layoff provision here acts to maintain levels of minority hiring that have no relation to remedying employment discrimination, it cannot be adjudged 'narrowly tailored' to effectuate its asserted remedial purpose."[136] Characterized differently, the Jackson

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wrote:

> The "school admission" cases, which involve the same basic concepts as cases involving hiring goals, illustrate this principle. For example, in *DeFunis v. Odegaard*, 416 U.S. 312, 94 S. Ct. 1704, 40 L.Ed.2d [sic] 164 (1974), while petitioner's complaint alleged that he had been denied admission to the University of Washington Law School because of his race, he also had been accepted at the Oregon, Idaho, Gonzaga, and Willamette Law Schools. *DeFunis v. Odegaard*, 82 Wash.2d [sic] 11, 30, [sic] n.11, 507 P.2d 1169, 1181, [sic] n.11 (1973). The injury to DeFunis was not of the same kind or degree as the injury that he would have suffered had he been removed from law school in his third year. Even this analogy may not rise to the level of harm suffered by a union member who is laid off.

Id. at 1851 n.11.

[131] *Id.* at 1852.

[132] *Id.* at 1857-58.

[133] *Wygant*, 746 F.2d at 1158.

[134] 433 U.S. 299 (1977).

[135] *Id.* at 308 (Stevens, J., dissenting) (footnote omitted).

[136] *Wygant*, 106 S. Ct. at 1857.

School Board failed to present the proper factual predicate for its program — an equally fatal defect.

Justice Stevens' dissent in *Wygant*,[137] and Justices Marshall, Brennan, and Blackmun in dissent agreed that a critical dimension of any affirmative action program's validity is its impact on innocent parties.[138] Eight Justices agreed that courts must assess an affirmative action program's impact on innocent third parties and that a program is constitutionally invalid if "too severe." Justice O'Connor would probably agree. However, the Justices disagree on what constitutes "too" severe.

IV. Consent Decrees and Title VII

Last Term,[139] the Supreme Court confronted whether section 706(g)[140] bars a consent decree instituting an exclusionary affirmative action program not limited to actually identified victims of past discrimination. The decision is narrow, avoiding all substantive affirmative action questions. The Court held only that section 706(g) was not such a bar:

> Because § 706(g) is not concerned with voluntary agreements by employers or unions to provide race-conscious relief [*Weber*], there is no inconsistency between it and a consent decree providing such relief, although the court might be barred from ordering the same relief after a trial or, as in *Memphis Firefighters v. Stotts*, in disputed proceedings to modify a decree entered upon consent.[141]

The Vanguards, Cleveland's black and Hispanic firefighters organization, filed a Title VII action complaining that the city had discriminated on the basis of race and national origin "in the hiring, assignment and promotion of firefighters . . . ."[142] Earlier litigation found

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[137] *Id.* at 1864-65.

[138] *Id.* at 1870 ("Finally we must consider the harm to the petitioners.").

[139] *See supra* note 1.

[140] 42 U.S.C. § 2000e-5(g) (1982). For the text of § 706(g), see *supra* note 41. Section 706(g) was modeled after § 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c) (1982). *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 769 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 n.11 (1975). Principles developed under the National Labor Relations Act "guide, but do not bind, courts in tailoring remedies under Title VII." Ford Motor Co. v. EEOC, 458 U.S. 219, 226 n.8 (1982).

[141] Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, 106 S. Ct. 3063, 3079 (1986). The Court held that "whether or not § 706(g) precludes a court from imposing certain forms of race-conscious relief after trial, that provision does not apply to relief awarded in a consent decree." *Id.* at 3064.

[142] *Id.* at 3066.

unlawful racial discrimination in the city's fire department and a consent decree imposed hiring quotas.

The Union intervened as of right and vigorously objected to any consent decree basing "promotions . . . upon any criterion other than competence, such as a racial quota system . . . ."[143] The Union did not "allege any causes of action or assert any claims against either the Vanguards or the City."[144]

The Vanguards and the city asked the court to approve a consent decree stating that the city discriminated against minorities in promotion, but did not delineate the discrimination's scope or nature and identified no victims. The proposed affirmative action promotion plan divided firefighters eligible for promotion into two lists — one minority and the other nonminority — ranked according to seniority and examination results. Promotions would take place two at a time — one person from each list — with the result that black and Hispanic firefighters would displace and leapfrog over higher-ranking whites. The trial judge adopted the consent decree and a divided Sixth Circuit Court of Appeals affirmed. The Union sought review in the Supreme Court. Ruling narrowly, the Court held only that the consent decree did not qualify within the meaning of an "order of the court" under section 706(g), and therefore was not subject to *Stotts* or any limitations in that section.[145]

Justice Brennan's opinion for the Court tracked *United Steelworkers v. Weber*.[146] He reasoned that the rationale behind section 706(g)'s policy of preventing courts from unduly interfering with the managerial discretion of employers or with unions was overriding.[147] Under this view, section 706(g)'s limitations apply solely to courts, not to employers or unions. The limitations on such agreements are not found in section 706(g), but elsewhere, perhaps in section 703 or in the Constitution.[148] Focusing on the overriding policy, the Court concluded that section 706(g) "by itself does not restrict the ability of employers or unions to enter into voluntary agreements providing for race conscious remedial action."[149]

This analysis preserves *Weber*'s group-justice approach, and limits

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[143] *Id.* at 3068.

[144] *Id.* at 3067-68.

[145] *Id.* at 3079.

[146] 443 U.S. 193 (1979).

[147] *Cleveland Firefighters*, 106 S. Ct. 3063, 3075 (1986).

[148] *Id.*

[149] *Id.*

Stotts' interpretation of section 706(g) to court-ordered remedies in seniority and make-whole relief contexts governed by section 703(h) and the model of individual justice. However, *Local Number 93, International Association of Firefighers v. City of Cleveland*'s[150] consent decree would most likely have been an "order" within section 706(g) had the Union intervenor asserted any legal claims against either the Vanguards or the city and the consent decree had resolved them.[151]

In dissent, Justice Rehnquist admitted that "the legislative history may be fairly apportioned among both sides," but he insisted that "the language of the statutes is clear."[152] Section 706(g)'s critical language states that "[n]o order of the Court shall require the . . . promotion of an individual . . . if such individual was refused advancement . . . for any reason other than discrimination on account of race . . . ."[153] For Rehnquist, that language limited section 706(g) to remedies for identified racial discrimination victims only, and applied to all court orders, including all consent decrees. A court adjudicates in rendering a consent judgment, because it issues an enforceable order. As such, consent decrees are subject to section 706(g).[154]

Justice White also dissented, primarily on the ground that the affirmative action remedy was inequitable because of its burden on nonminorities:

> This kind of leapfrogging minorities over senior and better qualified whites is an impermissible remedy under Title VII, just as in *Stotts*' laying off senior whites was an excessive remedy for an employer's prior discrimination, and just as in *Wygant*, the Equal Protection Clause did not require or permit the layoff of white teachers in order to maintain a particular racial balance in the work force.[155]

White's statutory analysis was akin to Powell's constitutional analysis in *Wygant*. A clear factual predicate identifying the city's past racial

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[150] 106 S. Ct. 3063 (1986).

[151] An analytical problem exists here. If the Union did not suffer any injury in fact, then it is hard to identify, under cases like Warth v. Seldin, 422 U.S. 490 (1975), exactly how the Union presented the constitutionally necessary standing requirements to litigate in the federal courts. True, the Union had intervened under Federal Rule of Civil Procedure 24(a)(2) as party plaintiff, but this rule cannot override constitutional requirements and confer standing. On the other hand, if the Union did present the constitutionally required injury in fact and hence had standing, it is difficult to identify why the court's action was not an adjudication of the Union's interests, and hence an "order" within § 706(g).

[152] *Cleveland Firefighters*, 106 S. Ct. at 3087.

[153] 42 U.S.C. § 2000e-5(g) (1982).

[154] *Cleveland Firefighters*, 106 S. Ct. at 3082-87.

