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Affirmative Action: Are the Equal Protection and Title VII Tests Synonymous?

*Maureen E. Lally-Green**

> "I said there was a society of men among us, bred up from their youth in the art of proving by words multiplied for the purpose, that white is black, and black is white, according as they are paid."[1]

The media's use[2] of Swift's famous description of lawyers to criticize the recent Supreme Court affirmative action[3] decision in *Johnson v. Transportation Agency of Santa Clara, California*[4] reflects the public's sharp division as to why an employment decision made on the basis of race or sex, the "black" in Swift's quote, should not be discrimination when it is in the context of affirmative action, the "white".[5] In the past decade, eight Supreme Court employment-

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The author acknowledges the valuable editorial comments of Bruce Bagin, J.D.

1. *Gulliver's Travels,* Jonathan Swift.

2. *National Review*, Apr. 24, 1987, pp. 17-18. Swift's quote introduced an article criticizing the Supreme Court's decision in Johnson v. Transportation Agency of Santa Clara, California, 107 S. Ct. 1442 (1987). *See infra* text accompanying notes 355-407. The author of this article argued that voluntary affirmative action in the public sector is against the law and concluded that: "Social justice will be reserved for those with tribal affliations and accredited victim status, proving once more that under the liberal regime, you have to have a lot of clout to be a victim. Being an individual isn't enough." *Id.* at 18.

3. The term "affirmative action" refers to policies that provide preferences based on membership in a designated group; however, no individual of the disadvantaged class has a claim to affirmative action and no individual beneficiary of relief need show he or she was a victim of discrimination. Such policies range from "weak" efforts, such as advertising or special recruitment efforts, to "strong" efforts, such as reserving a specific number of openings exclusively for members of the preferred group. The terms "affirmative action", "preferential treatment", and "affirmative discrimination" are used synonymously; however, the term "affirmative action" avoids the negative connotation of "preference" or "discrimination". Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327 (1986).

4. 107 S. Ct. 1442 (1987).

5. In affirmative action circles, critics have been called either "fair shakers" or "social engineers." The "fair shakers" are concerned with guaranteeing equality of opportunity, abolishing barriers to fair participation, and giving the individual a fair shake. The "social engineers" are ones who are concerned with results and who argue that, absent discrimination, all groups would be represented in the

related[6] affirmative action cases[7] demonstrate that sharp division through thirty-five majority, concurring or dissenting opinions that span over six hundred pages of official and unofficial text.[8]

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institutions and occupations of society roughly in proportion to their representation in the population. Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312 (1986).

Anti-affirmation action authors include among others: Abrams, *supra* and Bloom, *The Closing of the American Mind: How Higher Education Has Failed Democracy and Impoverished the Souls of Today's Students* (1987). There, the author states: "Affirmative action [quotas], at least at universities, is the source of what I fear is a long-term deterioration of the relations between the races in America." *Id.* at 96-97.

Pro-affirmative action authors include among others: Jones, *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal and Political Realities*, 70 IOWA L. REV. 901 (1985); Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327 (1986); and, Sullivan, *Sins of Discrimination: Last Terms Affirmative Action Cases*, 99 HARV. L. REV. 78 (1986).

6. The Supreme Court has dealt with the subject of affirmative action in other areas such as student assignments. *See, e.g.*, Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971); Green v. County School Board, 391 U.S. 430 (1968).

The issue of preferences has also been addressed in the area of admissions to law and medical schools. DeFunis v. Odegaard, 416 U.S. 312 (1974) (the issue of a minority group set-aside for law school was moot because petitioner was about to graduate); Regents of the University of California v. Bakke, 438 U.S. 265, (1978). In *Bakke*, petitioner, a white individual who was denied admission to the University of California medical school because of a minority group set-aside, challenged the constitutionality of that affirmative action plan. Unable to avoid deciding the matter, four members of the Court ruled that the set-aside was illegal under Title VI. Four members ruled that the set-aside was constitutional under the middle-tier analysis and that the school could take race into account as a "plus" factor in selecting qualified applicants for admission. Justice Powell voted with the first four, reasoning that the set-aside failed to meet the "strict scrutiny" test for equal protection challenges of racial classifications because there had been no finding of prior discrimination by the school. *Id.*

7. United Steelworkers of America v. Weber, 443 U.S. 193 (1979) ("*Weber*"); Fullilove v. Klutznick 448 U.S. 448 (1979) ("*Fullilove*"); Firefighters v. Stotts, 467 U.S. 561 (1984) ("*Stotts*"); Wygant v. Jackson Board of Education, 106 S. Ct. 1843 (1986) ("*Wygant*"); Local 28 of Sheet Metal Workers' International Association v. Equal Employment Opportunity Commission, 106 S. Ct. 3019 (1986) ("*Local 28*"); Local 93 Firefighters v. City of Cleveland, 106 S. Ct. 3063 (1986) ("*Local 93*"); United States v. Philip Paradise, 107 S. Ct. 1053 (1987) ("*Paradise*"); and Johnson v. Transportation Agency of Santa Clara, California, 107 S. Ct. 1442 (1987) ("*Johnson*").

Another employment-related case was County of Los Angeles v. Davis, 440 U.S. 625 (1979) (challenge to minority-group hiring quota imposed by a district court on an employer who used an allegedly biased examination for hiring purposes was found moot because by the time the case reached the Supreme Court, the county had revised its hiring procedures to conform with the district court's order and had extensively hired minority-group persons; therefore, any discriminatory effects of its previous practices were substantially cured and the quota was not necessary.)

8. The chart below sets out each case with an indication of the number of

There are Justices on the Supreme Court who would allow the use of race or sex only to compensate "identifiable victims" of employer discrimination but never to benefit nonvictims, no matter how egregious the employer's past discrimination.[9] There are Justices who would allow the use of race or sex to compensate both "identifiable victims" and nonvictims only in particularly egregious situations where the remedy is not excessive.[10] There are Justices who would allow the use of race or sex to benefit nonvictims where a manifest imbalance in a traditionally segregated job category is shown and the remedy is temporary, designed to eliminate that manifest imbalance and does not impinge on the nonminority's legal rights.[11] Finally, there are Justices who would allow the use of race or sex when nonvictims are compensated for "societal discrimination" and the remedy is designed to eliminate statistical imbalances in job categories.[12]

It is clear that the Supreme Court has decided affirmative action cases on the facts and circumstances reflected in the relevant records and has refused to articulate a controlling test for all types of affirmative action plans whether voluntary, part of a consent decree approved by a court, a contempt order or a remedy ordered by the court. What becomes evident is that the standards used by the

pages in official text or unofficial text ("-"), of the ruling and of how each Justice ruled. A "*" indicates that the Justice authored an opinion. An "x" indicates that the Justice did not participate in the decision.

		Brgr	Stwrt	Brnnn	Mrshll	Blckmn	Pwll	Stvns	Wht	Rhnqst	O'Cnnr	Scl
Weber -62 pp.	5-2	D	M	M*	M	M/C*	x	x	M	D*	-	-
Fullilove -106 pp.	6-3	M*	D*	C	C	C*	M/C*	D*	M	D	-	-
Stotts -34 pp.	5-4	M	-	D	D	D*	M	C	M*	M	C*	-
Wygant -28 pp.	5-4	M	-	D	D*	D	M*	D	C	M	M/C*	-
Local 28 -68 pp.	5-4	D	-	M*	M	M	M/C*	M	D*	D*	M/C/D*	-
Local 93 -33 pp.	6-3	D	-	M*	M	M	M	M	D*	D*	M/C	-
Paradise -30 pp.	5-4	-	-	M*	M	M	M/C*	C*	D*	D	D*	D
Johnson -16 pp.	6-3	-	-	M*	M	M	M	M/C*	D*	D	C*	D*

9. Rehnquist, J., and Burger, C.J., in *Local 28*, 92 L.Ed. 2d at 403-04; Scalia, J., in *Johnson*, 107 S. Ct. 1456-76.

10. This position was reflected in *Local 28* in the opinions of White, J., and O'Connor, J., both of whom dissented arguing that the remedy of a quota there was excessive.

11. The plurality opinions in *Weber* and *Johnson*.

12. With "societal discrimination", the pervasive consequences of racial discrimination would validate an employer's use of race-conscious remedies regardless

Supreme Court to test the validity of voluntary and court-ordered affirmative action plans for both public and private employers are the same whether the challenge is under equal protection or Title VII.

This article suggests that the controlling test for discrimination in both Title VII[13] and equal protection challenges and for all types of affirmative action plans should be whether there was a demonstration of intentional discrimination by the employer. If so, the remedy should be narrowly tailored to eliminate that discrimination. Intentional employer discrimination can be shown in all situations, except the judicial remedy, by evidence of a firm basis[14] that the employer has intentionally engaged in past or present discrimination or has used policies or practices that have had a discriminatory effect. Such discrimination, however, cannot be demonstrated simply by presenting evidence of a manifest statistical imbalance of the minority in the job category to the relevant labor market. The remedy limitation can be met only if the remedy is designed to eliminate the identified discrimination of the employer, is temporary, provides for goals with "safety valves" and does not impinge on the employee's Title VII rights or expectation interests.

In Part I of this article, the eight Supreme Court cases are reported. In Part II, the proposed test is analyzed in the context of those cases.[15] The final section, Part III, is the conclusion.

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of whether the employer itself engaged in discriminatory conduct. *See, e.g.*, Regents of the University of California v. Bakke, 438 U.S. 265, 369-73 (1978) (Brennan, J., concurring in part, advancing the societal discrimination approach); Wygant v. Jackson Board of Education, 106 S. Ct. 1842, 1847-48 (1986) (Powell, J., writing for the plurality, rejecting the societal discrimination approach).

13. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e17 (1982).

14. *See* the discussion *infra* notes 427-434 and accompanying text. *See* Justice O'Connor's concurrence in *Johnson*, 107 S. Ct. at 1461.

15. This article will not specifically address the affirmative action required by Executive Order 11246, as amended, and its implementing regulations, including 41 C.F.R. Part 60-2 (known as revised Order 4). Note, however, that employers must comply with this order in order to do business with some federal or state governmental agencies. For the reader's information, Executive Order 11246, signed into law by President Johnson, requires federal contractors to take affirmative action by hiring minority-group members and women or risk losing their federal contracts. Prior to the executive order, affirmative action had been required within the federal government but had been practiced only on a voluntary basis by federal contractors. Over the past few years, there has been intense debate concerning whether employers should be required to establish goals and timetables for hiring and promoting women and members of minority groups. However, with respect to federal contactors, neither Executive Order 11246 nor the regulations promulgated by the Labor Department's Office of Federal Contract Compliance Programs (OFCCP) have been altered during the Reagan administration. *Affirmative Action Today*, BNA Special Report, 5.

I. Background

A. Introduction

Before addressing the cases, it should be noted that discrimination under Title VII can be shown by evidence that the employer intentionally discriminated ("individual disparate treatment"), intentionally limited, segregated or classified employees or applicants in a manner that deprives those individuals of employment opportunities ("systemic disparate treatment") or otherwise adversely affected an individual's status as an employee ("adverse impact").[16] It is also important to note that the employer can invoke judicially created defenses or statutory exceptions.[17] Under "individual disparate treatment", if it is shown by direct evidence, (i.e., the "smoking gun" or circumstantial evidence which meets the *McDonald Douglas-Burdine* test,[18]) that the employer intentionally

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16. These are causes of action arising under 42 U.S.C. § 20003-2(a) and §§ 703(a)(1) and (2). *See* the text *infra* of § 703(a)(1) and (2) at note 25.

17. The statutory defenses are found in § 703(h), 42 U.S.C. § 2000e-2(h), which provides, in pertinent part:

> (h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national orgin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. . . .

18. McDonald Douglas Corp. v. Green, 411 U.S. 792 (1973) ("*McDonald Douglas*"); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) ("*Burdine*"). *McDonald Douglas* requires the plaintiff to show that he belongs to a class protected by Title VII, qualifies for an available position, and was rejected for that position in favor of a non-class member. The defending employer need only produce evidence which articulates a legitimate, nondiscriminatory reason for the selection of the non-class member. *Burdine*, 450 U.S. at 252-60. The plaintiff then bears the burden of persuading the trier of fact that this reason was merely pretext. *McDonald Douglas*, 411 U.S. at 807.

A nonminority has a protected right against "reverse discrimination" under § 703(a)(1). McDonald v. Sante Fe Trail Transportion Co., 427 U.S. 273 (1976). A claim of reverse discrimination often arises in the context of the employer's adoption of a voluntary affirmative action plan. Reverse discrimination can be shown by direct evidence of discrimination or by a demonstration of circumstantial evidence in accordance with the *McDonald Douglas* test. The defending employer

discriminated against the plaintiff, the employer is liable to that victim,[19] unless the employer proves that the classification is a bona fide occupational qualification.[20] Under "systemic disparate treatment", if it is shown that the employer intentionally uses a policy or practice or classifies employees in a way that limits opportunities for members of a protected class, the employer is liable to all of the actual victims in that class.[21] Under "adverse impact", if it is shown that an employer's facially neutral practice disqualifies substantially disproportionate numbers of the protected class and the employer fails to prove the business necessity of that practice, members of the class need not prove that the employer had a discriminatory purpose; a showing of discriminatory impact is sufficient.[22] While both individual and systemic disparate treatment claims involve a showing of the employer's intentional discrimination through the victims' testimony and often through statistics, adverse impact claims require only a showing of discriminatory impact on a class by statistics.

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need only produce evidence which articulates a legitimate, nondiscriminatory reason for its decision (i.e., the affirmative action plan). The plaintiff must prove that this reason was merely pretext and that the plan is invalid. For these issues the plaintiff bears the burden of persuasion. *McDonald Douglas*, 411 U.S. at 807. *See also Johnson*, 107 S. Ct. at 1449-50.

19. Remedies may include an order to rehire or reinstate the employee or to award him backpay.

20. Section 703(e), 42 U.S.C. § 2000e-2(e) provides:

> Notwithstanding any other provisions of this subchapter ... it shall not be an unlawful employment practice for an employer to hire and employ employees ... on the basis of his religion, sex, or national origin in these certain instances whose religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particluar business or enterprise.

The bona fide occupational qualification defense does not reach race or color discrimination.

21. Teamsters v. United States, 431 U.S. 324 (1977).

The term "pattern or practice" is found in § 707(a), 42 U.S.C. § 2000-e6(a) which provides:

> (a) Whenever the [Equal Employment Opportunity Commission] has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the [Equal Employment Opportunity Commission] may bring a civil action. . . .

22. *Teamsters*, 431 U.S. at 335 n. 15. For example, intelligence tests that have not been validated do not enjoy the § 703(h) privilege and cannot be justified by the "business necessity" defense. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

Discrimination under the equal protection clause, in the employment context, is shown by evidence that the employer intentionally limited, segregated or classified employees in a manner that deprived those individuals of their rights under the law.[23] The Title VII concept of adverse impact has no application in an equal protection context.[24]

B. The Cases

In this section, each of the cases will be reported in chronological order and in a detailed fashion so that the reader has an appreciation of the precedential value of each decision, as well as the factual context, the procedural posture and the legal analysis reflected in each case. The common denominator of the eight cases is the interrelationship of section 703(a),[25] section 703(j)[26] and, in

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23. Washington v. Davis, 426 U.S. 229 (1976). In Bolling v. Sharpe, 347 U.S. 497 (1954), the Court held that the due process clause of the fifth amendment, which contains an equal protection component, prohibited the United States from invidiously discriminating between individuals or groups. *Id.*

24. Washington v. Davis, 426 U.S. 229 (1976). In *Davis*, a test was administered generally to prospective government employees to determine whether the applicants had acquired a particular level of verbal-realted skills. *Id.* at 235-36. Unsuccessful black applicants for employment as police officers in the District of Columbia claimed that the police department's recruiting procedures, including the test, violated the due process clause of the fifth amendment because the test had the discriminatory impact of screening out black candidates and bore no relationship to job performance.

The Supreme Court held that the "adverse impact" standards applicable to Title VII cases do not apply to claims of invidious racial discrimination under the due process clause of the fifth amendment. *Id.* at 236. The Court first stated that the purpose of the equal protection clause of the fourteenth amendment, as well as the due process clause of the fifth amendment, is the prevention of official governmental conduct which discriminates on the basis of race. *Id.* at 239. The Court then held that an official act is not unconstitutional solely because it has a racially disproportionate impact. *Id.* at 239-41. Such acts should be examined with regard to whether they reflect a racially discriminatory purpose. *Id.* If the act is neutral on its face, the court must determine whether it is applied so as to invidiously discriminate on the basis of race. *Id.*

25. 42 U.S.C. § 2000e-2(a). Section 703(a) provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect his status as an

cases involving judicial action, section 706(g)[27] of Title VII.[28] When a public employer is involved, the equal protection clause is also implicated.[29]

1. *United Steelworkers of America v. Weber ("Weber")*[30]

Sections 703(a), (d) and (j) of Title VII are not violated when private sector employers and unions take affirmative race-conscious steps

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employee, because of such individual's race, color, religion, sex, or national origin.

26. 42 U.S.C. § 2000e-2(j). Section 703(j) provides:

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

27. 42 U.S.C. § 2000e-5(g). Section 706(g) provides:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice ..., the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay..., or any other equitable relief as the court deems appropriate.... No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin....

28. Section 703(d), 42 U.S.C. § 2000e-2(d), is sometimes also cited and provides:

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retaining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

29. The equal protection clause of the fourteenth amendment as well as the equal protection component of the due process clause of the fifth amendment must be analyzed in cases involving public employers.

30. 443 U.S. 193 (1979).

designed to eliminate a manifest racial imbalance in traditionally segregated job categories. Such action is lawful as long as the measure is only temporary, does not create an absolute bar to the advancement of white employees, does not require the replacement of white workers with new black hires, and is not intended to maintain a racial balance.

In 1974, the United Steelworkers of America ("Union") and the Kaiser Aluminum & Chemical Corp. ("Kaiser") entered into a master collective bargaining agreement ("Agreement") that covered the terms and conditions of employment at fifteen Kaiser plants; the Agreement included an affirmative action plan ("Plan") designed to eliminate the conspicuous racial imbalances in Kaiser's almost exclusively white craftwork forces.[31] The Agreement provided for hiring goals for black craftworkers for each Kaiser plant equal to the percentage of blacks in the respective local labor forces. To enable the plants to meet these hiring goals, the Plan provided for on-the-job training programs to teach both black and white unskilled production workers the skills necessary to become craftworkers.[32] The Plan reserved for black employees fifty percent of the openings in these in-plant training programs.[33]

The *Weber* controversy was generated by the operation of this Plan at Kaiser's plant in Gramercy, Louisiana, where, until 1974, Kaiser hired as craftworkers only persons who had had prior craft experience.[34] Since blacks traditionally had been excluded from craft unions, few were able to meet such credentials; therefore, only 1.83% of the skilled craftworkers at the plant were black even though the work force in the area was approximately 39% black.[35] As required by the Agreement, Kaiser established a program to train its production workers to fill craft openings. The Agreement permitted Kaiser to select trainees on the basis of seniority, with the proviso that at least fifty percent of the new trainees be black until the percentage of black craftworkers equaled the percentage of blacks in the local labor force.[36]

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31. *Id.* at 197-98. Justice Brennan noted that petitioners contended that the Plan was justified because they feared that black employees would sue for racial discrimination. In the alternative, petitioners claimed that the Plan represented an attempt to comply with Executive Order 11246. *Id.* at 209 n.9.

32. *Id.* at 198.

33. *Id.* at 199.

34. *Id.* at 198.

35. *Id.* at 198-99.

36. *Id.* at 199.

The first training class consisted of seven black and six white craft trainees. Weber was a white production worker with more seniority than any of the seven blacks selected, but with less seniority than the six white trainees.[37] He brought a class action suit in the United States District Court for the Eastern District of Louisiana claiming that the affirmative action program granted a preference to a junior black employee at the expense of a senior white employee and, therefore, resulted in discrimination in violation of sections 703(a)[38] and (d)[39] of Title VII. Both the district court[40] and the court of appeals[41] agreed. The Supreme Court granted certiorari[42] and reversed.[43]

Justice Brennan first pointed out that the only question before the Court was whether Title VII forbids private employers and unions from voluntarily agreeing on bona fide affirmative action plans that accord racial preferences in the manner and for the purpose provided in the Plan.[44] After reviewing the legislative history of Title VII, Justice Brennan concluded that the historical context from which the Act arose[45] and the language of section 703(j)[46] indicate that the Title VII prohibition against race discrimination did not forbid "all" race-conscious affirmative action plans. With respect to section 703(j), he reasoned that if Congress had meant to prohibit all race-conscious affirmative action, it would have stated in section 703(j) that Title VII did not "require or permit" racially preferential integration efforts instead of merely

37. *Id.*
38. *See supra* note 25 for the text of § 703(a).
39. *See supra* note 28 for the text of § 703(d) of Title VII.
40. 415 F. Supp. 761 (E.D. La. 1976).
41. 563 F.2d 216 (5th Cir. 1977).
42. 439 U.S. 1045 (1978).
43. 443 U.S. 193. Justice Brennan delivered the 5-2 opinion of the Court in which Justices Stewart, White, Marshall and Blackmun joined. Justice Blackmun also filed a concurring opinion. Chief Justice Burger filed a dissenting opinion. Justice Rehnquist filed a dissenting opinion in which Chief Justice Burger joined. Justices Powell and Stevens did not take part in the decision. *Id.* at 195.
44. *Id.* at 200. He made clear that since the Plan involved voluntary action by a private employer, there was no state action; therefore, the fourteenth amendment was not implicated. He also stated that because the Plan was adopted voluntarily, the Court was "not concerned with what Title VII requires or with what a court might order to remedy a past proved violation of the Act." *Id.*
45. *Id.* at 201-04.
46. *See supra* note 26 for the text of § 703(j).

providing that Title VII did not "require" such efforts.[47]

Next, while he refused to define the "line of demarcation between permissible and impermissible affirmative action plans,"[48] Justice Brennan concluded that this Plan was permissible because it was designed, like Title VII itself, to break down "old patterns of racial segregation and hierarchy" and to open employment opportunities for blacks in jobs that traditionally had been closed to them.[49] Also, the Plan did not unnecessarily trammel the interests of white employees by requiring the discharge of whites and their replacement with blacks,[50] nor did it create an absolute bar to the advancement of whites.[51] Also, the Plan was a temporary measure[52] intended to eliminate a manifest racial imbalance rather than to maintain a racial balance.[53] Justice Brennan concluded that the Plan fell within the "area of discretion left by Title VII to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories."[54]

Justice Blackmun concurred in the Court's opinion as well as its judgment. He emphasized that while Kaiser denied prior discrimination, the employer conceded that its past hiring practices, particularly the requirement that those hired have five years prior industrial experience, were subject to question.[55] He argued that while an employer need not admit prior discrimination before implementing a plan, he should be required to demonstrate an "arguable violation" of Title VII and that the implementation of the voluntary affirmative action plan is a reasonable response to

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47. 443 U.S. at 205-08. Justice Brennan maintained that Congress used the term "require" in § 703(j) to make clear that Title VII was not intended to force an employer to grant preferential treatment to any group because of a *de facto* racial imbalance in the employer's work force. Congress could have said "require or permit" in § 703(j); however, he said, the fact that Congress did not shows that it did not intend to limit traditional business freedom to such a degree as to prohibit all voluntary, race-conscious affirmative action. *Id.*

48. *Id.* at 208.

