Remedy for the Extreme Case: The Status of Affirmative Action after Croson, A

Leland Ware
A REMEDY FOR THE "EXTREME CASE:" THE STATUS OF AFFIRMATIVE ACTION AFTER CROSON

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After the Supreme Court decided City of Richmond v. J.A. Croson Co.,¹ a commentator responded with the following analogy:

The White Team and the Black Team are playing the last football game of the season. The White Team owns the stadium, owns the referees and has been allowed to field nine times as many players. For almost four quarters, the White Team has cheated on every play and, as a consequence, the score is White Team 140, Black Team 3. Only 10 seconds remain in the game, but as the White quarter-back huddles with his team before the final play, a light suddenly shines from his eyes. "So how about it, boys?" he asks his men. "What do you say from here on we play fair?"²

This reaction reflects the shock and disappointment that reverberated throughout the Civil Rights community at the conclusion of the Supreme Court's 1988-1989 term. An examination of the actual decisions indicates, however, that they are not entirely the radical

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1. Andrew Ward's commentaries are heard on "All Things Considered," broadcast by the National Public Radio.
departures from precedent that many of the press reports had suggested. Though disappointing to some, the cases merely fine-tuned existing legal doctrine and reflect the approach of what appears to be an emerging conservative majority.\(^3\) There are, however, some broad implications for equal protection jurisprudence.

In *Croson*, the Supreme Court struck down an ordinance which required thirty percent of the city's construction contracts to be reserved for minority contractors.\(^4\) The Court found that the ordinance discriminated against non-minority contractors in violation of the Equal Protection Clause of the fourteenth amendment. The decision in *Croson* represents the culmination of an ideological struggle that has waged within the Court for more than ten years. Prior to *Croson*, a majority of the Justices had agreed that race-conscious remedial efforts are constitutionally permissible, but could not agree to the applicable analytical framework for testing the validity of such measures.

One group argued that unlike classifications used to disadvantage minorities, racial classifications which are employed to remedy the lingering effects of discriminatory practices should not be judged by the same standard that is used to review classifications which operate to the detriment of minorities. Another group contended that any racial classification is inherently suspect and cannot be justified in the absence of a compelling justification. Furthermore, even where a compelling justification is shown, the latter group maintained that the classification must be narrowly tailored to achieve the goals of the legislation.

In the statutory context, one faction of the Court has taken the position that the anti-discrimination provisions of Title VII of the Civil Rights Act do not prohibit employers from developing race-conscious hiring and promotion criteria, as long as the employer has ample reason to believe that minority candidates were denied equal employment opportunities. The opposing faction has countered that Title VII forbids employers from considering an applicant's race or sex when making any personnel decisions.

The *Croson* decision ended the constitutional standoff when a majority of the Justices agreed, for the first time, to apply the strict scrutiny standard to an affirmative action program. When state action is involved, affirmative action must now be justified by a compelling state interest, and the means chosen to effectuate that interest must be narrowly tailored to achieving the state's goals. Although the opinion does not completely condemn race-conscious efforts designed to

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3. In addition to the Reagan appointees, this majority includes Chief Justice Rehnquist, and Justices Stevens and White. Dissenting in *Croson* were Justices Marshall, Brennan, and Blackmun.

4. See infra notes 233-331 and accompanying text for a detailed discussion of the *Croson* decision.
eliminate the effects of discrimination against minorities, efforts to do so will now be far more difficult. Further, although Croson did not address affirmative action programs developed by private entities, the implications extend far beyond the context of government contracts, in which this case arose.

This article will examine the Supreme Court decisions which address the validity of affirmative action programs. Beginning with Regents of the University of California v. Bakke, the Court has reviewed affirmative action in three separate areas: educational programs, government procurement, and employment disputes. In cases presenting employment issues, the Court has considered voluntary affirmative action programs, court-ordered affirmative action, and programs which resulted from negotiated consent decrees. Although Croson has resolved the conflict over whether strict scrutiny applies, it remains unclear what strict scrutiny will mean in this context. It appears that there is a compelling state interest in eliminating the vestiges of discrimination, but it is not certain that classifications can be narrowly drawn to achieving this goal.

Prior to Croson, at least one Justice served as a moderating influence between the competing factions. In light of recent changes within the Court, it remains to be seen whether moderation will prevail in the future. Some commentators will no doubt predict that Croson marks the demise of affirmative action. Others will argue that the level of judicial review will be more exacting, but that carefully crafted programs will survive. This article suggests that if racial discrimination is as isolated and sporadic as some believe, race-conscious remedies cannot be justified and will not withstand the strict scrutiny standard. On the other hand, if racial discrimination is as pervasive and entrenched as others believe, race-conscious remedies are a necessary means of redressing discriminatory practices.


7. The concept of strict scrutiny in this context can be traced to the judicial function of protection of constitutional rights for those groups that may be least able to demand protection; as stated in United States v. Carolene Products Co., 304 U.S. 144 (1938): "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." Id. at 152, n.4.
I. EDUCATIONAL PROGRAMS

Regents of the University of California v. Bakke

The first affirmative action case to reach the Supreme Court involved affirmative action in higher education. Although the Court struck down the plan employed by the University of California, a majority of the Justices endorsed the legality of affirmative action. The Justices could not agree, however, to the applicable standard of constitutional scrutiny. In Bakke, the Court considered a challenge to a program which reserved a specified number of positions in a medical school's entering class for minority students.

The plaintiff, Allan Bakke, was a white male whose 1973 and 1974 applications to the medical school had been rejected. During the same years, minority applicants whose grades, test scores, and ratings were lower than Bakke's were admitted under the Special Admissions program. After the rejection of his second application, Bakke filed a civil action in the Superior Court of California which claimed that the University's admissions program violated the Equal Protection Clause of the fourteenth amendment; Title VI of the Civil Rights Act; and art. I, section 21 of the California Constitution.

The Supreme Court assumed, without expressly deciding, that Title VI created a private right of action. The Court also held that Title VI proscribed racial classifications that would violate the Equal Protection Clause of the fifth amendment. Although a majority of the Justices agreed to a decision in Bakke's favor, they were unable to agree on the underlying rationale. One group of Justices believed that affirmative action was permissible and should not have been subjected to the strict scrutiny standard. Another group disagreed and argued that any form of race-conscious state action violated the Equal Protection Clause of the fourteenth amendment. A third view which declined to adopt either of the two extremes is reflected in the opinion

8. 438 U.S. 265 (1978) [hereinafter Bakke].
10. Id. at 284. The Court's assumption, "only for the purposes of this case", resulted from its hesitancy to review or resolve a question which was "neither argued nor decided in either of the courts below." Id. at 283-84.
11. Justice Powell's opinion was joined in part by Justices Brennan, White, Marshall, and Blackmun, who also issued a joint opinion, while separate opinions were authored by Justices White, Marshall, and Blackmun; additionally, an opinion by Justice Stevens was joined by Chief Justice Burger, and Justices Stewart and Rehnquist.
of Justice Powell.  

A. Justice Powell's Opinion

One of the most important disputes in Bakke focused on the level of judicial scrutiny to be applied to the special admissions program. The University contended that the strict scrutiny standard applied only to classifications that disadvantaged "discrete and insular minorities." Bakke, in contrast, argued that the strict scrutiny standard applied to any racial classification. Rejecting the University's position, Justice Powell found that "[t]he guarantee of Equal Protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." Based on this reasoning, Justice Powell concluded that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial scrutiny."

The University also argued that the strict scrutiny standard should not apply when the discriminatory conduct is directed towards the white majority and has a "benign purpose." This argument was rejected based on Justice Powell's perception of the difficulties that would arise with the application of varying levels of judicial review to what he termed "fluid" concepts of ethnicity. Justice Powell also stressed his view that the right to equal protection is a "personal one." Therefore, individuals, rather than groups, are entitled to protection from stigmatizing racial classifications.

To support its contention that benign classifications were permissible, the University pointed to several school desegregation and employment and sex discrimination cases which it believed justified the

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14. Justice Powell's opinion was joined in minor part by Justices Brennan, White, Marshall, and Blackmun, who also issued a joint opinion concurring in the judgement in part and dissenting in part.

15. Bakke, 438 U.S. at 288 (citing United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938)).

16. Id. at 289-90.

17. Id. at 291.

18. Id. at 294.

19. Id. at 298. Justice Powell noted three difficulties: (1) a "benign preference" cannot simply be taken at face value, i.e., that it is, in fact, truly "benign"; (2) preferential programs may reinforce stereotypes (a statement seen in later cases); and (3) to force innocents to bear the burden of redressing grievances is inequitable. Id.

20. Id. at 288, 289. Justice Powell relied on the explicit language of the fourteenth amendment, as well as those hallmark cases expounding on same, including Shelley v. Kraemer, 334 U.S. 1 (1948). Id.
special consideration that it had given to minority students.\textsuperscript{21} In these cases, the Court had approved race-conscious remedies. Justice Powell disagreed and distinguished the cases because they all involved remedies which were imposed after proving violations of law. In this case, however, there had been no formal determination that the University had ever engaged in any discriminatory practices.\textsuperscript{22} 

Justice Powell also found that under the University's admissions program, designated minority groups were preferred at the expense of other groups. As a consequence, Justice Powell concluded that the University's admissions process created a racial classification which could not be sustained in the absence of a compelling justification.\textsuperscript{23} 

Turning to the University's proffered justifications, the Court noted that the admissions program was intended to reduce the deficit of minority students enrolled in medical school; to counter the effects of past societal discrimination; to increase the number of physicians who practice in underserved communities; and to secure the educational benefits that would flow from an ethnically diverse student body.\textsuperscript{24} 

Justice Powell recognized California's legitimate interest in eliminating the effects of past discrimination but disapproved of classifications that aided "persons perceived as members of relatively victimized groups at the expense of other innocent victims."\textsuperscript{25} In Justice Powell's view, societal discrimination was not by itself an adequate justification for race-conscious remediation because discrimination of this sort "is an amorphous concept of injury that may be ageless in its reach to the past."\textsuperscript{26} Furthermore, in the absence of formally identified acts of discrimination, remediation of the type established by the University could not be constitutionally permissible


\textsuperscript{22} Bakke, 438 U.S. at 301. Although "there was no judicial determination of constitutional violation as a predicate for the formulation of a remedial classification", Justice Powell did note that "although disadvantaged whites applied to the special program in large numbers, . . . none received an offer of admission through that process." Id. at 276.

\textsuperscript{23} Id. at 320.

\textsuperscript{24} Id. at 307-15.

\textsuperscript{25} Id. at 307.

\textsuperscript{26} Id.
because it denied tangible benefits to innocent bystanders. The goal of improving health care services to underserved communities was dismissed almost summarily, because the University had conceded that there was no assurance that its minority graduates would practice in underserved communities.

Although he disapproved of the means that the University employed, Justice Powell found that the University's goal of attaining student body diversity was "clearly . . . constitutionally permissible."

Relying on the principle of academic freedom, Justice Powell agreed with the University's assertion that diversity enhances the atmosphere needed to foster the educational process.

After finding that the state's interest in student diversity was sufficient to satisfy the compelling interest requirement, Justice Powell focused on the question of whether the special admissions program was narrowly tailored to achieving its goal. He found that the University's practice of reserving a specified number of seats for minority students would actually hinder its goal of achieving genuine diversity because several potential students were totally excluded from consideration.

Citing with approval the Harvard College program, Justice Powell concluded that race could legitimately be a "plus factor" in the search for ethnic diversity, but an approach which isolates minorities from any sort of comparison to other groups operated to deprive non-minority candidates of fair consideration. Justice Powell stressed that each applicant should be treated as an individual and that each applicant was entitled to a fair assessment. Consideration of race or ethnicity is permissible, but such an approach could not legitimately operate as an

27. Id. at 307-09. The Court stated:
We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals, in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. . . . Without such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another.

Id. at 307.

28. Id. at 310-11.

29. Id. at 311.

30. Id. at 319.

31. Id. at 317. Columbia, Harvard, and Stanford Universities and the University of Pennsylvania had supplied briefs to the Court as Amici Curiae; attached to Justice Powell's opinion was the Harvard College Admissions Program Plan, a "constitutional" admissions criteria with race and ethnicity as a factor in helping to determine admission. The reader is advised that at this reading, approximately twelve years after the Bakke decision, the "Harvard Plan" may appear quaintly self-serving.
absolute bar to the consideration of non-minority candidates. Based on this analysis, Justice Powell concluded that the University's admissions program violated Title VI because it was not narrowly tailored to achieving the goal of student diversity.

B. Justice Brennan's Opinion

Justice Brennan partly concurred and partly dissented with Justice Powell's opinion. Justice Brennan, joined by Justices White, Marshall and Blackmun, believed that the Medical School's affirmative action program was constitutionally permissible. Specifically, Justice Brennan found that Title VI does not bar preferential treatment of racial minorities as a means of remediating past societal discrimination to the extent that such action is consistent with the fourteenth amendment.

In Justice Brennan's view, Bakke's claim—that Title VI prohibited affirmative action programs—was not supported by the legislative history of the statute. Justice Brennan found that "no decision of this Court has ever adopted the position that the Constitution must be colorblind." In addition, Justice Brennan deemed it "inconceivable" that Congress would endorse voluntary compliance with the anti-discrimination provisions of Title VI "while at the same time forbidding the voluntary use of race-conscious remedies to cure acknowledged or obvious statutory violations." In response to Bakke's claim that racial criteria are prohibited by the plain language of Title VI, Justice Brennan answered that this argument was not supported by the remedial purpose of Title VI or its legislative history.

32. Id. at 318. In a footnote, Justice Powell noted that fellow Justices Brennan, White, Marshall, and Blackmun failed to address (in their separate opinions) that "the denial to respondent of this right to individualized consideration without regard to his race is the principal evil of petitioner's special admissions program." Id. at 318 n.52.

33. Id. at 324. Chief Justice Burger, Justice Stewart and Justice Rehnquist believed that the admissions program violated Title VI. Id. at 325.

34. Id. at 325.

35. Id. at 336.

36. Id.

37. Id. at 328. According to Justice Brennan, Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies; it does not bar the preferential treatment of racial minorities as a means of remediating past societal discrimination to the extent such action is consistent with the Fourteenth Amendment. . . . [Neither the legislative history of Title VI nor other sources] lends support to the proposition that Congress intended to bar all race-conscious efforts to extend the benefits of federally financed programs to minorities who
to the degree of scrutiny required by the fourteenth amendment, Brennan suggested a level somewhere between the traditional strict scrutiny standard and the "reasonably related" standard which is used when a suspect category is not employed.38 Under this intermediate standard, "racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to the achievement of those objectives.'"39 The opinion went on to recognize the potential for misuse and stigmatization under this relaxed standard. It concluded, however, that a strict and searching review of legislative classifications under an intermediate standard would serve as an adequate check against abuse.40

Disagreeing with Justice Powell, Justice Brennan believed that the goal of remedying the present effects of past societal discrimination was sufficiently important to justify the use of race-conscious remedial programs as long as there was a substantial basis for concluding that barriers created by past discrimination interfered with the present ability of minority students to gain access to educational programs.41 Justice Brennan also contended that beneficiaries of affirmative action programs did not need to prove that they were actual victims of discrimination. In his view, "[s]uch relief does not require as a predicate proof that recipients of preferential advancement have been individually discriminated against; it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination."42

Justice Brennan argued that Justice Powell's approach of conditioning remedial action on a formal finding of discrimination would operate to undermine the goal of voluntary compliance with anti-discrimination laws. Institutions would be reluctant to admit to discriminatory practices or gather evidence which could be used in proceedings against them. As a consequence, Justice Brennan found that "a state government may adopt race-conscious programs if the purpose of such

have been historically excluded from the full benefits of American life.

*Id.*

38. *Id.* at 356. Strict scrutiny, "that inexact term", is "define[d] with precision" and is further described as follows: "a government practice or statute which restricts 'fundamental rights' or which contains 'suspect classifications' is to be subjected to 'strict scrutiny' and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available." *Id.* at 357 (citations omitted).

39. *Id.* at 359 (quoting Califano v. Webster, 430 U.S. 313, 317 (1977)).
40. *Id.* at 363-65.
41. *Id.* at 362-63.
42. *Id.* at 363 (referring to Teamsters v. United States, 431 U.S. 324, 357-62 (1977)).
programs is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large."43

Beyond a general endorsement of the concept by a majority of the Justices, *Bakke* had little impact on the legal status of affirmative action. In fact, the standard for reviewing constitutional challenges to remedial classifications was left in a state of confusion. One group of Justices believed that race-conscious state action was a permissible remedial measure and should not be subjected to strict scrutiny when the classification is employed to eliminate the vestiges of past discrimination. Another faction argued that all classifications were suspect regardless of whether they were employed to disadvantage or to assist racial minorities. In a view which reflects a compromise between the two extremes, Justice Powell asserted that race-conscious remedies could not be utilized in the absence of a compelling justification, but could be used as a plus factor in a multifaceted selection process when the goal desired was student body diversity. This debate continued in subsequent cases and remained unresolved for several years following *Bakke*. As the analysis of the various opinions indicates, *Bakke* decided very little beyond rejecting the use of a fixed quota in an admissions program. Affirmative action was seemingly endorsed but the appropriate analytical approach was far from clear.

