

# AN EXAMINATION OF THE LEGALITY AND CONSTITUTIONALITY OF RACE-CONSCIOUS AFFIRMATIVE ACTION

## I. INTRODUCTION

The American judicial system has struggled with race-conscious affirmative action plans since the passage of the Civil Rights Act of 1964.<sup>1</sup> Unfortunately, the economic condition of blacks in this country<sup>2</sup> shows that affirmative action is still necessary to remedy the effects of past racial discrimination. This Recent Development examines the history of affirmative action under both Title VII<sup>3</sup> of the Civil Rights Act of 1964 and the equal protection clause of the fourteenth amendment of the United States Constitution.<sup>4</sup> The article focuses on the

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1. 42 U.S.C. §§ 2000a-2000h-6 (1982). The Act prohibits discrimination on the basis of race, religion, sex, or national origin in voting, public accommodations, public schools, and employment. The purpose of the Act is "to protect and provide a more effective means to enforce, the civil rights of persons within the jurisdiction of the United States." H.R. REP. NO. 914, 88th Cong., 1st Sess. 16, *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2391.

2. On the average, blacks have a considerably lower standard of living than whites. Between 1972 and 1984, the number of blacks below the poverty level was thirty percent. NATIONAL URBAN LEAGUE, *THE STATE OF BLACK AMERICA* (1984). In contrast, only about thirteen percent of all whites live in poverty. *Id.* at 14. The average unemployment rate for blacks was 14.5% in 1986. The rate for whites was 6%. *Dept. of Labor Statistics*, MONTHLY LABOR REVIEW, April 1987, at 75.

3. 42 U.S.C. § 2000e-2 (1982). Title VII prohibits discrimination on the basis of race, religion, sex, or national origin in public or private employers' decisions on hiring, promoting, and firing employees.

4. The equal protection clause of the fourteenth amendment applies to state action. The text reads in pertinent part: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State

three recent Supreme Court decisions regarding race-conscious affirmative action plans: *Wygant v. Jackson Board of Education*,<sup>5</sup> *Local 28, Sheet Metal Workers International Association v. Equal Employment Opportunity Commission*,<sup>6</sup> and *Local Number 93, International Association of Firefighters v. Cleveland*.<sup>7</sup> Next, the article suggests guidelines to institutions and employers as to what constitutes a valid race-conscious affirmative action plan. The article concludes with a few words on the appropriate standard of judicial review of affirmative action plans.

## II. HISTORY OF THE LAW

### A. *Title VII of the Civil Rights Act of 1964*

Title VII<sup>8</sup> prohibits racial discrimination in employment.<sup>9</sup> A key purpose of Title VII is to protect the black person's right to equal employment opportunities.<sup>10</sup> If an employer racially discriminates

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wherein they reside. No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The due process clause of the fifth amendment subjects the federal government to equal protection principles. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

5. 106 S. Ct. 1842 (1986).

6. 106 S. Ct. 3019 (1986).

7. 106 S. Ct. 3063 (1986).

8. 42 U.S.C. § 2000e-2 (1982).

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

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

10. See, e.g., H.R. REP. 914, 88th Cong., 2d Sess. 18, *reprinted in* U.S. CODE CONG. & AD. NEWS 2393. The General Statement supporting H.R. 7152, which became the Civil Rights Act of 1964, reads in part:

In various regions of the country there is discrimination against some minority groups. Most glaring, however, is the discrimination against Negroes which exists throughout our Nation. Today, more than 100 years after their formal emancipation, Negroes . . . are by virtue of one or another type of discrimination not accorded the rights, privileges, and opportunities which are considered to be, and must be, the birthright of all citizens. . . .

. . . No bill can or should lay claim to eliminating all of the causes and consequences of racial and other types of discrimination against minorities. There is reason to believe, however, that national leadership provided by the enactment of

against a person in the employment context, the victim of such discrimination may sue the employer under Title VII. Title VII gives courts the equitable power to order the appropriate relief.<sup>11</sup> In individual cases of discrimination the appropriate relief is usually an order requiring the employer to hire or reinstate the individual. When an employer has discriminated against many people for a number of years, however, individual relief may be an inadequate remedy. When appropriate, the statute empowers the court to order "affirmative action."<sup>12</sup> Affirmative action means remedial preferential treatment on the basis of race, often in the form of hiring goals.<sup>13</sup> The controversial legal issue is determining when affirmative action constitutes appropriate remedial relief, and when it is illegal reverse discrimination.

Courts have extensively used their remedial powers under Title VII to order affirmative action in cases of egregious employment discrimi-

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Federal legislation dealing with the most troublesome problems will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination.

It is, however, possible and necessary for the Congress to enact legislation which prohibits and provides the means of terminating the most serious types of discrimination.

*Id.* at 2393-94.

11. Title VII, § 706(g), 42 U.S.C. § 2000e-5(g) (1982) provides:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative relief 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. . . . 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 . . . if such individual was refused admission . . . or discharged for any reason other than discrimination on account of race. . . .

*Id.*

12. *Id.*

13. One of the first references to racial quotas in affirmative action plans was in President Johnson's Executive Order No. 11246, 30 F.R. 12319 (1965), *codified in* 3 C.F.R. 1964-5 comp., p. 139. The order required government contractors to take positive steps to hire and promote racial minorities and women. *Id.* The regulations provided that an acceptable affirmative action plan must include an analysis of areas in which the contractor is deficient in the utilization of a minority group. 41 C.F.R. § 60-2.11(b) (1986). If the contractor fails to employ a sufficient number of workers from a particular minority group, the regulations require the contractor to set goals and timetables for the hiring of a certain amount of minorities. The contractor must use good faith efforts to achieve these goals. The goals themselves must be flexible. 41 C.F.R. § 60-2.12 (1986).

nation. Several lower courts upheld numerical hiring goals as proper remedial measures for past discrimination.<sup>14</sup> These courts reasoned that when an employer discriminates against blacks as a class, the only effective relief is to provide a remedy to blacks as a class. Establishing minimum hiring goals for blacks is one way of achieving this remedy.

Courts have construed Title VII as a limitation on the purposes for which a court or an employer can use goals and quotas.<sup>15</sup> In *Rios v. Enterprise Association of Steamfitters, Local 638*<sup>16</sup> four non-white workers and the federal government sued the union to enjoin the practice of discrimination against minorities in the construction industry.<sup>17</sup> The plaintiffs urged the court to require the union to adopt an affirma-

