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Observations on the Supreme Court's Recent Affirmative Action Cases

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INTRODUCTION

The 1985 term saw the United States Supreme Court decide more cases involving Title VII of the 1964 Civil Rights Act[1] than it had since 1977. During that earlier term the Court: (1) first applied the disparate impact theory to sex discrimination claims;[2] (2) rendered its only opinion on the scope of Title VII's "bona fide occupational qualification" (bfoq) exception for sex discrimination;[3] (3) set the standard for an employer's duty to accommodate an employee's religious belief under the statute;[4] (4) first approved the use of statistical evidence to establish prima facie cases of intentional discrimination;[5] and (5) reversed the unanimous decisions of the courts of appeals in cases involving pregnancy discrimination and the adverse effects of traditional seniority systems.[6] Although some of these decisions have been overruled by legislation[7] and some issues are subject

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1. Pub. L. No. 88-352, §§ 701-716, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1982)).

2. Dothard v. Rawlinson, 433 U.S. 321 (1977). "Disparate impact" claims involve employment practices that are facially neutral in their treatment of different groups but fall more harshly on one group and cannot be justified by business necessity. These claims contrast with disparate treatment claims, which require proof of discriminatory motivation.

3. *Dothard,* 433 U.S. at 336. The Court recently has decided several cases raising the scope of a similar bfoq provision in age discrimination cases. Western Air Lines v. Criswell, 105 S. Ct. 2743 (1985); Johnson v. Mayor and City Council of Baltimore, 105 S. Ct. 2717 (1985); Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985).

4. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) (accommodation with more than a de minimus cost is an undue hardship).

5. International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); Hazelwood School Dist. v. United States, 433 U.S. 299 (1977).

6. In General Electric Co. v. Gilbert, 429 U.S. 125 (1976), the Court held, in contrast to each of the courts of appeals which had considered the issue, that discrimination on the basis of pregnancy was not discrimination on the basis of sex under Title VII.

In *Teamsters* the Court held that routine application of a seniority system, even if it had an adverse impact on minority group members, did not violate Title VII, absent an intention to discriminate in the origins or applications of the seniority system itself.

Gilbert, Teamsters and *Hardison* are discussed in Note, *The Supreme Court, 1976 Term,* 91 HARV. L. REV. 72, 241-74 (1977).

7. *Gilbert* was overruled by the Pregnancy Discrimination Act, Pub. L. No. 95-555, § 701(k), 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1982)). The scope of that amendment was before the Court in California Fed. Sav. & Loan v. Guerra, 107 S. Ct. 683 (1987) (was California law requiring employers to provide pregnancy leave and jobs back inconsistent with Title VII?).

to reappraisal,[8] the Supreme Court's decisions of the 1976 term retain vitality in the law of employment discrimination.

The Supreme Court's decisions of the 1985 term also are important for the development of a stable body of employment discrimination law. Although skeptics might ask why it took the Court so long to recognize sexual harassment as a form of sex discrimination under Title VII, the important fact is that it did, and *in a unanimous opinion.*[9] The Court also rejected the silly argument that a state had no duty to eliminate current racial salary disparities simply because such discrepancies existed prior to the effective date of Title VII.[10] It also continued its narrow view of "programs or activities receiving federal financial assistance" and thus of the scope of those statutes' protection from employment discrimination.[11] It is, however, the three affirmative action cases[12] decided last term that make the 1985 term particularly noteworthy.

These cases are worthy of comment more for what they do not say than for what they do say, illustrating Justice Brandeis' point that "the most important thing we do is not doing."[13] The three affirmative action cases of the 1985 term produced fourteen separate opinions. Only one decision

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8. The scope of the employer's duty to accommodate an employee's religious beliefs was again before the Court. Ansonia Bd. of Educ. v. Philbrook, 107 S. Ct. 367 (1986) (religious accommodation under Title VII does not require additional paid leave for religious observance when standard days off are insufficient). *See also* Note, *Heaven Can Wait: Judicial Interpretation of Title VII's Religious Accommodation Requirement Since* Trans World Airlines v. Hardison, 53 FORDHAM L. REV. 839 (1985).

9. Meritor Sav. Bank v. Vinson, 106 S. Ct. 2399 (1986) (unanimous Court held that a plaintiff may establish a Title VII violation by proving that sexual harassment has created a hostile or abusive work environment but Court divided on the proper standard of liability for the employer).

10. Bazemore v. Friday, 106 S. Ct. 3000 (1986). The Court also held that plaintiffs' regression analyses need not include "all measurable variables" to be probative of discrimination.

11. In Department of Transp. v. Paralyzed Veterans of Am., 106 S. Ct. 2705 (1986), the Court held that commercial airlines were not recipients of federal assistance and therefore were not subject to the prohibitions of § 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, 394 (1973) (codified as amended at 29 U.S.C. § 794 (1982)).

12. Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842 (1986); Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 106 S. Ct. 3019 (1986); Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 106 S. Ct. 3063 (1986).

Affirmative action, although not in an employment context, was also involved in *Bazemore v. Friday,* discussed *supra* note 10 and accompanying text. North Carolinia segregated its Extension Service before 1965 and there remained many all white and all black clubs. The lower courts found that the Extension Service had explicitly communicated its nondiscriminatory policy and had encouraged local agents to form new clubs without regard to race. According to a majority of justices, defendants had done enough to desegregate the services provided by the Extension Service. Prior court decisions, they continued, concerning desegregation of schools, parks, and the like have "no application" to voluntary associations supported by the Extension Service. *Id.* at 3013. Justices Brennan, Marshall, Blackmun, and Stevens dissented from this holding. According to them, the fourteenth amendment as well as Title VI of the Civil Rights Act of 1964 (prohibiting racial discrimination in programs or activities that receive federal financial assistance) require more affirmative efforts to dismantle segregation of the 4-H and Homemakers Clubs.

13. *See generally* A. BICKEL, THE LEAST DANGEROUS BRANCH 71 (1962).

commanded a majority opinion and it was exceedingly narrow. In one case only three justices agreed fully with the decision. In every instance the decisions were narrow rather than broad discussions of the policies either for or against affirmative action efforts.