43. *Id.* at 369. Justice Stevens authored a separate opinion which was joined by Chief Justice Burger and Justice Rehnquist. This opinion concurred in the Court's judgment to the extent it affirmed the judgment of the Supreme Court of California, but it otherwise dissented. *Id.* at 421. Justice Stevens believed that the decision of the California Supreme Court did not resolve the question of whether race or color could ever be used as a factor in an admissions program. *Id.* at 410-11. For this reason, much of the analysis of the Powell and Brennan opinions was, in his view, unnecessary. Nevertheless, Justice Stevens believed that the University had violated the plain language of Title VI based on his conclusion that the University had excluded Bakke from medical school solely because of his race. *Id.* at 421. According to Justice Stevens, Title VI prohibits recipients of federal financial assistance from excluding "any" individual from a federally-funded program "on the ground of race." *Id.* at 413. To support his conclusion, Justice Stevens relied on the language of the statute and various passages in the legislative history of Title VI in which its proponents "gave repeated assurances that the Act would be 'colorblind' in application." *Id.* at 415. As a consequence, Justice Stevens believed that the judgment of the California Supreme should have been affirmed and that the other Justices should not have addressed the question of the continued validity of affirmative action programs. *Id.* at 411, 421.
The bulk of the Supreme Court's affirmative action cases have arisen in the context of employment disputes. This group of cases includes voluntary affirmative action programs, court-ordered programs, and programs resulting from consent decrees. With regard to hiring decisions, the Court held in one of its earliest decisions that an employer's voluntary affirmative action program, which designated a specified number of training positions for black employees, did not violate Title VII's prohibition against discrimination in employment.\textsuperscript{44} Several years later, the Court affirmed its approval of voluntary programs when it held that race or sex could be legitimately used as a plus factor in a multifaceted promotion process.\textsuperscript{45}

Race-conscious hiring has also been endorsed as a judicial remedy for discriminatory selection practices. In one case, the Supreme Court sustained a lower court's decision which required a labor union and an apprenticeship program to hire specific percentages of minority workers after the defendants were found guilty of engaging in discriminatory selection practices and repeatedly failed to comply with orders requiring them to abandon their unlawful conduct.\textsuperscript{46} The Supreme Court also approved negotiated consent decrees which included numerical hiring and promotional goals that benefitted minority workers who were not themselves the proven victims of discriminatory conduct.\textsuperscript{47}

In the case of layoffs, however, the Court has consistently held that affirmative action efforts cannot be invoked as a justification for the displacement of incumbent non-minority workers. In one case, the Court held that a consent decree which created temporary hiring and promotion preferences for minority employees but which did not address layoff procedures, could not be construed to require the retention of minority workers at a time when non-minority employees were being laid off.\textsuperscript{48} In a subsequent decision, the Court struck down a collective bargaining agreement which required the retention of probationary minority teachers when tenured non-minority teachers were being laid off.\textsuperscript{49} The analysis of these decisions is considered in greater detail in the following sections of this article.

\textsuperscript{44} United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979).
\textsuperscript{46} Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986).
\textsuperscript{47} Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986).
A. Voluntary Affirmative Action Programs

1. Steelworkers of America v. Weber

   a. Majority Opinion

   In United Steelworkers of America v. Weber, the Supreme Court considered a challenge to the validity of an affirmative action plan adopted by Kaiser Aluminum and Chemical Corporation. In 1974, Kaiser and the Steelworkers Union executed a collective bargaining agreement which created a training program and reserved fifty percent of the program's positions for black employees. The program was designed to eliminate substantial racial imbalances in Kaiser's skilled craft positions which resulted from a long-standing history of discriminatory practices.

   After implementation of the plan, a white production employee, Brian Weber, filed a civil action challenging the legality of the program. After a trial, the district court held that the plan violated Title VII because it required Kaiser to make hiring decisions on the basis of an applicant's race.

   When the case reached the Supreme Court, Weber argued that the provisions of Title VII which make it unlawful for employers to "discriminate . . . because of . . . race" prohibited race-conscious hiring programs. The Supreme Court disagreed. In an opinion authored by Justice Brennan, it held that Title VII allows "affirmative action plans designed to eliminate conspicuous racial imbalances in traditionally segregated job categories." Relying on the legislative history of Title VII and the congressional goal of achieving racial integration in the workplace, the opinion concluded that Congress could not have

50. 443 U.S. 193 (1979) [hereinafter Weber].

51. Weber, 443 U.S. at 197-99. Kaiser's skilled craft positions (electricians, pipefitters, sheetmetal workers) were essentially the domain of the white male workforce; the Gramercy, Louisiana plant had less than 2% black skilled tradesmen. Kaiser's plan set out to increase this number to approximate the percentage of blacks in the labor pool. Kaiser would provide on-the-job training to unskilled workers to meet this quota; 50% of these openings were reserved for black employees. Id. at 198.

52. Id. at 200. The complaint as framed in the lower court was that the plan, by allocating 50% of the openings to minority unskilled labor, allowed blacks with less seniority to receive the on-the-job training in lieu of white unskilled laborers with greater seniority. Id. at 199-200. The Fifth Circuit Court of Appeals affirmed the district court decision. Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 227 (5th Cir. 1977).

"intended to prohibit the private sector from taking effective steps to accomplish the goal that Congress designed Title VII to achieve."^54

The Court found additional support in the legislative history of Title VII. During the debates which preceded the enactment of the statute, opponents claimed that the Act would require a racially-balanced workforce and that employers with imbalanced workforces would be forced to establish hiring preferences. Justice Brennan determined that Congress had responded to the first concern with statutory language specifically stating that the Act did not require racial balance. Since Congress did not respond in a similar manner to the second objection, Justice Brennan concluded that hiring preferences were permitted.57

With regard to the impact of the program on Kaiser's white employees, the opinion emphasized that the plan did not require the discharge of any non-minority workers nor did it bar their advancement through the ranks. As a consequence, the program did not "unnecessarily trammel the interests of the white employees."^58 Further justification of Kaiser's hiring goals was found in the limited duration of the program and in the program's objective of eliminating a "manifest" racial imbalance in Kaiser's workforce.59

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54. Id. at 204.
55. Id. at 205 (referring to the comments of Senator Sparkman, D. Ala., 110 Cong. Rec. 8618-19 (1964)).
56. Id. at 205-06. Section 703(j) provides that nothing in the language of Title VII "shall be interpreted to require any employer . . . to grant preferential treatment . . . to any group because of the race . . . of such group on account of" obvious racial imbalance. 42 U.S.C. § 2000e-2(j) (1982). The legislative history indicates that this section was designed as a compromise to avoid opposition to what critics saw as undue federal regulation of the workplace.
57. Weber, 443 U.S. at 206. Justice Brennan stated that "[t]he natural inference is that Congress chose not to forbid all voluntary race-conscious affirmative action." Id.
58. Id. at 208-09.
59. Id. at 209. Justice Blackmun concurred with the result but he did not agree with the conclusion that affirmative action is justified whenever the job category in question was "traditionally segregated." Id. at 212. Justice Blackmun suggested that affirmative action programs should be limited to circumstances in which the employer or union had committed what he termed an "arguable violation" of Title VII. Id. at 211. In Justice Blackmun's view, Justice Brennan's "traditionally segregated" standard was over-inclusive because it considered conditions that existed prior to the effective date of Title VII. Id. at 214. The traditionally segregated standard also compared the percentage of minority employees in an employer's workforce to the percentage of minorities in the geographic area instead of comparing the percentage of minority workers qualified to perform the jobs to the percentage of minorities in the employer's
b. Justice Rehnquist's Dissent

Justice Rehnquist argued in dissent that Title VII prohibits employers from considering race when making an employment decision irrespective of the race of the individual. He believed that "Kaiser's racially discriminatory admission quota [was] flatly prohibited by the plain language of Title VII." In an argument which highlighted one of the major divisions within the Court, Justice Rehnquist claimed that Justice Brennan's interpretation of Title VII was at odds with the "uncontradicted" legislative history of the statute. Justice Rehnquist explained that the debates which resulted in the enactment of Title VII reflect a struggle between opponents and supporters of the bill. The opponents repeatedly charged that federal agencies which would be responsible for enforcing Title VII would construe the term "discrimination" to mean the existence of racial imbalances in an employer's workforce. The opponents also claimed that the bill would force employers to hire on the basis of race. When these claims were asserted, supporters of the bill responded that racial preferences would not be permissible and that the Act would flatly prohibit the use of racial quotas.

Justice Rehnquist believed that opponents to Title VII anticipated the circumstances of Weber and were assured by their colleagues that racial quotas would not be allowed. For these reasons, he contended that the majority's decision in Weber was prohibited by the plain language of Title VII, as well as the legislative history of the Act.

Justice Rehnquist did not address workforce imbalances which are the product of discriminatory practices. He did not refute the majority's finding that the absence of black employees from Kaiser's skilled craft unions was the direct result of the racial discrimination. Furthermore, if Kaiser and the Steelworkers had adopted a color-blind hiring standard, the injuries sustained by victims of prior discrimination would not have been redressed. Minority applicants who were denied jobs workforce. For these reasons, Justice Blackmun believed that standard should have been more narrowly drawn. Id. at 214.

60. Id. at 228.

61. Id. at 222. Justice Rehnquist refers to Justice Brennan's analysis as "a tour de force reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini." Id. (emphasis in original).

62. Id. at 237-38. Addressing the opponents, Senator Humphrey stated "[t]he truth is that [Title VII] forbids discriminat[ion] against anyone on account of race. . . . Contrary to the allegations of some opponents of this Title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial 'quota' up to achieve a certain racial balance. Id. at 238.
would have had to resort to a class action or individual suits to seek redress for the injuries that they suffered as a result of discriminatory practices.

With this exposure in mind, Kaiser and the Union negotiated a compromise which was intended to advance the interests of minority applicants and to protect their own interests. *Weber* raises the knotty problems presented by the transition from discriminatory hiring practices to a nondiscriminatory system. Based on a history of discriminatory practices, employers are exposed to Title VII liability if they fail to correct the effects of these practices. At the same time, however, they risk claims of reverse discrimination when affirmative action is taken. The "employer's dilemma" is recognized in Justice O'Connor's opinions in subsequent decisions where she suggests what may be the best approach to this issue.63

2. Johnson v. Transportation Agency

a. Plurality Opinion

Several years after the *Weber* decision, the Court's approval of voluntary affirmative action programs was upheld in another case, *Johnson v. Transportation Agency*.64 In *Johnson*, the Supreme Court considered a challenge to an affirmative action plan which authorized an employer to consider sex or race as a "plus factor" in its selection and promotion process. The events which led to the *Johnson* decision began when the Santa Clara County Transportation Agency announced a vacancy for the promotional position of road dispatcher. After the applications were received, one of the male applicants was tied for second place in the rankings with a score of seventy-five. Diane Joyce, a female applicant, ranked slightly lower with a score of seventy-three.65

At the time of the selection, the agency did not employ any women in its skilled craft positions and had never employed a woman as a road dispatcher. While the applications were pending, the Coordinator of the Agency's Affirmative Action Office recommended the selection of the female applicant. During the district court trial, the selecting official

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63. In a footnote, Justice Brennan states that the Court's decision "makes unnecessary consideration of petitioners' argument that their plan was justified because they feared that black employees would bring suit under Title VII if they did not adopt an affirmative action plan." *Id.* at 209 n.9. Justice O'Connor's suggestion is discussed in her concurring opinion in *Johnson v. Transportation Agency*, 480 U.S. 616 (1987).

64. 480 U.S. 616 (1987) [hereinafter *Johnson*].

testified that his decision to select Diane Joyce was based on his consideration of the candidates' qualifications, test scores, expertise, and backgrounds. He also considered the county's affirmative action program.66

When the dispute reached the Supreme Court, Justice Brennan reiterated the standard of review he had endorsed in Steelworkers of America v. Weber. Under this standard, an affirmative action plan can be justified under Title VII if: 1) there is a "manifest imbalance" in the employer's workforce which reflects female or minority underrepresentation in "traditionally segregated job categories"; and 2) the plan does not "unnecessarily trammel" the interests of non-minority employees.67

To satisfy the first prong of this standard, the employer should compare "the percentage of minorities or women in the employer's workforce with the percentage in the area labor market."68 Justice Brennan emphasized that when the job requires special skills or expertise, the comparison should focus on the percentage of minorities or women in the employer's workforce and the percentage of qualified minorities or women in the geographic area.69

Applying that standard to the present case, the plurality noted the Transportation Agency had found its female employees heavily concentrated in jobs traditionally occupied by women. Based on the finding of underrepresentation, the Agency's affirmative action plan established short-term hiring goals under which the race or sex of applicants could be a plus factor in hiring decisions. Since Santa Clara's hiring goals were the result of a finding of underrepresentation, Justice Brennan found that the agency's plan satisfied the first prong of the standard because it was "designed to eliminate Agency work force imbalances in traditionally segregated job categories."70

With regard to the second prong of the test, Justice Brennan determined the plan did not "unnecessarily trammel" the interests of non-minority employees. To support this conclusion, Justice Brennan noted that none of the Agency's positions had been set aside solely for

66. Id. at 624-26. The district court found the Agency's plan invalid based on Weber's "temporary" criteria; the Ninth Circuit Court of Appeals reversed. Johnson v. Transportation Agency, 770 F.2d 752 (9th Cir. 1985).
68. Id.
70. Johnson, 480 U.S. at 637.
women. In fact, the plan expressly stated that the hiring goals were not to be construed as numerical quotas. Justice Brennan also noted that since there were seven other qualified applicants, the petitioner was not entitled to a promotion. Thus, the denial of a promotion did not unsettle any "legitimate firmly rooted expectation of the petitioner."\(^{71}\) Justice Brennan emphasized the limited duration of the program which, in his view, was intended to "attain a balanced workforce, not to maintain one."\(^{72}\) Based on this analysis, Justice Brennan concluded that Title VII did not prohibit employers from considering an applicant's race or sex as one factor in a multifaceted hiring decision if the decision is guided by a legitimate affirmative action program.

b. Justice O'Connor's Opinion

Justice O'Connor concurred with the Court's holding that Title VII does not prohibit race-conscious affirmative action programs but she disagreed with what she deemed to be an unduly "expansive and ill-defined approach."\(^{73}\) In Justice O'Connor's view, affirmative action programs are warranted only as a remedial device to eliminate actual discrimination or the lingering effects of discriminatory practices. Justice O'Connor's concern was prompted by her view of the need to balance competing interests. Justice O'Connor explained that employers are "trapped between the competing hazards of liability to minorities if affirmative action is not taken to remedy apparent employment discrimination and liability to non-minorities if affirmative action is taken."\(^{74}\)

Justice O'Connor argued that dangers posed by these competing hazards could be minimized only if affirmative action plans are supported by evidence sufficient to support a prima facie case of pattern and practice discrimination. Under this standard, a statistically significant disparity in the percentage of women or minorities in an employer's workforce compared to the percentage of qualified women or minorities in the geographic area would justify a race or sex-conscious affirmative action program. A program which simply seeks to develop a workforce which approximates the total percentage of females or minorities in the geographic region, however, would not be permissible.\(^{75}\)

71. Id. at 638.
72. Id. at 639 (emphasis in original).
73. Id. at 648.
74. Id. at 652 (emphasis in original).
75. Id. at 653-54. Such a program would unrealistically "assume that individuals of each [sex] will gravitate with mathematical exactitude to each employer . . . absent unlawful discrimination". Johnson, 480 U.S. at 654.
Despite her disagreement with Justice Brennan's analysis of the evidentiary justification needed for an affirmative action plan, Justice O'Connor was satisfied that Santa Clara County had a firm basis for adopting its program. There were no women employed in any of the transportation agency's skilled craft positions at the time the plan was adopted. Moreover, the evidence presented during the trial indicated that by 1970, women constituted at least 5% of skilled craft workers in the geographic labor pool. Since this would have been sufficient to establish a prima facie case of sex discrimination, Justice O'Connor found Santa Clara's affirmative action plan amply justified.76

c. Justice Scalia's Dissent

Justice Scalia issued a dissent in which he not only disagreed with the majority's decision, but went on to conclude that Johnson should have been the occasion for reconsidering and overruling Weber.77 After labeling the majority's decision an "engine of discrimination,"78 Justice Scalia argued that the plain language of Title VII prohibits affirmative action programs because the statute forbids employers from considering race or sex in any employment decision. He also criticized the majority for discounting the district court's finding that the county had never discriminated against women. Thus, even under the majority's reasoning, remedial action was not warranted in Justice Scalia's view. Justice Scalia believed that instead of remedying the effects of past discrimination, the majority's opinion would "give each protected racial and sexual group a governmentally determined 'proper' proportion of each job category."79

Justice Scalia also took issue with the majority's characterization of the plan as "voluntary" and argued instead that the plan coerced county officials to select female and minority workers at the expense of white males. He disagreed with the majority's determination that sex was merely one factor in a multi-faceted selection process and contended, as the district court had found, that Joyce's gender was the determining factor in her selection.80

Justice Scalia was particularly concerned that the majority's decision permitted racial and sexual discrimination against non-
minorities to overcome the effects of "societal attitudes that have limited the entry of certain races, or of a particular sex, into certain jobs."\textsuperscript{81} To support this conclusion, Justice Scalia claimed that the dearth of women in various historically male job categories is not the result of unlawful discrimination but because these jobs have "not been regarded by women themselves as desirable work."\textsuperscript{82}

Justice Scalia also faulted Justice Brennan’s reliance on Congress’ failure to amend Title VII to repudiate Weber as tacit approval of Weber’s holding that race and sex-conscious affirmative action programs are permissible under Title VII. Congressional inaction, he believed, could be the result of a variety of reasons including "unawareness," "indifference," or even "political cowardice."\textsuperscript{83} In short, Justice Scalia believed that affirmative action programs require employers to engage in intentional discrimination against non-minorities in violation of the plain language of Title VII.

Despite the dissent’s characterization of the affirmative action program involved in Johnson as an "engine of discrimination," a majority of the Justices have repeatedly approved the use of voluntary affirmative action programs to eliminate the vestiges of long-standing discriminatory practices. A consensus concerning a standard by which to measure the legitimacy of such efforts, however, has not yet emerged. Justice Brennan has urged that affirmative action programs are justified as long as there is a "conspicuous racial imbalance in traditionally segregated job categories."\textsuperscript{84} Justice Blackmun found this standard too broad and argued for a standard which would limit affirmative action to circumstances in which an employee has committed an "arguable violation" of Title VII.\textsuperscript{85}

Justice O’Connor has urged a third standard under which the existence of a statistically significant imbalance between the percentage of women or minorities in an employers’ workforce, compared to the percentage of qualified women or minorities in the geographic area, would justify an affirmative action program in which race or sex is used as a plus factor in the selection process. Justice O’Connor’s approach may reflect the best resolution of the "employer’s dilemma." It allows the employers to act to eliminate the vestiges of discriminatory practices without actually admitting liability. At the same time, employers are provided with a valid defense to claims of reverse discrimination. This may be the most equitable means of effectuating the transition from a discriminatory system.