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14. See, e.g., *Association Against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256, 281 (2d Cir. 1981), cert. denied, 455 U.S. 998 (1982) (approved affirmative relief that offered 102 minority candidates firefighting positions before white applicants); *Sisco v. J.S. Alberici Constr. Co.*, 655 F.2d 146, 149 (8th Cir. 1981), cert. denied, 455 U.S. 976 (1982) (construction firm's affirmative action plan which expressed its minority hiring goals in terms of percentages of hours worked was valid); *Local 35, I.B.E.W. v. City of Hartford*, 625 F.2d 416, 417-18 (2d Cir. 1980) (affirmative action plan providing for every good faith effort to achieve at least a 15% level of female and minority employment held valid); *United States v. City of Buffalo*, 633 F.2d 643, 647 (2d Cir. 1980) (approves district court's setting of temporary hiring goals for blacks at a percentage higher than their representation in city's total work force or applicant pool); *United States v. City of Chicago*, 631 F.2d 469, 471 (7th Cir. 1980) (city permitted to strike a police sergeant's promotional roster without promoting 111 of 400 white officers); *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 688 (6th Cir. 1979) (district court erred in disallowing an affirmative action plan which involved a goal of 50% minority staffing at all levels of the police department); *Davis v. County of Los Angeles*, 566 F.2d 1334, 1343 (9th Cir. 1978), vacated as moot, 440 U.S. 625 (1979) (district court properly used quotas to eradicate effects of past discrimination and such relief was not limited to identifiable persons denied employment in the past); *Patterson v. Newspaper and Mail Deliverers' Union*, 514 F.2d 767, 770 (2d Cir. 1975), cert. denied, 427 U.S. 911 (1976) (approved a settlement agreement establishing a minority hiring goal of 25%); *United States v. Iron Workers Local 86*, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971) (approves court order obligating union to indenture sufficient black applicants to overcome past discrimination); *Contractors Ass'n of E. Pa. v. Secretary of Labor*, 442 F.2d 159, 163 (3d Cir.), cert. denied, 404 U.S. 854 (1971) (validates affirmative action plan promulgated under the authority of Executive Order No. 11246).

15. Most courts prefer the term "goal" to "quota." "Quota" connotes something rigid and permanent, whereas "goal" suggests something more flexible and temporary. See Spiegelman, *Court-Ordered Hiring Quotas after Stotts: A Narrative on the Role of the Moralities of the Web and the Ladder in Employment Discrimination Doctrine*, 20 HARV. C.R.—C.L. L. REV. 340, n.1 (1985) (goals are merely flexible quotas, as both involve allocating opportunities by group).

16. 501 F.2d 622 (2d Cir. 1974).

17. *Id.* at 625.

tive action plan which would ensure a certain number of black members in the union by 1977.<sup>18</sup> Arguing that such a plan would violate Title VII,<sup>19</sup> the union contended that section 703(j) of the Act prohibited all preferential treatment based on race.<sup>20</sup> The Second Circuit held that section 703(j) prohibits a court from imposing racially preferential treatment adopted merely to attain and keep a racial balance in an employer's workforce.<sup>21</sup> That section, however, does not prohibit racially preferential treatment when a court or employer uses such treatment to correct past discriminatory practice, as was true in *Rios*.<sup>22</sup>

In 1979 the Supreme Court decided in *United Steelworkers of America v. Weber*<sup>23</sup> that voluntary affirmative action plans are not *per se* violations of Title VII. *Weber* involved a collective bargaining agreement between the union and Kaiser Aluminum and Chemical Corporation. The agreement reserved 50% of the spaces in the plant's craft training program for blacks. The parties intended the agreement to be in effect only until the percentage of black workers in the plant became commensurate with the percentage of blacks in the local labor force.<sup>24</sup> In upholding the agreement, the Court held that a voluntary affirmative action program does not violate Title VII if the program's purpose is to eliminate racial imbalances in traditionally segregated job categories.<sup>25</sup>

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18. *Id.* at 626.

19. The particular provision in dispute was § 703(j), 42 U.S.C. § 2000e-2(j) (1982), which provides:

Nothing contained in this subchapter shall be interpreted to require any employer . . . 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 . . . employed by any employer . . . 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.

20. 501 F.2d at 628.

21. *Id.* at 631.

22. *Id.* at 630-31. See also *United States v. I.B.E.W. Local 38*, 428 F.2d 144, 149-50 (6th Cir.), cert. denied, 400 U.S. 943 (1970) (§ 703(j) ". . . cannot be construed as a ban on affirmative relief against continuation of effects of past discrimination. . . . Any other interpretation would allow complete nullification of the stated purposes of the Civil Rights Act of 1964").

23. 443 U.S. 193 (1979).

24. *Id.* at 197.

25. *Id.* This was Justice Brennan's test. In his concurrence, Justice Blackmun suggested that a voluntary affirmative action plan should be legal if the plan is an employer's reasonable response to "arguable violations" of Title VII. *Id.* at 211. Justice

The Court in *Weber* articulated several criteria delineating when an employer may use racial factors in an affirmative action plan. First, the employer must design the plan so that it compensates blacks for past discrimination. Second, the plan must avoid unduly interfering with the interests of white workers. Finally, the plan must be a temporary measure, terminating when the percentage of blacks in the union equals the number of blacks in the labor force.<sup>26</sup> Other courts added to these restrictions by forbidding quotas where a viable, less restrictive alternative exists.<sup>27</sup>

The first *Weber* criterion requires that the employer's affirmative action plan be in response to evidence that the employer discriminated in the past.<sup>28</sup> Statistical evidence showing a disparity between the racial composition of the employer's work force and that of the community from which the employer hires is usually sufficient to support an employer's affirmative action plan.<sup>29</sup> From such a disparity the court will infer that, in the absence of discriminatory hiring practices, the work

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Blackmun recognized the practical problem that employers have. A literal reading of Title VII leaves employers facing liability, on the one hand for past discrimination against blacks, while on the other hand risking liability to whites for preferential treatment policies adopted to ameliorate the effects of prior discrimination against blacks. *Id.* at 210. Allowing employers to institute affirmative action plans when they identify an arguable violation of Title VII allows them to escape liability from this trap.

26. *Id.* at 208. The court held that the plan adopted in the collective bargaining agreement "falls within the discretion left by Title VII to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalances in traditionally segregated job categories." *Id.*

27. Properly validated selection procedures, recruitment programs for minorities, and records of the race of all applicants are examples of viable alternatives to quotas in some instances. *See, e.g.,* *Morrow v. Crisler*, 479 F.2d 960, 962-64 (5th Cir. 1973), *cert. denied*, 419 U.S. 895 (1974).

28. *See supra* note 26 and accompanying text.

29. The EEOC interpretative guidelines to Title VII provide that a private employer's affirmative action plan shall contain three elements: 1) a reasonable self-analysis, 2) a reasonable basis for concluding action is appropriate, and 3) reasonable action. 29 C.F.R. § 1608.4 (1986). If the self-analysis shows that in the past the employer subjected blacks to disparate treatment, or the employer's policies had a disparate impact on blacks, then racial goals and timetables for hiring and promotion may be appropriate. *Id.* The self-analysis need not establish that the employer violated Title VII before the employer can institute an affirmative action plan. *Id.* *See also* *Setser v. Novack Inv. Co.*, 657 F.2d 962, 968 (8th Cir.), *cert. denied*, 454 U.S. 1064 (1981) (affirmative action plan valid response by an employer to a conspicuous racial imbalance in his workforce); *Local 35, I.B.E.W. v. City of Hartford*, 625 F.2d 416, 422 (2d Cir. 1980) (finding of discrimination within construction industry itself is sufficient to support an affirmative action plan of any employer in the construction industry); *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 688 (6th Cir. 1979) (statistics showing a gross

force is representative of the racial composition of the population from which the employer hires.<sup>30</sup> Occasionally, however, a court will require a more particularized showing of past discrimination.<sup>31</sup> In a Title VII case, courts rarely approve an affirmative action plan when the employer's purpose is something other than the correction of past discrimination.<sup>32</sup>

An affirmative action plan will often favor a black worker or applicant over a white counterpart. The Supreme Court stated an employer must avoid unduly interfering with the interests of white workers in its affirmative action plan.<sup>33</sup> The Supreme Court recently addressed the issue of the interests and expectations of white workers in *Firefighters Local Union Number 1784 v. Stotts*.<sup>34</sup> The Court in *Stotts* invalidated a consent decree modification which prohibited the layoff of minority firefighters in conformity with a bona fide seniority system.<sup>35</sup> The Court's decision reflects a trend in its recent holdings that affirmative action plans which abrogate the seniority rights of white workers unduly interfere with their rights.<sup>36</sup>

*Stotts* was a black captain with the Memphis Fire Department. In 1977 *Stotts* filed a class action charging that the department had engaged in a pattern of racial discrimination in violation of Title VII.<sup>37</sup> The district court entered a consent decree settling the case.<sup>38</sup> Both the

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disparity between black employment in the Detroit Police Department and black representation in the city's labor market held permissible to support a quota system).