These kinds of decisions are, of course, typical of the Court's prior treatment of affirmative action. In the last ten years,[14] the Court has failed to reach a consensus about affirmative action programs each time the issue has been presented. It has been unable to agree on the constitutional standards governing affirmative action efforts or on the weight to be given other conflicting policies.

In *University of California Board of Regents v. Bakke,*[15] for example, a majority of the Court struck down the special admissions program of the University of California at Davis Medical School as impermissible racial discrimination. At the same time, a different majority stated that it would be permissible to take race into account in higher education admission programs.[16] In *United Steelworkers of America v. Weber,*[17] a white employee challenged a provision of an existing collective bargaining agreement which provided for a craft training program where fifty percent of the spaces were reserved for black workers. Finding that Title VII did not condemn all private, voluntary, race-conscious affirmative action plans, Justice Brennan stated: "We need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans. It suffices to hold that the challenged . . . plan falls on the permissible side of the line."[18]

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14. For a discussion of affirmative action principles prior to the Court's decision in University of California Bd. of Regents v. Bakke, 438 U.S. 265 (1978), see A. BICKEL, THE MORALITY OF CONSENT (1975); B. BITTKER, THE CASE FOR BLACK REPARATIONS (1973); R. O'NEIL, DISCRIMINATING AGAINST DISCRIMINATION: PREFERENTIAL ADMISSIONS AND THE DEFUNIS CASE (1975); Ely, *The Constitutionality of Reverse Racial Discrimination,* 41 U. CHI. L. REV. 723 (1974); Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—the Problem of Special Treatment,* 61 NW. U. L. REV. 363 (1966).

15. 438 U.S. 265 (1978).

16. The opinion of Justices Brennan, White, Marshall, and Blackmun found that the special admissions program violated neither Title VI of the 1964 Civil Rights Act nor the fourteenth amendment of the Constitution. The opinion of Justices Stevens, Rehnquist, Stewart, and Chief Justice Burger found that the special admission program violated Title VI and did not reach the consitutional question. Justice Powell, writing for himself but announcing the judgment of the Court, found that racial classifications could be constitutional but were not in this case. From the considerable literature about *Bakke* see *Regents of the University of California v. Bakke,* 67 CALIF. L. REV. 1 (1979); *The Quest for Equality,* 1979 WASH. U.L.Q. 1 (especially Scalia, *The Disease as Cure,* at 147).

17. 443 U.S. 193 (1979).

18. *Id.* at 208. Justice Brennan authored the opinion in which Justices White, Marshall, and Stewart joined. Justice Blackmun wrote a separate opinion but concurred in the Court's opinion as well as in its judgment.

The plurality looked particularly at two factors: (1) the purpose of the plan mirrored Title VII in that both were designed to break down segregation patterns and open new opportunities to blacks; and (2) the plan did "not unnecessarily trammel the interests of white employees. . . ." *Id.* From the literature about *Weber* see Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and* Weber, 59 N.C.L. REV. 531 (1981).

In *Fullilove v. Klutznick*,[19] the Court considered the constitutionality of the Public Works Act of 1977, which Congress enacted while *Bakke* was under consideration. The Act included a provision requiring that at least ten percent of any grant thereunder be set aside for minority business enterprises. In a challenge to the statute by nonminority contractors, the Court needed three opinions, forming a six justice majority, to uphold the statute.[20]

Finally, in *Firefighters Local 1784 v. Stotts*,[21] the Court considered a district court's attempt to revise a voluntary affirmative action plan. The City of Memphis, Tennessee had entered into a consent decree requiring affirmative steps to increase the proportion of minority employees in its fire department. Subsequent layoffs pursuant to the traditional last-hired/first-fired seniority system meant that a disproportionate number of those laid off were black employees. The Supreme Court held that the district court exceeded its authority in revising the consent decree so as to protect the recently hired blacks from layoffs.

Five justices concluded that the district court's order conflicted with section 703(h) of Title VII which "permits the routine application of a seniority system absent proof of an intention to discriminate."[22] These justices also rejected the argument that, had the plaintiffs prevailed at trial, the court could have entered an order overriding the city's seniority system as justification for the order. They went on to comment that "[o]ur ruling in *Teamsters* that a court can award competitive seniority only when the beneficiary of the award has actually been a victim of illegal discrimination is consistent with the policy behind section 706(g)" which, they noted, "is to provide make-whole relief only to those who have been actual victims of illegal discrimination. . . ."[23]

The major legal question in affirmative action cases is the power of the government to impose or to authorize affirmative action efforts. If the power exists, the issue then becomes whether it matters which branch of the government imposes the obligation or under what procedures? The Supreme Court has answered these questions only in oblique bits and pieces. The Department of Justice, for example, argued that *Stotts* held that affirmative

19. 448 U.S. 448 (1980).

20. Chief Justice Burger wrote an opinion in which Justices Powell and White joined, arguing that Congress may enact legislation containing racial classification if the legislation is narrowly tailored to remedy the present effects of past discrimination that impair access by minority group members to opportunities enjoyed by whites. Justice Powell also issued a separate opinion relying on the views he expressed in *Bakke*. Justice Marshall's opinion, in which Justices Brennan and Blackmun joined, reiterated the views expressed in *Bakke*.

21. 467 U.S. 561 (1984).

22. *Id.* at 577. Justice White wrote the opinion in which Chief Justice Burger and Justices Rehnquist, O'Connor, and Powell joined. Justice Stevens authored a separate opinion concurring in the judgment because he believed the district court had abused its discretion in modifying the decree. *Id.* at 592.

23. *Id.* at 579-80.

action was limited to identifiable victims of an employer's discrimination.[24] Others contended that *Stotts* concerned a court's power to modify a consent decree.[25] Still others wondered why the Court made the statement about the purposes of section 706(g) which was so clearly unnecessary to its decision.[26]

This lack of consensus is understandable. Some would argue the lack of clarity is even desirable. The Court's inability to agree on the propriety of race-conscious remedies parallels political divisions, public disagreements as well as theoretical uncertainties. An individual's view of affirmative action is shaped by his or her moral and political beliefs, by his or her own vision of society and justice. I turn, then, to what the Court did and did not decide about affirmative action last term.