\textsuperscript{81} Id. at 664.
\textsuperscript{82} Id. at 668 (emphasis in original).
\textsuperscript{83} Id. at 672.
\textsuperscript{84} Weber, 443 U.S. at 209.
\textsuperscript{85} Id. at 211.
B. Court-Ordered Affirmative Action Programs

Local 28 of the Sheet Metal Workers’ International Association v. EEOC

In addition to endorsing voluntary affirmative action programs, the Supreme Court has also found that race-conscious hiring and promotion goals can be ordered to remedy proven violations of Title VII. In *Local 28 of the Sheet Metal Workers’ International Association v. EEOC*, the Supreme Court held that Title VII authorizes district courts to order race-conscious relief which benefits individuals who are not themselves the victims of discrimination. The Court also found that when an employer or union has engaged in long-standing or egregious discrimination, a race-conscious remedy may be the most effective means of enforcing Title VII.

The case began when the New York State Commission for Human Rights found that a labor union, Local 28 of the Sheet Metal Worker’s International and Local 28, Joint Apprenticeship Committee, a management-labor training program, had excluded blacks from the union and the training program. The New York State Supreme Court subsequently affirmed the Agency’s findings. After the Union failed to comply with the court’s order restraining it from engaging in discriminatory practices, the Human Rights Commission initiated an enforcement action in state court. The state court found that the Union and Apprenticeship Program had not complied with the previous order, and it again ordered them to cease their discriminatory practices. The union and the training program persisted in their unlawful conduct and were adjudged a third time to be in violation of a court order. In 1971, the Equal Employment Opportunity Commission filed a civil action against the Union and the Apprenticeship Program in which the State Commission for Human Rights intervened. At the conclusion of the trial, the district court found that the Union and the Apprenticeship

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86. 78 U.S. 421 (1986).
87. Id. at 445.
Program discriminated against non-white workers. Based on findings that the Union and Apprenticeship Program had acted in bad faith and in violation of a series of orders issued by the state courts, the district court ordered hiring goals and a preference for the admission of non-whites into the Union and the Apprenticeship Program. The Court of Appeals for the Second Circuit affirmed the trial court's order with minor modifications.

In 1982, the city and state initiated a contempt action which resulted in a finding of civil contempt. In 1983, a second contempt proceeding resulted in an additional finding of contempt. The contempt citations were appealed and a divided panel of the Court of Appeals for the Second Circuit affirmed all but one of the trial court's various contempt findings.

When the case reached the Supreme Court, the Union argued that relief available under Title VII was limited to actual victims of unlawful discrimination. A majority of the Justices disagreed. Speaking for a plurality, Justice Brennan noted that the language of section 706(g) authorizes courts to enjoin the respondent from engaging in such unlawful employment practice and to order "such affirmative action as may be appropriate, which may include, but is not limited to reinstatement or hiring of employees . . . or any other equitable relief as the court deems appropriate." In Justice Brennan's view, this language grants district courts broad discretion to remedy unlawful discrimination and allows "an employer or labor union to take affirmative steps to eliminate discrimination which might incidentally benefit individuals who are not the actual victims of discrimination."

The Union claimed that the last sentence of section 706(g)

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92. Sheet Metal Workers' Ass'n, 478 U.S. at 432. The district court imposed a 29% nonwhite membership goal, consistent with the appropriate New York City labor pool, under court-appointed supervision. EEOC v. Local 638, 401 F. Supp. at 489.

93. Id. at 433. See EEOC v. Local 638, 532 F.2d 821 (2d Cir. 1976) (the court of appeals did modify the district court order, permitting the use of a ratio system for entrance into the apprenticeship program pending new job-related entrance examinations).

94. Sheet Metal Workers' Ass'n, 478 U.S. at 435-39; EEOC v. Local 638, 753 F.2d 1172 (2d Cir. 1985).

95. Sheet Metal Workers' Ass'n, 478 U.S. at 440 (the plurality consisted of Justices Brennan, Marshall, Blackmun, and Stevens).

96. Id. at 466 (quoting 42 U.S.C. § 2000e-5(g) (1990)).

97. Id. at 447.
prohibited a remedy which benefitted individuals who were not themselves the victims of the employer's discriminatory practices. The relevant portion of section 706(g) states:

No order of the Court shall require the admission or reinstatement or hiring of an individual as a member of a union, . . . or the payment to him any back pay, if such individual was refused admission, suspend- ed, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin in violation of . . . this title.88

Justice Brennan disagreed with the Union's interpretation and found instead that the sentence in question protects employers and unions from being ordered to hire unqualified individuals as a remedy for violations of Title VII.99

Justice Brennan also determined that race-conscious relief advanced Title VII's goals of achieving equal employment opportunities and removing artificial barriers which historically operated to favor white employees. He reasoned further that injunctive relief would be appropriate in most cases, but some instances would require the union or employer to take affirmative steps to end discrimination.100 Furthermore, even when the employer abandons discriminatory practices, informal mechanisms might continue to obstruct equal employment opportunities. Justice Brennan also found that:

a district court may find it necessary to order interim hiring or promotional goals pending the development of nondiscriminatory hiring or promotion procedures. In these cases, the use of numerical goals provides a compromise between two unacceptable alternatives: an outright ban on hiring or promotions, or continued use of discrimin- natory selection procedures.101

Justice Brennan found additional support for his analysis in the

99. Sheet Metal Workers' Ass'n, 478 U.S. at 447. Justice Brennan stated that "[t]his reading twists the plain language of the statute." Id.
100. Id. at 448. He believed that the lower courts had a very broad congressional mandate to provide "the most complete relief possible," including injunctions, as well as contemplating the potential futility of injunctions with recalcitrant unions or employers, thus the need for court-ordered hiring proportions. Id. at 448-49.
101. Id. at 450-51. Additional support was cited in Fullilove v. Klutznick, 448 U.S. 448, 483 (1980) ("[W]here federal anti-discrimination laws have been violated, an equitable remedy may in the appropriate case include a racial or ethnic factor.").
legislative history of Title VII. During the debates over the enactment of Title VII, opponents feared that discrimination would be interpreted to mean mere imbalances in an employer's workforce and were concerned that employers would be required to establish racial preferences to avoid an imbalanced workforce. Supporters of the bill responded that the legislation would not require hiring and promotional quotas. When the opposition continued, supporters of the bill recognized that their assurances to the contrary would not end the dispute surrounding the racial balancing issue. As a consequence, they inserted language which is now contained in section 703(j). It provides:

Nothing contained in this title shall be interpreted to require any . . . labor organization, or joint labor management committee . . . to grant preferential treatment to any individual or to any group because of the race . . . 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 [admitted to the labor organization, or to any apprenticeship program] in comparison with the total number or percentage of persons of such race . . . in any community, state, section, or other area, or in the available work force in any community state, section or other area.102

Supporters of the bill explained that subsection 703(j) was added to make it clear that Title VII does not require employers to maintain racially-balanced workforces. The legislative history does not similarly address the question of whether numerical quotas would be an appropriate remedy for proven violations of the statute. For answers to this question, Justice Brennan turned his attention to the legislative history of the 1972 amendments to Title VII. In this portion of the Congressional Record, Justice Brennan found that Senator Ervin had responded to hiring goals and timetables established by the Department of Labor with accusations of reverse discrimination. His response was a proposed amendment which would have specifically outlawed race-conscious remedies.103

Senator Ervin's proposal was met with vigorous objections. Opponents to the Ervin Amendment cited with approval several court and administrative orders which had used race-conscious remedial

103. Sheet Metal Workers' Ass'n, 478 U.S. at 467. Senator Ervin's proposal stated that "[n]o department, agency, or officer of the United States shall require an employer to practice discrimination in reverse by employing persons of a particular race . . . in either fixed or variable numbers, proportions, percentages, quotas, goals, or ranges". Id. His proposal was attacked as disastrous to the concept of affirmative action. Id.
measures as a remedy for discriminatory practices.\textsuperscript{104} Senator Ervin's proposed amendment was ultimately defeated by a two-to-one margin\textsuperscript{105}. Although Justice Rehnquist reviewed the legislative history of the 1964 legislation in Weber and reached the opposite conclusion, Justice Brennan found that the events surrounding the 1972 amendments strongly evidenced congressional ratification of race-conscious remedies.\textsuperscript{106}

Justice Brennan stressed that race-conscious remedies would not be the appropriate remedy in every case, emphasizing that a court should be guided by sound legal principles and avoid measures which are "invoked simply to create a racially balanced workforce."\textsuperscript{107} Despite these precautions, Justice Brennan confirmed that "a court may have to resort to race-conscious affirmative action when confronted with an employer or a labor union that has engaged in persistent or egregious discrimination. Or such relief may be necessary to dissipate the lingering effects of pervasive discrimination."\textsuperscript{108}

After concluding that race-conscious remedies were permitted by Title VII, Justice Brennan examined the petitioner's claim that the affirmative action program violated the equal protection component of the Due Process Clause of the fifth amendment.\textsuperscript{109} He acknowledged that Justices had been unable to agree to the "proper test to be applied in analyzing race-conscious remedial measures,"\textsuperscript{110} but he found it unnecessary to do so because "the relief ordered in this case passes even the most rigorous test—it is narrowly tailored to further the government's compelling interest in remedying past discrimination."\textsuperscript{111}

Justice Brennan explained that the Union and the Apprenticeship Program had repeatedly been found guilty of engaging in repeated acts of racial discrimination and that the lower courts had determined that affirmative measures were needed to remedy the discriminatory practices. The district court considered the efficacy of alternate remedies and determined that stronger measures were necessary. Furthermore, the affirmative action program did not unduly impair the interests of white workers. As a result of this analysis, Justice Brennan concluded that the affirmative action plan did not violate the

\begin{itemize}
\item[104.] Id. at 467-68.
\item[105.] Id. at 468.
\item[106.] Id. at 469.
\item[107.] Id. at 475.
\item[108.] Id. at 476.
\item[109.] Id. at 479-80.
\item[110.] Id. at 480.
\item[111.] Id. (Justice Brennan synopsized the various tests as set out in the opinions of Bakke, Fullilove, and Wygant).
\end{itemize}
Equal Protection Clause of the fourteenth amendment. 112

Justice O'Connor concurred in part with Justice Brennan's plurality opinion but did not believe the hiring goals were permissible. Justice O'Connor asserted that the hiring goal in this case was a "rigid racial quota" which is not permitted by Title VII's prohibition against racial balancing. 113 Justice O'Connor contended that the Court's decision in Firefighters v. Stotts 114 prohibited court-ordered remedies which accorded racial preferences to individuals who were not themselves the victims of discrimination, but conceded that a majority of the Justices did not share her interpretation. Nevertheless, she believed that the hiring goals that the district court ordered in this case were racial

112. Id. at 480-81. Justice Powell issued a separate opinion which concurred, in large measure, with Justice Brennan. Id. at 483. Justice Powell reiterated his position concerning the standard for reviewing a constitutional challenge to a racial classification. Once again, Justice Powell argued that any racial classification must be justified by a compelling state interest and the means chosen to effectuate the purpose of the legislation must be narrowly tailored to that goal. Id. at 484.

In this case, Justice Powell found that the petitioners' "egregious violations of Title VII established, without a doubt, a compelling governmental interest sufficient to justify the imposition of a racially classified remedy." Id. at 485. With regard to whether the remedy was narrowly tailored, Justice Powell identified the four factors which should be considered:

(i) the efficacy of alternative remedies; (ii) the planned duration of the remedy; (iii) the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or workforce; and (iv) the availability of waiver provisions if the hiring plan could not be met. Id. at 486.

Justice Powell also indicated that some consideration should be given to the effect of remedy on innocent third parties. Justice Powell found that all of these considerations had been satisfied in this case. Based on the series of court orders and the Union's long-standing disregard for them, Justice Powell concluded that an affirmative action plan was the only effective remedy. The duration of the hiring goals was limited and the goals were directly linked to the percentage of nonwhites in the geographic area. The hiring goals were flexible, and they did not harm innocent non-minority workers. Based on these considerations, Justice Powell found that the Constitution allows the imposition of flexible hiring goals as a remedy for past discrimination. Id. at 487-89.

113. Id. at 489.

quotas which are prohibited by section 703(j).\textsuperscript{115}

Justice O'Connor agreed with Justice White who found in his separate dissenting opinion that the affirmative action plan "established not just a minority membership goal but also a strict racial quota that the Union was required to attain."\textsuperscript{116} Justice O'Connor also indicated that racial hiring goals intended to serve as benchmarks by which compliance with Title VII is measured would be consistent with section 703(j). Strict numerical goals, however, are not.\textsuperscript{117}

Despite the objections of the dissenters, a majority of the Justices found that neither Title VII nor the fourteenth amendment prohibit courts from ordering race-conscious hiring and promotion goals as a remedy to proven acts of racial discrimination, even when the beneficiaries of the hiring goals were not themselves the proven victims of discriminatory practices. Although it would revisit the issue in other contexts, the Court here chose to affirm its previous endorsement of race-conscious remedies.\textsuperscript{118}

\textbf{C. Consent Decrees}

1. Local 93, International Association of Firefighters v. City of Cleveland

\textit{a. Majority Opinion}

Race-conscious hiring and promotion criteria have been negotiated in the context of pending litigation. The resulting agreements were approved by district courts and entered as consent decrees. The Supreme Court has found that race-conscious remedies in these circumstances do not violate Title VII. In \textit{Local Number 93, International Association of Firefighters v. City of Cleveland},\textsuperscript{119} the Supreme Court held that the provisions of section 706(g)\textsuperscript{120} of Title VII do not prohibit the entry of a consent decree which affords relief to individuals who were not themselves the proven victims of an employer's discriminatory practices.

\begin{itemize}
  \item \textsuperscript{115} \textit{Sheet Metal Workers' Ass'\n, 478 U.S. at 490.}
  \item \textsuperscript{116} \textit{Id. at 499.}
  \item \textsuperscript{117} \textit{Id.}
  \item \textsuperscript{118} Justice Rehnquist, who was joined by Chief Justice Burger, authored a dissent in which he argued that $§$ 706(j) "forbids a court to order racial preferences that effectively displace non-minorities except for minority individuals who have been the actual victims of a particular employer's racial discrimination." \textit{Id.} at 500.
  \item \textsuperscript{119} 478 U.S. 501 (1986).
  \item \textsuperscript{120} 42 U.S.C. $§$ 2000e-5(g) (1986).
\end{itemize}
In 1980, an organization of black and Hispanic firefighters (the "Vanguards") filed a class action against the City of Cleveland which alleged discrimination with regard to hiring, assignment and promotion of the city's firefighters. The city entered into settlement negotiations with the plaintiffs. In 1981, a union which represented non-minority firefighters intervened, objecting to the imposition of any racial quota systems.\textsuperscript{121}

Negotiations between the Vanguards and the city resulted in a proposed consent decree which reserved a fixed number of the planned promotions for minority candidates, and which also contained long-term minority promotion goals.\textsuperscript{122} The non-minority union objected to the proposal and the failure to include it in the negotiations. The trial court subsequently rejected the proposal and ordered the city, the Vanguards and the Union to engage in settlement discussions.\textsuperscript{123} After intensive negotiations under a magistrate's supervision, counsel for the parties prepared a revised agreement which was approved by the Vanguards and the city but was rejected by the union. The district court overruled the union's objection and approved the revised consent decree.\textsuperscript{124} The revised decree created additional promotional opportunities for firefighters of all races. The decree required promotional examinations in the future and specified promotional goals for minority firefighters over a four-year period. The district court stated the consent decree was justified by "a historical pattern of discrimination in the promotions in the City of Cleveland Fire Department."\textsuperscript{125}

The Union appealed the entry of the consent decree and the Court of Appeals for the Sixth Circuit affirmed the district court with one judge dissenting.\textsuperscript{126} When the case reached the Supreme Court, the "sole issue" was "whether the consent decree [was] an impermissible

\textsuperscript{121} Firefighters, 478 U.S. at 506. At this point, Cleveland had unsuccessfully litigated a number of discrimination suits involving municipal workers over the previous eight years; counsel for the city stated that "[y]ou don't have to beat us on the head. We finally learned what we had to do and what we had to try to do to comply with the law, and it was the intent of the city to comply with the law fully . . . ." \textit{Id.}

\textsuperscript{122} The city planned to make forty promotions to the rank of Lieutenant. Sixteen of the forty promotions would have been reserved for minority firefighters. The proposed decree also reserved for minority candidates three of the twenty promotions to Captain; two of the planned ten promotions for Battalion Chief; and one of the three planned promotions to Assistant Chief. \textit{Id.} at 506.

\textsuperscript{123} \textit{Id.} at 508.

\textsuperscript{124} \textit{Id.} at 511.

\textsuperscript{125} \textit{Id.}

\textsuperscript{126} Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479 (6th Cir. 1985).
remedy under section 706(g) of Title VII. Section 706(g) of Title VII provides:

No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee or the payment to him of any backpay, 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.

The Union claimed that section 706(g) prohibited courts from awarding relief that would benefit individuals who were not the proven victims of an employer's discriminatory practices. After holding in Sheet Metal Workers' Association that section 703(j) of Title VII authorized district courts to order race-conscious relief which benefits individuals who are not themselves the victims of an employer's discriminatory practices, the majority found in this case that Title VII does not preclude consent decrees which accord benefits to individuals who were not the proven victims of discriminatory employment practices.

The Union, supported by the United States as Amicus, argued that section 706(g) established a limitation on the court's authority and prohibited relief that would benefit nonvictims. A consent decree, they claimed, was an "order of the court" that section 706(g) prohibited. Since consent decrees are hybrids of contracts and court orders, the majority found it necessary to examine the legislative history of Title VII for an authoritative interpretation of section 706(g). After reviewing the legislative history, the majority concluded that section 706(g) was added to Title VII to preserve "management prerogatives" and "union freedoms" to the maximum possible extent. As a consequence, the majority held that section 706(g) "does not restrict the ability of employers or unions to enter into voluntary agreements providing for race-conscious remedial actions."