49. *Id.*

50. *Id.*

51. *Id.* Half of those trained in each program were white.

52. *Id.* Justice Brennan, finding that preferential selection of craft trainees at the Gramercy plant was to end as soon as the percentage of black skilled craftworkers approximated the percentage of blacks in the local labor force. *Id.* at 208-09.

53. *Id.*

54. *Id.* at 209.

55. *Id.* at 210.

such arguable violations.[56] He criticized the Court's use of a broader test of "traditionally segregated" job categories because that test measures an individual employer's capacity for affirmative action only in terms of a statistical disparity and not in terms of whether the employer had engaged in past discriminatory practices.[57] Justice Blackmun also found fault with the Court's test because it permits an employer to redress discrimination that lies outside the bounds of Title VII.[58]

Regarding his first point, Justice Blackmun conceded that while the "arguable violation" standard was "conceptionally satisfying"[59], the standard would have to be set low enough to permit the employer to prove such a violation without obligating himself to pay a damages award.[60] Although a showing of mere disparity would inevitably satisfy the "arguable violation" standard, actual liability could not be established on that basis alone.[61] Regarding the second point, Justice Blackmun pointed out that while the purposeful discrimination which created the segregated job category may have predated the Act, the pool of qualified workers reflects the effects of that discrimination post-Title VII. Refusing to find that Title VII locks in the effects of pre-Act discrimination, Justice Blackmun concluded that Title VII does not preclude private employers from supplying relief for the effects of pre-Act discrimination for which Title VII provides no remedy.[62]

Chief Justice Burger dissented arguing that the "quota" in the Agreement had the effect of discrimination on the basis of race against individuals seeking training, that the plurality had misinterpreted sections 703(a) and (d) to permit preferences, and that Congress, not the Court, should make clear that Title VII permits affirmative action.[63]

Justice Rehnquist also dissented arguing that both the language and the legislative history of Title VII make clear that all forms

56. *Id.* at 211-15.
57. *Id.* at 213-14.
58. *Id.*
59. *Id.* at 312.
60. *Id.* at 213-14. He noted that neither Kaiser nor the Union had an incentive to prove that Kaiser had violated the Act and that no blacks who were harmed had sued. By showing disparity only, the company is able to avoid identifying victims of past discrimination and, therefore, avoids claims for backpay that would inevitably follow if a plan could only benefit actual victims. *Id.*
61. *Id.*
62. *Id.* at 214-16.
63. *Id.* at 216-19.

of racial discrimination in employment, including affirmative action, are prohibited.[64] Specifically, Justice Rehnquist argued that the plain language of section 703(a)(2) prohibits any type of racial discrimination by any employer or union where the racial classification would deprive any individual of employment opportunities or would otherwise adversely affect his status as an employee.[65] Justice Rehnquist also stated that the plain language of section 703(d) prohibits any type of racial discrimination in any training programs and that section 703(j) prohibits any preferential treatment to correct a racial imbalance in the employer's work force.[66] He concluded by stating that there is "no device more destructive to the notion of equality than" the quota he saw in *Weber*.[67]

2. *Fullilove v. Klutznick* (*"Fullilove"*)[68]

The equal protection component of the due process clause of the fifth amendment is not violated by congressional legislation which provides for a 10% set-aside of contracting grants for minorities. Congress has the power to enact such legislation provided the set-aside is narrowly tailored to achieve remedial objectives, includes safety valves, and is subject to continuing evaluation and reassessment.

In 1977, Congress passed the Public Works Employment Act of 1977[69] ("1977 Act"), which authorized a four billion dollar appropriation for federal grants to state and local governmental entities for use in local public works projects.[70] The 1977 Act contained a "minority business enterprise" ("MBE") provision which required that, absent an administrative waiver, at least ten percent of the federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from businesses owned by minority group members.[71] The legislative

64. *Id.* at 219-55.
65. *Id.* at 220.
66. *Id.* at 226-30.
67. *Id.* at 254.
68. 448 U.S. 448 (1979).
69. 42 U.S.C. § 6701 *et seq.* (1982).
70. *Id.*
71. 448 U.S. at 456-63. Section 103(f)(2) of the 1977 Act provides:

Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per cent of the amount of each grant shall be expended for minority business enterprises. For

purpose of the ten percent provision was to "begin to redress" the longstanding existence and maintenance of barriers which had impaired access by qualified minority enterprises to public contracting opportunities.[72]

As required by the 1977 Act, the Secretary of Commerce promulgated regulations[73] and the Economic Development Administration issued guidelines[74] ("Guidelines") which required that grantees and their private prime contractors, to the extent feasible to: (1) seek out all available, qualified, bona fide MBEs; (2) provide technical assistance as needed; (3) lower or waive bonding requirements where feasible; (4) solicit the aid of the Office of Minority Business Enterprise, the Small Business Administration, or other sources for assisting MBEs in obtaining required working capital; and, (5) give guidance to the MBEs as to the bidding process.[75] The administrative program recognizes that contracts will be awarded to bona fide MBEs even though they are not the lowest bidders if their bids reflect merely attempts to cover costs inflated by the present effects of prior discrimination.[76] The 1977 Act also provides for handling grantee applications for administrative waiver of the ten percent MBE requirement on a case-by-case basis if infeasibility is demonstrated by a showing that, despite affirmative efforts, such level of participation cannot be achieved without departing from the program's objectives.[77] The program also provides an administrative mechanism to ensure that only bona fide MBEs are en-

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purposes of this paragraph, the term "minority business enterprise" means a business at least 50 per cent of which is owned by minority group members or, in case of a publicly owned business, at least 51 per cent of the stock of which is owned by minoirty group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts. 42 U.S.C. § 6705 (f)(2) (1982).

72. 448 U.S. at 462-67. The Court also reviewed legislative and administrative programs evidencing Congress' awareness of the objective of, and reasons for, the enactment of the MBE provisions. *Id.*

73. 42 Fed. Reg. 27432 (1977), as amended by 42 Fed. Reg. 35822 (1977); 13 C.F.R. Part 317 (1978).

74. U.S. Dept. Commerce, Economic Development Administration, Local Public Works Program, Round II, Guidelines For 10% Minority Business Participation In LPW Grants (1977); U.S. Dept. Commerce, Economic Development Administration, EDA Minority Business Enterprise (MBE) Technical Bulletin (Additional Assistance and Information Available to Grantees and Their Contractors In Meeting the 10% MBE Requirement) (1977).

75. 448 U.S. at 468-72.

76. *Id.* at 470-72.

77. *Id.*

compassed therein and to prevent unjust participation of minority firms whose access to public contracting opportunities was not impaired by the effects of prior discrimination.[78]

Petitioners, several associations of construction contractors and subcontractors and a firm engaged in heating and cooling work, filed suit for declaratory and injunctive relief in the United States District Court for the Southern District of New York. Petitioners alleged that they had sustained economic injury due to enforcement of the ten percent MBE requirement and that the MBE provision, on its face, violated the equal protection clause of the fourteenth amendment, the equal protection component of the due process clause of the fifth amendment, and various statutory anti-discrimination provisions, including Title VII.[79] The district court upheld the validity of the MBE program and denied injunctive relief.[80] The United States Court of Appeals for the Second Circuit affirmed.[81] The United States Supreme Court also affirmed.[82]

Chief Justice Burger first made clear that congressional decisions are accorded great weight even though they raise equal protection concerns.[83] He maintained that the proper analysis of congressional enactments was whether the objectives of the legislation are within the power of Congress and, if so, whether the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible means for achieving those objectives.[84]

Regarding the scope of Congress' power, the Chief Justice stated that the 1977 Act was primarily an exercise of Congress' spending power[85] and the reach of the spending power is at least as broad as Congress' regulatory powers; therefore, if Congress, pursuant to its regulatory powers, could have achieved the objectives of the MBE program, it had the power to do so under its spending power.[86]

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78. *Id.* at 472.
79. *Id.* at 455.
80. Fullilove v. Kreps, 443 F. Supp. 253 (S.D. N.Y. 1977).
81. 584 F.2d 600 (2d Cir. 1978).
82. 448 U.S. 448. Chief Justice Burger announced the judgment of the Court and delivered an opinion in which Justices White and Powell joined. Justice Powell filed a concurring opinion. Justice Marshall, joined by Justices Brennan and Blackmun, filed an opinion concurring in the judgment. Justice Stewart filed a dissenting opinion, in which Justice Rehnquist joined. Justice Stevens also filed a dissenting opinion. *Id.* at 452.
83. *Id.* at 472.
84. *Id.* at 473.
85. U.S. CONST. art. I, § 8, cl. 1. 448 U.S. at 473-75.
86. 448 U.S. at 474-75.

Chief Justice Burger maintained that since Congress has regulatory power under both the commerce clause[87] and section five of the fourteenth amendment "to enforce, by appropriate legislation" the equal protection guarantee of the amendment,[88] the objectives of the MBE provisions were within the scope of Congress' spending power.[89]

Chief Justice Burger also concluded that use of racial and ethnic criteria was a valid means to accomplish this constitutional objective and that the MBE provision on its face did not violate the equal protection component of the due process clause of the fifth amendment.[90] Justice Burger stated that, in the context of remedial legislation, Congress was not required to act in a totally "colorblind" fashion.[91] He also commented that, where the remedy is limited and properly tailored to cure the effects of prior discrimination, a sharing of the burden by nonminority innocent parties is not impermissible.[92] He further stated that the MBE program is not underinclusive because it does not limit benefits to specified minority groups[93] nor is it overinclusive because it does not grant benefits to those who are not the victims of prior discrimination.[94]

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87. *Id.* at 475-76. The Chief Justice reasoned that there was a rational basis for Congress to conclude that the subcontracting practices of prime contractors could perpetuate the prevailing impaired access by minority businesses to public contracting opportunities and that this inequity has an effect on interstate commerce. *Id.*

88. *Id.* at 476-78. He determined that since there existed a historical basis for concluding that traditional procurement practices, when applied to minority business, could perpetuate the effects of prior discrimination, the prospective elimination of such barriers was appropriate to ensure that the minority-owned businesses were not denied equal opportunity to participate in federal grants. *Id.*

89. *Id.* at 479-80.

90. *Id.* at 480-92.

91. *Id.* at 482-84.

92. *Id.* at 484-85.

93. *Id.* at 485-86. The Court held that there had been no showing that Congress inadvertently discriminated by excluding from coverage an identifiable minority group whose members have been victims of discrimination to the same or greater degree as that suffered by the members of groups encompassed by the MBE program. *Id.*

94. *Id.* at 486-89. Chief Justice Burger noted that the administrative program provides waiver and exemption procedures to identify and eliminate from participation MBEs who are not "bona fide" or who attempt to exploit the remedial aspects of the program by charging an unreasonable price not attributable to the present effects of past discrimination. Also, grantees can obtain a waiver if they demonstrate that their best efforts will not achieve or have not achieved the 10% target for minority firm participation within the limitations of the program's remedial objectives. Further, he said, the program is a pilot program, limited in extent and duration and subject to reevaluation prior to reenactment. *Id.*

The Chief Justice concluded by holding that the MBE provision was constitutional under either "test" articulated in the *Bakke* opinions.[95]

Justice Powell concurred, arguing that the applicable test should have been the "strict judicial scrutiny" test.[96] He concluded that the MBE provision was justified under that test as a remedy that serves the compelling governmental interest in eradicating the continuing effects of past discrimination and found that no less restrictive means was available.[97]

Justice Marshall concurred in the judgment, arguing that the proper inquiry for determining the constitutionality of racial classifications which provide benefits to minorities to remedy the present effects of past racial discrimination was neither the strict scrutiny test nor the rational basis test.[98] Justice Marshall maintained that the applicable test was whether the classifications serve important governmental objectives and are substantially related to the achievment of those objectives.[99] He concluded that the ten percent set-aside met this test,[100]therefore, the MBE provision was constitutional.[101]

Justice Stewart dissented, arguing that the equal protection clause absolutely prohibits invidious discrimination by the government and that the MBE provision on its face denies the equal protection of the law.[102]

Justice Stevens also dissented, arguing that the MBE set-aside creates "monopoly privileges ... for a class of investors defined solely by racial characteristics."[103] He argued that the class afforded privileges was too broad since the history of discrimination against black citizens in America could not justify a grant of privileges to

95. *Id.* at 490-92.

96. *Id.* at 495.

97. *Id.* Justice Powell applied specific criteria in testing hiring remedies which provided for racial preferences. Those criteria included: (1) the efficacy of alternative remedies; (2) the planned duration of the remedy; (3) the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or workforce; (4) the availability of waiver provisions if the hiring plan could not be met; and, (5) the effect of the set-aside upon innocent third parties. *Id.* at 510-11 and 514-17.

98. *Id.* at 517-519.

99. *Id.* at 517-21.

100. *Id.*

101. *Id.* at 519-22.

102. *Id.* at 522-32.

103. *Id.* at 532.

Eskimos or Indians.[104] Justice Stevens argued that even if discrimination could be shown as to all the minorities afforded privileges under the MBE provision, it did not follow necessarily that each of those subclasses suffered harm of identical magnitude.[105]

3. *Wygant v. Jackson Board of Education ("Wygant")*[106]

Absent a showing of prior discrimination, a public employer who agrees to a collectively bargained for affirmative action plan requiring race-based layoffs violates the equal protection clause of the fourteenth amendment.

Because of racial tension in the community, the Jackson, Michigan Board of Education ("Board") agreed in 1972 to include a new layoff provision in its collective bargaining agreement with the Jackson Education Association.[107] The agreement with the teachers' union provided that if it became necessary to lay off teachers, those with the most seniority would be retained; however, at no time would there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the lay off.[108] When layoffs became necessary in 1974, the Board refused to adhere to the layoff provision and the union, together with two minority teachers who had been laid off, brought suit in federal court claiming that the Board's failure to comply with the layoff provision violated the equal protection clause and Title VII.[109] A Michigan state court eventually held that the con-

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104. *Id.* at 537.

105. *Id.* at 538 and 554.

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

107. *Id.* at 1844. The Jackson Education Association was the union representing the teachers. The layoff provision provided:

> [A]t no time will there be greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff. In no event will the number given notice of possible layoffs be greater than the number of positions to be eliminated. *Id.* at 1843.

108. *Id.* The purpose of the provision was to protect employees who were members of certain minority groups during periods of layoff. *Id.* at 1844.

109. *Id.* Jackson Education Assn. v. Board of Education, ("*Jackson I*") (mem. op.) *Id.* at 1845. Following the trial, the district court *sua sponte* ruled that it lacked jurisdiction over the case because there was insufficient evidence to support a claim of discrimination prior to 1972, the year public employers became subject to Title VII. *Id.* The court also found that the plaintiffs had not fulfilled the jurisdictional prerequisite to a Title VII claim by filing discrimination charges with the EEOC. *Id.* After dismissing the federal claims, the district court refused to exercise pendant juridiction over the state law contract claims. *Id.*

tractual provision was binding on the Board.[110] In both 1976 and 1981, non-minority teachers were laid off while minority teachers with less seniority were retained.[111]

Petitioners, the displaced teachers, brought suit in district court alleging that the Board's compliance with the layoff provision violated the equal protection clause and various federal and state statutes.[112] On cross-motions for summary judgment, the district court dismissed the suit holding that the racial preference in the layoff provision granted by the Board need not be grounded on a finding of prior discrimination and was permissible under the equal protection clause as an attempt to remedy societal discrimination by providing role models for minority school children.[113] The Court of Appeals for the Sixth Circuit affirmed.[114] The United States Supreme Court granted certiorari[115] and reversed.[116]

Justice Powell, writing for the plurality, cautioned that petitioners' claim that they were laid off because of their race in violation of the equal protection clause called for an exacting judicial examination because racial and ethnic distinctions of any sort were inherently suspect.[117] He explained that the following two-part inquiry should be used in an examination of a racial classification: (1) is the classification justified by a compelling governmental interest; and, (2) is the means chosen by the state to effectuate its purpose narrowly tailored to the achievement of that interest.[118]

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110. *Id.* Rather than appealing the decision of *Jackson I*, the plaintiffs instituted a suit in state court. Jackson Education Assn. v. Board of Education, No. 77-011484C7 (Jackson County Circuit Court, 1979), ("*Jackson* II"). Plaintiffs raised essentially the same issues presented in *Jackson I*. The court entered judgment for the plaintiffs, finding that the Board had breached its contract and that the layoff provision did not violate the Michigan Teacher Tenure Act. The court rejected the Board's argument that the layoff provision violated Title VII and held that it was permissible as an attempt to remedy the effects of societal discrimination despite its discriminatory effect on nonminority teachers. 106 S. Ct. at 1845.

111. *Id.* at 1845-46.

112. *Id.* at 1846.

113. *Id.*

114. 746 F.2d 1152 (6th Cir. 1984).

115. 471 U.S. 1014 (1985).

116. 106 S. Ct. 1842. Justice Powell announced the judgment of the Court. Chief Justice Burger and Justice Rhenquist joined in that opinion. Justice O'Connor filed an opinion concurring in part and concurring in the judgment. Justice White filed an opinion concurring in the judgment. Justice Marshall filed a dissenting opinion in which Justices Brennan and Blackmun joined. Justice Stevens filed a dissenting opinion. *Id.* at 1846.

117. *Id.* at 1846 (citing *Bakke*, *supra* notes 6 and 12).

118. *Id.* at 1846.

Regarding the first prong of the test, Justice Powell did not agree with the contention of the respondent-state that the role model theory, or that societal discrimination in general, was a sufficient governmental interest to justify a racial classification because such an interest was not related to remedying the prior governmental discrimination.[119] Justice Powell was not persuaded by the argument that one purpose in adopting the layoff provision was to remedy prior discriminatory hiring practices because the record and the district court's findings of fact did not support such a contention.[120] In this case, since there had been no factual determination that the employer had a "strong basis in evidence that remedial action was necessary,"[121] and since general societal discrimination was not a sufficient governmental interest, Justice Powell held that a compelling governmental interest was not shown.[122]

In relation to the second step of his test, Justice Powell addressed whether, assuming there was a showing of a sufficient governmental interest, the means chosen to accomplish this racial classification

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119. *Id.* at 1847 (citing Hazelwood School District v. United States, 433 U.S. 299 (1977)). In *Hazelwood*, minority teachers, in a systematic disparate treatment case, claimed that the school district had discriminated against black applicant teachers when hiring. The Court held that, in cases involving proof of discrimination by statistical disparity, the disparities must demonstrate the prior governmental discrimination. The Court determined that the relevant comparison was the racial composition of the teachers with the racial compostition of the qualified public school teacher population (not the student population) in the relevant labor market. 433 U.S. at 308.

In *Wygant*, Justice Powell reasoned that the role model theory, which ties the required percentage of minority teachers to the percentage of minority students, had no logical stopping point because it permits discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose. 106 S. Ct. at 1847. Further, Justice Powell commented that the theory does not necessarily bear a relationship to the harm caused by prior discriminatory hiring practices because a small percentage of black teachers could be justified by a small percentage of black students. *Id.* at 1847-48.

120. *Id.* at 1848. Justice Powell cautioned that the trial court must make a factual determination that the employer had a strong basis in evidence to justify its conclusion that remedial action was necessary if the remedial program is challenged in court by nonminority employees. *Id.*

121. *Id.* at 1848.

122. *Id.* at 1849. Justice Powell chastised Justice Marshall for his citation to non-record documents in support of his dissenting argument that the majority had assumed too quickly "the absence of a legitimate factual predicate for affirmative action" and for his failure to define what constitutes a "legitimate factual predicate." *Id.* at 1849 n.5. *See infra* text accompanying notes 137-143.

was sufficiently narrowly tailored to be deemed constitutional.[123] He rejected the test of reasonableness used by the court of appeals, stating that a more stringent standard must be applied to test the validity of the means chosen by a state to accomplish its race-conscious purposes.[124] He reasoned that, while a sharing of the burden by innocent parties is not impermissible,[125] layoffs, as opposed to hirings, impose the entire burden of achieving racial equality on particular nonminority individuals so that the Board's layoff plan was not sufficiently narrowly tailored for purposes of the equal protection clause.[126]

Justice O'Connor wrote separately, concurring in part and concurring in the judgment.[127] She stressed that, notwithstanding the variety of opinions previously issued by the Court, the Justices did agree that a public employer, consistent with the Constitution, may undertake an affirmative action program designed to further a

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123. 106 S. Ct. at 1850. Justice Powell commented that the term "narrowly tailored" has acquired a secondary meaning which requires consideration of whether lawful alternatives and less restrictive means could have been used. He wrote that the issue is whether a racial classification "fits" with greater precision than any alternative means. (citing Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 721, 727 n.26 (1974). 106 S. Ct. at 1850 n.6.

124. 106 S. Ct. at 1849.

125. *Id.* at 1850-51. Justice Powell emphasized that the term "narrowly tailored" has been interpreted to mean, in part, that the interests of the non-minorities were not significantly affected. He cited *Fullilove* where the Court found that a challenged statute requiring at least 10% of federal public works funds be used in contracts with minority-owned business enterprises was within the remedial powers of Congress because the actual burden shouldered by non-minority firms was relatively light. 106 S. Ct. at 1850-51. He also referred to *Weber* where the Court approved a hiring program in part because the plan did not "unnecessarily trammel the interests of the white employees"; however, since *Weber* involved a private company, its reasoning concerning the validity of the hiring plan at issue was not directly relevant to *Wygant*, where a state-imposed plan prompting the equal protection claim. *Id.* at 1851 n.9.