[155] *Id.* at 3082.

discrimination was crucial. Section 703 forbids racial discrimination in hiring or promotion, and an employer may adopt an affirmative action plan only to remedy its own past racial discrimination. An employer may not adopt an exclusionary affirmative action program broader in scope than its prior racial discrimination.[156] Without a clearer factual predicate, White observed, a judge could not identify whether the *Cleveland Firefighters*' plan remedied only the city's past discrimination or whether it went further, achieving a racially balanced work force at innocent whites' expense. White agreed with Rehnquist that the consent decree was an "order" under section 706(g).[157] For Rehnquist, a court's "authority to adopt a consent decree comes only from the statute which the decree is intended to enforce, not from the parties' consent to the decree."[158] Thus, White, Rehnquist, and Burger refused to interpret section 706(g) in isolation from the rest of Title VII. They would interpret that section in conjunction with, and limited by, section 703.

A. Remaining Constitutional and Statutory Problems

Cleveland Firefighters' consent decree binds only the city and the Vanguards, not the Union or unrepresented individual firefighters. The Court stated that "parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a fortiori* may not impose duties or obligations on a third party, without that party's agreement."[159] Thus, because a "court's approval of a consent decree between some of the parties . . . cannot dispose of the valid claims of nonconsenting intervenors [such as the Union], if properly raised, these claims remain and may be litigated by the intervenor . . . [in] the District Court, which has retained jurisdiction to hear such challenges."[160]

Thus the Union and the employees not represented by the Vanguards may challenge the consent decree's exclusionary affirmative action program either for consistency with sections 703(a)[161] and (d)[162] as

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[156] "Under the present law, an employer may adopt or be ordered to adopt racially discriminatory hiring or promotion practices favoring actual or putative employees of a particular race only as a remedy for its own prior discriminatory practices disfavoring members of that race." *Id.* at 3081.

[157] *Id.* at 3082.

[158] *Id.* at 3083 (quoting *Stotts*, 467 U.S. at 576 n.9).

[159] *Id.* at 3079.

[160] *Id.* at 3079-80 (footnotes omitted).

[161] 42 U.S.C. § 2000e-2(a) (1982). For the text of § 703(a), see *supra* note 38.

interpreted in *Weber*,[163] or as a breach of the collective bargaining agreement. Further, these plaintiffs may test the consent decree for consistency with the fourteenth amendment as interpreted in *Wygant*,[164] requiring that public employers demonstrate their prior illegal racial discrimination before entering into a consent decree.

Cleveland Firefighters indicates that a consent decree does not provide an employer with an umbrella of protection.[165] If the consent decree violates city or state civil service laws, disadvantaged employees not represented in the consent decree may sue. Also, the consent decree does not bind the Union, and it can seek to bargain for a new contract inconsistent with the decree. Presumably the City could not refuse to bargain in good faith with the Union on the ground that it was bound by the decree because that would compromise the Union's interests without its consent.

Weber held that sections 703(a) and (d) do "not condemn all private, voluntary, race-conscious affirmative action plans."[166] The obvious inference is that some racially preferential plans, such as *Weber*'s, are consistent with those sections' prohibitions and others are not. *Cleveland Firefighters* and *Wygant* suggest at least two criteria for distinguishing such plans: the factual predicate and the burden on innocent parties.

1. The Factual Predicate

Because the Court assimilates Title VII and constitutional standards, the first criterion is a clear and accurate factual predicate. The *Cleveland Firefighters* Court expressly refrained from deciding "what showing [an] employer would be required to make concerning prior discrimination on its part against minorities in order to defeat a challenge by non-minority employees based on § 703."[167] This disclaimer indicates that an employer must demonstrate a factual predicate "concerning prior discrimination on its part against minorities."

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[162] 42 U.S.C. § 2000e-2(d) (1982). For the text of § 703(d), see *supra* note 39.

[163] *See supra* notes 35-54 and accompanying text.

[164] *See supra* notes 80-86 and accompanying text.

[165] For example, the Court analogized the consent decree in the *Cleveland Firefighters* situation to W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757 (1983), in which the Court held that if an employer made promises in a collective bargain agreement and then made inconsistent promises to Title VII plaintiffs in an EEOC conciliation agreement, the employer could be held accountable for breach of the collective bargain contract.

[166] *Weber*, 443 U.S. 193, 208 (1979).

[167] *Cleveland Firefighters*, 106 S. Ct. at 3073 n.8.

By requiring a clear and accurate factual predicate, courts could judge the racial preference's scope. The courts could then determine whether an employer is remedying prior illegal racial discrimination or whether the employer is "balancing" its work force at nonminorities' expense and in violation of section 703. Justice White believes a clear and accurate factual predicate is the current requirement, stating that in *Weber* "the company's prior discriminatory conduct provided the predicate for a temporary remedy favoring black employees."[168] Justice O'Connor approvingly commented that "[i]f *Weber* indicates that an employer's or union's 'prior discriminatory conduct' is the necessary 'predicate for a temporary remedy favoring black employees' . . . the Court's opinion leaves that requirement wholly undisturbed."[169] The Court will likely reconsider *Weber* on this point.[170] If not, public employers must follow stricter requirements for consent decrees instituting affirmative action plans than do private employers. Yet the risk of discrimination against innocent employers in the private sector is greater than in the public sector. However, Congress originally enacted Title VII to apply only to the private sector, and its goal is to eliminate discrimination in both sectors.

2. Assessing the Burden on Innocent Parties

The second criterion for judging whether a consent decree comports with section 703 is the burden placed on the innocent. In *Wygant*, the

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[168] *Id.* at 3081.

[169] *Id.* at 3080.

[170] If Justice White's view of *Weber* prevails (he was in *Weber*'s 5-2 majority with Justices Powell and Stevens not participating), and if the Court holds that voluntary, exclusionary affirmative action is permissible for employers or unions only if they can show that they, themselves, have discriminated, then the Court must deal with Exec. Order No. 11,246, 3 C.F.R. 339 (1964), *reprinted in* 42 U.S.C. § 2000e, at 28 (1982), issued by President Johnson, and the Department of Labor's Office of Federal Contract Compliance Programs, 41 C.F.R. § 60-3 (1986). Under these regulations, a governmental contractor's obligations to adopt goals and timetables are triggered by minority underrepresentation and not by that contractor's past racial discrimination. It has been estimated that two-thirds of the jobs in the national labor market may be in firms affected by the executive order, which applies to all federal contracts, all their subcontracts, and all federally assisted construction contracts greater than $10,000. *See* J. LEONARD, THE IMPACT OF AFFIRMATIVE ACTION 133 (1983). From 1970 to 1980, statistics show all improvement in black employment in private firms subject to EEOC reporting requirements under Title VII actually occurred only with respect to federal contractors subject to Executive Order 11,246. *See* Smith & Welch, *Affirmative Action and Labor Markets*, 2 J. LAB. ECON. 269, 280-83 (1984). Fullilove v. Klutznick, 448 U.S. 448 (1980), may be a relevant precedent supporting the Executive Order.

Equal Protection Clause did not permit laying off white teachers to maintain a particular racial balance in the workforce. *Stotts* precluded laying off senior whites as an excessive remedy for an employer's prior discrimination under Title VII. It appears the die has been cast against affirmative action layoffs. The Court will assess the burdens imposed by affirmative action promotions given their impacts on existing employee expectations, and will require more precise analysis. Race-based hiring preferences[171] share some characteristics of race-based promotion preferences in that they do not actually displace any person from a job. But racial promotion preferences also share some characteristics of race-based layoffs, stricken in *Wygant*. Such preferences defeat reasonable and legitimate expectations, and their burdens fall on a clearly identifiable, and usually small, employee group. The Court has recently decided a case involving a race-based promotion preference.[172]

V. Court Ordered Goals or Quotas Benefiting Nonvictims

In the final case of last Term's trilogy, *Local 28 of the Sheet Metal Workers' International Association v. EEOC*,[173] the Court issued five

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[171] *See infra* note 174 and accompanying text.

