Has Affirmative Action Been Negated? A Closer Look at Public Employment

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I. INTRODUCTION

It is difficult to argue with the concept that race and gender should play no part in employment and education opportunities, but only if one were to ignore the extent to which those factors have played an extensive role in our past history. When I was appointed to the United States District Court in 1979, I was assigned the discrimination cases against the police and fire departments for all of New Jersey's major cities. These were cities in which minorities represented a majority of the population, with little, and in some cases no, representation among firefighters or police officers. Although far from perfect, steps to prevent future recurrence of invidious discrimination were easier to conceive than those that would remedy for the past. The specific means chosen to remedy past discrimination of such magnitude might be subject to challenge; but, in reality and fairness, some form of affirmative action was necessary to cure the past wrongs. The debate has bogged down over discussions of "quotas" and "goals," but arguments over the form of relief never overcame its necessity. Indeed, all of those cases were resolved by consent orders because everyone involved recognized both the need and the wisdom of affirmative action as a preventative measure for the future and an attempt, albeit imperfect, to cure past discrimination.

There are legitimate and understandable objections to affirmative action. Most forms of social engineering are spread over the populace by taxes or other forms of government action that attempt to apportion the burden in some rational way. But affirmative action is unique in that its implementation affects, or is perceived to affect, identifiable individuals, many of whom never committed an act of discrimination and are not responsible for those who have suffered from it. Every time someone is preferred for employment, promotion, or acceptance at an educational institution, someone else is deprived of that opportunity. It is difficult to explain to the police officer who is about to make sergeant that someone else lower down on the list will receive "his" promotion.

It can be argued that he has been the beneficiary of the discriminatory system, that minority persons are not "qualified" for the position simply because they have been denied opportunities under the system, or that the criteria and qualifications themselves are discriminatory. However, none of these arguments alleviates the anger and frustration of the persons adversely affected. The nonminority police officer cannot understand why he should be denied what he would otherwise receive in order to achieve some larger social good.

We delude ourselves if we do not admit and recognize that some of the resentment toward affirmative action has underpinnings of racial and gender prejudice. No referenda are proposed to bar athletic scholarships or geographic considerations in connection with admissions to educational institutions, even though those actions clearly deprive someone (more objectively qualified) from those positions. True, those actions are not predicated upon race or gender, nor are they of constitutional magnitude; but the consequences to others are the same, and we accept them without complaint. Apparently having a good football team is considered more important than promoting racial diversity on campus.

There is also the argument made by respected scholars that affirmative action demeans and stigmatizes those who benefit by it. A beneficiary may suffer doubts and others may always suspect that the person is unqualified or unworthy of the opportunity received. Those are real and understandable concerns, but given the choice between receiving the employment or educational opportunity with those possible side effects and not receiving it at all, the benefits would seem to outweigh the potential detriments.

It is ironic that the opposition to affirmative action is predicated upon the lofty principle that there should be no race-conscious or gender-conscious remedies. To bar affirmative action is to ignore reality and the past. The difference lies in whether we merely lift our heel off of the backs of minorities and women and say henceforth you will be treated equally, or reach down and lift them up to make amends for our past treatment. The former makes equality a goal of the next millennium; the latter makes it achievable in this one. Affirmative action is not only principled, it is practical. Indeed, our goal should be a time when affirmative action is no longer necessary. But the racial divide seems to

be widening, particularly for African-Americans.[1] If we cannot bring ourselves to recognize that we owe such action in keeping with the highest traditions of our democracy, let us, at least, recognize it as a necessity, so that a large segment of our population will not remain uneducated, unemployed, in poverty, and with no place to turn but crime. If principles do not carry the day, practicalities might.

First, this Article argues that affirmative action is right and necessary in certain circumstances. Second, it examines whether affirmative action has survived under current case law. Part II.A reviews the Supreme Court decisions that define the test of strict scrutiny in the public employment context. Part II.B discusses the current focus of the Court's debate on affirmative action. Part III looks at how strict scrutiny analysis and the Supreme Court's precedents are being applied by the lower federal courts. Part IV concludes that more guidance is needed from the Supreme Court on the first prong of the strict scrutiny analysis as to when a compelling government interest exists. Last, this Article suggests that the Supreme Court firmly establish an "inferential standard" for proving past discrimination by a public employer sufficient to warrant current affirmative action.

II. AFFIRMATIVE ACTION IN THE SUPREME COURT: THE EVOLUTION AND AFTERMATH OF STRICT SCRUTINY

Throughout the twentieth century, the Supreme Court has grappled with many of the issues described above. The contrasting and often conflicting considerations are reflected in the difficulty the Court has had in providing guidance. The Court has rarely delivered an opinion supported by a majority, much less reached a consensus. There has been a constant tension between the need to effect change for the whole of society and the need to protect each individual member of that society. While recognizing a historic need to advance the constitutionally protected equality interest of minorities toward fulfillment, the Court has been reluctant to impose the burden of society's past mistakes on any given individual. Although continually acknowledging that, in a perfect world, society, and especially government, would take a color-blind view of all people, the Court has been less consistent in establishing the means for achieving perfection.

One of the major obstacles the Court has faced is trying to set forth prospective bright-line rules in a retrospective, yet ever-changing

1. *See generally Text of 'Affirmative Action Review' Report to President Clinton Released July 19, 1995*, Daily Lab. Rep. Special Supp. No. 139 d30 (July 19, 1995) (citing to empirical studies that detail racial discrimination and inequality in American society).

society—orders to stop current discrimination are easy. But the line becomes blurred when a multiplicity of past, present, and future influences intersect—when discrimination imposed for decades in education, hiring, and promotion is necessarily perpetuated by merely maintaining the status quo.

In many cases, the Court has found itself reacting to the unintended, perhaps unforeseen consequences of attempts to remedy discrimination, such as the detriments to its beneficiaries, as previously discussed. In *Regents of the University of California v. Bakke*,[2] for example, Justice Powell suggested that programs designed to help minorities may actually backfire by "reinforc[ing] common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth."[3] Similar concerns were echoed in *Fullilove v. Klutznick*:[4]

> [E]ven though it is not the actual predicate for this legislation, a statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race. Because that perception—especially when fostered by the Congress of the United States—can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become a truly irrelevant, or at least insignificant, factor.[5]

Determining when affirmative action[6] is or should be constitutionally

2. 438 U.S. 265 (1978). In *Bakke*, a white male candidate for admission to medical school at the University of California at Davis charged violations of the Equal Protection Clause because he was ineligible to compete for 16 seats in the entering class on the basis of his race. *See id.* at 277-79. The Court held that the admissions program was unconstitutional. *See id.* at 271.

3. *Id.* at 298 (Powell, J., concurring).

4. 448 U.S. 448 (1980). The Court in *Fullilove* upheld a 10% minority business enterprise set-aside in deference to the legislative determinations of Congress. *See id.* at 492. Such deference would not pass the test of time, as later held in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995) ("Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.... [T]o the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling.").

5. *Fullilove*, 448 U.S. at 545 (Stevens, J., dissenting) (citation omitted).

6. As discussed in this Article, "affirmative action" refers generally to initiatives designed to promote equality between racial and ethnic groups. Affirmative action can be race-neutral or race-conscious. Typical race-neutral affirmative action programs include outreach and recruiting efforts. A common race-conscious affirmative action plan in public employment is the use of goals for promotion and hiring decisions. For example, an employer may set a goal of 25% minority composition of its workforce and establish an alternative hiring policy, where one minority employee is hired for each

permitted has become a critical issue for the Court. The broadest view, that racially preferential policies should be permitted to compensate for the past, present, and continuing effects of discrimination generally by a white majority against a black minority—so called "societal discrimination"—has largely been discarded.[7] Although government policy should rightfully be concerned with past discrimination by society as a whole, in the remedial sense, such discrimination has been viewed as too "amorphous [a] concept of injury" for courts to address.[8] The concept of minority and majority are temporary, reflecting political as well as demographic circumstances, while the concept of equal protection of the law should be timeless, enduring, and irrespective of which race constitutes the minority.[9] As a corollary, the related argument that the Fourteenth Amendment applies only to those who have been identified as "discrete and insular"[10] minorities subject to historical discrimination has also been discarded.[11]

Yet the Court has similarly rejected the narrowest reading of the Constitution's Equal Protection guarantee as dictating an entirely color-blind society.[12] The Court continues to recognize that this is no less true today than it was more than twenty years ago. The "claims that law must be 'color-blind' or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality."[13]

Somewhere in the middle, the Supreme Court has recognized an arena it considers appropriate for affirmative action. Amidst differing opinions as to the precise boundaries, the Court has settled on defining

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nonminority who is hired, until the 25% goal is reached. Only race-conscious affirmative action is subject to strict scrutiny. *See* Allen v. Alabama State Bd. of Educ., 164 F.3d 1347, 1352 (11th Cir. 1999) ("[W]here the government does not exclude persons from benefits based on race, but chooses to undertake outreach efforts to persons of one race, broadening the pool of applicants, but disadvantaging no one, strict scrutiny is generally inapplicable.").

7. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) (plurality opinion) ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.").

8. *Regents of the University of California v. Bakke*, 438 U.S. 265, 307 (1978).

9. *See id.* at 295.

10. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

11. *See Bakke*, 438 U.S. at 289-90. Justice Powell argued in *Bakke* that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal." *Id.*

12. *See id.* at 336 (plurality opinion) ("[N]o decision of this Court has ever adopted the proposition that the Constitution must be colorblind."); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (stating that strict scrutiny does not automatically invalidate all race-based government action).

13. *Bakke*, 438 U.S. at 327 (plurality opinion); *see also Adarand*, 515 U.S. at 272 (Ginsburg, J., dissenting).

this arena by applying strict scrutiny to all race-conscious affirmative action plans. As a result, the Court now requires that any affirmative action plan by a state actor be supported by a compelling government interest and be narrowly tailored to serve that interest.

In the employment context, the Court has been presented both with cases clearly exemplifying compelling interests and with those clearly falling outside the bounds, with remedies narrowly tailored to the alleged violation and with those attempting a broader reach. To date, only one situation has consistently met the compelling interest requirement: remedying the effects of discrimination. Once that interest has been established, the strict scrutiny analysis turns to a set of factors for considering whether an affirmative action plan is narrowly tailored as a remedial measure.

A. *The Development of Strict Scrutiny in the Public Employment Context*

A majority of the Court did not formally adopt the strict scrutiny test for race-conscious affirmative action until 1989.[14] Yet, in two pre-1989 decisions, a plurality of the Court analyzed public employment affirmative action plans within the framework of strict scrutiny. In *Wygant v. Jackson Board of Education*,[15] the Court looked at the evidentiary basis required to establish a compelling government interest in providing a remedy for past or present discrimination.[16] The following year, in *United States v. Paradise*,[17] the Court promulgated a list of factors for assessing whether an affirmative action plan is narrowly tailored.[18] Together, these two cases have become the blueprint for lower court analysis of public employment affirmative action plans.

In *Wygant*, a plurality of the Court established guidelines for the compelling government interest prong of the strict scrutiny test. *Wygant* involved a challenge to the collective bargaining agreement negotiated between the Jackson School Board and its teachers union, which prohibited the school board from laying off a greater percentage of minority teachers than the percentage who were employed at the time of

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14. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989) (plurality opinion); *see also id.* at 520 (Scalia, J., concurring in judgment).
15. 476 U.S. 267 (1986).
16. *See id.* at 274.
17. 480 U.S. 149 (1987).
18. *See id* at 171.

the layoff.[19] The layoff preference was designed to preserve the gains in minority hiring that had been made by ongoing affirmative action.[20] The district court upheld the layoff preference,[21] deciding that the agreement was valid "as an attempt to remedy societal discrimination by providing 'role models' for minority schoolchildren."[22]

On review, the Supreme Court held that the layoff preference should be subject to strict scrutiny, and thus considered whether it was justified by a compelling government interest.[23] The most significant flaw of the layoff preference was that it was not based on specific findings of past school board discrimination.[24] According to the plurality, the role model theory adopted by the district court had "no logical stopping point," because it would permit the school board "to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose."[25] Societal discrimination alone, the plurality stated, is "too amorphous"[26] to justify race-conscious action by government employers:

> No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and overexpansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.[27]

The plurality declined to review the school board's "belated" assertion that it could prove that it had discriminated in the past.[28] Rather, the plurality suggested that consideration of past discrimination was unnecessary in light of its finding that the layoff preference, even if supported by a compelling government interest, was not narrowly tailored.[29]

In concluding that the plan was not narrowly tailored, Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, recognized that "in order to remedy the effects of prior discrimination, it may be

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19. *See Wygant*, 476 U.S. at 270 (plurality opinion).
20. *See id.* at 288 (O'Connor, J., concurring).
21. *See* Wygant v. Jackson Bd. of Educ., 546 F. Supp. 1195 (E.D. Mich. 1982).
22. *Wygant*, 476 U.S. at 272 (plurality opinion). The Court of Appeals for the Sixth Circuit affirmed the district court's decision. *See* Wygant v. Jackson Bd. of Educ., 746 F.2d 1152 (6th Cir. 1984).
23. *See Wygant*, 476 U.S. at 274.
24. *See id.* at 274-75 (discussing Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977)).
25. *Id.* at 275.
26. *Id.* at 276.
27. *Id.*
28. *See id.* at 278.
29. *See id.*

necessary to take race into account."[30] However, Justice Powell asserted that taking race into account through layoff preferences, as opposed to hiring preferences, imposes too heavy a burden on innocent third parties who are laid off despite greater seniority.[31] Because other, less intrusive, means were available for accomplishing the board's purposes, the layoff preference did not satisfy the narrowly tailored requirement of strict scrutiny.[32] Justice Powell also noted that the preference was potentially overbroad because its definition of minority included "blacks, Orientals, American Indians, and persons of Spanish descent,"[33] despite the lack of evidence or suggestion that the school board had previously discriminated against these ethnic groups.

Justice O'Connor, in her concurring opinion, agreed with Justice Powell's conclusion regarding the narrowly tailored prong—but for separately stated reasons.[34] According to Justice O'Connor, the preference was not narrowly tailored because it was based on a comparison of the percentage of minority teachers with the percentage of minority students, a consideration unrelated to a remedial purpose.[35]

Justice O'Connor's concurring opinion highlights an important issue left unresolved by the plurality, which remains an open question even today: is remedying past discrimination the only interest sufficiently compelling to survive strict scrutiny? According to Justice O'Connor's *Wygant* opinion, the answer is no. There, she recognized that racial diversity may also be a compelling government interest in an affirmative action context, adding that "nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies."[36]

Justice O'Connor also clarified the plurality's prohibition on societal discrimination by positively stating that public employers need not present specific or contemporaneous evidence of discrimination to

30. *Id.* at 280.
31. *See id.* at 283 ("While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive.").
32. *See id.* at 283-84.
33. *Id.* at 284 n.13.
34. *See id.* at 294 (O'Connor, J., concurring).
35. *See id.*
36. *Id.* at 286.

support an affirmative action plan.[37] A contemporaneous finding requirement could chill public employers from voluntarily acting to address past discrimination.[38] Nevertheless, public employers implementing affirmative action to remedy past discrimination "must have a firm basis for determining" that affirmative action is necessary under the circumstances.[39] For example, a statistical disparity between the percentage of African-American teachers and the percentage of African-Americans in the relevant labor market (that is, those qualified to be teachers) could serve as a firm evidentiary basis for the necessity of remedial action by the school board.[40]

Wygant helped define the first prong of the strict scrutiny test as it applies to affirmative action in the public employment context. Although it essentially foreclosed the option of using societal discrimination as a basis for remedial affirmative action, *Wygant* also confirmed that specific individualized findings of discrimination are not required to justify remedial affirmative action. Instead, statistical evidence may be sufficient to justify race-conscious affirmative action where relevant comparisons are drawn between actual minority employment rates and the qualified minority work force.

However, the *Wygant* Court left many issues unsettled. The Court did not establish a specific standard for proving past discrimination sufficient to justify affirmative action—it merely stated what is not sufficient. In addition, the Court did not resolve the question of whether other interests, beyond remedying discrimination, could be considering compelling under a strict scrutiny analysis.

Although four justices (Powell, Burger, Rehnquist, and O'Connor) concluded that the layoff preference at issue in *Wygant* was not narrowly tailored,[41] their opinions did not provide any meaningful guidelines for lower courts in determining when an affirmative action plan is narrowly tailored. One year later, the Court addressed this issue in *United States*

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37. *See id.* at 289.

38. *See id.* at 291. Justice O'Connor recognized an important difference between public and private employers in this respect. "The value of voluntary compliance is doubly important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance." *Id.* at 290.

39. *Id.* at 292.