I. THE CASES

In the first of its affirmative action cases, *Wygant v. Jackson Board of Education,*[27] the Supreme Court struck down a race-based layoff scheme as unconstitutional under the fourteenth amendment. In 1972, the Jackson (Michigan) Board of Education proposed adding a provision to its collective bargaining agreement with the Jackson Education Association that would protect recently hired minority group employees against layoffs. The Board and the union eventually agreed to the following (known as Article XII):

> 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 the layoff.

As a result of this provision, during the 1976-77 and 1981-82 school years, nonminority teachers were laid off while minority teachers with less seniority were retained.

Plaintiffs, laid-off nonminority teachers, brought suit, alleging that Article XII violated the fourteenth amendment of the U.S. Constitution, Title VII of the 1964 Civil Rights Act, and other federal and state statutes. The district

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24. This was the Department of Justice argument in each affirmative action case in the 1985 term.

25. *See, e.g.,* Fallon & Weiler, Firefighters v. Stotts: *Conflicting Models for Racial Justice,* 1984 SUP. CT. REV. 1, 8-10. For a more general discussion of consent decrees and Title VII, see Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform,* 1984 DUKE L. J. 887.

26. I was one of these.

From the literature about *Stotts* see Fallon & Weiler, *supra* note 25; Jones, *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities,* 70 IOWA L. REV. 901 (1985); Spiegelman, *Court-Ordered Hiring Quotas After* Stotts*: A Narrative on the Role of the Moralities of the Web and the Ladder in Employment Discrimination Doctrine,* 20 HARV. C.R.-C.L. L. REV. 339 (1985).

27. 106 S. Ct. 1842 (1986).

court dismissed all of plaintiffs' claims.[28] It held that racial preferences embodied in the affirmative action plan did not require a finding of discrimination by the Board, the court, or other competent body. According to the court, the preferences were permissible without such findings as attempts to remedy "societal" discrimination.[29] The United States Court of Appeals for the Sixth Circuit affirmed, holding that the Board's interest in providing role models for its students so as to alleviate the effects of societal discrimination was sufficient to justify the racial preferences in the layoff provision.[30] The Supreme Court reversed.

The Supreme Court held the layoff provision unconstitutional. Writing for a plurality,[31] Justice Powell rejected both the Board's interest in providing role models and its goal of remedying societal discrimination. According to Justice Powell, neither is a sufficient governmental interest to justify racial discrimination. The lower courts had discerned a need for more minority faculty role models by comparing the percentage of minority teachers with the percentage of minority students. The plurality rejected the evidence of discrimination as well as the argument drawn from it. Justice Powell emphasized that the appropriate comparison to prove discrimination and to support an affirmative action plan is between the percentage of teachers who are minority group members and the percentage of the relevant labor market who are minority group members.[32]

The Board also argued its affirmative action effort *was* to remedy its prior discrimination in hiring rather than simply to remedy societal discrimination. Recognizing this possibility, the plurality declined to require a formal finding

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28. Wygant v. Jackson Bd. of Educ., 546 F. Supp. 1195 (E.D. Mich. 1982).

29. *Id.* at 1201.

30. Wygant v. Jackson Bd. of Educ., 746 F.2d 1152 (6th Cir. 1984). The court of appeals apparently thought that without specific findings of discrimination a governmental employer's only basis for affirmative action was to remedy societal discrimination. *Id.* at 1156. Given the Supreme Court's subsequent holding that a specific finding of discrimination is not necessary to support an affirmative action program, it is interesting to speculate about the school board's actual motive. According to the Powell plurality, a change in purpose would not save this affirmative action effort because of its view that layoffs were an inappropriate means to achieve a compelling state interest.

31. Chief Justice Burger and Justice Rehnquist joined in all of Justice Powell's opinion. Justice O'Connor joined in all except the part that disapproved of layoffs as an inappropriate means to achieving an important interest.

Justice Powell structured his opinion in terms of the appropriate level of scrutiny and justification. Quoting his opinion in University of California Bd. of Regents v. Bakke, 438 U.S. 265, 291 (1978), Powell stated that "racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." 106 S. Ct. at 1846. In *Wygant,* no one disputed that the layoffs were based in part on the race of the teachers, so the question facing the Court was whether this racial classification was justified. According to Powell, there are two prongs to this inquiry: (1) whether the racial classification was justified by a compelling governmental interest; and (2) whether the means chosen by the state were narrowly tailored to the achievement of that compelling interest. *Id.* at 1846-47.

32. 106 S. Ct. at 1847. Such is the teaching of Hazelwood School Dist. v. United States, 433 U.S. 299 (1977), as the plurality correctly noted.

33. 106 S. Ct. at 1848.

by a court or other competent body that the governmental unit seeking to institute an affirmative action plan had committed discriminatory acts in the past. Instead, Justice Powell stated, the Board "must have sufficient evidence to justify the conclusion that there has been prior discrimination."[33] Once the remedial program is challenged, continued Justice Powell, "the trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary."[34] Justice Powell observed that this determination allows a court to evaluate whether the race-based action is constitutionally appropriate.

Rather than remand the case for an evaluation of this "appropriate factual predicate," Justices Powell, Burger, and Rehnquist asserted that the challenged preferential treatment still would be unconstitutional because, even if the state's purpose was compelling, layoffs were not a legally appropriate means of achieving it. Justice White, in a one paragraph concurring opinion, agreed with this view.[35] Although this different plurality[36] recognized that some cases may require taking race into account in order to remedy the effects of prior discrimination, it distinguished affirmative action in hiring from racial preferences in layoffs. According to Justice Powell: "In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. . . . [L]ayoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives."[37]

Justice O'Connor agreed with the plurality except for its disapproval of layoffs. She concurred in the judgment, nonetheless, because the school's affirmative action goals were tied to the percentage of students rather than the percentage of qualified minority teachers within the relevant labor pool. She concluded that because the layoff provision acted to maintain levels of minority hiring that themselves had no relation to "remedying employment discrimination," it could not be judged "narrowly tailored" to effectuate its purpose.[38]

Four justices dissented. Justice Marshall, writing for Justices Brennan and Blackmun, concluded that Article XII met any constitutional standard for ensuring that race-conscious programs are necessary to achieve their remedial purpose.[39] Here, an elected school board and a teachers' union collectively

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34. *Id. See* Note, *Walking a Tightrope Without a Net: Voluntary Affirmative Action Plans after* Weber, 134 U. PA. L. REV. 457, 475 (1986) (arguing that past and present underrepresentation should suffice to create a strong presumption of discrimination and to place the burden on the nonminority plaintiffs to challenge the accuracy or significance of the statistics).

