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## SOME RUNS, SOME HITS, SOME ERRORS — KEEPING SCORE IN THE AFFIRMATIVE ACTION BALLPARK FROM *WEBER* TO *JOHNSON*†

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## INTRODUCTION

Among the most controversial practices to arise in recent years in public and private employment is the use of race/gender-conscious criteria in affirmative action plans to influence hiring and promotion decisions. Supporters of the use of these criteria defend them as absolutely indispensable to achieving equality of employment opportunity. Opponents condemn them as "reverse discrimination."<sup>1</sup> This article examines the use of race/gender-conscious

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<sup>1</sup> "Affirmative action" encompasses a broad spectrum of activities designed "to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity." EEOC Guidelines, Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, 29 C.F.R. § 1608.1(c) (1985). It includes training plans and programs, recruiting activity, elimination of any adverse impact caused by selection criteria not validated pursuant to EEOC Guidelines, and modification of promotion and layoff procedures. *Id.* § 1608.3(c); see also Office of Compliance of Federal Contract Compliance Programs (OFCCP), Affirmative Action Programs, 41 C.F.R. §§ 60-2.1-2.32 (1987).

Most of the controversy involving affirmative action has centered around "reverse discrimination" decisions giving preferences in hiring or promotions to either identified victims of employment discrimination on account of race, color, religion, sex, or national origin or to non-victims who share the "offending" characteristic that triggered the employer's conduct. As between relief for identified victims and relief for non-victims, non-victim relief is by far more controversial. Hiring and promotion preferences generally occur as a result of a judgment following trial, a judgment entered upon the parties' consent, or a voluntary agreement.

The content of voluntary agreements providing for race/gender-conscious relief varies considerably from industry to industry and from employer to employer. When relief is granted either after trial or upon entry of a consent judgment, it generally includes the following components irrespective of whether the underlying action arose under Title VII or the fourteenth amendment: first, "compliance relief," in which the court enjoins the prohibited practices and requires the hiring or promotion of actual victims; second, "compensatory relief," in which the court orders awards of backpay and constructive seniority to make whole the victims; and third, "affirmative relief," in which the court remedies the effects of discrimination which are not cured by the granting of compliance or compensatory relief. This third category of relief includes percentage hiring or promotions that benefit non-victims. *Berkman v. City of New York*, 705 F.2d 584, 595-96 (2d Cir. 1983). Model judgments or consent decrees containing provisions that illustrate these forms of relief are reprinted at *Empl. Prac. Guide* (CCH) ¶ 1484-97. See also *Stotts v. Memphis Fire Dep't*, 679 F.2d 541, 573-79 (6th Cir. 1982) (appendices), *rev'd sub nom. Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *United States v. City of Miami*, 614 F.2d 1322, 1342-51 (5th Cir. 1980) (appendices), *modified*, 664 F.2d 435 (5th Cir. 1981) (en banc) (per curiam).

criteria, particularly by public sector employers, the most influential group of employers in the national economy.

The debate surrounding affirmative action plans raises an issue fundamental to American society since its inception: the meaning of equality — especially racial and sexual equality.<sup>2</sup> Both the supporters and opponents of these controversial programs have looked to the United States Supreme Court to settle definitively the issue of their statutory and constitutional validity. But after nine major decisions in the last ten years, the Court is still sounding an uncertain trumpet. Neither supporters nor opponents of affirmative action can claim victory, and the final outcome looks as unpredictable as a World Series finale going into extra innings. Indeed, the Justices themselves look less and less like umpires and more and more like players: three pro-affirmative action, two anti, and four free agents.<sup>3</sup>

The Court has recently handed down its ninth major decision in this intellectually and emotionally charged area.<sup>4</sup> The retirement

For a stimulating critique of the traditional forms of relief and the formulation of a new approach see Friedman, *Redefining Equality, Discrimination, and Affirmative Action Under Title VII: The Access Principle*, 65 TEX. L. REV. 41 (1986).

<sup>2</sup> The Court's most recent affirmative action cases have been a source of lively scholarly discussion. E.g., Rutherglen & Ortiz, *Affirmative Action Under the Constitution and Title VII: From Confusion to Convergence*, 35 UCLA L. REV. 467 (1987); Schwartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over but the Shouting*, 86 MICH. L. REV. 524 (1987); Selig, *Affirmative Action in Employment: The Legacy of a Supreme Court Majority*, 63 IND. L. REV. 301 (1987).

<sup>3</sup> The pro's are Justices Brennan, Marshall and Blackmun; the anti's are Chief Justice Rehnquist and Justice Scalia; the free agents are Justices White, Stevens, O'Connor and Kennedy (and before Justice Kennedy's appointment, Justice Powell). For a complete explanation of this breakdown, see *infra* notes 145-46 and accompanying text.

<sup>4</sup> For ease of reference, each of the nine cases is fully cited below, followed by a brief description of its facts and a citation to the text where further factual information is given. *Johnson v. Transportation Agency, Santa Clara County, Cal.*, 107 S. Ct. 1442 (1987) (Title VII reverse discrimination case brought by a male who was passed over for a promotion to a road dispatcher's job in favor of an arguably less qualified woman). See *infra* notes 72-77 and accompanying text. *United States v. Paradise*, 107 S. Ct. 1053 (1987) (equal protection reverse discrimination claim brought by white state troopers challenging a judicially-imposed 50/50 promotion plan implemented following the district court's finding of egregious discrimination; the quota was actually used only once). See *infra* note 127 and accompanying text. *Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 106 S. Ct. 3063 (1986) (Title VII reverse discrimination claim by white firefighters challenging a consent judgment entered into by the city and a black firefighter association which called for promotion quotas). See *infra* notes 120, 192-94 and accompanying text. *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 3019 (1986) (Title VII reverse discrimination claim brought by a union objecting to a judicially-imposed 29% membership goal, following the district court's finding of persistent, egregious discrimination). See *infra* note 119 and accompanying text. *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842 (1986) (equal protection reverse discrimination claim brought by white school teachers with greater seniority who were laid

of Justice Lewis F. Powell at the end of the October 1986 Term and the appointment of Justice Anthony M. Kennedy on February 18, 1988 may have a dramatic impact on the Court's jurisprudence. Now is an appropriate time, therefore, to conduct an analysis of the legality, under Title VII of the Civil Rights Act of 1964, and under the equal protection clause, of public sector employment plans that contain race/gender-conscious criteria as part of an affirmative action program.

With nine decisions in place, it is possible to discern with some degree of particularity which issues of law have been resolved, which remain open, and how each of the eight veteran justices approaches the problems. It is also possible to gain some insight into the difference that Justice Kennedy's presence in the lineup may make. Unfortunately, reaching final answers to many of the most important questions remains problematic. The opinions in the nine cases are lengthy, incohesive, contradictory, and ambiguous. They occupy over five hundred fifty-four pages in the official reporters and consist of forty-six majority, plurality, concurring, and dissenting opinions. Even within a single case, it is often impossible to discern the Court's holding because not every Justice in the majority will endorse the entire majority opinion. Often there is no majority opinion, only a plurality opinion. Concurring opinions severely restrict the scope of the majority/plurality opinion. On occasion, dissenting opinions even "agree" with many of the principles enunciated in the majority/plurality opinion, thereby establishing new law

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off pursuant to a collective bargaining agreement to protect the jobs of minority teachers with less seniority in order to preserve gains in minority teacher recruitment). *See infra* notes 90-99 and accompanying text. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) (challenge by a fire department and firefighters' union to a district court order modifying, over their objection, a consent judgment in order to prevent the layoff of recently hired minority firefighters; the minority firefighters were originally hired to settle a Title VII action alleging discriminatory hiring and promotion practices). *See infra* notes 183-84 and accompanying text. *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (constitutional challenge to a federal statute enacted by Congress pursuant to its authority under the commerce clause, section 5 of the fourteenth amendment, and Congress's taxing and spending power; the statute set aside 10 percent of funds appropriated pursuant to the Public Works Employment Act of 1977 for minority business enterprises). *See infra* notes 199-202 and accompanying text. *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979) (Title VII reverse discrimination claim against a private employer challenging the establishment of a training program that limited its enrollment to 50 percent white trainees, reserving 50 percent of its enrollment for black trainees). *See infra* notes 60-62 and accompanying text. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (equal protection reverse discrimination challenge to a state medical school's admissions policy that reserved 16 out of 100 seats exclusively for minority group members). *See infra* note 88 and accompanying text.

or lending new support to principles that did not command support in earlier decisions.

The opinions' analytical disarray has four roots. First, the degree of congruency between the applicable antidiscrimination norms contained in Title VII of the Civil Rights Act of 1964 and the equal protection clause of the fourteenth amendment is uncertain. Second, the Court has unsuccessfully attempted to transfer the principles of liability developed under Title VII to voluntary decisions by public sector employers to adopt affirmative action plans containing race/gender-conscious criteria under both Title VII and the equal protection clause. Third, in not one reverse discrimination case has the Court considered both the Title VII and the equal protection clause issues together; the Court has always considered the claims in separate actions. Fourth, the Justices have jurisprudential misgivings concerning the use of such criteria in general.

Part I of this article addresses the uncertain relationship between Title VII and the equal protection clause. Part II examines two issues that have repeatedly claimed the Court's attention: the nature of the employer-specific, factual predicate required to support voluntary race/gender-conscious employment decisions; and whether societal discrimination is an acceptable predicate for such decisions. These issues were selected because they illustrate the difficulty the Court has faced in resolving basic questions underlying the voluntary adoption of race/gender-conscious programs by public sector employers. Both issues, moreover, sharply reveal the Court's ideological splintering. Finally, an examination of the Court's treatment of the factual predicate and societal discrimination issues evidences the holistic nature of the Court's affirmative action jurisprudence, in which Title VII and equal protection clause cases are frequently cited interchangeably.<sup>5</sup>

Part III addresses a major cause of the opinions' non-cohesiveness, namely, the shifting coalitions of the Justices themselves. Although readily acknowledging that the terms "liberal" and "conservative" are too often a pale substitute for analysis, this article nonetheless suggests that these terms, if appropriately defined and limited, provide a useful framework for examining the individual Justices' jurisprudence in reverse discrimination cases. The liberal camp consists of Justices Brennan, Marshall, and Blackmun, and the conservative camp consists of Chief Justice Rehnquist and Jus-

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<sup>5</sup> See *infra* notes 56-144 and accompanying text.

tice Scalia. Each camp's jurisprudence is straightforward and self-contained. The Justices in the two camps vote either "up" or "down" in accordance with their clearly enunciated views. What underlies the Court's institutional instability is not the near-polar ideologies of the two camps. Instead, the instability derives from neither camp's ability to command a clear majority of votes. Both camps have depended on the votes of Justices White, Stevens, Powell, and O'Connor. Part III thus addresses the divided Court, examining the views of these four Justices against the backdrop of the core principles of the two camps. It also explores Justice Kennedy's voting pattern and decisions in civil rights cases while a circuit judge.

Part IV offers three suggestions to repair the Court's fractured affirmative action jurisprudence. First, it urges the Court to reject the call of some of the Justices for the overruling of *United Steelworkers of America v. Weber*,<sup>6</sup> the seminal case approving the use of race-conscious employment criteria under Title VII. Second, it urges Congress to exercise its power under section 5 of the fourteenth amendment to amend Title VII to expressly authorize the states to adopt race/gender-conscious plans. Third, Part IV urges the Court to modify or distinguish certain principles that have evolved in the context of employment-related affirmative action plans in order to permit the states to set aside modest percentages of public contracts for minority businesses without violating the equal protection clause.

## I. THE UNCERTAIN RELATIONSHIP BETWEEN TITLE VII AND THE EQUAL PROTECTION CLAUSE

### A. *Origins of the Problem*

As originally enacted, Title VII of the Civil Rights Act of 1964 contained a series of sweeping prohibitions, essentially precluding private employers, unions, and employment agencies from considering race, color, religion, sex, or national origin in any fashion in their decision-making processes.<sup>7</sup> It constituted an overwhelmingly

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<sup>6</sup> 443 U.S. 193, 197 (1979).

<sup>7</sup> 42 U.S.C. § 2000e-2 (1982). Section 2000e-2 provides in relevant part:

(a) 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

powerful statement by Congress that these factors must be irrelevant to private employment in the United States. Congress deliberately excluded federal and state employees from the statute's coverage because political pressures made the passage of the statute impossible if these groups were included and because of constitutional concerns about the scope of Congress's authority over state employment practices.<sup>8</sup>

The failure of Congress to apply this non-discrimination norm to public employers left a gap with both moral and legal implications. From a moral perspective, it hardly appeared seemly for Congress to outlaw discrimination in the private sector while tolerating it in the public sector. The response to this moral objection, was, of course, that statutory relief was not needed: the equal protection clause barred public sector employers from considering race, color, religion, or national origin in making employment decisions. To what degree the equal protection clause prohibited gender-based distinctions was uncertain in 1964.<sup>9</sup>

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employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin

....  
(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin. . . .

(c) It shall be an unlawful employment practice for a labor organization —

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section. . . .

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

*Id.*

<sup>8</sup> Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972).

<sup>9</sup> Prior to 1971, the Court used the traditional rational basis standard to test the consti-

By 1972, ample political support existed for extending Title VII's coverage to public sector employees, and Congress entertained fewer doubts about the scope of its constitutional authority over state employment practices as a result of several Supreme Court decisions in the intervening period.<sup>10</sup> Three specific considerations prompted Congress to extend Title VII's coverage to the public sector. First, there was considerable evidence that racial animus played a large role in employment decisions in both the North and the South despite the equal protection clause's ban on discrimination.<sup>11</sup> Second, racially discriminatory employment decisions had a particularly significant impact on "governmental activities which are most visible to the minority communities (notably education, law enforcement, and the administration of justice) with the result that the credibility of the government's claim to represent all the people is negated."<sup>12</sup> Third, the absence of an administrative remedy to resolve complaints of discrimination by public employees frustrated the nation's policy of equal employment opportunity. Congress believed that because of the expense and time involved constitutional redress was "an empty promise . . . [for] disadvantaged individuals."<sup>13</sup>

In light of these considerations Congress amended Title VII in 1972. Consequently, public sector employers became subject to Title VII's prohibitions in addition to those of the equal protection clause. Trying to flesh out the relationship between the two norms is not an easy task. Two persistent problems have claimed the

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tutionality of gender-based statutes. Irrespective of whether the state statute operated to advance or retard women's economic or political rights, the Court's decisions regularly relied upon stereotypical considerations concerning the role of women in society and their physical frailties. *E.g.*, *Hoyt v. Florida*, 368 U.S. 57 (1961); *Goesaert v. Cleary*, 335 U.S. 464 (1948); *Muller v. Oregon*, 208 U.S. 412 (1908); *Bradwell v. Illinois*, 83 U.S. 130 (1872).

In 1971, the Court for the first time struck down a gender-based statute applying a heightened rational basis test. *Reed v. Reed*, 404 U.S. 71 (1971). Following *Reed*, the Court struggled to arrive at a consensus concerning the appropriate standard of review. Compare *Frontiero v. Richardson*, 411 U.S. 677 (1973) with *Kahn v. Shevin*, 416 U.S. 351 (1974) and *Schlesinger v. Ballard*, 419 U.S. 498 (1975). Finally, the Court formulated the so-called "intermediate" standard to test gender-based statutes. *Craig v. Boren*, 429 U.S. 190, 197 (1976) ("classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives"); accord *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Califano v. Webster*, 430 U.S. 313 (1977).