[172] Paradise v. Prescott, 767 F.2d 1514 (11th Cir. 1985), *aff'd*, United States v. Paradise, 107 S. Ct. 1053 (1987). This case began in 1972 when the National Association for the Advancement of Colored People sued the Alabama state trooper force. Under a consent decree filed in 1979, the state agreed to develop procedures to ensure nondiscriminatory promotions of black troops to the rank of corporal. The state failed to do so, and repeatedly engaged in delay tactics, refusing to comply with the consent decree.

Late in 1983, an exasperated district court ordered the state to promote one black trooper for each white trooper promoted until the corporal ranks were 25% black, but only if the black troopers were qualifed, and only if the Department had not developed and implemented a promotion plan without adverse impact for the relevant rank. The federal government, which had originally intervened in the case on the NAACP's side, joined Alabama in appealing that order.

The appeals court found that the quota order was justified by the state trooper force's long history of "egregious" racial discrimination; by the fact that no white trooper was denied a job or permanently barred from promotion; by the fact that the quota was no broader than necessary to erase the effects of past discrimination; and by the absence of any less drastic but effective alternative. The government argued that the quota violated the Constitution. *See infra* notes 236-46 and accompanying text.

[173] 106 S. Ct. 3019 (1986). Justice Brennan announced the Court's opinion, which was joined in all parts only by Justices Marshall, Blackmun, and Stevens. Justice O'Connor concurred and dissented, joining only parts of Brennan's opinion, as did Justice Powell, who also wrote separately, concurring in part and concurring in the judgment. Justice White dissented separately but agreed "in general" with parts of Justice

opinions. The Justices held that section 706(g) and equal protection did not prohibit all racially preferential affirmative action benefiting minorities generally at the expense of innocent third parties.[174] Also, the Court held that, under Title VII, courts should order race-based, exclusionary affirmative action relief only as a last resort. "In most cases" district courts "will not have to impose affirmative action as a remedy for past discrimination, but need only order the employer or union to cease engaging in discriminatory practices and to award make-whole relief to the individuals victimized by those practices."[175] However, in particularly egregious cases, like *Sheet Metal Workers*, "a court may have to resort to appropriately tailored race-conscious affirmative action when confronted with an employer or labor union that has engaged in persistent or egregious discrimination."[176]

Assuming that strict scrutiny is constitutionally required under *Wygant*[177] and *Sheet Metal Workers*,[178] the constitutional and statutory requirements parallel each other, making exclusionary affirmative action relief available only in unusual or "egregious" cases. Courts cannot order such remedies "simply to create a balanced work force,"[179] and

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Brennan's opinion, and Justices Rehnquist and Burger dissented.

[174] *Id.* at 3034-35 (pt. IV-A), 3047-50 (pt. IV-D), 3052-53 (pt. V) (Justice Brennan's opinion joined by Justices Marshall, Blackmun, and Stevens). Justice Powell stated: "I further agree that § 706(g) does not limit a court in all cases to granting relief only to actual victims of discrimination." *Id.* at 3054. He concluded similarly with regard to the equal protection component of the fifth amendment's due process clause. *Id.* at 3056-57. Justice White stated: "I agree that § 706(g) does not bar relief for nonvictims in all circumstances." *Id.* at 3062.

[175] *Id.* at 3036 (Brennan, Marshall, Blackmun, and Stevens, JJ.). For Justice Powell, "[t]he history of petitioners' contemptuous racial discrimination and their successive attempts to evade all efforts to end that discrimination" made this case one that justified invoking an exception to the general rules. Consequently, "in cases involving particularly egregious conduct a District Court may fairly conclude that an injunction alone is insufficient to remedy a proven violation of Title VII. This is such a case." *Id.* at 3054. In *Cleveland Firefighters*, Justice White stated that he:

> [A]gree[d] with Justice BRENNAN's opinion in *Local 28* [*Sheet Metal Workers*] that in Title VII cases enjoining discriminatory practices and granting relief only to victims of past discrimination is the general rule, with relief for non-victims being reserved for particularly egregious conduct that a District Court concludes cannot be cured by injunctive relief alone.

Cleveland Firefighters, 106 S. Ct. at 3082. Justice O'Connor also agreed that racial preferences were a last resort. *Sheet Metal Workers*, 106 S. Ct. at 3061.

[176] *Sheet Metal Workers*, 106 S. Ct. at 3050.

[177] *Wygant*, 106 S. Ct. at 1847.

[178] *See supra* text accompanying note 87 & *infra* text accompanying note 213.

[179] *Sheet Metal Workers*, 106 S. Ct. at 3050. A "court should exercise its discretion

courts must not order affirmative action remedies that "unnecessarily trammel the interests of white employees."[180] However, at least in hiring, courts need not limit affirmative action plans to benefiting only actually identified victims of the employer's past illegal discrimination. Thus, on this last point, *Sheet Metal Workers'* interpretation of Title VII parallels *Wygant's* approach to the equal protection clause. In "egregious" cases supplying a compelling interest, courts may order properly tailored affirmative action plans not having "too severe an impact" on innocent persons, and the plans may benefit minorities as class members rather than only those persons actually victimized by the employer's past discrimination.[181]

For about twenty years,[182] the Sheet Metal Workers Union Local 28 resisted all state and federal orders to end its discrimination against blacks and Hispanics. In 1971, the EEOC initiated an action to enjoin the Union from engaging in its pattern and practice of discrimination. New York City's Commission on Human Rights intervened as plaintiff "to press claims that [the Union] had violated municipal fair employment laws and had frustrated the City's efforts to increase job opportunities for minorities."[183]

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with an eye towards Congress' concern that race-conscious affirmative measures not be invoked simply to create a racially balanced work force." *Id.*

[180] *Weber*, 443 U.S. at 208.

[181] *Sheet Metal Workers*, 106 S. Ct. at 3052 (quoting *Weber*, 443 U.S. at 208).

[182] EEOC v. Local 638 . . . Local 28 of the Sheet Metal Workers' Int'l Ass'n, 753 F.2d 1172, 1175 (2d Cir. 1985):

> These appeals and cross-appeal arise from yet another attempt to force Local 28 and its JAC to correct the discriminatory practices they have used to keep nonwhites out of Local 28. As we have stated before, "Local 28 and the JAC are not strangers to the courts", [sic] *EEOC v. Local 638*, 532 F.2d 821, 824 (2d Cir.1976) [sic], and for a more complete history of this protracted struggle we refer the uninitiated reader to the many earlier opinions dealing with these defendants. *E.g., State Commission for Human Rights v. Farrell*, 43 Misc.2d [sic] 958, 252 N.Y.S.2d 649 (New York Cty. 1964); *State Commission of Human Rights v. Farrell*, 47 Misc.2d [sic] 244, 262 N.Y.S.2d 526 (New York Cty. 1965); *State Commission of Human Rights v. Farrell*, 52 Misc.2d [sic] 936, 277 N.Y.S.2d 287 (New York Cty. 1967), *aff'd*, 27 A.D.2d 327, 278 N.Y.S.2d 982 (1st Dep't), *aff'd*, 19 N.Y.2d 974, 281 N.Y.S.2d 521, 228 N.E.2d 691 (1967); *United States v. Local 638, Enterprise Association, etc.*, 347 F.Supp. [sic] 164 (S.D.N.Y.1972) [sic]; *EEOC v. Local 638*, 401 F.Supp. [sic] 467 (S.D.N.Y. 1975), *aff'd as modified*, 532 F.2d 821 (2d Cir. 1976); *EEOC v. Local 638*, 421 F.Supp. 603 (S.D.N.Y.1975) [sic]; *EEOC v. Local 638*, 565 F.2d 31 (2d Cir.1977) [sic].

[183] *Sheet Metal Workers*, 106 S. Ct. at 3026.