30. *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307 (1977).

31. *See Janowiak v. Corporate City of South Bend*, 750 F.2d 557, 562 (7th Cir. 1984) (city could not adopt an affirmative action plan merely based upon a finding that a disparity existed between percentage of minorities in community and percentage of minorities in the fire department).

32. *But cf. Detroit Police*, 608 F.2d at 696 (justification that law enforcement will be improved by a more integrated police force is sufficient to support this affirmative action plan). This integration argument is usually found only in the context of school desegregation. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

33. *See supra* note 26 and accompanying text.

34. 104 S. Ct. 2576 (1984).

35. *Id.* at 2582.

36. *Id.* at 2586 ("... it is inappropriate to deny an innocent employee the benefits of his seniority in order to provide a remedy in a pattern-or-practice suit such as this."). In *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842 (1986), the Court emphasized its disapproval of race-based layoffs. The Court stated, "We have previously expressed concern over the burden that a preferential layoff scheme imposes on innocent parties." 106 S. Ct. at 1851 (citing *Stotts*).

37. *Stotts*, 104 S. Ct. at 2581.

38. *Id.*

department and the city denied any violation of law. The parties, however, agreed to attempt annually to fill 50% of the job vacancies in the fire department with qualified black applicants.<sup>39</sup> In addition, they agreed to award approximately 20% of the promotions in each job classification to blacks.<sup>40</sup> In 1981 the city announced its intention to lay off workers, beginning with those with the least seniority, in accordance with the city's seniority system.<sup>41</sup> The district court, however, enjoined the city from laying off any black firefighters.<sup>42</sup> The district court reasoned that layoffs would hurt blacks as a class more than whites because blacks had less seniority than whites. The court determined that the layoff plan would undermine the effectiveness of the affirmative action plan.<sup>43</sup> The Sixth Circuit Court of Appeals affirmed.<sup>44</sup>

On writ of certiorari, the Supreme Court<sup>45</sup> found that section 703(h) of Title VII<sup>46</sup> protected the seniority system that the district court attempted to abrogate.<sup>47</sup> The Court found that the seniority system was bona fide because the city lacked discriminatory intent in adopting the

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39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 2582.

43. *Id.*

44. *Stotts v. Memphis Fire Dep't.*, 679 F.2d 541, 566-57 (6th Cir. 1982). The Sixth Circuit reasoned that the district court had the power to modify the consent decree when circumstances changed. *Id.* at 546. A clause in the consent decree gave the trial court the power to enter "such further order as may be necessary or appropriate to effectuate the purpose of this decree." *Id.* at 567. The injunction was necessary because layoffs would devastate minority employment in the fire department. *Id.* at 546.

45. The Court handed down four opinions in *Stotts*. Justice White delivered the opinion of the Court. Justice O'Connor submitted a concurring opinion. Justice Stevens wrote an opinion concurring in the judgment. Justices Blackmun, Brennan, and Marshall dissented. 104 S. Ct. 2576.

46. Title VII § 703(h), 42 U.S.C. § 2000e-2(h) (1982) reads:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race.

Title VII § 703(h). A "bona fide" seniority system is one that is facially neutral as to race, fails to disguise discrimination, or discontinues the effects of past discrimination. *Bacia v. Bd. of Educ. of the School Bd. of the City of Erie, Pa.*, 451 F. Supp. 882 (D. Pa. 1978).

47. 104 S. Ct. at 2587.

system.<sup>48</sup> Therefore, in abrogating the seniority system to benefit black employees,<sup>49</sup> the district court abused its discretion by interfering with the interests of white workers.<sup>50</sup>

In summary, courts have interpreted Title VII as allowing racial goals and quotas in affirmative action plans, subject to certain limitations. If, however, a state is the employer, courts must consider the equal protection clause in addition to the above analysis. The next section discusses the history of affirmative action plans and the equal protection clause.

### B. *Equal Protection*

The equal protection clause<sup>51</sup> requires states to treat all similarly situated people similarly with respect to the purpose of the law. Affirmative action plans pose constitutional problems because they treat people differently on the basis of race. The Supreme Court first addressed the validity of affirmative action plans under the equal protection clause in *Regents of the University of California v. Bakke*.<sup>52</sup> Bakke was a white male who applied to the University of California-Davis Medical School.<sup>53</sup> The school rejected him.<sup>54</sup> Bakke sued the university, alleging that the medical school's affirmative action admissions program discriminated against whites, and therefore violated equal protection.<sup>55</sup>

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48. *Id.* But cf. Recent Development, *The False Alarm of Firefighters Local Union No. 1784 v. Stotts*, 70 CORNELL L. REV. 991 (1985). The Recent Development explains that even though an employer lacked discriminatory intent in instituting a seniority system, its seniority system may still radically undermine the effectiveness of an affirmative action plan. *Id.* at 991. This is because black workers are typically among the most recently hired, and so are also among the first fired under a seniority system. *Id.*

49. 104 S. Ct. at 2587.

50. *Id.* at 2586. See *supra* note 36. Justice White's majority opinion also contained broad language suggesting that only "actual victims" of illegal discrimination are entitled to relief. 104 S. Ct. at 2589. Taken literally, that statement suggests that racial quotas are never appropriate. See e.g., Spiegelman, *supra* note 15, who explained that *Stotts* called into question a judicial power to order quotas, since a quota by definition is a remedy which goes to persons who are not actual victims. Spiegelman, *supra* note 15, at 349. However, the Supreme Court recently retreated from this statement and elucidated the legality of racial preferences in certain limited instances. See *infra* notes 137-48 and accompanying text.

51. U.S. CONST. amend. XIV, § 1.

52. 438 U.S. 265 (1978).

53. *Id.* at 276.

54. *Id.*

55. *Id.* at 278.