35. 106 S. Ct. at 1857 (White, J., concurring).

36. Justice O'Connor did not join in this part of Justice Powell's opinion. Justice White concurred in the judgment specifically because he believed the layoff policy is the same as discharging whites to make room for blacks and is thus unconstitutional.

37. 106 S. Ct. at 1851-52.

38. *Id.* at 1857 (O'Connor, J., concurring).

39. Justice Marshall first reiterated his view, as well as that of Justices Brennan and Blackmun, that the remedial use of racial classification is constitutional if it "serves important

bargained a layoff provision designed to preserve the effects of a valid minority recruitment plan by apportioning layoffs between two racial groups. This plan, in turn, sought to achieve racial diversity and stability for the benefit of all children in the school district. In contrast to the Powell plurality, Justice Marshall asserted that this layoff provision was, in fact, narrowly tailored to the state's compelling interest because it was the least burdensome of all the alternatives.[40]

In a separate dissent, Justice Stevens framed the issue as whether the Board's action advances the public interest in educating children for the future. If so, does that purpose transcend the harm to the white teachers who are disadvantaged by the special preference?[41] This analysis required an assessment of the procedures that were used to adopt and implement the race-conscious plan as well as an evaluation of the nature of the harm itself. Justice Stevens concluded that the plan was permissible because the decision to include more minority teachers in the Jackson school system served a valid public purpose, that it was adopted with fair procedures and given a narrow breadth, and that it transcended the harm to the plaintiffs.[42]

Deciphering the Court's signal is difficult given the five opinions in which no four justices join fully. Despite the Supreme Court's rejection of the affirmative action plan at issue, proponents of affirmative action could welcome much of what was said. Most of the Court, for instance, agreed that a public employer, consistent with the Constitution, may undertake an affirmative action program that is carefully designed to further a legitimate remedial purpose. The Court did not decide, moreover, that layoffs could never be used for remedial action. While the four dissenters would have sustained the debated layoff provision,[43] Justice O'Connor disapproved on grounds that the underlying evidence of discrimination was erroneous. She suggested, therefore, that in a different context layoffs might be appropriate.[44]

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governmental objectives" and is "substantially related to achievement of those objectives." *Id.* at 1861 (Marshall, J., dissenting) (quoting from *Bakke*, 438 U.S. at 359 (Marshall, J., dissenting in part and concurring in part)). He went on to say, however, that "this provision would pass constitutional muster, no matter which standard the Court should adopt." 106 S. Ct. at 1862.

40. 106 S. Ct. at 1865 (Marshall, J., dissenting).

The court of appeals' opinion reasoned that since the race-conscious layoff plan was embodied in the collective bargaining agreement, it would be immunized from constitutional scrutiny. 746 F.2d at 1157. Although the fact that the union's agreement to a written plan was an important factor in upholding the affirmative action plan in United Steelworkers v. Weber, 443 U.S. 193 (1979), it was not, and could not have been, dispositive. Nor is this conclusion inconsistent with International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), in which the Court stated that § 703(h) permits the routine application of a seniority system absent an intention to discriminate. Here, the contract is explicit in its use of race as a criterion for determining layoffs.

41. 106 S. Ct. at 1867 (Stevens, J., dissenting).

42. *Id.* at 1871.

43. *Id.* at 1866 (Marshall, J., dissenting); *id.* at 1870 n.14 (Stevens, J., dissenting).

44. *Id.* at 1857 (O'Connor, J., concurring).

Local 28 of the Sheet Metal Workers' International Association v. EEOC,[45] followed *Wygant*. There, the Court upheld a federal district court's power to order race-conscious relief for individuals who are not identified victims of the defendant's discrimination. In 1975, in a suit brought by the United States, a federal district court found that Local 28 of the Sheet Metal Workers' International Association (Local 28) had violated both Title VII and New York state law by discriminating against black and Hispanic individuals in recruitment, selection, training, and admission to the union through a variety of practices.[46] The court ordered Local 28 to end their discriminatory practices and to increase union membership of blacks and Hispanics to 29% by 1981. Noting that as of July 1, 1974, only 3.19% of the union's total membership was nonwhite, the court based the membership goal on the percentage of nonwhites in the relevant labor pool in New York City. The district court concluded that "the imposition of a remedial racial goal in conjunction with an admission preference in favor of non-whites is essential to place the [union] in a position of compliance with [Title VII]."[47]

The district court subsequently found Local 28 in civil contempt for disobeying its earlier orders.[48] Although nonwhite membership was only 10.8% in 1981, the district court rested its contempt order on its finding that the union never had attempted compliance with the affirmative action plan, rather than on the union's failure to meet the court-imposed 29% goal. A divided panel of the United States Court of Appeals for the Second Circuit affirmed the lower court's order in significant part, holding that the membership goal was proper in light of Local 28's long and egregious racial discrimination.[49] The court of appeals also concluded that the goal did not unnecessarily trammel the rights of any particular group of nonminority individuals.

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45. 106 S. Ct. 3019 (1986).

46. EEOC v. Local 638, 401 F. Supp. 467 (S.D.N.Y. 1975); *supplemental opinion at* 421 F. Supp. 603 (S.D.N.Y. 1975).

47. 401 F. Supp. at 488. The United States Court of Appeals for the Second Circuit affirmed the district court's determination of liability, finding that the union had consistently and egregiously violated Title VII. It also upheld the 29% nonwhite membership goal as a temporary remedy, justified by the long and persistent pattern of discrimination. EEOC v. Local 638, 532 F.2d 821, 825, 830 (2d Cir. 1976). The court modified the lower court order in other respects. On remand, the district court entered a revised affirmative action plan and order to incorporate the court of appeals' mandate. The union also was given an extra year to comply with the membership goal because of economic problems facing the construction industry. A divided Second Circuit panel again affirmed. 565 F.2d 31 (2d Cir. 1977). On neither occasion did the union seek Supreme Court review of these judgments.