After a three week trial, the district court found that "a majority of Local 28's members were admitted through the apprenticeship program." However, "entry of nonwhites into that program had been blocked by the JAC [a joint apprenticeship committee of labor and management] and Local 28 by using invalid entrance exams, by requiring that applicants possess high school diploma, and by inquiring into applicants' arrest records."[184] Further:

> [T]he local had impeded the other avenues of entry into the union by using invalid journeyman's examinations, by refusing to accept nonwhite transfers from sister locals while issuing temporary work permits primarily to white workers, and by selectively organizing only those shops having a higher percentage of white employees.[185]

The Union restricted its size by not administering yearly journeyman examinations despite increased demand for them. Instead, the Union recalled its medically certified pensioners and issued hundreds of temporary work permits to nonunion members, but only one to a nonwhite. Moreover, "the union [had] refused to keep records showing each applicant's race and national origin as required by EEOC regulations."[186]

The Court held that the Union and JAC intentionally and "egregiously" violated Title VII, and ordered an extensive exclusionary affirmative action plan. The plan included a goal of 29% nonwhite membership by July 1, 1981, based on the percentage of nonwhites in the relevant labor pool. The court of appeals affirmed the holding that the Union and the JAC had intentionally and "egregiously" violated Title VII, and slightly modified and then affirmed the affirmative action judgment.[187]

By June 1982, nonwhite union membership was only 10.8%, far short of the 29% goal. The Union and the JAC were found in civil contempt by the district court. The court found that five separate actions or omissions impeded nonwhite entry into the Union and violated prior court orders.[188] The court's contempt finding did not emphasize

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[184] *EEOC v. Local 638*, 753 F.2d at 1176.

[185] *Id.*

[186] *Id.*

[187] *Id.*; *see also EEOC v. Local 638*, 565 F.2d 31.

[188] Specifically, Judge Werker found that "[five] (brackets in original) separate actions or omissions on the part of the defendants have impeded the entry of non-whites into Local 28 in contravention of the prior orders of this court." Those five were (1) adoption of a policy of underutilizing the apprenticeship program to the detriment of nonwhites; (2) refusal to conduct the general publicity campaign [previously] ordered . . . ; (3) adoption of a job protection provision in their collective bargaining agree-

any specific violation; moreover, it did not rest on failure to meet the 29% nonwhite membership goal, thus avoiding the pitfall of turning goals into quotas by a contempt order. However, the court concluded "that the collective effect of these violations has been to thwart the achievement of the 29 percent goal of nonwhite membership in Local 28 . . . ."[189] In 1983, the court again held the defendants in contempt for failing to provide records and additional data, and for failing to serve the original affirmative action order on contractors who hired the Union's members.[190] The court of appeals largely affirmed the district court's orders stemming from the two contempt proceedings in 1985.[191] Before the Supreme Court, the Union conceded that it did not "challeng[e] any finding that there was deliberate discrimination,"[192] and then argued: (1) under *Hazelwood* the appropriate labor pool was the greater New York metropolitan area, which had a lesser percentage of minorities;[193] (2) the district court erred in ruling that the Union and

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> ment that favored older workers and discriminated against nonwhites (older workers' provision); (4) issuance of unauthorized work permits to white workers from sister locals; and (5) failure to maintain and submit the records and reports [as] required by [the previous order] and the administrator. After discussing these points Judge Werker concluded: "Based on the foregoing violations of the orders of the court and the Administrator, I have no other recourse but to hold the defendants in civil contempt of court." He did so "without placing primary emphasis on any one of the violations of the [previous order]," and he noted, "I am convinced that the collective effect of these violations has been to thwart the achievement of the 29 percent goal of non-white membership in Local 28 established by the court in 1975.

EEOC v. Local 638, 753 F.2d at 1177.

[189] *Id.*

[190] *Sheet Metal Workers*, 106 S. Ct. at 3029.

[191] *See EEOC v. Local 638*, 753 F.2d at 1189.

[192] *Sheet Metal Workers*, 106 S. Ct. at 3032 n.20.

[193] Previously, the court of appeals had twice affirmed the 29% membership goal established more than a decade previously. *Id.* at 3032. The union had argued that the 29% membership goal was invalid under *Hazelwood*. *See id.* at 3031-32, 3032 n.20. However, the Court of Appeals had stated that "the District Court's finding of liability 'did not rely on inferences from racial ratios of population and employment in the area,' " *id.* at 3032 n.20 (quoting *EEOC v. Local 638*, 565 F.2d at 36 n.8) (*i.e.*, disparate impact based on statistics), but rather, the finding "was based on direct and overwhelming evidence of purposeful racial discrimination over a period of many years," *id.* (*i.e.*, intentionally disparate treatment that the union had conceded in oral argument before the Supreme Court). The union had not sought Supreme Court review of either previous decision, and time for seeking such review had lapsed. *See id.* at 3032. "Consequently," Justice Brennan stated, "we do not have before us any issue as to the correctness of the 29% figure." *Id.* Res judicata had set in. Therefore, even if the origi-

JAC had underutilized the apprenticeship program;[194] (3) the contempt sanctions were punitive;[195] (4) that appointing an administrator to supervise the Union's compliance with court orders unjustifiably interfered with its statutory rights to self-governance;[196] and (5) the 29% membership goal and racial preferences to nonvictimized nonwhites were prohibited under section 706(g) or the Equal Protection Clause. The Union lost each argument.

Six Justices, in three opinions, reached the issue avoided in *Cleveland Firefighters*.[197] The Union, joined by the United States Department of Justice, argued that Title VII section 706(g) and *Memphis Firefighters v. Stotts*[198] prohibit race-conscious exclusionary affirmative action that benefits nonvictims. The six Justices held that section

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nal membership goal of 29% was erroneous, it would not now affect any of the union's obligations under the revised affirmative action plan. *Id.* at 3031-32.

[194] Justice Brennan stated that the Court of Appeals had recognized that the district court had relied on incorrect data when finding the apprenticeship program underutilized. However, the district court "affirmed the finding based on other evidence." *Id.* at 3032. The evidence revealed that despite an increased need for apprentices, the union "had deliberately shifted employment opportunities from apprentices to white journeymen," *id.* at 3032 n.22, and had refused to conduct the court-ordered publicity campaign to attract nonwhites to the apprenticeship program, *id.* Arguing before the Supreme Court, the union "did not explain whether, and if so, why, the Court of Appeals' evaluation of the evidence was incorrect." *Id.* at 3032. Moreover, the petitioners did "not challenge three of the findings on which the first contempt order was based, [thus] any alleged use of incorrect statistical evidence by the District Court provides no basis for disturbing the contempt citation." *Id.* at 3032-33.

[195] Justice Brennan analyzed the functions of the contempt sanctions. He sought to identify whether the sanctions were punitive, imposed to vindicate the authority of the court, and hence criminal; or whether they functioned to coerce compliance with the court's previous order and to compensate complainants for losses sustained, and hence civil. Under these standards, "the sanctions issued by the District Court were clearly civil in nature." *Id.* at 3033. The "attorneys fees and expenses compensated respondents for costs occasioned by petitioners' contemptuous conduct." *Id.* at n.23.

[196] The majority noted that the administrator's broad powers were limited to overseeing the Union's membership practices and the Union retained "complete control over its other affairs." *Id.* at 3053. Moreover, the Union still could select the particular persons it would admit. The administrator could only insist that the Union admit a sufficient number of nonwhites, but could not identify the persons individually. In light of the administrator's scope of authority and the Union's "established record of resistance to prior state and federal court orders designed to end their discriminatory membership practices," the appointment of an administrator was well within a court's discretion under FED. R. CIV. P. 53, Ruiz v. Estelle, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983), and Gary W. v. Louisiana, 601 F.2d 240, 244-45 (5th Cir. 1979). *Id.* at 3053.

[197] *See supra* note 130.

[198] 467 U.S. 561 (1984).

706(g) of Title VII does not restrict relief to only actual victims of past illegal racial discrimination.

The Union intentionally and "egregiously" discriminated by denying membership to blacks and Hispanics and "persistently" refused to comply with remedial court orders.[199] *Sheet Metal Workers* shows a predicate of "persistent" refusal to carry out court orders and "egregious" racial discrimination that was relied on to justify an affirmative action hiring plan.