<sup>10</sup> *E.g.*, *Maryland v. Wirtz*, 392 U.S. 183 (1968); cf. *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

<sup>11</sup> H.R. No. 92-238, 92d Cong., 2d Sess., reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2152.

<sup>12</sup> *Id.* at 2153.

<sup>13</sup> *Id.* at 2153-54.

Court's attention: the degree to which the principles establishing an employer's liability under Title VII and the equal protection clause overlap, and the relationship of the liability principles of both norms to principles controlling a public sector employer's decision to adopt voluntarily a race/gender-conscious plan. These problems are discussed below.

*B. Different Rules for Establishing Liability Under Title VII and the Equal Protection Clause*

1. Title VII

Generally speaking, there are two theories of Title VII liability: disparate treatment and disparate impact.<sup>14</sup> In a disparate treatment case, the plaintiff focuses on the employer's motives, claiming that it deliberately treated the plaintiff less favorably because of the plaintiff's race, color, religion, sex, or national origin. The evidence in a disparate treatment case is frequently anecdotal, but often the plaintiff supplements it with statistical data showing the employer has treated others similarly situated in a like discriminatory manner. In contrast, in a disparate impact case, the employer's motives are irrelevant. As the Supreme Court observed in *Griggs v. Duke Power Co.*,<sup>15</sup> the seminal adverse impact case, "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability . . . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."<sup>16</sup> Under both the disparate treatment and disparate impact theories of liability, the Court has encouraged plaintiffs to rely heavily on complex, sophisticated forms of statistical proof.<sup>17</sup>

One of the most useful tools available to an employer in assessing potential Title VII liability under either theory is a statistical comparison between the percentage of minorities and women in its work force and the percentage of minorities and women in the

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<sup>14</sup> See generally SCHLEI & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1286-1394 (2d ed. 1983).

<sup>15</sup> 401 U.S. 424 (1971).

<sup>16</sup> *Id.* at 432 (emphasis in the original).

<sup>17</sup> See *Watson v. Fort Worth Bank & Trust*, 56 U.S.L.W. 4922, 4927 n.3 (1988); *Basemore v. Friday*, 478 U.S. 385, 398-404 (1986) (Brennan, J., concurring); W. CONNOLLY & D. PETERSON, USE OF STATISTICS IN EQUAL OPPORTUNITY LITIGATION B-1-B-24 (1988); SCHLEI & GROSSMAN, *supra* note 14, at 11, 98-101.

appropriate labor pool. It has been repeatedly acknowledged that "[i]n cases concerning racial discrimination, 'statistics' often tell much and the Courts listen."<sup>18</sup> A statistical comparison may readily reveal that the employer is treating minorities or women differently or that such neutral practices as testing procedures, height and weight requirements, and educational requirements are adversely affecting members of the protected groups.<sup>19</sup> The Court explained the rationale underlying statistical comparisons in *Hazelwood School District v. United States*,<sup>20</sup> a case that is critical to understanding the Court's affirmative action jurisprudence. In *Hazelwood*, the government accused the school district of discriminating against black applicants for teaching positions. In large measure, its case rested upon statistical evidence, (1) comparing the percentage of black teachers actually employed to the percentage of black students in the school system and (2) comparing the percentage of black teachers actually employed to the percentage of black teachers in the relevant labor market area.

The Supreme Court flatly rejected the first comparison. Because teaching required special qualifications, a comparison based on the racial composition of the pupil population or the labor force had little probative value.<sup>21</sup> Accordingly, it held that only the second comparison was valid under Title VII. Ultimately, it vacated the judgment of liability against the school district and remanded the case for additional findings concerning the relevant labor market area. In the course of reaching that decision, the Court made clear why only the second statistical comparison was valid.

[A]bsent explanation, it is ordinarily expected that non-discriminatory 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

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<sup>18</sup> *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421, 426 (8th Cir. 1970).

<sup>19</sup> See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (gender-based impact of height and weight requirements); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (racial impact of employment tests); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (same). The importance of statistical proof in adverse impact cases cannot be disputed. "[T]he use of statistics remains the dominant method of establishing a prima facie adverse impact case." SCHLEI & GROSSMAN, *supra* note 14, at 152.

<sup>20</sup> 433 U.S. 299, 307 (1977).

<sup>21</sup> *Id.* at 308 n.18.

even though § 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population.<sup>22</sup>

*Hazelwood* thus established the proposition that evidence of "long-standing and gross disparity" created a *prima facie* case. It cannot be emphasized too strongly, however, that *Hazelwood* was a pure Title VII liability case. It had nothing whatsoever to do with an employer's voluntary decision to implement an affirmative action plan containing race/gender-conscious criteria. The question whether *Hazelwood* should be transferred wholesale to such a plan has been a constant source of division on the Court. The conservative camp Justices insist that only *Hazelwood*-like statistics sufficient to establish a direct *prima facie* case can serve as an acceptable factual predicate for voluntary race/gender-conscious programs.<sup>23</sup> The liberal camp Justices insist that a less rigorous statistical disparity is acceptable.<sup>24</sup> The problem is further exacerbated by the Court's failure in both liability and reverse discrimination cases to articulate clear guidelines for measuring statistical discrepancies.<sup>25</sup> In the absence of such guidelines, "evidence of long-lasting and gross disparity"<sup>26</sup> is essentially a meaningless standard.

## 2. Equal Protection Clause

Establishing liability under the equal protection clause is more difficult than establishing liability under Title VII. Suggestions of difficulty were first sounded in *Washington v. Davis*.<sup>27</sup> In that case, a group of rejected black candidates for police officer positions in the District of Columbia challenged an employment test, alleging it violated the equal protection component of the fifth amendment due process clause.<sup>28</sup> Their case rested principally on the disproportionate impact of the test: black applicants failed the test at a

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<sup>22</sup> *Id.* at 307 (quoting *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977)).

<sup>23</sup> See *infra* notes 175-76 and accompanying text.

<sup>24</sup> See *infra* notes 71-84 and accompanying text.

<sup>25</sup> SCHLEI & GROSSMAN, *supra* note 14, at 98-101 and SUPP. 1983 at 11-12.

<sup>26</sup> *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307 (quoting *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977)).

<sup>27</sup> 426 U.S. 229, 239 (1976).

<sup>28</sup> Unlike the fourteenth amendment, the fifth amendment does not contain an equal protection guarantee component. This is a difference without a distinction, however, because the Court has read an equal protection component into the due process clause of the fifth amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

much higher rate than whites.<sup>29</sup> Although the Court acknowledged that disproportionate impact created a *prima facie* case under Title VII, it firmly refused to transfer Title VII's disparate impact theory to equal protection claims, insisting instead upon a constitutional standard of actual discriminatory purpose.<sup>30</sup>

Because disparate impact was much easier to demonstrate than actual, purposeful discrimination, after *Washington v. Davis*, victims of employment discrimination in the public sector clearly had an incentive to rely upon Title VII. The Court increased that incentive the following year in *Dothard v. Rawlinson*<sup>31</sup> when it resolved the issue whether Title VII case law determining the liability of private employers was equally applicable to public sector employers. The Court had little difficulty in responding affirmatively to that question based on the amendment's legislative history. Congress clearly intended the same principles to apply.

As a result of the holdings in *Davis* and *Rawlinson*, Title VII became the preferred tool of public sector applicants and employees in pressing claims of race and gender discrimination. Correspondingly, public sector employers faced greater prospects of liability under Title VII than under the equal protection clause because the disparate impact standard was much easier to satisfy than the constitutional standard of purposeful intent. Recognizing the increased prospect of liability under Title VII, public sector employers, like their private sector counterparts, began to consider the use of affirmative action programs to eradicate, or at least lessen, the effect of the employment practices that created the offending disparate impact in the first place. In turn, also like their private sector counterparts, they walked a "tightrope," risking liability to their minority employees by not correcting the vestiges of the discrimination and risking liability to non-minority employees if they adopted such programs without adequate proof of their potential Title VII liability.<sup>32</sup> From the public sector employers' perspective,

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<sup>29</sup> 426 U.S. at 232-37.

<sup>30</sup> *Id.* at 238-48. The Court explained its refusal to adopt an impact test as follows:

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise several questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

*Id.* at 248.

<sup>31</sup> 433 U.S. 321, 331-32 n.14 (1977).

<sup>32</sup> This tightrope metaphor, which courts frequently invoke in affirmative action cases,

the fundamental affirmative action question was whether the statistical data they compiled constituted a sufficient "factual predicate" to permit them to adopt race/gender-conscious employment criteria.

In sum, a primary cause of the incoherence in the Court's affirmative action jurisprudence can be traced to the different rules for establishing liability under Title VII and the equal protection clause. *Hazelwood* and *Davis* are pure liability cases, involving the issue of the kind and quantum of proof that a plaintiff needs to establish a *prima facie* case. As will be discussed in Part II, the question with which the Court is wrestling in affirmative action cases is the flip side of this issue: how much, and what kind of information does a public sector employer need as a factual predicate before it may conclude it has discriminated in the past?

The answer to this question is complicated by the fact that, although the Justices generally agree that the rules for establishing liability under Title VII and the equal protection clause are different, some of the Justices believe the rules governing this "flip side" issue should be the same. Thus, as discussed in Part II, the Court's condemnation of societal discrimination as an acceptable predicate under the equal protection clause and its *sub silentio* acceptance of it in the guise of an adverse impact analysis under Title VII adds another element of uncertainty.

### C. *Unsettled Questions Concerning the Standard of Appellate Review*

In pure Title VII cases, the Court has directly admitted to using a "clearly erroneous" standard to review liability determinations and an "abuse of discretion" standard to review the forms of relief granted by the district court, such as compensatory seniority, back pay, forward pay, etc.<sup>33</sup> In Title VII reverse discrimination cases, the Court has been strangely silent and has not explored the standard of review issue at all.<sup>34</sup>

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can be traced to Judge Wisdom's dissent in *United Steelworkers of Am. v. Weber*, 563 F.2d 216, 230 (5th Cir. 1977) (Wisdom, J., dissenting), *rev'd*, 443 U.S. 193 (1979). *See generally* Comment, *Walking a Tightrope Without a Net: Voluntary Affirmative Action Plans After Weber*, 134 U. PA. L. REV. 457 (1986).

<sup>33</sup> Compare *Bazemore v. Friday*, 478 U.S. 385, 398 (1986) (Brennan, J., concurring) and *Anderson v. Bessemer City*, 470 U.S. 564 (1985) and *Pullman-Standard v. Swint*, 456 U.S. 273 (1982) (clearly erroneous standard of review) with *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 364-65, 371-76 (1977) and *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763-66, 770-72 (1976) and *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415-16, 419-22, 424-25 (1975) (abuse of discretion standard of review).

<sup>34</sup> E.g., *Johnson*, 107 S. Ct. at 1445-57 (standard of review not discussed); *Local 28*, 106 S. Ct. at 3025-54 (same); *Weber*, 443 U.S. at 197-209 (same).

In contrast, in constitutional cases, the Court has been openly divided and frequently explored the issue. There are three constitutional standards of review: the strict scrutiny test, the intermediate test, and the rational basis test. Only the first two are implicated in affirmative action cases.<sup>35</sup> In general, the degree of scrutiny is a function of the state's purpose. If the state uses race to disadvantage an individual, the Court will apply the strict scrutiny standard — the state must show that the racial classification serves a compelling government interest and that the means are narrowly tailored to the accomplishment of that purpose.<sup>36</sup>

The unanimity found when race is used to disadvantage breaks down when reverse discrimination claims are raised. At least four Justices believe that strict scrutiny should be applied even if the challenged statute or government program is using the racial classification to confer a benefit. In their view, "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification."<sup>37</sup> On the other hand, at least three Justices maintain that if the state uses race to confer a benefit on a group traditionally subject to discrimination, the Court should apply the intermediate test — the state must show that the racial classification serves an important government purpose and is substantially related to the accomplishment of that purpose.<sup>38</sup> For these Justices, a less exacting standard is appropriate because of the state's "legitimate . . . objective of eliminating the pernicious vestiges of past discrimination."<sup>39</sup>

The inability of the Court to reach a consensus on which standard to apply is a serious deficiency in these cases. This lack of

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<sup>35</sup> The Court uses the rational basis test, the most deferential of the three standards, when reviewing economic and social welfare legislation if no "suspect class" or fundamental right is implicated. The rational basis test requires only a legitimate end and a rational relationship between the means and the end. Of the three standards, it is the one most deferential to the politically accountable branches of government. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); see also *Bankers Life Casualty Co. v. Crenshaw*, 108 S. Ct. 1645 (1988); *Bowen v. Owens*, 476 U.S. 340 (1986); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985).

<sup>36</sup> E.g., *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984); *Loving v. Virginia*, 388 U.S. 1, 11 (1967). See generally Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

<sup>37</sup> *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842, 1850 (1986) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1979) (Stevens, J., dissenting)).

<sup>38</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. at 359 (1978) (opinion of Brennan, J., joined by White, J., Marshall, J., Blackmun, J.). Justice White's continued adherence to this test is open to question. See *infra* notes 180–82 and accompanying text.

<sup>39</sup> *Wygant*, 106 S. Ct. at 1861 (Marshall, J., dissenting).

agreement is exacerbated by the Court's use of the intermediate standard for gender-based distinctions. Although the Supreme Court has never reviewed affirmative action, employment-related plans benefitting women in a constitutional context, in other contexts it has insisted that gender-based statutes and programs must serve an important governmental objective and be substantially related to the accomplishment of that purpose.<sup>40</sup> This formulation parallels the lesser standard of review that some Justices would apply to race-conscious plans.

On occasion, the confusion concerning the appropriate standard of review has led to the lower courts reaching anomalous results. For example, in reviewing a program benefitting three categories of businesses — businesses owned by minority group members, women, and local residents — the Court of Appeals for the Ninth Circuit applied the strict scrutiny test and struck down the portion of the plan benefitting minority-owned businesses. It applied the intermediate test to uphold that portion of the plan benefitting women-owned businesses.<sup>41</sup> It applied the rational basis test to uphold that portion of the plan benefitting businesses owned by local residents.<sup>42</sup> The selection of these tests in this order had the anomalous result of benefitting women and white males over blacks, a result offensive to the history of racial discrimination in this country.<sup>43</sup>

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<sup>40</sup> *E.g.*, *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Craig v. Boren*, 429 U.S. 190 (1976).

<sup>41</sup> *Associated Gen. Contractors of Cal., Inc., v. City and County of San Francisco*, 813 F.2d 922, 938, 944 (9th Cir. 1987).

<sup>42</sup> *Id.* at 939-40.