The medical school had two separate admissions programs. The school's regular program had highly selective criteria.<sup>56</sup> In the special admissions program for minorities, the academic standards were lower than those in the regular admissions program. The medical school reserved sixteen out of the one hundred spaces in each class for students from the special admissions program.<sup>57</sup> The medical school considered Bakke's application for admission only under the regular program.<sup>58</sup> The medical school admitted applicants under the special program whose grade point averages and MCAT scores were significantly lower than Bakke's.<sup>59</sup>

In *Bakke* a plurality of the Court<sup>60</sup> declared that strict scrutiny<sup>61</sup> applied to all racial classifications, including the so-called "benign"<sup>62</sup> classifications of affirmative action plans. Racial quotas are thus unconstitutional according to the plurality, unless they are necessary to accomplish a substantial state interest.<sup>63</sup> Justice Powell believed that the medical school lacked a substantial interest in remedying the effects of past societal discrimination. The Court determined that the school had a substantial interest in attaining a diverse student body.<sup>64</sup> Racial quotas, however, were unnecessary and therefore an impermissible means of accomplishing diversity within the student body.<sup>65</sup> Thus, the

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56. *Id.* at 273-74.

57. *Id.* at 274-75.

58. *Id.* at 276.

59. *Id.* at 277.

60. There were six separate opinions in *Bakke*. Justice Powell announced the Court's judgment and filed an opinion expressing his views of the case. Justices Brennan, White, Marshall, and Blackmun filed an opinion concurring in the judgment and dissenting in part. Justices White, Marshall, and Blackmun each filed a separate opinion. Justice Stevens filed an opinion concurring in the judgment and dissenting in part. 438 U.S. 265.

61. *Id.* at 291.

62. *Id.* at 298. Justice Powell expressed doubt as to whether any racial group classifications are truly benign. He noted that preferential programs may reinforce negative stereotypes about the minority group. He also noted that innocent persons might have to bear the costs of correcting problems which were not of their own making. *Id.*

63. *Id.* at 305. See generally L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-6 (1978).

64. *Bakke*, 438 U.S. at 310-11. If, however, there were judicial, legislative, or administrative findings that the medical school itself discriminated against blacks in the past, then the school's interest in preferring members of the injured group would have been substantial. *Id.* at 307.

65. *Id.* at 315.

medical school's special admissions program was unconstitutional.<sup>66</sup> The Court ordered the medical school to admit Bakke.<sup>67</sup> Significantly though, Justice Powell said the medical school could consider race as one factor in the selection process, as long as it was not the sole factor.<sup>68</sup> The holding is important because it allows state supported institutions to employ color-conscious affirmative action plans.<sup>69</sup>

In a separate opinion, Justices Brennan, White, Marshall, and Blackmun declared that the scrutiny of benign racial classifications should be less strict than the scrutiny of other such classifications because benign classifications fail to discriminate against a disadvantaged minority. These Justices suggested an intermediate level of scrutiny,<sup>70</sup> under which the racial classification must be substantially related to an important state interest.<sup>71</sup> The Justices opined that compensating minorities for past societal discrimination was an important state interest,<sup>72</sup> and the use of racial classifications was substantially related to that objective.<sup>73</sup>

The Court's disagreement regarding the appropriate standard for judging affirmative action plans continued in *Fullilove v. Klutznick*.<sup>74</sup> *Fullilove* concerned the constitutionality of a congressionally designed affirmative action plan.<sup>75</sup> The Court<sup>76</sup> approved a government con-

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66. *Id.* at 271.

67. *Id.*

68. *Id.* at 320. Justice Powell cited the Harvard Admission Plan with approval. This plan allows an applicant to receive a "plus" for his racial or ethnic background, while not explicitly placing minority applicants in a separate group and judging them on different criteria than those used in judging non-minority applicants. *Id.* at 316-18, 321-24.

69. *Id.* at 320.

70. *Id.* at 359.

71. *Id.*

72. *Id.* at 362.

73. *Id.* at 377. Justices Marshall, Brennan, White, and Blackmun also indicated that a racial classification which stigmatizes any group or that singles out those disproportionately represented in the political process to bear the brunt of the affirmative action program violates equal protection. *Id.* at 361.

74. 448 U.S. 448 (1980).

75. *Id.* at 453.

76. The Court delivered five opinions in *Fullilove*. Chief Justice Burger announced the judgment of the Court. Justice Powell filed a concurring opinion. Justice Marshall filed an opinion concurring in the judgment. Justices Stewart and Stevens both filed dissents.

struction contract program which contained set-aside provisions.<sup>77</sup> These set-aside provisions delineated explicit racial guidelines designed to assist minority-owned businesses.<sup>78</sup> Chief Justice Burger, writing for the majority, found that Congress had narrowly drawn the program's guidelines to accomplish the legitimate objective of remedying the present effects of past discrimination.<sup>79</sup> Although Burger refused to adopt either the strict or intermediate scrutiny level employed in *Bakke*, he stated that the plan would survive judicial scrutiny under either test.<sup>80</sup> Instead, the Court held that Congress' findings of past discrimination in the construction industry were sufficient to support a race-conscious affirmative action program.<sup>81</sup> Justice Burger held that some harm to whites, incidental to the affirmative action plan, is permissible.<sup>82</sup>

Without clear guidance from the Supreme Court lower federal courts have been reluctant to invalidate affirmative action plans on equal protection grounds.<sup>83</sup> Most courts require that the government agency make competent findings of its own, regarding past discrimination, before implementing an affirmative action plan.<sup>84</sup> Lower courts

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77. *Id.* at 484.

78. *Id.*

79. *Id.* at 481.

80. *Id.* at 492.

81. *Id.* at 506. (Powell, J., concurring).

82. *Id.* at 484.

83. *See, e.g.*, South Florida Chapter of the Associated Gen. Contractors of America, Inc. v. Metropolitan Dade County, 723 F.2d 846, 847 (11th Cir.), *cert. denied*, 469 U.S. 871 (1984) (ordinance granting set-asides to blacks in the contract bidding process was constitutional); *Bratton v. City of Detroit*, 704 F.2d 878, 882, 897-98 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984) (promotional goal calling for an end goal of an equal staffing ratio between blacks and whites in various positions of the police department was constitutional as long as the blacks promoted were qualified for the positions in which they were placed); *Valentine v. Smith*, 654 F.2d 503, 510 (8th Cir.), *cert. denied*, 454 U.S. 1124 (1980) (state university's quota of hiring 25% black faculty members between 1976 and 1979 to achieve a total percentage of black faculty members of 5% by 1979 was constitutional). *But see Janowiak v. Corporate City of South Bend*, 750 F.2d 557, 564 (7th Cir. 1984) (statistical data alone fails to constitute a finding of past discrimination, and is constitutionally insufficient to justify a remedial plan that discriminates against white males); *Oliver v. Kalamazoo Bd. of Educ.*, 706 F.2d 757, 763 (6th Cir. 1983) (district court's imposition of a 20% quota system for the teaching staff was unconstitutional because the school district had made a sustained good faith effort to recruit minority faculty members).

84. *See South Florida Contractors*, 723 F.2d at 852 (county commission was competent to make findings of past discrimination); *Bratton*, 704 F.2d at 888 (board of police commissioners was competent to make findings regarding the existence and effect of

have applied the full spectrum of scrutiny levels in analyzing racial quotas under the equal protection clause. Some have used Burger's analysis in *Fullilove*.<sup>85</sup> Other courts have used strict scrutiny,<sup>86</sup> intermediate scrutiny,<sup>87</sup> and even the mere reasonableness test.<sup>88</sup>

The Supreme Court again addressed the issue of the use of racial quotas in affirmative action plans. The trilogy of *Wygant v. Jackson Board of Education*,<sup>89</sup> *Local 28, Sheet Metal Workers International Association v. Equal Employment Opportunity Commission*,<sup>90</sup> and *Local Number 93, International Association of Firefighters v. Cleveland*<sup>91</sup> provides some guidance on both Title VII and equal protection challenges to affirmative action. These three cases, however, do little to simplify the inquiry as to whether a particular affirmative action plan is legal.