The Court confined its analysis to section 706(g)[200] in isolation, refusing to construe it with other Title VII provisions. It concluded that section 706(g)'s last sentence applies only to courts and then only when a union or employer has racially discriminated against a person who, for example, is also otherwise unqualified for the job. In this circumstance, section 706(g) prohibits a court order in the unqualified individual's favor because a court may not issue an order favoring an individual "who was denied . . . [by union or employer] for reasons other than discrimination."[201] On this analysis, section 706(g) does not prohibit a court from ordering, in the appropriate case, an exclusionary affirmative action plan that benefits individuals who are not actual victims of illegal racial discrimination. *Stotts* was based on the policy behind section 706(g), which was "to prohibit a court from awarding make-whole relief, such as competitive seniority, backpay, or promotion, to individuals who were denied employment opportunities for reasons unrelated to discrimination."[202] Section 706 and *Stotts* were seen solely as limitations on a court's power to order individual make-whole relief (the model of individual justice) and would not affect a court's authority to order racially preferential exclusive affirmative action (the model of group justice). Thus, the Court drew a line between make-whole and class-based relief, with *Stotts* governing only the former.

Given the "persistent" and "egregious" union discrimination, "simply enjoining [the union] from once again engaging in discriminatory practices would clearly have been futile."[203] In this circumstance, the

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[199] *Sheet Metal Workers*, 106 S. Ct. at 3028.

[200] *See supra* note 140 and accompanying text.

[201] *Sheet Metal Workers*, 106 S. Ct. at 3043.

[202] *Id.* at 3049.

[203] *Id.* at 3051. After determining that a court could order affirmative action in a case of "persistent" and "egregious" racial discrimination, *id.* at 3050, Justice Brennan considered four factors and determined that the remedy was proper, ruling that (1) affirmative action was "necessary to remedy petitioners' pervasive and egregious discrimination," *id.*; (2) "the District Court's flexible application of the membership goal gives strong indication that it is not being used simply to achieve and maintain racial

district court could appropriately establish a flexible goal "as a benchmark against which the court could gauge [the union's] efforts to remedy past discrimination."[204] As such, the goal was merely "a means by which [a court] can measure [the union's] compliance with its orders, rather than . . . a strict racial quota,"[205] which, the Court implied, would be illegal. This goal was not too burdensome because it governed only future membership admissions, and therefore "did not disadvantage *existing* union members."[206]

A. The Dissenting Justices

Justice White, *Stotts*' author, dissented but also provided an important fifth vote by stating: "I agree that section 706(g) does not bar relief for nonvictims in all circumstances."[207] In *Cleveland Firefighters*, White stated that he agreed "with Justice Brennan's opinion in [*Sheet Metal Workers*] that in Title VII cases enjoining discriminatory practices and granting relief only to victims of past discrimination is the general rule, with relief for non-victims being reserved for particularly egregious conduct that a district court concludes cannot be cured by injunctive relief alone."[208] Thus, he provided a fifth vote on this point as well. In a concurrence primarily devoted to constitutional issues, Powell provided the sixth vote on the main issue by "agree[ing] that § 706(g) does not limit a court in all cases to granting relief only to actual victims of discrimination."[209]

Justice Rehnquist, joined by Burger, dissented for reasons stated in *Cleveland Firefighters*,[210] and O'Connor dissented on different grounds.[211]

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balance, but rather as a benchmark against which the court could gauge petitioners' efforts to remedy past discrimination," *id.* at 3051; (3) the affirmative action was temporary, *id.* at 3052; and (4) the affirmative action "did not require any member of the union to be laid off, and did not discriminate against *existing* union members," *id.* (emphasis in original).

[204] *Id.* at 3051.

[205] *Id.*

[206] *Id.* at 3052 (emphasis in original).

[207] *Id.* at 3062.

[208] *Cleveland Firefighters*, 106 S. Ct. at 3082.

[209] *Sheet Metal Workers*, 106 S. Ct. at 3054.

[210] *Id.* at 3063. They were of the "belief that § 706(g) forbids a court from ordering racial preferences that effectively displace non-minorities except to minority individuals who have been the actual victims of a particular employer's racial discrimination." *Id.*

[211] *See id.* at 3057. O'Connor did agree with White "that the membership 'goal' in this case operates as a rigid racial quota that cannot feasibly be met through good-faith efforts by Local 28." *Id.* By reading together § 703(j), 42 U.S.C. § 2000e-2(j), and §

B. The Constitutional Issue

Five Justices, in two opinions, also agreed that the equal protection component of the fifth amendment's due process clause did not bar *Sheet Metal Workers'* exclusive affirmative action program benefiting nonvictims.[212] Powell held that *Wygant*'s strict scrutiny analysis[213] was both required and satisfied. "The finding by the District Court and the Court of Appeals that [the Union had] engaged in egregious violations of Title VII establishe[d]" the necessary factual predicate which, in turn, provided "a compelling government interest sufficient to justify the imposition of a racially classified remedy."[214] The remaining question was whether *Sheet Metal Workers'* remedies were "narrowly tailored." Emphasizing that the "fund order was not imposed until *after* the petitioners were held in contempt," and assessing that the "burden [it] imposes on nonminorities is slight," Powell found "little difficulty concluding that the Fund order was carefully structured to vindicate the compelling governmental interests in this case."[215] But, "the percentage goal raise[d] a different question."[216]

Characterizing the twenty-nine percent minority/nonminority ratio as a flexible goal, Powell declared that five tests, each governing independently rather than in the aggregate, determined whether *Sheet Metal Workers'* goal was narrowly tailored: (1) the efficacy of alternative remedies; (2) the planned duration of the remedy; (3) the nature of the relationship between the percentage of minorities to be employed and the percentage of minorities in the relevant population or work force; (4) the availability of waiver possibilities if the hiring plan could not be met; and (5) the character and severity of the burden on innocent third parties. The flexible goal passed each test, and Powell found that *Sheet Metal Workers'* remedies comported with the Constitution. But, he cautioned, his "view that the imposition of flexible goals as a remedy for past discrimination may be permissible under the Constitution is not an endorsement of their indiscriminate use," nor did he "im-

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706(g), 42 U.S.C. § 2000e-5(g), she concluded that these provisions "preclude courts from ordering racial quotas such as this." *Id.*

[212] The Justices are Powell, Blackmun, Brennan, Marshall, and Stevens. Justices White, O'Connor, Rehnquist, and Burger did not reach the constitutional question in *Sheet Metal Workers*, but O'Connor, Rehnquist, and Burger did in *Wygant*, 106 S. Ct. 1842.

[213] *See supra* note 87 and accompanying text.

[214] *Sheet Metal Workers*, 106 S. Ct. at 3055.

[215] *Id.*

[216] *Id.*

ply that the adoption of such a goal will always pass constitutional muster."[217] He expressly pointed out that it was "too simplistic" to conclude from *Sheet Metal Workers* and *Wygant* that hiring goals always will pass constitutional muster but layoff goals and fixed quotas will not.[218] For Powell, the "proper constitutional inquiry focuses on the effect, if any, and the diffuseness of the burden imposed on innocent non-minorities, not on the label applied to the particular employment plan at issue."[219] Presumably, if white journeymen were replaced on jobs by nonwhite apprentices, this would convert *Sheet Metal Workers'* order into the type of affirmative action layoff plan condemned in *Wygant*.[220]

Brennan's plurality opinion agreed with Powell that the necessary factual predicate existed, for *Sheet Metal Workers* had no problem "as there was in *Wygant*, with a proper showing of prior discrimination that would justify the use of remedial racial classifications."[221] The plurality further agreed "that the relief ordered . . . passes even the most rigorous test — it is narrowly tailored to further the Government's compelling interest in remedying past discrimination."[222] O'Connor, Rehnquist, and Burger agreed with Powell's similar equal protection analysis in *Wygant*,[223] and presumably would also agree with him here, had they reached the issue.