<sup>43</sup> In order to avoid anomalous results such as this and in an attempt to reconcile the diverse views of the Justices, several appellate courts have interpreted the Court's opinions prior to *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842 (1986), as permitting the use of the intermediate test in reverse discrimination cases, but have grafted on to it the "impact" analysis developed by the Supreme Court in *Weber* to protect "innocent" non-minority employees. *E.g.*, *Kirkland v. New York State Dep't of Correctional Servs.*, 711 F.2d 1117, 1130-32 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984); *Bratton v. City of Detroit*, 704 F.2d 878, 884 n.18 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); *La Riviere v. EEOC*, 682 F.2d 1275, 1278-79 (9th Cir. 1982); *Valentine v. Smith*, 654 F.2d 503, 511 (8th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1982); *Local Union No. 35, Int'l Bhd. of Elec. Workers v. City of Hartford*, 625 F.2d 416, 421-23 (2d Cir. 1980), *cert. denied*, 453 U.S. 913 (1981); *Zaslowsky v. Board of Educ.*, 610 F.2d 661, 663-64 (9th Cir. 1979); *Britton v. South Bend Community School Corp.*, 593 F. Supp. 1223, 1231 (N.D. Ind. 1984), *aff'd*, 775 F.2d 794 (7th Cir. 1985), *vacated*, 783 F.2d 105 (7th Cir. 1986); *Marsh v. Board of Educ.*, 581 F. Supp. 614, 624 (E.D. Mich. 1984), *aff'd*, 762 F.2d 1009 (6th Cir. 1985); *see also Boston Chapter, NAACP v. Beecher*, 679 F.2d 965, 965-97 (1st Cir. 1982), *vacated and remanded for consideration of mootness sub nom. Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP*, 461 U.S. 477 (1983); *Jacobs, Justice Out of Balance: Voluntary Race-Conscious Affirmative Action in State and Local*

Finally, as if there were not already enough confusion concerning which constitutional standard of review is applicable in reverse discrimination cases, an argument exists that in imposing race-conscious relief in a pure Title VII liability case, and in approving a consent judgment in a pure Title VII liability case the district court's orders are subject to a constitutional standard of review because judicial decision-making must conform to the equal protection component of the due process clause of the fifth amendment.<sup>44</sup>

*D. The Court's Solicitude for Promoting Voluntary Settlements of  
Employment Discrimination Claims*

The preceding discussion highlights some elements of the uncertain relationship between Title VII and the equal protection clause. There is, however, one very important doctrinal link between the Court's Title VII and equal protection clause jurisprudence. Simply stated, even though they may disagree on the principles applicable to the underlying issues, a majority of the Justices are committed to an institutional policy of encouraging voluntary resolution of employment discrimination claims.

The commitment of these Justices, as expressed in their Title VII opinions, has rested on four interrelated considerations. First, in enacting Title VII Congress clearly "intended cooperation and conciliation to be the preferred means of achieving [the objectives of] Title VII."<sup>45</sup> Second, Congress enacted Title VII penalties to prompt employers "to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible,

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*Government*, 17 URB. LAW. 1, 25 (1985); Kreiling & Mercurio, *Beyond Weber: The Broadening Scope of Judicial Approval of Affirmative Action*, 88 DICK. L. REV. 46, 79 (1983). See *infra* note 143 and accompanying text. After *Wygant*, the correctness of such an approach is highly dubious. See *supra* notes 33-44 and accompanying text.

<sup>44</sup> Compare *Paradise*, 107 S. Ct. 1080-82 (O'Connor, J., dissenting) with *id.* at 1076-79 (Stevens, J., concurring in the judgment).

<sup>45</sup> *W.R. Grace & Co. v. Local Union 759*, Int'l Union of United Rubber Workers of Am., 461 U.S. 757, 770-71 (1983); see also *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982); *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). The *Alexander* Court observed that:

Cooperation and voluntary compliance were selected as the preferred means for achieving this goal. To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit.

*Id.* at 44.

the last vestiges' of their discriminatory practices."<sup>46</sup> Third, Congress intended that Title VII intrude as minimally as possible into traditional managerial decisions relating to employment.<sup>47</sup> Fourth, the EEOC, the federal agency charged with enforcing Title VII, has issued regulations encouraging voluntary settlements in the form of consent decrees.<sup>48</sup>

The importance these Justices attach to voluntary settlements is dramatically illustrated by *Local Number 93, International Association of Firefighters, AFL-CIO v. City of Cleveland*,<sup>49</sup> one of the nine reverse discrimination cases that the Supreme Court has decided. In *City of Cleveland*, the firefighters' union challenged a consent decree between the city and an association representing minority firefighters which provided for race-conscious promotions.<sup>50</sup> The union argued that the district court had violated section 706(g) of Title VII by entering a consent judgment that benefitted black firefighters who were not themselves actual victims of discrimination. Its argument rested on the plain language of section 706(g) which prohibited a court from ordering the promotion of any employee who was not personally a victim of the employer's discriminatory conduct.<sup>51</sup> The Court declined to reach that argument, holding instead that section 706(g) simply did not apply to consent judgments.<sup>52</sup> In reaching that conclusion, the Court relied extensively on the four factors discussed above. Although the Court did not say that consent judgments could never be challenged under Title VII or, in the case of

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<sup>46</sup> *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 364 (1977) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975)); accord *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 204 (1979).

<sup>47</sup> *E.g.*, *Weber*, 443 U.S. at 205-07; see also 110 CONG. REC. 1518 (1964) (remarks of Rep. Celler); *id.* at 11,471 (remarks of Sen. Javits).

<sup>48</sup> 29 C.F.R. § 1608.3 (1986).

<sup>49</sup> 106 S. Ct. at 3063.

<sup>50</sup> *Id.* at 3067-71. The Court has not been able to resolve the question whether objectors to a consent judgment must intervene in a timely fashion in the underlying action or can bring a separate action collaterally attacking the consent judgments. The precise issue was before the Court in the 1987 Term, but it split 4 to 4. *Marino v. Ortiz*, 56 U.S.L.W. 4090 (1988), *aff'g by an equally divided court*, 806 F.2d 1144 (2d Cir. 1986).

<sup>51</sup> Section 706(g) provides in pertinent part:

[n]o order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

<sup>52</sup> 106 S. Ct. at 3072.

a public sector employer, under the equal protection clause,<sup>53</sup> the tenor of the Court's opinion left no doubt as to its view of the importance of promoting voluntary efforts to settle claims of discrimination without extensive judicial involvement.

Although the Court's solicitude for voluntary settlements in equal protection clause cases cannot be as extensively documented, nothing in those decisions suggests a contrary disposition.<sup>54</sup> Furthermore, for these Justices to endorse consent judgments entered into by public sector employers with less enthusiasm because such employers are subject to the equal protection clause rather than Title VII would make very little sense. Such an approach would simply encourage litigation, cause more court congestion, and sap the judiciary's resources. Voluntary plans adopted in the public sector are also likely to reflect community consensus and thus generate less opposition and hostility. Moreover, a contrary disposition would be inconsistent with the philosophy underlying the Court's decisions involving school desegregation, an area analogous to employment discrimination by the public sector. In school desegregation cases, the Court has always endorsed legitimate, good faith efforts by school boards to eliminate the vestiges of discrimination.<sup>55</sup> In short, "voluntarism" is as much a virtue in equal protection clause cases involving race/gender-conscious decisions by public sector employers as it is in Title VII cases.

Ironically, the policy favoring voluntary settlements turns out to be partially responsible for the opinions' lack of cohesiveness. As demonstrated in Parts II and III, in large measure the Court's jurisprudential instability stems from a willingness on the part of the Justices to forego a complete legal exegesis of certain statutory and constitutional issues in order to preserve a majority vote. Even where a majority of the Justices strikes down a plan, it does so in narrow terms in an effort to cause the least disruption to the overall policy favoring voluntary settlements.

In sum, in examining the legality of race/gender-conscious employment decisions, a majority of the Justices are mindful not only of the specific issues before the Court, such as the plan's factual predicate, or the employer's attempt to remedy societal discrimi-

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<sup>53</sup> *Id.* at 3079-80.

<sup>54</sup> *E.g.*, *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842 (1986); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

<sup>55</sup> *Brown v. Board of Educ.*, 349 U.S. 294, 299 (1955); *cf. Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16, 21 (1971).

nation, but are also mindful of the general effect of their underlying decision on voluntary settlements.

## II. MUCH CONFUSION AND LITTLE CONSENSUS: TWO ILLUSTRATIVE ISSUES

As noted at the outset of this article, a major flaw in the Court's affirmative action jurisprudence is the absence of a solid consensus on key issues. As a "bottom-line" matter there is often sufficient agreement among five Justices to support or strike down a particular race/gender-conscious plan. But careful study of the opinions reveals little or no consensus on the underlying principles that compelled their votes. The two issues discussed below illustrate in particular how difficult it is to pin down the Court's affirmative action jurisprudence.

### A. *The Factual Predicate Controversy*

All members of the Court generally agree that an employer is free to implement a race/gender-conscious program if it has some basis for believing it has discriminated in the past.<sup>56</sup> The Justices disagree, however, about what kind and quantum of statistical proof constitute a sufficient basis for an employer to draw the conclusion it has discriminated. Two terms, "manifest imbalance" and "prima facie case," have surfaced again and again in the Court's opinions. Although their precise meaning is not certain, an analysis of *Weber v. United Steelworkers of America*<sup>57</sup> and *Johnson v. Transportation Agency, Santa Clara County, California*,<sup>58</sup> decided under Title VII, and *Wygant v. Jackson Board of Education*,<sup>59</sup> decided under the equal protection clause, offers some guidance.

#### 1. Title VII and the *Weber* formula after *Johnson*

The meaning of the term "manifest imbalance" cannot be divorced from the factual setting of *Weber*, the first reverse discrimination case to reach the Court involving Title VII and the case that

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<sup>56</sup> E.g., *Wygant*, 106 S. Ct. at 1855 (O'Connor, J., concurring in part and concurring in the judgment); *Bakke*, 438 U.S. at 362-79 (*passim*) (Brennan, J., concurring in the judgment in part and dissenting in part). Based on the tenor of Justice Kennedy's decisions on the Court of Appeals for the Ninth Circuit, no reason exists to doubt Justice Kennedy's agreement with this proposition. See *infra* notes 256-60 and accompanying text.

<sup>57</sup> 443 U.S. 193 (1979).

<sup>58</sup> 107 S. Ct. 1442 (1987).

<sup>59</sup> 106 S. Ct. 1842 (1986).

gave birth to the term. In *Weber*, the Kaiser Aluminum and Chemical Corporation (Kaiser) and the United Steelworkers Union of America (USWA) entered into a collective bargaining agreement establishing a training program to enable unskilled production workers at various plants to qualify for craft positions.<sup>60</sup> Admission to the program hinged on the applicant's race. The agreement reserved fifty percent of the places for black employees. Thus, there were two lists of applicants: one composed of white employees, the other of black employees. Within each racial group, selection was based on seniority. Because of the separate lists, *Weber*, a white employee, was denied admission to the training program, while black employees with less seniority were admitted.<sup>61</sup> The Kaiser Plan admitted eligible black employees without requiring any proof that they had been victims of discriminatory practices by the company.

*Weber* challenged the collective bargaining agreement, arguing it violated subsections (a) and (d) of section 703 of Title VII, which made it unlawful to "discriminate . . . because of . . . race" in hiring and apprenticeship programs.<sup>62</sup> The Supreme Court rejected that challenge in a 5-2 decision. The opinion, written by Justice Brennan, acknowledged that a literal construction of the statute would be fatal to the Kaiser/USWA agreement. But the Court looked to the "spirit of the Act" and interpreted section 703's prohibition "against the background of the legislative history of Title VII and the historical context from which the Act arose."<sup>63</sup> Because Congress intended Title VII to bring blacks into the mainstream of American society, Justice Brennan concluded that striking down the affirmative action program "would 'bring about an end completely at variance with the purpose of the statute' and must be rejected."<sup>64</sup>

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<sup>60</sup> 443 U.S. 193, 197-98 (1978).

<sup>61</sup> *Id.* at 198-99.

<sup>62</sup> See *supra* note 7.

<sup>63</sup> 443 U.S. at 201.

<sup>64</sup> *Id.* at 202 (quoting *United States v. Public Util. Comm'n*, 345 U.S. 295, 315 (1953)). Justice Brennan's opinion has been criticized for its exclusive reliance on Title VII's 1964 legislative history because it offers very little support for the opinion's holding. Curiously, he completely overlooked the legislative history of the 1972 amendments, which do support the holding. Edwards, *Affirmative Action or Reverse Discrimination: The Head and Tail of Weber*, 13 CREIGHTON L. REV. 713, 743-50 (1980). Justice Brennan corrected this oversight in *Local 28*, 106 S. Ct. at 3045-47. The correctness of the *Weber* decision has been a subject of fierce debate among scholars. Compare Lerner, *Employment Discrimination: Adverse Impact, Validity and Equality*, 1979 SUP. CT. REV. 17, 45 and Meltzer, *The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. CHI. L. REV. 423 (1980) and Walker, *The Exorbitant Cost of Redistributing Injustice: A Critical View of United States Steelworkers v. Weber and the Misguided Policy of Numerical Employment*, 21 B.C.L. REV. 1 (1979) with Belton, *Discrim-*

Central to Justice Brennan's analysis was his conclusion that the Kaiser/USWA agreement was designed "to eliminate conspicuous racial imbalance in traditionally segregated job categories."<sup>65</sup> Although the Court did not extensively analyze the meaning of the language "conspicuous racial imbalance," it was clearly referring to the significant statistical disparity between the percentage of minority workers actually employed by Kaiser and the percentage available in the local labor pool.<sup>66</sup> A bare 1.83% of Kaiser's skilled craftworkers were black, although the local work force was approximately 39% black.<sup>67</sup>

Contrary to the *Hazelwood* principle that for jobs demanding specialized skills, reliance on general labor pool statistics was improper,<sup>68</sup> the Court readily accepted the validity of this statistical comparison. A comparison more consistent with *Hazelwood* would have looked to the percentage of qualified blacks in the labor pool. After all, how could Kaiser conclude that it faced potential Title VII liability if there were no or very few qualified blacks to hire in the first place? The difficulties associated with this question may have been the impetus for the Court's appendage of the "traditionally segregated job categories" language.

The *Weber* Court, in selecting that phraseology, was acutely conscious that at the Kaiser plant and at almost all the other plants in the deep South, blacks had no chance of obtaining the skills necessary for craft jobs because of employer and union discrimination.<sup>69</sup> Furthermore, the problem of hiring a qualified skilled black craftworker rarely presented itself because of the poor quality of segregated schools. Just as *Brown v. Board of Education*<sup>70</sup> and its progeny were directed to dismantling the educational disabilities that flowed from segregated schools, *Weber* was clearly directed to dismantling the employment barriers blacks faced throughout the South.

Not all the Justices in the majority supported the "racial imbalance in traditionally segregated job categories" test. Justice Black-

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ination and Affirmative Action: An Analysis of Competing Theories of Equality and *Weber*, 59 N.C.L. REV. 531 (1981) and Blumrosen, *Affirmative Action in Employment After Weber*, 34 RUTGERS L. REV. 1 (1981). See also Boyd, *Affirmative Action in Employment — The Weber Decision*, 66 IOWA L. REV. 1 (1980).

<sup>65</sup> 443 U.S. at 209.

<sup>66</sup> *Id.* at 208-09; *id.* at 210-11 (Blackmun, J., concurring).

<sup>67</sup> *Id.* at 198-99.

<sup>68</sup> See *supra* notes 20-22 and accompanying text.

<sup>69</sup> 443 U.S. at 198 n.1, 202-05.

<sup>70</sup> 347 U.S. 483 (1954).

mun in a concurring opinion, echoes of which will be heard in later opinions by other Justices, stated that he preferred the "arguable violation" approach. Under this more restrictive theory, an employer could implement a race/gender-conscious program only if it had evidence rising to the level of an "arguable violation" of the statute.<sup>71</sup> This theory was more demanding than the manifest imbalance test but less strenuous than *Hazelwood's* requirement of a *prima facie* case for liability.