### III. RECENT SUPREME COURT DECISIONS

#### A. *Wygant v. Jackson Board of Education*

In *Wygant* a group of white teachers challenged a provision of the collective agreement between the teachers' union and the school

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prior discrimination on the part of the police department); *Valentine*, 654 F.2d at 508-09 (HEW and District Court for D.C. were competent to make findings of past discrimination on the part of Arkansas universities sufficient to justify affirmative action plan). *But cf.* *Caulfield v. Bd. of Educ. of City of New York*, 632 F.2d 999, 1006 (2d Cir. 1980) (a teacher transfer scheme to integrate faculty failed to require findings of past intentional discrimination because the white teachers were not being seriously harmed).

85. *South Florida Contractors*, 723 F.2d at 856. The Eleventh Circuit held that the state's affirmative action ordinance incorporated sufficient procedural safeguards to ensure that it was narrowly drawn to accomplish the legitimate objective of redressing past discrimination. *Id.*

86. *See, e.g., Oliver*, 706 F.2d at 764, in which the Sixth Circuit found that a nullification of seniority rights must be necessary before a court will find it constitutional.

87. *See, e.g., Valentine*, 654 F.2d at 510. The *Valentine* decision set forth helpful criteria for determining when an affirmative action program is constitutional. Although the Eighth Circuit used the intermediate scrutiny test, the criteria the court employed are useful in analyzing an affirmative action plan under any test. First, the government agency must design the plan to result in the hiring of a sufficient number of minority applicants so that the racial balance of the agency's work force approximates the balance that the agency would achieve absent past discrimination. *Id.* Second, the plan may last only as long as reasonably necessary to achieve its legitimate goals. *Id.* Third, it is impermissible for the plan to result in the hiring of unqualified applicants. *Id.* Fourth, it is impermissible for the plan to completely bar whites from all vacancies. *Id.*

88. *See, e.g., Bratton v. City of Detroit*, 704 F.2d 878, 890 (6th Cir. 1983).

89. 106 S. Ct. 1842 (1986).

90. 106 S. Ct. 3019 (1986).

91. 106 S. Ct. 3063 (1986).

board.<sup>92</sup> The provision would modify the existing seniority system in the event of layoffs.<sup>93</sup> Under the provision, the percentage of black teachers laid off could not be greater than the percentage of black teachers employed at the time of the layoff.<sup>94</sup> Pursuant to the plan, the school board laid off the plaintiffs, who were white teachers with greater seniority<sup>95</sup> than the black teachers the school board retained.<sup>96</sup> The plaintiffs charged violations of the equal protection clause.<sup>97</sup> The district court dismissed the plaintiffs' claims,<sup>98</sup> and the Sixth Circuit affirmed.<sup>99</sup> The Supreme Court granted certiorari and reversed.<sup>100</sup> The Court criticized both the justification for the layoff plan and the nature of the plan itself.

The school board justified the plan as a means of providing minority role models for minority students in an effort to mitigate the effects of past societal discrimination.<sup>101</sup> Justice Powell, in his plurality opinion,<sup>102</sup> attacked the plan on a number of grounds. First, Justice Powell stated that past societal discrimination is an insufficient basis for the

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92. 106 S. Ct. at 1846.

93. *Id.* at 1845.

94. Article XII of the collective bargaining agreement stated:

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

*Id.*

95. By the time of the appeal to the Sixth Circuit, economic conditions had improved so that only one white teacher was still laid off pursuant to the plan. *Wygant v. Jackson Bd. of Educ.*, 746 F.2d 1152, 1154 (6th Cir. 1984).

96. 106 S. Ct. at 1845-46.

97. *Id.* at 1846. They also alleged violation of Title VII and 42 U.S.C. § 1983. *Id.*

98. *Id.*

99. *Wygant*, 746 F.2d at 1156-57. The constitutional test used was whether the racially preferential layoff plan was substantially related to the school board's objectives of remedying past discrimination and correcting the chronic and substantial under-representation of minorities. The Sixth Circuit found that the plan passed this test. *Id.* at 1157.

100. 106 S. Ct. at 1846.

101. *Id.* at 1847.

102. The Justices filed five opinions in *Wygant*. Justice Powell wrote the plurality opinion. Justice O'Connor filed an opinion concurring in part and concurring in the judgment. Justice White filed an opinion concurring in the judgment. Justices Marshall and Stevens filed dissenting opinions.

use of a remedial classification.<sup>103</sup> The school board fatally erred by failing to prove its prior discrimination against blacks.<sup>104</sup> By presenting the statistical disparity between the number of black teachers in the school system and the available black labor pool in the area, the board could have shown past discrimination on its part.<sup>105</sup> According to Powell, but for past discrimination, the percentage of black teachers would approximate the percentage of blacks in the relevant labor pool.<sup>106</sup> However, rather than demonstrating the disparity between the percentage of minorities on the faculty and the percentage in the Jackson labor pool, the board correlated the number of black teachers with the number of black students in the Jackson school system.<sup>107</sup> Powell noted that this correlation proved nothing about whether the school board discriminated against black teachers in the past.<sup>108</sup> Sharply criticizing the role-model theory, Justice Powell stated that the idea that black students are better off with black teachers suspiciously paralleled the reasoning which fostered the segregated schools that *Brown v. Board of Education*<sup>109</sup> abolished.<sup>110</sup>

In addition to disagreeing with the role-model theory, the majority<sup>111</sup> objected to the board's use of racial preferences as a basis for layoff decisions.<sup>112</sup> Although affirmative action plans may legally impose some burdens on whites, Powell stated that layoffs unduly injure innocent white workers. The Court implied that race-based layoffs are more objectionable than racial preferences in hiring.<sup>113</sup> Powell distinguished between layoffs and hiring goals, noting that hiring goals impose a diffuse burden on a large group of whites, while layoffs "impose the entire burden of achieving racial equality" on a few individuals.<sup>114</sup>

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103. *Id.* at 1847. *See supra* note 61 and accompanying text.

104. *Id.* at 1848. *See infra* note 119 and accompanying text for the dissent's explanation of why the board did not present findings of past discrimination.

105. *Id.* at 1847. *See supra* note 29 and accompanying text. *See also Hazelwood School District*, 433 U.S. at 308.

106. 106 S. Ct. at 1847.

107. *Id.*

108. *Id.* at 1847-48.

109. 347 U.S. 483 (1954).

110. 106 S. Ct. at 1848.

111. Justices Powell, Burger, Rehnquist, O'Connor, and White.

112. 106 S. Ct. at 1849. *See generally* Fallon and Weiler, *Firefighters v. Stotts: Conflicting Models of Racial Justice*, 1984 S. CT. REV. 1.

113. 106 S. Ct. at 1851.