Reading *Sheet Metal Workers* in light of *Wygant*, the suggestion is that if "persistent" and "egregious" illegal racial discrimination is presented and all other requisite legal standards are met, court-ordered racially preferential hiring plans are permissible so long as the employment ratio of minorities to nonminorities does not exceed the number of qualified minorities in the relevant work force. In that situation, the "purpose of affirmative action is not to make identified victims whole, but rather to dismantle prior patterns of . . . discrimination and to prevent discrimination in the future."[224] On the other hand, the opinions indicate that the Court would probably strike a court-ordered plan that required a percentage of minority workers greater than that in the qualified work force because that additional ratio would involve a judgment about proper racial balances.

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[217] *Id.* at 3057 (footnote omitted).
[218] *Id.* at n.3.
[219] *Id.*
[220] *See id.* at 3057 n.4.
[221] *Id.* at 3053.
[222] *Id.*
[223] *See supra* notes 87-89 and accompanying text.
[224] *Sheet Metal Workers*, 106 S. Ct. at 3049.

C. Flexible Goals Versus Quotas and Rigid Timetables

A majority may have emerged that is willing to judge whether "goals" in certain circumstances are really disguised "quotas." Justice O'Connor dissented from Brennan's plurality interpretation of section 706(g). She would have interpreted it in conjunction with, and limited by, section 703(j)[225] which, in Brennan's words, "stated expressly that the statute did not require an employer or labor union to adopt quotas or [racial] preferences simply because of a racial imbalance."[226] She would have qualified a court's section 706(g) remedial powers with the limitations found in section 703(j) "preclud[ing] courts from ordering racial quotas such as this."[227]

That interpretation would not eliminate "goals," but would drastically curtail their use in exclusionary affirmative action by limiting uses of timetables. "To hold an employer or union to achievement of a particular percentage of minority employment or membership," O'Connor stated, "and to do so regardless of circumstances such as economic conditions or the number of available qualified minority applicants, is to impose a quota" and not a flexible goal because "a permissible goal should require only a good faith effort to come within a range demarcated by the goal itself."[228] She did not pursue the inquiry of whether the Union had made a good faith effort. Instead, she argued that because the court-ordered timetable in *Sheet Metal Workers* "was quite unrealistic and clearly could not be met by good faith efforts" by the Union, "the membership goal operates as a rigid membership

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[225] Title VII § 703(j), 42 U.S.C. § 2000e-2(j) (1982), provides:

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

[226] *Sheet Metal Workers*, 106 S. Ct. at 3043-44.

[227] *Id.* at 3057.

[228] *Id.* at 3060.

quota."[229] If the Union were actually to meet this goal/quota, it would "require the replacement of journeymen by apprentices on a strictly racial basis."[230] Thus, by interpreting sections 706(g) and 703(j) together, thereby limiting a court's Title VII remedial powers, and by adding her view about the plan's necessary operation, O'Connor's position was that the "membership quota cannot stand."[231]

Justice White did not consider section 703(j)'s relation to section 706(g). He "agree[d] that section 706(g) does not bar relief for nonvictims in all circumstances," but he dissented on the ground that, "the cumulative effect of the revised affirmative action plan and the contempt judgments against the union established not just a minority membership goal but also a strict racial quota . . . ."[232] Justice White viewed holding the Union in contempt "for failing to attain the membership quota during a time of economic doldrums in the construction industry and a declining demand for union skills involved in this case was for all practical purposes equivalent to a judicial insistence that the union comply even if it required the displacement of nonminority workers by [minority workers]."[233] Justice White most likely views all affirmative action remedies as a matter of equity. Section 706(g) vests courts with broad discretion to award "appropriate" equitable relief to remedy unlawful discrimination, and he concluded that "the displacement of nonminority workers by members of the plaintiff class [was] . . . inequitable in my view . . . ."[234]

Powell indicated he was satisfied that *Sheet Metal Workers'* goal was a flexible one; however, if "the record now before us supported the position taken by Justice O'Connor, I might well view this case differently."[235] Given their past positions, Chief Justice Rehnquist and Justice Scalia would likely agree and draw a similar, perhaps even more stringent, line between goals and quotas. Thus, five Justices appear

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[229] *Id.* at 3062.

[230] *Id.*

[231] *Id.* (quoting Judge Winter's dissent below, 753 F.2d 1172, 1195 (2d Cir. 1985)).

[232] *Id.* "In sum, the creation of racial preferences by courts, even in the more limited form of goals rather than quotas, must be done sparingly and only where manifestly necessary to remedy violations of Title VII if the policy underlying § 703(j) and § 706(g) is to be honored." *Id.* at 3061.

[233] *Id.* at 3062-63.

[234] *Id.* at 3063.

[235] *Id.* at 3057 n.4. Justice Powell indicated that if Justice O'Connor's prediction about how the plan must work in the future is correct, then "petitioners will be free to argue that an impermissible quota has been imposed on the union and the JAC," *id.*, thereby presumably implying he would view such a circumstance as constituting an illegal quota.

willing to judge contextually whether affirmative action goals and timetables are really goals or disguised quotas.

VI. Racial Promotion Preferences and Quotas: *United States v. Paradise*

As this Article was going to press, the United States Supreme Court decided *United States v. Paradise*.[236] Like *Local 28 of the Sheet Metal Workers' International Association v. EEOC*,[237] the *Paradise* case involved "persistent" refusals to carry out court orders and "egregious" racial discrimination against minorities.[238] However, while *Sheet Metal Workers* addressed discrimination in hiring, *Paradise* addressed discrimination in promoting minorities. The case marks the first time the Court has allowed a lower court to impose racial preferences and precise numerical quotas for promoting minorities. Yet, the holding appears limited to the peculiarities of the case, is fairly narrow, and creates no new constitutional doctrine, indicating that strict promotion quotas are only acceptable in extreme cases, and that they must be necessary, flexible, and not oppressively burdensome to nonminorities.[239]

The *Paradise* decision culminated nearly fifteen years of litigation aimed at integrating the Alabama state trooper force.[240] In 1972, after finding that the Department of Public Safety had "engaged in a blatant and continuous pattern and practice of discrimination in hiring," and that in the force's thirty-seven year history there had never been a black trooper, a federal district court enjoined the Department from engaging in racial discrimination in "recruitment . . . appointment, training [and] promotion . . . ." The Court also imposed a hiring quota.[241] By

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[236] 107 S. Ct. 1053 (1987).

[237] 106 S. Ct. 3019 (1986).

[238] *Paradise*, 107 S. Ct. at 1065 ("In 1972 the District Court found, and the Court of Appeals affirmed, that for almost four decades the Department had excluded blacks from all positions including jobs in the upper ranks. Such egregious discriminatory conduct was 'unquestionably a violation of the Fourteenth Amendment.'" (citation omitted)).

[239] *Id.* at 1074.

[240] The litigation originated in an action brought in 1972 by the NAACP to challenge the discriminatory employment practices of the Alabama state troopers. The United States was joined as a party plaintiff, and Phillip Paradise, Jr., intervened on behalf of a class of black plaintiffs. *Id.* at 1058.

[241] The district court issued an order requiring the Department to hire one black trooper for each nonblack trooper hired until blacks constituted approximately 25% of the force and to refrain from engaging in any discriminatory employment practices. NAACP v. Allen, 340 F. Supp. 703, 705-06 (M.D. Ala. 1972), *aff'd*, 493 F.2d 614, 621 (5th Cir. 1974).

1979, no blacks had attained the upper ranks of the force.[242] Thus, the district court approved a partial consent decree in which the Department of Public Safety agreed to develop nondiscriminatory promotion procedures.[243]

By 1983, because of dilatory practices aimed at avoiding the consent decree, the force still did not have any black majors, captains, lieutenants, or sergeants; of sixty-six corporals, only four were black.[244] To remedy the egregious discrimination that had existed for more than a decade after the first court order to halt it, the district court imposed a quota. The court ordered that "for a period of time," the force must promote one black for every nonblack promoted at all ranks, provided that qualified blacks were available, but only if the force had not developed and implemented a promotion plan without an adverse impact on

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[242] In 1974, shortly after the Court of Appeals' decision, the plaintiffs sought further relief from the district. Finding the force had artificially restricted its own size and the number of new troopers hired, the district court reaffirmed the 1972 order and enjoined any further attempts by the Department to delay or frustrate compliance. Paradise v. Dothard, Civ. Action No. 3561-N (M.D. Ala., Aug. 5, 1975).