*Johnson v. Transportation Agency, Santa Clara County, California* involved a Title VII affirmative action program of a very different character. In *Johnson*, the defendant, a county transportation agency, had unilaterally adopted an affirmative action plan for women, minorities, and handicapped persons based on a statistical imbalance between its work force and the general labor pool. A key provision of the plan provided that in making promotions to jobs within traditionally segregated job categories, the selecting official could take race, gender, or disability into consideration. Unlike *Weber's* 50/50 selection criteria, the plan did not contain fixed ratios or percentages. Gender was simply a "plus."<sup>72</sup>

One of the skilled craft jobs subject to the affirmative action plan was that of a road dispatcher. The position involved assigning road crews, equipment, and materials and record keeping. No woman had ever held this position; nor did the gender composition of the road crews subject to the dispatcher's discretion reflect the percentage of available women in the area's labor force.<sup>73</sup> Following agency procedures, the job was posted and ultimately seven applicants were certified as eligible for selection by the appointing official. Although the appointing official was free to select any one of the seven, the applicants were ranked. First on the list was Johnson, a male. His overall score was 75. Second on the promotion list was Joyce, a female with a score of 73.<sup>74</sup> Joyce contacted the agency's affirmative action coordinator who, in turn, recommended to the selecting official that Joyce be promoted in keeping with the affir-

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<sup>71</sup> 443 U.S. at 209-16 (Blackmun, J., concurring). See *infra* notes 150-51 and accompanying text. Although she does not explicitly say so, Justice O'Connor appears to have adopted this approach in cases brought under the fourteenth amendment challenging race/gender-conscious employment decisions in the public sector. *Wygant*, 106 S. Ct. at 1856-57 (O'Connor, J., concurring in part and in the judgment). See *infra* note 246 and accompanying text.

<sup>72</sup> 107 S. Ct. 1442, 1447 (1987).

<sup>73</sup> *Id.* at 1453.

<sup>74</sup> *Id.* at 1448.

mative action plan. According to the selecting official, after "look[ing] at the whole picture, the combination of her qualifications and Mr. Johnson's qualifications, their test scores, their expertise, their background, affirmative action matters, things like that . . .," the selecting official chose Joyce.<sup>75</sup>

Johnson filed a Title VII action. The district court ruled in his favor, holding that the county's affirmative action plan did not satisfy *Weber*.<sup>76</sup> Also relying on *Weber*, the Court of Appeals for the Ninth Circuit reversed.<sup>77</sup> The Supreme Court affirmed the Court of Appeals decision in an opinion which significantly altered the *Weber* formula. Justice Brennan wrote the majority opinion in which Justices Marshall, Blackmun, Powell, and Stevens joined. Justice O'Connor concurred solely in the judgment and, as explained below, filed a concurring opinion, adopting a significantly more restrictive approach to the establishment of a factual predicate under Title VII.

The *Johnson* majority's analysis of the "manifest racial balance" test enunciated in *Weber* proceeded in three stages. The first stage examined the relevant labor pool. Although the Court reaffirmed the *Hazelwood* principle that if a job requires special expertise, the labor pool must reflect the percentage of persons qualified for the job,<sup>78</sup> the Court approved the county's use of general population figures because the feeder positions that qualified an employee for the road dispatcher job required no special expertise.<sup>79</sup>

The second stage of the "manifest racial balance" test examined the degree of gender disparity between the county's work force and the relevant labor pool. Because of the stark disparity between the gender composition of the general labor pool and the county's work force — all of the agency's 238 skilled craft positions were held by men, the third stage of the analysis was remarkably uncomplicated. Given the total exclusion of women and given that Joyce was qualified for the road dispatcher position, Justice Brennan concluded that the county's affirmative action plan satisfied the first *Weber* requirement of being designed to eliminate a manifest imbalance.<sup>80</sup>

To view *Johnson* simply as a reaffirmation of *Weber* in the context of gender discrimination is misleading. With minimal explanation,

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<sup>75</sup> *Id.*

<sup>76</sup> 107 S. Ct. at 1449 (1987). The district court's decision is unreported.

<sup>77</sup> 748 F.2d 1308, 1309 (9th Cir. 1984).

<sup>78</sup> 107 S. Ct. at 1452.

<sup>79</sup> *Cf. id.* at 1452-56 (*passim*).

<sup>80</sup> *Id.* at 1454-56.

the majority opinion altered the *Weber* formula in two significant respects, a fact that was not lost on Justice O'Connor in her concurring opinion nor on Justice White in his dissenting opinion. The first alteration consisted of the collapsing of the second part of the *Weber* formula, "*in traditionally segregated job categories*," into the first part, "manifest imbalance." As noted earlier, *Weber* was a case whose holding cannot be divorced from its factual setting of systemic employment discrimination and educational segregation in the deep South. In the Kaiser plant, the skilled jobs were white jobs and the labor jobs were black jobs. As Justice Brennan observed in *Weber*: "The purposes of the plan mirror those of the statute. Both were designed to break down old patterns of racial segregation and hierarchy. Both were structured to 'open employment opportunities for Negroes in occupations which have been traditionally closed to them.'"<sup>81</sup>

In fashioning the *Weber* formula, the Court was certainly aware of the far reaching implications of its decision. The Kaiser plan was not an original proposal. It was modeled on a massive, nationwide settlement between the Department of Justice and the steel industry which literally opened up tens of thousands of jobs and training opportunities for blacks.<sup>82</sup> By putting a judicial imprimatur on the Kaiser plan, the Court was in effect endorsing the steel settlement and purposefully putting a powerful tool in the hands of the federal government, aggrieved employees, and private employers.

The segregation in *Johnson* resulted from societal norms of a very different nature: women did office work; men did manual labor. Although Justice Brennan could properly buttress the holding in *Weber* by asserting that Congress's principal goal in enacting Title VII was to bring blacks into the mainstream of the American economy, Congress had no similar goal for women in 1964. "Sex" was inserted into Title VII as a proscribed basis for discrimination by opponents of the bill who hoped to insure its defeat by the

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<sup>81</sup> 443 U.S. at 208 (quoting 110 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey)).

<sup>82</sup> *Id.* at 210 (Blackmun, J., concurring). The settlement resolved charges of racial and sexual discrimination against nine of the nation's largest steel companies and resulted in a sweeping overhaul of the industry's employment practices and in back pay awards of over \$30 million dollars to approximately 50,000 minority workers. *United States v. Allegheny-Ludlum Indus.*, 517 F.2d 826 (5th Cir. 1975); Blumrosen, *Affirmative Action in Employment After Weber*, 34 *RUTGERS L. REV.* 1, 6-7 n.13 (1981). Provisions similar to the Kaiser/USWA agreement were also included in the union's contracts with Reynolds Metals and ALCOA, the other two major American aluminum producers. *Weber v. Kaiser Aluminum & Chem. Corp.*, 563 F.2d 216, 229 (5th Cir. 1977) (Wisdom, J., dissenting).

inclusion.<sup>83</sup> Although undoubtedly the victims of employment discrimination if they sought access to jobs traditionally held by men, women never constituted the kind of economic underclass blacks did in the South. Nonetheless, Justice Brennan's opinion for the majority treats their exclusion from manual labor positions as an exclusion of the same character as the exclusion of blacks from skilled trade jobs in the South.

Although one can applaud this extension of *Weber* from a social perspective, it remains a troubling flaw in Justice Brennan's analysis. The reality of *Johnson* is that the five-Justice majority recast the *Weber* formula in a significantly different manner without acknowledging the change. The factual predicate is now "statistical imbalance" without more.

A second and equally disturbing alteration of the *Weber* formula consists in the Court's reduction of the quantum of proof needed as a factual predicate by a public sector employer before implementing a voluntary race/gender-conscious program. Justice Brennan's opinion clearly rejects any suggestion that a "manifest imbalance" is synonymous with a "prima facie" case. Thus, something less than *Hazelwood's*, "[e]vidence of long-standing and gross disparity between the composition of a work force and that of the general population," satisfies *Weber*.<sup>84</sup> The open question, of course, is how much less?

The value of *Johnson's* factual predicate analysis is further weakened by the character of Justice O'Connor's vote. Although she cast the sixth vote in support of the gender-conscious plan, Justice O'Connor declined to join Justice Brennan's opinion because it followed "an expansive and ill-defined approach to voluntary affirmative action."<sup>85</sup> Her more guarded approach rested on a synthesis of *Weber* and *Wygant v. Jackson Board of Education*, discussed below. Insisting that no valid justification existed for different standards under Title VII and the fourteenth amendment, she opted for a *prima facie* predicate, a position much like the "arguable violation" taken by Justice Blackmun in his concurring opinion in *Weber*.<sup>86</sup>

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<sup>83</sup> Ironically, Title VII's inclusion of women as a protected group resulted from the attempts of Southern Congressmen to defeat the bill. 110 CONG. REC. 2577-84 (1964); C. & B. WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 124-217 (*passim*) (1985).

<sup>84</sup> See *supra* notes 20-22 and accompanying text.

<sup>85</sup> 107 S. Ct. at 1461 (O'Connor, J., concurring in the judgment).

<sup>86</sup> *Id.* at 1461-63. See *infra* notes 150-51 and accompanying text.

In sum, simply because six Justices voted in favor of the gender-conscious plan in *Johnson* does not mean that the validity of other gender-conscious plans is guaranteed. Justice Powell's retirement diminishes the support by one vote. Justice Stevens continues to believe *Weber* was wrongly decided in the first place.<sup>87</sup> Justice O'Connor explicitly disagrees with the majority's new formulation.

## 2. The Equal Protection Clause and *Wygant*

The Court first interpreted the meaning of the equal protection clause in the context of reverse discrimination claims in two cases that did not involve employment. In *Regents of the University of California v. Bakke*, a highly splintered Court struck down a special admissions program at the medical school of the University of California at Davis which exclusively reserved 16 seats for minority-group applicants. Five Justices, however, agreed that the state could at a minimum consider race as a "plus" in conferring benefits.<sup>88</sup> In *Fullilove v. Klutznick*, a majority of the Justices agreed that Congress could set aside 10 percent of the funds appropriated under the Public Works Act of 1977 for minority business enterprises.<sup>89</sup>

A close reading of *Bakke* and *Fullilove* suggests that all the Justices except Justice Rehnquist agreed that the equal protection clause did not prohibit the use of race-conscious criteria in a voluntary remedial context. Whether read singly or in tandem, neither case offered more than general guidance to a public sector employer considering implementing a race/gender-conscious affirmative action plan. At best, three principles could be gleaned from the two cases. First, exclusively reserving a specific number of new hire slots or promotions for minority-group members would most likely violate the equal protection clause. Second, using race as a "plus," but not the determinant factor in employment decisions, was probably safe. Third, the Court would defer to Congress's judgment that race/gender-conscious remedial action was necessary to correct prior discrimination.

Neither *Bakke* nor *Fullilove* examined race-conscious employment decisions directly. *Wygant v. Jackson Board of Education*, decided in 1986, was the first pure employment case to reach the Court

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<sup>87</sup> 107 S. Ct. at 1458-59 (Stevens, J., concurring).

<sup>88</sup> 438 U.S. at 272, 315-20 (opinion of Powell, J.); *id.* at 326, 355-79 (opinion of Brennan, J., joined by Marshall, J., Blackmun, J., and White, J.).

<sup>89</sup> 448 U.S. at 472-92 (opinion of Burger C.J., joined by White, J., and Powell, J.); *id.* at 517-22 (opinion of Marshall, J., joined by Brennan, J., and Blackmun, J.).

involving an equal protection clause challenge to a voluntarily adopted program. Just as Kaiser was prompted to develop its race-conscious training program in *Weber* because the federal government had found serious fault with its hiring and promotion policies, the Jackson School Board in *Wygant* aggressively began to recruit minority teachers, following the issuance of a complaint by the Michigan Civil Rights Commission in 1969.<sup>90</sup> Although the recruitment proved quite successful — the percentage of minority teachers increased dramatically within two years from 3.9% to 8.8% — those gains were later wiped out when economic conditions precipitated faculty layoffs.<sup>91</sup> The newly hired minority teachers bore the brunt of the layoffs because the collective bargaining agreement mandated dismissal in reverse order of seniority.<sup>92</sup>

Shortly after the layoffs, racial violence erupted in the schools. After difficult negotiations, the School Board and the teachers' Union amended the collective bargaining agreement to protect minority teachers' job security. The new provision, Article XII, established a dismissal mechanism whereby in the event of a layoff, teachers with the most seniority would be retained except that at no time would the percentage of minority personnel laid off be greater than the percentage of minority personnel existing at the time of the layoff.<sup>93</sup>

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<sup>90</sup> 106 S. Ct. at 1858–59 (Marshall, J., dissenting).

<sup>91</sup> *Id.* at 1859.

<sup>92</sup> *Id.* at 1843–45.

<sup>93</sup> Article XII provided as follows:

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

*Id.* at 1845. "Minority Personnel" were defined in another provision as "those employees who are Black, American Indian, Oriental, or of Spanish descendency." *Id.* at 1845 n.2.

It has been observed that modification of seniority to preserve gains in minority employment is "by no means uncommon in public education." Brief for the National Education Association as Amicus Curiae in Support of Respondents at 5 & n.2, *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842 (1986), citing a number of collective bargaining agreements throughout the United States. If the Supreme Court had held that a prior legislative, judicial, or administrative finding of discrimination were necessary, such a holding would have thrown affirmative action programs across the country into total chaos, and possibly exposed the states to significant financial loss. Certainly, there would have been a tidal wave of litigation. Over 26 million individuals are employed by the federal government and the states. BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1986 294 (10th ed. 1985).

Subsequently, the School Board refused to adhere to the terms of the contract because compliance would have meant laying off