The Union also claimed that even if section 706(g) did not directly prohibit the consent decree, the decree was not valid because it accorded greater relief than the district court was authorized to order. The

127. Firefighters, 478 U.S. at 514 n.5.
129. 478 U.S. 421 (1986). For a discussion of this case, see supra notes 86-117 and accompanying text.
130. Sheetmetal Worker's Ass'n, 478 U.S. at 515.
131. Id. at 519-20.
132. Id. at 520 (quoting H.R. REP. NO. 914, 88th Cong., 1st Sess., pt. 2, at 29 (1963)).
133. Id. at 521.
majority rejected this argument and held that courts are not barred from entering consent decrees which provide broader relief than a court could have awarded after a trial. 134

b. Justice Rehnquist's Dissent

Justice Rehnquist issued a dissent joined by Chief Justice Burger. 135 Justice Rehnquist believed individuals who were not themselves the identified victims of the city's discriminatory practices should not have been preferred for promotions at the expense of non-minority firefighters. He also argued that the Court's decision in Firefighters v. Stotts 136 precluded class-wide relief in the absence of a showing of injuries by individual members of the class and took issue with the majority's finding that the union was not bound by any of the terms of the consent decree since the city was obligated to accord hiring preferences to minority firefighters. Justice Rehnquist concluded that non-minority union members who would otherwise have received promotions were obviously injured by the hiring preference. 137

Justice Rehnquist also maintained that section 706(g) protects "innocent non-minority employees from the evil of court-sanctioned racial quotas." 138 To support this assertion, he relied on his interpretation of portions of the legislative history of Title VII which indicate the statute forbids quotas and racial balancing. He concluded the city's failure to make individualized findings of discrimination with respect to each of the minority firefighters required a conclusion that they were not entitled to benefit from the consent decree.

The most questionable aspect of Justice Rehnquist's argument is

134. Id. at 528. In a dissenting opinion, Justice White claimed that the majority had paid too little attention to the predicate necessary for race-conscious remedies. Justice White argued that "an employer may adopt or be ordered to adopt racially discriminatory hiring practices . . . favoring actual or putative employees of a particular race only as a remedy for its own prior discriminatory practices disfavoring members of that race." Id. at 532.

Justice White found that the consent decree involved in this case indicated that the Cleveland Fire Department had engaged in discriminatory conduct but did not identify any actual victims of discrimination. Id. Despite this lack of identification, the decree allowed black and Hispanic firefighters who ranked below non-minority firefighters in seniority and examination results to be preferred over senior and better qualified non-minority firefighters. Id. In Justice White's view, "[t]his kind of leapfrogging . . . is an impermissible remedy under Title VII." Id.

135. Id. at 535.
137. Id. at 537.
138. Id. at 541.
that it fails to consider that non-minority firefighters who would have "otherwise" received promotions would have done so under a discriminatory system. How the non-minority firefighters might have fared under a nondiscriminatory system which included minority workers is speculative, at best. Justice Rehnquist discounted the "pattern and practice" element of this case. The city conceded it had engaged in discriminatory practices which adversely affected black and Hispanic firefighters as a class, not as individuals. The extent of the injury may be arguable. The fact of the injury is not. In any event, the majority found that the consent decree was permissible and it affirmed this proposition in United States v. Paradise,133 a case decided in 1987.

2. United States v. Paradise

   a. Majority Opinion

In another consent decree case, United States v. Paradise,140 the Court affirmed a "one-black for one-white" temporary promotion quota based on its conclusion that the promotions served the government's compelling interest in eradicating egregious racial discrimination. The Court also found that the remedy imposed was narrowly tailored to serving a compelling governmental purpose.141

In 1972, the District Court for the Middle District of Alabama held that the Alabama Department of Public Safety (the "Department") had engaged in a pattern and practice of systemic exclusion of blacks from the Department in violation of the fourteenth amendment of the Constitution.142 The district court enjoined the Department from engaging in any discriminatory employment practices, including recruitment, examination, appointment, training, promotion and retention. The district court also ordered the Department "to hire one black trooper for each white trooper hired until blacks constituted approximately 25% of the state trooper force."143 The district court's ruling was subsequently affirmed by the Court of Appeals for the Fifth Circuit.144

In 1974, the plaintiffs brought an enforcement action which resulted in a finding that the Department had failed to comply with the

140. Id.
141. Id. at 186-88.
143. Paradise, 480 U.S. at 154-55.
144. NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974).
district court's original order.145 In 1977, the plaintiffs initiated a supplemental proceeding which focused on the Department's promotion practices. This proceeding resulted in the entry of a consent decree in which the Department agreed to develop nondiscriminatory promotion procedures within one year after the entry of the decree. A clarifying order was later issued which emphasized that the 1972 ruling was not limited to entry level positions, but applied instead to all levels of the state trooper force.146

The Department later sought the court's approval of a proposed promotion procedure. The plaintiffs objected to the Department's proposal, and the dispute was later resolved by the development of a consent decree which was approved by the district court in August of 1981. The parties agreed to the development and administration of a nondiscriminatory promotion examination. When the promotion examination was actually administered, however, it disproportionately disqualified black employees. As a consequence, in 1983 the plaintiffs returned to the district court and requested an order that would require the Department to comply with the previously entered consent decrees.147

A class consisting of white state troopers intervened, claiming that the decrees were illegal and unconstitutional. After finding that "conspicuous" and "pervasive" discriminatory practices were still in place twelve years after the entry of its original order, the district court ordered a temporary 50% promotional goal to the rank of corporal if qualified black applicants could be found. In addition, "the court imposed a 50% promotional quota in the upper ranks, but only if there were qualified black candidates, if the rank [was] less than 25% black, and if the Department had not developed and implemented a promotion plan without adverse impact for the relevant rank."148 The Court thus emphasized the temporary and flexible nature of the goals.

When the case reached the Supreme Court, Justice Brennan's

145. Paradise, 480 U.S. at 156-57. The court found that the defendants, in a scheme to defeat or deny relief to plaintiffs, had artificially restricted the size of the troop and number of troopers hired. See Paradise v. Dothard, No. 3561-N (M.D. Ala. Aug. 5, 1975).
146. Paradise, 480 U.S. at 157-58.
147. Id. at 159-60. Plaintiffs specifically urged that defendants be ordered to promote black troopers to supervisory rank (corporal) at the same rate hired, contending such order would motivate defendants to develop and implement a valid--i.e., non-discriminatory--promotion policy and procedure, alleging such an order would "help to alleviate the gross underrepresentation of blacks in the supervisory ranks of the department" resulting from the department's continuing refusal to implement a fair plan. Id. at 160.
148. Id. at 163 (emphasis added).
plurality opinion noted preliminarily "[i]t is now well established that
government bodies, including courts, may constitutionally employ racial
classifications essential to remedy unlawful treatment of racial or ethnic
groups subject to discrimination." Justice Brennan acknowledged
that the Justices had been unable to agree to the level of scrutiny
required for an appropriate constitutional analysis of a race-conscious
remedy. Nevertheless, he found the relief ordered by the district court
permissible because it satisfied the most exacting interpretation of the
strict scrutiny standard.

With respect to the first prong of the standard, the Court found and
the Department had conceded that "the pervasive, systematic, and
obstinate discriminatory conduct of the department created a profound
need and a firm justification for the race-conscious relief ordered by the
District Court." The Department and the intervenors argued that
the relief awarded was not warranted since the district court had only
found discrimination with respect to the Department’s hiring practices.
The Supreme Court disagreed and found instead that the trial court’s
record amply supported its finding that the Department had engaged in
discriminatory hiring and promotion.

The United States claimed, on behalf of the Department, that the
remedy was not narrowly tailored to achieving the goal of eliminating
discrimination in the State of Alabama’s Department of Public Safety.
Before responding to the merits of this argument, Justice Brennan
indicated that in determining the validity of race-conscious remedies, the factors to be considered were: (1) the necessity for the
relief; (2) the efficacy of alternative remedies; (3) the flexibility and
duration of the relief including the availability of any waiver provisions;
(4) the relationship of the numerical goals to the relevant labor market;
and (5) the impact of the remedy on third parties.

149. Id. at 166 (citing Wygant v. Jackson Bd. of Educ., 426 U.S. 267 (1986);
Local 28 of the Sheet Metal Workers’ Int’l Ass’n v. EEOC, 478 U.S. 421 (1986)).
150. Id. at 166-67. Here Justice Brennan refers to the Wygant standard:
the relief ordered by the lower court withstands strict scrutiny, as it is "narrowly
tailed to serve a compelling [governmental] purpose." Id. at 167 (quoting
Wygant, 476 U.S. at 274).
151. Id. The forty-year record of discriminatory practice within the agency
was voluminously reported from the 1972 lower court decisions; a record of
"egregious discriminatory conduct . . . pervasive, systematic, and obstinate." Id.
at 167.
152. Id. at 168-69.
153. Id. at 171. The Justice Department originally supported the plaintiffs.
By the time the case reached the Supreme Court, the federal government was
arguing on behalf of the State of Alabama.
154. Id. at 171 (referring to the analysis set forth in Sheet Metal Workers’
Ass’n, 478 U.S. at 481).
The opinion held the relief ordered by the district court necessary to eliminate the effects of pervasive discriminatory practices and to coerce the State of Alabama into compliance with a series of court orders that had been flouted over a twelve year period. It also found that there were no effective alternatives.\textsuperscript{155}

Justice Brennan concluded further that the goals were flexible and limited in duration. The promotional goal was contingent on the availability of eligible black candidates, only operated to the extent the force remained less than 25% black, and would expire upon the development of a non-discriminatory promotion procedure. The numerical goal was found reasonably related to the relevant labor market. The overall goal of a 25% black force reflected the percentage of blacks in the relevant geographic labor pool. The 50%, one-black for one-white hiring requirement was designed to achieve the overall goal of a 25% black workforce.\textsuperscript{156}

Justice Brennan also determined that the rights of third parties were not unduly burdened by the hiring and promotional goals. No white employees were fired and the promotional goals did not act as a bar to their progress through the ranks. The burden imposed was diffuse, "foreclosing only one of several opportunities."\textsuperscript{157} He also found "[d]enial of a future employment opportunity is not as intrusive as loss of an existing job."\textsuperscript{158}

\textsuperscript{155} Id. at 171-73. It is an understatement to say that the defendants lacked credibility at this stage of the proceedings. In reviewing the incredible record of discriminatory practice, Justice Brennan stated that "we find it astonishing that the Department should suggest that in 1983 the District Court was constitutionally required to settle for yet another promise that such a procedure would be forthcoming "as soon as possible." Id. at 172-73.

\textsuperscript{156} Id. at 179. Justice Brennan analogized this requirement to that found in \textit{Sheet Metal Worker's Ass'n} "of an end date, which regulated the speed of progress toward fulfillment of the hiring goal." Id. at 180.

\textsuperscript{157} Id. at 183 (quoting Justice Powell's opinion in \textit{Wygant}, 476 U.S. at 283). Here, unlike layoffs, there is no burden placed on particular individuals, only a postponement of promotions for otherwise-qualified white troopers. Id.

\textsuperscript{158} 480 U.S. at 183 (quoting \textit{Wygant}, 476 U.S. at 282-83). Justice Powell issued a concurring opinion which endorsed Justice Brennan's application of the strict scrutiny standard and reiterated his view that strict scrutiny was the appropriate method of constitutional analysis. Id. at 186-89. Justice Stevens issued a separate opinion which emphasized his view that the district court was not required to narrowly tailor a remedy for a constitutional violation. Id. at 194-95. Justice Stevens also disagreed with the dissent's argument that the district court's order had to be supported by a compelling governmental interest. In Justice Steven's view, the standard for reviewing an order issued by a federal court is not the same as that which is used to review state executive or legislative actions. Id. at 190 n.1. The courts' broad equity powers, in Justice
b. Justice O'Connor's Dissent

Justice O'Connor entered a dissenting opinion which was joined by Justice Scalia and Chief Justice Rehnquist. The dissent conceded that there was a compelling interest in eliminating the Department's long-standing and pervasive discriminatory practices. Justice O'Connor believed, however, that the remedy was not narrowly tailored to accomplish this purpose.

Justice O'Connor argued that the temporary one-for-one promotion goal was not designed to eradicate the effects of past discrimination because the promotional examination which was ultimately adopted resulted in a lower percentage of black promotions (23%) than the Court's original goal of 25%. In her view, the one-for-one promotional goal was not related to the goal of achieving a 25% minority workforce.

Justice O'Connor also believed that there were other options available for securing compliance with the district court's order that would not have affected the interests of white employees. She argued that the strict scrutiny standard required the district court to explore exhaustively the efficacy of alternative remedies prior to the imposition of race-conscious relief. In her view, that process did not occur in this case.

Although the dissenting Justices argued strenuously against the result, the majority approved of race-conscious approaches to hiring and promotion goals, in the context of voluntary programs, court-ordered remedies, and negotiated consent decrees. In each of the employment cases, race-conscious measures were used to integrate racially segregated workforces and were employed only where longstanding discriminatory practices had excluded minority workers. In some cases, additional justifications were derived from the actions of recalcitrant defendants who continued to resist legitimate efforts to eliminate racial barriers after the entry of court orders. In these circumstances, it appears that race-conscious remedies are not only a permissible means of eliminating discriminatory practices, but may be the only effective means where the practices are systemic or when there is resistance to less stringent approaches.

Stevens' view, are far broader and more flexible that those suggested by Justice O'Connor's dissent. Id.

159. Id. at 196.

160. Id. at 197. Justice O'Connor believed that the Court used a "standard-less view of 'narrowly tailored'" that was much less stringent than required by "strict scrutiny". Id.

161. Id. at 198.
D. Layoffs

1. Firefighters Local Union No. 1784 v. Stotts

Although race-conscious hiring and promotional efforts have been repeatedly approved, the Supreme Court has just as consistently disapproved of affirmative action plans which resulted in the displacement of incumbent non-minority employees. For example, in Firefighters Local Union No. 1784 v. Stotts,162 the respondent, Carl Stotts, filed a civil action which claimed that the Memphis Fire Department had engaged in a pattern and practice of racial discrimination with regard to hiring and promotions. During the pendency of the case, settlement negotiations ensued which ultimately resulted in the entry of a consent decree. Although the city did not admit to any actual violations of Title VII, it agreed to provide promotions and backpay to certain identified individuals and it also agreed to implement some long-term hiring goals.163

The consent decree in Stotts did not address reductions in force or layoffs, but a consent decree entered in an earlier case in which the city was the defendant specified that transfers, rank, promotions, assignment and seniority would be determined in accordance with the employee's seniority with the City of Memphis.164 In 1981, the city announced a layoff in which it followed a "last-hired first-fired" policy. Stotts sought to enjoin the layoffs on the grounds that they would violate the consent decree. The Firefighter's Union intervened, and at the conclusion of a temporary injunction hearing, the district court found the proposed layoffs racially discriminatory.165

When the case reached the Supreme Court, it held that the district court's injunction did not carry out the purposes of the consent decree,

163. Id. at 565 (the city promoted the named individuals, provided backpay to eighty-one fire department employees, and established a goal to increase black representation in the various job categories in proportion to their numbers in the labor force).
164. Id. at 566. This 1974 decree provided that promotions, transfers, and assignments be computed "as the total seniority of that person with the City." Id.
165. Id. at 567. While the district court stated that the layoffs were "in accordance with the City's seniority system and was not adopted with any intent to discriminate," it concluded that the proposed layoffs would indeed have a discriminatory effect, and ordered the city not to apply the proposed policy insofar as to decrease the percentage of blacks in various fire department job classifications. Id. In complying with this order, some non-minority fire department employees with greater seniority than minority employees were either demoted in rank or laid off. Id. at 567 n.2.
remediying past hiring and promotion practices. The majority also found that section 703(h) of Title VII protects bona fide seniority systems as long as the seniority system is not itself the product of discrimination. As a consequence, incumbent employees could not be denied the benefits of a valid seniority system in order to provide a remedy for a pattern and practice of discrimination.

The majority also held the district court did not have the inherent authority to modify the terms of a consent decree based on a conclusion that seniority-based layoffs would undermine the affirmative action goals of the decree. Speaking for the majority, Justice White explained that section 703(h) permits valid seniority systems as long as the seniority system is not itself the product of discriminatory practices. Here, there was no evidence offered to indicate that the Memphis seniority system was discriminatory. The majority also found that the court of appeals' conclusion—that the injunction advanced the settlement goals of Title VII—was unfounded. In the majority's view, there was no actual settlement since the Firefighter's Union objected to the district court's modification of the consent decree.

The court of appeals had justified the district court's injunction because it placed the minority firefighters in the positions they would have occupied in the absence of unlawful discrimination. According to the court of appeals, this result was an appropriate remedy under the "make whole" theory of Title VII. The Supreme Court disagreed. It noted that the case had been settled without an admission of liability. Thus, there were no individualized showings that specific members of the class would have been entitled to awards of retroactive seniority. More important, even when such a showing is made, the prevailing plaintiffs are not automatically entitled to have non-minority employees laid off when all of the employer's positions are filled. In such a circumstance, the prevailing party could be required to wait until

166. Id. at 577-78. A bona fide seniority system is not invalid even when it operates to perpetuate the effects of past discrimination as long as the seniority system is not itself the product of discrimination. See, e.g., Franks v. Bowman Transp. Co., Inc., 424 U.S. 747, 767-71 (1976); International Bhd. of Teamsters v. United States, 431 U.S. 324, 348-55 (1977).

167. Stotts, 467 U.S. at 578-79.

168. Id. at 578 ("The settlement theory, whatever its merits might otherwise be, has no application when there is no 'settlement' with respect to the disputed issue.").