126. *Id.* at 1852. Justice Powell then compared the burden borne by innocent individuals in cases involving valid general hiring goals as opposed to layoff requirements and concluded that hiring goals are not as intrusive as layoffs. *Id.* While the hiring goals involve a denial of future employment opportunities, layoffs are too intrusive as they cause a loss of existing jobs, a disruption of an employee's settled expectations of the stability and security of seniority, and impose the entire burden of achieving racial equality on particular individuals. *Id.* at 1851-52.

Justice Powell noted that the Court had previously recognized that, a court may, in an appropriate case, award competitive seniority in order to provide make-whole relief to the actual, identified victims of individual discrimination. 106 S. Ct. at 1852 n.12 (citing Franks v. Bowman Transportation Co., 424 U.S. 747 (1976)).

127. 106 S. Ct. at 1852.

legitimate remedial purpose as long as the means employed to implement such purpose do not "impose disproportionate harm on the interests or unnecessarily trammel the rights of innocent individuals who are directly adversely affected by a plan's racial preference."[128]

Justice O'Connor disagreed with the lower courts' conclusion that the plan could be upheld as a remedy for societal discrimination, explaining that an evidentiary basis of a remedial purpose can be shown either by particularized, contemporaneous findings of discrimination by the public employer or by "information" which gives public employers a "sufficient basis" for concluding that remedial action is necessary.[129] She argued that particularized findings should not be mandated because of the legal risks attendant to requiring such findings.[130] She also pointed out that such a requirement would have the effect of permitting private employers to voluntarily correct apparent violations of Title VII, while public employers would be constitutionally forbidden to act in a similar manner to correct their statutory and constitutional violations.[131] She then concluded that the public employer's "information" could be demonstrated by a statistical disparity between the qualified blacks on a school's teaching staff and the percentage of qualified minorities in the relevant labor pool, if such statistics would be sufficient to support a prima facie Title VII pattern or practice claim by minority teachers.[132]

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128. *Id.* at 1853-54. Justice O'Connor reviewed the opinions of many of the Justices in *Fullilove* and *Bakke.*

129. *Id.* at 1853.

130. *Id.* at 1855-56.

131. *Id.* at 1855. Justice O'Connor explained that if public employers are required to make particularized findings of past discrimination, they are caught between the competing hazards of liability to minorities if affirmative action is not taken to remedy the employment discrimination and liability to nonminorities on a reverse discrimination claim if affirmative action is taken. *Id.*

132. *Id.* at 1856. She recognized that the nonminority employees must be given the opportunity to challenge the plan in court by proving that it did not meet the constitutional standard. While these employees could easily demonstrate that the purpose and effect of the plan is to impose a race-based classification, the Board could rebut this argument by introducing statistical proof as evidence of its remedial purpose. This statistical evidence was sufficient to permit the court to determine that the Board had a "firm basis" for concluding that remedial action was appropriate. The nonminority employees retained the ultimate burden of persuading the court that the Board's evidence did not support an inference of prior discrimination and, therefore, the plan did not have a remedial purpose or was not sufficiently narrowly tailored. *Id.* at 1856.

Justice O'Connor also disagreed with the lower courts' application of a reasonableness test to evaluate the relationship between the ends pursued and the means employed, maintaining that the means had to be "narrowly tailored" to effectuate the remedial purpose.[133] Here, she said, the petitioners had met their burden of establishing that this layoff provision was not narrowly tailored to achieve its asserted remedial purpose because it was keyed to a hiring goal which was based on the percentage of minorities in the student body and was designed to maintain levels of minority hiring that had no relation to remedying employment discrimination.[134]

Justice White concurred in the judgment emphasizing that it is impermissible under the equal protection clause to require discharge of whites until a suitable percentage of blacks, none of whom had been shown to be actual victims of any racial discrimination, have been integrated into a work force.[135] Justice Marshall dissented in an opinion joined by Justices Brennan and Blackmun.[136] Charging that the plurality had erroneously assumed the absence of a legitimate factual predicate for affirmative action where both the record and extra-record materials before the Court suggested such a predicate, Justice Marshall recommended a remand to develop the record on the issue of past discrimination.[137] Justice Marshall also argued that the only question presented was whether the Constitution prohibited a union and a school board from developing a collective bargaining agreement that apportioned layoffs between two racially determined groups as a means of preserving the effects of an affirmative hiring policy when the constitutionality of the agreement was unchallenged.[138]

Justice Marshall then argued that the appropriate constitutional test, (i.e., whether the measure was legitimately designed to ame-

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133. *Id.* at 1857.

134. *Id.*

135. *Id.* at 1857-58.

136. *Id.* at 1858.

137. *Id.* Justice Marshall referred to voluminous submissions containing factual material which was not considered by either the district court or the court of appeals. He then reviewed the information presented in that material. *Id.* at 1858-60.

138. *Id.* at 1860-61. He argued that this was not a case where a court order was entered to achieve racial balance, a white worker was required to give up his or her job in favor of a black worker, a party was required to suffer the consequences of an agreement in which it had no role in adopting as in *Stotts,* or a party to a collective bargaining agreement had attempted unilaterally to achieve racial balance by refusing to comply with a contractual, seniority-based layoff provision. *Id.* at 1860.

liorate the present effects of past discrimination) was met in this case.[139] He reasoned that the collective bargaining agreement's stated purpose of preserving the levels of faculty integration achieved through an affirmative hiring policy,[140] when viewed within the turbulent history of integration efforts in *Jackson*, was a sufficient substitute for any finding by a district court that the employer had a strong basis in evidence to conclude that remedial action was necessary.[141] He also stated that in light of the history of the Agreement, the remedy was constitutionally appropriate because: (1) the impact of the layoff protection was allocated proportionately between two racial groups; (2) race, along with seniority, was a factor used to determine which individuals the school system would lose; (3) the layoff protection was not designed to increase the minority representation; and, (4) the layoff provision was temporary.[142] Justice Marshall concluded that the means were, therefore, the least burdensome of all options.[143]

Justice Stevens dissented separately, reasoning that a distinction should be drawn between a decision to exclude a member of a minority because of his or her skin color and a decision to include a member of a minority in the school faculty for that reason. He argued that the appropriate inquiry here was whether the Board's action advanced the public interest in educating children for the future and urged that such an interest, and the manner in which it is pursued, justified any adverse effects on the disadvantaged group.[144] He concluded that this plan was appropriate because the race conscious layoff policy served a valid public purpose, had been adopted fairly with full participation of the disadvantaged

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139. *Id.* at 1862.

140. *Id.*

141. *Id.* at 1863. In recommending remand for a finding of fact on the issue of discrimination, Justice Marshall stated: "Were I satisfied with the record before us, I would hold that the state purpose of preserving the integrity of a valid hiring policy — which in turn sought to achieve diversity and stability for the benefit of *all* students — was sufficient, in this case, to satisfy the demands of the Constitution." *Id.*

142. *Id.* at 1865.

143. *Id.* Justice Marshall concluded that two noteworthy results emerged from the many views expressed in the case: (1) an affirmative action plan need not be preceded by a formal finding that the entity seeking to institute that plan has committed discriminatory acts in the past; and, (2) the Court has left open whether layoffs may be used as an instrument of remedial action. *Id.* at 1867 n.7.

144. *Id.* at 1867.

individuals and operated within the confines of a narrowly circumscribed role.[145]

4. *Firefighters v. Stotts ("Stotts"*[146])

A district court may not enjoin an employer from following its bona fide seniority system when determining which employees will be laid off absent a showing that the seniority system was adopted with a discriminatory intent or a determination that such an order is necessary to make whole a proven victim of discrimination.

In 1977, Carl Stotts, a black captain in the Memphis, Tennessee Fire Department ("Department") filed a class action Title VII lawsuit on behalf of black firemen against the Department alleging that it had engaged in a pattern or practice of making hiring and promotion decisions on the basis of race.[147] Three years later, the district court approved and entered a consent decree ("the Decree"), the stated purpose of which was to remedy the hiring and promotion practices of the Department with respect to blacks.[148] The City of Memphis ("City") agreed to promote thirteen named individuals and to give backpay to eighty-one employees.[149] The City also adopted a long-term goal of increasing the proportion of minority representation in each job classification in the Department to approximate the proportion of blacks in the labor force in Shelby County, Tennessee.[150] By agreeing to the Decree, the City did not admit violations of any laws, rules or regulations with respect to the allegations in the complaint.[151] The Decree did not provide for layoffs or reductions in rank or for the award of any competitive seniority.[152]

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145. *Id.* at 1869-71.

146. 467 U.S. 561 (1984).

147. *Id.* at 565. The district court certified the case as a class action and consolidated it with an individual action subsequently filed by a black firefighting private in the Department who claimed that he had been denied a promotion because of his race. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 565-66. Like a 1974 consent decree, which settled a case brought against the City by the United States and which applied city-wide, the Decree provided for an interim hiring goal of filling 50 percent of the job vacancies in the Department with qualified black applicants. In addition, the Decree provided that 20 percent of the promotions in each job classification be given to blacks. *Id.* at 566.

151. *Id.* at 565. The plaintiffs also waived any further relief except to enforce the decree and the district court retained jurisdiction to do so. *Id.*

152. *Id.* at 566.

In early May, 1981, the City announced that projected budget deficits required a reduction in non-essential personnel and that layoffs were to be based on the last-hired, first-fired rule of the seniority system included in the City's collective bargaining agreement with the firefighters' union ("Union").[153] On May 4, 1981, at Stotts' request, the district court entered a temporary restraining order forbidding the layoff of any black employee.[154] The court also permitted the Union, which had not been a party, to intervene.[155]

On May 18, the district court granted the preliminary injunction.[156] Although the layoff policy comported with the City's seniority system and was not adopted with an intent to discriminate, the court found that the proposed layoffs would have a racially discriminatory effect and that the seniority system was not bona fide.[157] The district court ordered that the seniority policy should not apply insofar as it would decrease the percentage of blacks in seven employment categories; instead, the court approved a modified layoff plan.[158] Layoffs according to this plan resulted in the release of nonminority employees who had more seniority than minority employees.[159]

The Court of Appeals for the Sixth Circuit affirmed,[160] concluding that while the City's seniority system in fact was bona fide,[161] the district court properly modified the 1980 Decree to prevent a disproportionate effect on minorities resulting from unanticipated

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153. *Id.* The layoff policy also provided that if a senior employee's position were abolished or eliminated, the employee could "bump down" to a lower ranking position rather than be laid off. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 567.

157. *Id.* At this hearing, it appeared that of the 40 persons who would be laid off, 25 were white and 15 were black; since 1974, 56% of the employees hired in the Department had been black; and the percentage of black employees had increased from 3-4% in 1974 to 11 1/2% in 1980. *Id.* The court also found that the Decree did not contemplate the method to be used for reduction in rank or lay-off. *Id.*

158. *Id.* The court issued two orders. The May 18 order covered lieutenants, drivers, inspectors and privates. On June 23, three additional classifications were added and the modified plan was approved. *Id.*

159. *Id.* The City laid off twenty-four privates, three of whom were black. Had the seniority system operated normally, six blacks would have been among the twenty-four laid off. The number of whites demoted as a result of the order was not clear from the record. *Id.* n.2.

160. 679 F.2d 541 (6th Cir. 1982).

161. *Id.* at 551 n.6.

layoffs.[162] The court reasoned that the modification was justified either under general contract principles[163] or because unforeseen circumstances had created a hardship for one of the parties to the 1980 Decree and the modification did not conflict with the City's seniority system.[164] The Supreme Court granted certiorari[165]and reversed.[166]

Justice White determined[167] that the district court had exceeded its powers in entering an injunction that required white employees to be laid off when the otherwise applicable seniority system would have called for the layoff of black employees with less seniority.[168] According to the majority opinion, this injunction violated sections 703(h) and 706(g).[169] Justice White reasoned that because there had not been a finding that the seniority system was adopted with discriminatory intent or a determination that such a remedy was necessary to make whole a proven victim of discrimination, there was no justification for overriding the valid seniority system.[170]

Justice White rejected the argument that the district court's injunction was merely the specific enforcement of a consent decree

162. *Id.* at 566-67.

163. *Id.* at 561. The court reasoned that the City contracted to provide a substantial increase in the number of minorities in supervisory positions and the layoffs would breach that contract. *Id.*

164. *Id.* at 562-63.

165. 462 U.S. 1105 (1983). The Department and the Union filed separate petitions for certiorari and both were granted. 467 U.S. at 568.

166. 467 U.S. 561. Justice White announced the majority opinion in which Chief Justice Burger, Justices Powell and Rehnquist joined. Justice O'Connor filed a concurring opinion. Justice Stevens filed an opinion concurring in the judgment. Justice Blackmun dissented and filed an opinion in which Justice Brennan and Justice Marshall joined. *Id.*

167. *Id.* at 568-73. Justice White first stated that the cases were not moot because the injunction had not been vacated and was, therefore, still in force. The court order would require the City to obey the modified consent decree in making future layoffs and even though the City had restored or offered to restore all non-minorities to their former positions, those employees had no right to be made whole for backpay and competitive seniority lost during the layoffs unless the court order was reversed. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 577. Justice White explained that § 703(h) permits the routine application of a seniority system absent proof of an intention to discriminate (citing Teamsters v. United States, 431 U.S. 324 (1977)). He also explained that absent a showing that the seniority system was adopted with a discriminatory purpose or an admission of discrimination by the City, the district court's injunction was not proper because the layoff plan contravened the bona fide seniority system. 467 U.S. at 577.

because that Decree did not speak to layoffs and neither the union nor the nonminority employees were parties.[171] Justice White also maintained that any judicial remedy could not violate the provisions of a bona fide seniority system.[172]He also rejected the argument that the district court had inherent authority to set aside the seniority system because absent an express contractual provision regarding the award of competitive seniority or a demonstration that the beneficiaries of the award were actual victims, such an order was impermissible even if a pattern of discrimination had been shown at trial.[173] Finally, Justice White refused to decide whether the City, as a public employer, could have voluntarily

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171. *Id.* at 575-76. Justice White disagreed with the specific performance approach reasoning that the express terms of the decree did not contemplate such an injunction because there was no mention of layoffs or of an intention to depart from the existing seniority system or from the City's arrangements with the Union in the Decree. *Id.* at 573-75. Justice White also disagreed that the injunction was proper because it carried out the purposes of the decree. He pointed out that the purpose of the Decree was to establish valid hiring and promotion procedures and not to displace whites during layoffs. *Id.* at 575.

172. *Id.* at 575. Further, Justice White emphasized that bona fide seniority systems are protected by Title VII and that a remedy could not violate that protection. *Id.*

173. *Id.* at 576-78. Justice White disagreed with each of the reasons advanced by the court of appeals:

> First, he refused to accept the "settlement" theory which maintained that Title VII's strong policy favoring voluntary settlement permitted consent decrees that encroached on seniority systems. He reasoned that there was no settlement of any disputed issue by an award of competitive seniority to any minority and that no layoffs were addressed in the decree. *Id.* at 578. Second, he disagreed with the argument that since the district court could have ordered the relief after discrimination had been proved at trial, it had the same authority to override the seniority provisions to effecutate the purposes of the decree. He made clear that a district court has the authority to award competitive seniority to *actual victims*. *See Teamsters, supra* at notes 21 and 22 and Franks v. Bowman Transportation Co., 424 U.S. 747 (1976). He emphasized that the actual victim is not automatically entitled to have a nonminority employee laid off to make room for him (citing Patterson v. American Tobacco Co., 535 F.2d 257, (4th Cir. 1976), *cert denied*, 429 U.S. 920 (1976)). The court is to balance the equities in such a situation. *See Teamsters, supra* 431 U.S. at 371-76. He then held that since none of the blacks who were protected from layoff were actual victims and no award of competitive seniority had been given to any of them, the district court had exceeded the remedy it could have ordered after a pattern of discrimination had been shown at trial. 467 U.S. at 577-79. Third, he stated that § 706(g) makes clear that Title VII remedies include make-whole relief for actual victims but does not preclude preferential treatment for nonvictims. *Id.*

adopted this type of affirmative action because, in this case, the City had not taken such action.[174]

Justice O'Connor concurred,[175] emphasizing that, because there was no showing of a discriminatory animus in the adoption or application of the seniority system, as distinguished from mere discriminatory impact, the district court had no authority to order the Department to maintain a racial percentage.[176] Like the majority, she concluded that the preliminary injunction was not justified as a reasonable interpretation of the consent decree since the decree did not speak to layoffs.[177] Also, the injunction was not justified as a permissible exercise of the district court's authority to unilaterally modify that consent decree because the legitimate expectations of other employees and applicants were abrogated.[178] She concluded by stating that the Court properly disapproved of the preliminary injunction in this case since respondents had no chance of succeeding on the merits of their claim that the district court had the authority to maintain a current racial balance or to provide preferential treatment to blacks.[179]

Justice Stevens concurred in the judgment, finding references by the plurality and Justice O'Connor to Title VII purely advisory as the only issue involved in the case was that of the administration

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174. *Id.* at 583.

175. *Id.* at 584-90. Justice O'Connor first addressed the mootness argument and agreed with the Court that the case would not be resolved by vacating the preliminary injunction and remanding with instructions to dismiss. *Id.* at 584. She pointed out that since certain black employees have more seniority for purposes of future job decisions and entitlements than they otherwise would have under the City's seniority system and since they had not waived their increased seniority benefits, the issue of the propriety of the injunction still existed. *Id.* at 585-86.

176. *Id.* at 587. (quoting American Tobacco Co. v. Patterson, 456 U.S. 63 (1982)). She reaffirmed that Title VII protects bona fide seniority systems including those which have discriminatory effects on minorities. 467 U.S. at 587.

177. *Id.*

178. *Id.* (quoting *Weber*, at 205-207). She then emphasized that a district court does not have the power to grant preferential treatment to an individual simply because the group to which he belongs is adversely affected by a bona fide seniority system. 467 U.S. at 587. Justice O'Connor then cautioned that a court may use its remedial powers, including its power to modify a consent decree, only to prevent future violations and to compensate identified victims of unlawful discrimination. She emphasized that the court should exercise this power only after balancing the competing interests of discriminatees, innocent employees, and the employer. *Id.*

179. *Id.* at 589-90.

of a consent decree.[180] Justice Stevens concluded that the district court abused its discretion because the preliminary injunction could not be justified as a valid construction of the consent decree[181] and because there had been no change of circumstances which would permit modification of that decree.[182]

Justice Blackmun dissented,[183] arguing that the Court should have reviewed the preliminary injunction under the abuse of discretion standard and should not have treated the action as a permanent injunction.[184] Instead, Justice Blackmun maintained that the Court should have decided the case on its merits.[185] He also argued that the district court had the authority under the consent decree to issue the preliminary injunction because that order merely reduced the City's options in meeting its fiscal crisis and did not require the dismissal of white employees.[186] Since the modified layoff plan was proposed by the City to comply with the preliminary

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180. *Id.* at 590. Justice Stevens stated that if the consent decree justified the district court's preliminary injunction, that injunction should be upheld irrespective of whether Title VII would authorize a similar injunction. *Id.* at 591 n.3.

181. *Id.* at 591. He noted that there was nothing in the record to justify the conclusion that the injunction was based on a reasoned construction of the consent decree. *Id.*

182. *Id.* at 592. He explained that the injunction could be justified if it was based on a likelihood that the district court would modify the decree. Such action would have been appropriate if respondents had demonstrated the presence of changed circumstances. However, the only "circumstance" found by the district court was that the City's proposed layoffs would have an adverse effect on the level of black employment. This was a circumstance which was known at the time the consent decree was entered. *Id.*

183. *Id.* at 593. Justice Blackmun first argued that there was no justiciable controversy because the cases were moot. He explained that there was not a continuing controversy because the preliminary injunction no longer restrained anyone: the layoffs had ceased and the laid off worker had been rehired. Any continuing effects from the preliminary injunction could, therefore, be erased by vacating the court of appeals' judgment. *Id.* at 593-601.

184. *Id.* at 593.

185. *Id.* at 593 and 601-604. He explained that in granting the relief, the district court was required to consider the respondents' likelihood of success on the merits, the extent of irreparable harm to the parties, and whether the injunction would be in the public interest. *Id.* at 601. He made clear that the reviewing court's inquiry was only whether, in light of that standard, the issuance of the injunction constituted an abuse of discretion. *Id.* at 601. He then stated that the Court had viewed these cases as if they involved a permanent injunction, and had addressed whether the City's proposed layoffs violated the consent decree. *Id.* at 602. That issue, however, was never resolved in the district court and, thus, was not before the Court. *Id.*

186. *Id.*

injunction, Justice Blackmun maintained that if the plan abrogated any contractual rights of the union, those remained enforceable as against the City.[187]

He also argued that, assuming a permanent injunction had been issued, the district court had authority to enter such an order because a consent decree is to be construed for enforcement purposes as a contract and respondents had the right to specific performance of the terms of that decree.[188] Justice Brennan also maintained that a court of equity has inherent power to modify a consent decree in light of changed circumstances.[189] He disputed the Court's argument that the only purpose of affirmative action is to make whole any particular individual, arguing that such action is also designed to remedy the present class-wide effects of past discrimination or to prevent similar discrimination in the future.[190] As applied to the instant case, Justice Blackmun urged that an injunction against layoffs with a disproportionate effect on blacks was appropriate because the City had engaged in a prior pattern and practice of discrimination against members of the plaintiff class which resulted in the lack of seniority of the members of that class.[191]

5. *Local 28 of the Sheet Metal Workers' International Association and Local 28 Joint Apprenticeship Committee v. Equal Employment Opportunity Commission ("Local 28")*[192]

A district court may order affirmative race-conscious relief for nonvictims where an employer or labor union has engaged in persistent or egregious discrimination or where necessary to dissipate the lingering effects of pervasive discrimination. Such an order must be narrowly tailored to eliminate that discrimination and must not unnecessarily trammel the interests of nonminority employees.

In 1971, the United States[193] initiated an action under Title VII and Executive Order 11246 to enjoin petitioners, Local 28 of the

187. *Id.* at 605 (citing W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757 (1983)).
188. 467 U.S. at 607-10.
189. *Id.* at 610-21.
190. *Id.* at 613 and 616-20.
191. *Id.* at 613-16.
192. 106 S. Ct. 3019 (1986).
193. The Equal Employment Opportunity Commission was substituted as named plaintiff. *Id.* at 3026 n.3.

Sheet Metal Workers' International Association ("Union")[194] and Local 28 Joint Apprenticeship Committee ("JAC"),[195] from engaging in a pattern and practice of discrimination against black and Hispanic individuals ("nonwhites").[196] Following a trial in 1975, the district court concluded that petitioners violated Title VII and state laws by discriminating against nonwhite workers in recruitment, selection, training, and admission to the union.[197] The court enjoined petitioners from discriminating against nonwhites, engaging in specific selection practices,[198] restricting the size of its mem-

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194. The Union represents sheet metal workers employed by contractors in the New York City metropolitan area. *Id.* at 3025.