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Affirmative action programs using race-conscious criteria exist in just about every state. *E.g.*, See ALASKA STAT. §§ 44.19.444-44.19.445 (1985), and Alaska Admin. Order No. 59, *reported in 8A Fair Emp. Prac. Man. (BNA) 453:225*; Arizona Exec. Order No. 83-5, *reported in 8A Fair Emp. Prac. Man. (BNA) 453:436*; CAL. GOV'T CODE §§ 19400-19406, 19790-19798 (West 1980); Cal. Exec. Orders Nos. B-85-81 and D-20-83, *reported in 8A Fair Emp. Prac. Man. (BNA) 453:853*, and CAL. ADMIN. CODE tit. 2, Rule 7286.8, *reprinted in 8A Fair Emp. Prac. Man. (BNA) 453:862*; COLO. ADMIN. CODE § 1-6-1, *reprinted in 8A Fair Emp. Prac. Man. (BNA) 453:1039*; COLO. ADMIN. CODE §§ 5-2-4 and 5-6-1 *et seq.*, *reprinted in 8A Fair Emp. Prac. Man. (BNA) 453:1105*; COLO. ADMIN. CODE § 80.9, *reprinted in 8A Fair Emp. Prac. Man. (BNA) 453:1128*, and COLO. ADMIN. CODE § 90.13, *reprinted in 8A Fair Emp. Prac. Man. (BNA) 453:1157*; CONN. GEN. STAT. ANN. § 46a-68 (West Supp. 1985), and Conn. Exec. Order No. 9, *reported in 8A Fair Emp. Prac. Man. (BNA) 453:1246*; Del. Exec. Orders Nos. 74, 81, and 102, *reported in 8A Fair Emp. Prac. Man. (BNA) 453:1446*; D.C. CODE § 1-2524 (1981); D.C. CODE §§ 1-507-1-511 and 1-1141-1-1151 (1981); FLA. STAT. ANN. § 110.112 (West 1982), and Fla. Exec. Order No. 79-50, *reported in 8A Fair Emp. Prac. Man. (BNA) 453:1827*; Ga. Exec. Order dated July 29, 1976, *reported in 8A Fair Emp. Prac. Man. (BNA) 453:2051*; Hawaii Exec. Order No. 77-4 and Admin. Directive 80-2, *reported in 8A Fair Emp. Prac. Man. (BNA) 453:2259*, and HAWAII EQUAL EMPLOYMENT OPPORTUNITY REGULATIONS §§ 12-31-1-12-31-7 *reprinted in 8A Fair Emp. Prac. Man. (BNA) 453:2351-56*; ILL. DEP'T OF HUMAN RIGHTS PROCEDURAL & PUBLIC CONTRACT RULES, §§ 750.110-170 (1984) *reported in 8A Fair Emp. Prac. Man. (BNA) 453:2711*; IND. CODE ANN. §§ 4-15-12-1 *et seq.* (Supp. 1985); IOWA ADMIN. CODE § 240, Chapters 8.1(1) *et seq.*, *reprinted in 8A Fair Emp. Prac. Man. (BNA) 453:3091*, and IOWA ADMIN. CODE § 240, Chapters 20.1 *et seq.*, *reprinted in 8A Fair Emp. Prac. Man. (BNA) 453:3151*; KAN. ADMIN. REGS. 21-30-14 *et seq.*, *reprinted in 8A Fair Emp. Prac. Man. (BNA) 453:3306*; KY. REV. STAT. §§ 45.550-45.640 (1980), and Ky. Exec. Orders Nos. 80-106 and 84-549, *reported in 8A Fair Emp. Prac. Man. (BNA) 455:74*; ME. REV. STAT. ANN. tit. 5, §§ 781-790 (1979); MD. ANN. CODE art. 78A, § 7A (1977), and Md. Exec. Order dated December 9, 1970, *reprinted in 8A Fair Emp. Prac. Man. (BNA) 455:655*; Mass. Exec. Orders Nos. 227 and 237, *reported in 8A Fair Emp. Prac. Man. (BNA) 455:883-84* and Mass. Equal Employment Opportunity Anti-Discrimination and Affirmative Action Program (Admin. Bull. 75-14), *reprinted in 3A Fair Emp. Prac. Man. (BNA) 455:961*; MICH. COMP. LAWS ANN. § 37.2210 (West 1985), Mich. Exec. Order 1983-4, *reported in 8A Fair Emp. Prac. Man. (BNA) 455:1030*, and Mich. Civil Rts. Div. Directive dated April 1978, *reprinted in 8A Fair Emp. Prac. Man. (BNA) 455:1132*; MINN. STAT. ANN. § 43A.19 (West Supp. 1985), and Minn. Dep't of Human Rights Regulations, ch. 5000, *reprinted in 8A Fair Emp. Prac. Man. (BNA) 455:1301*; Miss. State Personnel Board Manual of Policies, Rules 5.10 *et seq.*, *reprinted in 8A Fair Emp. Prac. Man. (BNA) 455:1505*; Mo. Exec. Order No. 82-27, *reported in 8A Fair Emp. Prac. Man. (BNA) 455:1643*, and Mo. ADMIN. CODE (8 CSR) 60-3.080, *reprinted in 8A Fair Emp. Prac. Man. (BNA) 455:1715*; Mont. Exec. Order No. 24-81, *reported in 8A Fair Emp. Prac. Man. (BNA) 455:1845*; NEB. REV. STAT. §§ 81-1355 *et seq.* (1981), and Neb. Exec. Order dated June 16, 1978, *reported in 8A Fair Emp. Prac. Man. (BNA) 455:2048*; Nev. Exec. Order dated February 23, 1983, *reported in 8A Fair Emp. Prac. Man. (BNA) 455:2226*; N.H. Exec. Order 81-3, *reported in 8A Fair Emp. Prac. Man. (BNA) 455:2436*, and N.H. State Plan for Equal Employment in Apprenticeship and Training, *reprinted in 8A Fair Emp. Prac. Man. (BNA) 455:2531-2543*; N.J. STAT. ANN. § 10:5-34 (West 1976), N.J. STAT. ANN. §§ 11:2d-1 *et seq.* (West Supp. 1985), N.J. Exec. Order No. 61, *reported in 3 Empl. Prac. Guide (CCH) 25,722*; N.M. Exec. Order 81-45, *reported in 8A Fair Emp. Prac. Man. (BNA) 455:2849*, and N.M. Human Rts. Commission Regulations §§ XIII-XIV, *reprinted in 8A Fair Emp. Prac. Man. (BNA) 455:2881-83*; N.Y. Exec. Law § 296 (12) (Consol. 1982), N.Y. Exec. Orders

tenured teachers while retaining probationary minority teachers. The Union challenged the refusal in two separate actions. In the first case, commenced in federal court, the Union asserted that the Board's breach violated the equal protection clause of the fourteenth amendment and Title VII. In its answer, the Board specifically denied any prior discrimination in employment. The district court never reached this defense, however, because it *sua sponte* dismissed the complaint.<sup>94</sup>

The Union won the second case, commenced in state court, when the court ordered enforcement of the layoff provision. In so doing, however, the state court concluded that "no history of overt past discrimination" existed, that discrimination against minorities "ha[d] not been established," and that the absence of minority teachers "was the result of societal racial discrimination."<sup>95</sup> In holding

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Nos. 6 and 21, *reported in* 8A Fair Emp. Prac. Man. (BNA) 455:3071-73, and N.Y. ADMIN. CODE tit. 9, § 466, *reprinted in* 8A Fair Emp. Prac. Man. (BNA) 455:3125; OHIO REV. CODE ANN. § 4112.04(A)(10) (Baldwin Supp. 1979), Ohio Exec. Order dated September 13, 1973, *reported in* 3 Empl. Prac. Guide (CCH) ¶ 26,715, Ohio Dep't of State Personnel Rules and Regulations, ch. 123: 1-49-01 *et seq.*, *reprinted in* 8A Fair Emp. Prac. Man. (BNA) 457:231, Ohio Bureau of Equal Employment Opportunity for Construction Regulations, ch. 123:2-3-01 *et seq.*, *reprinted in* 8A Fair Emp. Prac. Man. (BNA) 457:282, and Ohio State Apprenticeship Council Rules 4101:1-5-02 *et seq.*, *reprinted in* 8A Fair Emp. Prac. Man. (BNA) 457:307; OKLA. STAT. ANN. tit. 74, § 840.25 (West Supp. 1985), and Okla. Exec. Order No. 79-14, *reported in* 8A Fair Emp. Prac. Man. (BNA) 457:425; OR. REV. STAT. §§ 182.100, 243.305, 243.315, and 659.025 (1983), Or. Exec. Order 79-22, *reported in* 8A Fair Emp. Prac. Man. (BNA) 45:709, and OR. ADMIN. R. 839-11-200, *reprinted in* 8A Fair Emp. Prac. Man. (BNA) 457:693; Pa. Exec. Order 1984-1, *reported in* 3 Empl. Prac. Guide (CCH) ¶ 27,251, Regulations of Penn. Human Rights Commission §§ 49.51 *et seq.*, *reprinted in* 8A Fair Emp. Prac. Man. (BNA) 457:889, Regulations of Penn. Dep't of Labor and Industry, Industrial Board, §§ 81.1 *et seq.*, *reprinted in* 8A Fair Emp. Prac. Man. (BNA) 457:935, Affirmative Action Guidelines of the Penn. Human Relations Commission, *reprinted in* 8A Fair Emp. Prac. Man. (BNA) 457:851, and Penn. Employee Selection Guidelines § 15 (1 Pa. Admin. Bull. 2359 (1971)), *reprinted in* 8A Fair Emp. Prac. Man. (BNA) 457:861; R.I. Exec. Order 85-11, *reprinted in* 8A Fair Emp. Prac. Man. (BNA) 457:1245; S.D. ADMIN. R. 65-20 *et seq.*, *reprinted in* 8A Fair Emp. Prac. Man. (BNA) 457:SD1751; TENN. CODE ANN. § 4-21-3, (1985) and Tenn. Exec. Order No. 8, *reported in* 8A Fair Prac. Man. (BNA) 457:1865; Tex. Exec. Order MW-6, *reported in* 8A Fair Emp. Prac. Man. (BNA) 457:2007; Utah Exec. Order dated May 4, 1979, *reported in* 8A Fair Emp. Prac. Man. (BNA) 457:2218; Va. Exec. Order No. 1-86, *reported in* 8A Fair Emp. Prac. Man. (BNA) 457:2626; Wash. Exec. Order No. 85-09, *reported in* 8A Fair Emp. Prac. Man. (BNA) 457:2826, WASH. REV. CODE §§ 49.04.100-49.04.130 (1974), *reprinted in* 8A Fair Emp. Prac. Man. (BNA) 457:2873-74, WASH. ADMIN. CODE 168-08-298(4)(g), *reprinted in* 8A Fair Emp. Prac. Man. (BNA) 457:2912, WASH. ADMIN. CODE 168-18-011-168-18-100, *reprinted in* 8A Fair Emp. Prac. Man. (BNA) 457:2928a-28b, and WASH. ADMIN. CODE 296-04-300-296-04-480, *reprinted in* 8A Fair Emp. Prac. Man. (BNA) 457:2970; W. Va. Order 16-78 *reported in* 8A Fair Emp. Prac. Man. (BNA) 457:3026; WIS. STAT. ANN. §§ 16.765 and 230.01 *et seq.* (West Supp. 1985), and Wis. Exec. Order Nos. 9, 26, and 28, *reported in* 8A Fair Emp. Prac. Man. (BNA) 457:3217-18.

<sup>94</sup> 106 S. Ct. at 1845.

<sup>95</sup> *Id.*

that Article XII did not violate Title VII, the state court upheld the modification of the seniority agreement as an attempt to remedy the effects of societal discrimination.<sup>96</sup> The Board's answer denying discrimination and the state court's finding of no discrimination would later prove significant in the Supreme Court's resolution of the factual predicate issue.

In 1981, non-minority teachers challenged the constitutional validity of Article XII.<sup>97</sup> In rejecting the plaintiffs' challenge, both the district court and the Court of Appeals for the Sixth Circuit addressed the factual predicate issue. The statistical evidence relied upon by the district court compared the percentage of minority teachers to the percentage of minority students in the student body, not to the percentage of minority teachers in the relevant labor market.<sup>98</sup> The Court of Appeals for the Sixth Circuit approved the statistics' use in a cursory fashion, emphasizing "the school board's interests in eliminating historic discrimination, promoting racial harmony in the community and providing role-models for minority students . . . ."<sup>99</sup>

The Supreme Court reversed by a vote of 5-4. Justice Powell wrote a plurality opinion in which Chief Justice Burger and Justice Rehnquist joined. Justice O'Connor joined parts of the plurality opinion and wrote a separate opinion concurring in part and in the judgment. Justice White filed an opinion concurring in the judgment. The absence of a majority opinion and the presence of the two concurring opinions contribute to the opinion's jurisprudential instability — a far greater instability than the majority's narrow margin suggests.

The factual predicate issue came before the Court in a somewhat convoluted fashion, arising in the context of Justice Powell's

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<sup>96</sup> *Id.*

<sup>97</sup> 546 F. Supp. at 1195 (E.D. Mich. 1982). The teachers also raised claims resting on Title VII, certain civil rights statutes, 42 U.S.C. §§ 1981, 1983 and 1985, and several Michigan statutes. *Id.* at 1199. The district court dismissed the Title VII allegations because the plaintiffs had failed to file an administrative claim with the Equal Employment Opportunity Commission, a jurisdictional prerequisite to the filing of a Title VII action. *Id.* at 1203. It dismissed the section 1981, 1983 and 1985 claims because, on the merits of plaintiffs' constitutional claim, it had ruled that the layoff provision was valid. Finally, it dismissed the state law claims because it had dismissed the federal claims. *Id.* at 1203-04.

<sup>98</sup> *Id.* at 1201-02. The district court reasoned: "[T]eaching is more than just a job. Teachers are role-models for their students. More specifically, minority teachers are role-models for minority students. This is vitally important because societal discrimination has often deprived minority children of other role-models." *Id.* at 1201.

<sup>99</sup> 746 F.2d at 1157.

application of the strict scrutiny test to the layoff procedure. Consistent with his opinions in *Bakke*<sup>100</sup> and *Fullilove*,<sup>101</sup> Justice Powell maintained that government action triggered by racial criteria must be subjected to a "searching examination." He insisted that "[f]irst, any racial classification 'must be justified by a compelling government interest. . . .' Second, the means chosen by the State to effectuate its purpose must be 'narrowly tailored to the achievement of that goal.'"<sup>102</sup>

Justice Powell's opinion emphatically rejected the "role-model" justification<sup>103</sup> advanced by the district court and the court of appeals, both of which viewed the modified layoff procedure as a means of providing role-models to minority children for the purpose of alleviating societal discrimination.<sup>104</sup>

The School Board also claimed, as a fallback position, that it adopted the layoff provision to remedy prior hiring discrimination.<sup>105</sup> While declining to examine the specific facts advanced by the School Board as proof of discrimination because of the chaotic state of the record, Justice Powell very pointedly discussed what kind of factual predicate would insulate a public employer's affirmative action plan from a successful constitutional challenge by non-minority employees:<sup>106</sup> "In particular, a public employer like the Board must ensure that, before it embarks on an affirmative action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination."<sup>107</sup> Essentially, the plurality opinion reaffirmed *Hazelwood's* Title VII liability analysis discussed earlier.<sup>108</sup> Significantly, Justice Powell extended it to equal protection clause claims involving voluntary race-conscious plans.<sup>109</sup> In Justice Powell's view, had the School Board demonstrated a statistically significant disparity between the percentage of minority school teachers hired and the percentage available in the labor pool, it would have been able to show "a strong basis in evidence for its

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<sup>100</sup> 438 U.S. at 287-91.

<sup>101</sup> 448 U.S. at 498 (Powell, J., concurring).

<sup>102</sup> 106 S. Ct. at 1846.

<sup>103</sup> *Id.* at 1847.

<sup>104</sup> 546 F. Supp. at 1201; 746 F.2d at 1156-57.

<sup>105</sup> 106 S. Ct. at 1849 (opinion of Powell, J.); *id.* at 1858-59 (Marshall, J., dissenting).

<sup>106</sup> *Id.* at 1847-48 (opinion of Powell, J.).

<sup>107</sup> *Id.* at 1848.

<sup>108</sup> *Id.* at 1847-48.

<sup>109</sup> *Id.*

conclusion that remedial action was necessary."<sup>110</sup> The record, however, did not contain such proof. Ultimately, a majority of the Justices in *Wygant* held the layoff provision was unconstitutional because "as a means of accomplishing purposes that otherwise may be legitimate, the Board's layoff plan is not sufficiently narrowly tailored. Other, less intrusive means of accomplishing similar purposes — such as the adoption of hiring goals — are available."<sup>111</sup>

The major difficulty with the plurality opinion's reliance on *Hazelwood* lies in its avoidance of the firm rule of actual and purposeful intent laid down in *Washington v. Davis*.<sup>112</sup> As discussed earlier, that case flatly rejected impact as proof of discrimination. Although the Court in *Washington v. Davis* and subsequent cases did not dismiss impact as irrelevant,<sup>113</sup> it never diminished the importance of intent as the *sine qua non* of an equal protection clause violation. In looking to *Hazelwood*, the four Justices in the *Wygant* plurality were clearly saying that whatever evidence satisfies Title VII's impact theory will also provide sufficient proof that "the employer had a strong basis in evidence for its conclusion that remedial action was necessary."<sup>114</sup>

The principle that satisfying the burden of proof associated with Title VII's impact theory also provides a satisfactory factual predicate for a voluntary plan under the equal protection clause drew the support of the three dissenting Justices as well. Although the dissenters did not address the factual predicate issue directly, their earlier opinions, especially in *Bakke* and *Fullilove*, leave no doubt that they would endorse this principle.<sup>115</sup> Unlike the Justices in the plurality opinion, however, they refuse to accept "strong evidence" as a limiting principle in fashioning an acceptable factual predicate for remedial purposes.