40. *See id.* Nonminorities challenging an affirmative action plan could rebut such statistical evidence. *See id.* at 293. Justice O'Connor noted that in the instant case, the nonminority teachers would still have the burden of showing that the evidence was insufficient to infer private discrimination. *See id.* "Only by meeting this burden could the plaintiffs establish a violation of their constitutional rights, and thereby defeat the presumption that the Board's assertedly remedial action based on the statistical evidence was justified." *Id.*

41. *See id.* at 269 (plurality opinion).

v. Paradise[42] by enumerating the factors that should be considered when determining whether a race-conscious affirmative action plan is narrowly tailored.

In *Paradise*, the Supreme Court affirmed a race-conscious plan (Plan) designed to address promotion practices in the Alabama Department of Public Safety.[43] The United States alleged that the Plan, which temporarily required that fifty percent of promotions in the Department be awarded to African-Americans, was unconstitutional.[44] The district court formulated the Plan pursuant to two consent decrees, which called for court intervention when the parties were unable to agree on an interim promotional procedure.[45] In designing the Plan, the district court attempted to confront the Department's long history of defiance of its previous orders:

> On February 10, 1984... twelve years will have passed since this court condemned the racially discriminatory policies and practices of [the Department]. Nevertheless, the effects of these policies and practices remain pervasive and conspicuous at all ranks above the entry-level position.... [T]he department *still* operates an upper rank structure in which almost every trooper obtained his position through procedures that totally excluded black persons.... The preceding scenario is intolerable and must not continue. The time has now arrived for the department to... open the upper ranks to black troopers.[46]

The fifty percent requirement was intended to remain in effect only until the Department established permanent, race-neutral promotion procedures for each rank.[47] Furthermore, it would be enforceable only when qualified African-American candidates were available to fill positions in ranks which comprised less than twenty-five percent African-Americans.[48]

The Court of Appeals for the Eleventh Circuit upheld the order as a "temporary remedy" that would be suspended as soon as the Department developed "objective, neutral employment criteria" to select and promote its employees.[49] According to the district court, the use of

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42. 480 U.S. 149 (1987).
43. *See id.* at 153, 186 (plurality opinion); *see also id.* at 195 (Stevens, J., concurring).
44. *See id.* at 153 (plurality opinion).
45. *See id.* at 162.
46. *Id.* at 162-63 (quoting Paradise v. Prescott, 585 F. Supp. 72, 74 (M.D. Ala. 1983)).
47. *See id.* at 163.
48. *See id.*
49. *Id.* at 156 (quoting NAACP v. Allen, 493 F.2d 614, 621 (1974)).

quotas was permissible in this case in order to eliminate the continuing effects of past discrimination.[50] Such effects persisted not only in the overall paucity of black state troopers, but especially in the upper ranks of the Department, where the effects of discriminatory hiring had been multiplied by preferential treatment of whites in training, discipline, and evaluation.[51] African-Americans, facing a harsh path to promotion, left the force in greater numbers than whites, further compounding disparities in their representation as permanent troopers.[52]

In reviewing this case, the Supreme Court again lacked the necessary majority to establish the level of scrutiny required for remedying past racial discrimination.[53] Nevertheless, four justices (Brennan, Marshall, Blackmun, and Powell) held that the disputed quota would survive even strict scrutiny.[54] First, the district court's order was supported by a compelling interest in remedying the continuing effects of past discrimination:[55] "the pervasive, systematic, and obstinate discriminatory conduct of the Department created a profound need and a firm justification for the race-conscious relief ordered by the District Court."[56] Justice Brennan, writing for a plurality of the Court, rejected the Department's effort to separate the discriminatory results of its hiring procedures from its promotion procedures.[57] The plurality found that while the Department's discriminatory practices had an effect on both hiring and promotion, the effect on promotions alone was sufficient to justify affirmative relief.[58]

The plurality then considered whether the Plan was narrowly tailored to remedy past discrimination.[59] The Court focused its review on specific criteria:

> In determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the

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50. *See id.* The district court had found the Department had systematically excluded African-Americans for nearly four decades. *See id.* at 167.

51. *See id.* at 157 (quoting Paradise v. Dothard, Civ. Action No. 3561-N (M.D. Ala. 1975)).

52. *See id.*

53. *See id.* at 166 ("[A]lthough this Court has consistently held that some elevated level of scrutiny is required when a racial or ethnic distinction is made for remedial purposes, it has yet to reach consensus on the appropriate constitutional analysis.").

54. *See id.* at 167.

55. *See id.* at 167-68 n.18.

56. *Id.* at 167. In its opinion, the plurality provided a twelve-year timeline of the Department's efforts to resist integration and its persistent discriminatory actions against African-Americans. *See id.* at 154-66.

57. *See id.* at 169.

58. *See id.* at 169-70.

59. *See id.* at 171.

relevant labor market; and the impact of the relief on the rights of third parties.[60]

Application of the narrowly tailored prong thus became a fact-intensive analysis of the remedial promotion Plan in light of these factors.

First, the plurality examined the underlying purposes of the Plan to assess the feasibility of race-neutral alternatives.[61] The Plan was designed to eliminate the effects of discriminatory practices and force the Department to finally comply with the consent decrees by developing a valid promotional procedure in an expeditious manner.[62] The plurality rejected the alternatives proposed by the government and the Department for failure to advance these purposes.[63] The Department had proposed promotion of four African-American and eleven white troopers in the interim.[64] According to the plurality, even if the Department's proposal would not adversely impact African-Americans, it was an unacceptable alternative because it failed to provide an incentive for expeditiously establishing valid promotional procedures and failed to remedy the effects of the Department's repeated delays in developing a valid procedure.[65] "To permit ad hoc decisionmaking to continue and allow only 4 of 15 slots to be filled by blacks would have denied relief to black troopers who had irretrievably lost promotion opportunities."[66]

The plurality also rejected the government's contention that, as an alternative, the district court could have imposed significant fines and fees on the Department to encourage its compliance with the consent decrees.[67] Throughout the twelve-year litigation history, the district court had repeatedly ordered the Department to pay the plaintiffs' attorneys' fees and costs, but "these court orders had done little to prevent future foot-dragging."[68] Furthermore, fees and fines would not compensate the African-American troopers who were wrongfully denied promotions in the past.[69]

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60. *Id.*
61. *See id.*
62. *See id.* at 172.
63. *See id.*
64. *See id.*
65. *See id.* at 173-74.
66. *Id.*
67. *See id.* at 174-75.
68. *Id.*
69. *See id.* at 175. "While fines vindicate the court's authority, here they would not fulfill the court's additional responsibility to 'eliminate the discriminatory effects of the past as well as bar like discrimination in the future.'" *Id.* at 175 n.25 (quoting Louisiana

Having dismissed the alternatives as unfeasible, the plurality next analyzed whether the Plan could adapt to the demands of changing circumstances. Several features of the Plan persuaded the Court that it was sufficiently flexible.[70] These included a waiver of the fifty percent promotion requirement where there were no qualified African-American candidates available.[71] In addition, the plurality emphasized that no "gratuitous promotions" were required,[72] since the fifty percent requirement was only triggered when the Department needed to make promotions. Finally, the Department controlled the duration of the Plan.[73] Once the Department put a nondiscriminatory procedure in place, the fifty percent requirement would end.[74]

In finding the Plan to be sufficiently flexible, the plurality went beyond the specifics articulated by the Plan itself and examined how it was actually implemented.[75] Where no qualified African-American candidates were available for promotion to a specific rank, the district court had in fact allowed the Department to promote one hundred percent white troopers.[76] Once the Department submitted nondiscriminatory promotional procedures for the ranks of corporal and sergeant, the district court had suspended the fifty percent requirement at those ranks.[77]

The plurality also held that the fifty percent goal was narrowly tailored to the overall goal of twenty-five percent African-Americans at all levels in the Department's workforce.[78] The plurality pointed out that "the 50% figure is not itself the goal; rather it represents the speed at which the goal of 25% will be achieved."[79] A speedier remedy was justified in this case because of the Department's past history of egregious discrimination and delays.[80]

The plurality also found that the impact of the promotional Plan did not place an undue burden on third parties.[81] This finding was premised on the fact that the Plan was temporary and limited, and did not totally exclude white troopers from receiving promotions.[82] Citing *Wygant*, the

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v. United States, 380 U.S. 145, 154 (1965)).

70. *See id.* at 178.
71. *See id.* at 177.
72. *Id.* at 177-78.
73. *See id.* at 178.
74. *See id.*
75. *See id.* at 178-79.
76. *See id.* at 179.
77. *See id.*
78. *See id.*
79. *Id.*
80. *See id.* at 180-81.
81. *See id.* at 182.
82. *See id.*

plurality emphasized that postponement of promotional opportunities is not as severe a burden as layoffs: "like a hiring goal, it 'impose[s] a diffuse burden, . . . foreclosing only one of several opportunities.'"[83] Justice Powell acknowledged that, while the promotional goals did diffuse the remedial burden throughout society in general, any burden placed upon nonminorities was merely a delay, rather than an absolute denial.[84]

Chief Justice Rehnquist and Justice Scalia joined Justice O'Connor's dissent, agreeing that a government actor has a compelling interest when it acts to remedy past or present discrimination.[85] However, Justice O'Connor argued that the district court's purpose in designing the fifty percent promotion requirement was to compel the Department to comply with the consent decrees—not to remedy past discrimination.[86] "If the order were truly designed to eradicate the effects of the Department's delay, the District Court would certainly have continued the use of the one-for-one quota even after the Department had complied with the consent decrees."[87]

Justice O'Connor's analysis focused on alternatives to a one-for-one quota, including the imposition of fines or penalties, or the appointment of a trustee to develop a promotion procedure.[88] Under her view of strict scrutiny, the availability of alternatives to imposing race-conscious classifications necessarily defeated any argument that the district court's promotional plan is narrowly tailored to eliminate past discrimination. "The District Court, however, did not discuss these options or *any* other alternatives to the use of a racial quota. Not a single alternative method of achieving compliance with the consent decrees is even mentioned in the District Court's opinion . . . ."[89] Strict scrutiny, according to Justice O'Connor, requires at the very minimum that a court discuss the feasibility of race-neutral alternatives prior to upholding any race-

83. *Id.* at 183 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283 (1986) (Powell, J., concurring)).
84. *See id.* at 189 (Powell, J., concurring).
85. *See id.* at 196 (O'Connor, J., dissenting).
86. *See id.* at 197-98.
87. *Id.* at 198.
88. *See id.* at 199-200. Although the plurality did discuss the feasibility of fines or penalties, *see supra* note 67 and accompanying text, Justice O'Connor's objection was that the district court itself did not discuss race-neutral alternatives in its order. *See id.* at 200.
89. *Id.*

conscious measures.[90] During the next decade, the focus on alternatives to affirmative action would intensify.

B. *The New Debate: Is Strict Scrutiny the Death Knell for Affirmative Action?*

The year 1989 proved a watershed for affirmative action in the United States. The Supreme Court's decision in *City of Richmond v. J.A. Croson Co.*[91] clearly established the standard of strict scrutiny as the benchmark for cases in which a state or local government seeks to apply a racially based classification.[92] Six years later, in *Adarand Constructors, Inc. v. Pena*,[93] the Court confirmed its ruling in *Croson* and applied the strict scrutiny standard to federal as well as state and local government affirmative action plans.[94] As soon as an agreement was reached on the level of scrutiny to be applied, however, the justices once again split into separate camps on a host of other issues. The debate on the Court moved from how strictly affirmative action should be scrutinized to a more fundamental question: is affirmative action good policy? This shift in focus renders the future of affirmative action uncertain. Although *Croson* and *Adarand* have helped lower courts by clarifying technical aspects of the law, the varying opinions of the justices on the vices and virtues of affirmative action have left more confusion than understanding in their wake.[95]

In *Croson*, the Court held that the City of Richmond's Minority Business Utilization Plan (Plan), which set aside a percentage of work on city contracts for minority contractors, violated the Equal Protection Clause of the Fourteenth Amendment.[96] The Plan required that prime contractors who were awarded city contracts utilize minority subcontractors for at least thirty percent of the dollar value of work involved.[97] For the first time, a majority of the Court agreed that strict

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90. *See id.* at 201.
91. 488 U.S. 469 (1989).
92. *See id.* at 493-94 (plurality opinion); *see also id.* at 520 (Scalia, J., concurring in judgment).
93. 515 U.S. 200 (1995).
94. *See id.* at 235.
95. *Croson* and *Adarand* do not directly address public employment affirmative action plans. Both cases involved racial preferences in the public procurement context. However, the Court did not expressly limit its holdings in these cases to minority set-asides in public procurement. In addition, as the Court's most recent pronouncements on the constitutionality of affirmative action, lower courts consider both *Croson* and *Adarand* to be applicable even in the public employment context. *See* George R. La Noue, *The Impact of* Croson *on Equal Protection Law and Policy*, 61 ALB. L. REV. 1, 16 (1997).
96. *See* 488 U.S. at 477-78, 511.
97. *See id.* at 477.

scrutiny was the appropriate test to apply to race-conscious affirmative action.[98]

The City asserted that the Plan was designed to remedy past discrimination suffered by minorities in the construction industry.[99] Preferential treatment under the Plan was not limited to the Richmond area—any minority contractor was eligible to participate.[100] The Plan defined "minority" as "Blacks, Spanish-speaking [citizens], Orientals, Indians, Eskimos, or Aleuts."[101] Waivers of the Plan's requirements were allowed, but only in exceptional circumstances.[102]

The City's evidentiary support of the Plan's remedial purpose included a showing of statistical disparity between the percentage of African-Americans in the City's population (50%) and the percentage of the City's construction contracts that had been awarded to minority contractors from 1978 to 1983 (0.67%).[103] The City also relied on the fact that a number of contractors' associations in the area had virtually no minority business members.[104] Yet the City had no direct evidence of discrimination either by the City in awarding contracts, or by prime contractors when subcontracting City work.[105] Neither was the thirty percent quota used in the Plan tied to any statistical evidence of the availability of minority contractors in the Richmond area.[106]

A majority of the Court held that the City's evidence of discrimination was not sufficient to meet the compelling government interest prong of the strict scrutiny test.[107] The Court found the City's evidence lacking for the same reasons it had rejected the affirmative action plan at issue in *Wygant*: "a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to

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98. *See id.* at 493-94 (plurality opinion); *see also id.* at 520 (Scalia, J., concurring in judgment).
99. *See id.* at 478 (plurality opinion).
100. *See id.*
101. *Id.* at 478 (internal quotation marks omitted).
102. *See id.* at 478-79. In fact, the City denied Croson's request for a waiver after the only minority subcontractor available came in with a price that was $7,663.16 over Croson's original bid. *See id.* at 482-83. The City also denied Croson's request for an increase of the contract price, and told Croson that it intended to rebid the project. *See id.* at 483. Croson then sued the City in federal court, challenging the Plan's constitutionality. *See id.*
103. *See id.* at 479-80.
104. *See id.* at 480.
105. *See id.*
106. *See id.* at 486.
107. *See id.* at 505.

determine the precise scope of the injury it seeks to remedy."[108] The City's comparison of the percentage of minority contracts awarded with general population statistics could not be used to demonstrate discrimination.[109] Instead, where special qualifications are required, the comparison must be with the percentage of minorities in the general population who possess those specific qualifications.[110]

Similarly, the Court rejected the City's evidence with respect to the low minority membership in construction industry associations:

> For low minority membership in these associations to be relevant, the city would have to link it to the number of local MBE's [minority business enterprises] eligible for membership. If the statistical disparity between eligible MBE's and MBE membership were great enough, an inference of discriminatory exclusion could arise. In such a case, the city would have a compelling interest in preventing its tax dollars from assisting these organizations in maintaining a racially segregated construction market.[111]

The Court also noted that the "random inclusion" of minority groups such as Orientals, Indians, and Eskimos contradicted the City's assertion that the Plan was designed to serve a remedial purpose, since it had found no evidence of any discrimination against these groups.[112]

In a brief discussion of the Plan, with respect to narrow tailoring, the Court made two important points.[113] First, the Court noted that the City did not consider race-neutral measures as an alternative to the thirty percent quota.[114] Second, the Court stated that the thirty percent quota established in the Plan was not "narrowly tailored to any goal, except perhaps outright racial balancing."[115] Based on these considerations, the Court held that the Plan was not narrowly tailored to serve its asserted remedial interest.[116]

The majority spirit of the Court was short-lived, however. A mere plurality agreed on situations in which a government agency can act to redress discrimination and its effects.[117] Justice O'Connor, joined by Chief Justice Rehnquist and Justices Kennedy and White, concluded that a government actor, such as the City of Richmond, is not limited to using race-conscious measures to remedy its own discrimination.[118]

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108. *Id.* at 498.
109. *See id.* at 501.
110. *See id* at 501-02.
111. *Id.* at 503.
112. *See id.* at 506.
113. *See id.* at 507.
114. *See id.*
115. *Id.*
116. *See id.* at 508.
117. *See id.* at 509 (plurality opinion).
118. *See id.* Justice O'Connor, joined by Chief Justice Rehnquist and Justice White, also stated:

"Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction."[119] Identified discrimination includes discrimination by the government actor implementing an affirmative action plan, or private actors.[120] Justice Kennedy echoed this point in his concurring opinion, asserting that "the State has the power to eradicate racial discrimination and its effects in both the public and private sectors, and the *absolute duty to do so* where those wrongs were caused intentionally by the State itself."[121]

Justice Scalia, however, disagreed with this conclusion, arguing that only Congress and federal courts, not state actors, should be able to use racial classifications as a remedy for past discrimination.[122] Justice Scalia justified this distinction between federal and state actors by arguing that the Equal Protection Clause was specifically enacted to deal with the states' oppression of racial minorities, and because discrimination is more likely to occur at the state and local levels.[123] According to Justice Scalia, the Equal Protection Clause embraces the principle that "our 'Constitution is color-blind, and neither knows nor tolerates classes among citizens.'"[124]

Justice Scalia went on to indict the concept of "benign"

> [I]f the city could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.