114. *Id.*

Justices Marshall, Brennan, and Blackmun dissented. Marshall argued that the Court should have remanded the case to the district court for further development of the record.<sup>115</sup> Because the district court granted summary judgment to the board, the board lacked the opportunity to fully present its evidence of prior discrimination.<sup>116</sup> Nevertheless, Justice Marshall addressed the merits of the case. The dissent argued that Justice Powell's distinction between affirmative action plans involving hirings and those involving layoffs was untenable.<sup>117</sup> He explained that a preferential layoff system may be necessary to protect a valid affirmative action hiring policy.<sup>118</sup> This is because minorities are usually the "last-hired and first-fired" under a strict seniority system.<sup>119</sup>

B. *Local 28, Sheet Metal Workers International Association v. Equal Employment Opportunity Commission*

The *Sheet Metal Workers* case involved a long history of discrimination against blacks on the part of the union.<sup>120</sup> In 1975 the district court found the Sheet Metal Workers Union guilty of engaging in a pattern of discrimination against blacks in violation of Title VII.<sup>121</sup> The district court enjoined the union from future discrimination<sup>122</sup> and ordered it to achieve a 29% non-white membership goal by July 1, 1981.<sup>123</sup> The Second Circuit Court of Appeals affirmed.<sup>124</sup>

For failing to comply with the court-ordered plan<sup>125</sup> in 1982<sup>126</sup> and 1983, the district court fined the union<sup>127</sup> and modified the affirmative

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115. *Id.* at 1858 (Marshall, J., dissenting).

116. *Id.*

117. *Id.* at 1864.

118. *Id.* See *supra* note 45.

119. *Id.* Justice Marshall also found it important that the teacher's union to which the plaintiffs belonged had agreed to the plan. *Id.* at 1866.

120. *Local 28, Sheet Metal Workers Int'l. Ass'n v. EEOC*, 106 S. Ct. 3019, 3025 (1986).

121. *Id.* at 3024.

122. *Id.* at 3027.

123. *Id.* The court based the goal on the percentage of non-whites in the relevant labor pool in New York City. *Id.*

124. *Id.* at 3028. On remand, the district court gave the union an additional year to meet the membership goal. *Id.*

125. *Id.* at 3029.

126. *Id.* at 3028-29.

127. *Id.* at 3029. The court ordered the union to place the 1982 fine of \$150,000 in

action plan by establishing a 29.23% minority membership goal for the union to reach by August 31, 1987.<sup>128</sup> The Second Circuit affirmed the membership goal.<sup>129</sup>

In upholding the Second Circuit's decision,<sup>130</sup> the central issue<sup>131</sup> the Court considered was whether section 706(g) of Title VII<sup>132</sup> prohibits racial preference in court-ordered affirmative action plans.<sup>133</sup> The last sentence of section 706(g) prohibits a court from ordering a union to admit an individual whom the union "refused admission . . . for any reason other than discrimination."<sup>134</sup> In announcing the judgment of the Court,<sup>135</sup> Justice Brennan relied on the legislative history of Title VII to uphold the court-ordered plan.<sup>136</sup>

The union argued that section 706(g) authorizes a court to award preferential relief only to the victims of actual discrimination.<sup>137</sup> Justice Brennan disagreed, looking first at the plain language of the section.<sup>138</sup> He stated that the section applies only in the situation in which an employer demonstrates that, even absent any discrimination, he would not have hired the worker who now alleges discrimination.<sup>139</sup> Under this interpretation, section 706(g) clearly fails to require the court to order relief only for the actual victims of past discrimination.

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a fund designed to increase black membership in the apprenticeship program in the union. *Id.* The 1983 fine was to pay for an "Employment, Training, and Recruitment Fund." *Id.* at 3030.

128. *Id.*

129. *Id.* See also *EEOC v. Local 638, Sheet Metal Workers Ass'n*, 753 F.2d 1172, 1186 (2d Cir. 1985). The dissent in the Second Circuit argued that the district court's attempts to force the union to comply with the 29.23% membership goal turned the goal into a strict racial quota in contravention of *Stotts* and *Bakke*. 753 F.2d at 1194.

130. 106 S. Ct. at 3031.

131. There was also an equal protection claim. See *infra* notes 154-55 and accompanying text.

132. See *supra* note 11 for the full language of § 706(g).

133. 106 S. Ct. at 3034-35.

134. Title VII § 706(g), 42 U.S.C. § 2000e-5(g) (1982).

135. There were five written opinions in *Sheet Metal Workers*. Justice Brennan announced the judgment of the Court and filed an opinion in which different Justices joined different parts. Justice Powell filed an opinion concurring in the judgment. Justice O'Connor filed an opinion concurring in part and dissenting in part. Justices White and Rehnquist dissented.

136. 106 S. Ct. at 3034.

137. *Id.* at 3031.

138. *Id.* at 3035.

139. *Id.*

In the instant case, Justice Brennan noted that under the membership goal, the union could refuse to admit individuals to whom it previously denied admission for reasons unrelated to discrimination.<sup>140</sup> Therefore, the plain language of section 706(g) allowed the court-ordered membership goal.<sup>141</sup>

Justice Brennan next turned to the legislative history of Title VII and found that race-conscious affirmative action furthers the purposes of Title VII.<sup>142</sup> The purposes he referred to were those of eradicating discrimination and creating employment opportunities for blacks.<sup>143</sup> To achieve these purposes in cases so severe that an injunction prohibiting future discrimination is an insufficient solution,<sup>144</sup> Brennan declared that hiring and membership goals may be necessary.

According to Justice Brennan, Congress added section 706(g) to Title VII to elucidate that a court is powerless to order a union or employer to adopt quotas merely to correct racial imbalances in his work force when the imbalances were not due to the employer's racial discrimination.<sup>145</sup> In its debates over the section, Congress failed to discuss whether courts could prescribe racial preferences as a remedy for past discrimination.<sup>146</sup>

Brennan also examined the legislative history of the Equal Employment Act of 1972, which amended Title VII.<sup>147</sup> Congress failed to amend section 706(g), implying congressional approval of the courts' use of race-conscious affirmative action.<sup>148</sup> Brennan then examined the particular facts of the case and found that the district court's prescribed remedies were appropriate because of the union's previous egregious discrimination.<sup>149</sup> He followed the *Weber* analysis,<sup>150</sup> noting

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140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 3036. *See supra* note 10 and accompanying text.

144. 106 S. Ct. at 3036.

145. *Id.* at 3040. *See supra* note 21 and accompanying text. *See also* 110 CONG. REC. 2558 (1964) (remarks of Rep. Goodell) ("There is nothing here as a matter of legislative history that would require racial balancing").

146. 106 S. Ct. at 3040.

147. *Id.* at 3045.

148. *Id.* at 3047. For two examples of pre-1972 cases that applied race-conscious relief under Title VII, *see* *Contractors Ass'n of E. Pa. v. Secretary of Labor*, 442 F.2d 159, 163 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971) and *United States v. Ironworkers Local 86*, 443 F.2d 544, 552-54 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971).