*Wygant* is a case in which a scorecard tallying up the Justices' votes tells very little about its true significance. A scorecard would simply show that a majority of the Justices voted to strike down the layoff provision, apparently agreeing that it was not sufficiently

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<sup>110</sup> *Id.* at 1848.

<sup>111</sup> *Id.* at 1852.

<sup>112</sup> See *supra* notes 28–30 and accompanying text.

<sup>113</sup> 426 U.S. 229 (1976).

<sup>114</sup> 106 S. Ct. at 1848.

<sup>115</sup> *Fullilove*, 448 U.S. at 457–73 (opinion of Burger, C.J., in which White, J., joined); *id.* at 517–22 (opinion of Marshall, J., in which Brennan, J., Powell, J., and Blackmun, J., joined); *Bakke*, 438 U.S. at 355–62 (opinion of Brennan, J., in which Marshall, J., White, J., and Blackmun, J., joined).

narrowly tailored. What it overlooks is that eight of the Justices (1) endorsed race-conscious hiring and promotion criteria in voluntary affirmative action programs in the public sector, (2) confirmed that a judicial, administrative, or legislative finding of discrimination was not a constitutionally required factual predicate, and (3) agreed on a "minimum floor" for an acceptable factual predicate, to wit, statistical evidence of a disparate impact resembling *Hazelwood's*.

Unfortunately, their consensus disintegrated upon further consideration of the factual predicate issue. Key questions remain unanswered. How great an imbalance is needed to show "evidence of long-lasting and gross disparity" between the race or gender composition of the employer's work force and that of the local labor pool? Is the need for a racially diverse and gender-balanced faculty an acceptable predicate for an affirmative action plan? If either need is, can other employers in different settings make a similar claim?

### 3. Are *Johnson* and *Wygant* Really Saying the Same Thing?

After *Weber* and *Johnson* on the one hand, and *Wygant*, on the other, a public sector employer wanting to implement an affirmative action program has two questions to ponder: under Title VII, is there a "manifest imbalance in traditionally segregated job categories," and under the equal protection clause, is there "a strong basis in evidence" resembling *Hazelwood's* to conclude that it has engaged in prior discriminatory conduct? As noted above, a persuasive argument can be constructed that *Johnson* has made the "traditionally segregated job categories" prong of the *Weber* formula essentially irrelevant. An additional argument can be made that *Wygant's* "strong basis in evidence" is simply reformulation of *Weber's* "conspicuous imbalance." In both cases, the Court used the two formulae to direct a comparison between the racial or gender composition of the employer's work force and the labor pool from which it drew its employees. In both cases, the formulae strongly suggest that impact alone protects an employer's decision to implement a race/gender-conscious program.

Despite this common bond between the two sets of cases, a subtle tension arises from their differing approaches to the concept of the appropriate labor pool. In *Wygant*, both general population figures and minority pupil ratios were hardly relevant to deciding the availability of qualified minority teachers. The Court's insistence upon reference to "the racial composition of the qualified public

school teacher population in the relevant labor market"<sup>116</sup> had an unmistakable ring of common sense to it. A school district cannot be expected to hire minority teachers if none are available. On the other hand, if the Court in *Weber* had looked to the percentage of qualified black craftworkers in the skilled labor pool surrounding the Kaiser plant, the "conspicuous imbalance" would have diminished, if not disappeared entirely. Similar arguments existed in *Johnson* given the very small percentage of women in the skilled labor pool and the low employee turnover.

Why the difference in approach between *Weber* and *Johnson*, on the one hand, and *Wygant*, on the other? Admittedly, the Court's analysis can be faulted from a strictly logical perspective. On an intuitive level, however, it does not seem unreasonable. On a practical level, it seems compelling.

The Court's analysis in each case produced a rough justice. After *Weber*, Kaiser was free to conduct a training program, enabling unskilled blacks and whites to improve their economic status and qualify for significantly higher paying jobs. The Court's decision in no way compelled or even encouraged Kaiser to promote unskilled or less than qualified employees into these jobs. If the Court had required the racial composition of the training program to mirror the racial composition of the labor pool of qualified craftworkers, the Court would have allowed the skilled trades positions at the Kaiser plant to remain virtually all white. The use of straight seniority as the determining criterion for eligibility would have severely limited the entry of blacks. At best, their entry into the skilled trades positions would have progressed in slow, incremental steps. The Kaiser 50/50, white/black ratio accelerated the mainstreaming of blacks into the American economy, which was, after all, the overriding goal of Congress in enacting Title VII. Although Congress had no similar, expressed goal with respect to women in enacting Title VII in 1964, certainly Congress's amendments in 1972 and its failure to disapprove any of the Court's gender-discrimination decisions justify extending the *Weber* rationale to women in *Johnson*.

On the other hand, the Court would have affirmatively frustrated the goal of integrating blacks and women into the mainstream of the American economy in *Wygant* if it had permitted a comparison based on the general population statistics or minority pupil

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<sup>116</sup> 106 S. Ct. at 1847 (quoting *Hazelwood*, 433 U.S. at 308).

ratio. The obvious result would have been a hiring of minorities for the sake of numbers. Quality and competence would have suffered. This result, in turn, would have certainly fueled public resistance to affirmative action and increased racial friction.

*B. Beyond the Factual Predicate: Societal Discrimination as a Justification for Race/Gender-Conscious Employment Decisions*

One of the problems that has plagued the Court's affirmative action jurisprudence since its inception has been the treatment of societal discrimination, *i.e.*, discrimination by institutions over which the employer has no control, such as schools, other employers, and unions. As a general observation, it is fair to say American law, whether judge-made or statutory, federal or state, centers on the concept of individual liability.<sup>117</sup> A defendant is under no obligation to correct any wrong except one of its doing. Correspondingly, a plaintiff can obtain no relief unless it has been a victim of the defendant's wrongdoing. To some extent the Court has completely departed from this second observation by interpreting Title VII as permitting relief for non-victims. A brief mention of three cases will illustrate this point. In *Weber*, the Court permitted a private employer to adopt a voluntary plan benefitting non-victims.<sup>118</sup> In *Local 28 of the Sheet Metal Workers' International Association v. EEOC*, it held that section 706(g) did not prevent a district court from ordering

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<sup>117</sup> See R. POUND, OUTLINES OF LECTURES ON JURISPRUDENCE 96 (5th ed. 1943). For a spirited defense of "group" interests as a justification for imposing liability, see Fiss, *The Supreme Court, 1978 Term — Forward: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978). See generally Cowan, *Group Interests*, 44 VA. L. REV. 331 (1958); Cowan, *The Impact of Social Security on the Philosophy of Law: The Protection of Interests Based on Group Membership*, 11 RUTGERS L. REV. 688 (1957); Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 240-44 (1979); Fiss, *The Fate of an Idea Whose Time Has Come: Antidiscrimination Law in the Second Decade After Brown v. Board of Education*, 41 U. CHI. L. REV. 742 (1974); Greenberg, *Race Relations and Group Interest in the Law*, 13 RUTGERS L. REV. 503 (1959); Horowitz, *The Jurisprudence of Brown and the Dilemma of Liberalism*, 14 HARV. C.R.-C.L. L. REV. 599 (1979); Marshall, *A Comment on the Nondiscrimination Principle in a "Nation of Minorities"*, 93 YALE L.J. 1006 (1984).

For criticism of the "group" theory, see Cowan, *Inverse Discrimination*, 33 ANALYSIS 10, 12 (1972); Goldman, *Limits to the Justification of Discrimination*, 3 SOC. THEORY & PRAC. 289 (1975); see also Taylor, *Reverse Discrimination and Compensatory Justice*, 33 ANALYSIS 177 (1973). See generally Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866 (1977).

<sup>118</sup> 443 U.S. 193 (1978).

relief benefitting individuals who were not themselves the actual victims of discrimination.<sup>119</sup> In *City of Cleveland*, it removed a consent judgment containing such relief from the possibility of any section 706(g) objection.<sup>120</sup>

The Court has shown less willingness to depart from the first observation, however. The doctrine that an employer remains responsible only for correcting its own discrimination is firmly established under Title VII and the equal protection clause. This premise underlies the entire factual predicate controversy. How much, and what kind of, information are necessary before an employer is free to conclude that it has discriminated in the past?

On occasion, however, an employer may conclude that the race/gender imbalance in its work force is not of its own doing. Neither intentional disparate treatment nor unintentional disparate impact has caused the imbalance. The only factual predicate upon which the employer can rely in such an instance is the disparate treatment and disparate impact of institutions over which it has no control, e.g., schools, other employers, and unions.

An illustration will help to focus the question. In *Hazelwood*, the school district argued that the percentage of minority teachers in its work force was less than the percentage in the area's labor pool because a nearby school district with higher salaries, better working conditions, and more benefits aggressively recruited minority teachers.<sup>121</sup> If this explanation was correct, then the small percentage of minority teachers in the work force was not traceable to a violation of either Title VII or the fourteenth amendment.

Assume the correctness of the school district's position, but also assume that in response to steadily increasing minority enrollment, the district decides to adopt a race-conscious hiring and promotion plan. Can it lawfully do so? This illustration is not purely hypothetical. In some northern states, school districts have implemented a teacher assignment system that sets the percentage of minority and non-minority teachers in each school without regard to prior discrimination.<sup>122</sup>

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<sup>119</sup> 106 S. Ct. 3019 (1986).

<sup>120</sup> 106 S. Ct. 3063 (1986).

<sup>121</sup> *Hazelwood*, 433 U.S. 299, 310-13 (1977).

<sup>122</sup> See *Kromnick v. School Dist. of Philadelphia*, 739 F.2d 894 (3d Cir. 1984), cert. denied, 469 U.S. 1107 (1985); *Caulfield v. Board of Educ.*, 632 F.2d 999 (2d Cir. 1980), cert. denied, 450 U.S. 1030 (1981); *Zaslowsky v. Board of Educ.*, 610 F.2d 661 (9th Cir. 1979).

The issue of race/gender-conscious hiring and promotion can arise in other public

The difficulty with the Court's decisions in this area is their lack of coherent vision. Two aspects of the Court's jurisprudence are particularly unsettling. The first is its inability to reach a consensus concerning the remediation of societal discrimination under the equal protection clause. The second is its unwillingness to acknowledge that Title VII's disparate impact theory of liability is premised upon societal discrimination — not employer discrimination.

### 1. Societal Discrimination and the Equal Protection Clause

In *Bakke*, the medical school adopted its special admissions program in part to compensate for years of societal discrimination, which limited the access of minority group members to higher education. This societal discrimination, in turn, deprived minority children of much needed role-models. Justices Brennan, Blackmun, Marshall, and White readily accepted the remediation of societal discrimination as an "important government interest."<sup>123</sup> Relying heavily on sociological data showing the long-standing exclusion of blacks from the medical profession and the still lingering effects of segregated schooling, the so-called "Brennan" group Justices lauded the medical school's efforts to overcome the debilitating residuum of years of unequal treatment.

Justice Powell rejected that position, fearful that its acceptance would lead to a parceling out of government benefits "to whatever groups are perceived as victims of societal discrimination . . . a step we have never approved."<sup>124</sup> At the same time, however, Justice Powell distinguished remediation of societal discrimination from the state's compelling interest in the promotion of a racially diverse student body. The issue of the constitutionality of state efforts to remedy societal discrimination ultimately remained unresolved in

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employment contexts as well. The courts have generally agreed that such relief is necessary to assist law enforcement agencies in their operational needs. See *Talbert v. City of Richmond*, 648 F.2d 925, 931 (4th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982); *Detroit Police Officers Ass'n v. Young*, 608 F.2d 671, 695 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981); *Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Serv. Comm'n*, 482 F.2d 1333, 1341 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975). See generally U.S. COMM'N ON CIVIL RIGHTS, *CONFRONTING RACIAL ISOLATION IN MIAMI* 290, 326-27, 332-39 (1982); U.S. COMM'N ON CIVIL RIGHTS, *WHO IS GUARDING THE GUARDIANS: A REPORT ON POLICE PRACTICES* 5 (1981); Note, *Race As An Employment Qualification to Meet Police Department Operational Needs*, 54 N.Y.U. L. REV. 413 (1979).

<sup>123</sup> *Bakke*, 438 U.S. at 357-62 (opinion of Brennan, J.).

<sup>124</sup> *Id.* at 310 (opinion of Powell, J.).

*Bakke* because the four Justices in the so-called "Stevens" group rested their opinion on statutory rather than constitutional grounds.<sup>125</sup>

Until *Wygant* in 1986, the Court did not have another opportunity to consider the issue of societal discrimination and the employment-related role-model justification for race/gender-conscious affirmative action programs. In *Fullilove*, the Court accepted the United States' position that the MBE provision was remedying prior government discrimination in contracting.<sup>126</sup> In *United States v. Paradise*, the district court imposed a one-for-one promotion quota to remedy Alabama's deliberate exclusion of blacks from state trooper jobs.<sup>127</sup> *Wygant*, on the other hand, squarely presented the issue of remedying societal discrimination because the Jackson School Board's primary justification for Article XII was the need to retain minority teachers as role models in order to alleviate the effects of societal discrimination. Justice Powell's plurality opinion, in which Chief Justice Burger and Justice Rehnquist joined, rejected that justification: "This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classification in order to remedy such discrimination."<sup>128</sup>

Justice Powell's emphatic rejection of the role-model theory rested on several different fears. First, the theory had "no logical stopping point" and would have required year-to-year calibrations of the sort the Court had eschewed in other cases. Second, the theory had the potential to justify *Brown*-like segregation based on the idea that black students were better off with black teachers. Third, the concept of societal discrimination was "too amorphous,"

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<sup>125</sup> *Id.* at 408-21 (opinion of Stevens, J.).

<sup>126</sup> 448 U.S. at 463-68, 473-82 (opinion of Burger, C.J.); *id.* at 497-506 (Powell, J., concurring); *id.* at 520-22 (Marshall, J., concurring).

<sup>127</sup> 107 S. Ct. at 1058-64.