Id. at 492 (O'Connor, J., concurring).

119. *Id.* at 509.

120. *See id.* For example, "[i]f the city of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion." *Id.*

121. *Id.* at 518 (Kennedy, J., concurring) (emphasis added).

122. *See id.* at 521-22 (Scalia, J., concurring).

123. *See id.* at 521-23.

124. *See id.* at 521 (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). The "color-blind Constitution" concept originated in Justice Harlan's dissenting opinion in the infamous case of *Plessy v. Ferguson*. However, Justice Harlan's opinion was not that of the Court, and it was not until decades later that the Court finally rejected the "separate but equal" principle adopted by the *Plessy* majority. *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954). Given that background, to focus on the color-blind rationale at this point is to turn one's back on a constitutional history where color was extremely relevant.

discrimination, calling attention to the fact that, whether classified as benign or invidious, racial classifications impose a price on individuals who have a "right not to be disadvantaged on the basis of race."[125] While recognizing that African-Americans have suffered great discrimination in our society, Justice Scalia argued that trying to "even the score" through racial classifications would be contrary to the constitutional protection of individuals, as opposed to groups, and solidify the notion that society should be viewed as racial groups rather than individuals.[126]

Justice Stevens, who joined in the majority opinion, wrote separately to express his opinion that remedying past discrimination should not be the only permissible compelling government interest under the strict scrutiny test.[127] According to Justice Stevens, "race is not always irrelevant to sound governmental decisionmaking."[128] Because in this case no alternative reason was asserted for factoring race into the selection of a contractor—such as more efficient performance of the contracts—Stevens left open the possibility that there may be cases, perhaps similar to *Wygant*, in which it could be argued that a diverse faculty enhances and improves the education of students.[129]

Justice Marshall, in his dissenting opinion, called the majority's decision a "giant step backward" for affirmative action, and a "grapeshot attack on race-conscious remedies in general."[130] According to Justice Marshall, the City should have been entitled to rely on congressional findings of national discrimination to justify the Plan.[131] He also disagreed with the application of strict scrutiny to remedial affirmative action, arguing instead that the City should only be required to show "important governmental objectives" and a plan that is "substantially related" to achieving those objectives, a test that Marshall argued the City's Plan could have passed.[132] Justice Marshall's argument that

125. *Id.* at 527.

126. *Id.* at 527-28. In his concurring opinion, Justice Kennedy agreed with Justice Scalia's opinion in that it supported the proposition that "[t]he moral imperative of racial neutrality is the driving force of the Equal Protection Clause." *Id.* at 518 (Kennedy, J., concurring). However, Justice Kennedy did not agree with Justice Scalia's rule of "automatic invalidity for racial preferences in almost every case" because it was not consistent with the Court's precedent. *Id.* at 519.

127. *See id.* at 511 (Stevens, J., concurring).

128. *Id.* at 512.

129. *See id.* at 512-13.

130. *Id.* at 529 (Marshall, J., dissenting).

131. *See id.* at 530 ("[T]he city council had before it a rich trove of evidence that discrimination in the Nation's construction industry had seriously impaired the competitive position of businesses owned or controlled by members of minority groups.").

132. *See id.* at 535-36.

benign, remedial racial classifications should be treated differently from invidious discrimination would be squarely addressed in the Court's next pronouncement on affirmative action, *Adarand Constructors, Inc. v. Pena*.[133]

In *Adarand*, the Court ostensibly brought finality and consistency to the questions surrounding the level of scrutiny that must be applied to affirmative action. Holding that all racial classifications, state and federal, must be analyzed under strict scrutiny, *Adarand* overruled *Metro Broadcasting, Inc., v. Federal Communications Commission*,[134] a case that had been decided just five years earlier.[135] In the six short years since *Croson*, the landscape of the Court had changed dramatically. The three dissenting justices in *Croson*, Justices Blackmun, Brennan, and Marshall, were no longer on the Court. Justices Breyer, Ginsburg, and Souter were appointed as their replacements. In body, and perhaps in spirit, they formed the dissent in *Adarand*. Ironically, they were joined by Justice Stevens, who had concurred with the Court's holding in *Croson*. Yet Justices Thomas and Scalia, concurring in *Adarand*, together with Justices O'Connor, Rehnquist, and Kennedy, provided a majority for the Court.

Adarand involved a challenge to a federal statute that paid bonuses to federal contractors who hired subcontractors that were "controlled by 'socially and economically disadvantaged individuals.'"[136] Subcontractors of certain races were presumed to fall within the disadvantaged category.[137] This presumption of disadvantage could be rebutted by a third party.[138] Adarand Constructors sued the City when its low bid on a federal project was rejected by the general contractor, who retained a higher-bidding minority subcontractor in exchange for the federal bonus dollars provided by the statute.[139]

Writing for the Court, Justice O'Connor stated that past precedents regarding the constitutionality of racial classifications could be

133. 515 U.S. 200 (1995).

134. 497 U.S. 547 (1990). In *Metro Broadcasting*, the Court upheld the Federal Communications Commission's minority ownership policies under an intermediate scrutiny standard because they "bear the *imprimatur* of longstanding congressional support and direction and are substantially related to the achievement of the important governmental objective of broadcast diversity." *Id.* at 600.

135. *See Adarand*, 515 U.S. at 227.

136. *Id.* at 204 (quoting Brief for Petitioner Adarand Constructors).

137. *See id.*

138. *See id.* at 208.

139. *See id.* at 208-10.

summarized into three general propositions: (1) skepticism of all racial classifications, exemplified by the application of strict scrutiny across the board; (2) consistency, in that all forms of discrimination, benign and invidious, are subject to strict scrutiny; and (3) congruence between the standards applicable to racial classifications by the federal government under the Fifth Amendment and state classifications under the Fourteenth Amendment.[140] Based on these three propositions, the Court held that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."[141]

The Court imposed a strict scrutiny standard for all racial classifications because they are "seldom" justified, and "too pernicious" to permit any lesser form of scrutiny.[142] Despite this strong language, the Court also stated that it wanted to "dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact,'" reiterating that even under strict scrutiny, government actors can still address the "lingering effects" of discrimination.[143] The case was remanded to the lower court to determine whether in fact the statutory scheme survived strict scrutiny.[144]

In his concurring opinion, Justice Scalia went further than the majority in condemning affirmative action. Justice Scalia stated that the government can never have a compelling government interest in making up for past discrimination against an entire race because constitutional rights are held by individuals, not by racial groups.[145] According to Justice Scalia, the use of a racial classification, for any purpose, "reinforce[s] and preserve[s] for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American."[146] Although Justice Scalia did not dispute the decision to remand the case, he noted that it was highly unlikely that the statute could withstand strict scrutiny.[147]

Justice Thomas continued the assault on affirmative action in his concurring opinion, equating benign racial preferences with invidious

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140. *See id.* at 223-24.
141. *Id.* at 227.
142. *See id.* at 236.
143. *Id.* at 237 (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment)).
144. *See id.* at 238-39.
145. *See id.* at 239 (Scalia, J., concurring).
146. *Id.*
147. *See id.*

discrimination.[148] He also endorsed the "color-blind" concept advocated by Justice Scalia in his *Croson* concurrence: "under our Constitution, the government may not make distinctions on the basis of race," regardless of whether the motive behind the distinction is what Justice Thomas calls "paternalism" or oppression.[149] According to Justice Thomas, benign discrimination fosters "attitudes of superiority" and resentment among the majority race, while imposing a "badge of inferiority" on minorities which "may cause them to develop dependencies or to adopt an attitude" of entitlement.[150]

In his dissent, Justice Stevens criticized the majority for its "disconcerting lecture" on the ills of racial classifications.[151] Stevens rejected the notion espoused in the majority and concurring opinions that benign and invidious forms of discrimination are morally and constitutionally equivalent.[152] According to Stevens, courts can adequately determine whether a racial classification is motivated by benign or invidious purposes; then less scrutiny can appropriately be applied when the motives are benign.[153] Stevens also pointed out the anomalous result of *Adarand* in comparison to the application of Equal Protection in other contexts. For example, after *Adarand*, a racial preference is subject to higher scrutiny in the courts than a gender preference, "even though the primary purpose of the Equal Protection Clause was to end discrimination" against African-Americans in the postslavery era.[154]

Justice Ginsburg's dissent focused on the areas of agreement in the various opinions of the Court.[155] First, however, she responded to Justice Scalia's concurring opinion. Justice Ginsburg noted that, as a country, Americans are still dealing with the effects of discrimination "because,

148. *See id.* at 240-41 (Thomas, J., concurring).
149. *Id.* at 240. *See also* City of Richmond v. J. A. Croson Co., 488 U.S. 469, 520 (1989) (Scalia, J., concurring).
150. *Id.* at 241.
151. *Id.* at 242 (Stevens, J., dissenting).
152. *See id.* at 243.
153. *See id.* at 246. Justice Stevens thought that the majority may, in fact, have been applying a lesser form of strict scrutiny to benign discrimination because it stated that strict scrutiny would not be fatal in fact. *See id.* at 243-44 n.1. Even though the majority may have set a lesser standard, Justice Stevens still objected because the mere application of strict scrutiny would put "well-crafted benign programs at unnecessary risk" of invalidation by lower courts applying strict scrutiny in its traditional form. *Id.* at 244 n.1.
154. *Id.* at 247.
155. *See id.* at 271 (Ginsburg, J., dissenting).

for most of our Nation's history, the idea that 'we are just one race' was not embraced."[156] Justice Ginsburg noted that Justice Harlan introduced the concept of a "color-blind" Constitution in his *Plessy v. Ferguson*[157] dissent, where he also stated that whites were the "dominant" race, and that the white race would remain dominant "if it remains true to its great heritage and holds fast to the principles of constitutional liberty."[158]

Justice Ginsburg emphasized that despite the differences in the Justices' opinions, the Court as a whole acknowledged that the government may act to address not only discrimination itself, but also its effects.[159] Justice Ginsburg agreed that close judicial review of racial classifications is necessary, particularly in light of the potential impact such actions have on third parties.[160] However, she also recognized that "[b]ias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice."[161]

These dissenting opinions from the new guard on the Court leave open the possibility that the Court's approach to affirmative action may still allow "our precedent to evolve, still to be informed by and responsive to changing conditions."[162] Justice Ginsburg, for example, while acknowledging that "catchup mechanisms designed to cope with the lingering effects of entrenched racial subjugation" can indeed inflict harm on the favored race, further suggests that "Court review can ensure that preferences are not so large as to trammel unduly upon the opportunities of others or interfere too harshly with legitimate expectations of persons in once-preferred groups."[163] Similarly, Justice Souter proposed that even when the innocent bear the burden of remediating past discrimination, such a price "is considered reasonable . . . [under] the assumption . . . that the effects will

156. *Id.* at 272 (quoting *id.* at 239 (Scalia, J., concurring)).
157. 163 U.S. 537 (1896).
158. *Adarand*, 515 U.S. at 272 (Ginsburg, J., dissenting) (citing Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)) (internal quotation marks omitted).
159. *See id.* at 273. Justice Souter also emphasized this point in his dissenting opinion:

> The Court has long accepted the view that constitutional authority to remedy past discrimination is not limited to the power to forbid its continuation, but extends to eliminating those effects that would otherwise persist and skew the operation of public systems even in the absence of current intent to practice any discrimination.

Id. at 269 (Souter, J., dissenting).
160. *See id.* at 276 (Ginsburg, J., dissenting).
161. *Id.* at 274.
162. *Id.* at 276.
163. *Id.*

themselves recede into the past, becoming attenuated and finally disappearing."[164]

C. Summary

The Supreme Court's decision in *Croson*, and its subsequent broadening in *Adarand*, have firmly established strict scrutiny as the test for constitutionality of affirmative action programs in government employment. Yet on their facts, these cases, together with *Wygant* and *Paradise*, leave a wide margin of uncertainty. As Justice Stevens pointed out in his *Adarand* dissent, "substantial agreement on the standard to be applied in deciding difficult cases does not necessarily lead to agreement on how those cases actually should or will be resolved."[165]

There is still no consensus among the members of the Court on how "strictly" strict scrutiny should apply. Justices Scalia and Thomas obviously prefer that strict scrutiny be fatal in fact for most, if not all, racial classifications. Justices Breyer, Ginsburg, Souter, and Stevens have expressed confidence that courts can determine the underlying motivations of racial classifications, whether benign or invidious, and apply a less strict form of scrutiny when the motivation is benign. Finally, Justices Kennedy, O'Connor, and Rehnquist represent the middle ground on the Court with respect to affirmative action. Justice O'Connor's opinion in *Adarand* suggests a standard that is something less than traditional strict scrutiny, because the Justices clearly anticipated that strict scrutiny would not be an automatic rule of invalidity. However, the Court has provided little guidance, beyond the traditional formulation of strict scrutiny, to lower courts that might be willing to transcend traditional boundaries.

With respect to the first prong of strict scrutiny—the compelling government interest—lower courts have only the vague "substantial basis in evidence" test from *Croson* and *Wygant's* proscription against the use of societal discrimination as a basis for a remedy. The Court has not provided any further detail on the second prong—the narrowly tailored requirement—since enumerating its list of factors in *Paradise*. In between these "guidelines," the Court has interwoven inconsistency and contradiction vis-à-vis dicta both supporting and deriding

164. *Id.* at 270 (Souter, J., dissenting).
165. *Id.* at 242 (Stevens, J., dissenting).

affirmative action, considering its effects on its beneficiaries, and yet contrasting its impact on nonminority third parties. The net result is that the lower courts are left to wade through a mire of opinions—much less a seamless fabric than a tangled web—when determining the constitutionality of affirmative action plans.

To complicate matters further, the permissible affirmative action plan in *Paradise* represents an extreme which is increasingly uncommon in today's society. In that case, a recalcitrant, even obstinate, bureaucracy repeatedly refused to take voluntary steps to eliminate obvious discrimination among its ranks. The relevant labor pool undoubtedly comprised willing and able minorities seeking employment as state troopers. Yet the Alabama Department of Public Safety refused to make the necessary changes, even to its own detriment. In contrast, the City of Richmond in *Croson* failed to prove that actual discrimination had taken place in hiring contractors. Statistical disparities between minority populations of contractors and the general community, although undoubtedly a result of the cumulative effects of decades of societal discrimination, could not be attributed to specific acts of the government.

However, many situations faced today do not fall neatly under such precedential extremes. Twenty-first century bigotry is more subtle and sophisticated, and has largely gone underground.[166] Only in rare cases will direct proof be found of specific instances of actual discrimination in today's employment market. Thus, statistical comparisons have become the necessary, if imperfect, measure of particular discrimination.

Another area of uncertainty that remains is whether any justification other than remediating past discrimination would pass the test of strict scrutiny. Although the Court has ruled out consideration of race for the purposes of racial balancing or even for providing role models, the issue of diversity has never been settled. For example, as suggested by Justice Powell in *Bakke*, can race be considered among other factors in employment decisions when having a heterogenous population is a desirable or even a necessary characteristic of the specific labor pool?

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166. *See generally* Christopher Edley, Jr., *Color at Century's End: Race in Law, Policy, and Politics*, 67 FORDHAM L. REV. 939, 942 (1998) (suggesting that discrimination persists, in subtle forms); Ann C. McGinley, *The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race-Conscious Decision Making Under Title VII*, 39 ARIZ. L. REV. 1003, 1049 (1997) ("[D]iscrimination has become much less overt; much discriminatory behavior is the result of unconscious processes and biases."); David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1619 (1991) (arguing that the extent of discrimination in today's workplace is difficult to determine because of the covert nature of modern discrimination).

As discussed below, this question may turn on the specific facts of a particular case, which may indeed warrant race-conscious actions under narrow circumstances.