48. In 1982, the city and the State moved for an order holding the union in contempt, alleging failure to meet the membership goal and numerous violations of the court order. *See* EEOC v. Local 28, 30 Empl. Prac. Dec. (CCH) ¶ 33,198 (S.D.N.Y. 1982). In 1983, the city brought a second contempt proceeding, charging the union with additional violations. Part of the remedy in this latter proceeding was the establishment of a "Fund," financed by fines imposed on the union for its civil contempt. *See* EEOC v. Local 28, 31 Empl. Prac. Dec. (CCH) ¶ 33,534 (S.D.N.Y. 1983).

49. 753 F.2d 1172 (2d Cir. 1985).

Presenting several claims for Supreme Court review,[50] the union, supported by the Solicitor General, argued that the membership goal exceeded the scope of remedies available under Title VII because the order extended race-conscious remedies to individuals who were not identified victims of unlawful discrimination. Again dividing 5-4 on the issue of preferential treatment,[51] the Court this time affirmed the lower courts' judgments, upholding the court-ordered affirmative action efforts.

Section 706(g) of Title VII vests district courts with broad discretion to award "appropriate" equitable relief to remedy unlawful discrimination.[52] Relying on the Court's opinion in *Firefighters Local 1784 v. Stotts,*[53] the union and the Solicitor General argued that race-conscious remedies contravened the policy behind section 706(g) because they extended preferential treatment to individuals who were not actual victims of illegal discrimination.[54]

In a plurality opinion joined by Justices Blackmun, Marshall, and Stevens, Justice Brennan held that section 706(g) did not prohibit a court from ordering affirmative race-conscious relief as a remedy for past discrimination. Specifically, the plurality concluded that such relief was appropriate where an employer or labor union had engaged in "persistent or egregious discrimination or where necessary to dissipate the lingering effect of pervasive discrimination."[55] Rejecting the union's suggested limitation of the last sentence of section 706(g), the plurality interpreted the sentence as addressing only the situation where the union (or employer) had engaged in unlawful discrimination but could show a legitimate reason for the refusal to hire (or to admit to membership) a *particular* individual.[56]

The plurality also reasoned that court-ordered affirmative action efforts further the purposes of Title VII because: (1) they are often the only effective way to ensure compliance by a recalcitrant employer; (2) they may be the

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50. 106 S. Ct. at 3031. The petition presented several other claims for review. Those included: (1) that the district court relied on incorrect statistical data; (2) that the contempt remedies ordered by the district court were criminal in nature; (3) that the appointment of an administrator to supervise membership practices interferes with their right to self-governance; and (4) that the membership goal and Fund are unconstitutional.

51. Justice Brennan authored an opinion in which Justices Marshall, Blackmun, and Stevens joined. Justice Powell concurred in the judgment of the Court. Justices O'Connor, White, Rehnquist, and Chief Justice Burger dissented.

52. 42 U.S.C. § 2000e-5(g).

53. 467 U.S. 561 (1984).

54. The last sentence of § 706(g) provides:

> 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 [in violation of Title VII].

For a discussion of *Stotts,* see *supra* text accompanying notes 21-23.

55. 106 S. Ct. at 3034.

56. *Id.* at 3035.

only way to overcome a union's (or employer's) reputation for discrimination; and (3) they provide a compromise between an outright ban on hiring or promotions and the continued use of discriminatory procedures.[57] Finally, the plurality concluded that court-ordered affirmative action efforts did not violate the equal protection component of the due process clause of the fifth amendment because the relief was narrowly tailored to further the government's compelling interest in remedying past discrimination.[58] Distinguishing the present case from the court's decision in *Wygant v. Jackson Board of Education,* the plurality noted that here the district court and court of appeals made formal findings of prior discrimination. The measures were necessary to remedy the identified discrimination and they were properly tailored to accomplish that objective in light of the union's recalcitrance and the marginal impact such efforts would have on the interests of white workers.

Justice Powell concurred in a separate opinion.[59] First, he concluded that the membership goal did not violate Title VII given the particularly egregious circumstances; a district court may properly conclude that an injunction alone is insufficient to remedy a proven violation of Title VII.[60] Second, Justice Powell concluded that the remedy was constitutional because it was narrowly tailored to accomplish a compelling governmental interest. Reiterating his views in *Fullilove v. Klutznick,*[61] and *Wygant,* Powell found the percentage goal sufficient to justify race-conscious remedies because: (1) alternative remedies would not have been effective; (2) the goal was limited in duration; (3) the goal was directly related to the percentage of nonwhites in the relevant workforce; (4) the goal was indeed a flexible goal; and (5) the remedy was unlikely to have any direct effect on "innocent third parties."[62]

Again, four justices dissented. Justices O'Connor and White, in separate opinions, concluded that the membership goals were impermissible under Title VII because they operated as racial quotas, not goals.[63] According to Justice O'Connor, absent expansion of the apprentice program or vast changes in the economic conditions of the construction industry, the goal set by the district court could not have been achieved by the deadline.

In contrast to Justices White and O'Connor, who suggested the possibility of permissible affirmative action efforts under appropriate circumstances,[64]

57. *Id.* at 3050-52.

58. *Id.* at 3052-53.

59. *Id.* at 3054 (Powell, J. concurring).

60. *Id.*

61. 448 U.S. 448, 495 (1980)(Powell, J., concurring) (upholding constitutionality of Minority Business Enterprise program which set aside a certain percentage of the federal grants for minority-owned businesses).

62. 106 S. Ct. at 3055-56 (Powell, J., concurring).

63. *Id.* at 3057 (O'Connor, J., dissenting); *id.* at 3062 (White, J., dissenting).

64. "I agree that sec. 706(g) does not bar relief for non-victims in all circumstances." *Id.* at 3062 (White, J., dissenting).
"[T]he 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 . . . ." *Id.* at 3061 (O'Connor, J., dissenting).