<sup>128</sup> 106 S. Ct. at 1847. Generally speaking, the lower courts had rejected the role model concept when it was raised to justify assigning black teachers and administrators to black schools. *E.g.*, *United States v. School Dist. of Omaha*, 521 F.2d 530 (8th Cir. 1975), *cert. denied*, 423 U.S. 946 (1975); *Morgan v. Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *Diaz v. San Jose Unified School Dist.*, 518 F. Supp. 622 (N.D. Cal. 1981), *aff'd*, 705 F.2d 1129 (9th Cir. 1983), *rev'd*, 733 F.2d 660 (9th Cir. 1984); *Reed v. Rhodes*, 455 F. Supp. 546 (N.D. Ohio 1978), *aff'd in part and remanded*, 607 F.2d 714 (6th Cir. 1979), *cert. denied*, 445 U.S. 935 (1980); *Arthur v. Nyquist*, 415 F. Supp. 904 (W.D.N.Y. 1976), *modified*, 573 F.2d 134 (2d Cir.), *cert. denied*, 439 U.S. 860 (1978). *But see* *Kromnick v. School Dist. of Philadelphia*, 739 F.2d 894 (3d Cir. 1984), *cert. denied*, 469 U.S. 1107 (1985); *Evans v. Buchanan*, 582 F.2d 750, 773 (3d Cir. 1978), *cert. denied*, 446 U.S. 923 (1980).

and "insufficient" and "over expansive."<sup>129</sup> Justice O'Connor similarly rejected the concept in her concurring opinion.<sup>130</sup>

The views of these four Justices in *Wygant* are counterbalanced by the view of Justices Brennan, Marshall, Blackmun, and Stevens. The first three Justices did not specifically address remediation of societal discrimination in *Wygant*, resting their dissent instead on the important government purpose of "preserving the integrity of a valid hiring policy."<sup>131</sup> There is no reason to suspect, however, that they have changed their view since *Bakke* in which they specifically endorsed such a purpose:

[O]ur prior cases unequivocally show that a state government may adopt race-conscious programs if the purpose of such 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*.<sup>132</sup>

In contrast to the other dissenting Justices, Justice Stevens commented upon the remediation of societal discrimination. Not persuaded by the fears chronicled in Justice Powell's plurality opinion, Justice Stevens found two constitutionally acceptable purposes served by the layoff provision: the educational soundness of "multi-ethnic representation on the teaching faculty" and the retention of recently recruited minority teachers.<sup>133</sup> He linked both of these purposes to remediation of societal discrimination:

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<sup>129</sup> 106 S. Ct. at 1847-48. *Wygant* struck down a layoff provision in a voluntary affirmative action program. Arguably, its holding may also call into question orders entered in desegregation cases in which the courts overrode seniority provisions to protect recently hired minority teachers, most of whom had obtained their jobs as a result of other provisions in the courts' orders imposing hiring goals. *E.g.*, *Arthur v. Nyquist*, 712 F.2d 816 (2d Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984); *Morgan v. O'Bryant*, 671 F.2d 23, 24-28 (1st Cir. 1982), *cert. denied*, 459 U.S. 1059 (1983).

These cases can be distinguished, however. In the school desegregation cases, the interests at stake are not simply those of the recently hired minority teachers. The *Morgan* court observed that "the victims here are the black school children, not the possible hiring discriminatees . . ." 671 F.2d at 27; *accord Arthur*, 712 F.2d at 822 (teachers' security rights modified "in order to vindicate the constitutional rights of the minority children."); *Zaslowsky v. Board of Educ.*, 610 F.2d 661, 664 (9th Cir. 1979) ("The focus of this action of the school board is to enhance the educational opportunities available to the students," not to eliminate discrimination in employment.).

<sup>130</sup> 106 S. Ct. at 1854-55 (O'Connor, J., concurring in part and concurring in the judgment).

<sup>131</sup> *Id.* at 1863 (Marshall, J., dissenting).

<sup>132</sup> 438 U.S. at 369 (opinion of Brennan, J.) (emphasis added).

<sup>133</sup> 106 S. Ct. at 1868 (Stevens, J., dissenting).

[T]he fact that persons of different races do, indeed, have differently colored skin, may give rise to a belief that there is some significant difference between such persons. The inclusion of minority teachers in the educational process inevitably tends to dispel that illusion whereas their exclusion could only tend to foster it.<sup>134</sup>

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<sup>134</sup> *Id.* at 1869. It is perplexing that Justice Stevens failed to discuss — or even cite — related Supreme Court precedent and significant social science studies.

On a number of occasions in school desegregation cases, the Court has acknowledged the importance of a racially integrated faculty in achieving a unitary school system. *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 539–40 & n.11 (1979); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 460 (1979); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18–20 (1971). It has stressed that an integrated faculty exists for the benefit of students, not minority teachers. *United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225, 231–32 (1969); *Rogers v. Paul*, 382 U.S. 198, 200 (1965); *Bradley v. School Bd.*, 382 U.S. 103, 104–05 (1965). In turn, several appellate courts have emphasized the importance of the “role model” concept in approving race-conscious transfers of teachers and modification of seniority provisions. *Kromnick v. School Dist. of Philadelphia*, 739 F.2d 894, 906 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 782 (1985); *Morgan v. O’Bryant*, 671 F.2d 23, 27 (1st Cir. 1982), *cert. denied*, 459 U.S. 1059 (1983). *But see* cases cited *supra* note 129.

Voluminous social science studies stress the important role minority teachers play in the intellectual and social development of minority pupils. *E.g.*, M. CHESLER & P. SEGAL, *CHARACTERISTICS OF NEGRO STUDENTS ATTENDING PREVIOUSLY ALL-WHITE SCHOOLS IN THE DEEP SOUTH* (1967); R.L. CRAIN & R.E. MAHARD, *THE INFLUENCE OF HIGH SCHOOL RACIAL COMPOSITION ON BLACK COLLEGE ATTENDANCE AND TEST PERFORMANCE* (1978); G.A. FOREHAND & M. RAGOSTA, *A HANDBOOK FOR INTEGRATED SCHOOLING* 11–12 (1976); G. GAY, *DIFFERENTIAL DYADIC INTERACTION OF BLACK AND WHITE TEACHERS WITH BLACK AND WHITE PUPILS IN RECENTLY DESEGREGATED SOCIAL STUDIES CLASSROOMS: A FUNCTION OF TEACHER AND PUPIL ETHNICITY: A FINAL REPORT* (1974); R.G. BRIDGE & C. JUDD, *THE DETERMINANTS OF EDUCATIONAL OUTCOMES: THE EFFECTS OF FAMILIES, PEERS, TEACHERS AND SCHOOLS* (1979); R. MAYER ET AL., *THE IMPACT OF SCHOOL DESEGREGATION IN A SOUTHERN CITY: A CASE STUDY IN THE ANALYSIS OF EDUCATIONAL POLICY* (1974); M. WEINBERG, *MINORITY STUDENTS: A RESEARCH APPRAISAL* 240 (1977); 6 W. HAWLEY, *ASSESSMENT OF CURRENT KNOWLEDGE ABOUT THE EFFECTIVENESS OF SCHOOL DESEGREGATION STRATEGIES* 86–87 (1981); *EFFECTIVE SCHOOL DESEGREGATION: STUDIES IN THE NATIONAL REVIEW PANEL ON SCHOOL DESEGREGATION* 30 (W.D. Hawley, ed. 1981); Bosma, *The Role of Teachers in School Desegregation*, 15 *INTEGRATED EDUC.* 106 (1977); Coates, *White Adult Behavior Toward Black and White Children*, 43 *CHILD DEV.* 143 (1972); Henderson & Long, *Academic Expectations of Black and White Teachers for Black and White First Graders*, 8 *PROC. OF THE 77TH ANNUAL CONVENTION OF THE AM. PSYCHOLOGICAL ASS’N* 687–88 (1973); Johnson, Gerard & Miller, *Teacher Effectiveness in the Desegregated Classroom*, in H.B. GERARD & N. MILLER, *SCHOOL DESEGREGATION: A LONG-TERM STUDY* (1975); Kaulz, *Some Motivational Determinants of Racial Differences in Intellectual Achievements*, 2 *INT’L J. PSY.* 1 (1967); Simpson & Erickson, *Teacher’s Verbal and Nonverbal Communication Patterns as a Function of Teacher Race, Student Gender and Student Race*, 20(2), *AM. EDUC. RES. J.* 183–98 (1983).

There are some studies that dispute the “role model” thesis. *E.g.*, J.S. COLEMAN, *EQUALITY OF EDUCATIONAL OPPORTUNITY, A SUMMARY REPORT* 316–19 (1966); E. HANUSHEK, *EDUCATION AND RACE, AN ANALYSIS OF THE EDUCATIONAL PRODUCTION PROCESS* 78–88 (1972); Clague, *Voluntary Affirmative Action Plans in Public Education: Matching Faculty Race to Student Race*, 14 *J. LAW & EDUC.* 309 (1985); Hanushek, *Throwing Money at Schools*, *J. POL’Y ANALYSIS & MGMT.* 19 (1981).

In sum, the Court as presently composed appears almost evenly divided over the societal discrimination issue, with Chief Justice Rehnquist and Justices O'Connor and Scalia condemning a public employer's reliance on societal discrimination as a justification for race/gender-conscious plans and Justices Brennan, Marshall, Blackmun, and Stevens approving it. Two final observations are in order. First, it is unclear how Justice White currently views this issue. Although he voted with the Brennan group in *Bakke*, he has distanced himself from the group on repeated occasions in other contexts. His refusal to join Justice Powell's plurality opinion in *Wygant*, may, however, indicate that he has not accepted that opinion's wholesale condemnation of remediation of societal discrimination.<sup>135</sup>

Second, even apart from the remediation of societal discrimination, the possibility of the Court's accepting predicates other than the defendant-employer's own discriminatory conduct remains viable, in light of the shifting coalitions of Justices. As evidenced by their opinion in *Bakke*, Justices Brennan, Blackmun, and Marshall would accept such other predicates as the need for a racially-diverse faculty.<sup>136</sup> Conceivably, they would accept a general claim of a need for a racially-diverse and gender-balanced work force by most employers. Certainly, Justice Stevens appears to accept such a claim.<sup>137</sup> Likewise, Justice O'Connor has not ruled out the possibility of other acceptable factual predicates. In *Wygant*, while condemning remediation of societal discrimination as an acceptable predicate, she noted that the case did not raise "the very different role of promoting racial diversity among the faculty."<sup>138</sup>

## 2: Societal Discrimination and Title VII

The Court almost never raises the subject of societal discrimination in Title VII cases. In each reverse discrimination case the

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<sup>135</sup> See *infra* notes 180-98 and accompanying text.

<sup>136</sup> 438 U.S. at 362-73 (opinion of Brennan, J., concurring in the judgment in part and dissenting in part).

<sup>137</sup> 107 S. Ct. at 1460 (Stevens, J., concurring); accord Sullivan, *The Supreme Court — Comment, Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 96 (1986).

<sup>138</sup> 106 S. Ct. at 1854 (O'Connor, J., concurring in part and in the judgment) (in an asterisked footnote).

Court has considered, the facts were presented in such a fashion as to explain the absence of minorities, women, or both, as a consequence of the employer's acts. Thus, the Court's attention was consistently directed to the factual predicate offered by the employer to justify the race/gender-conscious program. The emphasis was always on what the employer did — not how the infrastructure of society at large treated minorities and women.

As mentioned earlier, the Court has developed two theories of liability under Title VII, disparate treatment and disparate impact.<sup>139</sup> Disparate treatment looks at the employer's actual motives; disparate impact looks at the employer's practices. The Court has never explored in any systematic fashion whether its condemnation of the remediation of societal discrimination as an acceptable factual predicate is consistent with its ringing endorsement of the disparate impact theory. It has avoided this analysis by using the term "societal discrimination" without defining it. As noted earlier in discussing *Wygant*, the Court obviously equates the term with discrimination caused by an individual or an entity other than the employer. Such a definition, however, is far too simplistic to be useful. As one commentator has astutely pointed out,

"societal discrimination" is nothing more than an accumulation of wrongs on the part of governmental and private entities that cannot be identified with particularity at the present time. But their consequences are no less enduring because they cannot be so identified. The non-identifiable nature of the discrimination does not obviate the government's valid and substantial interest in redressing its consequences.<sup>140</sup>

In other words, the effects of thousands of acts of discrimination by both public and private entities have assumed a life of their own, the effects of which are still being felt by women and minorities today.

Viewed in this fashion, the relation between societal discrimination and the disparate impact theory is clear. Such racially neutral requirements as a high school diploma or a particular passing score on a pen-and-pencil test frequently impact minority-group members in a disparate manner because societal discrimination has ham-

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<sup>139</sup> See *supra* notes 14–17 and accompanying text.

<sup>140</sup> Sedler, *Beyond Bakke: The Constitution and Redressing the Social History of Racism*, 14 HARV. C.R.-C.L. L. REV. 133, 157 (1979).

pered their ability to compete. Ironically, Justice Powell, who so vigorously condemned the remediation of societal discrimination in *Wygant* and *Bakke* acknowledged this fact directly in *McDonnell Douglas Corporation v. Green*.<sup>141</sup> In referring to the seminal disparate impact decision he wrote: "*Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives."<sup>142</sup>

*Weber* and *Johnson* further illustrate the link between societal discrimination and the disparate impact theory. Initially, the Kaiser Company hired only skilled craft workers with five years experience. Because of the craft unions' overt discrimination, there were almost no qualified blacks for the Kaiser Company to hire. Although the race-conscious training program was jointly agreed to by the craft unions and the Kaiser Company, the evidence pointed solely to the unions' discriminatory conduct. Kaiser was remedying the unions' discrimination and, undoubtedly, the educational deficiencies caused by the state's segregated school system.

*Johnson* even more dramatically demonstrates the link between societal discrimination and disparate impact. Justice Brennan's majority opinion approved the plan's implementation based on general labor pool statistics. Yet it is hard to imagine that many of the women in the labor pool, which was made up of 36.4% female workers, were eager or even willing to take jobs involving the kinds of heavy and dirty manual labor the feeder positions to the road dispatcher's job required. Societal constructs were more responsible for the absence of women from these jobs than any conduct, intentional or unintentional, by the state transportation agency.

These observations concerning the link between societal discrimination and disparate impact, moreover, are indirectly reinforced by the previous analysis of the factual predicate issue under Title VII. As noted, *Johnson* emphasized the manifest imbalance prong of the *Weber* formula to such a degree that the "traditionally segregated job categories" prong has disappeared. *Johnson* contains no requirement that an employer look behind the statistics to determine whether it, the marketplace, the educational system or any other institution has caused the imbalance.

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<sup>141</sup> 411 U.S. 792 (1973).

<sup>142</sup> *Id.* at 806.

3. Does the Court's Different Treatment of Societal Discrimination Under the Equal Protection Clause and Title VII Make Sense?

As the foregoing analysis demonstrates, when the Court approves of a public employer's reliance upon statistics reflecting disparate impact and disapproves of the same employer's desire to remedy societal discrimination, it is behaving in a schizophrenic manner. Societal discrimination causes disparate impact and therefore, from standpoints of both logic and fairness, should be a permissible predicate for remediation as well. Justice Powell's concern that recognition of societal discrimination as an acceptable predicate would lead to plans that are "over expansive" can be satisfied by the requirement that the plans have a limited impact on innocent employees.<sup>143</sup>

Furthermore, the Court's condemnation of societal discrimination in equal protection clause cases makes little sense in light of the factual predicate analysis discussed earlier. As shown, at a minimum, there is a five-Justice consensus that evidence sufficient to satisfy *Hazelwood's* *prima facie* case standard will also satisfy *Wygant's* demand for "a strong basis in evidence." If impact resembling *Hazelwood's* establishes a *prima facie* case, a public sector employer is free to correct that impact without proof of its own culpability. Once again, remediation of societal discrimination is the underlying purpose of the plan, not remediation of a discriminatory practice specifically traceable to the employer.<sup>144</sup>

### III. A COURT DIVIDED

#### *Introduction*

As demonstrated by the preceding discussion of the issues surrounding the factual predicate needed by a public employer to

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<sup>143</sup> *Weber*, 443 U.S. at 208-09. Regardless of (1) whether the case involves court-ordered race/gender-conscious relief or a voluntary program with these features or (2) whether the case turns on the equal protection clause or Title VII, the Court always examines the impact of the challenged plan on "innocent employees," *i.e.*, non-minority employees who are in no way responsible for the employer's discriminatory conduct. In each case, it examines the same three questions it first considered in *Weber*: does the plan require the discharge of non-minority employees and their replacement by minority employees? Does the plan establish an absolute bar to the advancement of white employees or applicants? Is the plan designed to maintain racial balance or simply eliminate racial imbalance? *Id.* at 208-09. *Wygant* is the only case in which the Court has found an impact sufficiently draconian to void the plan. 106 S. Ct. at 1851-52.