III. THE AFTERMATH OF STRICT SCRUTINY IN THE LOWER COURTS

After the Supreme Court decided *Croson*, lower courts began applying the strict scrutiny test to affirmative action programs in the public employment arena.[167] Courts seem resigned to view *Croson* as an important change in the law regarding race-conscious measures for remedying past and present discrimination.[168] Particularly in the area of public employment, *Croson* has had an unparalleled impact, since courts have accepted the *Croson* decision as a significant change in the law, sufficient to warrant modification or termination of existing consent decrees.[169] The significance of this development cannot be

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167. *See* Krupa v. New Castle County, 732 F. Supp. 497, 506 (D. Del. 1990) (citing *Croson* and stating that "[t]he standard that the Supreme Court would apply to a race based affirmative action plan under equal protection clause analysis is finally settled. Strict scrutiny will now be applied by a majority of the Court . . . ."); *see also* Charles Fried, *Affirmative Action After* City of Richmond v. J.A. Croson Co.*: A Response to the Scholars' Statement*, 99 YALE L.J. 155, 156 (1989) ("*Croson* is significant. For the first time a majority of the Court holds unequivocally that all racial classifications—what the scholars' statement calls 'inclusive' remedial measures as well as what it calls 'invidious discrimination' or 'exclusionary practices'—must pass strict scrutiny and be justified by a compelling governmental purpose.") (citation omitted). *But see Scholars' Reply to Professor Fried*, 99 YALE L.J. 163, 165-66 (1989) (arguing that *Croson* is not a significant change because the Supreme Court had already applied strict scrutiny in previous cases determining the constitutionality of affirmative action plans prior to *Croson*).

168. *See, e.g.*, Freeman v. City of Fayetteville, 971 F. Supp. 971, 975 (E.D.N.C. 1997) (citing *Croson* for the proposition that affirmative action plans are subject to strict scrutiny, and noting that this was not the law in 1974, when the consent decree at issue was initially implemented). The *Freeman* court concluded that "[t]he constitutional ceiling of the Fourteenth Amendment has been lowered, resulting in the transformation of rigid race-based quotas from allowable remedies to illegal constrictions" under a strict scrutiny analysis. *Id.* at 977.

169. Under the standard established by the Supreme Court in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), a consent decree can be modified when "a significant change in circumstances warrants revision of the decree." *Id.* at 383. A change in law qualifies as a change warranting modification. *See id.* at 384. The Court specifically stated that "[a] consent decree must of course be modified if, as it later turns out, one or more of the obligations placed upon the parties has become impermissible under federal law." *Id.* at 388. *Croson*'s application of strict scrutiny to all race-based affirmative action plans has been recognized as a change in law sufficient to require modification of affirmative action consent decrees that do not comport with the strict scrutiny standard. *See* Ensley Branch, NAACP v. Seibels, 31 F.3d 1548, 1564 (11th Cir.

underestimated, considering the large number of consent decrees approved by courts since the 1960s to address problems of racial discrimination in employment.[170]

Croson requires lower courts to engage in a two-step analysis to determine whether an affirmative action plan instituted by a public employer is consistent with the Equal Protection Clause.[171] Under strict scrutiny, a government employer must demonstrate that it has a compelling government interest to justify the use of racial classifications,[172] and that any affirmative action measures are narrowly tailored to serve that interest.[173] However, lower courts have yet to reach a consensus regarding how the two prongs of strict scrutiny analysis should be applied to affirmative action in public employment.

A. *Establishing a Compelling Government Interest*

1. *What Interests Qualify as Compelling?*

Providing a remedy for past or present discrimination in the workplace is the most commonly asserted compelling government interest for affirmative action in public employment.[174] Whether any other purpose

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1994) ("*Croson* sufficiently altered the legal landscape to warrant modifications to the present decrees under *Rufo*."). In *Freeman*, for example, the court held that an existing consent decree must be terminated because of a change in law under *Rufo*. *See Freeman*, 971 F. Supp. at 977. Because of the change in law brought on by the implementation of the strict scrutiny test in *Croson*, the *Freeman* court held that the "race-based quotas imposed . . . by the judgment are constitutionally impermissible under [the] current state of equal protection analysis." *Id.* at 977. *See also* Allen v. Alabama State Bd. of Educ., 164 F.3d 1347, 1352 (11th Cir. 1999) ("The Supreme Court's recent precedents concerning the validity of race-conscious government action 'altered the legal landscape' in place at the time the consent decree in this case was approved and '*Rufo* . . . requires that consent decrees be modified to avoid any violations of governing constitutional standards.'") (quoting *Ensley Branch*, 31 F.3d at 1564).

170. *See also* Debra Baker, *Backdraft*, ABA J. Apr. 2000, at 48 (discussing the effects of terminating consent decrees in public employment); Charles J. Cooper, *The Collateral Attack Doctrine and the Rules of Intervention: A Judicial Pincer Movement on Due Process*, 1987 U. CHI. LEGAL F. 155, 155 n.1.

171. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989) (plurality opinion); *see also id.* at 520 (Scalia, J., concurring).

172. *See id.* at 505 (plurality opinion).

173. *See id.* at 506-07. Although *Croson* analyzed the constitutionality of a program that set aside a certain portion of municipal contracts for minority business enterprises, its holding has been applied to all types of race classifications and affirmative action initiatives. *See supra* note 95.

174. *See Ensley Branch*, 31 F.3d at 1565 ("In practice, the interest that is alleged in support of racial preferences is almost always the same—remedying past or present discrimination. That interest is widely accepted as compelling.") (citations omitted); *see also* Sims v. Montgomery County Comm'n, 887 F. Supp. 1479, 1487 (M.D. Ala. 1995) ("The Supreme Court has indicated that the government 'unquestionably has a compelling interest in remedying past and present discrimination.'" (quoting United States v. Paradise, 480 U.S. 149, 167 (1987) (plurality opinion))).

is sufficiently compelling to pass strict scrutiny, however, remains unsettled.[175] Indeed, some courts have explicitly rejected nonremedial purposes for affirmative action, including promoting diversity and providing role models for minorities.[176]

In *Police Ass'n v. City of New Orleans*,[177] for example, a group of police officers successfully challenged transfers and promotions made by the City of New Orleans to increase the percentage of African-American officers in their police department.[178] A previous consent decree had created thirty "supernumerary" sergeant positions for African-Americans as a one-time affirmative action measure.[179] In order to further increase African-American representation at the sergeant level, the City transferred certain African-American sergeants out of the supernumerary positions into regular positions.[180] The City then filled the vacant supernumerary positions by promoting other African-American officers who had scored lower on the promotional test than white officers who were not promoted.[181]

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175. *See* McNamara v. City of Chicago, 138 F.3d 1219, 1222 (7th Cir. 1998) (noting that it is unclear whether other justifications for affirmative action besides providing a remedy for discrimination are constitutionally permissible); *see also* Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207, 213 (4th Cir. 1993) (stating that it was not clear whether the city's asserted purpose of providing greater racial diversity within the police department could be a compelling government interest for its affirmative action plan); Joint Statement, *Constitutional Scholars' Statement on Affirmative Action After* City of Richmond v. J.A. Croson Co., 98 YALE L.J. 1711, 1713 (1989) ("[T]he Supreme Court as a whole has not yet resolved the issue of what goals other than overcoming historic discrimination may provide permissible grounds for race-conscious measures in areas outside education.").

176. *See, e.g.*, Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 354-55 (D.C. Cir. 1998). In *Lutheran Church*, the court expressed doubt that diversity could ever serve as a compelling government interest for affirmative action. *See id.* at 355. The defendant, the FCC, had argued that the Supreme Court's approval of diversity as a rationale for an FCC affirmative action plan in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), *overruled in part by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), had not been expressly overruled. *See Lutheran Church*, 141 F.3d at 354. The *Lutheran Church* court pointed out, however, that in *Metro Broadcasting*, diversity was considered an "important" government interest under an intermediate scrutiny test, which is easier to satisfy than the compelling interest requirement of strict scrutiny. *See id.* The court stated that it did "not think diversity can be elevated to the 'compelling' level, particularly when the Court has given every indication of wanting to cut back *Metro Broadcasting*. In that case, the majority's analysis of the government's 'diversity' interest seems very much tied to the more forgiving standard of review it adopted." *Id.*

177. 100 F.3d 1159 (5th Cir. 1996).

178. *See id.* at 1163.

179. *See id.*

180. *See id.* at 1164.

181. *See id.* at 1163-64.

The City asserted that the purpose of the transfers and promotions was to make the police department more representative of the racial makeup of the city.[182] The court interpreted this as an attempt to racially balance the police department, which does not constitute a compelling government interest under strict scrutiny.[183] Instead, the court stated that, under *Croson*, "an affirmative action plan must be narrowly tailored to remedy past specific instances of discrimination."[184] Because the City was not using the transfers and promotions to remedy past discrimination, the court held that it did not have a compelling government interest for its actions.[185]

Similarly, in *Covington v. Beaumont Independent School District (BISD)*,[186] the court found that maintaining the unitary[187] status of a previously desegregated public high school was not a compelling interest justifying race-conscious reassignment of its coaching staff.[188] Shortly after a newspaper article about the lack of African-American varsity coaches was published, the BISD Board of Trustees ordered that two non-African-American varsity coaches switch positions with two African-American sophomore coaches.[189] The court found that "[o]nce a school system is integrated, the prior discrimination has been cured and race-based classifications are thereafter no longer remedial of pre-unitary violations."[190] Because the school district had been declared unitary, there could be no further remedial actions taken to address pre-unitary status discrimination.[191]

The school district also asserted two other interests to justify the reassignments: (1) the educational benefits of an integrated education for students;[192] and (2) the need to provide role models for minority

182. *See id.* at 1168.
183. *See id.*
184. *Id.*
185. *See id.* The Fourth Circuit has similarly held that a government entity "must specify the racial discrimination that it is targeting" when using race-conscious affirmative action measures. Maryland Troopers Ass'n, Inc. v. Evans, 993 F.2d 1072, 1076 (4th Cir. 1993).
186. 714 F. Supp. 1402 (E.D. Tex. 1989).
187. Unitary, in this context, refers to a school system which has become desegregated through the consolidation of two or more segregated school districts in a geographical area. *See id.* at 1404. Beaumont, Texas formerly had two coexistent school districts that racially segregated students: BISD and South Park Independent School District. *See id.* at 1404 n.2. After joining to form the single, integrated BISD, the district court bestowed unitary status, noting "faculty and staff are integrated in *every* school in the new BISD." *Id.* at 1404 n.3.
188. *See id.* at 1409.
189. *See id.* at 1404-05.
190. *Id.* at 1410.
191. *See id.*
192. *See id.* at 1411.

members of the athletic teams.[193] The court rejected both of these interests with little discussion. With respect to the benefits of an integrated education, the court stated that "[t]he Supreme Court made clear that states and local subdivisions may constitutionally utilize racial classifications *only* to remedy prior discrimination . . . ."[194] According to the *Covington* court's application of *Croson*, any government interest asserted to justify racial classifications will fail if it does not involve a remedial purpose.[195] The court rejected the defendant's role model interest based on *Wygant v. Jackson Board of Education*,[196] in which the Supreme Court "forcefully denounced" the legitimacy of providing role models as a justification for affirmative action.[197] Because the school district could provide no evidence of postintegration discrimination to support a remedial purpose, the reassignments were ruled unconstitutional.[198]

The *Covington* court is not alone in reading *Wygant* and *Croson* as expressly limiting compelling government interests to remedial situations. The First Circuit, for example, has concluded that "[t]o date, the Supreme Court has identified only one goal sufficiently important to justify the use of affirmative action in public employment: remedying a governmental body's own past racial discrimination."[199] Similarly, in *Long v. City of Saginaw*,[200] the Sixth Circuit held that without evidence of discrimination by the City in police department hiring, the City could not assert a compelling government interest to justify its affirmative action measures.[201]

District courts have generally followed this trend by reading the Supreme Court's decisions narrowly. In *Hiller v. County of Suffolk*,[202] for example, a federal district court in New York stated that "[a]chieving diversity is not a sufficiently compelling state interest. Rather, there must be some 'showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to

193. *See id.* at 1413.
194. *Id.* at 1412 (emphasis added).
195. *See id.*
196. 476 U.S. 267 (1986).
197. *Covington*, 714 F. Supp. at 1413.
198. *See id.*
199. Boston Police Superior Officers Fed'n v. City of Boston, 147 F.3d 13, 19 (1st Cir. 1998).
200. 911 F.2d 1192 (6th Cir. 1990).
201. *See id.* at 1196.
202. 977 F. Supp. 202 (E.D.N.Y. 1997).

remedy such discrimination.'"[203]

In contrast, some courts have left open the possibility that nonremedial purposes could satisfy the compelling government interest prong of the strict scrutiny test. In *Petit v. City of Chicago*,[204] the defendant-city had racially standardized the scores of promotional examinations to favor African-American and Hispanic test-takers.[205] The City had also promoted minority officers with a lower adjusted score than nonminority officers.[206] The interest asserted for these actions was to avoid a potential Title VII claim against the City for using test results that had an adverse impact on African-Americans and Hispanics.[207]

The court stated that avoiding a Title VII violation could potentially be a compelling government interest under the strict scrutiny test.[208] However, the defendant in this case had not provided enough evidence to support the interest it asserted: if the test was valid as job-related, there would be no Title VII violation.[209] The City had not shown that the test could not be validated, nor had it shown that the test could not be redesigned to mitigate its disparate impact.[210] Because the defendant's asserted interest was not supported by evidence, the court refused to grant the defendant's motion for summary judgment.[211] However, the court did not reject the possibility that the City could present such evidence at a later stage, and still assert avoidance of a Title VII violation as a compelling justification for using racial standardization.[212]

In *Wittmer v. Peters*,[213] the Seventh Circuit held that a nonremedial purpose based on the operational needs[214] of a law enforcement agency

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203. *Id.* at 206 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986)) (citations omitted).
204. 31 F. Supp. 2d 604 (N.D. Ill. 1998).
205. *See id.* at 606.
206. *See id.* at 610.
207. *See id.* at 613-14.
208. *See id.* "Past discrimination . . . is not the only possible compelling interest. Possibly, an attempt to avoid discrimination in violation of Title VII could be another such compelling interest." *Id.* (citations omitted).
209. *See id.* at 614.
210. *See id.*
211. *See id.*
212. *See id.* ("Perhaps defendant will be able to show that racial standardization was justified by a combination of the need to cure past racial discrimination and the impact of the test.").
213. 87 F.3d 916 (7th Cir. 1996).
214. The operational needs defense to an Equal Protection claim has been set forth as showing a compelling government interest by establishing: "(1) that discrimination against the black community has characterized law enforcement in the past; (2) that this discrimination has engendered hostility between black community members and the police; and (3) this hostility has made law enforcement in the community ineffective." *Patrolmen's Benevolent Ass'n, Inc. v. City of New York*, 74 F. Supp. 2d 321, 327 (S.D.N.Y. 1999). That case involved the race-based transfer of African-American,

could be a compelling government interest.[215] In *Wittmer*, white plaintiffs challenged the Illinois Department of Corrections' decision to promote an African-American officer at a prison boot camp to the position of lieutenant, even though he ranked forty-second on the promotional test.[216] The defendant argued that it needed an African-American authority figure at the boot camp in order to encourage the African-American inmates to "play the correctional game of brutal drill sergeant and brutalized recruit."[217]

The *Wittmer* court stated the strict scrutiny test somewhat differently: when a public entity employs a racial classification, its action can survive strict scrutiny only if it demonstrates that such action is "motivated by a truly powerful and worthy concern and that the racial measure that they have adopted is a plainly apt response to that concern."[218] Such a concern must, nevertheless, be "substantiated and not merely asserted."[219] The defendant substantiated its concern for the operational needs of the boot camp by providing expert testimony regarding the need for minority authority figures in the camp.[220] The plaintiffs did not rebut this testimony with any contrary evidence.[221] The

Hispanic, and Haitian officers to the Brooklyn, New York precinct several days after the Abner Louima incident took place. *See id.* at 325. Abner Louima, "a black man of Haitian national origin," was subjected to a severe beating and sexual assault by white police officers. *Id.* The City asserted that it made the transfers under exigent circumstances to "reestablish effective law enforcement after it [had] been impaired by community hostility" regarding the incident. *Id.* at 328. The case did not involve an affirmative action plan or a claim of reverse discrimination. Instead, the African-American, Hispanic, and Haitian officers who were transferred challenged it as a race-based action. *See id.* at 324. The case is still significant, however, because the court stated that if the City provided evidence to support its asserted interest based on the operational needs of the police department, it could satisfy the compelling government interest prong of the strict scrutiny test, even though the race-based action was not related to any remedial purpose. *See id.* at 329. "[T]he need for effective law enforcement can be a compelling state interest. In order to carry out its mission effectively, a police force must appear to be unbiased, must be respected by the community it serves and must be able to communicate with the public." *Id.*

215. *See Wittmer*, 87 F.3d at 920-21.
216. *See id.* at 917.
217. *Id.* at 920.
218. *Id.* at 918. In *Petit v. City of Chicago*, 31 F. Supp. 2d 604, 613 (N.D. Ill. 1998), the court applied *Wittmer*'s "truly powerful and worthy concern" standard to find that avoidance of a Title VII violation could potentially serve as a compelling government interest supporting affirmative action measures. *See supra* notes 204-212 and accompanying text.
219. *Wittmer*, 87 F.3d at 918.
220. *See id.* at 920.
221. *See id.*

court ultimately held that the defendant's promotion of an African-American officer over white officers with higher scores was justified by the operational needs of the boot camp.[222]

Providing a remedy for past or present discrimination is currently the only recognized compelling government interest for a public employment affirmative action plan. As the above discussion demonstrates, many lower courts are generally unwilling to accept other nonremedial justifications, such as providing role models, increasing diversity, or attempting to racially balance a workplace. The Supreme Court has not formally approved any other interest as compelling; however, it has expressly proscribed the use of role models and racial balancing. Another compelling interest may be emerging in the area of law enforcement. Some courts have been willing to accept a nonremedial purpose for race-conscious action based on the operational needs of law enforcement. However, in such cases, courts still require that a public employer provide evidence to prove that the nonremedial purpose is legitimate. The issue of how much evidence is required to support a compelling government interest is discussed in greater detail below.