Justice Rehnquist and Chief Justice Burger rejected that possibility.[65] They concluded that "section 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."[66] None of the dissenting opinions discussed the constitutional question because each concluded the court order violated Title VII.

Deciphering the Court's signal is slightly easier here because at least six members of the Court agreed that under Title VII a district court may, in appropriate circumstances, order preferential relief benefitting individuals who are not actual victims of discrimination.[67] Five members of the Court agreed that race-conscious remedies are not violative of either Title VII or the Constitution.[68] The case differs from others raising affirmative action issues because the affirmative action plan at issue was not in any sense voluntary and because clear judicial findings of intentional discrimination supported the race-conscious remedies.

For the six members of the Court who concluded that courts might order preferential relief benefitting nonidentified victims of discrimination, it is clear that such relief should not be the usual or typical remedy.[69] Courts must find facts necessary to support race-conscious relief. In *Sheet Metal Workers,* the union's conduct, both the underlying discrimination as well as the recalcitrant and foot-dragging behavior at the remedial stage, was undoubtedly a prime factor. The other consideration that apparently tipped the balance in favor of the remedy was that no current union member (i.e., whites) would be affected by the affirmative action plan.[70]

In the third affirmative action case, *Local Number 93, International Association of Firefighters v. City of Cleveland,*[71] the Court held that section 706(g) of Title VII[72] did not preclude the district court from approving a consent decree that included race-conscious remedies benefitting nonidentifiable victims of discrimination. In 1980, the Vanguards of Cleveland, an organization of black and Hispanic firefighters employed by the City of Cleveland, filed a complaint charging the city and various officials with discrimination on the basis of race and national origin. Although the complaint alleged facts to establish discrimination in hiring and work assign-

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65. *Id.* at 3063. (Rehnquist, J., dissenting).

66. *Id.* (in reliance on their opinion in Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, 106 S. Ct. 3063, 3082 (1986) (Rehnquist, J., dissenting).

67. The plurality plus Justices Powell and White.

68. The plurality and Justice Powell.

69. 106 S. Ct. at 3050.

70. Justice Powell cautioned that it would be "too simplistic to conclude . . . that hiring goals withstand constitutional muster whereas layoff goals and fixed quotas do not." *Id.* at 3057 n.3 (Powell, J., concurring). Such a distinction does explain, however, the different results for Justice Powell in similar cases decided the same term.

71. 106 S. Ct. 3063 (1986).

72. *See supra* notes 52-56 and accompanying text.

ments, the plaintiffs' primary allegations charged discrimination in promotions. By the time the Vanguards filed their complaint, the city had already unsuccessfully contested many of the basic factual issues in other lawsuits. Thus, rather than begin another round of litigation, the city entered into "serious settlement negotiations" with the Vanguards.[73]

In 1981, however, Local 93 of the International Association of Firefighters (petitioners in the Supreme Court) intervened as a party plaintiff. Although Local 93 submitted a "Complaint of Applicant for Intervention," the document did not allege any cause of action or assert any claims against either the Vanguards or the city.[74] Instead, it expressed its opposition to racial goals or quotas. After months of negotiations and several court hearings, the final consent decree required that those eligible for promotion be divided into two lists, one composed of eligible minority group members and one of eligible majority group members. Promotions were to proceed two at a time, with one from each list. Under this scheme, some eligible minority group members would be promoted before some eligible majority group members with greater seniority.[75] A divided panel for the United States Court of Appeals for the Sixth Circuit affirmed.[76]

Before the Supreme Court, Local 93 contended that the consent decree was an impermissible remedy under section 706(g). The argument contained two parts: (1) section 706(g) prohibits a court from ordering the race-conscious relief contained in the consent decree; and (2) the court's power to approve a consent decree is subject to the same constraints.[77] In response to these arguments, a majority of the Court held only that the limitations of section 706(g) do not apply to consent decrees.[78] It did not discuss whether a court could have ordered this relief (race-conscious remedies available to nonidentifiable victims) on the basis of the evidence before it.[79]

Writing for a majority of six justices, Justice Brennan began by noting that "[w]e have on numerous occasions recognized that Congress intended for voluntary compliance to be the preferred means of achieving the objectives of Title VII."[80] Absent some contrary indications, he continued, there is no reason to think that voluntary, race-conscious affirmative action, such as was permissible in *Steelworkers v. Weber*,[81] is rendered impermissible by Title VII simply because it is incorporated into a consent decree.

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73. *Id.* at 3067.
74. *Id.* at 3067-68.
75. *Id.* at 3069.
76. Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479 (6th Cir. 1985).
77. 106 S. Ct. at 3071.
78. *Id.* at 3080. The majority included Justices Brennan, Marshall, Blackmun, Stevens, and Powell. Justice O'Connor filed a separate concurring opinion.
79. *Id.* at 3073 n.8.
80. *Id.* at 3072.
81. 443 U.S. 193 (1979) (holding that voluntary affirmative action plan in the private sector to provide training program did not violate Title VII).

Petitioners had argued that section 706(g) prohibited an "order of the court" from providing relief that benefits nonvictims and thus established an independent limitation on what courts can do. Finding the Court's past treatment of consent decrees inconclusive, the majority relied on the purpose and the legislative history of Title VII to support its view that section 706(g) is irrelevant to voluntary affirmative action efforts. This conclusion, however, did not immunize consent decrees from attack by majority group members on grounds that the decree violates some other provision of Title VII, such as section 703, or the fourteenth amendment. Because the union did not mount such an attack, the Court found it unnecessary to address those issues.

Three justices dissented. Justice Rehnquist and Chief Justice Burger rejected the view that section 706(g) is inapplicable to consent decrees.[82] According to them, a consent decree should be treated as an "order" within the meaning of section 706(g) because it possesses the legal force and character of a judgment decreed after trial: A consent decree looks like and is entered as a judgment, the court retains the power to modify a consent decree in certain circumstances, and noncompliance with a consent decree is enforceable by contempt.[83] Reiterating their views in *Stotts,* the dissenting justices noted that " 'the District 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.' "[84] They also quoted extensively from *Stotts* to show that these remedies were, in fact, impermissible under Title VII.