170. Stotts, 467 U.S. at 579.
positions become available.¹⁷¹

2. Wygant v. Jackson Board of Education

In another case involving layoffs, Wygant v. Jackson Board of Education,¹⁷² the Court struck down a provision of a collective bargaining agreement which retained probationary minority employees during layoffs, but displaced non-minorities with greater seniority. In 1972, the Jackson Board of Education proposed an amendment to an existing collective bargaining agreement with a teacher’s union. The board and the union ultimately agreed to an amendment which provided that employees with less seniority would be laid off prior to employees with more seniority, "except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employees at the time of the layoff."¹⁷³

During 1976-77 and again in 1981-82, the board applied the amended collective bargaining agreement to a series of layoffs. This resulted in the retention of probationary minority teachers when tenured non-minority teachers were being laid off. The displaced non-minority teachers filed this action in federal court alleging violations of Title VII, the Equal Protection Clause, and 42 U.S.C. section 1983.¹⁷⁴ The district court held the layoff procedures established by the amendment to the collective bargaining agreement were not required to be justified by a prior finding of discrimination. The court also held

¹⁷¹ Id. at 579. Justice Blackmun authored a dissent which was joined by Justices Brennan and Marshall. Id. at 593-621. Justice Blackmun believed that the recall of the laid-off employees and the reinstatement of the demoted employees rendered the challenge moot. Id. at 593. Justice Blackmun also believed that the majority’s opinion was erroneous because it treated the entry of a preliminary injunction as if it were a judgment on the merits. Id. In Justice Blackmun’s view, the injunction which prohibited the layoff of black employees did not require the city to lay off white employees. Id. at 610. The city was left with other options to address its fiscal crisis. Furthermore, to the extent that the layoff of white employees violated their seniority rights, a remedy was available in the grievance process established by the Union’s collective bargaining agreement. Id.

Justice Blackmun also believed that the minority firefighters had not been given a full and fair opportunity to prove their claims. The claims of the minority firefighters (that the proposed layoffs discriminated against them) might have been proven if the case had gone to trial. Id. at 615.

¹⁷² 476 U.S. 267 (1986) [hereinafter Wygant].

¹⁷³ Id. at 270. The collective bargaining agreement defined "minority group personnel" to include blacks, American Indians, and those of Oriental or Spanish descent. Id. at 271 n.2.

¹⁷⁴ Id. at 270.
that the race-conscious layoff procedures were justified as a remedy for past societal discrimination. The court also found that the amendment promoted the legitimate goal of providing role models for minority schoolchildren.\textsuperscript{176}

The Supreme Court disagreed. Speaking for a plurality, Justice Powell found that the amendment to the collective bargaining agreement "operates against whites and in favor of certain minorities, and therefore constitutes a classification based on race."\textsuperscript{177} As a consequence, Justice Powell found that classification "must be justified by a compelling governmental interest" and that "the means chosen to effectuate its purpose must be narrowly tailored to the achievement of that goal."\textsuperscript{177}

Justice Powell found that some showing of prior discrimination by the governmental unit must be made to justify the adoption of race-conscious remedies. The district court's role-model theory was rejected because it had no "logical stopping point" and did not bear a demonstrable relationship to any harm caused by prior discriminatory hiring practices.\textsuperscript{178} In Justice Powell's view, "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."\textsuperscript{179} The school board claimed that the purpose of the layoff procedure was to remedy prior discrimination by the school board against minority teachers. Justice Powell determined that this admission was not sufficient. He believed that a factual predicate was necessary and in this case, "no such determination ever ha[d] been made."\textsuperscript{180} Based on the lack of a formal finding of prior discrimination, Justice Powell concluded that the board had not satisfied the compelling justification requirement of the strict scrutiny standard.\textsuperscript{181}

Justice Powell also found that "the Board's layoff plan [was] not sufficiently narrowly tailored. . . . Other, less intrusive means of accomplishing similar purposes—such as the adoption of hiring goals—[were] available."\textsuperscript{182} Justice Powell believed that layoffs were too intrusive to serve as a legitimate means of achieving the board's

\textsuperscript{175} Id. at 272.
\textsuperscript{176} Id. at 273.
\textsuperscript{177} Id. at 274 ("Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees.") (citing Wygant, 476 U.S. at 274).
\textsuperscript{178} Id. at 275.
\textsuperscript{179} Id. at 276. Justice Powell noted that numerous reasons could be found for the disparity between student and faculty minority composition, and that "[i]n fact, there is no apparent connection between the two groups." Id.
\textsuperscript{180} Id. at 278.
\textsuperscript{181} Id.
\textsuperscript{182} Id. at 283-84.
goals. The adverse financial and psychological effects of even a temporary layoff were too heavy a burden for the non-minority teachers to bear. After noting that the rights and expectations surrounding seniority are the most valuable assets that a worker owns, Justice Powell indicated that the board could have achieved its goal by less intrusive means.183

Justice O'Connor issued a concurring opinion in which she endorsed Justice Powell's application of the strict scrutiny standard.184 Justice O'Connor also agreed that societal discrimination would not by itself provide the compelling justification needed for race-conscious remedies. Nevertheless, Justice O'Connor observed that "[t]he Court is in agreement that . . . remedying past or present discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program."185 Here, however, there was no finding that the board had engaged in discriminatory practices.

Justice O'Connor also contended that the requirement of an adequate factual predicate should not be construed to mean a formal adjudication by a court or an admission of liability by the defendant. She emphasized that "employers are trapped between the competing hazards of liability to minorities if affirmative action is not taken to remedy apparent employment discrimination and liability to non-minorities if action is taken." 186

To resolve this dilemma, Justice O'Connor suggested that an adequate evidentiary basis for a race-conscious affirmative action program exists when there is "demonstrable evidence of a statistical disparity between the percentage of qualified blacks on a school's teaching staff and the percentage of qualified minorities in the relevant labor pool sufficient to support a prima facie Title VII pattern and practice claim by minority teachers."187 Justice O'Connor declined to address the second aspect of the strict scrutiny standard, that is, how to "narrowly tailor" the remedy.

It is noteworthy that the majority was unwilling to accept the findings of the Michigan Civil Rights Commission or the board's own assertion that it had engaged in discriminatory conduct. Furthermore,

183. Id.
184. Id. at 284-85. Justice O'Connor cites numerous decisions, including Bakke and Fullilove, as standing for the proposition that any scheme of racial classification must be viewed with strict scrutiny, a standard she believes to be "held by all Members of this Court . . . however defined." Id. at 285.
185. Id. at 286.
186. Id. at 291 (emphasis in original). A further discussion of this "employer's dilemma" is discussed supra at note 63.
187. Id. at 292.
after indicating in her concurring opinion in *Stotts* that the parties could have negotiated layoff priorities, Justice O'Connor suggested in this case that layoffs are not a negotiable issue.

Justice Marshall dissented. Because he believed that the record reflected a history of discriminatory hiring practices, Justice Marshall would have held that the state had a compelling interest in "preserving the integrity of valid hiring policy—which in turn sought to achieve diversity and stability for the benefit of all students."\(^{188}\)

With regard to the means chosen to accomplish that goal, Justice Marshall contended that the board's goal of integrating its faculty could not be achieved without some modification to the seniority-based layoff procedures. Justice Marshall also found that the revised layoff procedures were narrowly tailored because they "allocate[d] the impact of an unavoidable burden proportionately between two racial groups."\(^{189}\) Justice Marshall emphasized that the amendment to the collective bargaining agreement was the result of lengthy negotiations in which several alternatives were considered and rejected. In his view, the bilateral nature of the negotiations provided ample evidence for a conclusion that the layoff procedures finally selected were the least intrusive means of achieving the board's goal.\(^{190}\)

Unlike the hiring and promotion cases, the Court was not willing in *Wygant* and *Stotts* to approve affirmative action efforts which resulted in the loss of jobs by incumbent non-minority employees. In *Stotts*, the Court did not address the merits of the issue, but held instead that a consent decree which did not address the question of layoffs could not be construed to require the loss of seniority priorities which protected the jobs of non-minority employees, even though the existing layoff priorities undermined the minority hiring goals of the consent decree.

In *Wygant*, the Court addressed the layoff issue directly and held that provisions of a collective bargaining agreement which divested the seniority rights of tenured non-minority school teachers while retaining probationary minority teachers could not be justified in the absence of a compelling justification. Societal discrimination was not a sufficiently weighty justification, and without an adequate foundation, the racial classification violated the Equal Protection Clause of the fourteenth amendment. Furthermore, even if a compelling justification had been shown, the majority opinion in *Wygant* indicates that the loss of an existing job was far too intrusive to satisfy the narrowly tailored requirement of the strict scrutiny standard.

Considered together, the employment cases indicate that race-

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188. *Id.* at 306.
189. *Id.* at 309.
190. *Id.* at 310.
conscious remedial actions will be approved if there is an adequate justification, except where they result in the loss of existing jobs held by non-minority workers. Furthermore, a history of excluding minority workers is sufficient to satisfy Title VII and the compelling justification requirement of the fourteenth amendment. Further, it should be noted that each of the employment cases involved efforts to eliminate longstanding racial barriers which prevented minority workers from securing employment opportunities.

None of the cases involved individual or isolated incidents of discrimination. They all involved longstanding and systemic discriminatory practices, which had operated to deny opportunities to minority employees. Some of the cases had the added element of intransient defendants. In such cases, some sort of organized and systemic approach would appear to be the most effective means of overcoming the discriminatory practices.

A majority of the Justices have agreed that the elimination of invidious discrimination is a compelling interest, regardless of whether it involves a private employee seeking to eliminate the vestiges of discriminatory actions, or a state or local government whose personnel policies and practices operate to the detriment of minority workers.

The debate, of course, concerns the conflict between the interests of minority workers who have long been precluded from equitable job opportunities and non-minority employees who are now competing for the same jobs. In this regard, however, the question is not one of "reverse discrimination," that is, favoring minority candidates at the expense of non-minority employees. The question, rather, is how to eliminate customs and practices which were not eliminated by a congressional prohibition against discrimination in employment.

Non-minority employees have long enjoyed a competitive advantage by virtue of not having to compete with the entire labor market. As the employment cases discussed above establish, when practices (whether active or passive) operate to perpetuate those advantages, some action beyond an order to cease the discriminatory conduct may be necessary. It is in these circumstances that race-conscious efforts are justified.

Incumbent employees whose promotions are potentially effected cannot claim that they are innocent bystanders since they gained their positions at a time when minority workers were precluded from the competition. How incumbents might have fared in an equitable system cannot be determined. Furthermore, the Court has assured that incumbent employees will not be displaced by minority workers. New applicants who might be denied entry level positions because marginally less qualified minority or female workers are temporarily preferred may have some standing to complain, but the Court has found that diminution of one of several potential employment opportunities is only one of many factors in a competitive balance. In each of the programs approved by the Court, none of the non-minority candidates was totally
foreclosed from competition and none was prevented from progressing through the ranks. The thrust of the programs approved was inclusive. Programs which foreclosed any consideration of non-minorities were struck down.

The opponents of affirmative action are correct to the extent that they believe that race or sex should not have any role in employment decisions. This view looks to a goal which has not been achieved. The issue now is how to accomplish the transition from a discriminatory system to a system which is truly equitable. To argue now that no consideration should be given to present effects of past discrimination ignores the highly visible effects of a pervasive system of state-sanctioned discrimination, and will in most cases simply operate to perpetuate the status quo ante.

III. PROCUREMENT PROGRAMS

A. Fullilove v. Klutznick

1. Majority Opinion

The third context in which the Court addressed legal challenges to race-conscious remedial programs involved government procurement practices. One of the procurement cases was among the first group of affirmative action cases to reach the Supreme Court. Fullilove involved a constitutional challenge to a federal public works statute which required ten percent of the federal funds expended to be reserved for minority business enterprises ("MBE"). The statute, the Public Works Employment Act of 1976, authorized federal grants to state and local governments to finance public works projects. The disputed provision of the statute stated that "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 centum of the amount of each grant shall be expended for minority business enterprises." Several associations of construction contractors and subcontractors filed suit claiming that the minority set-aside provision 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. The district

191. 448 U.S. 448 (1980) [hereinafter Fullilove].
193. Id. § 6705(e)(2).
194. Fullilove, 448 U.S. at 455.
court upheld the validity of the set-aside provision, and the Court of Appeals for the Second Circuit later affirmed the district court's decision.

When the case reached the Supreme Court, Chief Justice Burger's opinion articulated a variation of the strict scrutiny standard which consisted of an inquiry into whether the objectives of the Public Works legislation were within Congress' powers and, if so, whether the use of racial and ethnic criteria was a permissible means of achieving the objectives of the legislation.

With regard to the first aspect of the standard, Justice Burger found that the Constitution granted broad spending powers to Congress. Under this authority, Congress could legitimately condition federal funds on the recipient's compliance with federal policies. Justice Burger also found that under its constitutional power to regulate commerce, Congress could act to prevent federal contractors from hampering minority access to contracting opportunities.

Support for this conclusion was found in section 5 of the fourteenth amendment which gives Congress the authority "to enforce, by appropriate legislation" the Equal Protection Clause of the fourteenth amendment. Under this authority, Congress was authorized to enact legislation designed to eliminate procurement practices that perpetuate the effects of past discrimination. As a result of this analysis, Justice Burger concluded that the objectives of the MBE legislation were within Congress' constitutional authority.

Justice Burger then considered whether the use of racial and ethnic criteria was a permissible means of achieving the goals of the Public Works Employment Act. In doing so, Justice Burger acknowledged that the means chosen to effectuate the objectives of the legislation must be

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195. Id. The district court decision is reported at 443 F. Supp. 253 (S.D.N.Y. 1977).
196. Fullilove, 448 U.S. at 455. The United States Court of Appeals for the Second Circuit previously held that the minority business enterprise provision was not contrary to the Constitution, "even under the most exacting standard of review". Fullilove v. Kreps, 584 F.2d 600, 603 (2d Cir. 1978).
197. Fullilove, 448 U.S. at 473.
198. Id. at 474.
199. Id. at 478. Justice Burger first reviewed congressional grants of authority under the commerce power, U.S. CONST. art. I, § 8, cl. 3; as the MBE program "pertains to the actions of private prime contractors", id. at 476, Congress could have employed its powers under the Commerce Clause to reach the objectives of the MBE provision. However, "in certain contexts, there are limitations on the reach of the Commerce Power to regulate the actions of state and local governments." Id. (citation omitted).
narrowly tailored to achieving Congress' goals. He found that since the waiver provisions of the Public Works Act could be invoked to prevent awards that did not carry out the objectives of the set-aside, the means chosen was narrowly tailored to effectuate the goals of the Act. The contractors' contention that "Congress must act in a wholly 'color-blind' fashion" was rejected. Relying on the precedent established by school desegregation cases, Justice Burger found that Congress could enact race-conscious legislation designed to coerce state action to eliminate discriminatory practices.

To the extent that non-minority firms would not receive procurement contracts they might have received in the absence of the set-aside, Justice Burger found that this result was an inconsequential incident to the goals of the legislation. He noted with some irony that the historic exclusion of minority contractors was similarly incidental to "business as usual" in a segregated industry. More important, Congress could act on the assumption that many of the non-minority firms that were objecting to the set-aside had themselves benefitted competitively from the historic exclusion of minority contractors.

The contractors challenging the set-aside also argued that the class benefitted was both over-inclusive and under-inclusive. The class was allegedly under-inclusive because it did not include all of the individuals who had been the victims of discriminatory practices. At the same time, the class was purportedly too broadly drawn since it bestowed benefits on MBEs that had not themselves been the victims of discriminatory conduct.

In Justice Burger's view, the fact that all victims of discriminatory

200. Id. at 480. While mindful of the deference due Congress on matters within its power, Justice Burger notes that constitutional mandates, notably the Due Process Clause, require the Court to view any racial or ethnic classifications employed by Congress to remedy current effects of past discrimination with "careful judicial evaluation" to ensure accomplishment of the goal without violation of constitutional rights. Id.

201. Id. at 481-82. In addition to the waiver provision, an administrative complaint mechanism existed to prevent unjust participation in the program by non-bona fide MBE's. Id. at 482 (citation omitted).

202. Id.


204. Fullilove, 448 U.S. at 484-85.

205. Id. at 485. Justice Burger noted that the non-minority contractors may be presumed innocent of discrimination. He cites Franks v. Bowman Transp. Co., Inc., 424 U.S. 747, 777 (1976), for the proposition that innocent parties sharing the burden is not impermissible. Fullilove, 448 U.S. at 484.

206. Id. at 485-89.

207. Id. at 485-86.

208. Id. at 486-89.
practices were not included within the statutory definition of MBE did not undermine the constitutionality of the statute.209 He found that Congress could address broad problems one step at a time, focusing on that aspect it deemed most severe.210 In addition, Justice Burger found that the contractors had not shown that any identifiable minority group had been intentionally excluded from the class benefitted by the set-aside.211 Based on this analysis, Justice Burger affirmed the validity of the set-aside provision of the Public Works Act.212

2. Justice Powell's Opinion

In a concurring opinion, Justice Powell analyzed the set-aside provisions of the Public Works Act using the more traditional standard that he had originally applied in Bakke.213 Applying this standard, Justice Powell found that the set-aside in Fullilove had a compelling justification. He also concluded that the means selected to effectuate the legislation's goals were "equitable and reasonably necessary to the redress of identified discrimination."214

With regard to the compelling justification requirement, Justice Powell believed that the federal government "does have a legitimate interest in ameliorating the disabling effects of identified discrimination,"215 but that this finding alone would not support an affirmative action program. In Justice Powell's view, race-conscious remedies should not be approved in the absence of judicial, administrative, or legislative findings of constitutional or statutory violations. Furthermore, governmental bodies which act to impose a race-conscious remedy must have the authority to respond to identified acts of discrimination. Such a body must also establish an adequate evidentiary record of discrimination. If these requirements are satisfied, the means selected must be narrowly drawn to fulfill the governmental purpose.