195. The JAC is a management-labor committee which operates a four year apprenticeship training program designed to teach sheet metal skills. Upon completion of the program, apprentices become journeyman members of the Union. Successful completion of the program is the principal means of attaining union membership. *Id.*

196. The New York State Commission for Human Rights ("Commission") intervened to press claims that petitioners had violated municipal fair employment laws and had frustrated the City's efforts to increase job opportunities for minorities in the construction industry. 347 F. Supp. 164 (1972).
In 1964, the Commission found that petitioners had systematically excluded all blacks seeking to enter the sheet metal trade from the Union and the apprenticeship program in violation of state law. Petitioners were ordered to cease and desist their racially discriminatory practices, including admissions on a nepotistic basis. The New York State Supreme Court affirmed the Commission's findings and directed petitioners to implement objective standards for selecting apprentices. State Commission for Human Rights v. Farrell, 43 Misc. 2d 958, 252 N.Y.2d 649 (1964).
After 1964, the Commission commenced other state court proceedings in unsuccessful efforts to end petitioner's discriminatory practices. *See* State Commission for Human Rights v. Farrell, 47 Misc. 2d 244, 262 N.Y.S.2d 526, *aff'd*, 24 A.D.2d 128, 264 N.Y.S.2d 489 (1st Dept. 1965); State Commission for Human Rights v. Farrell, 52 Misc. 2d 936, 277 N.Y.S.2d 287, *aff'd*, 27 A.D.2d 327, 278 N.Y.S.2d 982 (1st Dept), *aff'd* 19 N.Y.2d 974, 281 N.Y.S.2d 251, 228 N.E.2d 691 (1967).
In 1970, the City adopted a plan requiring contractors on its projects to employ one minority trainee for every four journeyman union members. The Union was the only construction local which refused to comply with the City's plan. When the City attempted in 1974 to assign nonwhite trainees to sheet metal contractors working on municipal construction projects, the Union stopped work. The JAC also refused to admit nonwhite trainees. The district court directed JAC to admit six trainees into the apprenticeship program and enjoined the Union from causing any work stoppage at the affected job sites. Both the Union and JAC subsequently agreed to a consent order which required JAC to admit up to 40 minorities into the apprenticehip program by September 1974. JAC stalled compliance with the order, completing the indenture process only after a threat of contempt. 106 S. Ct. at 3025-26.

197. 401 F. Supp. 467 (S.D. N.Y. 1975).

198. *Id.* at 482. Those practices included using an entrance examination and requiring a high-school diploma. These practices had an adverse impact on

bership in order to deny access to nonwhites,[199] admitting to membership only white employees from nonunion sheet metal shops organized by petitioners,[200] and discriminating in favor of white applicants seeking to transfer from sister locals.[201]

The court awarded backpay to those nonwhites who could demonstrate that they were discriminatorily excluded from Union membership and established a twenty-nine percent nonwhite membership goal based on the percentage of nonwhites in the relevant labor pool in New York City.[202] The district court ordered that the goal be achieved by July, 1981 and that petitioners implement procedures designed to achieve this goal under the supervision of a court-appointed administrator.[203] The administrator then proposed, and the court approved, an affirmative action program which, among other things, required petitioners to: (1) offer annual, nondiscriminatory journeyman and apprentice examinations; (2) select members according to a white-nonwhite ratio to be negotiated by the parties; (3) conduct extensive recruitment and publicity campaigns aimed at minorities; (4) secure the adminstrator's consent before issuing temporary work permits; and, (5) maintain detailed membership records, including separate records for whites and nonwhites.[204]

The United States Court of Appeals for the Second Circuit affirmed the determination of liability, the membership goal and the appointment of the administrator and modified the order to permit the use of the ratio pending implementation of valid, job-related entrance tests.[205] On remand, the district court adopted a

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nonwhites and were not related to job performance. The court also enjoined the Union's practice of paying for special training sessions for members' friends and relatives who were to take the apprencticeship examination. *Id.* at 481.

199. *Id.* at 487-88. The court found that the Union refused to administer the yearly journeyman's examination and used pensioners and persons from sister locals across the country as "temporary workers" rather than using persons from a nonwhite local in New York City. *Id.* at 485.

200. *Id.* at 485-86. The court found also that the Union had stubbornly refused to organize sheet metal workers in the local blowpipe industry because a large percentage of such workers were nonwhite. *Id.*

201. *Id.* at 486-87. The court found that from 1967 through 1972, the Union had accepted 57 transfers from sister locals all of whom were white. After this litigation had commenced, the Union accepted its first nonwhite transfers, two journeymen from Local 400, the predominately nonwhite union. *Id.*

202. *Id.* at 491.

203. *Id.* at 489.

204. 421 F. Supp. 603 (S.D. N.Y. 1975).

205. 532 F.2d 821 (2d Cir. 1976). Certiorari to the Supreme Court was not sought.

revised affirmative action program which incorporated the court of appeals' requirement and extended the time to meet the twenty-nine percent membership goal.[206] The court of appeals again affirmed and petitioners did not seek certiorari from the Supreme Court.[207]

In 1982, the district court found petitioners guilty of civil contempt for disobeying the court's earlier orders in almost every respect and ordered them to pay a $150,000 fine which would be placed in a special Employment, Training, Education, and Recruitment Fund ("Fund") to be used to increase nonwhite membership in the Union and its apprenticeship program.[208] In 1983, the district court again found petitioners in contempt for failing to keep accurate records and for failing to provide accurate data to the administrator; the court ordered petitioners to pay for a computerized record-keeping system maintained by outside consultants.[209] The district court approved the administrator's proposal for the Fund,[210] and entered an amended affirmative action program establishing a 29.23% nonwhite membership goal[211] to be met by August, 1987. The court also abolished the apprenticeship examination.[211] A divided panel of the court of appeals affirmed[213] the

206. 106 S. Ct. at 3028.

207. 565 F.2d 31 (2d Cir. 1977). A divided panel affirmed the revised affirmative action plan in its entirety. *Id.*

208. 106 S. Ct. at 3028. The court found that, in addition to failing to meet the 29% membership goal, the Union had adopted a policy of underutilizing the apprenticeship program in order to limit nonwhite membership and employment oportunities, refused to conduct the publicity campaign, added a job protection provision to the Union's collective bargaining agreement that favored older workers and discriminated against nonwhites, issued unauthorizied work permits to white workers from sister locals, and failed to maintain and submit the required records and reports. 106 S. Ct. at 3029.

209. *Id.* at 3029-30.

210. *Id.* The Fund was used for a variety of purposes, including education, tutoring, training, counseling and financial assistance. The Fund was to be financed from the $150,000 fine and a payment of $.02 per hour for each hour worked by a journeyman or apprentice and was to remain in existence until the Union achieved its nonwhite membership goal. The district court determined that this was appropriate. *Id.* at 3031 and n.14.

211. *Id.* at 3029. The new goal was based on the labor pool in the area covered by the Union which had increased in size due to the Union's merger with five other locals which were predominately composed of white members. *Id.* at 3029 n.12 and 3030.

212. *Id.* at 3030. Apprentices were to be selected by a three-member Board which would pick one minority apprentice for each white apprentice indentured. Also, to prevent petitioners from underutilizing the apprenticeship program, the JAC was required to assign one apprentice to Union contractors for every four

district court's contempt findings and remedies, including the Fund order and the affirmative action program with modifications.[214] The court also found that the 29.23% nonwhite membership goal was proper and did not violate Title VII or the Constitution. The Supreme Court granted certiorari[215]and affirmed.[216]

Justice Brennan, in Part II-A of the opinion, concluded that the district court used the correct statistical evidence of the relevant labor pool based in New York City in fashioning the twenty-nine percent goal.[217] He noted that since the goal was later adjusted to account for the fact that the members of the Union were drawn from outside of New York City, the original goal would not affect the obligations of the petitioners under the affimative action program.[218] In Part II-B, Justice Brennan determined that the district court's finding that petitioner had underutilized the apprenticeship program was not clearly erroneous even though that court may have relied in part on incorrect data.[219]

In Part III, Justice Brennan ruled that the contempt sanctions were proper remedies for civil contempt.[220] Since the sanctions clearly were designed to coerce compliance with the district court's order rather than to punish petitioners for their contemptuous conduct, he reasoned that the procedures required for criminal contempt proceedings were not applicable.[221]

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journeymen unless the contractor obtained a written waiver from respondents. *Id.*

213. 753 F.2d 1172 (2d Cir. 1985).

214. *Id.*

215. 106 S. Ct. 58 (1985).

216. 106 S. Ct. 3019 (1986). Justice Brennan announced the 5-4 judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, and VI. Justices Marshall, Blackmun, Powell and Stevens joined in this opinion. Justice O'Connor joined in Parts II-A, III and VI. Justice Brennan also wrote an opinion with respect to Parts IV, V, and VII in which Justices Marshall, Blackmun, and Stevens joined. Justice Powell filed an opinion concurring in part and concurring in the judgment. Justice O'Connor filed an opinion concurring in part and dissenting in part. Justice White filed a dissenting opinion. Justice Rehnquist filed a dissenting opinion in which Chief Justice Burger joined.

217. *Id.* at 3032-33. Justice Brennan noted that petitioners had conceded that there was no evidence in the record from which their alleged correct percentage could be derived and that no issue as to the correctness of the 29% figure was properly before the Court because the goal had been affirmed twice by the court of appeals and certiorari had not been sought. *Id.* at 3032.

218. *Id.* at 3032.

219. *Id.* at 3032 and n.22.

220. *Id.* at 3033.

221. *Id. See* Fed. R. Crim. P. 42(b); 42 U.S.C. § 2000h (1982).

In Part IV, Justice Brennan held that the membership goal, the fund order and other orders which required petitioners to grant membership preferences to nonwhite nonvictims were not prohibited by section 706(g).[222] Justice Brennan maintained that such relief is not prohibited by the plain language of the statute and is permissible where an employer or a labor union has engaged in persistent or egregious discrimination or where it is necessary to dissipate the lingering effects of pervasive discrimination.[223] Justice Brennan reasoned that such relief furthers the purposes underlying Title VII, is consistent with the legislative history of the statute, and complies with the Court's precedents.[224]

Justice Brennan explained that the plain language of section 706(g) gives the district court permission to award "other equitable relief as the court deems appropriate".[225] This language reflects Congress' intent to vest broad discretion in a court seeking to remedy unlawful discrimination. This phrase is also indicative of the drafters' desire to permit the employer or the union to show that the plaintiff would not have been admitted even in the absence of the demonstrated discrimination.[226] Justice Brennan concluded that since neither the membership goal nor the Fund order required the Union to admit to membership individuals who had been refused admission for reasons unrelated to discrimination, the plain language of section 706(g) did not prohibit a court from ordering the kind of affirmative relief awarded by the district court.[227]

Justice Brennan next concluded that his interpretation of the district court's orders furthered the purposes underlying Title VII.[228] In situations where the employer has engaged in particularly long-

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222. 106 S. Ct. at 3034-35. For the text of § 706(g), 42 U.S.C. § 2000e-5(g), *see supra* note 27.

Justice Brennan made clear that § 706(g) did not apply to the benefits conferred by the Fund. Since the Fund was established in the exercise of the court's contempt powers, § 706(g) would not necessarily limit the district court's authority to order petitioners to implement the Fund. 106 S. Ct. at 3034 n.25.

223. *Id.* at 3035.

224. *Id.*

225. *Id.* He ruled that although this sentence prohibits a court from ordering a union to admit an individual who was "refused admission ... for any reason other than discrimination on account of race ..." it does not expressly forbid affirmative race-conscious relief for nonvictims. *Id. See* the full text *supra* note 27.

226. 106 S. Ct. at 3035.

227. *Id.*

228. *Id.* at 3037.

standing or egregious discrimination or has formally ceased to engage in discrimination but has erected informal mechanisms that obstruct equal employment opportunities, injunctions often prove useless and race-conscious remedies may be the only effective way to ensure the full enjoyment of Title VII rights.[229]. He also concluded that, consistent with the relevant legislative history of section 706(g)[230] and section 703(j),[231] Congress did not intend to prohibit a court from exercising its remedial authority for past discrimination.[232]

Justice Brennan then said that his conclusion was consistent with contemporaneous interpretations of the EEOC and the Justice Department, with the legislative history of the amendments to Title VII, and with the Supreme Court's prior decisions.[233] He concluded that the district court had authority under section 706(g) to order race-conscious affirmative action for nonvictims,[234] but cautioned that a court should use such measures only when confronted with an employer or a labor union that has engaged in persistent or egregious discrimination or when the lingering effects of pervasive discrimination must be dissipated.[235] Also, a district court should

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229. *Id.* at 3036. In most cases, he said, the court need only order the employer or union to cease engaging in discriminatory practices and to award make-whole relief to the individuals victimized by those practices. *Id*

230. *Id.* at 3036-37. He explained that § 706 (g) was intended to reassure opponents of the civil rights bill that a court could not order an employer to adopt racial quotas or to grant preferential treatment to racial minorities in order to correct a racially imbalanced work force. *Id.*

231. *Id.* at 3036-37. Justice Brennan held that § 703(j) was added to make clear that employers do not have to correct mere imbalances. *Id.* at 3042-43. He rejected petitioners' argument that the district court's remedies contravened § 703(j), since these remedies require petitioners to grant preferential treatment to blacks and Hispanics based on race. He reasoned that, in circumstances where an illegal discriminatory act or practice is established, both the purpose and the legislative history of § 703(j) supported the conclusion that this provision neither qualified nor proscribed a court's authority to order relief otherwise appropriate under § 706(g). *Id.* at 3044 n.37.

232. *Id.* at 3044-45.

233. *Id.* at 3045-47. Justice Brennan explained that in *Stotts*, the Court held that since none of the firefighters protected by the district court's order was a proven victim of illegal discrimination, that court had no authority under § 706(g) to override the bona fide seniority system by an award to individual nonvictims. *Id.* at 3049.

234. *Id.* at 3049. He made clear that the purpose of the remedy was to dismantle prior patterns of employment discrimination and to prevent discrimination in the future for a class and to specifically benefit a nonvictim; therefore, the Union or JAC could chose to admit or to train the persons of their choice. *Id.*

235. *Id.* at 3052.

tailor an order to fit the nature of the violation it seeks to correct so that the interests of white employees are not unnecessarily trammelled.[236]

In Part V of the opinion, Justice Brennan determined that the issue of whether the membership goal and the Fund order violated the equal protection component of the due process clause of the fifth amendment[237] need not be resolved because the relief ordered passed the most rigorous test—the government had a compelling interest in remedying proven past discrimination and the relief was narrowly tailored to further that interest.[238]

Justice Powell, in his concurring opinion, agreed that the district court's establishment of the numerical goal and the Fund order was within the remedial authority granted by section 706(g).[239] He also concluded that neither order violated the equal protection

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236. *Id.* Justice Brennan concluded that the membership goal and the establishment of the Fund were necessary to remedy the pervasive discrimination and that the court's flexible application of the membership goal indicated that this remedy was not being used simply to achieve and maintain racial balance, but rather as a benchmark against which the court could gauge petitioners' efforts to remedy past discrimination. He also concluded that the membership goal and Fund order were temporary and that the membership goal did not unnecessarily trammel the interests of white employees because the court orders did not operate as a bar to admission of nonminority persons to the Union. *Id.*

237. *Id.* He noted that while the Court consistently had recognized that government bodies constitutionally may adopt racial classifications as a remedy for past discrimination, the Court has not agreed on the proper test to be applied in analyzing the constitutionality of race-conscious remedial measures. *Id.*

238. *Id.* at 3052-53. Justice Brennan concluded that there was a proper showing of prior discrimination that would justify the use of remedial racial classification. He also concluded that the district court's orders were appropriately tailored to accomplish this objective: the court had properly considered the efficacy of alternate remedies and, in light of petitioners' long history of resistance to official efforts to end their discrimnatory practices, concluded that stronger measures were necessary; the court had properly devised temporary membership goals and the Fund as tools for remedying past discrimination; and, the court's orders had only a marginal impact on the interests of white workers and did not operate as an absolute bar to the admission of white applicants or to disadvantage existing Union members at all. *Id.* at 3053. In Part VI, Justice Brennan held that the district court's appointment of an administrator with broad powers to supervise the Union's compliance with the court's orders was not an unjustifiable interference with the Union's statutory right to self-governance. He reasoned that while the administrator had broad powers to oversee petitioners' membership practices, the Union retained complete control over its other affairs including the selection of the particular individuals who are to be admitted. He concluded by holding that any interference by the administrator with membership operations was necessary to put an end to petitioners' discriminatory ways. *Id.*

239. *Id.* at 3054.

clause.[240] Justice Powell proposed a two-pronged inquiry for assessing a constitutional challenge to a racial classification: (1) is the racial classification justified by a compelling governmental interest; and, (2) is the means chosen by the state to effectuate its purpose narrowly tailored to the achievement of that goal.[241] He determined that the petitioners' past egregious discrimination established, without doubt, a compelling governmental interest sufficient to justify the imposition of a racially classified remedy.[242] He then concluded that the Fund order, imposed after petitioners were held in contempt, was supported not only by the governmental interest in eradicating petitioners' discrimination, but also by the societal interest in compliance with the judgments of federal courts.[243] Justice Powell also found that the numerical goal[244] comported with constitutional requirements because, absent authority to set a goal as a benchmark against which it could measure progress in eliminating discriminatory practices, the district court may have been powerless to provide an effective remedy.[245] That the goal was not permanent and would not be applied as an inflexible quota to achieve a racial balance along with the fact that the goal was directly related to the percentage of nonwhites in the relevant work force and would not substantially burden nonminorities were factors which influenced Justice Powell's conclusion.[246]

Justice O'Connor concurred in the Court's affirmance of the findings of contempt but dissented from its holding with respect to the propriety of the court-ordered relief.[247]

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240. Id.

241. *Id.* at 3054-55.

242. *Id.* at 3055.

243. *Id.*

244. *Id.* In assessing the numerical goal, he relied on five factors to determine the proper scope of this race-conscious hiring remedy: (1) the efficacy of alternate remedies; (2) the planned duration of the remedy; (3) the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or the work force; (4) the availability of waiver provisions if the hiring plan could not be met; and, (5) the effect of the remedy upon innocent third parties. *Id.*

245. *Id.* at 3056-57.

246. *Id.* He disagreed with Justice O'Connor's position that the membership goal was a quota because in order to achieve the goal by its due date (August 1987), the petitioners would have to replace journeymen and apprentices on a strictly racial basis. When that occurs, petitioners will be free to argue that an impermissible quota has been imposed; however, based on an examination of what had occurred in this litigation over the years, the district court had not enforced the goal in the rigid manner that concerned Justice O'Connor. *Id.* at 3057 n.4.

247. *Id.* at 3057.

She argued that the membership goal operated as a "rigid racial quota" that could not reasonably be met through "good faith efforts" by the Union and, therefore, was prohibited by sections 703(j) and 706(g).[248] She argued that section 703(j) is applicable to section 706(g) and addresses both make-whole and class-wide relief.[249] This numerical goal, according to Justice O'Connor, violated 703(j) because it was a quota[250] which required racial preferences because of a racial imbalance.[251] She concluded that the district court had no authority under section 706(g) to order the membership goal or the Fund as a remedy because both operated as a quota.[252]

Justice White dissented, agreeing that section 706(g) does not bar relief for nonvictims in all circumstances, but arguing that the remedy operated as a strict racial quota which, due to the economic doldrums in the construction industry, could require the displacement of nonminority workers by members of the plaintiff class.[253] Justice Rhenquist and Chief Justice Burger also dissented arguing that section 706(g) precludes the award of racial preferences to nonvictims at the expense of innocent nonminority workers.[254]

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248. *Id.*

249. *See supra* note 26 for the text of § 703(j). She quoted the phrase in § 703(j): "Nothing contained in this title shall be interpreted to require ...". 106 S. Ct. at 3058. She also disagreed with the plurality's reading of the legislative history concerning racial quotas, pointing out that the history reflected a concern that no substantive liability existed for mere racial imbalance and also that quotas were not a permissible remedy even for past discrimination, because innocent nonminorities were harmed. *Id.* at 3058-59.

250. *Id.* at 3059. Justice O'Connor explained the difference between a quota and a goal:

> The imposition of a quota is not truly remedial but rather amounts to a requirement of racial balance in contravention of section 703(j)'s clear policy against such requirement . . . [a] goal must be intended to serve merely as a benchmark for measuring compliance with Title VII and eliminating the lingering effects of past discrimination, rather than as a rigid numerical requirement that must unconditionally be met on pain of sanctions.

Id. at 3060.

She argued that the 29.23% membership figure was not a goal because it required that the racial composition of the Union's membership mirror that of the relevant labor pool by August 31, 1987 without regard to variables such as the number of qualified minority applicants available or the number of apprentices needed. *Id.*

251. *Id.* at 3058-62.

252. *Id.*

253. *Id.* at 3062-63.

254. *Id.* at 3063.

6. *Local 93 Firefighters v. City of Cleveland ("Local 93")*[255]

A consent decree requiring a public employer to promote its minority employees who are not actual victims of past discriminatory practices is not a section 706(g) order and is, therefore, permissible.

In 1980, an organization of black and Hispanic firefighters in the City of Cleveland ("City"), the Vanguards, brought a class action lawsuit against the City and its fire department ("Department") alleging race and national origin discrimination in violation of Title VII and the thirteenth and fourteenth amendments.[256] Specifically, the firefighters claimed that the Department's reliance on an allegedly discriminatory written examination used to determine which employees were eligible for promotions and the City's refusal to administer a new examination after 1975 violated federal laws.[257] Prior to this action, Cleveland had unsuccessfully litigated a number of the underlying factual issues in other lawsuits.[258] Therefore, rather than commence another round of possibly futile litigation, the City entered into negotiations with the Vanguards.[259] While these negotiations were taking place, Local Number 93 of the International Association of Firefighters, AFL-CIO, C.L.C. ("Union"), which represented a majority of Cleveland's firefighters, was permitted to intervene as a party plaintiff.[260]

The City and Vanguards continued to negotiate alone and submitted a proposed consent decree to the district court in November,

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255. *Id. Local 93* is sometimes referred to as *Vanguards.*

256. 106 S. Ct. at 3066-67.