In a separate dissenting opinion, Justice White agreed that consent decrees were not immune from examination under section 706(g) and wrote separately to argue that the limits of permissible affirmative action had been exceeded in this case.[85] In Justice White's view, the provisions of the consent decree obviously violated section 703 of Title VII and the equal protection clause of the fourteenth amendment.[86]

The decision in *Local Number 93 v. Cleveland Fire Fighters* is quite narrow. Simply stated, the Court concluded that whatever the limitations on a court's power imposed by section 706(g), such limitations do not apply to consent decrees. The more interesting question, of course, is whether a court could have imposed these race-conscious remedies.

II. THE QUESTIONS

In the three affirmative action cases of the 1985 term, the Supreme Court upheld two of the challenged affirmative action efforts and struck down

82. *Id.* at 3082 (Rehnquist, J., dissenting).
83. *Id.* at 3074. This is the argument of the union and the Solicitor General.
84. *Id.* at 3078 (citing *Stotts,* 467 U.S. at 576 n.9).
85. 106 S. Ct. at 3081 (White, J., dissenting).
86. *Id.* at 3081-82.

one. It gave small, but unmistakable, indications of an affirmative answer to the major legal question facing affirmative action: does the government have the power to impose or to authorize affirmative action efforts? According to Justice O'Connor, the Court has in fact forged a degree of unanimity on a number of issues. First, remedying past or present discrimination by a state actor is a sufficiently weighty interest to warrant the remedial use of a carefully constructed affirmative action plan. Second, formal findings of actual discrimination need not accompany the adoption of the plan. Third, a state interest in promoting racial diversity is sufficiently compelling, at least in higher education, to support race-conscious plans. And fourth, a plan need not be limited to remedying specific instances of identified discrimination for it to be sufficiently narrowly tailored or substantially related to the correction of past discrimination by a state actor.[87]

The consensus crumbles, however, under more difficult facts. In *Cleveland Firefighters,* for example, the parties argued the case in terms of whether the affirmative action plan contained in the consent decree fit within the *Weber* framework and whether that framework should apply to these kinds of cases. The Court did not decide those issues, choosing instead the narrower approach that a consent decree is not limited by section 706(g).

Because it did not address the question of the permissibility of the plan under Title VII or the Constitution, the Court also refrained from deciding what factual showing would support the relief. Nor did it discuss the adequacy of the relationship between the government's interest and the promotion quotas. The Court, thus, did not address the circumstances in which voluntary affirmative action would violate section 703 or, even if permissible under section 703, would violate the fourteenth amendment.

Had the Court been interested, it could have applied its reasoning in *Wygant* to test the validity of the plan challenged in *Cleveland Firefighters.* Answering this question is necessary, given the recurring character of the *Cleveland Firefighters'* plan. The Court, in fact, now faces this question next term in *United States v. Paradise,*[88] involving the constitutionality of a district court's order that Alabama promote one black state trooper for each white state trooper promoted to a higher rank.[89]

In 1972 the district court in *Paradise* found that the Alabama Department of Public Safety had "engaged in a blatant and continuous pattern and practice of" discrimination against blacks in hiring.[90] It ordered the de-

87. *Wygant v. Jackson Bd. of Educ.,* 106 S. Ct. 1842, 1853 (1986) (O'Connor, J., concurring).

88. 767 F.2d 1514 (11th Cir. 1985) (Paradise v. Prescott), *aff'g* 585 F. Supp. 72 (M.D. Ala. 1983), *cert. granted,* 106 S. Ct. 3331 (1986).

89. The one-for-one promotion scheme exists until 25% of the rank is comprised of black troopers or the state develops and implements its own promotion procedures having no adverse impact on blacks. 767 F.2d at 1524.

90. NAACP v. Allen, 340 F. Supp. 703 (M.D. Ala. 1972), *aff'd,* 493 F.2d 614 (5th Cir. 1974). The court found, for example, that in the thirty-seven-year history of the patrol there had never been a black trooper.

partment to hire one black trooper for each white trooper until the state trooper force was comprised of approximately 25% blacks. After several intervening decisions, the district court rendered its most recent decision on December 15, 1983, in effect ordering the defendant to comply with two previous consent decrees which included the promotion quota. Now in the Supreme Court, the United States challenges the promotion quotas as unconstitutional based on the Court's recent decisions in *Wygant* and *Sheet Metal Workers*. Although the factual background of *Paradise* is similar to that of *Sheet Metal Workers,*[91] the case differs from the Court's three affirmative action decisions of the 1985 term because the promotion quota is unrelated to the specific judicial finding that the state discriminated in hiring.

Another case the Court has agreed to hear next term, *Johnson v. Transportation Agency, Santa Clara County*[92] raises two additional questions. First, what is the "appropriate factual predicate" to support a voluntary affirmative action plan?[93] Second, what standards govern affirmative action efforts addressing gender discrimination?[94] In *Johnson,* a white male denied promotion challenged the county's affirmative action plan. That plan has a long-range goal of attaining a workforce whose composition in various job categories approximates the percentage of women in the county labor market. The United States Court of Appeals for the Ninth Circuit upheld the plan, stating that an employer need not show its own history of purposeful discrimination in order to demonstrate that the plan is remedial. It is sufficient, according to the court, for the employer to show a conspicuous imbalance in its workforce.[95]

One task for the Supreme Court in *Johnson* is to elucidate the factual showing necessary to support a voluntary affirmative action program. Recall that in *Wygant* the Powell plurality declined to require a formal finding that the public employer seeking to institute an affirmative action plan had committed discriminatory acts in the past. Instead, once the remedial program is challenged, "the trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial

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91. The parallels include: (1) a judicial finding of discrimination to support the race-conscious remedies; and (2) the court finding the defendant's original conduct as well as its interim conduct especially egregious. 585 F. Supp. at 74. It differs because the one-for-one quota contrasts with the membership goal in *Sheet Metal Workers. Cf.* Justices O'Connor and White in *Sheet Metal Workers* arguing that the goal is in fact a quota and thus impermissible. *See supra* text accompanying note 63.

92. 770 F.2d 752 (9th Cir. 1985), *cert. granted,* 106 S. Ct. 3331 (1986).