2. *Evidentiary Requirements of a Compelling Government Interest*

In *Croson*, the Supreme Court stated that a government entity must have a "strong basis in evidence" to justify the use of race-conscious affirmative action.[223] The evidence cannot be based on societal discrimination.[224] Lower courts have not interpreted this requirement as establishing a bright line test for the sufficiency of evidence. For example, the court in *Aiken v. City of Memphis*[225] stated that "[n]o *formal* finding of past discrimination by the governmental unit involved is necessary to determine that a compelling interest exists, but there must

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222. *See id* at 920-21. *Wittmer*'s standard for determining when an interest is compelling is consistent with other court decisions dealing with nonremedial purposes for affirmative action in a law enforcement setting. For example, in *Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207 (4th Cir. 1993), the court did not summarily reject the defendant's assertion that its police force needed to be racially diverse in order to be effective. *See id.* at 213. Instead, the court found that the defendant had not submitted enough evidence to prove that this was a valid concern. *See id.* at 214.

223. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498-500 (1989) (plurality opinion) (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986)).

224. *See id.* at 498 ("[A] generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy" (citing *Wygant*, 488 U.S. at 275, for the proposition that an ill-defined purpose "has no logical stopping point.")).

225. 37 F.3d 1155 (6th Cir. 1994).

be 'strong' or 'convincing' evidence of past discrimination by that governmental unit."[226] This evidence is often presented in one or a combination of the following forms: statistical evidence, anecdotal evidence, or prior judicial findings.

A statistical disparity or under-representation of minorities in a public agency is the most common evidence provided in support of affirmative action. However, there are restrictions on this type of evidence. Statistical evidence must be based on a comparison with the percentage of qualified minorities in the relevant labor pool.[227] Thus, an appropriate statistical analysis compares the percentage of minorities working for the public employer with the percentage of minorities in the applicable geographic area who possess the skills necessary for the particular job or promotion.[228] A tight statistical comparison ensures that affirmative action is being taken in response to specific discriminatory events or effects, and not as a cure for general societal discrimination.[229]

In *Long v. City of Saginaw*,[230] the court rejected a public employer's statistical evidence of past discrimination because the disparity was based on a comparison with an inappropriate statistical pool characterized as "protective services."[231] The court found the protective services category to be overinclusive with respect to police officers because it included a number of irrelevant jobs, such as school bus monitors, life guards, wildlife control agents, and building security officers.[232] The minority availability in the protective service category

226. *Id.* at 1162-63 (citation omitted).

227. *See id.* at 1163; *see also* United States v. City of Miami, 2 F.3d 1497, 1509 (11th Cir. 1993) ("It is well established that, in determining whether there is a work force imbalance that justifies affirmative action remedies, the proper comparison is between the minority composition of the work force in question and the *qualified* minority population in the relevant labor market.").

228. *See, e.g.*, Krupa v. New Castle County, 732 F. Supp. 497, 511 (D. Del. 1990).

229. *See Croson*, 488 U.S. at 507 (plurality opinion). In *Croson*, the Court rejected the 30% goal set by the city because it was not based on the number of minority contractors available in the city. *See id.* The Court stated that the goal was problematic because it was based on "the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." *Id.* (citation omitted) (quoting *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 494 (1986) (O'Connor, J., concurring in part and dissenting in part)). One might ask, however, whether the contrary assumption, that a wide statistical disparity can be explained wholly by a lack of minority interest in certain fields of employment, is any more valid.

230. 911 F.2d 1192 (6th Cir. 1990).

231. *Id.* at 1199.

232. *See id.* at 1200.

was 29%, compared to 7.7% minority police officers in the City's police department.[233] Instead of basing the comparison on this overinclusive statistical category, the court held that the City must instead consider actual job qualifications, such as educational background and physical fitness.[234]

In contrast, the court in *Peightal v. Metropolitan Dade County*[235] did not require the County's statistical analysis to compare its workforce with a differentiated labor pool.[236] The affirmative action plan at issue involved a hiring preference for female, African-American, and Hispanic firefighters.[237] The court found that since the qualifications for entry-level firefighters did not involve special skills, a valid statistical comparison need not take into account the particular job requirements.[238] Based on the wide statistical disparity between Hispanic firefighters and the general population of Hispanics in the area between the ages of eighteen and fifty-five, the court held that the County had demonstrated a compelling government interest to justify its affirmative action plan.[239]

Some courts will find a compelling government interest based on statistics alone, particularly when the statistical evidence has not been rebutted by the opposing party.[240] For example, in *Aiken v. City of Memphis*,[241] the Sixth Circuit found that the City had a compelling government interest in remedying past discrimination in its police and fire departments based on a wide statistical disparity.[242] The court first stated that when strict scrutiny is applied to an affirmative action plan,

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233. *See id.* at 1199.
234. *See id.*
235. 26 F.3d 1545 (11th Cir. 1994).
236. *See id.* at 1554.
237. *See id.* at 1548.
238. *See id.* at 1554. The specific requirements for the position were:

> (1) possess a high school diploma or its equivalent; (2) possess a driver's license and have the ability to obtain a chauffeur's license; (3) be at least 18 years old; (4) pass a physical capabilities test; (5) pass a medical examination; (6) pass a personal interview; (7) have corrected vision in both eyes of at least 20/40.

Id. at 1548.

239. *See id.* at 1556-57.
240. *See id.* at 1557. *See, e.g., id.* at 1555 ("Evidence that the statistical imbalance between minorities and non-minorities in the relevant work force and available labor pool constitutes a gross disparity, and thus a prima facie case of a constitutional or statutory violation, may justify a public employer's adoption of racial or gender preferences."); Vogel v. City of Cincinnati, 959 F.2d 594, 599 (6th Cir. 1992) ("Evidence of wide statistical disparities ... may justify an affirmative action policy adopted by a public employer."); Paganucci v. City of New York, 785 F. Supp. 467, 477 (S.D.N.Y. 1992) ("[A] statistical disparity sufficient to support a prima facie claim under Title VII provides a firm basis for the implementation of a race-conscious remedy.").
241. 37 F.3d 1155 (6th Cir. 1994).
242. *See id.* at 1163.

"the party defending the plan bears the burden of producing evidence that the plan is constitutional. The party challenging the plan, however, retains the ultimate burden of proving its unconstitutionality."[243] In *Aiken*, the City submitted statistics that showed significant disparities in minority representation among the ranks of the police and fire departments.[244] The court stated that the plaintiffs had "not offered any evidence to rebut the inference of discrimination that arises from these statistics."[245] According to the court, "the compelling interest inquiry focuses simply on whether discrimination occurred, not on the precise extent of any discrimination that did occur."[246]

However, other courts have held that statistical evidence must be confirmed by anecdotal or other corroborating evidence.[247] In *Maryland Troopers Ass'n, Inc. v. Evans*, the court held that the State of Maryland did not have a compelling government interest supporting its use of numerical employment goals because it lacked a strong basis in evidence of past discrimination.[248] The court's primary objection to the defendant's evidence was that it was purely statistical.[249] "Inferring past discrimination from statistics alone assumes the most dubious of conclusions: that the true measure of racial equality is always to be found in numeric proportionality."[250] Because the defendant's statistics did not amount to a "gross disparity" and they were not corroborated by anecdotal evidence of discrimination, the court held that the defendant failed to demonstrate a compelling government interest for using employment goals.[251]

Similarly, in *Bertoncini v. City of Providence*,[252] the court rejected the

243. *Id.* at 1162.
244. *See id.* at 1163. In the police department in 1978, 23% of patrol officers were African-American, but only 7.5% of sergeants, a higher rank, were African-American. *See id.* In the fire department in 1979, 14.3% of entry level fire fighters were African-American, compared with only 1.1% of African-Americans above that rank. *See id.*
245. *Id.*
246. *Id.*
247. *See* Maryland Troopers Ass'n, Inc. v. Evans, 993 F.2d 1072, 1077-78 (4th Cir. 1993).
248. *See id.* at 1077.
249. *See id.*
250. *Id.*
251. *See id.* at 1078-79. *Cf.* McNamara v. City of Chicago, 138 F.3d 1219, 1223-24 (7th Cir. 1998) (stating that raw statistics do not prove intentional discrimination, but also finding that defendant had presented strong basis in evidence of need to remedy discrimination, through combination of statistics, anecdotal evidence, and judicial findings).
252. 767 F. Supp. 1194 (D.R.I. 1991).

defendant's evidence of a statistical disparity between the percentages of minorities in the general population and in the Providence Fire Department as insufficient, by itself, to prove past discrimination.[253] In contrast to the situation in *Maryland Troopers*, the disparity in *Bertoncini* was severe—six percent of fire fighters were from minority groups, compared to forty-two percent minority representation in the general population.[254] Furthermore, the City did not require specialized qualifications for applicants to become fire fighters,[255] supporting the validity of statistical comparisons to the general population. The court suggested that alternative explanations could explain the observed disparity, such as recent immigration of minorities into the area, although specific evidence for that assertion was not offered.[256] Beyond defendant's statistical proof, the court found that "the City has been unable to point to any complaints or findings of such discrimination, and Fire Department officials expressly deny that the department discriminates."[257] Indeed, the fire department had been using a voluntary affirmative action plan for fourteen years and had actively recruited minority applicants.[258] Because there was no evidence to corroborate the inference of discrimination suggested by the statistical disparity, the *Bertoncini* court concluded that there was insufficient evidence of past discrimination by the fire department.[259]

Courts also look to prior judicial findings of discrimination to provide a strong basis in evidence of the need for remedial action.[260] In *Boston Police Superior Officers Federation v. City of Boston*,[261] an affirmative action plan resulted in the promotion of an African-American who scored one point less on the promotional test than three white plaintiffs

253. *See id.* at 1203. Although the court suggested that such statistical evidence might be sufficient to satisfy Title VII's requirement for demonstrating a "manifest racial imbalance," it held that it was insufficient to prove the compelling interest necessary under the Equal Protection Clause. *See id.* at 1201-03.

254. *See id.* at 1203 n.2.

255. *See id.* at 1196. The Providence Fire Department required only that an applicant have a high school degree or equivalent and complete a training course to be eligible to be a fire fighter. *See id. Cf.* Peightal v. Metropolitan Dade County, 26 F.3d 1545, 1548 (11th Cir. 1994), discussed *supra* note 238. In *Peightal*, the eligibility requirements for application to the Dade County Fire Department were essentially the same as the Providence requirements. *See Peightal*, 26 F.3d at 1548. However, the *Peightal* court found that these requirements were not specialized, and comparison to general population statistics was appropriate. *See id.* at 1554.

256. *See Bertoncini*, 767 F. Supp. at 1203.

257. *Id.*

258. *See id.*

259. *See id.*

260. *See generally* Stuart v. Roache, 951 F.2d 446, 452 (1st Cir. 1991) ("[L]itigated court findings of recent entry-level discrimination would seem sufficient to justify race-conscious remedies at both entry and promotional levels.").

261. 147 F.3d 13 (1st Cir. 1998).

who were not promoted at the same time.[262] In upholding the out-of-order promotion, the court based its finding of a compelling interest on the history of racial discrimination by the Boston Police Department previously documented in several First Circuit opinions.[263] Thus, it may be easier to convince a court of the compelling state interest at stake in an affirmative action plan that resulted from a court order or consent decree, rather than a voluntary affirmative action plan which is challenged for the first time.[264]

Some courts prefer to compare evidence of discrimination with the level of discrimination found by the Supreme Court in *United States v. Paradise*.[265] In *Paradise*, the Court examined the validity of an order requiring the Alabama Department of Public Safety to promote one African-American trooper for every white trooper promoted until such time as the Department developed a valid procedure for promotions.[266] The district court had issued the order after the Department delayed developing valid promotion procedures for eleven years.[267] The Supreme

262. *See id.* at 14.
263. *See id.* at 20.
264. *See, e.g.*, Jansen v. City of Cincinnati, 977 F.2d 238, 242 (6th Cir. 1992) ("This Court has already recognized that the manifest imbalance in the fire division with regard to racial composition justified the 1974 order implementing the decree."); Sims v. Montgomery County Comm'n, 887 F. Supp. 1479, 1487 (M.D. Ala. 1995) ("The court hereby adopts the background history of race discrimination in the Sheriff's Department documented in the memorandum opinions [of the United States District Court for the Middle District of Alabama].") (citations omitted), *aff'd*, 119 F.3d 9 (11th Cir. 1997). *But see* Freeman v. City of Fayetteville, 971 F. Supp. 971 (E.D.N.C. 1997). In *Freeman*, the court noted that the record accompanying an existing consent decree did not include evidence of discrimination sufficient to meet the compelling government interest standard. *See id.* at 975-76. Furthermore, the court would not allow the defendant to develop additional evidence of discrimination for trial—by that time it was more than twenty years after the consent decree was entered. *See id.* at 976. Thus, the defendant could not demonstrate the strong evidentiary basis required to show a compelling government interest in support of its affirmative action plan. *See id.* The result in *Freeman* contradicts the recommendation of several constitutional law scholars that, in the wake of *Croson*, courts should allow local governments "adequate time to establish the relevant factual record" needed to respond to a strict scrutiny challenge. Joint Statement, *Constitutional Scholars' Statement on Affirmative Action After City of Richmond v. J.A. Croson Co.*, 98 YALE L.J. 1711, 1714 (1989).
265. 480 U.S. 149 (1987). *See, e.g.*, *Bertoncini v. City of Providence*, 767 F. Supp. 1194, 1200, 1203 (D.R.I. 1991) (citing *Paradise* for the proposition that "[i]f a governmental agency has engaged in deliberate and pervasive discrimination, sweeping measures may qualify as narrowly tailored to provide the type of remedy required," while holding that the statistical evidence presented did not support a finding of such purposeful discrimination).
266. *See Paradise*, 480 U.S. at 153 (plurality opinion).
267. *See id.*; *see also* discussion *supra* Part II.A.