257. *Id.*

258. *Id.* at 3067. In 1972, an organization of black police officers filed an action alleging that the police department discriminated against minorities in hiring and promotion. Shield Club v. City of Cleveland, 370 F. Supp. 251 (N.D. Ohio 1972). The district court ruled in favor of the plaintiffs and issued an order enjoining certain hiring and promotion practices and establishing minority hiring goals. In 1977, these hiring goals were adjusted and promotion goals were established pursuant to a consent decree.

Similar claims were raised in an action against the fire department and the district court found unlawful discrimination and entered a consent decree imposing hiring quotas similar to those ordered in the Shield Club litigation. Headen v. City of Cleveland, No. C73-330 (N.D. Ohio, Apr. 25, 1975). In 1977, after additional litigation, the *Headen* court approved a new plan governing the hiring procedure in the fire department. *Id.*

259. *Id.*

260. *Id.* The Union failed to allege any cause of action or assert any claims against either the Vanguards or the City but prayed for relief that enjoined the City from awarding promotions on the basis of competitve examinations. *Id.* at 3067-68.

1981.[261] The proposal established interim procedures to be implemented over a nine-year period as a two-step temporary remedy[262] for past discrimination in promotions; the city would be required to (1) reserve a fixed number of already planned promotions for minorities;[263] and, (2) design minority promotion goals which did not rely on seniority points[264] ("Proposal I").[265] Proposal I was later revised to include more promotions than previously announced; these revisions permitted the City to add a substantial number of black leaders to the fire department while still promoting the same nonminority officers who would have obtained promotions under the existing challenged promotion system ("Proposal II").[266] Proposal II was submitted to the Union's members who voted overwhelmingly to reject it.[267]

The Vanguards and the City then submitted another revised consent decree ("Proposal III"),[268] to the district court. Proposal III resembled Proposal II and provided for the set-aside of certain promotions for minorities, the establishment of promotional goals, the reduction of the implementation period from nine to four years

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261. *Id.* at 3068.

262. *Id.*

263. *Id.* The promotions reserved were as follows: 16 of 40 planned promotions to Lieutenant; 3 of 20 planned promotions to Captain; 2 of 10 planned promotions to Battalion Chief; and, 1 of 3 planned promotions to Assistant Chief. *Id.*

264. *Id.* The minority promotion goals were for the ranks of Lieutenant, Captain, and Battalion Chief. *Id.*

265. *Id.* The Union objected that it had not been a party to the negotiations and the district court judge expressed reservations about the fairness of a decree where the Union had not participated in the negotiations. *Id.*

266. *Id.* at 3068-69. The testimoney revealed that while the proposed consent decree dealt only with the 40 promotions to Lieutenant already planned by the City, the Department was actually authorized to make up to 66 offers and the City could hire 32 rather than 20 Captains and 14 rather than 10 Battalion Chiefs.

267. *Id.* at 3069 and n.2.

268. Proposal III, dated January 11, 1983, required the City to immediately make 66 promotions to Lieutenant, 32 promotions to Captain, 16 promotions to Battalion Chief and 4 promotions to Assistant Chief. These promotions were to be based on an examination that had been administered during the litigation. The 66 initial promotions to Lieutenant were to be split evenly between minority and nonminority firefighters; however, since only 10 minorities had qualified for the 52 upper-level positions, this proposed decree provided that all 10 be promoted. This decree further required that two promotional examinations be adminstered in June, 1984 and December, 1985, and that promotions from the lists produced by these examinations were to be made in accordance with specified promotional goals that were expressed in terms of percentages that were different for each rank. *Id.*

and the restoration of the use of seniority points as a factor in ranking candidates for promotion.[269] The district court overruled the Union's objection[270] and approved Proposal III, finding that the record reflected a historical pattern of racial discrimination in promotions in the Department, that the quota system for the short period of four years was neither unfair nor unreasonable in light of the history of discrimination, and that Proposal III was more reasonable and less burdensome than the nine-year plan that had been proposed originally.[271] The Court of Appeals for the Sixth Circuit affirmed with one judge dissenting.[272] The court also maintained that such relief was justified by the record and that the decree was fair and reasonable to nonminority firefighters.[273] The *Stotts* decision was determined to be inapplicable to this case.[274] The Supreme Court granted certiorari[275] and affirmed.[276]

Justice Brennan, writing for the majority first stated that, regardless of whether section 706(g) precludes a court from imposing certain forms of race-conscious relief after trial,[277] the provision did not apply to relief awarded in a consent decree.[278] Justice

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269. *Id.*

270. *Id.* at 3070. The Union merely asserted that the proposed consent decree was neither wise nor necessary. *Id.*

271. *Id.*

272. Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479 (6th Cir. 1985). The court of appeals held that the goals were modest, the plan was short in duration and did not require the hiring of unqualified minority firefighters or the discharge of nonminority firefighters, nor did it create an absolute bar to the advancement of nonminority employees. *Id.* at 485.

273. *Id.*

274. *Id.* at 486. The court of appeals commented that the district court in *Stotts* had issued an injunction requiring layoffs over the objection of the City. That injunction had the direct effect of abrogating a valid seniority system to the detriment of nonminority workers. In this case, the court found *Stotts* inapplicable because the City had agreed to the Plan and because a consent decree which guaranteed the integrity of the existing seniority system was involved rather than an injunction. *Id.*

275. 106 S. Ct. 59 (1985).

276. 106 S. Ct. at 3072. Justice Brennan announced the 6-3 judgment in an opinion in which Justices Marshall, Blackmun, Powell, Stevens and O'Connor joined. Justice O'Connor filed a concurring opinion. Justice White filed a dissenting opinion. Justice Rehnquist also filed a dissenting opinion in which Chief Justice Burger joined. *Id.*

277. *Id.* Justice Brennan did note that the Court held in *Local 28*, announced the same day as *Local 93*, that courts may, in appropriate cases, provide relief under Title VII which benefits individuals who were not the actual victims of a defendant's discriminatory practices. *Id.*

278. *Id.*

Brennan recognized that both Congress and the EEOC intended voluntary compliance to be the preferred means of achieving the objectives of Title VII.[279] He then noted that in *Weber* the Court made clear that voluntary action by a private employer which includes reasonable race-conscious relief that benefits individuals who were not actual victims of discrimination is permissible under section 703.[280] Justice Brennan saw no reason to distinguish between voluntary action taken outside the context of litigation and voluntary action taken in the context of a consent decree, except for fourteenth amendment considerations applicable to public employers in both situations.[281]

Justice Brennan then rejected the Union's argument that since a consent decree possesses the legal force and character of a judgment entered after a trial, can be modified by the court in certain circumstances over the objection of a signatory, and can be enforced by citation for contempt of court, it is an "order" proscribed by section 706(g).[282] Justice Brennan first stated that while consent decrees and judgments after litigation bear some of the same earmarks, consent decrees also closely resemble contracts.[283] He then explained that Congress' purpose in enacting section 706(g) was to protect the managerial perogatives of employers and unions from undue unilateral interference by the federal courts.[284] Since

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279. *Id.*

280. *Id.*

281. *Id.* at 3073. The majority noted that, unlike *Weber*, which involved a private employer, *Local 93* involved a public employer whose voluntary actions are subject to both the fourteenth amendment and § 703 of Title VII. *Id.*

Justice Brennan carefully delineated the issues the Court was not deciding: (1) the circumstances, if any, in which voluntary action by a public employer that is permissible under § 703 would be barred by the fourteenth amendment; (2) the limits § 703 places on an employer's ability to agree to race-conscious relief in a voluntary settlement that is not embodied in a consent decree; and, (3) what showing the employer would be required to make concerning possible prior discrimination on its part against minorities in order to defeat a challenge by nonminority employees based on § 703. *Id.* n.8.

282. *Id.* at 3073-74.

283. *Id.* at 3074.

284. *Id.* (quoting 110 Cong. Rec. 15893). Justice Brennan recognized that Title VII was expanded to cover municipalities by the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103. The legislative history of the amendments did not reflect the same concern with preserving the managerial discretion of governmental employers but also did not indicate that Congress intended to leave governmental employers with less latitute under Title VII than had been left to employers in the private sector when Title VII was originally enacted. 106 S. Ct. at 3075 n.10.

the principal characteristic of consent decrees is the voluntary and mutual agreement by the parties without judicial interference, this purpose is not affected.[285] Justice Brennan then concluded that because nothing in the legislative history of section 706(g) indicated that Congress was concerned about judicial enforcement, as opposed to judicial creation, of an obligation, a consent decree is not a prohibited "order".[286]

Justice Brennan next rejected the Union's argument that, under *Stotts*, a district court lacks the power pursuant to section 706(g) to enforce a consent decree that provides for greater relief than a court could order.[287] He ruled that, to the extent that the consent decree is not shown to conflict with section 703, as it had in *Stotts*,[288] the court is not barred from entering a consent decree merely because it might lack authority under section 706(g) to do so after a trial.[289]

Justice O'Connor concurred, emphasizing that the Court's decision was a "narrow one" and that nonminority employees remain free to challenge the validity of race-conscious relief provided in a consent decree as violative of their rights under section 703 and, if appropriate, the fourteenth amendment.[290] Even if nonminority employees do not object the decree, Justice O'Connor cautioned that a court should not approve a consent decree which on its face provides for racially preferential treatment that would clearly violate section 703 or the fourteenth amendment.[291] She then emphasized that there must be a factual predicate of prior discriminatory conduct before race-conscious remedies can be permitted.[292] Finally,

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285. 106 S. Ct. at 3075-76.

286. *Id.* at 3076.

287. *Id.*

288. *Id.* Justice Brennan distinguished *Stotts* where the Court held that a district court could not enter a disputed modification of a consent decree where the resulting order is inconsistent with § 703(h). *Id.*

289. *Id.* at 3077-78. Finally, Justice Brennan did not agree with the Union's allegation that since it had been permitted to intervene as of right, the consent decree was invalid because the Union had not consented to it. He made clear that while an intervenor of right is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree, the intervenor does not have power to block the decree by withholding its consent nor does the intervenor have the right to challenge a decree which imposes no legal duties or obligations on the intervenor and resolves none of its claims. *Id.* at 3080.

290. *Id.*

291. *Id.*

292. *Id.*

she cautioned that the issue of whether the race-conscious remedy in the consent decree was permissible under section 703 or the fourteenth amendment was left open for resolution on remand.[293]

Justice White dissented arguing that the majority erred in limiting itself to holding that section 706(g), which deals with judicial remedies for violations of Title VII, has no application to consent decrees.[294] He argued that the Court should have decided that consent decrees are not immune from examination under section 706(g) and that, regardless of whether that section applies to consent decrees, the remedies in such decrees should conform to the limitations of section 706(g).[295] Justice White explained that those limitations require a showing that the employer has discriminated within the meaning of section 703, an identification of actual victims of that discrimination, and a remedy tailored for the victims of the past discrimination.[296] A remedy may be fashioned for nonvictims only where there exists particularly egregious conduct that a district court concludes cannot be cured by injunctive relief alone.[297] He concluded that because none of the racially preferred blacks was shown to have been a victim and none of the whites who were denied promotion was shown to have been involved in the discriminatory practices recited in the consent decree, the remedy could not have been awarded by the court and was no more valid when agreed to by the employer but contested by nonminorities.[298]

Justice Rehnquist, joined by Chief Justice Burger, also dissented, arguing that the consent decree was subject to section 706(g).[299] This dissent reasoned that a court order entered with consent of the parties was still an "order" of the court and, therefore, was subject to 706(g).[300] The dissent then agreed with Justice White's conclusion that section 706(g) barred the relief granted by the district court's issuance of the consent decree because, consistent

293. *Id.*
294. *Id.* at 3081.
295. *Id.*
296. *Id.*
297. *Id.* at 3081-82.
298. *Id.* at 3082.
299. *Id.* at 3084.
300. *Id.* He also argued that this consent decree did impair the Union's rights in the sense that nonminority Union members who would otherwise have received promotion were obviously injured. *Id.* He emphasized that the question of whether an intervenor as of right may block the entry of a consent decree, as opposed to a judicial decree, was left unresolved by the case. *Id.* at 3084-85.

with the limitations of section 706(g), the district court should have made a finding that the minority firemen who would receive the promotions were victims of the City's alleged discriminatory policies and should have awarded relief only to those victims.[301]

7. *United States v. Philip Paradise, Jr. ("Paradise")*[302]

The equal protection clause of the fourteenth amendment is not violated when a district court order requires a one-black-for-one white promotion system as an interim measure in situations where there has been systematic and total exclusion of blacks from employment; however, such a remedy must not bar white promotions or mandate the hiring of unqualified blacks over qualified whites.

In 1972, the National Association for the Advancement of Colored People ("NAACP") brought an action challenging the Alabama Police Department's (the "Department") practice of excluding blacks from employment in the Department. The district court held that the Department had systematically excluded blacks from employment in violation of the fourteenth amendment[303] and ordered the Department to hire one black trooper for each white trooper hired until blacks constituted approximately twenty-five percent of the state trooper force.[304] The court also enjoined the Department from engaging in any employment practices that have the effect of discriminating against any employee or applicant on the basis of race or color.[305] The Fifth Circuit Court of Appeals approved the hiring requirement[306] and held that white applicants who had higher

301. *Id.* at 3085-87.

302. 107 S. Ct. 1053 (1987).

303. NAACP v. Allen, 340 F. Supp. 703 (M.D. Ala. 1970). The United States was joined as a party plaintiff and Phillip Paradise, Jr. intervened on behalf of a class of black plaintiffs. *Paradise*, 107 S.Ct. at 1058. The district court found that the plaintiffs had demonstrated, without contradiction, that the defendants had engaged in a "blatant and continuous pattern and practice of discrimination in hiring in the ... Department ... both as to troopers and supporting personnel." *Id.* at 1058. The district court found that in the thirty-seven year history of the patrol, no black trooper had ever been hired and the only blacks ever employed by the Department were nonmerit system laborers. *Id.* at 1058.

304. 107 S. Ct. at 1058.

305. *Id.*

306. *Id.* at 1059. The court of appeals held that the quota relief began the process of dismantling the barriers, psychological or otherwise, created by the past unlawful practices and operated as a temporary remedy until such time as objective, neutral employment criteria was developed to select public employees only on the basis of job-related merit. *Id.*

eligibility rankings than blacks were not denied due process or equal protection by the one-for-one hiring order.[307]

In 1974, shortly after the Fifth Circuit's decision, the plaintiffs sought further relief from the district court after the Department artificially restricted the size of the trooper force, thereby limiting the number of the new troopers that were hired and the number of blacks who could achieve permanent trooper status.[308] The district court reaffirmed its 1972 hiring order, enjoining any further attempts by the Department to delay or frustrate compliance.[309]

In 1977, the plaintiffs returned to district court for supplemental relief against the Department's lack of neutral promotion practices.[310] The court approved a "Partial Consent Decree" in which the Department agreed to develop within one year a procedure for promotion to corporal which would not have an adverse impact on blacks and which would comply with the Uniform Guidelines on Employee Selection Procedures ("Guidelines");[311] the Department also agreed to develop similar procedures for the other upper ranks ("1979 Decree").[312]

In 1981, over a year and a half after the deadline imposed by the 1979 Decree, the Department sought approval of its proposed corporal selection procedure.[313] Both the United States and the plaintiff class objected to this procedure arguing that it had not been validated and would be impermissible if it had an adverse impact on blacks.[314] To resolve this dispute, the parties executed

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307. United States v. Dothard, 373 F. Supp. 504, 618 (M.D. Ala. 1974), *aff'd sub nom.* NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974). None of the parties sought certiorari review of the court of appeals' determination that the 50% hiring quota was constitutional. 107 S. Ct. at 1059 n.5.

308. 107 S. Ct. at 1059. The district court found that the disproportionate failure to hire blacks as permanent troopers was due to social and official discrimination, harsher discipline of blacks and preferential treatment of whites in some aspects of training and testing. Paradise v. Dothard, Civ. Action No. 3561-N (M.D. Ala. Aug. 5, 1975). 107 S. Ct. at 1059.

309. 107 S. Ct. at 1059.

310. *Id.*

311. *Id.* at 1060. The Uniform Guidelines are designed to "provide a framework for determining the proper use of tests and other [employee] selection procedures consistent with federal law." 28 C.F.R. 50.14, Part 1 Section 1 (1978).

312. Paradise v. Shoemaker, 470 F. Supp. 439 (M.D. Ala. 1979). Five days after approval of the 1979 decree, the Department returned to court seeking clarification of the 1972 hiring order. The district court rejected the Department's arguments noting that, as of November 1, 1978, 232 state troopers were employed by the Department and only whites occupied the higher ranks. *Id.* at 440-41.

313. 107 S. Ct. at 1060.

314. *Id.*

another consent decree which provided: (1) the Department's proposed promotion test for corporals should first be administered to applicants and the results should be reviewed to determine whether, under the Guidelines, the test had an adverse impact on blacks; (2) if the parties failed to agree on a promotion procedure, the court should develop an appropriate procedure; and, (3) no promotions should occur until the parties agreed or the court ruled upon the promotion method to be used ("1981 Decree").[315] The district court approved this decree.[316]

The Department administered the test to 262 applicants, sixty of whom were black.[317] Only five blacks were listed in the top half of the promotional register and the highest ranking black was listed at eighty.[318] When the Department indicated that it had an immediate need for between eight and ten new corporals and would elevate between sixteen to twenty individuals before constructing a new list, the United States objected, arguing that any rank-ordered use of the list in making promotions would have an adverse impact on black applicants.[319] The United States suggested that the Department submit an alternative proposal that would comply with both the 1979 and 1981 Decrees.[320]

Because no proposal was submitted, plaintiffs returned to district court in 1983 seeking an order enforcing the terms of the 1979 and 1981 Decrees.[321] The district court found that, in the eleven years since the litigation began, not one black was promoted to a major, a captain, a lieutenant, or a sergeant and, of the sixty-six corporals, only four were black.[322] The district court held that the test had an adverse impact on blacks and granted plaintiffs' motion to enforce both Decrees.[323] The court also rejected the Department's

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315. *Id.*
316. *Id.*
317. *Id.* at 1061.
318. *Id.*
319. *Id.*
320. *Id.*
321. *Id.* Although it opposed the one-for-one requirement, the United States agreed that the Decrees should be enforced, observing that the defendants had failed to give any reason why promotions should not be made or why no progress had been made towards remedying the effects of past discrimination. The United States also claimed that the Department's failure to produce a promotion plan in compliance with the Decrees suggested a continuing pattern of discrimination. *Id.*
322. *Id.*
323. Paradise v. Prescott, 585 F. Supp. 72 (M.D. Ala. 1983).

proposal to promote four blacks among the fifteen new corporals.[324] The district court ordered that the Department submit a plan under which it would promote at least fifteen qualified candidates to corporal in a manner that would not have an adverse racial impact and would ensure that "for a period of time" if qualified black candidates were available, at least fifty percent of those promoted to corporal would be black.[325] If less than twenty-five percent of those employed in a particular rank were black and the Department had not developed and implemented a promotion plan without adverse impact for that rank, the court ordered that fifty percent of those promoted in the other upper ranks must be black.[326] The Department was also ordered to submit a schedule, based on realistic expectations, for the development of promotion procedures for all ranks above the entry level.[327] After the Department promoted eight blacks and eight whites under the court's order and submitted its proposed promotion procedures for corporal and sergeant, the district court suspended the fifty percent requirement for those ranks.[328]

On appeal by the United States, the Court of Appeals for the Eleventh Circuit affirmed the order, concluding that the remedy was designed to rectify the present effects of past discrimination.[329] The court concluded that this remedy extended only as far as was necessary to reverse the egregious and long-standing racial imbalances in the upper ranks of the Department.[330] The Supreme Court granted certiorari[331] and affirmed.[332]

Justice Brennan maintained that under the strict scrutiny standard the one-for-one race-conscious relief ordered by the district court was narrowly tailored to serve a compelling governmental interest.[333] Justice Brennan held that the state unquestionably had a compelling

324. *Id.*
325. *Id.* at 74-75.
326. *Id.*
327. *Id.* at 75.
328. 107 S. Ct. 1053.
329. Paradise v. Prescott, 787 F.2d 1514 (11th Cir. 1985).
330. *Id.*
331. 106 S. Ct. 3331 (1986).
332. 107 S. Ct. 1053. Justice Brennan authored the 6-3 plurality opinion in which Justices Marshall, Blackmun and Powell joined. Justice Powell filed a concurring opinion and Justice Stevens filed an opinion concurring in the judgment. Justice O'Connor filed a dissenting opinion in which Chief Justice Rehnquist and Justice Scalia joined. Justice White filed a dissenting statement. *Id.*
333. *Id.* at 1064.

governmental interest in remedying the past and present "pervasive, systematic, and obstinate discriminatory exclusion of blacks" by the Department, a state entity, and in furthering society's interest in compliance with federal court judgments.[334] He then held that the one-for-one promotion requirement was narrowly tailored to serve these purposes; the requirement was, therefore, valid as to both the initial promotions of corporals and the promotions of those in the upper ranks.[335] In arriving at this conclusion, he reiterated the factors that should be considered by a court in determining whether a state's race-conscious remedies are appropriate in the circumstances: (1) the necessity for the relief and the effectiveness of alternative remedies; (2) the flexibility and duration of the relief, including the availability of waiver provisions; (3) the relationship of the numerical goals to the relevant labor market; and, (4) the impact of the relief on the rights of third parties.[336]

Justice Brennan first concluded that the one-for-one requirement was necessary to eliminate the effects of the Department's pervasive discrimination particularly its absolute exclusion of blacks in the upper ranks.[337] Such a requirement would also eradicate the ill effects of the Department's delay in producing such a procedure and would ensure compliance with the 1979 and 1981 Decrees by encouraging the implementation of a promotion procedure that would not have an adverse racial impact.[338] He then concluded that the one-for-one requirement was the only proposal in the circumstances because the Department's alternative would not have satisfied the governmental interest.[339] Justice Brennan also noted that the alternative of imposing heavy fines and attorneys' fees on the defendants, an alternative never proposed to the district court, was unlikely to be effective.[340]

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334. *Id.* at 1065. Justice Brennan disagreed with the Department's contention that promotion relief was not justified since the Department was only found guilty of discrimination in hiring. He reasoned that the Department's discriminatory hiring practices obviously affected the force's upper ranks by precluding blacks from competing for promotions and that the Department's promotional procedure was itself discriminatory and caused a total exclusion of blacks in the upper ranks. *Id.* at 1065-66.

335. *Id.* at 1066.

336. *Id.* at 1067.

337. *Id.* at 1066.

338. *Id.*

339. *Id.* at 1066-70.