93. The issue was raised but not resolved in *Wygant,* discussed *supra* text accompanying notes 31-37.

94. So far the Court has avoided this issue. The Court granted review in one case, Minnick v. California Dept. of Corrections, 453 U.S. 105 (1981), but, in a full opinion, dismissed the writ of certiorari because significant developments in the law and significant ambiguities in the record suggested that the constitutional issues should not be addressed.

95. 770 F.2d at 758.

action was necessary.'"[96] Recall also that the plurality in *Wygant* said that an attempt to remedy societal discrimination was not a sufficient governmental interest to justify racial discrimination. In *Johnson*, the county's affirmative action plan did not specify past discriminatory practices. It simply stated that women had been underrepresented in the relevant job classifications and recognized the difficulty of increasing significantly the representation of women in certain of those technical and skilled jobs.[97]

The second issue before the Supreme Court is the standard by which to evaluate affirmative action efforts for women. While the Court has failed to reach a consensus on the line between permissible and impermissible affirmative action plans, the cases strongly suggest that the employer bears a heavy burden of justification to support race-conscious preferential treatment. In *Johnson* the Supreme Court must decide whether employers should meet a similar burden to support preferential treatment on the basis of gender. The lower standard of scrutiny under the Constitution for gender classifications[98] ironically can support either an argument that affirmative action plans for women are easier to justify or that they are more difficult. On the one hand, the lower level of scrutiny for gender cases suggests some forms of gender discrimination can be tolerated and therefore it is easier for a public employer to justify affirmative action for women. On the other hand, the fact that gender is subject to less scrutiny may suggest that the government's interest in eradicating the present effects of past discrimination is not important enough to justify gender-specific remedies.[99]

Finally, the decisions in the three affirmative action cases of the 1985 term are further evidence that Justice Powell's views remain critical to the outcome of affirmative action challenges under both civil rights statutes and the Constitution. Justice Powell's vote, for example, is the difference between the outcomes in *Sheet Metal Workers* and *Firefighters v. Stotts*.[100] The majority in *Stotts*, which included Justice Powell, stated that its decision,

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96. 106 S. Ct. at 1848.

97. The question presented by the plaintiff in his petition for certiorari is: may a public employer lawfully promote a less qualified woman over a more qualified man allegedly pursuant to an affirmative action plan adopted solely to eliminate statistical disparity in the workforce unrelated to sex discrimination? 54 U.S.L.W. 3861 (U.S. July 7, 1986). Although the county does not admit it discriminated in the past, it is significant that not one of the agency's 238 skilled craft positions was held by a woman.

98. Compare "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives," Craig v. Boren, 429 U.S. 190, 197 (1976) with "racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination," 106 S. Ct. at 1846.

99. Neither has the Court discussed the Title VII standard for affirmative action efforts based on gender. The plaintiff in *Johnson* raises only the Title VII issue. If the Court interprets Title VII in such a way so as to avoid the constitutional question, it would be further evidence that the Court would like not to decide that issue.

See also Kay, *Models of Equality*, 1985 ILL. L. REV. 39 (distinguishing claims of reverse discrimination in racial context from sex discrimination cases brought by men).

100. 467 U.S. 561 (1984), discussed *supra* text accompanying notes 21-23.

denying the district court power to modify a consent decree as to layoffs with racial impact, was consistent with the policy behind section 706(g), providing relief only to those who have been actual victims of illegal discrimination.[101] The dissenters in *Sheet Metal Workers* argued that *Stotts* decided the issue. If Justice Powell had maintained his alliance with the *Stotts*' majority, that view would have prevailed. Justice Powell instead dismissed that opinion, noting only that "the question of whether Title VII might *ever* authorize a remedy that benefits those who were not victims of discrimination was not before us, although there is language in the opinion suggesting an answer to that question."[102]

CONCLUSION

Professor Nathaniel Nathanson once wrote that experience with the legislative veto demonstrated its undesirability but he nonetheless defended its constitutionality.[103] Writing before the Supreme Court decided *Immigration and Naturalization Service v. Chadha,*[104] striking down the legislative veto, he also doubted the desirability of a judicial solution and noted that sometimes "consistency, like certainty, is not the greatest desideratum."[105] He argued that if both the President and the Congress were reasonably uncertain of success neither would be apt to push for final resolution. He concluded that:

> If neither the President nor the Congress were inclined to litigate the constitutional question, it is also possible that the Court might continue to find ways to avoid deciding the issue even if it were pressed by private parties. To my mind, this would, for the foreseeable future, be the happiest solution.[106]

Professor Nathanson was wrong in his prediction that the Court would, if necessary, uphold the legislative veto. His sense that society would have been happier if the Court had not decided at all is probably right.

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101. 467 U.S. at 579-80.

102. 106 S. Ct. at 3054 (Powell, J., concurring) (emphasis in the original).

It is also interesting to note that Justices White and Stevens apparently have switched sides on the affirmative action issue. Justice White was one of four justices arguing that the special admissions program in *Bakke* was constitutional and he joined the majority opinion in *Weber,* upholding the race-conscious affirmative action plan. As the author of the majority opinion in *Stotts,* he fails to mention the previous decision in *Weber.* Justice Stevens, in contrast, was one of four justices in *Bakke* arguing that the special admissions program violated Title VI (prohibiting race discrimination in federally funded programs). He dissented in *Fullilove,* which upheld a race-specific provision in a federal grant program, and he did not participate in *Weber.* He wrote separately only in *Wygant,* arguing in favor of the plan, but he agreed with the majority in the other two cases.

103. Nathanson, *Separation of Powers and Administrative Law: Delegation, The Legislative Veto, and the "Independent Agencies,"* 75 NW. U.L. REV. 1064, 1110 (1981).

104. 462 U.S. 919 (1983).

105. Nathanson, *supra* note 103, at 1111.

106. *Id.*

A similar happiness is possible with the affirmative action cases. It is clear that the Court has carved out an exception to the traditional anti-discrimination principle that individuals should be treated on the basis of their individual characteristics. The scope of the exception and its justification, however, remain unclear. Arguably, the Court's decisions are the same as an acceptable affirmative action program: temporary, unusual, and with no clear line between the permissible and the impermissible. Perhaps this is how it should be.