Court held that there was a compelling interest in granting this relief because "the pervasive, systematic, and obstinate discriminatory conduct of the Department created a profound need and a firm justification for the race-conscious relief ordered by the District Court."[268]

In *Shuford v. Alabama State Board of Education*,[269] the court was asked to review the constitutionality of a proposed consent decree settling the discrimination claims of African-American teachers and administrators in Alabama's postsecondary education system.[270] The decree set numerical hiring goals for African-Americans systemwide and at various employment levels.[271] The decree also specified changes in recruitment procedures, including the establishment of a recruiting committee with a minimum of forty percent African-American membership.[272] In support of a compelling interest, the court documented the lengthy history of systemic discrimination against African-Americans and the Board of Education's resistance to eliminating such discrimination.[273] Following the Supreme Court's lead, the court found a compelling interest not only in eradicating discrimination, but also in demanding compliance with previous orders of the court, stating that "[a]s in *Paradise*, defendants in this case have resisted the implementation of both court-ordered and court-approved relief .... Their resistance provides an additional basis to conclude that the race-conscious provisions of the decree serve a compelling purpose."[274]

Race-conscious plans can be affirmed by analogy to *Paradise*, which for many courts has become the standard for judging constitutionality. However, when a court distinguishes the facts of a case from those in *Paradise*, an affirmative action plan typically will be found unconstitutional for lack of a compelling government interest.[275] In

268. 480 U.S. at 167 (plurality opinion).
269. 846 F. Supp. 1511 (M.D. Ala. 1994).
270. *See id.* at 1513.
271. *See id.* at 1515-16.
272. *See id.* at 1516.
273. *See id.* at 1522-24.
274. *Id.* at 1523-24. Similarly, the Ninth Circuit upheld an affirmative action consent decree that set goals for hiring minorities and women, finding the facts of the case to be "strikingly similar" to the facts in *Paradise*. Davis v. City and County of San Francisco, 890 F.2d 1438, 1442-44, 1446 (9th Cir. 1989).
275. *See, e.g.*, Middleton v. City of Flint, 92 F.3d 396, 403 (6th Cir. 1996) ("[O]ur review clearly indicates that the fact pattern in *Paradise* does not prevail in this case."); Maryland Troopers Ass'n, Inc. v. Evans, 993 F.2d 1072, 1078-79 (4th Cir. 1993) (comparing the "slender reed" of statistical evidence found not to support a compelling government interest in affirmative action in that case to the specific examples of continuing discriminatory practice seen in *Paradise*); Krupa v. New Castle County, 732 F. Supp. 497, 513 (D. Del. 1990) ("The obstinate, systematic, pervasive and exclusionary discrimination found in *Paradise* is simply not present in this case and any statistical

Dallas Fire Fighters Ass'n v. City of Dallas,[276] for example, the court rejected the compelling interest asserted to support the use of out-of-rank promotions in the Dallas Fire Department.[277] The City's evidence of past discrimination included a 1976 consent decree entered upon Department of Justice findings that the City had violated Title VII, and statistical analysis showing that minorities were underrepresented in the upper ranks of the fire department.[278] Without specifying the precise problems with this evidence, the court dismissed it as minimal. The record was "devoid of proof of a history of egregious and pervasive discrimination or resistance to affirmative action that has warranted more serious measures in other cases."[279] In comparison, the *Paradise* court had found "'pervasive, systematic, and obstinate discriminatory conduct' which 'created a profound need and a firm justification for the race-conscious relief ordered by the District Court.'"[280]

3. Summary

Most courts will not accept as compelling any interest other than remedying past and present effects of discrimination. Although some courts have acknowledged a possible exception with respect to the operational needs of law enforcement, that exception has been expressly sanctioned by only one circuit court.[281] Even where such an exception applies, the government employer must articulate a strong basis in evidence that race-conscious measures are necessary to serve that operational need.

Whenever a public employer develops or implements an affirmative

imbalances that may have existed, if at all pertinent, were being addressed in an ongoing, good faith successful manner.").

276. 150 F.3d 438 (5th Cir. 1998).

277. *See id.* at 441.

278. *See id.*

279. *Id.* Justice Breyer, joined by Justice Ginsburg, dissented from the Supreme Court's denial of certiorari in *Dallas Fire Fighters Ass'n*. *See* 526 U.S. 1046 (1999). Justice Breyer noted that other courts of appeal had upheld affirmative action plans that were supported by similar evidence of past discrimination. *See id.* at 1047. "In light of the many affirmative-action plans in effect throughout the Nation, the question presented, concerning the means of proving past discrimination, is an important one; the lower courts are divided; and the Fifth Circuit's decision may be questionable in light of our precedents." *Id.*

280. *Dallas Fire Fighters Ass'n*, 150 F.3d at 441 n.11 (quoting United States v. Paradise, 480 U.S. 149, 167 (1987)).

281. *See supra* notes 213-222 and accompanying text discussing *Wittmer v. Peters*, 87 F.3d 916, 918, 920-21 (7th Cir. 1996).

action plan, that employer should ensure that it has substantial evidence to support its asserted purpose—typically to remedy past or present discrimination. Statistics used by the employer should be based on the relevant qualified minority work force or from actual applications made to the agency. In addition, anecdotal evidence should be collected whenever possible, as the combination of anecdotal and statistical evidence demonstrates the reality of discrimination more than mere numbers.

Anecdotal evidence, however, can be difficult to accumulate. In modern society, overt discrimination is rarely found in the workplace, thanks in large part to employer and employee education and outreach programs seeking to foster an inclusive and diverse workplace. In its place a more invidious form of discrimination, characterized by subtle prejudice that does not often manifest itself in openly hostile ways, has come to predominate. Such sophisticated, yet all too real, discrimination makes for difficult proof. Unfortunately, the strict scrutiny test, as applied by most of the lower courts here, does not seem to allow exceptions in that type of subtle case.[282]

Finally, if any court has made judicial findings of discrimination in the past, that should be noted. This type of evidence is highly persuasive in corroborating inferences of discrimination arising from statistical disparities, and also can be used to show a history of delay on the part of the employer justifying more rapid and targeted affirmative action.

B. Defining Narrowly Tailored Affirmative Action

The second prong of the *Croson* strict scrutiny test requires that an affirmative action plan be narrowly tailored, reaching no further than is necessary to remedy the specific violation. This prong ensures that the unavoidable as well as unintentional effects of affirmative action are minimized. To apply the narrowly tailored prong, lower courts typically focus on the list of factors elaborated by the Supreme Court in *United States v. Paradise*.[283] These factors include "the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties."[284] Courts do not treat

282. As one scholar has noted, "[h]eightened proof requirements threaten to leave unremedied less traceable, but nonetheless pervasive, impacts of discrimination." Lisa E. Chang, *Remedial Purpose and Affirmative Action: False Limits and Real Harms*, 16 YALE L. & POL'Y REV. 59, 60 (1997).

283. 480 U.S. 149, 171 (1987).

284. *Id.* (plurality opinion).

the *Paradise* factors as individually dispositive; instead, they review the circumstances of each case and weigh the factors against each other.[285]

1. Necessity of Relief and Efficacy of Alternative Remedies

A critical factor in determining whether race-conscious affirmative action is necessary is the extent to which a public employer has considered less restrictive, race-neutral measures.[286] Race-neutral actions are essentially efforts to widen the pool of minority applicants for certain positions without showing preference to those who apply. One of the most important race-neutral measures a public employer should implement is a validated selection procedure.[287] Validation not only can avoid race-conscious measures, but also can ensure that procedures are not inadvertently discriminatory.

In *In re Birmingham Reverse Discrimination Employment Litigation*,[288] nonminority fire fighters challenged a 1981 consent decree that established an affirmative action plan for promotions within the fire department.[289] According to the decree, fifty percent of the promotions to lieutenant were given to qualified African-American fire fighters.[290] Although the decree did not have a termination date, it provided that either party could move for modification or termination after it had been

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285. *See, e.g.*, Hiller v. County of Suffolk, 977 F. Supp. 202, 206-07 (E.D.N.Y. 1997). Even though the court found that some *Paradise* factors were met, it concluded that, as a whole, the affirmative action plan was not narrowly tailored. *See id.* at 207.

286. Some courts have held that unless there is proof that an employer considered race-neutral alternative measures, the plan cannot be narrowly tailored:

> The essence of the 'narrowly tailored' inquiry is the notion that explicit racial preferences, if available at all, must be only a 'last resort' option. Without evidence that the City considered race-neutral alternatives to achieve diversity, or that the use of a non-discriminatory policy would not achieve its goal, we simply cannot hold that the City's promotion policy was narrowly tailored.

Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207, 217 (4th Cir. 1993); *see also Hiller*, 977 F. Supp. at 206 ("[T]here is no evidence in the record to suggest that all other alternative measures were evaluated and properly passed over."); Freeman v. City of Fayetteville, 971 F. Supp. 971, 976 (E.D.N.C. 1997) (terminating existing consent decree because, inter alia, "there is not any suggestion or indication that the parties even considered a race-neutral remedy to alleviate the alleged problems . . . .").

287. *See* Ensley Branch, NAACP v. Seibels, 31 F.3d 1548, 1571 (11th Cir. 1994). A "validated" procedure is one that meets the standards established by the Equal Employment Opportunity Commission in its *Uniform Guidelines for Employee Selection Procedures*, 29 C.F.R. §§ 1607.1-1607.14 (1999).

288. 20 F.3d 1525 (11th Cir. 1994).

289. *See id.* at 1530.

290. *See id.* at 1532.

in effect for six years.[291] The court held that the consent decree was not narrowly tailored because there were other measures available to remedy past discrimination in the fire department.[292]

The court reached its conclusion after noting the success of the department's minority recruiting efforts for entry level hires.[293] The court stated that "given the City's progress at the entry-level, alternative measures designed to increase black representation in the fire lieutenant ranks were feasible."[294] The court endorsed a number of alternative measures that could potentially be effective, such as eliminating seniority points from the promotion rankings, since one effect of past discrimination was the accumulation of more seniority among white fire fighters than among African-Americans.[295] The City could also ensure that its promotional test did not have an adverse impact on African-Americans.[296] Finally, rather than implementing a plan where race was the primary factor in awarding fifty percent of the lieutenant promotions, the City could have adopted a promotion process that considered race as one of many factors for selection.[297]

In *Ashton v. City of Memphis*,[298] a federal district court considered whether Memphis's affirmative action plan for promotions in its police

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291. *See id.*

292. *See id.* at 1547; *accord* Alexander v. Estepp, 95 F.3d 312, 316 (4th Cir. 1996) ("The program is not narrowly tailored because means less drastic than outright racial classification were available to department officials.").

293. *See Birmingham*, 20 F.3d at 1546. In 1974, there were only two African-American fire fighters in the department. *See id.* By 1981, the month before the decree was entered, the number of African-Americans increased to 42—approximately 9.3% of the total number of fire fighters. *See id.* These statistics indicated to the court that progress was being made in the absence of the drastic race-conscious efforts demanded by the decree. *See id.* Other courts have reached similar conclusions. *See* Middleton v. City of Flint, 92 F.3d 396, 410-11 (6th Cir. 1996) (rejecting race-conscious promotion plan because, inter alia, the City had successfully used "less drastic, alternate ways" to increase percentage of minority police officers); Krupa v. New Castle County, 732 F. Supp. 497, 518 (D. Del. 1990) (finding that "the County's recruitment of minorities actually exceeded minority representation in the area labor force and the eligibility list.").

294. *Birmingham*, 20 F.3d at 1546.

295. *See id.* at 1547.

296. *See id.*

297. *See id.* In his dissent from the Eleventh Circuit's denial of en banc review of this case, 60 F.3d 720 (11th Cir. 1994), Judge Hatchett disputed the original panel's finding that the promotional plan was not narrowly tailored. *See id.* at 722-23 (Hatchett, J., dissenting). Judge Hatchett argued the promotional goal was flexible, as demonstrated by its actual implementation. *See id.* at 722. Although the goal called for 1:1 promotions of white and African-American fire fighters, in fact the promotion rate was 60% white and 40% African-American. *See id.* Judge Hatchett also questioned the panel's determination that the plan unduly burdened white fire fighters, since their expectations of promotion were based on an unlawfully discriminatory selection procedure. *See id.* at 722-23.

298. 49 F. Supp. 2d 1051 (W.D. Tenn. 1999).

department was narrowly tailored.[299] The court held that the plan was not narrowly tailored because it was not necessary: the City could have avoided the use of race-conscious measures if it had developed and implemented a valid nondiscriminatory procedure for promotions, as it had promised to do in 1979.[300] According to the *Ashton* court, "[h]ad a validated test been developed, the necessity of using affirmative action to adjust the order of promotions produced from the results of a non-valid test would be a moot issue."[301]

A potential problem with a strict requirement for using available race-neutral means is that they may not work fast enough to significantly impact the lingering effects of discrimination.[302] Some courts have taken this into account when assessing whether an affirmative action plan is constitutional.[303] In *Howard v. McLucas*,[304] for example, the court held that an affirmative action consent decree was narrowly tailored even

299. *See id.* at 1053. The Court of Appeals for the Sixth Circuit had already held that the City had a compelling interest in remedying past discrimination in *Aiken v. City of Memphis*, 37 F.3d 1155 (6th Cir. 1994), and remanded to the district court to determine whether the plan was narrowly tailored. *See Ashton*, 49 F. Supp. 2d at 1053.

300. *See id.* at 1060-61.

301. *Id.* at 1061. In *Ensley Branch, NAACP v. Seibels*, the Eleventh Circuit similarly held that a twenty-year-old affirmative action consent decree had to be modified to "put teeth" into the requirement that the defendant Personnel Board develop valid, nondiscriminatory procedures. *See* Ensley Branch, NAACP v. Seibels, 31 F.3d 1548, 1572 (11th Cir. 1994). "Under its present decree, the Board may indefinitely administer racially discriminatory tests and then attempt to cure the resulting injury to blacks with race-conscious affirmative action. Federal courts should not tolerate such institutionalized discrimination." *Id. Cf.* Sims v. Montgomery County Comm'n, 887 F. Supp. 1479 (M.D. Ala. 1995). In *Sims*, the court found that a proposed settlement agreement which required a one-time promotion of two African-American officers concurrently with the promotion of two white officers was narrowly tailored, in part because of a concern that the African-American officers not "be penalized . . . [for] the department's failure to fashion new, nondiscriminatory promotion procedures in a timely manner." *Id.* at 1488 (holding that the fact that a promotional exam had subsequently been validated and approved by the court did not preclude use of narrowly tailored race-conscious affirmative action as a remedy for past discrimination in promotions where no adequate alternative was available).

302. *See, e.g.*, Peightal v. Metropolitan Dade County, 26 F.3d 1545, 1558 (11th Cir. 1994) (finding that race-conscious measures were appropriate since race-neutral measures had only achieved limited success). *But see* Middleton v. City of Flint, 92 F.3d 396, 411 (6th Cir. 1996) ("Complete reform may not have come overnight, but the message of both *Croson* and *Paradise* is that the complete implementation of such reform is not a prerequisite to avoiding a quota remedy.").

303. *See, e.g.*, Boston Police Superior Officers Fed'n v. City of Boston, 147 F.3d 13, 25 (1st Cir. 1998) (holding that one-time affirmative action promotion was narrowly tailored because race-neutral measures "would not provide a timely remedy").

304. 871 F.2d 1000 (11th Cir. 1989).

though other remedial alternatives were available.[305] The decree called for 240 promotions of African-Americans in 38 "target" positions.[306] African-Americans eligible for promotion to these positions were placed on a special register, and promotions were made alternately from the special register and then from a regular eligibility list.[307] Opponents of the consent decree argued that the promotions should be phased in more slowly over time.[308] The court rejected this argument, stating that "[t]hese alternatives, however, are not feasible because they do not place the plaintiffs in their rightful place or do not do so expeditiously."[309]

Thus, to satisfy the first *Paradise* factor, a local government or public agency must inquire as to what race-neutral measures are available as an alternative to race-conscious affirmative action. The success of previous efforts should first be determined. If race-neutral efforts have been unsuccessful, or have worked too slowly to achieve meaningful progress, an employer has a strong reason for implementing race-conscious measures. However, if past or current race-neutral programs have resulted in significant improvement, a court will likely reject future race-conscious affirmative action. In either event, an examination of the available race-neutral remedies is critical, because some courts have found that the mere lack of inquiry constitutes a failure to satisfy this *Paradise* factor.

2. Flexibility and Duration of the Relief

Another consideration in the *Paradise* analysis is whether an affirmative action plan is sufficiently flexible and temporary in nature to withstand strict scrutiny. The flexibility factor looks particularly at whether an affirmative action plan is rigidly applied or more adaptable, allowing exceptions as needed by changing circumstances.[310] One of the hallmarks of flexibility in an affirmative action plan is a waiver provision providing that only qualified persons shall be hired or promoted, irrespective of their race or the goals of the plan.[311] Courts

305. *See id.* at 1009.
306. *Id.* at 1003.
307. *See id.*
308. *See id.* at 1009.
309. *Id.*
310. *See* Ashton v. City of Memphis, 49 F. Supp. 2d 1051, 1063 (W.D. Tenn. 1999).
311. *See* Hiller v. County of Suffolk, 977 F. Supp. 202, 207 (E.D.N.Y. 1997) ("The element of flexibility considers whether a waiver exists when sufficient number of qualified minorities are not available for hire."); *see also* Donaghy v. City of Omaha, 933 F.2d 1448, 1461 (8th Cir. 1991) (finding consent decree, pursuant to which Omaha police department promoted an African-American officer who had greater seniority but lower test score than competing white sergeant, to be both flexible and valid).

also look at whether the plan requires a public employer to make unnecessary promotions in order to meet the plan's goals,[312] or prohibits nonminorities from being hired or promoted altogether.[313]

For example, a federal district court in Tennessee characterized the affirmative action plan at issue in *Ashton* as "highly flexible."[314] This finding was based on the fact that the City was not required to promote police officers who were not qualified, nor make unnecessary promotions in order to achieve the plan's goals.[315] In *Howard*, the Eleventh Circuit also found an affirmative action plan to be sufficiently flexible under the *Paradise* standard.[316] This finding was based on the following characteristics of the plan: the plan did not prevent white employees from being promoted; all employees had to satisfy certain qualification criteria before being promoted; and the plan did not require unnecessary promotions.[317] "Simply put, the promotional relief does not constitute blind hiring by the numbers and does not amount to a rigid and impermissible quota system."[318]

The consent decree approved in *Shuford v. Alabama State Board of Education*[319] included an additional element of flexibility in its hiring and promotion goals.[320] Designed to remedy past discrimination in the Alabama postsecondary educational system,[321] the decree set hiring and promotional goals both systemwide and for each individual educational institution in the system.[322] The court found that the decree was flexible,

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312. *See Howard*, 871 F.2d at 1009; *Ashton*, 49 F. Supp. 2d at 1064.