340. *Id.* He reasoned that imposition of attorney's fees and costs on the defendants in the past had not prevented delays. Such action would not have compensated the plaintiffs for the delays and would not have satisfied the Department's need to promote 15 immediately. *Id.* at 1069 and n.24.

Justice Brennan further concluded that the one-for-one requirement was flexible in application at all ranks[341] and bore a proper relation to the percentage of nonwhites in the work force.[342] He then stated that the requirement did not impose an unacceptable burden on innocent white promotion applicants because (1) it was temporary and limited; (2) it had been used only once; (3) it merely delayed and did not bar the promotion of some whites; (4) it did not require the layoff or discharge of whites; and, (5) it did not require the promotion of unqualified blacks over qualified whites.[343]

Justice Powell concurred, identifying five factors, similar to those used by Justice Brennan, which are relevant in determining whether an affirmative action remedy is narrowly drawn to achieve its goal.[344] After examining what had occurred in the litigation, he noted that the one-for-one requirement had not been enforced by the district court in a rigid manner and did not impose the entire burden of achieving racial equality on particular individuals nor did it seriously disrupt the lives of innocent individuals.[345]

Justice Stevens also concurred in the judgment.[346] Because the record disclosed an egregious violation of the equal protection clause, Justice Stevens concluded that the district court had broad

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341. *Id.* at 1071. The one-for-one requirement was flexible because it applied only when the Department needed to make promotions, could be waived by the court if there were no qualified black troopers, and was applicable only until the Department successfully implemented and validated promotion procedures. *Id.*

342. *Id.* at 1071-72. The district court ordered 50% black promotions until each rank was 25% black where the relevant labor market was 25% black. The government contended that the one-for-one 50% requirement was arbitrary because it bore no relation to the 25% minority labor pool; however, the plurality rejected this argument stating that the district court was not limited to ordering the promotion of only 25% blacks at any one time and that the temporary 50% requirement was constitutionally permissible in these circumstances where delay had occured and use of deadlines had proven ineffective. *Id.*

343. *Id.* at 1070-73. Finally, Justice Brennan reaffirmed that district court judges are accorded substantial respect in the exercise of their broad discretion to fashion appropriate remedies to cure fourteenth amendment violations because they have first-hand experience with the parties and are best qualified to judge whether an alternative remedy, such as an injunction, would be effective in ending the discrimination. *Id.* at 1073-74.

344. *Id.* at 1075. Those factors included: (1) the efficacy of alternative remedies; (2) the planned duration of the remedy; (3) the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force; (4) the availability of waiver provisions if the hiring plan could not be met; and, (5) the effect of the remedy on innocent parties. *Id.*

345. *Id.* at 1076.

346. *Id.* at 1077.

and flexible authority to fashion race-conscious remedies and had not abused its discretion by ordering the one-for-one requirement.[347] He emphasized that in a rare discrimination action where the governmental unit has been found guilty of discriminatory conduct, the Supreme Court need only determine whether the district court abused its discretion; the Court need not employ special and narrow rules for reviewing the court's decree nor must it use a different standard of review when a remedial decree employs mathematical ratios.[348]

Justice O'Connor dissented.[349] She agreed that the federal government had a compelling interest in remedying past and present discrimination by the Department and that the district court unquestionably had the authority to fashion a remedy designed to end the Department's history of discrimination.[350] She disagreed, however, with the majority's conclusion that the relief adopted was narrowly tailored and "manifestly necessary" to achieve compliance with the district court's previous orders.[351] Justice O'Connor argued that the one-for-one quota was not justified even if its purpose was to eradicate the effects of the Department's delay as it exceeded the percentage of blacks in the relevant labor pool and a compelling justification had not been shown by the district court.[352] Also, under a strict scrutiny review, the district court's order did not "fit with greater precision than any alternative remedy" because the promotion quota was imposed without consideration of any of the available alternatives, such as appointing a trustee to develop promotion procedures or finding the Department in contempt of court and imposing stiff fines and penalties.[353]

Justice White, in a separate dissent, expressed his agreement with Justice O'Connor's opinion, stating that the district court had exceeded its equitable powers in devising a remedy.[354]

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347. *Id.*
348. *Id.* at 1077-79.
349. *Id.* at 1080.
350. *Id.*
351. *Id.* at 1080-81.
352. *Id.* at 1081. If a one-for-one promotion plan could be valid because it speeded up the time within which the 25% goal was to be achieved, Justice O'Connor queried whether the 100% quota could be defended on the ground that it merely "determined how quickly the Department progressed toward some alternate goal." *Id.* She then stated that the "protection of the rights of non-minority workers demand that a racial goal not substantially exceed the percentage of minority group members and the relevant population of the work force absent compelling justification." *Id.*
353. *Id.* at 1081-82.
354. *Id.* at 1082-83.

8. *Johnson v. Transportation Agency ("Johnson")*[355]

Where there is a statistical imbalance in a particular job category, a public employer may voluntarily adopt an affirmative action plan under which an individual's sex is one factor which is considered in promotion decisions. Such a plan, however, must meet the Weber standards.

In 1978, the Santa Clara County Transit District Board ("Board") adopted an Affirmative Action Plan ("Plan") for the County Transportation Agency ("Agency").[356] In reviewing the composition of its work force at the time of the adoption of the Plan, the Agency noted that women were represented both in the Agency as a whole and in five of seven of its top job categories far less than their proportion of the county labor force.[357] The Plan noted that this underrepresentation of women, in part, reflected the fact that women traditionally had not been employed in these positions nor had they been strongly motivated to seek training or employment in these positions because of limited opportunities in the past.[358]

In the Plan, the Agency stated that its long-term goal was to obtain a work force whose composition reflected the percentage of minorities and women in the local labor force;[359] however, the Agency identified a number of factors, such as low turnover rate and limited available positions, which might make such a long-term goal unrealistic.[360] Because of these factors, the Plan stated that short range goals might be established and annually adjusted to serve as a realistic guide for actual employment decisions.[361] The Plan did not set aside a specific number of positions for minorities or women; instead, it authorized the consideration of ethnicity or

355. 107 S. Ct. 1442 (1987).

356. *Id.* at 1446.

357. *Id.* Specifically, while women constituted 36.4% of the area labor market, women composed only 22.4% of the Agency employees and women working at the Agency were concentrated largely in EEOC job categories traditionally held by women. For example, 76% of the office and clerical workers were women but less than 10% of the agency officials and administrative professionals or technicians were women. No woman (before Diana Joyce) held a position in the skilled craft and road maintenance classes. *Id.*

358. *Id.*

359. *Id.* at 1447.

360. *Id.* Among other factors listed were the requirement of heavy labor in some jobs, the limited number of entry positions leading to the skilled craft classification and the limited number of minorities and women qualified for positions requiring specialized training and experience. *Id.*

361. *Id.*

sex as a factor when evaluating qualified candidates for jobs in which members of such groups were poorly represented.[362]

When the Agency announced a vacancy in 1979 for the promotional postition of road dispatcher, none of the 238 positions in the Skilled Craft Worker job classification, which included the dispatcher position, was held by a woman.[363] Twelve employees applied in 1986 for the promotion, including Diane Joyce and Paul Johnson, who, along with seven other applicants, were deemed qualified.[364] Seven of the nine applicants scored above seventy percent on an interview.[365] Johnson and another applicant scored seventy-five percent while Joyce had the next highest ranked score with seventy-three percent.[366] Prior to the second interview, Joyce was concerned that her application would not receive a disinterested review and contacted the County's Affirmative Action Office (the "Office").[367] The Office, in turn, contacted the Agency's Affirmative Action Coordinator who recommended to the Director of the Agency that Joyce be promoted.[368] After the second interview, three agency supervisors recommended that Johnson be promoted; however, the Director, who had the authority to pick any of the seven persons deemed eligible, promoted Joyce.[369]

After receiving a right-to-sue letter from the EEOC, Johnson filed suit in the United States District Court for the Northern District of California, which held: (1) the Agency had violated Title VII because Johnson was more qualified for the dispatcher position than Joyce; (2) sex was the determining factor in the Agency's selection of Joyce for promotion; and, (3) the Agency's Plan was invalid under the *Weber* requirement that such a plan be temporary.[370] The Court of Appeals for the Ninth Circuit reversed, holding that the absence of an express termination date in the Plan

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362. *Id.*

363. *Id.*

364. *Id.* at 1447-48.

365. *Id.* Seventy percent was the cutoff for eligibility. *Id.*

366. *Id.* at 1448.

367. *Id.* The record reflected that Joyce had had disagreements with two of the three members of the second interview panel. One member had been her first supervisor when she started as a road maintenance worker and the dispute occurred after Joyce complained that her male co-workers had been given coveralls and she had not. When her supervisor did not respond, Joyce filed a grievance and was issued four pair of coveralls the next day. *Id.* n.5.

368. *Id.* at 1448.

369. *Id.*

370. *Id.* at 1449.

was not dispositive, because the Plan's expressed objective was the attainment, rather than the maintenance, of a work force mirroring the labor force in the county.[371] The Supreme Court granted certiorari[372] and affirmed.[373]

Justice Brennan, writing for the plurality, held that the determination of the validity of the Plan was to be made within the context of the four factors announced in *Weber*: (1) whether the purpose of the plan is directed toward correcting a manifest imbalance in the work force in traditionally segregated job categories; (2) whether the plan unduly trammels the rights of the formerly favored class; (3) whether the plan poses an absolute bar to the advancement of the formerly favored class; and, (4) whether the plan was limited and temporary.[374]

Justice Brennan first determined that an employer could consider the sex of an applicant for a skilled craft job where there existed a "manifest imbalance" which reflected the underrepresentation of women in traditionally segregated job categories.[375] Justice Brennan stated that a "manifest imbalance"[376] for entry into training pro-

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371. 748 F.2d at 1312, *modified*, 770 F.2d 752 (1985).

372. 106 S. Ct. 3331 (1987).

373. 107 S. Ct. 1442 (1987). Justice Brennan announced the 6-3 judgment of the Court. Joining in the plurality opinion were Justices Marshall, Blackmun, Powell and Stevens. Justice Stevens filed a concurring opinion and Justice O'Connor filed an opinion concurring in the judgment. Justice White filed a dissenting opinion as did Justice Scalia who was joined by Chief Justice Rehnquist and by Justice White in Parts I and II. *Id.* at 1445.

374. *Id.* at 1449 (citing *Weber*, 443 U.S. 193 (1979)). Justice Brennan noted that no constitutional issue was raised or addressed in the litigation below (citing 748 F.2d 1308 n.1 (1984)). He held, however, that where the issue is properly presented, public employers must justify the adoption and implementation of a voluntary affirmative action plan under the equal protection clause (citing *Wygant,* 106 S. Ct at 1848). He disagreed with the dissent's argument that the obligations of a public employer under Title VII must be identical to its obligations under the Constitution and that a public employer's adoption of an affirmative action plan should be governed by *Wygant* and not *Weber*. He stressed that the issue had been resolved in *Weber* where the Court held that Title VII was enacted pursuant to the commerce power to regulate purely private decision-making and was not intended to incorporate the commands of the fifth and fourteenth amendments. 107 S. Ct. at 1449-50.

375. *Id.* at 1452.

376. *Id.* Justice Brennan also said that where a job requires no special skills a "manifest imbalance" is determined by comparing the percentage of minorities or of women working in that unskilled job with the percentage of unskilled workers in the general population or in the local work force; where the job requires special training, (i.e., teaching), the percentage of minorities or women in the employer's trained work force should be compared with the percentage of trained minorities or women in the local work force. *Id.*

grams for the skilled crafts and for promotion to skilled positions is determined by comparing the percentage of minorities or women in the employer's skilled work force with the percentage of both skilled and unskilled minorities in the overall labor force.[377]

Justice Brennan also maintained that the imbalance need not be sufficiently gross or direct so as to support a prima facie case of a pattern or practice claim.[378] He concluded that the Agency's employment decision was permissible because it was made pursuant to a plan that (1) had a purpose of remedying the underrepresentation of women in traditionally segregated job categories; (2) did not authorize blind hiring;[379] and, (3) expressly directed that numerous factors be taken into account when making employment decisions.[380] Even though a precise short-term goal was not in place when Joyce was promoted, Justice Brennan concluded that the Plan was valid because no female had ever been a dispatcher and the promotion worked toward the long-term goal of mirroring the presence of women in the labor market.[381]

Justice Brennan then decided that the Plan did not unnecessarily trammel male employees' rights nor did it create an absolute bar to male advancement within the Agency.[382] He noted that the Plan was temporary in nature, contained no set-asides for women and upset no legitimate firmly rooted expectation on Johnson's part, as the Agency director was authorized to select any of the seven qualified candidates.[383] The Plan did not mandate that any positions be "reversed" for women; it did not require the Agency to hire minimally qualified employees; it contained no quotas;[384] and it did not exclude anyone from having his or her qualifications weighed against those of other applicants.[385] Finally, the Plan was temporary

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377. *Id.* Justice Brennan maintained that since skilled minority and women workers are likely to be as rare outside a particular workplace as inside, a comparison of only skilled workers would perpetuate the imbalance forever and forestall training and promotion opportunities proportional with work force share. *Id.*

378. *Id.* at 1454. *See supra* text accompanying notes 16-24 for a definition of "systemic disparate treatment" and "adverse impact."

379. 107 S. Ct. at 1454. The Plan recognized that certain skills were necessary for particular jobs. *Id.*

380. *Id.*

381. *Id.* at 1455.

382. *Id.*

383. *Id.*

384. *Id.* The Plan expressly stated that its goals should not be construed as "quotas" that must be met. *Id.*

385. *Id.* at 1456.

in that it was intended to attain, rather than maintain, a representative work force and its goals were restricted in time and moderate in execution.[386] Justice Brennan concluded that the Agency had sought to take a moderate, flexible, case-by-case approach to improve the representation of minorities and women at the Agency consistent with Title VII.[387]

Justice Stevens concurred, agreeing that the employer could take an applicant's sex into account as the purpose of Title VII was not to absolutely prohibit preferential hiring in favor of minorities but to protect historically disadvantaged groups against discrimination.[388] Title VII was not intended to restrict management efforts in that regard.[389] He also stated that the record supported the conclusion that the employer's desire to create diversity in a category of employment that had been almost totally male was a legitimate purpose.[390]

Justice O'Connor concurred in the judgment stating that the proper inquiry for evaluating the legality of an affirmative action plan by a public employer under Title VII is identical to that required by the equal protection clause.[391] She explained that, while the employer need not point to any contemporaneous findings of actual discrimination, there must exist a "firm basis" for the employer's belief that remedial action was required.[392] Such a basis can be demonstrated, for both constitutional and Title VII purposes, by a statistical disparity sufficient to support a prima facie Title VII pattern or practice claim of discrimination brought by the employee beneficiaries of the affirmative action plan.[393] She stated that *Wygant,* a constitutional case, is consistent with *Weber*, a Title VII case, because, in both, affirmative action was permitted only as a remedial tool to eliminate either actual or apparent

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386. *Id.* at 1457.
387. *Id.* at 1457-58.
388. *Id.* at 1459-60.
389. *Id.*
390. *Id.* at 1460. He suggested that employers should not focus on the history of discriminatory practices in its or society's past; instead, employers should attempt to achieve a racially integrated future which is not based on racial balancing per se. *Id.*
391. *Id.* at 1461.
392. *Id.* Justice O'Connor maintained that this "firm basis" must be consistent with the congressional intent to provide some measure of protection to the interests of the employer's nonminority employees. *Id.*
393. *Id.* A "pattern and practice" cause of action is discussed *supra* note 21.

discrimination by the employer or the lingering effects of such discrimination.[394] Justice O'Connor concluded that since women constituted approximately five percent of the local labor pool of skilled craftworkers in 1970 and there were no women in the skilled craft position, the statistical disparity would have been sufficient to establish a prima facie Title VII case.[395]

Justice White dissented, arguing that, in *Weber*, the employer's plan did not violate Title VII because it was designed to remedy both the employer's and the union's intentional and systematic exclusion of blacks from certain job categories.[396] This, according to Justice White, is what the Court meant by "traditionally segregated jobs."[397] He charged that the majority interpreted the *Weber* requirement to mean nothing more than a manifest imbalance between one identifiable group and another in an employer's work force and, as such, distorted Title VII.[398] Justice White would have overruled *Weber* and the reversed the judgment.[399]

Justice Scalia also dissented, arguing that the Plan had an impermissible discriminatory effect on Johnson.[400] Justice Scalia reasoned that since the district court found no previous sex discrimination, the purpose of the Plan could not have been to remedy past discrimination.[401] He then contended that the Court had disregarded its prior decisions by now holding that racial or sexual discrimination is permitted under Title VII when such discrimination is intended to overcome societal attitudes which have limited the entry of persons of a particular race or sex into certain jobs.[402]

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394. *Id.* at 1462. She disagreed with Justice Stevens' suggestion that affirmative action might be appropriate for any reason that might seem "sensible from a business or social point of view." *Id.* at 1461.

395. *Id.* at 1465.

396. *Id.*

397. *Id.*

398. *Id.*

399. *Id.*

400. *Id.* at 1471.

401. *Id.* He then charged that the objective of the Plan was not to "replicate what a lack of discrimination would produce" but to give each protected group a "governmentally determined 'proper' proportion of each job category" (i.e., the Agency's "Platonic ideal of a work force"). *Id.*

402. *Id.* at 1469-71. He addressed Justice O'Connor's argument that under Title VII an employer may discriminate affirmatively if it has a "firm basis" for believing that it might be guilty of discrimination and if its action is designed to remedy that suspected prior discrimination. Justice Scalia identified two problems with his analysis in this case: (1) even assuming the Agency's belief in its prior

Justice Scalia then argued that *Weber* should be overruled on constitutional grounds because it ignored Title VII's clear mandate that discrimination against any individual because of his race or sex is illegal.[403] He also argued that *Weber* should not be reaffirmed on the basis of *stare decisis* considerations.[404] Justice Scalia predicted that the failure to engage in reverse discrimination would be economic folly and perhaps a breach of duty to shareholders or taxpayers where the cost of anticipated Title VII litigation[405] and of convincing federal agencies by nonnumerical means that no discrimination exists exceeds the cost of hiring less capable (though still minimally capable) workers.[406] He concluded by stating that the irony of the Court's decision is that predominantly unknown, unaffluent, and unorganized individuals suffer injustice at the hands of a Court "fond of thinking itself the champion of the politically impotent."[407]

It is apparent that a plurality of the Court believes that: (1) private and public employers, consistent with sections 703(a) and 703(j), can voluntarily adopt affirmative action plans (*Weber*) and (*Johnson*); (2) a court cannot, consistent with sections 703(h)[408] and 706(g), require compliance with a consent decree which provides for affirmative action by overriding a bona fide seniority system (*Stotts*); (3) a court can, consistent with section 706(g), approve a consent decree which provides for affirmative action (*Local 93*); and, (4) a court which finds the employer guilty of egregious

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discrimination, the Plan was not designed to remedy prior discrimination but to establish a sexually representative work force; and, (2) an absolute zero is not determinative of a belief on the employer's part that it discriminated because it may be aware of particular reasons that account for the zero. *Id.* at 1470 n.4.

403. *Id.* at 1472.

404. *Id.* at 1473. He argued that the Court has applied the doctrine of *stare decisis* to civil rights statutes less rigorously than to other laws and that *Weber* was a dramatic departure from the Court's prior Title VII precedents. Since *Weber* was decided only seven years previously and had provided little guidance to persons seeking to conform their conduct to the law, *stare decisis* considerations were not compelling. *Id.*

405. *Id.* at 1475. Justice Scalia further argued that even if the employer is confident of prevailing in a discrimination lawsuit, the expense and adverse publicity of a trial must be contemplated. The extent of the imbalance and the "job relatedness" of the employer's selection criteria are questions of fact which must be proven in court in order to rebut a prima facie case consisting only of a showing that the selection process chooses those from the protected class at a "significantly lesser rate than their counterparts". *Id.*

406. *Id.*

407. *Id.* at 1476.

408. 42 U.S.C. § 2000e-2(h). Section 703(h) is set forth *supra* note 17.

discrimination can order remedial affirmative action relief consistent with section 706(g) (*Local 28*). The Court has also determined that: (1) a congressional statute providing for set-asides is constitutional (*Fullilove*); (2) a public employer cannot constitutionally agree to affirmative action which requires whites to be laid off without proof that the employer was guilty of prior discrimination and that this remedy is narrowly tailored (*Wygant*); and, (3) a court can constitutionally require, an interim, one-for-one promotion requirement after finding systematic discrimination (*Paradise*).

II. The Synonymous Test[409]

When any type of affirmative action plan is challenged, the controlling test for both Title VII and equal protection actions involves the identical two-pronged inquiry: (1) is there a sufficient demonstration of intentional discrimination by the employer[410] and, (2) is the remedy narrowly tailored, in light of other alternatives, to eliminate that discrimination. The employer can meet the discrimination prong of this test by producing evidence, for all but the judicial remedy,[411] of a *firm basis* for concluding that the employer has intentionally engaged in past or present discrimination or used policies or practices which have left uncorrected past discrimination or which have a present discriminatory effect ("fac-

409. Various authors have discussed related issues not specifically addressed in this article. For example, one author argues effectively that the framers of the fourteenth amendment could not have intended it to generally prohibit all affirmative action for blacks or other disadvantaged groups. Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Virg. L. Rev. 753 (1985). Another author focuses on the conflict between nondiscrimination and integration as interpreted by the courts and as viewed in terms of an underlying philosophical theory of justice. Farrell, *Intergating by Discriminating: Affirmative Action that Disadvantages Minorities*, 62 U. Detr. L. Rev. 553 (1985). A third author argues that the traditional conceptions of equality and discrimination do not serve the purposes of Title VII and that the proper analytic framework should be based on an "access principle." Friedman, *Redefining Equality, Discrimination, and Affirmative Action Under Title VII: The Access Principle*, 65 Texas L. Rev. 41 (1986).

410. The term "employer" includes labor organizations, employment agencies and joint labor-management committees. The term "employee" includes applicants, trainees, and any other person protected by Title VII.

411. Section 706(g) requires that the court find the employer guilty of discrimination before it may award relief under that section. Except in adverse impact cases, no judicial remedy can be awarded unless the employer or union has been found guilty, in accordance with rules of evidence, of intentional discrimination in violation of § 703.

tual basis" or "discrimination test"). This evidence does not require an employer admission of discrimination and the employer need not identify the victims of that discrimination. The remedy prong can be met only if the relief is designed to eliminate the employer's identified discrimination, is temporary, provides for goals that have "safety valves," and does not impinge on the employee's contractual or Title VII rights or expectation interests ("remedy test").