209. Id. at 486.
210. Id. at 485.
211. Id. at 486. Justice Burger again noted that the congressional assumptions of (1) impairment of competitiveness of minority businesses by current effects of past discrimination, and (2) that affirmative efforts would result in participation by minority businesses, could be rebutted in the administrative waiver and exemption protocols of the MBE program. Id. at 487.
212. Id. at 491-92. Justice Burger noted that while this opinion does not adopt any of the Bakke formulations, "our analysis demonstrates that the MBE provision would survive judicial review under either 'test' articulated in the several Bakke opinions." Id. at 492.
213. Id. at 496.
214. Id.
215. Id. at 497.
Applying these considerations to this case, Justice Powell found that "the National Legislature is competent to find constitutional and statutory violations."\(^{216}\) After reviewing a number of precedents, he concluded that Congress had the authority to identify discriminatory practices and to prescribe remedies when violations were found. Justice Powell believed there was an ample evidentiary basis for Congress' conclusion that discrimination existed in the construction industry.\(^{217}\)

After concluding that Congress had a compelling interest in eradicating discrimination in the construction industry and that the congressional finding of discrimination had an ample evidentiary basis, Justice Powell turned to the question of whether the means chosen were narrowly tailored to achieving the legislation's goals. In evaluating the validity of the means chosen, Justice Powell indicated that consideration should be given to the "efficacy of alternative remedies" and the "planned duration of the remedy."\(^{218}\) With regard to the efficacy of alternative remedies, Justice Powell noted that previous efforts had been made to eradicate the effects of past discrimination in the construction industry. Nevertheless, by 1977, less than one percent of the federal procurement contracts went to MBES. Furthermore, the duration of the set-aside was limited, since it would expire when the Public Works programs ended. Justice Powell also found the 10% set-aside justified since 4% of the nation's contractors were minorities and 17% of the nation's population consisted of minorities. The 10% figure represented a compromise which fell between those figures.\(^{219}\)

Justice Powell also indicated that the effects of the set-aside on third parties should be considered. In this case, the set-aside reserved approximately 0.25% of all the federal construction funds for 4% of the nation's contractors. The remaining 96% of the contractors were free to compete for the remaining 99.75% of the construction funds. In Justice

\(^{216}\) Id. at 499 (contrasting the lack of competency by the University of California Regents in Bakke).

\(^{217}\) Id. at 503-06. When the Public Works statute was enacted, the House Sponsor, Representative Parren Mitchell, and the Senate sponsor, Senator Edward Brook, both pointed to extensive hearings that were held in connection with section 8a, the minority set-aside provision of the Small Business Act.

The operation of the section 8a program had been reviewed by congressional committees on numerous occasions between 1972 and 1977. During those hearings, the committees concluded that discriminatory practices in the construction industry were operating to impair minority access to contracting opportunities. Justice Powell believed that these findings fully supported Congress' determination that "purposeful discrimination contributed significantly to the small percentage of federal contracting funds that minority business enterprises have received." Id. at 504-06.

\(^{218}\) Id. at 510.

\(^{219}\) Id. at 511-14.
Powell's view, the minimal loss to non-minority contractors was outweighed by the goals of the set-aside provision. Based on these considerations, Justice Powell concluded that the set-aside was a valid exercise of congressional authority.\(^2\)

3. Justice Stewart's Dissent

Justice Stewart authored a dissenting opinion which was joined by Justice Rehnquist. Justice Stewart contended that the Constitution is colorblind and that all racial classifications are invidious. He believed that any legislative classification should be subjected to the strict scrutiny standard irrespective of whether the classification established applies to racial minorities or majorities.\(^2\)

In Justice Stewart's view, the set-aside provisions of the Public Works Act violated the Equal Protection Clause of the fourteenth amendment because it "bar[red] a class to which the petitioners belong from having the opportunity to receive a governmental benefit, and bar[red] the members of that class solely on the basis of their race or ethnic background."\(^2\)

The dissent also contended that unlike a court of equity, legislatures lack the "objectivity" and "flexibility" that are needed to fashion race-conscious remedies. In the dissent's view, even if the legislature had the authority to enact race-conscious legislation, it would not be justified in this case because there was no showing that the federal government had ever engaged in racially discriminatory procurement practices. The dissent also contended that the Equal Protection Clause immunizes individuals from unequal treatment. As a result, any statute which affords a remedy to a group, as opposed to individuals, cannot be justified under the fourteenth amendment.\(^2\)

Justice Stewart also claimed that statutory classifications of racial groups would operate to reinforce negative racial stereotypes and to bolster the belief that some racial groups are unable to achieve success without special governmental protections. He believed that the set-aside would foster unwarranted notions of racial entitlement, and undermine the basic principles of equality that are embodied in the fourteenth amendment.\(^2\)

\(^{220}\) Id. at 514-15.
\(^{221}\) Id. at 523-24.
\(^{222}\) Id. at 527.
\(^{223}\) Id. at 527-30.
\(^{224}\) Id. at 531 ("[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth.") (quoting Bakke, 438 U.S. at 298).
4. Justice Stevens' Analysis

Justice Stevens issued a separate dissenting opinion which criticized the manner in which the class benefitted by the set-aside had been determined. The class benefitted included Negroes, Spanish-speaking persons, Orientals, Indians, and Aleuts. There was no justification, however, in the statute or in the legislative history, which explained why the class contained all of these groups. Justice Stevens believed that since the various groups had been the victims of different forms of discrimination, they should not have been the recipients of the same degree of remediation. Justice Stevens argued further that the class benefitted by the set-aside was too broadly drawn because it included minority firms that were not the actual victims of discriminatory practices.

Justice Stevens also objected to the legislation because he believed that it would serve as a "permanent source of justification for grants of special privileges." This approach, he believed, could potentially support a legislative preference for almost any ethnic group with the political power to negotiate a legislative preference. He also suggested that the set-aside reflected political patronage. This contention was based on portions of the legislative history which reflected a desire by members of the Congressional Black Caucus to receive a portion of the financial benefits flowing from the statute. This, he believed, was an impermissible justification for the statute's racial classification.

Although he disagreed with the manner in which the Public Works Act was structured, Justice Stevens endorsed the goal of encouraging and facilitating minority participation in the economy. He doubted, however, that the set-aside statute was an effective means of accomplishing this goal.

225. Id. at 532.
226. Id. at 535-39. Justice Stevens pointed out that "the negro was dragged to this country in chains to be sold into slavery, . . . the 'Spanish-speaking' subclass came voluntarily, frequently without invitation, and the Indians, the Eskimos and the Aleuts had an opportunity to exploit America's resources before the ancestors of most American citizens arrived. There is no reason to assume . . . that each of these subclasses is equally entitled to reparations . . . ." Id. at 538 (citation omitted).
227. Id. at 539.
228. Id. at 541-42. While Justice Stevens refers to "the legislative history of the Act [which] discloses that there is a group of legislators in Congress identified as the 'Black Caucus'" and that members of the Caucus argued for "a piece of the action," he neglects to provide any specific citation to the Congressional Record. Id.
229. Id. at 542-43.
Although he did not believe that the Equal Protection Clause prohibits racial classifications, Justice Stevens concluded that the set-aside provisions of the Public Works Act were not narrowly tailored to achieving the legislation's goals. For these reasons, Justice Stevens argued that the statute did not satisfy the strict scrutiny standard.  

*Fullilove* was hailed as a victory by the proponents of affirmative action. Following the Supreme Court's approval of the federal set-aside in 1980, a number of state and local governments enacted set-aside legislation which followed the *Fullilove* model. Commentators opposed to affirmative action roundly criticized *Fullilove*, just as they had previously denounced *Bakke* and would later castigate the pro-affirmative action decisions that were issued in the employment cases. In addition to academic criticism, opposition to affirmative action became a political issue which was formally adopted by the Reagan Administration. Ironically, one of the articles critical of *Fullilove* was authored by Professor Drew Days, the former Assistant Attorney General for Civil Rights who represented the United States when *Fullilove* was argued before the Supreme Court. When another procurement case finally reached the Court, Justice O'Connor's plurality opinion relied heavily on Professor Days' criticism to support the majority's invalidation of a set-

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230. Id. at 548-53. Justice Stevens believed that the statute could not be "narrowly tailored" "because it simply raises too many serious questions that Congress failed to answer or to even address in a responsible way." Id. at 552. Some of the questions Justice Stevens apparently wanted addressed include "[w]hat percentage of Oriental blood or what degree of Spanish-speaking skill is required for membership in the preferred class?" Id. at 552 n.30. He fails to provide answers to these questions.


[W]e must be mindful that the federal government alone cannot be expected to eradicate racial discrimination in America. Public institutions at all levels must contribute to the effort. They are often in a better position to identify the effects of racial discrimination and to tailor corrective programs than is Congress. They should not be disqualified from this endeavor; rather, they should be required to proceed in a fashion that reduces the chances of irresponsible action to an acceptable minimum. Courts' efforts to compel such heightened accountability should focus on three factors that bear on the propriety of state and local set-aside programs: competence, findings, and means.  

*Id.* at 477-78.
aside ordinance.232

B. City of Richmond v. J.A. Croson Co.233

After Fullilove was decided in 1980, the Supreme Court was not confronted with affirmative action in the procurement context until Croson was decided in 1989. During the interim, the Court decided a number of affirmative action cases in the employment context and, perhaps more importantly, some significant changes had occurred in the composition of the Court.234 In Croson, the Supreme Court invalidated Richmond's set-aside ordinance.235 After ten years of debate, a majority of the Justices agreed, for the first time, to apply the strict scrutiny standard to an affirmative action program.236 Croson represents a significant change in equal protection jurisprudence and it appears to reflect an emerging conservative majority within the Court. The City of Richmond's set-aside ordinance required non-minority prime contractors who performed work for the city to subcontract at least thirty percent of the dollar amount of their contracts to a minority business enterprise ("MBE").237 The ordinance allowed the director of


233. 109 S. Ct. 706 [hereinafter Croson].

234. Appointments by President Reagan include Justices O'Connor, Scalia, and Kennedy, and the appointment of William H. Rehnquist (appointed as Associate Justice by President Nixon) as Chief Justice; these appointments replaced Justices Potter Stewart, Lewis F. Powell, Jr., and Chief Justice Warren Burger.

235. Croson, 109 S. Ct. at 730. Richmond adopted a "Minority Business Utilization Plan" in 1983, codified as City Code § 12-156(a) (1985), requiring prime contractors to subcontract no less than 30% of the dollar amount of the prime contract to minority business enterprises; this plan did not apply to minority-owned businesses awarded city contracts. Id. at 712-13.

236. Initially, the district court upheld Richmond's Minority Business Utilization Plan, and the Fourth Circuit Court of Appeals affirmed. J.A. Croson Co. v. City of Richmond, 779 F.2d 181 (4th Cir. 1985) [hereinafter Croson I]; Croson then sought certiorari from the Supreme Court, which remanded the case due to the Court's intervening Wygant decision. The Supreme Court affirmed the court of appeals' decision to strike down Richmond's program in J.A. Croson Co. v. City of Richmond, 822 F.2d 1355 (4th Cir. 1987) [hereinafter Croson II], as "violating both prongs of strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment." Croson, 109 S. Ct. at 716 (citations omitted).

237. Id. at 712-13.
Richmond's Department of General Services to promulgate rules which permitted a waiver of the set-aside requirement if the prime contractor demonstrated that the requirement could not be satisfied.\(^{238}\) Under the city's purchasing procedures, contractors with the lowest bids were required to submit forms on which they identified the MBEs which they intended to hire and to indicate the total percentage of the contract price that would be paid to the MBE. The completed MBE utilization forms or, in appropriate cases, requests for waivers, were forwarded to the city's Human Resources Commission which verified the MBE information or made a recommendation concerning the contractor's request for a waiver.\(^{239}\)

Thereafter, the city's Director of General Services made a final determination concerning compliance with the minority subcontracting requirement. There were no provisions for an appeal from the director's final decision. If a contract were awarded to another bidder after a finding of non-compliance with the set-aside requirement, however, the disappointed bidder had a general right of protest under Richmond's procurement regulations.\(^{240}\)

The set-aside program had been adopted by Richmond's city council after a public hearing.\(^{241}\) Proponents of the set-aside relied heavily on a study which indicated that for the five year period between 1978 and 1983, only .67% of the city's prime construction contracts had been awarded to MBEs, despite the fact that 50% of the city's residents were black.\(^{242}\) The study also showed there were virtually no black members of the various contractor trade associations in the Richmond area. During the public hearing in which the ordinance was proposed, a city councilman testified that widespread racial discrimination existed in Richmond's construction industry.\(^{243}\)

Opponents of the ordinance disagreed and argued that the low per-

\(^{238}\) Id. at 713.
\(^{239}\) Id.
\(^{240}\) Id. (citing Richmond Va. City Code, § 12-126(a) (1985)). Although a protest was available to a bidder denied the contract, the Director's discretion and determination of compliance with the set-aside plan or the appropriateness of a waiver "in this regard appears to have been plenary." Id.
\(^{241}\) Id. at 714.
\(^{242}\) Id.
\(^{243}\) Id. Councilman Marsh, a practicing attorney in the area since 1961, stated on the record that the "general conduct of the construction industry in this area, and the State, and around the nation, is one in which race discrimination and exclusion on the basis of race is widespread," yet "[t]here was no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors." Id. (citations omitted).
percentage of city contracts awarded to MBEs did not reflect discrimination in the construction industry. Other opponents to the ordinance claimed there were not enough MBEs in the Richmond area to satisfy the thirty percent minimum. Witnesses representing contractor associations claimed that their organizations did not exclude minority contractors. At the conclusion of the public hearing, however, the ordinance was enacted by a vote of six to two, with one council member abstaining.\textsuperscript{244}

1. Croson's Efforts to Obtain a City Contract

In 1983, the City of Richmond solicited bids for the installation of plumbing fixtures at the city jail. J.A. Croson Co. ("Croson") decided to submit a bid. Croson's regional manager contacted five or six MBEs in an effort to satisfy the city's set-aside requirement.\textsuperscript{245} Melvin Brown, the president of a local MBE, responded to Croson's solicitation and subsequently contacted two vendors who sold the fixtures specified in the city's original solicitation for bids. One company that Brown contacted had previously quoted Croson a price for the fixtures but refused to quote the fixtures to Brown; the other supplier did not want to extend credit to Brown without a satisfactory credit check.\textsuperscript{246} When the City of Richmond opened the bids, Croson turned out to be the only bidder. On the same day, Brown advised Croson that he was having difficulty securing credit approval. Six days later, Croson submitted a formal request for a waiver of the set-aside requirement. Croson's waiver request claimed that Brown was "unqualified" and that other MBEs had been unresponsive.\textsuperscript{247}

After learning of Croson's request for a waiver, Brown contacted another fixture supplier and later submitted a bid to Croson. After Brown notified the city that he could supply the fixtures for the project, the city denied Croson's waiver request and advised Croson that it had ten days to submit an MBE utilization form. Croson responded with a letter which argued that Brown was not an authorized dealer of the plumbing fixtures in question. Croson also stated that Brown's bid was

\textsuperscript{244} Id. Arguments of the council included the possibility of a "windfall" for the few minority-owned businesses in Richmond, as well as the threat of lost jobs to Richmond area residents as the city's Minority Business Utilization Plan did not specify geographic limits regarding contractors' location. Id.

\textsuperscript{245} Id. at 715. Initially, no minority-owned businesses either showed interest in or supplied a quote for the subcontract; a second attempt to solicit MBE participation was made on the day Croson's bid to the city was due. Id.

\textsuperscript{246} Id. No reason appears in the record to indicate why the supplier refused to quote the fixtures to Brown; the credit check would take no less than thirty days. Id.

\textsuperscript{247} Id.
subject to credit approval and that the price Brown had quoted was substantially higher than any other price quotation that Croson received. In a second letter to the city, Croson explained in some detail the additional costs that would result from Brown's participation and requested authorization to adjust its bid in accordance with the increased costs.248

The city denied Croson's waiver request as well as its request for a cost adjustment. After the city elected to re-solicit the project, Croson filed a civil action in the United States District Court for the Eastern District of Virginia under 42 U.S.C. section 1983, which challenged the constitutionality of Richmond's set-aside ordinance.249

2. The Supreme Court's Decision

The City of Richmond argued before the Supreme Court that it had broad legislative powers to define and attack the effects of prior discrimination in its local construction industry and that it was not required to make specific findings of discrimination to enact race-conscious legislation.250 Speaking for a divided Court, Justice O'Connor disagreed. In her plurality opinion, Justice O'Connor found "[t]he Richmond Plan deny[d] certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race."251 As a consequence, a majority of the Justices held that the set-aside program could not be justified in the absence of a compelling justification. Although the plurality opinion conceded that public and private racial discrimination had probably contributed to diminished opportunities for black entrepreneurs, it held "an amorphous claim that there had been past discrimination in a particular industry cannot justify the use of an unyielding racial quota."252

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248. Id.
249. Id. at 715-16.
250. Id. at 717. Richmond relied on the Court's decision in Fullilove, which had been accepted by the divided panel of the Fourth Circuit Court of Appeals in Croson I. Referred to by the Court as the Fourth Circuit's "synthesized Fullilove test," the Richmond City Council's finding of generalized national discrimination coupled with the statistical evidence peculiar to Richmond rendered the Council's decision "reasonable" and "narrowly tailored to the legislative goals of the [Minority Business Utilization] Plan." Id. at 716 (quoting Croson I, 779 F.2d at 190).
251. Id. at 721.
252. Id. at 724. Justice O'Connor analogized that claims of discrimination in primary and secondary education would not justify "rigid racial preference in medical school admissions" and expressed the concern that these non-evidentiary claims "would give local governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of
The plurality also found that the legislative facts on which the Richmond City Council relied to justify its quota did not provide the city with an adequate evidentiary foundation for race-conscious legislation. In Part I of her opinion, Justice O'Connor found that the "conclusionary statements" made by a City Council member concerning the presence of racial discrimination in Richmond had minimal probative value.\textsuperscript{253} Justice O'Connor also found that when suspect classifications are employed in legislative enactments, the legislating body cannot rely on generalized assertions concerning the classification's relevance to its goal.\textsuperscript{254} Since Richmond had not shown a compelling justification for its set-aside program, the majority held the ordinance violated the Equal Protection Clause of the fourteenth amendment.