313. *See* Sims v. Montgomery County Comm'n, 887 F. Supp. 1479, 1488 (M.D. Ala. 1995) (upholding race-conscious measures that "merely delay the opportunity for advancement of [nonminorities] not chosen for promotion"), *aff'd*, 119 F.3d 9 (11th Cir. 1997).

314. *Ashton*, 49 F. Supp. 2d at 1065. It is interesting to note, however, that even though the *Ashton* court found that the plan was highly flexible, it ultimately held that the plan as a whole was not narrowly tailored because it was not necessary and had lasted too long. *See id.* at 1074. Similarly, in *Hiller*, the court found that a requirement for all candidates to pass the same examination "met the minimal threshold" for flexibility, yet the program failed on other grounds including unreasonable duration, failure to consider race-neutral alternatives, and poor fit of numerical goals to relevant labor market. *See Hiller*, 977 F. Supp. at 207.

315. *See Ashton*, 49 F. Supp. 2d at 1065.

316. *See Howard*, 871 F.2d at 1009.

317. *See id.*

318. *Id.*

319. 846 F. Supp. 1511 (M.D. Ala. 1994).

320. *See id.* at 1529.

321. *See id.* at 1513.

322. *See id.* at 1516. The institutional goals were necessary to prevent the state from rounding up the systemwide average with hiring at historically African-American

in part because failure to meet these goals would not automatically violate the decree.[323] Instead, the decree provided that goals could be modified if they were not reasonably attainable through good faith efforts.[324] In addition, once an individual institution met its goals, it would be released from the requirement, even if systemwide goals had not been met.[325]

However, courts will often look beyond the language of a particular decree or plan to determine whether these elements of flexibility are actually put into practice. In *Middleton v. City of Flint*,[326] for example, the court rejected the City's argument that its affirmative action plan was flexible because it included a waiver when qualified minorities were unavailable.[327] Although the plan characterized its goals as "flexible targets . . . [that] shall not result in unqualified persons being appointed" rather than "quotas or rigid standards," the court found these words to be "merely conclusory assertions."[328] In reality, the plan did little more than pay lip service to flexibility concerns because the City actually awarded bonus points to all test-takers in certain years in order to give minority candidates qualifying scores.[329]

Affirmative action plans that operate on a "one-time" basis are more likely to be considered flexible due to the temporary nature of their relief.[330] Rather than setting goals that must be met over time through

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institutions while historically white institutions ignored the problem. *See id.*

323. *See id.* at 1529. The goals were not intended to be quotas, nor was it necessary to hire an unqualified person. *See id.* The court interpreted Supreme Court rulings as "more favorably disposed toward hiring goals [than quotas] . . . [because] 'hiring goals impose a diffuse burden, often foreclosing only one of several opportunities.'" *Id.* (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283 (1986)).

324. *See id.* at 1530.

325. *See id.*

326. 92 F.3d 396 (6th Cir. 1996).

327. *See id.* at 411.

328. *Id.*

329. *See id.* ("This flexibility with *grading* destroys the city's claim that its plan flexibly waives the 1:1 requirement so that it shall not result in unqualified persons being appointed to positions.") (internal quotation marks omitted); *accord* Ensley Branch, NAACP v. Seibels, 31 F.3d 1548, 1576 (11th Cir. 1994) (finding that affirmative action goals operated as rigid quotas, particularly in light of specific instances where unqualified minorities were promoted in order to meet the plan's goals). *Cf.* Peightal v. Metropolitan Dade County, 26 F.3d 1545, 1559 n.21 (11th Cir. 1994) ("The hiring goals in 1983 were not rigidly applied, as is evident from the presence of numerous minority applicants who did not receive employment offers, despite the Department's failure to meet its goals.").

330. *See, e.g.*, Reynolds v. Alabama Dep't of Transp., 996 F. Supp. 1118, 1127 (M.D. Ala. 1998) (holding that "short-lived," one time remedial provision in consent decree was narrowly tailored); Sims v. Montgomery County Comm'n, 887 F. Supp. 1479, 1488 (M.D. Ala. 1995) (finding that promotional relief provided in a settlement agreement was flexible because it was a "one-time measure," responsive to an immediate need that arose while race-neutral procedures were being developed).

the general hiring and promotion processes, one-time plans establish a specific number of promotions or hires that must be made over a prescribed period of time to remedy past discrimination.[331]

Courts also look at the duration of an affirmative action plan as an indicator of flexibility.[332] There is no bright-line test for when the duration of a plan becomes unreasonable.[333] One court has noted that "[a] consent decree may appropriately be used to remedy past discrimination, but it may not be used to achieve and maintain racial balance. The longer a consent decree remains in effect, the more it appears to belong in the latter category."[334]

Providing for a means to terminate the plan or consent decree once its goals have been accomplished is one way to make the duration of affirmative action more narrowly tailored. For example, in *Davis v. City and County of San Francisco*,[335] the court modified an affirmative action consent decree that was set to last seven years by requiring that the term be "seven years or sooner upon the accomplishment of the objectives or

331. *See, e.g.*, Howard v. McLucas, 871 F.2d 1000 (11th Cir. 1989). In *Howard*, the court approved a consent decree that set aside 240 promotions to be awarded to qualified African-Americans as a remedy for past discrimination. *See id.* at 1003. The promotions were to be awarded in 38 target positions and alternated with general promotions, preserving promotion opportunities for non-African-American employees. *See id.* The court found the plan to be sufficiently flexible, particularly since it set no numerical goals, did not seek to racially balance the workplace, and ended once the promotions were made. *See id.* at 1009.

332. *See* Detroit Police Officers Ass'n v. Young, 989 F.2d 225, 228 (6th Cir. 1993) ("Limiting the duration of a race-conscious remedy which clearly impacts adversely upon the plaintiffs is a keystone of a narrowly tailored plan . . . .").

333. *See, e.g.*, Middleton v. City of Flint, 92 F.3d 396, 411-12 (6th Cir. 1996) (finding that a race-conscious plan was not flexible because it lasted ten years); Jansen v. City of Cincinnati, 977 F.2d 238, 245-46 (6th Cir. 1992) (reversing dissolution of consent decree that had been in place for eighteen years and further suggesting that if the goals of a consent decree have not been met it could rightfully remain in effect indefinitely); Donaghy v. City of Omaha, 933 F.2d 1448, 1461 (8th Cir. 1991) (approving limited duration of seven years); Hiller v. County of Suffolk, 977 F. Supp. 202, 207 (E.D.N.Y. 1997) (stating that nine years is an unreasonable duration for an affirmative action plan); Shuford v. Alabama State Bd. of Educ., 846 F. Supp. 1511, 1529 (M.D. Ala. 1994) (holding that a seven-year plan is "sufficiently temporary" to meet the flexibility requirement because it is not "an attempt to maintain racial balance in perpetuity").

334. Ashton v. City of Memphis, 49 F. Supp. 2d 1051, 1065-66 (W.D. Tenn. 1999) (citations omitted). In *Ashton*, the court found that the consent decree was not narrowly tailored because it had been in effect for 14 years, yet during that time, the City had never attempted to develop a validated procedure for promotions, which could have ended affirmative action. *See id.* at 1067.

335. 890 F.2d 1438 (9th Cir. 1989).

the goals of the consent decree."[336] Similarly, in *Peightal v. Metropolitan Dade County*,[337] the court found that an affirmative action plan was reasonable and limited in duration because it provided for termination once the County's seventy percent hiring goal was reached.[338] An additional factor contributing to the reasonableness of its duration was a requirement that the county reevaluate the plan's goals on an annual basis.[339]

In sum, the hallmark of a flexible affirmative action plan is a waiver provision stating that an employer is not required to hire or promote unqualified minorities. Many courts will look for such a provision when reviewing a written affirmative action plan or consent decree, and also examine whether it was actually used in practice. If a public employer lowers the threshold qualifications for hiring or promotion, a court will most likely find the waiver provision to be irrelevant, because it is not enforced in practice. In addition to a waiver provision, a public employer using affirmative action should be careful to avoid unnecessary hires or promotions, while at the same time avoiding the preclusion of the hiring or promoting of nonminority employees during the term of the plan.

The duration of an affirmative action plan is also an important consideration under *Paradise*. One-time relief is often favored, because it does not require ongoing goals or court monitoring, and there is a definite end to the relief. However, if goals are necessary, a public employer should set a date certain in the future for terminating the plan, provided the goals have been met. The goals themselves should be subject to review on a periodic basis to ensure continuing reasonableness and close ties to remedying discrimination. The consent decree in *Shuford v. Alabama State Board of Education*,[340] for example, provided that goals set in the decree could be adjusted if they were not reasonably attainable through good faith efforts, thereby adding another layer of flexibility to an otherwise narrowly tailored plan.

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336. *Id.* at 1448.
337. 26 F.3d 1545 (11th Cir. 1994).
338. *See id.* at 1559.
339. *See id.* ("'[T]he plan is remedial in nature, and it addresses problems of underutilization. If they don't exist, then there is no need to set a goal.'") (quoting testimony of Jacquelyn Rowe, former Director of the Fire Department's Affirmative Action Office). *Cf.* Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207, 217 (4th Cir. 1993) ("The City has offered no evidence regarding the duration of its use of racial preferences. Furthermore, it has offered no evidence indicating that the City regularly reevaluates its use of racial preferences to insure that such preferences continue to be justified by some compelling state interest.").
340. *See supra* notes 319-26 and accompanying text.

3. *Relationship Between Goals and Relevant Labor Market*

The *Paradise* analysis also requires a court to examine the relationship between the goals established by the affirmative action plan and the relevant labor market. This factor is similar to the evidentiary requirements for proving past discrimination.[341] If minority employment goals are not based on the percentage of qualified minorities in the relevant labor market, this *Paradise* factor is not met and the plan will most likely not pass strict scrutiny.[342] Instead, the statistical basis used to establish goals must consider the number of persons in the labor force who possess the requisite qualifications for the job.[343]

In *Shuford v. Alabama State Board of Education*,[344] however, the court approved a consent decree with goals that only approximated the relevant labor market.[345] The plaintiffs in *Shuford*, African-American employees in Alabama's post-secondary education system, could not precisely define the relevant labor market because the defendant had never established objective qualifications for the disputed positions.[346] Without a description of these qualifications, the court could not determine the true percentage of African-Americans in the relevant labor market who possessed the necessary skills for these jobs.[347] In setting a

341. *See* discussion *supra* Part III.A.1.

342. *See* Middleton v. City of Flint, 92 F.3d 396, 412 (6th Cir. 1996) (holding that the plan at issue was not narrowly tailored, in part because the court could find no relationship between the 41.5% goal and the relevant labor market); Ensley Branch, NAACP v. Seibels, 31 F.3d 1548, 1577 (11th Cir. 1994) (remanding consent decree to the district court for modification of goals to align them with the proportion of qualified African-Americans in the labor pool); *In re* Birmingham Reverse Discrimination Employment Litig., 20 F.3d 1525, 1549 (11th Cir. 1994) (finding there was "no relationship between the numerical goal for fire lieutenant promotions and the representation of blacks among firefighters"); Freeman v. City of Fayetteville, 971 F. Supp. 971, 976 (E.D.N.C. 1997) (holding that plan imposing race-based hiring quotas was not narrowly tailored because there was no explanation for the percentages used to set goals); Bertoncini v. City of Providence, 767 F. Supp. 1194, 1203 (D.R.I. 1991) (rejecting goals of affirmative action plan because they were not based on any particular findings, but rather were selected by default because they had been used in the past).

343. *See, e.g.*, Hiller v. County of Suffolk, 977 F. Supp. 202, 207 (E.D.N.Y. 1997) ("[T]he figures utilized reflected the minority percentage of the general population .... There are additional educational, physical, medical, psychological and background requirements that were not considered, and therefore, the statistics provided have little probative value.").

344. 846 F. Supp. 1511 (M.D. Ala. 1994).

345. *See id.* at 1530.

346. *See id.*

347. *See id.* ("[T]he court cannot say conclusively that the goals represent that number of available and qualified African-Americans who would have been employed in

25% goal, the *Shuford* court considered the actual 15.1 to 22.2% African-American representation underinclusive because it had been achieved under the existing discriminatory system.[348] The goal was approved, despite the lack of relevant labor market comparisons, because, under the terms of the consent decree, the goal could be changed once the defendant developed suitable criteria for these positions.[349]

However, in *Aiken v. City of Memphis*,[350] the Sixth Circuit remanded the case back to the district court to reconsider whether an affirmative action plan for police officer promotions was narrowly tailored.[351] The appellate court found that promotion goals set by the consent decree were problematic, because they were tied to goals for hiring African-American officers which were, in turn, based on the minority population in the undifferentiated labor force.[352] According to the court, this caused a "ripple effect," potentially making the promotion goals unconstitutional since they were piggybacked onto undifferentiated statistics.[353] The court stated that on remand:

> [T]he [district] court should ascertain as best it can the racial makeup of the qualified labor pool for the positions at issue, so that it can determine whether the decrees' hiring and promotion goals have caused black representation in the relevant higher ranks to be greater than that representation would have been if no discrimination had ever occurred.[354]

When affirmative action plans do not include the use of goals, this element of the *Paradise* analysis looks at whether the plan is overinclusive or underinclusive.[355] In *Alexander v. Estepp*,[356] for example, the court held that an affirmative action hiring plan was not narrowly tailored because it benefitted minorities, including Hispanics and South Asians, who had not suffered from past discrimination by the

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the covered positions by 1999 in the absence of racial discrimination.").

348. *See id.*

349. *See id.* at 1531 (concluding that the "proposed decree has built-in mechanisms to ensure that the goals become narrowly tailored to the relevant labor pool, if they are not already so, and remain narrowly tailored throughout the life of the decree").

350. 37 F.3d 1155 (6th Cir. 1994).

351. *See id.* at 1167.

352. *See id.* at 1165.

353. *See id.*

354. *Id.* at 1167. On remand, the district court held that the plan was not narrowly tailored. *See* Ashton v. City of Memphis, 49 F. Supp. 2d 1051, 1074 (W.D. Tenn. 1999). *See supra* notes 298-301 and accompanying text.

355. *See* Reynolds v. Alabama Dep't of Transp., 996 F. Supp. 1118, 1128 (M.D. Ala. 1998) (affirming constitutionality of affirmative action plan that did not include goals, but was neither underinclusive nor overinclusive because it applied only to a small group of African-Americans).

356. 95 F.3d 312 (4th Cir. 1996).

County.[357] The *Estepp* court concluded that, "failure to match particular racial or ethnic preferences with particular acts of discrimination against particular racial or ethnic groups also shows that the program as currently structured is not narrowly tailored."[358]

In *Black Fire Fighters Ass'n v. City of Dallas*,[359] the court similarly rejected a proposed consent decree that failed to specifically identify victims of past discrimination.[360] In that case, the consent decree called for out-of-rank or "skip" promotions as a remedy for past discrimination against African-Americans in the fire department.[361] The court found that since a separate provision of the consent decree awarded damages to some of the plaintiffs, the specific victims of discrimination could be identified.[362] Considering this, the court stated that "[t]he broad skip promotion remedy in the decree is difficult to justify when the knowledge to narrow it seems readily available."[363]

The relevant labor market factor is related to the evidentiary requirements for demonstrating a compelling government interest. When goals are used in an affirmative action plan, they must be tied to the minority population in the relevant labor market. In order to define the relevant labor market, a public employer must determine what percentage of minorities possesses the required qualifications for the position at issue. For promotions, this is often the percentage of minorities who are eligible to take the promotional test. For hiring, the appropriate goal is the qualified minority population in the pertinent geographic area. If the job requires only minimum qualifications, such as a high school education or equivalent and a drivers' license, goals may be based on general or undifferentiated population statistics. Not

357. *See id.* at 316. The County had only provided evidence of past discrimination toward African-Americans. *See id.*

358. *Id.* at 316. *Cf.* Donaghy v. City of Omaha, 933 F.2d 1448, 1460 (8th Cir. 1991) (holding that consent decree was not overinclusive, because it applied only to African-Americans, who were the only underutilized minority group that had been identified). When the actual individuals who suffered discrimination can be identified and remediated directly, a court will typically find narrow tailoring. *See, e.g.*, Paganucci v. City of New York, 785 F. Supp. 467, 478 (S.D.N.Y. 1992) ("The only beneficiaries of the settlement are the minority officers who were affected by the examination's disparate impact, and thus the settlement is not overinclusive.").

359. 19 F.3d 992 (5th Cir. 1994).

360. *See id.* at 994-95.