In 1977 the plaintiffs again returned to the district court. After extensive discovery, the parties entered into a Partial Consent Decree approved by the court in 1979. *Paradise*, 107 S. Ct. at 1059-60.

The district court found that as of Nov. 1, 1978, out of 232 state troopers at the rank of corporal or above, not one was black. Paradise v. Shoemaker, 470 F. Supp. 439, 442 (M.D. Ala. 1979).

[243] In April 1981, more than a year after the deadline set in the 1979 Decree, the Department proposed a promotion plan and sought the district court's approval. *Paradise*, 107 S. Ct. at 1060. The parties then executed another Consent Decree providing that if the parties failed to agree on the procedure, a determination would be made by the district court. *Id.* The defendants administered the proposed test to 262 applicants of whom 60 (23%) were black. *Id.* at 1061. Only five blacks ranked in the top half of the promotion register; the highest ranking black was number 80. *Id.* At the time, the Department had an urgent need to promote 16 individuals. *Id.*

[244] Given the results of the proposed plan, the plaintiffs returned to the district court to enforce the 1979 and 1981 decrees. Observing that even if 79 corporals were promoted in rank order, rather than the number actually contemplated, not one would be black, the court concluded that, short of outright exclusion based on race "it is hard to conceive of a selection procedure which would have a greater discriminatory impact." Paradise v. Prescott, 580 F. Supp. 171, 175 (M.D. Ala. 1983).

The Department subsequently submitted an ad hoc proposal to promote 15 persons to the rank of corporal, four of whom would be black, and requested more time to develop a nondiscriminatory plan. *Paradise*, 107 S. Ct. at 1062. Finding that only four blacks had been promoted and that the Department was still without a nondiscriminatory procedure nearly twelve years after the litigation had originated, the district court rejected the ad hoc proposal and issued the one black for one white order challenged in *Paradise*. Paradise v. Prescott, 585 F. Supp. 72, 74 (M.D. Ala. 1983).

blacks at the relevant rank.[245] The one-for-one promotion quota was to continue for each rank until blacks comprised 25% of its members.[246] The federal government, challenging the district court's plan as "profoundly illegal,"[247] appealed. Both the Eleventh Circuit Court of Appeals and the United States Supreme Court upheld the temporary quota, emphasizing its flexibility and that it was the only effective alternative available.

As in *Wygant v. Jackson Board of Education*[248] and *Sheet Metal Workers*,[249] a five vote precedent for applying strict scrutiny eluded the Court.[250] In the plurality opinion Justice Brennan noted that the Court "has yet to reach consensus on the appropriate constitutional analysis."[251] There were five opinions in *Paradise*. Brennan stated that the Court need not determine the level of scrutiny in *Paradise* because "the relief ordered survives even strict scrutiny."[252] Yet, his statement about "consensus" ignored that Justices Powell, O'Connor, Rehnquist, and Scalia insisted on the strict scrutiny standard in *Paradise* and that White had joined the part of Powell's *Bakke* opinion calling for strict scrutiny.

Justices Powell, Stevens, and White adhered to their earlier analyses. Consistent with his position in *Wygant*,[253] Justice Stevens wrote that *Swann* and the school desegregation cases provide the proper model for analyzing race conscious, court-ordered remedies.[254] He asserted that the district court has broad equitable powers to remedy proven racial discrimination and that they should be upheld unless "unreasonable." He rejected the "unprecedented suggestion" that a court's remedial "discretion is constricted by a 'narrowly tailored to achieve a compelling governmental interest' standard."[255] Given their positions in *Wy-*

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[245] *Paradise*, 585 F. Supp. at 75. In February 1984, the Department promoted eight blacks and eight whites. *Paradise*, 107 S. Ct. at 1063. The one-for-one plan was suspended four months later when the district court approved a promotion plan submitted by the Department. *Id.* The Eleventh Circuit affirmed the district court's order. Paradise v. Prescott, 767 F.2d 1514, 1533 (11th Cir. 1985), *cert. granted*, 106 S. Ct. 3331 (1986).

[246] *Paradise*, 107 S. Ct. at 1063.

[247] Lacayo, *Replying in the Affirmative*, TIME, Mar. 9, 1987, at 66.

[248] 106 S. Ct. 1842 (1986); *see supra* text accompanying notes 81-90.

[249] *See supra* note 173 and accompanying text.

[250] The Court decided *Paradise* by a 5-4 vote and issued five opinions.

[251] *Paradise*, 107 S. Ct. at 1064 (footnote omitted).

[252] *Id.*

[253] *See supra* text accompanying notes 101-18.

[254] *Paradise*, 107 S. Ct. at 1076.

[255] *Id.* at 1077 (footnote omitted).

gant, *Bakke*, and other affirmative action cases, Justices Brennan, Marshall, and Blackmun probably would have preferred the "reasonableness" test of Justice Stevens for court-ordered affirmative action plans. But for these four Justices to have adopted Stevens' standard would have cost them Powell's fifth, and majority, vote. Powell consistently insists on strict scrutiny.

Conversely, Justice White dissented because he concluded that the plan for one black for each nonblack promotion exceeded the district court's equitable powers.[256] Presumably, his very brief opinion rests on the same reasoning that led him to reject the hiring preference in *Sheet Metal Workers*; he concluded that the racial preference unreasonably "displaced" nonminority workers, and was therefore inequitable.[257]

As in *Wygant*,[258] current Chief Justice Rehnquist and Justices Powell and O'Connor agreed that strict scrutiny controlled racially preferential affirmative action.[259] Not unexpectedly, Justice Scalia, in his first affirmative action decision, joined them, replacing Burger.[260] Both the plurality and the dissent in *Paradise* concurred that the government had a compelling interest in remedying the department's "pervasive, systematic, and obstinate conduct."[261] However, the dissenting Justices disagreed on whether the relief was sufficiently narrowly tailored to survive strict scrutiny.

On the issue of whether the order was the least drastic alternative, Justice Brennan's plurality opinion tracked his opinion in *Sheet Metal Workers*,[262] examining the necessity for the relief, its flexibility and duration, the relationship of the numerical goals to the relevant labor market, the impact on nonminority troopers, and the repeated failure to carry out court orders.[263] The last item showed that the Court could not rely on good faith cooperation by the force. Justice Brennan concluded that no other effective remedy was available to the district court.[264] At the time of the order, the Department had an urgent need to promote at least fifteen troopers and had not developed any nondis-

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[256] *Id.* at 1082-83.

[257] *See supra* text accompanying notes 232-34. For Justice White's view in *Cleveland Firefighters*, see *supra* text accompanying notes 156-58.

[258] *See supra* note 94.

[259] Justice Powell, however, found that the ordered relief survived strict scrutiny.

[260] *See supra* text accompanying note 119.

[261] *Paradise*, 107 S. Ct. at 1080.

[262] *See supra* text accompanying notes 221-23.

[263] *Paradise*, 107 S. Ct. at 1067.