149. 106 S. Ct. at 3050.

that the membership goal was flexible,<sup>151</sup> temporary,<sup>152</sup> and did not unduly burden white workers, as no white workers would be laid off because of the goal.<sup>153</sup>

The union also challenged the district court's orders under the equal protection component of the fifth amendment due process clause.<sup>154</sup> Justice Brennan declined to specify which level of scrutiny a court should use in considering the constitutionality of affirmative action plans, because the relief in this case passed even the strict scrutiny test.<sup>155</sup>

### C. *Local Number 93, International Association of Firefighters v. Cleveland*

In *Firefighters v. Cleveland*, the companion case to *Sheet Metal Workers*, the Supreme Court again construed section 706(g).<sup>156</sup> White firefighters challenged the district court's consent decree which contained a race-conscious plan to increase the number of minorities in the Cleveland Fire Department.<sup>157</sup> The plan called for the promotion of firefighters on a one white to one black basis.<sup>158</sup> The Sixth Circuit found that the district court acted within its discretion in approving the consent decree.<sup>159</sup>

The Supreme Court affirmed.<sup>160</sup> The precise issue the Court ad-

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150. See *supra* notes 23-26 and accompanying text.

151. 106 S. Ct. at 3051. Justices White and O'Connor dissented on this point. They each maintained that the contempt judgments against the union and the district court's unwillingness to take economic decline into account, showed that the court was really administering a rigid quota and not a flexible goal. *Id.* at 3062 (White, J., dissenting) and at 3061 (O'Connor, J., concurring in part and dissenting in part).

152. *Id.* at 3056.

153. *Id.* at 3056-57.

154. *Id.* at 3052.

155. *Id.* at 3054.

156. *Local Number 93, Int'l. Ass'n of Firefighters v. Cleveland*, 106 S. Ct. 3063, 3071 (1986).

157. *Id.* at 3070. The district court adopted the consent decree on January 31, 1983, pursuant to OHIO REV. CODE § 4117.01-.23. *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479, 483, 492 (6th Cir. 1985).

158. 106 S. Ct. at 3069. In other words, when an employer promoted a white, it had to promote a black as well. This goal was modified for the upper-level positions because there were not enough qualified minority candidates. *Id.*

159. *Vanguards of Cleveland*, 753 F.2d at 485.

160. 106 S. Ct. at 3072.

dressed was whether section 706(g) prohibits the entry of a consent decree which gives relief to persons other than the actual victims of the defendant's discriminatory practices.<sup>161</sup> The Court concluded that section 706(g) allows such consent decrees.<sup>162</sup>

In *Firefighters v. Cleveland* Justice Brennan, writing for the majority,<sup>163</sup> ignored the question of whether section 706(g) always precludes court-ordered relief to persons other than actual victims, as he already discussed that issue in *Sheet Metal Workers*.<sup>164</sup> Instead, the majority opinion considered whether a consent decree is a court order for purposes of section 706(g).<sup>165</sup> The Court concluded that a consent decree is not a court order.<sup>166</sup> Therefore, consent decrees could benefit persons who were not actual victims of the defendant's discriminatory practices even in situations where a court order would be unable to benefit such persons.<sup>167</sup>

The Court reached its decision by noting first that Congress preferred voluntary compliance with Title VII, as opposed to litigation and the resulting court orders.<sup>168</sup> The Court then stated that *Weber* elucidated that employers seeking to remedy racial discrimination could voluntarily establish affirmative action plans that include reasonable race-conscious relief that benefits persons who are not the actual victims of discrimination.<sup>169</sup> Since an employer can do this voluntarily, the question for the Court became whether a consent decree was a voluntary action.<sup>170</sup>

The Court reasoned that a consent decree resembles voluntary action more than it resembles a court order. The Court examined the legislative history of Title VII<sup>171</sup> and found congressional concern over

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161. *Id.* at 3071-72.

162. *Id.* at 3072.

163. Justices Marshall, Blackmun, Powell, Stevens, and O'Connor joined Justice Brennan in the majority opinion. Justice O'Connor also filed a concurrence. Justices White and Rehnquist each dissented.

164. *See supra* notes 132-48 and accompanying text.

165. 106 S. Ct. at 3072.

166. *Id.* at 3075.

167. *Id.* at 3078.

168. *Id.* at 3072. *See, e.g.,* *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975).

169. 106 S. Ct. at 3072.

170. *Id.* at 3074.

171. *Id.*

section 706(g) regarding the coercive aspects of a court-ordered affirmative action plan. Congress wanted to avoid empowering the courts to dictate to employers who the employers could hire.<sup>172</sup> According to the majority, this type of coercion is not present in consent decrees. Although technically a court judgment,<sup>173</sup> a consent decree's most fundamental characteristic is its voluntary nature.<sup>174</sup> Therefore, consent decrees fail to implicate the congressional concerns over section 706(g).<sup>175</sup>

#### IV. ANALYSIS

##### A. *Suggestions for Institutions Developing Affirmative Action Plans*

The recent Supreme Court decisions fail to provide an easy blueprint for constructing legal and constitutional affirmative action plans. These cases do, however, provide some guidance to a governmental body or an employer developing such a plan. The cases illustrate that an institution must allege the proper reasons for the affirmative action plan and devise the plan effectively to achieve the desired equal employment goals.

First, it is clear from *Stotts* and *Wygant* that race-based layoffs are impermissible because they excessively burden white workers.<sup>176</sup> It is unclear, however, whether other race-conscious measures unduly burden whites. Hiring goals are permissible, at least where they are in response to past egregious discrimination.<sup>177</sup> Promotion goals fall between layoffs and hiring goals in terms of their burden on white work-

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172. *Id.* at 3075. See, e.g., 110 CONG. REC. 6549 (1964) (remarks of Sen. Humphrey) (§ 706(g) elucidates "that employers may hire and fire, promote and refuse to promote for any reason, good or bad," except when their choices violate substantive sections of Title VII).

173. 106 S. Ct. at 3074.

174. *Id.* at 3075.

175. *Id.* at 3076. The Court noted, however, that the union might still have an equal protection claim against the city, but the union failed to bring such a claim in the present lawsuit. *Id.* at 3080.

The Court recently decided in *United States v. Paradise*, 107 S. Ct. 1053 (1987), that a one black for one white promotion scheme is not unduly burdensome so long as the scheme is temporary, flexible, and narrowly tailored to serve a legitimate state interest. *Id.* at 1073-74. See generally Comment, *Equal Protection and Affirmative Action in Job Promotion: A Prospective Analysis of United States v. Paradise*, 17 CUM. L. REV. 205 (1986-87).

176. See *supra* notes 50 and 112-14 and accompanying text.

177. See *supra* note 149 and accompanying text.

ers.<sup>178</sup> In *Firefighters v. Cleveland* the Court approved a consent decree involving race-based promotions, but failed to say whether white workers could later challenge such a plan under equal protection.<sup>179</sup> A good question for an institution to ask is whether its affirmative action plan will harm identifiable individuals. If it does so, then there is both a constitutional and a fairness problem.

An institution must admit that it discriminated against blacks in the past in order to adopt an affirmative action plan. Although there may be other valid reasons for affirmative action,<sup>180</sup> courts most readily accept the remedying of past discrimination as a reason for the plan. This reason, however, is an insufficient rationale for adoption of such a plan.<sup>181</sup>

Further, the institution must support its admission of past discrimination with factual findings.<sup>182</sup> It is unclear exactly what these findings must include. The Supreme Court stated, however, that the institution does not have the burden of convincing a court of its liabil-

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178. See Fallon and Weiler, *supra* note 112, at 67.