361. *Id.*

362. *See id.*

363. *Id.* at 995.

all courts, however, have agreed with this approach.[364]

Where goals are not involved, a court will still look at whether the affirmative action plan is under- or overinclusive. When victims of discrimination can be identified or have been identified for other purposes, such as payment of damages, the relief should focus on those identified as victims. If, as is typically the case, specific victims cannot be ascertained, a public employer should be careful to match the relief to the minority groups for which it has evidence of discrimination. For example, if all evidence of past discrimination focuses on African-Americans, an affirmative action plan for Hispanics may be seen as overinclusive. Essentially, this factor calls for a tight fit between the discrimination asserted and the relief granted.

4. *Impact on Third Parties*

The final *Paradise* factor looks at how the affirmative action plan at issue impacts the rights of third parties. Courts tend to view such impact on a continuum, depending on the type of employment action involved. For example, the impact of a racial preference for a promotion is not as harsh as the impact of a racial preference for a layoff decision.[365] Preferences in hiring may have even less impact on third parties than promotions.[366] Some courts, however, have found the impact of both promotional and hiring preferences to be "relatively diffuse," particularly when the plan does not prohibit nonminorities from being promoted or hired altogether.[367]

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364. *See supra* note 255 and accompanying text.

365. *See* Peightal v. Metropolitan Dade County, 26 F.3d 1545, 1561 (11th Cir. 1994) ("Denial of a future employment opportunity [is] not as intrusive as loss of an existing job." (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283 (1986))); *see also* Ashton v. City of Memphis, 49 F. Supp. 2d 1051, 1073 (W.D. Tenn. 1999) ("[L]ost promotions are not as burdensome as the loss of an existing job."). *But see* Middleton v. City of Flint, 92 F.3d 396, 413 (6th Cir. 1996) (finding that even promotional preferences had "drastically" affected the rights of third parties by denying them "salary increases, increased pensions, and related benefits, as well as the opportunity to accrue seniority to gain subsequent promotions.").

366. *See Ashton*, 49 F. Supp. 2d at 1074 ("Unlike the use of affirmative action in initial hiring where the burden is diffused among the relevant labor force, the potential impact of race-based promotions here is limited to the pool of qualified white patrol officers who might be passed over for promotion.").

367. *See* Shuford v. Alabama State Bd. of Educ., 846 F. Supp. 1511, 1531 (M.D. Ala. 1994) ("At the very worst, some white applicants' attempts to be hired or promoted will be delayed."); *see also* Howard v. McLucas, 871 F.2d 1000, 1009-10 (11th Cir. 1989). *But see In re* Birmingham Reverse Discrimination Employment Litig., 20 F.3d 1525, 1549 (11th Cir. 1994). The *Birmingham* court distinguished *Howard* because in *Howard* a targeted number of promotions were spread out over thirty-eight different positions. *See id.* In *Birmingham*, however, the promotions only affected one position and were to continue until the goals of the consent decree were met, thus creating a

In *Boston Police Superior Officers Federation v. City of Boston*,[368] the court looked at the legitimacy and reasonableness of the expectations of third parties affected by affirmative action.[369] The court pointed out that the plaintiffs' expectations "could not have been overly firm,"[370] considering there were more candidates than positions for the promotion at issue, and there was no state law right to promotion for civil servants.[371] Furthermore, the plaintiffs remained eligible for future promotions.[372]

In *Black Fire Fighters Ass'n v. City of Dallas*,[373] however, the impact of an affirmative action consent decree on third parties was too great to meet narrow tailoring requirements.[374] The consent decree called for out-of-rank promotions that the court recognized as having a less severe impact than being laid off.[375] However, the court's analysis focused primarily on the expectations of the third parties, rather than the nature of the affirmative action: "[s]o long as the department ranks its employees' exam scores, however, a firefighter has an expectation that he can earn promotion through study. That expectation is tangible enough that we cannot ignore the problems with the tailoring of this remedy."[376]

In *Ashton v. City of Memphis*,[377] the court found that out-of-rank

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bottleneck at the position of lieutenant for nonminorities wishing to move up in the ranks. *See id. Cf.* Hiller v. County of Suffolk, 977 F. Supp. 202, 207 (E.D.N.Y. 1997). In *Hiller*, even though the court found that the impact on third parties was "attenuated and diffused," it still held that the affirmative action plan was not narrowly tailored based on a balancing of all the *Paradise* factors. *Id.*

368. 147 F.3d 13 (1st Cir. 1998).
369. *See id.* at 24.
370. *Id.*
371. *See id.*
372. *See id.* In looking at the effect on third parties, courts also consider whether hiring and promotion procedures provide a legitimate and reasonable basis for third party expectation. Included in this inquiry is the validity of an examination with respect to requirements for a particular job as well as race-neutral impact. *See, e.g.*, Peightal v. Metropolitan Dade County, 26 F.3d 1545, 1562 (11th Cir. 1994) ("Given the test's unreliability and its adverse impact on minorities, we cannot say that Peightal should be entitled to relief based upon the rigid rank-ordering produced from such a flawed examination or that Metro Dade's departure from these rankings placed an undue onus upon Peightal.").
373. 19 F.3d 992 (5th Cir. 1994).
374. *See id.* at 997.
375. *See id.*
376. *Id.*
377. 49 F. Supp. 2d 1051 (W.D. Tenn. 1999).

promotions subjected plaintiffs to a "relatively light impact."[378] The impact was less than it would have been had affirmative action involved layoffs rather than promotions.[379] However, by focusing on a small group of individuals—white patrol officers eligible for promotion who ranked higher than those officers who were actually promoted—the impact was heightened.[380] Regarding the plaintiffs' expectations, the court acknowledged that if seniority had not been factored into the ranking, several plaintiffs would not have had high enough ranks for promotion.[381] The court stated that:

> It can be assumed that the white officers' greater experience stems, at least in part, from the identified prior discrimination in the MPD against hiring blacks.... Thus, it is difficult to find these plaintiffs were greatly impacted through the use of affirmative action when, but for their greater seniority points due in part to prior discrimination by the MPD, they would not have ranked high enough to be promoted absent the use of affirmative action.[382]

Nevertheless, after considering all of the *Paradise* factors, the *Ashton* court ultimately held that the affirmative action plan could not survive strict scrutiny because it was not narrowly tailored.[383]

Typically, this final *Paradise* factor focuses on the impact of race-conscious relief on third parties in light of what their reasonable expectations are or should be. Courts generally agree that hiring preferences are less detrimental than promotions, which are in turn less detrimental than layoffs. However, one court's unbearable impact is often tolerable to another. In the end, this may be the least significant factor. Affirmative action plans that satisfy the other factors will most likely be found narrowly tailored regardless of their impact on third parties. Likewise, where a plan fails to meet the previous *Paradise* factors, the fact that its impact on third parties is not overly burdensome will probably not save it in the end.

C. *Recommendations for Practitioners and Summary*

In general, the strict scrutiny test operates on a sliding scale. With a strong compelling interest, a public employer will have more flexibility

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378. *Id.* at 1074.
379. *See id.* at 1073.
380. *See id.* at 1074.
381. *See id.* at 1073 n.29. Other courts have also recognized the problems associated with factoring seniority into promotional procedures. *See, e.g.*, Boston Police Superior Officers Fed'n v. City of Boston, 147 F.3d 13, 20 (1st Cir. 1998) ("The effect of prior discrimination was compounded by the fact that experience makes up twenty percent of the score assigned to a candidate for promotion ... negatively impact[ing] black ... candidates.").
382. *Ashton*, 49 F. Supp. 2d at 1073 n.29.
383. *See id.* at 1074.

under the narrowly tailored prong to develop an aggressive affirmative action plan. By contrast, if the evidence of past or present discrimination is weak or minimal, an affirmative action plan that employs race-conscious measures will be unlikely to survive the narrowly tailored analysis. Public employers should thus examine the extent of past or present discrimination as a first step in developing an affirmative action program. The employer's options regarding which techniques and methods to implement depend on this determination.

In order to survive the narrowly tailored prong of the strict scrutiny test, public employers should consider the following questions when formulating an affirmative action plan:[384]

1. Have alternate remedies been considered or implemented? Were they successful?
2. Have the testing procedures used been validated according to EEOC Guidelines?
3. Does the plan include a waiver provision that excuses the employer from hiring or promoting unqualified persons?
4. Is there a specific termination date for the plan? Can the plan be terminated at an earlier date if its objectives are met?
5. If the plan includes numerical goals, are the goals based on the percentage of qualified minorities in the relevant labor market? Does the plan call for regular review of these goals?
6. Is the plan overinclusive or underinclusive? Does it benefit all minorities, or only those minority groups that have been found to suffer from discrimination?
7. What burden does the plan place on third parties? Does the plan prohibit third parties from being promoted or hired, or cause them to be laid off?

Taken together, the two prongs of strict scrutiny, as currently applied by the federal courts, present a daunting challenge to the employer or government actor who seeks to apply affirmative, race-conscious action in hiring or promotion. The employer must first be prepared to bear the full burden of proving and defending a compelling interest. Good

384. For further guidance, see Walter Dellinger, *Justice Department Memorandum on Supreme Court's* Adarand *Decision*, 1995 DAILY LAB. REP. 125 d33 (June 29, 1995), which lists a number of additional questions that the Department of Justice has instructed federal agencies to ask when reviewing the constitutionality of existing affirmative action plans.

intentions are not enough. Thus, the perceptive employer's acknowledgment of the benefits of a culturally diverse work force, if such diversity relies on the recognition of race as a criteria for achieving diversity, not only will fail but will likely lead to counter-challenges of racism. Even the less-than-altruistic employer seeking simply to comply with statutory antidiscrimination laws such as Title VII must tread carefully lest its compelling interest in self-preservation lead to its ultimate downfall.

For all intents and purposes, employers implementing voluntary affirmative action must be prepared to prove that they have purposefully discriminated on the basis of race. Not only does such a burden place employers in the awkward position of documenting and coming forward with substantial evidence of their own past wrongdoing, but a court is likely to look with skepticism at such admissions. A simple showing of a statistical disparity is insufficient proof of past discrimination, since the majority of courts have accepted the mere suggestion of any plausible alternative explanation for such a disparity. No longer can employers count on logic and reason to save them. For the courts, following the lead of the Supreme Court, have turned a blind eye to the reasonable inference that if it looks like discrimination, and smells like discrimination, it most probably is discrimination. Thus, employers are faced with demonstrating that they intentionally, specifically, and perhaps even systematically violated the law. Such a burden has undoubtedly chilled all but the most conscientious volunteers.[385]

Employers convinced that they have a compelling interest—indeed duty—to remedy past discrimination must then set aside any lofty notions of lifting minorities up to make amends for past discrimination, replacing their altruism with caution, control, and deliberation. Restraint is clearly the key word for narrow tailoring. Should employers decide to proceed against all current odds, they do so at substantial personal risk. Should they falter in their uncertain attempts to do the right thing, they face not only the cost, inconvenience, and embarrassment of court intervention, but potential *personal* liability as well. At least one Circuit has held that a government actor may not be protected by the shield of

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385. *See* Brent E. Simmons, *Reconsidering Strict Scrutiny of Affirmative Action*, 2 MICH. J. RACE & L. 51 (1996).

> The Court's ambivalence about the permissible use of race-conscious remedies has frustrated good-faith efforts by government at all levels to investigate and voluntarily rectify both historic and continuing problems of racial and gender discrimination. Many state and local agencies that want to implement voluntary plans have no clear, definitive guidance from the Court on what is required to satisfy strict scrutiny.

Id. at 88.

his office if he should have known his actions were unconstitutional.[386] Given the Court's diverse measurements, it is difficult to know whether the suit fits!

The scenario employers face today might be appropriate for a society that has achieved the goal of true color-blindness. But in our less-than-perfect world, it seems more suited to promoting indifference—not acceptance. Is this truly what the Supreme Court had in mind when it proclaimed strict scrutiny? Is this all that remains of affirmative action? Is there a better way? This Article suggests below that there is.

IV. CONCLUSION

So, has affirmative action been negated? A review of the lower court cases demonstrates that strict scrutiny is not "strict in theory, fatal in fact" with respect to affirmative action. A small window of opportunity still remains, but the view through that window provides visions of both hope and gloom. To a large extent the need for affirmative action has diminished. The laws of discrimination are being enforced. Employers have become more aware and more sensitive. Training and education are directed at avoiding discrimination and harassment in the workplace. Progess has been made in hiring and promotions.

But with that new awareness comes discrimination which is more sophisticated. The former, blatant discrimination has been replaced by a more subtle form which is more difficult to prove. Likewise, things that we all assume to be true may not meet the current standards of proof and the definition of a "compelling government interest." The Supreme Court requires that public employers have a "strong basis in evidence" in order to use affirmative action to remedy past or present discrimination. In order to provide consistency among lower courts, the Supreme Court should further articulate the evidentiary standard for a compelling government interest. If a significant statistical disparity exists, those data alone should be sufficient to create an inference of discrimination,

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386. *See* Alexander v. Estepp, 95 F.3d 312, 317-18 (4th Cir. 1996). In *Alexander*, the court held that the *Croson* decision, as well as two other decisions from the Fourth Circuit, should have put the defendants on notice that the affirmative action plan at issue would be subject to strict scrutiny. *See id.* at 317-18. The court stated that "the individual defendants have not established their entitlement to qualified immunity because case law (about which a reasonable official would have known) had clearly established by 1993 and 1994 that the department's affirmative action program failed to satisfy the strict requirements of the Equal Protection Clause." *Id.* at 318.

enough to justify the development of affirmative action measures. Under this "inferential" standard, a statistical disparity that proves a prime facie case under Title VII would be sufficient to constitute a compelling government interest.

The Supreme Court expressed concern that if societal discrimination could be the basis for specific affirmative action, there would be "no logical stopping point" for affirmative action. The inferential standard proposed here, however, satisfies this concern because a compelling government interest is only one prong of the strict scrutiny test. Under the narrowly tailored prong, a public employer is required to go beyond demonstrating that discrimination has occurred and must also justify the specific actions it has taken in response. Public employers must still demonstrate that they have considered race-neutral alternatives, and that those alternatives would not be effective to remedy the effects of the past discrimination at hand. A narrowly tailored affirmative action plan must also be flexible and limited in duration. The impact on third parties must be weighed against the benefits of the affirmative action plan. All of these safeguards ensure that affirmative action *does* have a logical stopping point—when facts giving rise to the inference of discrimination no longer exist.

As the forms of discrimination in the workplace and in society become increasingly subtle, a high evidentiary standard essentially becomes the death-knell to affirmative action and precludes public employers from taking action to avoid perpetuating the status quo. Coupled with the requirements of narrow tailoring, the inferential standard for a compelling government interest allows flexibility on the part of employers while providing a measuring stick of fairness for all parties affected by affirmative action.

Furthermore, the inferential standard may be a means to address the contribution the State itself has made in creating and perpetuating the situation characterized as "societal discrimination." As Justice Kennedy said in his concurring opinion in *Croson*, "the State has the power to eradicate racial discrimination and its effects in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself."[387] Yet the lingering effects of state-sponsored discrimination are not so easily eradicated. African-Americans face a continuing struggle toward parity in such essential state-controlled facets of life as education, housing, transportation, and indeed even access to justice. The Supreme Court has, at worst, been unwilling to acknowledge such effects and, at best, been unable to

387. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 518 (1989) (Kennedy, J., concurring).

devise an easily quantifiable formula to address them with affirmative action.

Although an imperfect measure, the inferential standard could be appropriately applied to incorporate the degree to which governmental discrimination has contributed to minority unavailability in the workforce due to cumulative loss of opportunity, for example, in education and transportation. Such an explanation for statistical disparities is at least as compelling as the argument that minorities simply choose not to enter a desirable job market.

In addition to establishing the inferential standard, the Supreme Court should also explicitly define the part that diversity, role model, and operational needs rationales may play in developing an affirmative action plan. Can there be any doubt as to the need and efficacy of having African-American police officers serving on the streets of African-American neighborhoods, or having African-American teachers inspiring African-American children? No experience can do more to eradicate prejudice than to have college students of all races living and working side by side. No course on the evils of discrimination can match the educational value of a white student having an African-American as a close personal friend or roommate. A diverse workplace makes people more aware and tolerant of other races and cultures.

But the benefits of diversity and appropriate role models have not been recognized by the courts and may not be susceptible of easy proof despite our assumptions. To limit affirmative action to only those instances where there is clear proof of past discrimination is to ignore the harm that can be eradicated, the benefits that can be achieved, and the realities that exist.

If the reasons and bases for allowing affirmative action were expanded, we have little quarrel with the concept of having such programs "narrowly tailored"—doing no more than what is necessary to accomplish the goals set forth above. But the efforts to bar or eliminate affirmative action programs, particularly those programs voluntarily undertaken, deprive the nation of a significant means of ending discrimination and affording opportunity to those who need and deserve it. Although, admittedly, affirmative action has some adverse consequences, its benefits far outweigh its detriments. True, contribution by those so affected is essential, but they cannot avail themselves of opportunities that do not exist. The "level playing field" is still a steep climb for far too many.