[264] He rejected Justice O'Connor's suggestion that the district court should consider alternatives not actually raised. *Id.* at 1070 n.28.

criminatory procedures.[265] It made an ad hoc proposal to promote four blacks and eleven whites, approximating the racial ratio of the relevant labor market.[266] Justice Brennan agreed with the district court that adopting the Department's proposal would have been insufficient. That proposal would have done little to compensate past victims, would not have motivated the Department to develop nondiscriminatory procedures, and would not have vitiated the Department's long delay.[267]

Justice Brennan further determined that the court-imposed quota was flexible, waivable, and temporary.[268] It applied only if qualified black candidates were available and if the Department needed to make promotions.[269] The quota terminated when either the Department developed its own nondiscriminatory procedures or the percentage of blacks in the upper ranks equalled that in the relevant labor market.[270] "It is doubtful," he concluded, "that the district court had available to it any other effective remedy."[271]

He rejected the objection that in order to achieve a goal of 25% black representation in the force, the court could order only 25% of any round of promotions to blacks.[272] The 50% figure ordered by the district court, although greater than the percentage of blacks in the relevant labor market, was not itself the goal; rather it merely measured the speed at which the acceptable goal of 25% would be achieved.[273] Brennan analogized the 50% figure to the end date used to regulate the speed of progress toward fulfillment of the hiring goal in *Sheet Metal Workers*.[274]

Finally, Justice Brennan held that the one-for-one requirement did not overly burden white troopers because it did not absolutely bar their advancement.[275] Citing *Wygant*,[276] he characterized the burden as only postponing the promotion of qualified whites; he analogized its "diffuse" burden to acceptable hiring goals that foreclose only one of the

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[265] *See supra* note 247.

[266] *Id.*

[267] *Paradise*, 107 S. Ct. at 1068.

[268] *Id.* at 1074.

[269] *Id.*

[270] *Id.*

[271] *Id.* at 1070 (quoting *Sheet Metal Workers*, 106 S. Ct. at 3056) (footnote omitted).

[272] *Id.* at 1071.

[273] *Id.*

[274] *Id.*; *see supra* text accompanying notes 225-35.

[275] *Paradise*, 107 S. Ct. at 1073.

[276] *Id.*; *see supra* text accompanying notes 120-31.

several opportunities available to nonminorities.[277]

Addressing similar factors, Justice O'Connor reached contradictory conclusions. In her dissenting opinion, she suggested alternative, nonracial remedies, such as appointing a trustee to develop a nondiscriminatory promotion plan or imposing stiff fines on the Department.[278] Although these options were not proposed at the district court level, she concluded that their possibility indicated that the racial remedy ordered was not "truly necessary."[279] She rejected the plurality's justification for the 50% quota as merely affecting the speed by which the Department would attain the 25% goal, noting that it "eviscerates any notion of 'narrowly tailored' because it has no stopping point; even a 100% quota could be defended on the ground that it merely 'determined how quickly the Department progressed toward' some ultimate goal."[280] She held to her position in *Wygant*[281] and *Sheet Metal Workers*[282] that protecting nonminority rights demands that a racial goal not exceed the percentage of minorities in the relevant labor group "absent compelling justification."[283] She concluded that even in the face of the Department's "reprehensible recalcitrance," rapid progress alone did not justify the 50% quota.[284]

Paradise reveals that in the context of egregious and persistent failures to carry out court orders, two of the Court's major disagreements are (1) the extent to which courts will be required to search for a possible alternative to a racially conditioned affirmative action plan, and (2) the assessment of the burden that racial affirmative action imposes on innocent nonminorities. Its narrow majority holds that preferential hiring and promotion plans can be acceptable when their impact on an important but not absolutely vital area is diffuse, merely limiting or postponing the opportunities available to nonminorities.[285] Previously, in *Wygant*, the Court had held that layoffs are unacceptable because they directly concentrate their burdens on very few, individual nonminorities, and involve a vitally important area.[286] *Paradise* gives virtu-

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[277] *Paradise*, 107 S. Ct. at 1073; *see supra* text accompanying notes 206, 215, 219-20.

[278] *Paradise*, 107 S. Ct. at 1082.

[279] *Id.* at 1080 (citing *Sheet Metal Workers*, 106 S. Ct. at 3061).

[280] *Id.* at 1081.

[281] *See supra* text accompanying notes 133-36.

[282] *See supra* text accompanying notes 225-31.

[283] *Paradise*, 107 S. Ct. at 1081.

[284] *Id.*

[285] The Justices are Brennan, Powell, Stevens, Marshall, and Blackmun.

[286] *See supra* text accompanying notes 122-31.

ally no guidance in nonegregious cases of discrimination.

CONCLUSION

Sheet Metal Workers and *Paradise* not only involved egregious racial discrimination, but also persistent refusals to carry out court orders. Both of these facts materially conditioned decisionmaking in the Supreme Court on what suffices as a reasonable alternative to an affirmative action plan, especially for Justice Powell, who often is the swing vote. For example, how would *Paradise* or *Sheet Metal Workers* have been decided if the factor of refusing to carry out court orders had been absent and replaced by a defendant's willingness to carry out court orders?

It should be clear that *Paradise* is not the final word on quotas. Nor does it decide that "goals" can never be a forbidden quota. In the context of less egregious cases involving defendants who will not refuse to carry out court orders, future litigation likely will focus on timetables in exclusionary affirmative action plans having goals, measuring them in context to identify whether they "really" are forbidden quotas.

Judging the issues in this context is different from *Paradise* and will require standards. Either one of two may be acceptable to the emerging majority willing to consider whether "goals" are really forbidden quotas. The Justices could agree with Justice O'Connor, simply requiring that unions and employers make a good faith effort to reach the court-ordered goal. Or they could do what she did in *Sheet Metal Workers* and focus on various elements of the affirmative action plan itself, judging whether its goals and timetables are flexible enough and realistic enough to allow for their reasonable achievement or whether they rigidly function as illegal quotas.

The issue whether "goals" are really "quotas" is, of course, not the only remaining issue about quotas unresolved by *Paradise*. Another question is whether, in a nonegregious case of racial discrimination involving a defendant who is willing to carry out court orders, a court can simply order clearly rigid quotas, such as promotions by a ratio of one minority to one nonminority as in *Paradise*, until some decreed ratio or goal has been achieved.

Another of several remaining issues involves disparate impact. The *Wygant* Court indicated that under the equal protection clause no school board has constitutional power to order, on affirmative action grounds, some desired ratio of racial balance in its faculty. Instead, a school board has constitutional power to redress its own wrongs only if it has engaged in illegal racial discrimination, and then only so long as the plan's scope is no broader than its factual predicate and only so long as the plan does not overly burden innocent third parties. Justice

O'Connor suggested that a school board could show a factual predicate for an affirmative action plan with "demonstrable evidence of a disparity between the percentage of qualified blacks on a school's teaching staff and the percentage of qualified minorities in the relevant labor pool sufficient to support a prima facie Title VII pattern or practice claim."[287] The *Sheet Metal Workers* Court held that "persistent" and "egregious" racial discrimination sufficiently demonstrated the necessary factual predicate to justify the court-ordered plan.

Given the emphasis throughout *Sheet Metal Workers* on "persistent" and "egregious" racial discrimination as constitutional and statutory requirements, last Term's cases leave two additional questions. The first question is whether a court may order an exclusionary affirmative action plan in a nonegregious but intentional case, or more importantly, in a statistical case in which a pattern or practice violation does not exist but a disparate impact is proven. For example, perhaps a college employer requires a high school diploma of all workers, and although that requirement can be validated for most college jobs, it cannot be validated as a proper requirement for all jobs.[288] If so, the second question is whether a court may order affirmative action for nonegregious but intentional or disparate impact discrimination, particularly if ample evidence shows that the employer will fully comply with less drastic relief such as an injunction against future discrimination.

Considerable language in last Term's opinions indicates doubt whether a disparate impact that is not similar to "persistent" and "egregious" would ever qualify as a compelling constitutional interest under strict scrutiny analysis.[289] Also, alternatives less drastic than exclusionary affirmative action likely would remedy at least some, perhaps most, intentional or disparate impact violations. For example, some employers may be relied upon to comply with an injunction against future discrimination, thereby making an affirmative action plan unnecessary except in "persistent" and "egregious" cases. Thus, logic and dicta in *Wygant* and *Sheet Metal Workers* indicate that the answers to both questions are negative. But logic and dicta may not prove fully reliable guides in this volatile area. The only certainty here is that the solutions to these issues have been prejudiced by last Term's cases and that the issues will be litigated in the future.

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[287] *Wygant*, 106 S. Ct. at 1856.

[288] *Cf.* Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972).

[289] In addition, cases like Washington v. Davis, 426 U.S. 229 (1976), reinforce this view.