3. The Limitations on the Authority of Localities to Enact Race-Conscious Legislation

In Part II of her opinion, Justice O'Connor analyzed the scope of the power of localities to adopt legislation which is designed to address the effects of past discrimination. She determined that states and their subdivisions "have the authority to eradicate the effects of private discrimination [which takes place] within their own jurisdictions."\textsuperscript{255} Furthermore, even if a city determines that it is merely "a 'passive participant' in a system of racial exclusion practiced [by its] local construction industry, . . . the city could take affirmative steps to dismantle such a system," providing it does so within the limitations imposed by section 1 of the fourteenth amendment.\textsuperscript{256}

Relying on Professor Days' analysis in his Fullilove article, Justice O'Connor explained that section 5 of the fourteenth amendment vests Congress with an affirmative grant of authority to enforce the four-

\begin{footnotesize}
253. Id. at 717.
254. Id. at 725.
255. Id. at 720. Justice O'Connor states further that this power must be exercised without violation of the first section of the fourteenth amendment, and that the \textit{Croson I} decision of the Fourth Circuit Court of Appeals, holding that Richmond did indeed have legal authority to establish a set-aside program, is not disturbed by the subsequent decision of \textit{Croson II}, holding that Richmond's program violated the Equal Protection Clause. \textit{Id.} at 720 n.2.
256. Id. at 720. Justice O'Connor distinguishes the \textit{Wygant} decision in that \textit{Wygant} concerned the policies of a school board, and was not "a case [such as \textit{Croson II}] involving a state entity which has state-law authority to address discriminatory practices within local commerce under its jurisdiction." \textit{Id.} at 720.
\end{footnotesize}
teenth amendment. This enforcement power carries with it "the power to define situations which Congress determines [to be a] threat to the principles of equality." States and their subdivisions are not likewise authorized to enforce, by appropriate legislation, the provisions of the fourteenth amendment. The Civil War Amendments established limitations on the powers of the states, while at the same time enlarging the powers of Congress. Since section 1 of the fourteenth amendment established explicit constraints on state powers, any race-conscious remedial actions that are taken by states are subject to those limitations.

Richmond relied on Fullilove to lend support to its view that it had broad authority to enact remedial legislation. In Fullilove, the Court found that Congress could enact race-conscious legislation based on its broad powers to enforce the fourteenth amendment. The Court in Fullilove also determined that when Congress enacted the Public Works Employment Act, it had before it an ample evidentiary basis for concluding that the federal government's procurement practices operated to perpetuate the effects of prior discrimination. These findings, in the Court's view, authorized the set-aside provisions of the Public Works Employment Act. In Croson, Justice O'Connor found that unlike Congress, states and their subdivisions are not authorized to enforce the fourteenth amendment. According to this analysis, the fourteenth amendment contains an affirmative grant of Congressional enforcement power and a concurrent limitation of the powers of the states. Because of this distinction, Justice O'Connor reasoned Congress could mandate state and local government compliance with the set-aside provisions under its section 5 power to enforce the fourteenth amendment. This "does not, however, mean that, a fortiori, the States and their political subdivisions are free to decide that such remedies are appropriate." Because of the fourteenth amendment's relative

257. Id. at 719.
258. Section 5 of the fourteenth amendment to the Constitution specifies "Congress," without any mention of the states, as having the power to enforce the provisions of the fourteenth amendment. U.S. CONST. amend. XIV, § 5.
259. Id. at 719. Justice O'Connor noted that while Fullilove could perhaps be invoked to support Richmond's set-aside regardless of the lack of "specific findings of discrimination," comparison between Congress and a city council (or any state or state governmental unit) cannot ignore Congress' constitutional mandate to enforce the fourteenth amendment. Id.
260. The Fullilove Court referred to congressional investigation of statistical evidence, including reports from the Department of Commerce: "These statistics are not the result of random chance. The presumption must be made that past discriminatory systems have resulted in present economic inequities." Fullilove, 448 U.S. at 466.
allocation of powers, Justice O'Connor found that the City of Richmond could not rely on the holding in Fullilove to support its set-aside ordinance. 262

4. The Application of the Strict Scrutiny Standard

The most significant aspect of the Croson decision is that a majority of the Justices agreed, for the first time, to apply the strict scrutiny standard to the Court's review of an affirmative action program. In Part II of her plurality opinion, Justice O'Connor rejected the City's claim that a lower level of scrutiny should apply to racial classifications which have a benign or remedial purpose. 263 After finding that "[t]he Richmond plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race," 264 the majority held "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification." 265 Thus, the majority agreed, after ten years of debate, to apply the strict scrutiny standard to an affirmative action program.

In her plurality opinion, Justice O'Connor also found that even if a lower standard of review would be appropriate in some instances, "heightened scrutiny would still be appropriate in the circumstances of this case." 266 The circumstance to which she referred consisted of the racial composition of Richmond and the black majority on Richmond's City Council. In Justice O'Connor's view, the concern that a political majority might act to disadvantage the minority population provided an additional justification for the Court's application of strict scrutiny. 267

262. Id. at 720. Justice O'Connor cited the Slaughter-House Cases, 83 U.S. 36 (1872), for the proposition that the Civil War Amendments provided an extension of federal powers and a restraint upon those of the individual states.

263. According to Justice O'Connor, "[t]he mere recitation of a benign or compensatory purpose for the use of a racial classification would essentially entitle the States to exercise the full power of Congress under § 5 of the Fourteenth Amendment and insulate any racial classification from judicial scrutiny under § 1." Croson, 109 S. Ct. at 719.

264. Id. at 721.

265. Id.

266. Id. at 722.

267. Id. Justice O'Connor cites to United States v. Carolene Products Co., 304 U.S. 144 (1938), for its reference to the threat against "discrete and insular minorities" by an indifferent or prejudiced "majority"; while the simple majority of city council seats and approximately fifty percent of Richmond's population is black, there is no mention of the economic power this "majority" may wield against the "discrete and insular" white minority. Croson, 109 S. Ct. at 722.
5. The City Council's Evidence of Discrimination Was Not Adequate to Support Race-Conscious Legislation

Justice O'Connor concluded that the city had erroneously relied on the statistical "disparity between the percentage of prime contracts awarded to minority firms" and the percentage of blacks in Richmond's population as evidence of discrimination in the construction industry.\textsuperscript{268} Although statistical comparisons can be used to establish an evidentiary basis for discrimination in appropriate circumstances, when special qualifications are necessary, the relevant statistical pool must be limited to the number of minorities who are "qualified" to undertake the task.\textsuperscript{269} In this case, Richmond should have compared the percentage of qualified minority contractors in the Richmond area to the percentage of city contracts actually awarded to MBEs.\textsuperscript{270}

The plurality opinion also discounted the probative value of evidence which reflected low minority membership in Richmond's contractor associations. Justice O'Connor speculated that the dearth of minority participation in local trade organizations could have been attributable to several factors, including societal discrimination in educational and economic opportunities, as well as black and white career choices.\textsuperscript{271} Justice O'Connor also found that a congressional finding of nationwide discrimination in the construction industry was not an adequate basis for concluding that a similar degree of discrimination existed in Richmond. In her view, the waiver provisions of the federal set-aside program in \textit{Fullilove} recognized that the pervasiveness of discrimination would vary from market to market.\textsuperscript{272}

Although finding the city's statistical evidence defective, Justice O'Connor's opinion indicates that if there is a sufficient statistical disparity between minority membership in trade organizations and persons of color eligible to join such organizations, an inference of discriminatory exclusion could be drawn. In such a case, the city would

\textsuperscript{268} \textit{Id.} at 725.
\textsuperscript{269} \textit{Id.} Here, Justice O'Connor refers to \textit{Hazelwood School Dist. v. United States}, 433 U.S. 299, 308 (1977), which states that where gross statistical disparities may be \textit{prima facie} proof of discrimination "in a proper case," where special job qualifications are required, then the proper comparison is to those holding the qualifications, and not to the general public. \textit{Id.}
\textsuperscript{270} \textit{Croson}, 109 S. Ct. at 725. Under this analysis, if twenty percent of the local contracting firms were minority owned and only two percent of those firms received city contracts, a fact finder could infer a \textit{prima facie} case of discrimination.
\textsuperscript{271} \textit{Id.} at 726.
\textsuperscript{272} \textit{Id.}
have a compelling interest in preventing its tax dollars from fostering a racially segregated construction market.\(^{273}\) In this case, however, Justice O'Connor concluded that "none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry."\(^{274}\) As a consequence, "the city ha[d] failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race."\(^{275}\)

In Part IV of her opinion, Justice O'Connor criticized the City of Richmond's failure to explore any race-neutral means of increasing minority participation in contracting.\(^{276}\) Citing her dissent in *United States v. Paradise*,\(^{277}\) Justice O'Connor argued that the efficacy of alternative remedies should have been weighed prior to the imposition of racial quotas. Justice O'Connor also suggested that cities should develop race-neutral devices to enhance minority access to city contracting opportunities and that they could do so without evidence of racial discrimination. The examples she cited included "simplification of bidding procedures, relaxation of bonding requirements and training and financial aid."\(^{278}\) Justice O'Connor also recommended the enactment of measures that would prohibit discrimination in the provision of credit or bonding by local suppliers and banks. Legislation along these lines would enhance opportunities for minority businesses without the use of a race-conscious criterion.

Justice O'Connor also found that Richmond's 30% quota was not narrowly tailored to any legislative goal since it rested on what she deemed to be the "completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population."\(^{279}\) Justice O'Connor also criticized Richmond's failure to consider whether any individual minority contractors had been injured by past discrimination.\(^{280}\)

\(273.\) Id.

\(274.\) Id. at 727.

\(275.\) Id.

\(276.\) Id. at 728.


\(278.\) *Croson*, 109 S. Ct. at 729. Additional measures would be undertaken to ensure no discrimination in credit and bonding; "[b]usiness as usual should not mean business pursuant to the unthinking exclusion of certain members of our society from its rewards." Id. at 730.

\(279.\) Id. at 728.

\(280.\) Id. at 729.
6. Localities Can Still Act to Eliminate the Effects of Past Discrimination

Despite her sharp rejection of the Richmond ordinance, Justice O'Connor emphasized in Part V of her opinion that the Croson decision does not preclude state and local governments from acting to rectify the effects of discriminatory practices. If the city of Richmond had evidence before it that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion.\textsuperscript{281}

Justice O'Connor also stated that a legitimate inference of discrimination could be drawn "where there is a significant statistical disparity between the number of qualified minority contractors" located within the relevant geographic area and the number of MBEs actually utilized by a city or its prime contractors. In such a case, the city could take appropriate measures against those who discriminate on the basis of race, but only in the "extreme case" could the use of some narrowly tailored form of racial preference be justified.\textsuperscript{282}

7. Justice Stevens' Opinion

In a concurring opinion, Justice Stevens agreed with Justice O'Connor's explanation of why Richmond's ordinance could not be justified as a remedy for past discrimination, but he did not agree with the underlying premise "that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong."\textsuperscript{283} For these reasons, Justice Stevens limited his concurrence to Parts I, III-B, and IV of Justice O'Connor's opinion.\textsuperscript{284}

In Justice Stevens' view, race is not always a bar to sound governmental decision making. To support this assertion, Justice Stevens cited, among other things, examples of a police department's use of black undercover agents to infiltrate a group of black criminals and a school board's decision that an integrated faculty would be more desirable than an all-white faculty.\textsuperscript{285} Since, in this case, Richmond did not identify a compelling public interest that would be served by granting a preference to minority owned businesses, Justice Stevens concluded that there was no basis for suggesting that the race of a

\textsuperscript{281} Id.
\textsuperscript{282} Id.
\textsuperscript{283} Id. at 730.
\textsuperscript{284} Id. at 731.
\textsuperscript{285} Id. (referring to his dissent in Wygant).
contractor had any relevance to his access to the construction market. 286

Justice Stevens also found that the difficulties presented by Richmond's set-aside program demonstrated that courts are better suited than legislatures to fashion remedies for past wrongs. 287 To support this conclusion, Justice Stevens noted that Richmond's set-aside was over-inclusive because the class that benefitted by the set-aside included persons who had never attempted to transact business with the city "as well as minority contractors who may have been guilty of discriminating against" contractors who belonged to other minority groups. 288 In addition, the ordinance penalized white contractors who may not have engaged in any racially discriminatory conduct. Justice Stevens also warned that instead of remedying discrimination, the ordinance would probably reinforce the stereotypical assumption that the group granted the preference is "less qualified in some respect that is identified purely by their race." 289

8. Justice Kennedy's Opinion

Justice Kennedy issued a separate opinion in which he concurred with all but Part II of Justice O'Connor's opinion because he could not understand "[t]he process by which a law that is an equal protection violation when enacted by a State becomes transformed to an equal protection guarantee when enacted by Congress." 290 Justice Kennedy argued that states possess the power to remediate the effects of racial discrimination in both the public and private sectors, and that they have an "absolute duty" to do so when discrimination is practiced by the state itself. 291 In Justice Kennedy's view, the fourteenth amendment should not be interpreted to reduce a state's authority to take steps to eliminate public or private discrimination. Justice Kennedy also endorsed what he deemed the "moral imperative of racial neutrality" as the driving force of the fourteenth amendment and would strike down

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286. Id.
287. Id. at 731-32. Justice Stevens notes that legislatures as policy-making bodies have a focus towards future conduct, as opposed to the judicial role of identification of past wrongdoers and the imposition of appropriate remedies. Id. (emphasis added).
288. Id. at 732-33.
289. Id. at 733 ("[A] statute of this kind is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race.") (citing Fullilove, 448 U.S. at 454).
290. Id. at 734.
291. Id.
all preferences which are not remedies for victims of unlawful discrimination.292

Nevertheless, Justice Kennedy would not support the adoption of a rule which would automatically invalidate racial preferences in every case. He agreed, however, that any racial classification should be subject to the strict scrutiny standard. This standard, he believes, would forbid the use of even narrowly drawn racial classifications except as a last resort.293

Justice Kennedy contended that evidence which would support a judicial finding of intentional discrimination by a state or a political subdivision would also support legislative action. The Richmond ordinance did not satisfy this standard because it did not adequately explore: the nature and scope of the injury; the historical causes of the injury; the extent to which the city contributed to the injury (actively or passively); the necessity for the response adopted; its duration in relation to the wrong; and the precision with which it otherwise addressed discriminatory practices.294

9. Justice Scalia's Analysis

In a separate opinion, Justice Scalia concurred with most of Justice O'Connor's views. He specifically endorsed the application of the strict scrutiny standard even where the racial classifications have a benign or remedial purpose. Unlike other members of the Court, Justice Scalia does not believe that states and local governments possess the authority to enact race-conscious legislation to "ameliorate the effects of past discrimination."295 Legislation which is intended to compensate for social disadvantages resulting from prior discrimination cannot, in Justice Scalia's view, be pursued by race-conscious means.296

The harm resulting from the classification of individuals on the basis of their national origin or the color of their skin far outweighs, in Justice Scalia's opinion, the goal of compensation for past discrimination. He argued that any form of racial discrimination is inherently wrong and destructive of democratic society. Only a social emergency

292. Id.
293. Id.
294. Id. at 735. In concluding that Richmond's city ordinance violated the fourteenth amendment, Justice Kennedy seemed to view the case as one of reverse discrimination. He stated that the ordinance and legislative record are "open to the fair charge that it is not a remedy but is itself a preference which will cause the same corrosive animosities" which are constitutionally forbidden and contrary to national policy. Id.
295. Id. at 735 (referring to Justice O'Connor's opinion).
296. Id.
creating an imminent danger to life and limb could justify, in his view, an exception to the race-neutral principles of the fourteenth amendment.297

After acknowledging that the Supreme Court had previously approved the use of racial classifications by the federal government to remedy the effects of past discrimination, Justice Scalia urged the Court to limit the application of those cases to federal legislation:

[It is one thing to permit racially based conduct by the Federal Government--whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment... and quite another to permit it by the precise entities against whose conduct in matters of race that Amendment was specifically directed....]298

Justice Scalia echoed Justice O'Connor's conclusion that the Civil War Amendments were designed to eliminate racial oppression by limiting the power of states to establish racial classifications, while at the same time enlarging congressional power. Justice Scalia also cautioned that racial discrimination against any group finds a more ready expression at the state and local level. He noted with some irony that Richmond's set-aside was directly beneficial to Richmond's black citizens, a group that was then the dominant racial and political group in that city.299

Justice Scalia conceded that a state could enact race-conscious legislation when it is necessary to eliminate the state's own maintenance of a system of unlawful racial classification. Justice Scalia also found that states could take actions which are designed to undo the effects of past discrimination if the state employs a race-neutral classification to do so. He explained that this approach would allow a preference for small businesses "which would make it easier for those previously excluded to enter the field."300 A race-neutral mechanism of this sort would be permissible even when it has a racially disproportionate impact.301 Nevertheless, in what was the most far-reaching condemnation of the set-aside program, Justice Scalia seems to suggest that any race-conscious legislation would be unlawful, however remedial the purpose and irrespective of whether there is an adequate evidenti-

297. Id. at 735. Justice Scalia uses the example of a prison race riot, where the temporary segregation of prisoners may be appropriate when failure to take such a remedy would in all likelihood result in death or injury to the inmates. Id.

298. Id. at 736.

299. Id. at 737.

300. Id. at 738.

301. Id.
10. Justice Marshall's Dissent

Justice Marshall was joined by Justices Brennan and Blackmun in a vitriolic dissent characterizing the plurality opinion as "a deliberate and giant step backward in this Court's affirmative action jurisprudence." Justice Marshall viewed the Richmond plan as virtually identical to the federal plan upheld in Fullilove, yet failing Court scrutiny by "fail[ing] to catalogue adequate findings to prove that past discrimination has impeded minorities from joining or participating fully in Richmond's construction contracting industry.