Part A of the following discussion summarizes the holdings of the previously discussed cases. Part B analyzes both the discrimination and the remedy tests in the context of voluntary affirmative action, consent decrees and judicial remedies.

A. Case Holdings

1. Voluntary Affirmative Action: Weber, Wygant, and Johnson

a. Weber[412]

The Court held, in a 5-2 decision, that sections 703 (a), (d), and (j) are not violated when private sector employers and unions take affirmative race-conscious steps designed to eliminate manifest racial imbalances in traditionally segregated job categories as long as such action does not trammel unnecessarily the interests of white employees by requiring the discharge of white workers and their replacement with new black hirees. The affirmative race-conscious action in this case did not create an absolute bar to the advancement of white employees because the action was a temporary measure which was intended to eliminate a manifest racial imbalance not maintain a racial balance.

b. Wygant[413]

The Court held, in a 5-4 decision, that the equal protection clause of the fourteenth amendment was violated when a public employer agreed to a collectively bargained for affirmative action plan requiring race-based layoffs and there was neither a showing of prior discrimination by the employer nor a showing that this remedy was

412. *See* the discussion *supra* at notes 30-67 and the accompanying text.
413. *See* the discussion *supra* notes 106-145 and the accompanying text.

narrowly tailored and the least intrusive means of accomplishing the employer's stated goal.

c. *Johnson*[414]

The Court held, in a 6-3 decision, that section 703(a) was not violated by a public employer who voluntarily adopted an affirmative action plan under which an individual's sex could be taken into account as one factor in making promotion decisions where there was a manifest statistical imbalance in the relevant job category and where the remedy meets the *Weber* standards.

2. *Consent Decrees and Injunctions: Stotts and Local 93*

a. *Stotts*[415]

The Court held, in a 5-4 decision, that sections 703(h) and 706(g) were violated when a district court enjoined a city from following its bona fide seniority system to determine who was to be laid off as a result of a budgetary shortfall. Absent either a finding that the seniority system was adopted with discriminatory intent or a determination that such a remedy was necessary to make whole a proven victim of discrimination, the district court's order was not justified as a way to enforce the terms of an agreed upon consent decree or as part of the court's inherent authority to modify the decree.

b. *Local 93*[416]

The Court held, in a 6-3 decision, that section 706(g) was not violated when a public employer entered into a consent decree requiring promotions for its minority firefighters who were not the actual victims of past discriminatory practices because the consent decree was not a 706(g) order and did not violate any other provision of Title VII.

3. *Judicial Remedies: Local 28 and Paradise*

a. *Local 28*[417]

The Court held, in a 5-4 decision, that section 706(g) was not violated when a district court ordered affirmative race-conscious

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414. *See* the discussion *supra* notes 355-407 and the accompanying text.
415. *See* the discussion *supra* notes 146-191 and the accompanying text.
416. *See* the discussion *supra* notes 255-301 and the accompanying text.
417. *See* the discussion *supra* notes 192-254 and the accompanying text.

relief by a certain date for nonvictims where an employer or a labor union had engaged in persistent or egregious discrimination. The Court determined that such relief was also mandated where necessary to dissipate the lingering effects of pervasive discrimination as long as the remedy was narrowly tailored to eliminate that discrimination and did not trammel unnecessarily the interests of nonminority employees.

b. *Paradise*[418]

The Court, in a 5-4 decision, held that the equal protection guarantee of the fourteenth amendment was not violated when a district court awarded relief requiring a one-black-for-one-white promotion procedure as an interim measure for state trooper promotions in a public safety department where there had been systematic and total exclusion of blacks from employment as state troopers in that department and where the remedy was narrowly tailored to address that discrimination.

4. *Legislation: Fullilove*

a. *Fullilove*[419]

The Court held, in a 6-3 decision, that the equal protection provision of the due process clause of the fifth amendment is not violated when Congress enacts legislation providing for a ten percent set-aside of contracting grants for minorities. Congress has the power to enact such legislation as long as constitutionally permissible means, are employed (i.e., the program narrowly tailored to achieve Congress' remedial objectives, it provides for safety valves, and it is subject to continuing evaluation and reassessment).

B. The Showing of Discrimination

1. The Enunciated Tests

a. *Voluntary Plans*

1.) *Equal Protection*

Appropriate voluntary affirmative action remedies developed to rectify race discrimination are not upheld unless there is a showing

418. *See* the discussion *supra* notes 302-354 and the accompanying text.
419. *See* the discussion *supra* notes 68-105 and the accompanying text.

that the racial classification is justified by a compelling governmental interest.[420] While a factual determination that the employer had a "strong basis in evidence that remedial action was necessary"[421] can be a sufficient showing for equal protection purposes, the role model theory[422] and general societal discrimination are not sufficient governmental interests to justify a racial classification because these reasons are unrelated to remedying prior intentional governmental discrimination.[423]

Justice O'Connor argues that a remedial purpose can be shown by particularized, contemporaneous findings of discrimination by the public employer or by "information" which gives public employers a "sufficient basis" for concluding that remedial action is necessary.[424] The public employer's "information" can be demonstrated by a showing of statistical disparity between the percentage of minorities in the employer's work force and the percentage of qualified minorities in the relevant labor pool if such statistics would be sufficient to support a prima facie Title VII pattern or practice claim by minority plaintiffs.[425]

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420. The strict scrutiny test, used for a racial classification, asks whether the remedy is narrowly tailored to serve the *compelling* governmental interest of eliminating race discrimination. *Paradise*, 107 S. Ct. at 1064. The test usually employed for sex is less restrictive: whether the remedy is substantially related to the *important* governmental interest of eliminating sex discrimination. Personnel Adminstrator v. Feeney, 442 U.S. 256 (1979).

421. *Wygant*, 106 S. Ct. at 1848.

422. *Id.* at 1847-49. In *Wygant*, Justice Powell reasoned that the role model theory, which ties the required percentage of minority teachers to the percentage of minority students, had no logical stopping point because it permits discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose. *Id.* at 1847. Further, Justice Powell commented that the theory does not necessarily bear a relationship to the harm caused by prior discriminatory hiring practices because a small percentage of black teachers could be justified by a small percentage of black students. *Id.* at 1847-48.

423. *Id.*

424. *Id.* at 1855-56. Justice O'Connor argued that particularized findings should not be mandated because of the legal risks attendant to requiring such findings as well as the anomalous result that public employers would be constitutionally forbidden to correct their statutory and constitutional violations using the same methods that private employers can voluntarily employ to correct Title VII violations. *Id.* Also, she explained, if public employers are required to make particularized findings of past discrimination, they are caught between the competing hazards of liability to minorities if affirmative action is not taken to remedy the admitted employment discrimination and liability to nonminorities on a reverse discrimination claim if affirmative action is taken. *Id.*

425. *Id.* at 1856.

2.) Title VII

Appropriate voluntary affirmative action remedies are justified by the existence of a "manifest imbalance" that reflects an under-representation of blacks or women in traditionally segregated job categories.[426] For entry into training programs for the skilled crafts and for promotion to skilled positions, a "manifest imbalance" is determined by comparing the percentage of minorities or women in the employer's skilled work force with the percentage of both skilled and unskilled minorities in the overall labor force.[427] Although the imbalance must be "manifest," it need not be as gross or direct as is necessary to support a prima facie case of a pattern or practice claim.[428]

Justice O'Connor argues that, while no contemporaneous findings of actual discrimination need be shown, the employer must have had a "firm basis" for believing that remedial action was required.[429] Such "basis" can be demonstrated, for both constitutional and Title VII purposes, by a statistical disparity sufficient to support a prima facie pattern or practice claim of discrimination under Title VII.[430] She insists that *Wygant*,[431] a constitutional case, is consistent with *Weber*,[432] a Title VII case, because, in both, affirmative action was permitted only as a remedial tool to eliminate actual or apparent employer discrimination or the lingering effects of such discrimination.[433]

b. Consent Decrees; Injunctions[434]

1.) Title VII

Both *Stotts*[435] and *Local 93*[436] involved factual situations where a city was found to have engaged in prior, systematic intentional

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426. *Weber*, 443 U.S at 209-10 and *Johnson*, 107 S. Ct. at 1452-54.

427. *Johnson*, 107 S. Ct. at 1452. *See also supra* note 377.

428. *Johnson*, 107 S. Ct. at 1454. All of the dissenters argued that, after *Johnson*, *Weber* requires nothing more than a showing of a manifest imbalance between one identifiable group and another in an employer's work force and, as such, distorts Title VII; therefore, *Weber* should be overruled on constitutional grounds. *Id.* at 1465-75.

429. *Id.* at 1462.

430. *Id.*

431. 106 S. Ct. 1842 (1986).

432. 443 U.S. 193 (1979).

433. 107 S. Ct. at 1462.

434. The Supreme Court has not yet ruled on a case charging that the court's enforcement of a consent decree is a violation of the equal protection clause.

435. 467 U.S. at 565-66.

436. 106 S. Ct. at 3067.

discrimination which had not been eliminated by prior consent decrees. The Court saw no reason to distinguish between voluntary action taken outside the context of the litigation and voluntary action taken in the context of a consent decree; however, there were fourteenth amendment considerations applicable to public employers in both situations.[437] In *Local 93*,[438] Justice O'Connor emphasized that before race-conscious remedies can be permitted, there must be a factual predicate of prior discriminatory conduct.

c. *Judicial Remedies*

1.) Equal Protection

The state has a compelling governmental interest in remedying both the past and present pervasive, systematic, and obstinate discriminatory exclusion of blacks by a state entity and in furthering society's interest in compliance with federal court judgments.[439]

2.) Title VII

Under section 706(g), a judicial finding of intentional individual or systemic disparate treatment can be the predicate of any affirmative action relief.[440]

2. Discussion

In the context of voluntary plans or consent decrees, the cases give little direction as to the requisite showing of discrimination[441] which would provide a reasonable basis for the employer to conclude that affirmative action is appropriate.[442] As the composition of the Court changes, there is serious question as to whether discrimination in Title VII actions can be shown by a manifest statistical imbalance without some showing of the employer's actual

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437. *Id.* at 3073.

438. *Id.* at 3075.

439. *Paradise*, 107 S. Ct. at 1065.

440. *Local 28*, 106 S. Ct. at 3035.

441. Indeed, although the language of Title VII refers many times to "discrimination," Title VII does not define the term. Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983).

442. The Court viewed consent decrees as more like "agreements" than court orders subject to the § 706(g) requirement of intentional engagement in unlawful employment practies. *Local 93*, 106 S. Ct. at 3073.

or apparent discrimination.[443] For equal protection purposes, a showing of a manifest statistical imbalance, without a showing of the employer's actual or apparent discrimination, will not constitute a sufficient showing of discrimination.[444] The critical question, therefore, is what evidence must be shown to provide a reasonable basis for the employer's conclusion that affirmative action is appropriate in the context of voluntary affirmative action or a consent decree?

a. *Factual Predicate of Employer's Intentional Discrimination*

The fundamental focus, for both equal protection and Title VII affirmative action inquiries, should be whether there exists some evidence of actual past or present discrimination *by the employer*, not by society at large. This focus is consistent with the Court's requirement that the affirmative action remedy be designed to eliminate an employer's present discrimination or to correct an employer's past discrimination. This focus also serves as the correct backdrop for the employer's determination of whether there exists a reasonable basis for determining that affirmative action is appropriate and as the correct framework within which a remedy that eliminates that discrimination is narrowly tailored in light of the circumstances.

The necessary factual basis for a voluntary plan should be a reasonable employer self-analysis which demonstrates one or more employment practices that *may* leave uncorrected the effects of prior discrimination or that *may* result in disparate treatment of members of a protected class. This analysis need not reveal a violation of Title VII or require an admission by the employer of such a violation. It is suggested that the self-analysis should pattern the guide promulgated by the Equal Employment Opportunity Commission in its Regulation 1608.4(1)-(c), Guidelines On Affir-

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443. The cases reflect fundamental differences among the Justices as to the requisite showing of discrimination. For example, Justice O'Connor consistently emphasizes that the record must reflect a "firm basis" or "legitimate factual predicate" of the employer's intentional discrimination. Justices Blackmun, Brennan, and Marshall maintain that discrimination is shown under Title VII if statistics indicate a "manifest imbalance in traditionally segregated job categories." Justices Rehnquist, Scalia, and White require a showing of actual, intentional discrimination and only permit a remedy for identified victims.

444. *Washington v. Davis, supra* note 24.

mative Action,[445] without requiring proof of discrimination by a demonstration of adverse impact. Following these guidelines would establish a standard for determining whether a factual basis of discrimination *may* exist for both Title VII and equal protection purposes. Such a standard is also familiar to the public and, in the Title VII context, provides for a defense to challengers of plans.[446]

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445. Guidelines On Affirmative Action, 44 Fed. Reg. 4422 (1979), 29 C.F.R. § 1608.

§ 1608.4 Establishing affirmative action plans.

An affirmative action plan or program ... shall contain three elememts: reasonable self analysis; a reaonable basis for concluding action is appropriate; and reasonable action.

(a) Reasonable self analysis. The objective of a self analysis is to determine whether employment practices do, or tend to, exclude, disadvantage, restrict, or result in adverse impact or disparate treatment of previously excluded or restricted groups or leave uncorrected the effects of prior discrimination, and if so, to attempt to determine why. There is not mandatory method of conduction a self analysis. The employer may utilize techniques used in order to comply with Executive Order No. 11246., as amended, and ... (Revised Order 4), or related orders issued by the Office of Federal Contract Compliance programs or its authorized agencies, or may use an analysis similar to that required under other federal, state, or locals laws or regulations prohibiting employment discrimination. In conducting a self analysis, the employer ... should be concerned with the effect on its employment practices of circumstances which may be the result of discrimination by other persons or institutions. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

(b) Reasonable basis. If the self analysis shows that one or more employment practices: (1) Have or tend to have an adverse effect on employment opportunities of members of previously excluded groups, or groups whose employment or promotional opportunities have been artificially limited, (2) leave uncorrected the effect of prior discrimination, or (3) result in disparate treatment, the person making the self analysis has a reasonable basis for concluding that action is appropriate. It is not necessary that the self analysis establish a violation of Title VII. This reasonable basis exists without any admission or formal finding that the person has violated Title VII, and without regard to whether there exists arguable defenses to a Title VII action.

(c) Reasonable action. The action taken pursuant to an affirmative action plan or program must be reasonable in relation to the problems disclosed by the self analysis. Such reasonable action may include goals and timetables or other appropriate employment tools which recognize the race, sex, or national origin of applicants or employees. It may include the adoption of practices which will eliminate the actual or potential adverse impact, disparate treatment or effect or (sic) past discrimination by providing opportunities for members of groups which have been excluded, regardless of whether the persons benefited were themselves the victims of prior policies or procedures which produced the adverse impact or disparate treatment or which perpetuated past discrimination.

446. § 1608.10(b), 29 C.F.R. § 1608.10(b), provides:

(b) Reliance on these guidelines. If a respondent asserts that the action taken

b. A Showing of Adverse Impact is Not Sufficient to Establish a Factual Basis of Discrimination

Although it is relevant, the concept of adverse impact has no place in demonstrating discrimination for either equal protection or Title VII purposes where affirmative action is the remedy.[447] As explained in Part One, absent some evidence of the employer's intentional discrimination, statistics alone are not a dispositive demonstration of intentional discrimination in equal protection cases.[448] Proof of discrimination by statistics alone in Title VII systemic-disparate-treatment (i.e., pattern or practice) challenges is

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was pursuant to and in accordance with a plan or program which was adopted or implemented in good faith, in conformity with, and in reliance upon those guidelines, and the self analysis and plan are in writing, the Commission will determine whether such assertion is true. If the Commission so finds, it will so state in the determination of no reasonable cause and will advise the respondent that:

(1) The Commission has found that the respondent is entitled to the protection of section 713(b)(1) of Title VII; and

(2) That the determination is itself an additional written interpretation or opinion of the Commission pursuant to section 713(b)(1).

Section 713(b)(1), 42 U.S.C. § 2000e-12(b)(1), provides:

(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment of or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or reliance on any written interpretation or opinion of the Commission ... . Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect....

A related issue is the discoverability of the factual basis for determining that affirmative action may be appropriate. Employers defending such plans have argued, in appropriate circumstances, that the analysis underlying the determination to adopt such a plan is not discoverable because it constitutes "work-product" performed in anticipation of litigation or is protected from discovery because of the "self-critical analysis" privilege. *The Self-critical Analysis Privilege and Discovery of Affirmative Action Plans in Title VII Suits*, 83 MICH. L. REV. 405 (1984). In this article, the author states that plaintiffs bringing Title VII actions are usually interested in either the statistics or the self-analysis of company policy contained in affimative action plans and often attempt to obtain this information from the defendant employer during discovery or through the Freedom of Information Act. *Id.* at 406-07. The author suggests that plaintiffs should have access to the plans in discovery and that the self-evaluative privilege should not be applied but that the plans should be produced under a protective order.

447. An aggrieved party would still have a cause of action under § 703(a)(2). The employer should be enjoined from using the practice causing the impact, but affirmative action is not an appropriate remedy because actual or apparent intentional discrimination is not demonstrated.

448. *See Davis*, *supra* notes 23 and 24.

permitted only if the record contains testimony of actual victims of the employer's discrimination.[449] Since adverse impact cannot prove intentional employer discrimination, a remedy based on those statistics cannot be addressed to eradicating the employer's intentional discrimination.

In a potential adverse impact case, a diligent search will usually produce identifiable victims so that the plaintiffs can bring a systemic-disparate-treatment case rather that an adverse impact case. Likewise, to show past discrimination, the employer should look beyond the mere statistics and identify *possible* victims without incurring liability to any one *actual* victim. This is consistent with both the purposes of affirmative action and with the Court's decisions in the voluntary affirmative action cases—*Weber* and *Johnson*—in the consent decree case— *Local 93*—in all Title VII cases where the affirmative action remedy was approved, and in *Wygant*, an equal protection case where the affirmative action remedy was not approved.

In *Weber*, there was statistical proof that less than two percent of the employer's work force was black even though blacks represented thirty-nine percent available work force.[450] There was also evidence that the employer knowingly hired from the all-white Union.[451] In *Johnson*, there was statistical proof that women were not represented in the relevant work force, but constituted ten percent of the available work force.[452] While a majority of the Court in both *Weber* and *Johnson* found discrimination on the basis of a manifest imbalance in a traditionally segregated job category, the statistical basis in both cases reflected that the employer employed members of the protected class at or very near the "inexorable zero,"[453] therefore, intentional discrimination could be implied. Also, the concurrences in both cases stated that the record supported a finding of an "arguable violation"[454] or a "firm basis"[455] that intentional discrimination existed.

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449. A "pattern or practice" case is discussed *supra* note 21.

450. *Weber*, 443 U.S. at 198-99.

451. *Id.*

452. *Id.* There was also evidence that Joyce had been a victim of discrimination in the past. *Id.*

453. Teamsters v. United States, 431 U.S. 324 (1977). The Court held that "the company's inability to rebut the inference of discrimination came not from a misuse of statistics but from the 'inexorable zero.'" *See supra* notes 21 and 22 and accompanying text.

454. *Weber*, 443 U.S. at 211-15 (Blackmun, J., concurring). The employer's

In *Local 93*, evidence that the City's past discrimination was uncorrected formed the basis upon which the parties negotiated a consent decree which the Court approved.[456] By contrast, in *Wygant*, the record did not reveal any evidence of discrimination by the employer and the Court held that a showing of societal discrimination is not enough for an equal protection challenge.[457] The records in *Weber*, *Johnson*, and *Local 93*, however, all reflected evidence of possible past or present disparate treatment.

c. *Conclusion*

To justify affirmative action, the facts or the employer's self-analysis should reveal at least one employment practice that *may* leave the effects of the employer's prior discrimination uncorrected or that *may* result in disparate treatment of unidentified members of the protected class. Neither statistics of a manifest imbalance alone nor general societal discrimination can constitute a sufficient showing of discrimination for either Title VII or equal protection purposes in the affirmative action context because such evidence does not focus on the employer's intentional discriminatory actions. However, statistics that reflect employment of members of the protected class at or very near the "inexorable zero" can be strong, but not the sole, evidence of a factual basis for affirmative action under both Title VII and the equal protection clauses.

C. The Remedy

1. The Enunciated Tests

a. *Voluntary Plans*

1.) *Equal Protection*

Under the *Wygant* analysis, a remedy is appropriate where the means chosen by the state are narrowly tailored to achieve the

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intentional selection of applicants from an all-white union was an "arguable violation."

455. *Johnson*, 107 S. Ct. at 1460 (O'Connor, J., concurring). The employer's intentional selection of applicants from traditionally all-male departments was a "firm basis" on which to predicate an affirmative action plan.

456. *Local 93*, 106 S. Ct. at 3072.

457. *Wygant*, 106 S. Ct. at 1847.

compelling state interest in eradicating present or past actual or apparent invidious discrimination.[458] While a sharing of the burden by innocent parties is not impermissible as long as the burden is not significant, layoffs, as opposed to hirings, impose the entire burden of achieving racial equality on particular nonminority individuals; therefore, a layoff plan is not sufficiently narrowly tailored for purposes of the equal protection clause.[459]

2.) Title VII

A remedy is appropriate under *Weber*[460] and *Johnson*[461] if: (1) the purpose of the plan is directed toward correcting a manifest imbalance in the work force in traditionally segregated job categories; (2) the plan does not unduly trammel the rights of the formerly favored class by calling for set-asides or by upsetting legitimate rights or firmly rooted expectations; (3) the plan does not pose an absolute bar to the advancement of the formerly favored class by reserving positions for the minority or by requiring the hiring of unqualified or minimally qualified employees or by mandatory hiring in accordance with a quota; and, (4) the plan is temporary and will be discontinued when a representative work force is attained.

b.) Consent Decrees; Injunctions

1.) Title VII

As long as a consent decree does not conflict with section 703, as in *Stotts*,[462] the district court is not barred from entering such a decree merely because it might lack authority under section 706(g) to do so.[463]

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458. *Id.* at 1852.

459. *Id.* Justice Powell compared the burden borne by innocent individuals in cases involving valid general hiring goals as opposed to layoff requirements and concluded that hiring goals are not as intrusive as the layoffs. *Id.* While the goals involve a denial of future employment opportunities, layoffs are too intrusive as they cause a loss of existing jobs, a disruption of settled expectations of the stability and security of seniority and impose the entire burden of achieving racial equality on particular individuals. *Id.*

460. 443 U.S. at 208-209.

461. 107 S. Ct. at 1455-57.