179. 106 S. Ct. at 3080. The Supreme Court addressed this issue in *United States v. Paradise*, 107 S. Ct. 1053 (1987). In *Paradise*, white troopers challenged a modification of a consent decree fashioned by the district court for the Alabama Department of Safety. *Paradise v. Prescott*, 767 F.2d 1514, 1516 (11th Cir. 1985). The consent decree required the department to promote one black trooper for each white trooper if there was a qualified black trooper. This was to continue until either 1) black troopers composed 25% of that rank or 2) the department developed a comparable plan. *Id.* at 1524. The white troopers charged that the plan violated equal protection and Title VII. *Id.* at 1527, 1530. The Eleventh Circuit affirmed the district court's promotion plan. *Id.* at 1516. The Supreme Court affirmed. 107 S. Ct. 1053 (1987). See *supra* note 175.

180. For example, a medical school may consider race for the purpose of achieving academic diversity. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-12 (1978).

181. *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842, 1847 (1986).

182. See Comment, *Principles of Competence: The Ability of Public Institutions to Adopt Remedial Affirmative Action Plans*, 53 U. CHI. L. REV. 581 (1986). The Comment uses the concept of "institutional competence" to determine if a public institution can implement an affirmative action plan. *Id.* at 582. There are two aspects of institutional competence: 1) authority and 2) adequacy of the factual findings. *Id.* Under the authority aspect, the question is whether the institution has been given the power to announce the government's interest in eradication of discrimination. *Id.* at 599. Courts, through their article III power, and Congress, through § 5 of the fourteenth amendment, have the greatest authority in this area. *Id.* at 600.

The findings of fact requirement examines an institution's ability to determine if it discriminated. An institution's determination is reliable if its fact-finding abilities are comparable to, or improve on those of the courts. Congressional fact-finding is an example of an improvement on the courts because Congress can conduct a broader inquiry than the courts can. *Id.* at 602.

ity for past discrimination.<sup>183</sup> The employer or institution need only show that it had a firm basis for determining that affirmative action was warranted.<sup>184</sup>

After *Sheet Metal Workers*, courts will uphold an employer's plan which uses specific numbers or quotas.<sup>185</sup> Numbers are quite useful in determining whether an affirmative action plan is effective. The goal of the plan, however, must be flexible. If a change in circumstances renders the goal impractical, then the employer must revise the goal.<sup>186</sup>

A final point for institutions and employers to keep in mind is that they should use other methods of increasing their black employment rate before resorting to race-conscious goals. Examples include intensive minority recruiting, maintaining records and reports on the race of all their workers, and using tests that are non-discriminatory and properly validated.<sup>187</sup> These methods can increase employment opportunities for blacks without unduly burdening whites. Institutions should only take race-conscious action if the above mentioned methods inadequately remedy the effects of prior discrimination by the employer.

### B. *A Suggested Analysis for Courts*

To date, the Supreme Court has failed to articulate a constitutional standard for review of benign racial classifications. The Court appears to be leaning towards a strict scrutiny approach. A plurality of the Court<sup>188</sup> in *Wygant* purports to adopt the classic strict scrutiny test: the racial classification must serve a compelling state interest and the means chosen to effectuate this interest must be narrowly tailored to the achievement of that goal.<sup>189</sup> This is a very restrictive test, charac-

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183. *Wygant*, 106 S. Ct. at 1856 (O'Connor, J., concurring).

184. *Id.*

185. *Sheet Metal Workers* involved a 29.23% membership goal. 106 S. Ct. 3019, 3030 (1986).

186. *Id.* at 3051.

187. See *supra* note 27 and accompanying text. The EEOC's *Uniform Guidelines* explain how an employment screening test can be validated properly. Psychologists developed the Guidelines, intending to show employers how to use tests so that they do not discriminate against blacks explicitly or implicitly. 29 C.F.R. § 1607 (1986).

188. Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor comprised the plurality. However, the retirements of Chief Justice Burger and Justice Powell may well change the ideological viewpoint of the Court and thus shift its direction in affirmative action cases.

189. *Wygant*, 106 S. Ct. at 1846.

terized as "strict in theory and fatal in fact."<sup>190</sup> The Court has nevertheless approved several race-conscious affirmative action plans. The Court has had some trouble fitting these cases into the traditional strict scrutiny test. This author suggests that the intermediate scrutiny test is more appropriate.

In the years since *Bakke*, Justices Brennan, White, and Marshall have argued strenuously for the intermediate scrutiny test.<sup>191</sup> Under this test, racial quotas would have to serve important governmental objectives and be substantially related to the achievement of these objectives.<sup>192</sup> This test has much merit because it recognizes that the purpose of the equal protection clause after the Civil War was to protect blacks and to ensure them treatment equal to that accorded whites.<sup>193</sup> Furthermore, the framers of the fourteenth amendment instituted race-conscious educational and employment programs during the Reconstruction Era.<sup>194</sup> This indicates that they did not believe that remedial race-conscious programs necessarily violated equal protection. The irony in employing the strict scrutiny standard to review affirmative action plans is that it often denies a remedy to the very class of people Congress intended the fourteenth amendment to protect. Although it provides for searching judicial review, the intermediate scrutiny test is more appropriate because it leaves the government

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190. Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

191. *Wygant*, 106 S. Ct. at 1861.

192. *Bakke*, 438 U.S. at 359. This test is now used in the analysis of gender classifications. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976).

193. 438 U.S. at 396-97 (separate opinion of Marshall, J.). Marshall stated that the fourteenth amendment was not intended to prohibit race-conscious remedial measures aimed at blacks. *Id.* He observed that the Congress that passed the fourteenth amendment is the same Congress that passed the 1886 Freedman's Bureau Act, an Act which provided many of its benefits only to blacks. *Id.* at 397.

194. See Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985). Schnapper advocated adoption of the intermediate review standard because it is most consistent with the fourteenth amendment's legislative history. *Id.* at 795. Schnapper wrote that the history suggests that limitations on affirmative action plans should concern the type of benefit conferred by the program, and not the amount of burden on whites or the precision with which black victims of past discrimination can be identified. *Id.* at 796. The framers approved race-conscious programs designed to help blacks improve their situations and to become self-supporting. *Id.* Education and jobs were the two major areas of concern to the framers of the fourteenth amendment. They are the concerns of affirmative action plans we have today as well. *Id.* at 796-97.

some room to devise an effective affirmative action plan. For example, the intermediate scrutiny test would take into account that a race-based layoff plan may be needed to achieve a particular hiring goal. Assuming the hiring goal served an important state interest, a court would find the layoff plan to be substantially related to achieving that important interest because it protected the hiring goal. This would be a more sound result than the Court's decision in *Wygant*.

#### V. CONCLUSION

The Supreme Court clearly indicated in its recent decision that it supports race-conscious affirmative action under both Title VII and equal protection in a limited number of circumstances. In *Sheet Metal Workers* the Court took an important step by limiting *Stotts* to its facts and by declaring that Title VII does not limit race-conscious relief to the actual victims of discrimination. The Court's guidance in the area of equal protection was less bold, however, and the Court still needs to define a constitutional standard of scrutiny. This Recent Development suggests the adoption of an intermediate standard of scrutiny in affirmative action cases.

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