Justice Marshall began his chastisement of the plurality decision with an analysis of the factual record compiled and relied upon by Richmond, a "rich trove of evidence" of discrimination that the plurality "takes [with] an exceedingly myopic view." He relied on the Court's decision in Fullilove upholding the federal set-aside enacted in the Public Works Employment Act of 1976 and congressional records of systematic discrimination in the construction industry to provide the backdrop for Richmond's local evidence; a viewpoint which in his opinion allows for resolution of the case within the test set forth in Bakke.

Under Bakke, any race-conscious classifications enacted for a remedial purpose "must serve important governmental objectives and must be substantially related to achievement of those objectives" to

302. Id. at 740.
303. Id. at 739. Justice Marshall stated that the program was "indistinguishable in all meaningful respects from--and in fact was patterned upon--the federal set-aside plan which this Court upheld in Fullilove." Id. (citation omitted).
304. Id. at 740. Justice Marshall begins his analysis by pointing out what he considers the "deep irony in second-guessing Richmond's judgment" Id. Later in his opinion he recites the numerous patterns and practices of racial discrimination which permeated Richmond and did not escape earlier Court scrutiny.
305. Justice Marshall refers to Justice O'Connor's opinion as the "majority opinion" for the sake of convenience. Id. at 740 n.1.
306. Id. at 740. Justice Marshall maintains that the evidence of discrimination specific to Richmond must be viewed against the national record to be "properly understood" and that the plurality's refusal to view Richmond's appraisal of local discrimination as indicative of its consistency with nationwide discrimination "infects its entire analysis of this case." Id.
308. Croson, 109 S. Ct. at 742-43.
survive constitutional scrutiny. Justice Marshall concluded that Richmond had met both prongs of this test. Richmond had two interests that meet the "governmental interest" criteria "in eradicating the effects of past racial discrimination" and a "prospective one of preventing the city's own spending decisions from reinforcing and perpetuating the exclusionary effects of past discrimination." It is this second interest, according to Justice Marshall, that the plurality discounted. According to Justice Marshall, prior Court decisions reflect a practical inquiry regarding whether the requisite proof is offered to support these two interests, a standard he believes Richmond handily met. Finally, Richmond meets the second step of the Bakke test as the Minority Business Utilization Plan is substantially related to Richmond's twin interests. Justice Marshall argued that Richmond's plan was "appropriately limited" in duration, included a waiver provision, had limited effect on "innocent third parties" and operated prospectively without interference to the "vested rights of a contractor to a particular contract." Justice Marshall then refuted the plurality's contention of Richmond's lack of race-neutral measures and its thirty percent set-aside quota.

Justice Marshall concluded his dissent by arguing against the "strict scrutiny" standard of review: "the [plurality] has gone beyond the facts of this case to announce a set of principles which unnecessarily restrict the power of governmental entities to take race-conscious measures to redress the effects of prior discrimination."

309. Id. at 743 (quoting Bakke, 438 U.S. at 359).
310. Id.
311. Id. at 744.
312. Id. Justice Marshall states that "[t]he majority pays only lip service to this additional governmental interest" of preventing Richmond's contracting resources from perpetuating a discriminatory situation in the construction industry specific to the Richmond area. Id.
313. Id. at 745-50. Justice Marshall states that "to suggest that the facts on which Richmond has relied do not provide a sound basis for its finding of past racial discrimination simply blinks credibility." Id. at 746.
314. Id. at 750.
315. Id. at 751-52. Justice Marshall notes the virtual similarity of Richmond's ordinance and that of the federal set-aside upheld in Fullilove, including a limited duration, a waiver provision, minimal impact on innocent third parties, and prospective operation without interference with any contractor's vested rights. Id. at 750-51. He also notes that Richmond's ban (since 1975) on discrimination has not been effective (evidenced by less that 1% minority participation) and that race-neutral measures, "while theoretically appealing, have been discredited by Congress as ineffectual in eradicating the effects of past discrimination in this very industry." Id. at 751.
316. Id. at 752.
to Marshall, the application of the strict scrutiny standard is appropriate only when the actions of the governmental unit are racist, not when the actions of government are designed to remedy past discrimination or act as a "neutral" acquiescence to racism. Additionally, Justice Marshall did not believe that the numerical majority of blacks in Richmond’s population and city council votes would warrant application of the strict scrutiny standard absent a general belief in the standard. Finally, Justice Marshall refuted the plurality’s "daunting standard" regarding the constitutional grant of authority to the federal government and to the states.

11. The Use of Statistical Evidence to Support a Finding of Discrimination

The plurality endorsed the use of statistical evidence as a means of identifying racial discrimination. In one of the leading employment discrimination decisions, International Brotherhood of Teamsters v. United States, the Supreme Court held that statistical evidence could be an important source of proof in employment discrimination cases. The rationale underlying the use of statistical evidence was explained in Teamsters. In that case, the Court found:

Absent explanation, it is ordinarily expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of long-lasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though § 703 (j) makes clear that Title VII imposes no requirement that a work force mirror the general population.

In a later case, Hazelwood School District v. United States, the Court clarified the level of proof needed in cases which rely on statistical evidence. In Hazelwood, a district court compared the percentage of minority teachers in the Hazelwood School District to the percentage of minority students who attended Hazelwood’s public schools to support

317. Id. Justice Marshall cites to Wygant, Fullilove, and Bakke in support of this proposition, and implies that singular application of the strict scrutiny standard indicates a willingness to view "racial discrimination as largely a phenomenon of the past." Id.
318. Id. at 752-53.
319. Id. at 754-57.
321. Id. at 340 n.20.
its determination that the school district had not utilized any discriminatory practices. The court of appeals reversed, holding that the proper comparison should have been the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market. The court of appeals' approach was endorsed by the Supreme Court's decision in *Hazelwood.* Assuming that the Title VII standard is the appropriate analytical approach, Richmond should not have based its comparison on the percentage of blacks in the general population. It should have compared the percentage of black contractors in the Richmond area to the percentage of City contracts that were awarded to MBEs.

It is important to note that statistical evidence is used only to establish a *prima facie* case of employment discrimination. In cases interpreting Title VII, a *prima facie* case can be rebutted by the mere "articulation" of a legitimate non-discriminatory reason for the employer's conduct. For example, in *Hazelwood,* the Supreme Court specifically rejected the Court of Appeals determination that the statistical evidence involved in that case conclusively demonstrated discriminatory hiring practices, remanding the case for additional proceedings. Thus, despite the plurality's endorsement of statistical evidence, a state or a city may not be able to rely solely on a statistical showing of the underutilization of qualified minority contractors to justify the enactment of a set-aside ordinance. Additional evidence of actual discriminatory practices may be needed.

Furthermore, even when there is a gross disparity between the percentage of qualified minority contractors in the geographic area and the percentage of city contracts awarded to minority firms or where there is a gross disparity between the percentage of qualified minority contractors in a particular locality and the level of minority membership in local trade groups, these disparities might not by themselves justify race-conscious legislation. The plurality's opinion suggests that the remedy to these situations would be some sort of action against the individuals who are engaging in the discriminatory conduct. As Justice O'Connor explained, when there is a sufficient statistical disparity to infer discrimination, "the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria." As Justice Stevens' concurrence makes clear, this implies that a governmental classification which rests on a racial classification is never permissible except as a remedy for an individual wrong. Nevertheless, the plurality conceded that "[i]n the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliber-

323. *Croson*, 109 S. Ct. at 729 (citation omitted).
ate exclusion." Unfortunately, Justice O'Connor did not describe the circumstances that would constitute an "extreme case," nor did she indicate what form the "narrowly tailored" legislation should take.

Justice O'Connor also indicated that localities must explore individualized approaches when they identify discriminatory practices prior to resorting to remedial legislation. This sort of *ad hoc* approach would not achieve the goal of assuring that local MBEs receive at least some share of the government contracts. First, as Justice Stevens indicates in his concurrence, courts are better suited to determine liability and fashion remedies against individual wrongdoers. Second, an *ad hoc* approach would be limited to the parties to the enforcement action and would require separate civil actions for each discriminatory incident. At best, class actions could be used in cases involving a pattern and practice of discriminatory conduct. An individualized approach along these lines could not remedy the type of systemic discrimination that was identified in *Fullilove*. Legislatures should be free to address broad-based problems with legislative rules of general applicability. Since even the plurality acknowledges "that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs," localities must be allowed the latitude to enact remedial legislation which addresses their compelling interest in eliminating systemic discrimination.

12. Justice O'Connor's Analysis of the Fourteenth Amendment

The *Croson* decision relies heavily on Justice O'Connor's analysis of the fourteenth amendment. Without the distinction between the relative allocation of powers to the state and federal government, it would have been difficult to distinguish this case from *Fullilove*. The Richmond set-aside program was the functional equivalent to the federal set-aside that was approved in *Fullilove*. Like the Public Works Employment Act, Richmond's set-aside ordinance required allocation of a fixed percentage of the city's contracts to minority enterprises. Although Richmond's thirty percent set-aside was twenty percent higher than the federal statute's ten percent, the Richmond plan was not entirely exclusionary. It assumed non-minority participation because it required non-minority prime contractors to subcontract with minority entrepreneurs. Hence, the legislative intent was the inclusion of a group that suffered from historic exclusion.

Contrary to Justice O'Connor's assertion, the Richmond plan was

324. *Id.*
325. *Id.* at 724.
not an "unyielding quota." Like the federal statute involved in *Fullilove*, the Richmond ordinance authorized waivers when prime contractors were unable to secure the cooperation of an MBE. In this case, Richmond denied Croson's waiver request after a minority subcontractor advised the procurement office that he was available to enter into a subcontract with Croson. If a minority subcontractor had not been available, Richmond's bidding procedures would have allowed the city to grant Croson's waiver request. Although the Court found that there was an adequate evidentiary basis for the set-aside in *Fullilove*, without Justice O'Connor's analysis of the fourteenth amendment it would have been difficult to conclude that the same findings would not support a local set-aside ordinance.

Furthermore, although a majority of the Justices endorsed the application of the strict scrutiny standard, only two Justices concurred with Justice O'Connor's analysis of the fourteenth amendment's allocation of power between the states and the federal government. Justice Kennedy flatly disagreed with Justice O'Connor, because he could not understand "[t]he process by which a law that is an equal protection violation when enacted by a state becomes transformed into an equal protection guarantee when enacted by Congress."326 Furthermore, as the dissenting opinion points out, the support for this analysis is limited to a circuit court opinion and two law review articles. Even if it is conceded that there is an affirmative allocation of power to the federal government and a concurrent limitation on the powers of the states, that does not automatically require the conclusion that a federal action which enforces the requirements of the Equal Protection Clause somehow becomes a violation of the Equal Protection Clause when an identical action is taken by a locality. Since a majority of the Justices did not endorse Justice O'Connor's analysis, the extent to which the fourteenth amendment prohibits race-conscious legislation remains uncertain.

13. The Status of Set-Aside Programs After *Croson*

The plurality recommended the utilization of race-neutral devices to enhance minority access to contracting opportunities. Justice O'Connor found that "[s]implification of bidding procedures, relaxation of bonding requirements, and training and financial aid . . . would open up the public contracting market to all those who have suffered the effects of past societal discrimination."327 Justice O'Connor also suggested that cities should act to prohibit discrimination in the provision

326. *Id.* at 734.
327. *Id.* at 729.
of credit or bonding by local suppliers and banks.\textsuperscript{328}

Justice Scalia, who was by far the harshest critic of the set-aside program, also endorsed the use of race-neutral devices which would disproportionately benefit minority entrepreneurs. He suggested that states could "adopt a preference for small businesses, or even new businesses—which would make it easier for those previously excluded by discrimination to enter the field."\textsuperscript{329} If, as the plurality assumes, these race-neutral approaches would enhance minority contracting opportunities, state and local governments could adopt this approach to avoid the threat posed by the Croson decision.

It seems doubtful, however, that this approach would do much to assist minority entrepreneurs. An extensive federal set-aside for small businesses has been in effect for several years. It requires each federal agency to obtain a substantial portion of their goods and services from small business enterprises. Moreover, there is an existing federal statute which prohibits discrimination in the extension of credit. Neither of these federal measures has significantly enhanced minority contracting in the federal arena. This would seem to undermine the plurality's assumption that race-neutral measures are an adequate remedy to the inability of minorities to gain access to government contracts.

In any event, the critical question after Croson is whether states and their subdivisions can enact race-conscious remedial legislation without violating the Equal Protection Clause of the fourteenth amendment. Croson holds that legislation of this nature will be subjected to strict scrutiny; any race-conscious legislation must now be justified by a compelling governmental interest and the means chosen to effectuate that interest must be narrowly tailored to the legislation's goals.

With regard to the first prong of the standard, it would appear that states could satisfy the compelling interest requirement if they can show that their existing procurement practices are part of a larger system which perpetuates the effects of past discrimination. In Croson, the plurality conceded that localities would have a compelling interest in preventing their tax dollars from maintaining a discriminatory marketplace.\textsuperscript{330}

Croson makes it clear, however, that localities must establish a sound evidentiary basis for such a finding. The Croson opinion also indicates that this obligation could be satisfied by the use of statistical evidence. If, for example, there is a gross statistical disparity between the percentage of eligible MBEs in a particular locality and the percentage of MBEs that actually receive city contracts, a set-aside which

\textsuperscript{328} Id. at 730.
\textsuperscript{329} Id. at 738.
\textsuperscript{330} Id. at 728.
reflects that statistical disparity might be justified. Likewise, if there is a statistically significant disparity between the percentage of eligible MBEs and the level of MBE membership in local trade organizations, such a showing would provide additional support for a minority set-aside which has a limited duration.

In addition to developing statistical evidence, localities enacting set-aside legislation should commission studies which document the historic exclusion of minorities from the marketplace. Testimony of witnesses who could describe actual episodes of discrimination should be offered to buttress the statistical evidence. It should not be impossible to secure statements from experienced minority contractors who could testify about their business experiences with racial discrimination and their exclusion from local trade organizations. If it can be shown that the existing construction industry developed in an era of racial exclusion, it should not be difficult to establish a causal nexus between the discriminatory practices and the current inability of minorities to gain access to the marketplace.

After the locality establishes an adequate evidentiary showing of the existence of discriminatory market forces, it must thereafter demonstrate that race-neutral measures cannot resolve the problem. The satisfaction of this obligation would involve the development of studies which show that despite a twenty-five year record of anti-discrimination legislation, minority businesses have been unable to make inroads into the local construction market. If the locality does not already have a small business or new business set-aside, it may be advisable to explore legislation along these lines prior to the enactment of race-conscious legislation. At a minimum, the locality would need to develop studies to show that race-neutral legislation would not provide an effective remedy.

After the locality has exhausted race-neutral alternatives or demonstrated that these options would not result in enhanced minority access to the marketplace, the locality could enact set-aside legislation. At this juncture, care must be taken to assure that the set-aside is "narrowly tailored" to achieving the legislation's goal. If the locality has identified gross statistical discrepancies between the percentage of qualified MBEs in the area and the percentage of MBEs who actually receive city contracts, a set-aside which reflects that disparity would be justified. Care should be taken to assure that the class benefitted is not over-inclusive. If the evidence only shows the exclusion of black entrepreneurs, the inclusion of other minorities might not be justified. If statutory or constitutional violations are shown, the class benefitted would not have to be restricted to the actual victims of discriminatory practices. Similarly, if "innocent" non-minority contractors are excluded by the set-aside, that would not mean that the class was too broadly drawn. The duration of the set-aside should be limited and the levels of minority participation in the provision of goods and services to the
locality should be monitored. The goal of the set-aside would be enhanced minority access to the marketplace. When the level of minority participation reaches a level roughly equal to the percentage of qualified MBES in the geographic region, there would be no justification for a continuation of the set-aside.

IV. CONCLUSION

After ten years of debate, the disagreement concerning the appropriate constitutional analysis has ended. In Croson, a majority of the Justices agreed to apply the strict scrutiny standard to an affirmative action plan. Race-conscious remedies employed by governmental units must now be justified by a compelling governmental interest and the means chosen must be narrowly tailored to achieving the classification's goals. The elimination of discriminatory practices or the lingering effects of past discrimination, however, will constitute a compelling state interest as long as there is an adequate evidentiary predicate for making this determination. Furthermore, if Justice O'Connor's views prevail, the factual predicate can be satisfied by a showing of gross statistical disparities.

If a compelling justification is shown, a determination of whether the means chosen is narrowly tailored involves consideration of: (a) the efficacy of alternative remedies; (b) the duration of the remedy; (c) the impact of the remedy on "innocent" third parties; and (d) the scope of the class benefitted. If these considerations are satisfied, a race-conscious remedy can be justified.

The decision in Croson does not affect affirmative action programs developed by private employers nor does it prohibit courts from ordering race-conscious relief. If there is a statistically significant imbalance in an employer's workforce compared to the percentage of minorities or females in the geographic area, an affirmative action plan can be justified and the program would serve as a defense to claims of reverse discrimination.

Beneath the majority's decision in Croson lies an unstated assumption that race-neutral remedies will almost always provide an adequate remedy for racial discrimination. As Justice O'Connor suggests in Croson, only in the "extreme case" would a race-conscious remedy be justified. Racial discrimination did not end, however, with the enactment of the Civil Rights legislation of the 1960's. The Court's own decisions in cases such as United States v. Paradise and Local 28 of the Sheetmetal Worker's International Association v. EEOC show just how deeply entrenched racial discrimination can be, as well as how intransigent some employers have been. Furthermore, the Congressional findings cited in Fullilove clearly establish that statutory proscriptions against racial discrimination will not by themselves
eliminate the vestiges of practices which resulted from an elaborate system of state sanctioned discrimination. Affirmative action is an equitable means of effectuating the transition from a deeply rooted system of discrimination to the colorblind goals of the Equal Protection Clause. There are, however, far more "extreme cases" than the majority seems to realize. In cases involving longstanding or systemic discrimination, race-conscious remedies will likely prove to be the only effective means of dismantling the vestiges of a segregated society even when the stringent standard of Croson is applied.