462. 467 U.S. 561 (1984).

463. *Local 93*, 106 S. Ct. at 3077-78. Justice Brennan distinguished *Stotts* by explaining that the Court held a disputed modification of a consent decree could not be entered by the district court where the resulting order was inconsistent with § 703(h). *Id.*

c.) Judicial Orders

1.) Equal Protection

A remedy is narrowly tailored to eliminate egregious discrimination if: (1) the relief is necessary to eliminate prior egregious discrimination; (2) the relief is the only feasible alternative in light of other alternative remedies, such as the imposition of fines, costs, and fees; (3) the relief is flexible, contains waiver provisions, and is limited in duration; (4) the relief in the form of a numerical goal has a relationship to the relevant qualified labor market; and, (5) the relief does not impact unnecessarily on the rights of third parties.[464]

2.) Title VII

Affirmative action relief is appropriate where the remedy, including a numerical goal, is designed to eliminate an employer's persistent or egregious discrimination or to dissipate the lingering effects of pervasive discrimination.[465] An affirmative action plan

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464. *Paradise*, 107 S. Ct. at 1066-73. In *Local 28*, which was decided on Title VII grounds, Justice Brennan said that the issue of an alleged violation of the equal protection component of the due process clause of the fifth amendment need not be resolved because the relief ordered passed the most rigorous test: the government had a compelling interest in remedying proven past discrimination and the relief was narrowly tailored to further that interest. 106 S. Ct. at 3053.

Justice Powell concurred and would have ruled that the court-ordered goal met constitutional requirements. In so concluding, he relied on five factors to determine the proper scope of the race-conscious numerical goal: (1) the efficacy of alternate remedies; (2) the planned duration of the remedy; (3) the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or the work force; (4) the availability of waiver provisions if the hiring plan could not be met; and, (5) the effect of the remedy upon innocent third parties. *Id.*

Justice Powell also concluded that the numerical goal comported with constitutional requirements because, absent authority to set a goal as a benchmark against which it could measure progress in eliminating discriminatory practices, the district court may have been powerless to provide an effective remedy. *Id.* at 3056-57. Justice Powell also noted that the goal was of limited duration and was directly related to the percentage of nonwhites in the relevant work force; the goal was not to be applied as an inflexible quota to achieve racial balance and would not substantially burden nonminorities. *Id.* He disagreed with Justice O'Connor's finding that the membership goal was a quota, arguing that the record did not reflect that the district court had enforced the goal in the rigid manner that concerned Justice O'Connor. *Id.* at 3056 n.4.

465. *Local 28*, 106 S. Ct. at 3052.

must be tailored to fit the nature of the violation it seeks to correct in light of alternatives such as fines and contempt citations; such a plan must not trammel unnecessarily the interests of the non-minority employees.[466] Justice O'Connor argues that a numerical goal with an enddate is not a "goal" but a quota[467] and that the district court has no authority under section 706(g) to order a quota.[468]

2. Discussion

Assuming an appropriate showing of discrimination for affirmative action in the the voluntary,[469] consent decree, or judicial

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466. *Id.*

467. *Id.* at 3059. Justice O'Connor explained the difference between a quota and a goal:

> The imposition of a quota is not truly remedial but rather amounts to a requirement of racial balance in contravention of section 703(j)'s clear policy against such requirement . . . [a] goal must be intended to serve merely as a benchmark for measuring compliance with Title VII and eliminating the lingering effects of past discrimination, rather than as a rigid numerical requirement that must unconditionally be met on pain of sanctions. *Id.* at 3060.

In *Local 28*, she argued that the 29.23% membership figure was not a goal because it required that the racial composition of the Union's membership mirror that of the relevant labor pool by August 31, 1987 without regard to variables such as the number of qualified minority applicants available or the number of apprentices needed. *Id.*

468. *Id.* at 3058-62.

469. If the self-analysis shows that employment practices result in disparate treatment or leave uncorrected the effects of prior discrimination, the employer has, according to EEOC Reg. 1608, a reasonable basis for adopting or agreeing to reasonable affirmative action. Regulation 1608.4(c), 41 C.F.R. § 1608.4(c). In its Affirmative Action Regulation 1604.4(c)(1), the EEOC indicated that appropriate affirmative steps could include:

> The establishment of a long term goal and short range, interim goals and timetables for the specific job classifications, all of which should take into account the availability of basically qualified persons in the relevant job market;
> A recruitment program designed to attract qualified members of the group in question;
> A systematic effort to organize work and re-design jobs in ways that provide opportunities for persons lacking "journeyman" level knowledge or skills to enter and, with appropriate training, to progress in a career field;
> Revamping selection instruments or procedures which have not yet been validated in order to reduce or eliminate exclusionary effects on particular groups in particular job classifications;
> The initiation of measures designed to assure that members of the affected group who are qualified to perform the job are included within the pool

remedy context, the test for a valid equal protection affirmative action remedy is identical to the test for a valid Title VII affirmative action remedy. In *Paradise*,[470] an equal protection judicial remedy case, a remedy designed to eliminate the employer's intentional discrimination was found constitutional. In light of the *Paradise* circumstances, the temporary remedy did not impose an unacceptable burden on innocent white promotion applicants.[471] The procedure did not bar such promotions nor did it require layoffs or the discharge of whites; the plan also did not require the hiring of unqualified blacks over qualified whites.[472] However, in *Wygant*,[473] a remedy requiring layoffs was found unconstitutional because it was not narrowly tailored to be the least intrustive means of accomplishing the employer's stated goal. Finally, in *Fullilove*,[474] an equal protection case, the remedy was held constitutional because it was narrowly tailored to achieve Congress' remedial objectives, provided for "safety valves" and was subject to continuing evaluation and reassessment.

For Title VII purposes, the test articulated by the Court in *Weber*,[475] *Johnson*,[476] and *Local 93*,[477] was whether the remedy was a temporary measure designed to eliminate a manifest imbalance and not to maintain a racial or sexual balance. Such a remedy is permissible provided it does not unnecessarily trammel the interests of white employees or create an absolute bar to the advancement of white employees. The test articulated in *Local 28*,[478] a Title VII judicial remedy case, reaffirmed that a remedy is valid as long as it is narrowly tailored to eliminate the employer's discrimination, complies with the *Weber*[479] standards, and does not trammel unnecessarily the interests of nonminority employees.

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of persons from which the selecting official makes the selection;
A systematic effort to provide career advancement training, both classroom and on-the-job, to employees locked into dead end jobs; and
The establishement of a system for regularly monitoring the effectiveness of the particular affirmative action program, and procedures for making timely adjustments in this program where effectivness is not demonstrated.

470. 107 S. Ct. 1053 (1987).
471. *Id.* at 1073.
472. *Id.*
473. 106 S. Ct. 1842 (1986).
474. 448 U.S. 448 (1979).
475. 443 U.S. 193 (1979).
476. 107 S. Ct. 1442 (1987).
477. 106 S. Ct. 3063 (1986).
478. *Id.* at 3072-73.
479. 434 U.S. 193 (1979).

Based on an analysis of the relevant cases, the test for a valid Title VII remedy is identical to the test for a valid equal protection remedy: it must be "narrowly tailored" in light of the available alternatives. This means that the remedy: (1) must be designed to eliminate or to correct the identified present or past discrimination of the employer; (2) must be temporary; (3) must provide for goals that have "safety valves"; and, (4) must not impinge on the employee's Title VII rights or expectation interests.

a. Remedy Designed To Eliminate the Employer's Discrimination

The validity of a remedy which is designed to eliminate an employer's discrimination depends on the severity of the employer's past discriminatory conduct. The Court, as reflected in both the Title VII and equal protection decisions reviewed above, requires that the remedy be "narrowly tailored" to effectuate the goal of eliminating the employer's identified present discrimination or of correcting the effects of the employer's identified past discriminatory conduct. While identified victims should be made whole, the remedies for unidentified victims can be weaker; alternatives such as advertising, redesigning of job descriptions, and special training may be sufficient where specific victims are not identified. On the other hand, when an employer has been found to have intentionally discriminated in related cases or in the case at hand, stronger alternatives such as hiring or promotion goals are appropriate remedies to eliminate the employer's intentional, and often, egregious discrimination.

1.) Barriers

When the circumstances do not reveal direct evidence of an intentional refusal to hire minorities but a firm, factual basis reveals that the employer's current or prior policies were actually barriers to the employment of minorities, affirmative action remedies should be designed to remove those barriers. The appropriate "narrowly tailored" remedy for unidentified victims is not a hiring or promotion goal because the focus of the remedy should be on removal of the barrier and not on the correction of egregious, intentional conduct.

For example, if the identified barrier is the minority's lack of knowledge of job openings because of a policy requiring only in-house hiring, the appropriate remedy may be publicity and adver-

tisements addressed to the minorities; this type of remedy was upheld in *Johnson*.[480] If a policy requiring in-house promotions from jobs traditionally held only by males with certain skills is identified, the appropriate remedy may be to revise the job descriptions, to eliminate the requirement of skills that can only be learned on the job, to provide on-the-job training and to consider the applicant's sex along with other factors in making promotion decisions.[481] All of these remedies are narrowly tailored to eliminate the identified discrimination and involve minimal preference of the minority over the nonminority. In any event, the stronger the barrier, the more necessary a goal becomes, and as long as the goal meets the *Weber-Johnson-Wygant* test, it should be deemed appropriate.

2.) Actual Discrimination

When the circumstances reveal a firm factual basis that the employer, with respect to *unidentified* victims, is intentionally engaging in present discrimination or has left uncorrected past discrimination, the affirmative action remedy should be designed to eliminate or correct that discrimination. Often, the only way the parties can measure whether discrimination is eliminated or corrected is by using a goal that serves as a benchmark.[482] Whether the identified discrimination is a union's refusal to admit qualified black applicants, an employer's varying of job qualifications by pools of applicants so as to bar the hiring of qualified blacks, or an employer's reluctance to hire or promote qualified blacks or women, the appropriate remedy is a goal fashioned in accordance with the *Weber-Local 93-Johnson* test.

When a court finds that the employer has intentionally engaged in egregious discriminatory conduct, the inquiry is the same but from a different point of view. The question is whether the affirmative action remedy, in light of the employer's prior behavior, is the only way the court, in the exercise of reasonable discretion, can determine that the present or past discrimination can be eliminated or corrected. Evidence such as the violation of prior con-

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480. 107 S. Ct. at 1447.

481. The Court approved an affirmative action plan in *Johnson*, 107 S. Ct. at 1453-54, which directed that sex or race be considered for the purpose of remedying the underrepresentation of women and minorities in traditionally segregated job categories.

482. *See* the discussion *supra* note 467.

tempt orders and the ineffectiveness of the imposition of fines and fees are probative of that inquiry. For example, in *Local 28*,[483] the defendants were found in contempt twice before the Court ordered affirmative action. In *Paradise*,[484] the Court made a point of noting that even if the defendants had been ordered to pay fines and attorney's fees, the result would not have been different.

Therefore, in both the voluntary and judicial remedy context, for both equal protection and Title VII purposes, a goal can be a remedy narrowly tailored to eliminate the employer's discrimination. A goal can be fashioned to require that the percentage of minorities in the employer's work force reflects the percentage of the minorities in the qualified labor force. The goal can be numerical and can specify an enddate in the most egregious circumstances. In all cases, however, the goal should include "safety valves" and must be administered by the court and the parties as a benchmark, not as a rigid quota, to measure the degree to which the discrimination has been eliminated or corrected.

b. Remedy That Is Temporary and Has Flexible Goals

A remedy is temporary and has flexible goals when it is designed to cease once the goal is reached[485] and to provide for "safety valves" so that it does not operate as a rigid quota. A remedy includes "safety valves" when it provides for modification in the event that there are no qualified minorities in the available work force or there are no qualified minority applicants, or there is a reduction-in-force by the employer due to economic problems, or similar non-discrimination-related situations.

The question of whether the stated "goal" is in fact a "quota" has been addressed in every case. Some Justices view any remedy involving percentages as an "illegal quota". Most Justices, however, permit "flexible goals" that provide for "safety valves" in the event that the available number of qualified minorities is less than the goal or the available jobs or promotions are limited for reasons other than affirmative action. A goal, therefore, becomes a quota when a fixed percentage of hirings or promotions is required by a fixed enddate,[486] and no "safety valves" are provided.

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483. 106 S. Ct. at 3030.

484. 107 S. Ct. at 1069 and n.24.

485. The last sentence of Regulation 1604(c)(2)(1) reflects this purpose.

486. In *Local 28*, 106 S. Ct. at 3059, Justice O'Connor dissented stating that the "goal" was an illegal quota because it included an enddate, and, therefore, required racial preferential hirings without "safety valves".

c. *The Remedy Must Weigh the Competing Interests of the Nonminority Employees And The Minority Employees So That No Statutory Rights or Expectation Interests Are Infringed*

Stotts[487] and *Local 93*[488] teach that a proposed remedy will not be deemed "narrowly tailored" if it infringes on the Title VII rights of a nonminority employee or another interested party.[489] Also, the proposed remedy will not be deemed "narrowly tailored" if it infringes on a valid expectation interest (i.e., the expectation that one will not be laid off to provide a job for a minority).[490]

The Title VII test set out in *Weber*[491] and *Johnson*[492] reflects this theme by mandating that the remedy must not trammel unnecessarily the interests of white employees, require the hiring of unqualified blacks or create an absolute bar to the advancement of white employees. The equal protection test, as stated in *Paradise*,[493] also reflects this theme by requiring that the remedy impose no unacceptable burden on innocent white promotion applicants. The remedy can delay, but cannot completely bar, white promotions. Also, the remedy may not require the layoff or discharge of whites and may not require the hiring of unqualified blacks over qualified whites. For both Title VII and equal protection purposes, therefore, if the proposed remedy is tailored so that the employee's statutory

487. 467 U.S. 561 (1984).

488. 106 S. Ct. 3063 (1986).

489. Other interested parties may include a union or other similar persons. In *Local 93*, the Court ruled that unions and white employees, regardless of a consent decree, can litigate their own claims. *Id.* at 3079; *cf.* Ashley v. City of Jackson, 464 U.S. 900 (1983). Nonminority employees who challenge the plan on constitutional or Title VII grounds must carry the burden of persuasion that the employer's evidence did not support an inference of prior discrimination and, therefore, the plan was not sufficiently narrowly tailored. *Wygant*, 106 S. Ct. at 1856 (O'Connor, J., concurring).
Failure of a joined party to agree to a consent decree does not deprive the decree of effect. This term, the Supreme Court will decide issues of intervention. Marino v. Ortiz, Costello v. New York City P.D., *cert. granted.*, No. 86-1415 (May 18, 1987). Also, while a union cannot prevent an employer from entering into a consent decree. The union has a remedy under § 301 of the Taft-Hartley Act for breach of a collective bargaining contract. Where an employer enters into a conciliation agreement with the Office of Federal Contract Compliance Programs that is contrary to its contract with a union, the union's remedy is the same. W. R. Grace & Co. v. Rubber Workers Local 759, 461 U.S. 757 (1983).

490. *See Wygant*, 106 S. Ct. 1842 (1986) and *Stotts*, 467 U.S. 561 (1984).

491. 443 U.S. at 208.

492. 107 S. Ct. at 1455.

493. 107 S. Ct. at 1073-74.

rights or expectation interests are not infringed, it meets the third condition of the remedy test.

1.) Layoffs and Firings of Innocent, Nonminority Employees

Layoffs and firings of innocent nonminority employees where no valid seniority system exists should not be deemed a "narrowly tailored" remedy, except in some reduction-in-force situations. The Court is clear that layoffs and firings of innocent, nonminority employees, in contravention of a valid, bona fide seniority system which is protected by section 703(h), are not "narrowly tailored" remedies. This is so because the nonminority employee's expectation interest in not being fired or laid off to provide a job for a minority will usually supercede the competing interests of the minorities. The same reasoning applies to layoffs and firings that occur where no seniority system is present. Layoffs and firings are drastic measures that substantially affect the employee's financial, social, and emotional well-being. In any analysis, the interests of the nonminority, innocent employee would be quite great. This is so even though the nonminority employee may have a cause of action for unjust dismissal[494] because the time and expense involved in pursuing such an action in combination with the loss of job would almost always outweigh a minority's interests. Delayed promotions and hirings do not have the effect that layoffs and firings have and in the affirmative action analysis, would not be accorded as much weight. Even if the employee is not protected by a valid seniority system, layoffs or firings would violate the employee's "expectation interests". Such action is never sufficiently "narrowly tailored" in light of the availability of hiring, promotion, or training alternatives.

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494. In some states, employees have a cause of action for unjust dismissal under three theories: contract, tort, or dismissal against public policy. Under the contract theory, if the discharge occurs without "just cause", the employer may be found to have violated an implied covenant of good faith. Under the tort theory, if the discharge violates some right protected under federal or state law, the employee has a cause of action for "wrongful discharge." Under the public policy exception, if the discharge occurs because an employee refused to commit a crime or exercised a statutory right or privilege, the employee has a cause of action for wrongful discharge on the basis of a public policy violation.
In a related context, some of the lower courts have recognized a contractual right in the minority where an affirmative action plan, or a statement of affirmative action principles in an employee handbook, are not followed. Sola v. Lafayette College. 804 F.2d 40 (3d Cir. 1986); Liao v. Dean. 94 Daily Labor Reporter D-1 (N.D. Ala. May 18, 1987).

In the reduction-in-force situation where no valid collective bargaining agreement prescribes the method of job reduction, the employer determines what jobs are to be eliminated and which employees in jobs that are not eliminated should be terminated. The latter decision is usually based on job performance. An employer who has in place a valid affirmative action plan which meets the standards discussed in this article may have an affirmative duty to retain or hire a minority rather than an equally qualified nonminority to avoid resegregating the work force or to overcome the pattern of past discrimination. In this narrow situation, where the employer has engaged in a pattern of past uncorrected or present discrimination and there is no valid collective bargaining agreement prescribing the method of job reduction, the layoff or termination of the nonminority may be appropriate.

2.) Contract Rights and Rights Protected by State Law

Where the affirmative action remedy is promotions rather than firings and layoffs, a nonminority employee may claim that his contractual right to promotion, as provided for in his employment contract, should be accorded great weight in the balancing process. The same argument could be made if an employee has promotion rights under a seniority system or under state law. Since the employee has a cause of action for violations of those rights and since the issue is delayed promotion, rather than job loss, it is suggested that the court would not assign as great weight to the nonminority employee's interests in the promotions as it would in a layoff situation.[495]

d. Conclusion

Assuming an appropriate showing of discrimination for the voluntary or judicial remedy, the test for a valid equal protection affirmative action remedy is identical to the test for a valid Title VII affirmative action remedy. The remedy must be "narrowly

495. The Court, particularly Justice O'Connor, consistently makes clear that even if the affirmative action remedy is deemed valid, the nonminority employees or other interested parties can still sue the employer or the union for violation of their rights. In a related case, the Supreme Court recently held that a union, pursuant to its duty of fair representation, must bargain for an affirmative action plan or must protest an employer's discrimination. *See* Goodman v. Lukens Steel, 107 S. Ct. 2617 (1987).

tailored" in light of the alternatives which means that it: (1) must be designed to eliminate or to correct the identified present or past discrimination of the employer; (2) must be temporary; (3) must provide for goals that have "safety valves"; and, (4) must not impinge on the employee's Title VII rights or expectation interests.

III. CONCLUSION

The critical unanswered question[496] is whether a public employer who, in compliance with Title VII, has agreed to affirmative action remedies or who enters a consent decree providing for the same, violates the equal protection clause of the fourteenth amendment or the equal protection component of the due process clause of the fifth amendment. The answer is no.

The controlling test for both Title VII and equal protection challenges for all types of plans involves the identical two-pronged inquiry (1) is there a sufficient demonstration of intentional discrimination by the employer; and, (2) is the remedy "narrowly tailored", in light of other alternatives, to eliminate that discrimination.

The discrimination prong, for both Title VII and equal protection purposes, can be demonstrated by evidence, for all but the judicial remedy, of a *firm factual basis*, short of an admission of discrimination by the employer, that one or more employment practices *may* leave uncorrected the effects of the employer's prior discrimination or *may* result in disparate treatment of members of the protected class. This factual basis can not be demonstrated by statistics

496. The Court has not addressed the issue of the validity of affirmative action plans implemented in compliance with Executive Order 11246, various federal funding statutes or state and local laws. Under the *Fullilove* analysis of a statute, as long as there is a showing of a history of past discrimination and the remedy is narrowly tailored, such plans should be deemed valid. *See* General Contactors v. San Francisco, 813 F.2d 922 (9th Cir. 1987) (governmental contract set-aside for minorities ruled invalid because government had made no finding of prior discrimination), *See also* Ohio Contractors Assoc. v. Keip, 713 F.2d 167 (6th Cir. 1983) (minority set-aside ruled valid because city had demonstrated prior history of discrimination); Edinger & Son v. Louisville, 802 F.2d 213 (6th Cir. 1986).

Voluntary affirmative action plans adopted in order to comply with local laws requiring racial balance in a public employer's work force, but without a showing of a history of past discrimination, was ruled invalid under both Title VII and the Constitution because there was no predicate of discrimination and no consideration or use of alternatives. (This decision was pre-*Johnson.)* Hammon v. Berry, 813 F.2d 412, 43 FEP Cases 89 (D.C. Cir 1987).

which show that a challenged policy or practice has an adverse impact. On the other hand, the factual basis can be demonstrated by statistics which are sufficient to sustain a pattern and practice case. In such a case, the plaintiff may use statistics which show a manifest imbalance between the presence of minorities in the employer's work force and the qualified minorities in the relevant labor pool; as long as the plaintiff demonstrates that the employer used a policy or practice that *may* have had or *may* have a discriminatory effect.

The remedy component can be satisfied, for both Title VII and equal protection purposes, only if the remedy is "narrowly tailored" to the situation in light of other reasonable alternatives. A "narrowly tailored" remedy is one which is designed to eliminate the identified discrimination of the employer, is temporary, provides for goals, not quotas, includes "safety valves", and does not unreasonably impinge on the employee's Title VII rights or expectation interests. Regardless of whether the challenge is under Title VII or the equal protection clause, when affirmative action has been designed to meet this two-pronged test, the judicial remedy is approved by a majority of the Court, even where the remedy is a numerical goal with an enddate.

To address the introductory quotation, there is no reverse discrimination where the focus of affirmative action is on identifying and remedying, in a narrowly tailored fashion, the employer's actual or probable disparate treatment of protected individuals or members of a protected class. When that occurs, black is certainly not white and white is certainly not black.