<sup>144</sup> See *supra* notes 15-24 and accompanying text.

implement a race/gender-conscious plan and the remediation of societal discrimination as an acceptable predicate, the Court's affirmative action opinions betray a general institutional instability. Part III of this article examines the ideological splintering of the Court that has led to this problem. Before turning to this analysis, however, it is necessary to confront a threshold question: What is to be gained by analyzing the divisions on the Court? Is it not enough to simply examine the past and look to the future? Three considerations prompt a negative response. First, the analysis in Part II describes the impact of the Court's fractured jurisprudence on two critical issues: the employer-specific, factual predicate for race/gender-conscious plans and the remediation of societal discrimination as an acceptable factual predicate. It does not explain *why* the Court has failed to reach a consensus. Second, to say simply that the absence of a consensus is attributable to different and shifting judicial philosophies does a disservice to the Justices by merely labeling their jurisprudence, not exploring it. Third, this discussion will contribute to examinations of the jurisprudence of the Justices in the context of other issues, leading ultimately to a better understanding of each Justice's overall constitutional ethos.<sup>145</sup>

Essentially, there are two core groups of Justices, one "liberal" and one "conservative."<sup>146</sup> The liberal group has a slight numerical

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<sup>145</sup> Hopefully, this analysis will also assist practicing attorneys who litigate reverse discrimination cases. Because of the divisions on the Court, the lower courts will be particularly interested in learning how a challenged race/gender-conscious program corresponds to the views of the particular Justices.

<sup>146</sup> It is interesting to speculate how far and how deep this liberal/conservative division runs. In the 1986 Term, the Term the Court decided *Paradise* and *Johnson*, Justice Brennan and Chief Justice Rehnquist took opposite positions in 86 cases. The lineup of the other Justices is also illuminating. Justice Scalia voted with the Chief Justice in 84% of the cases; Justice White, 80%; and Justice O'Connor, 72%. Justice Marshall voted with Justice Brennan in 97% of the cases; Justice Blackmun, 70%; and Justice Stevens, 62%. Nat'l L.J., Aug. 17, 1987, at S-3, col. 1. See also *infra* note 159.

The considerable unanimity of the Court in other civil rights cases graphically illustrates the divisiveness of reverse discrimination cases handed down in the 1986 Term. In *St. Francis College v. Al-Khazraji*, 107 S. Ct. 2022 (1987) and *Shaare Tefila Congregation v. Cobb*, 107 S. Ct. 2019 (1987), the Court unanimously expanded the scope of section 1981 or 1982 coverage, holding that the statute protected "identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics." *St. Francis College*, 107 S. Ct. at 2028. In *City of Pleasant Grove v. United States*, 107 S. Ct. 794 (1987), the Court by a 6-3 vote held that a city's refusal to annex a black neighborhood violated section 5 of the 1965 Voting Rights Act. Justice White is the author of all three opinions. Finally, in *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 107 S. Ct. 1940 (1987), seven Justices, two Justices having recused themselves, rejected a first amendment challenge to a California public accommodations statute prohibiting gender discrimination.

edge over the conservative group, but neither can consistently command a majority of votes. Thus, both groups must carefully craft their opinions to win the support of the nonaligned Justices. The practical necessity of compromise leads to opinions whose controlling principles are expressed in the most general of terms. Furthermore, the hesitancy of the nonaligned Justices concerning even these general principles often leads them (1) to refuse to join the majority or plurality opinion altogether, simply joining in the judgment; (2) to join only parts of the majority or plurality opinion; and/or (3) to file separate concurring opinions expressing their disagreement with the majority or plurality opinion. Consequently, the principles expressed in these cases are often too vague to be useful and too qualified to be of weighty precedential value.

Although the terms "liberal" and "conservative" are often nothing more than labels substituting for analysis, their designation here has a precise meaning. Their content is determined by reference to the earliest race-conscious cases to reach the Court, *Bakke* and *Fullilove* under the equal protection clause and *Weber* under Title VII. "Liberal" describes the jurisprudence of those Justices who look to the "spirit" of Title VII which the *Weber* Court found so persuasive. When a state uses race to benefit minorities rather than to stigmatize them, "liberal" camp Justices strenuously argue in favor of applying the intermediate test rather than the strict scrutiny test under the equal protection clause. The core principles of their statutory and constitutional jurisprudence are animated by two overriding concerns: a firm desire to encourage employers to implement race/gender-conscious programs voluntarily, and a general solicitude for such programs because they bring long excluded groups into the economic mainstream.

"Conservative" describes the jurisprudence of those Justices who reject *Weber's* reliance on the "spirit" of Title VII and who argue that both the plain language of the statute and its legislative history flatly contradict the majority opinion. Despite *stare decisis*, the conservative Justices remain ready to overrule *Weber*. "Conservative" camp Justices insist that racial classifications, whether used to benefit or to stigmatize minority group members, are subject to the strict scrutiny test under the equal protection clause because of their inherently pernicious character. These core principles reflect an odd mixture of restraint and activism: restraint because these Justices insist upon a strict adherence to the literal language of Title VII's legislative history; activism because they reject *stare decisis* and so aggressively review the state's factual predicate and the structure

of the race/gender-conscious plan to determine its impact on non-minority employees and applicants.

Even in the context of these definitions, however, the terms "liberal" and "conservative" are nuanced. They are used here to provide an analytical framework — not to straightjacket the Justices and their decisions in this complex area.

The liberal camp is led by Justice Brennan with Justices Marshall, Blackmun, and Stevens being key players. Because the first three Justices generally vote as a bloc, they are considered together. The conservative camp is essentially a three-Justice bloc consisting of Chief Justice Rehnquist and Justices Scalia and White. Because Chief Justice Rehnquist and Justice Scalia share a common analytical approach, they are discussed as a unit. Justice White is analyzed separately along with Justice Stevens to illustrate how their evolving jurisprudence has contributed to the Court's doctrinal instability.

With the Court roughly divided concerning the core principles governing the statutory and constitutional antidiscrimination norms, the views of Justice Powell and Justice O'Connor became critical. They have been the Court's "free agents," voting with the liberal camp on some occasions and with the conservative camp on others. It remains to be seen whether Justice Kennedy will follow Justice Powell's lead in this respect or more closely align himself with the views of either camp.

#### A. *Justices Brennan, Marshall, and Blackmun: The Liberal Camp*

Baseball buffs remember with fondness "Tinker to Evers to Chance,"<sup>147</sup> a fabled combination of three players who never missed a double play. "Brennan to Marshall to Blackmun" is the fabled combination of the Court's liberal camp. In not one of the nine affirmative action cases have they voted to strike down the race or gender-conscious program under review.

##### 1. Title VII Cases

The first famous "throw" of the threesome is, of course, *Weber*. Faced with a statute that on its face invalidated the Kaiser program

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<sup>147</sup> "These are the saddest of possible words,/ 'Tinker to Evers to Chance./ Trio of bear cubs, and fleetier than birds,/ 'Tinker to Evers to Chance./ Ruthlessly pricking our gonfalon bubble./ Making a Giant hit into a double — Words that are weighty with nothing but trouble./ Tinker to Evers to Chance.'" F.P. ADAMS, *BASEBALL'S SAD LEXICON*, quoted in *Flood v. Kuhn*, 407 U.S. 258, 264 n.5 (1972).

and thousands of others just like it in both the public and private sector,<sup>148</sup> Justice Brennan in *Weber* rejected the statute's plain meaning in favor of its "spirit."<sup>149</sup> *Weber* is the catalyst for the two concerns just described as underlying the liberal camp's core principles. First, in enacting Title VII Congress's overriding goal was to integrate blacks into the mainstream of the American economy. Second, voluntary action by employers was central to achieving Congress's goal.<sup>150</sup>

There was some early disagreement among members of the liberal camp, however. Justice Blackmun favored a more rigorous "arguable violation" approach to the factual predicate issue instead of the majority opinion's "racial imbalance" approach. By joining Justice Brennan's opinion in *Johnson* without any reservation, Justice Blackmun appears to have abandoned the "arguable violation" part of his concurring opinion in *Weber*. His shift reinforces the liberal camp's support of principles encouraging voluntary compliance with Title VII's mandates.

How consistently the two concerns of economic integration and the promotion of voluntary plans appear in later cases is easily demonstrated.<sup>151</sup> For example, when confronted with language whose surface meaning appeared to limit race/gender-conscious relief to the actual victims of discrimination, the liberal camp in *City of Cleveland*, discussed earlier,<sup>152</sup> circumvented the language's narrowness by holding that section 706(g) was inapplicable to consent judgments. To reach this holding the *City of Cleveland* Court turned to the statute's legislative history, emphasizing Congress's decision to maximize voluntary efforts and to protect managerial prerogatives of employers and unions.<sup>153</sup> These same concerns also played a prominent part in Justice Brennan's majority opinion in *Johnson*. By deliberately leaving the "manifest imbalance" definition of *Weber* open-ended in *Johnson*, the liberal camp gave a great boost to affirmative action proponents who correctly read the opinion encouraging the adoption of voluntary plans by easing the employer's burden in compiling statistical data to support race/gender-conscious decisions. Furthermore, by relying upon general labor pool

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<sup>148</sup> See *supra* note 82.

<sup>149</sup> *Weber*, 443 U.S. 193, 201 (1979).

<sup>150</sup> *Id.* at 206-07.

<sup>151</sup> *Id.* at 202-08 (*passim*); accord *Johnson*, 107 S. Ct. at 1452-53, 1456-57; *Local 28*, 106 S. Ct. at 3035-36.

<sup>152</sup> See *supra* notes 50-52 and accompanying text.

<sup>153</sup> 106 S. Ct. at 3072-75.

statistics without asking the key question whether women had ever sought heavy, manual labor jobs in the first place, *Johnson* also opened the way for the fuller integration of women into the mainstream of the American economy.

## 2. Equal Protection Clause Cases

Both *Wygant* and *Paradise* illustrate that the core principles of the liberal camp have carried the day in equal protection clause cases as well as in Title VII cases. Even before *Wygant*, in *Bakke* and *Fullilove*, cases that did not involve employment-related decisions, a majority of the Justices supported the proposition that race-conscious decisions by the state or federal government did not violate the equal protection clause despite the absence of a specific judicial, legislative, or administrative finding of discrimination.<sup>154</sup> *Wygant* confirmed explicitly what *Bakke* and *Fullilove* had suggested implicitly. Eight Justices agreed that race-conscious relief could be appropriate to remedy prior discrimination even in the absence of a formal finding of discrimination. They also agreed that hiring goals were likely to withstand an equal protection challenge because the burden on non-minorities was diffuse. Finally, at a minimum, they agreed that under the equal protection clause, an employer could legitimately adopt a race/gender-conscious affirmative action program based on statistical disparities.<sup>155</sup>

Accordingly, the majority vote in *Wygant* can be viewed as fully consistent with the liberal camp's core principles. The opinion rejected only the plan's race-conscious layoff provision. Furthermore, a majority of the Court did not hold such relief always unconstitutional.

The *Paradise* decision also rested on core liberal camp principles. It extended to the fourteenth amendment the principle already established under Title VII in *Local 28* that a district court's remedial powers sweep extra broadly where the defendant's discriminatory conduct had been egregious and its attitude toward the court's enforcement powers overtly hostile. In allowing a one-for-

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<sup>154</sup> *Fullilove*, 448 U.S. at 473-76; *id.* at 502-03 (Powell, J., concurring); *id.* at 517-20 (Marshall, J., concurring in the judgment); *Bakke*, 438 U.S. at 363-69 (Brennan, J., concurring in the judgment in part and dissenting in part).

<sup>155</sup> Compare *Wygant*, 106 S. Ct. at 1847-49 (opinion of Powell, J., joined by Burger, C.J., and Rehnquist, J.) and *id.* at 1853-57 (O'Connor, J., concurring in part and concurring in the judgment) with *id.* at 1858-67 (Marshall, J., dissenting) and *id.* at 1867-71 (Stevens, J., dissenting).

one promotion quota that significantly exceeded the percentage of qualified minorities in the labor pool, *Paradise* actually went several steps beyond *Local 28*. Finally, it insisted upon a narrow reading of *Weber's* "impact" requirement in light of the fact that (1) no non-minority lost a job, in contrast to *Wygant*; (2) the minority beneficiaries of the quota were qualified; and (3) the promotion expectancies of non-minorities were only postponed, not extinguished.<sup>156</sup> In sum, the liberal camp, led by Justice Brennan, has been instrumental in shaping the Court's affirmative action jurisprudence.

Outstanding baseball players whose talents have dazzled fans, critics, and colleagues are usually rewarded by being elected into the Hall of Fame. If there were a Supreme Court Hall of Fame, Justice Brennan's election would be a foregone conclusion. An indefatigable leader of the liberal camp, he has repeatedly led a coalition of Justices in a string of victories, upholding the statutory and constitutional right of employers, unions, and courts to implement race/gender-conscious hiring and promotion plans. The liberal camp has not walked off with the game, however. Its victories have been hard fought. Although Justice Brennan could count on the votes of Justices Marshall and Blackmun, from the beginning, and the vote of Justice Stevens in the most recent cases, Justice Brennan always had to undertake the arduous task of persuading one or two of his more reluctant peers to join the liberal camp. His success rate has earned him the reputation of "the 'play-maker' of the Court, the consensus builder who somehow manages, in case after case, to get votes for very liberal opinions."<sup>157</sup>

Justice Brennan's own description of his consensus building techniques is revealing:

It really isn't very mysterious or complex, what we do. Just look at how we work in these chambers. We debate the issues, the merits, and when it comes time to write, we discuss the various possible approaches. We ask about some of the approaches. Will this be rejected by Lewis Powell or Harry Blackmun? Will Thurgood agree with this? Has John Stevens written any cases which may suggest how he is thinking and about which we should be aware? What does Sandra think? You try to get, in advance of circulation, a sense of what will sell, what the others

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<sup>156</sup> 107 S. Ct. at 1073.

<sup>157</sup> Leeds, *A Life on the Court: A Conversation with Justice Brennan*, N.Y. Times, Oct. 5, 1986, § 6 (Magazine), at 73, col. 2.

can accept. And you write it that way, and when it works out — and maybe you have suggestions that come in and perhaps you make substantial revisions — but when it works out and you have a Court, you are delighted.<sup>158</sup>

Justice Brennan's successful consensus building has a dark side, however. To keep the nonaligned Justices' votes he must often soft-peddle issues, speaking in the most general of terms. Such difficult, pressing questions as the difference between a "*prima facie*" standard and a "manifest imbalance" standard or when to apply the intermediate standard as opposed to the strict-scrutiny test, can be treated only in the subtlest of terms — terms so subtle that they offer little or no useful guidance to the lower courts, unions, employers, and employees. Although Justice Brennan cannot be personally faulted for these failures — after all, a consensus builder cannot exceed the limits of the consensus — the divisions among the majority/plurality Justices and the opinions' resulting ambiguities temper the liberal camp's victories, leaving them vulnerable to narrow interpretations in future cases.

Despite these serious shortcomings the high quality of Justice Brennan's leadership must be acknowledged. To join the Hall of Fame you do not have to strike out every hitter or bat 1000 percent. Justice Brennan's winning streak, though not perfect in every respect, is nevertheless a feat of no mean accomplishment.

#### B. Chief Justice Rehnquist and Justice Scalia: Securing the Conservative Camp's Core Principles.

Nicknamed the "Lone Dissenter" by Court observers and his clerks, who once presented him with a Lone Ranger doll, Chief Justice Rehnquist has doggedly led the conservative camp in each of the nine cases.<sup>159</sup> Unlike Justice Brennan, he does not have the

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<sup>158</sup> *Id.* at 73–75.

<sup>159</sup> Jenkins, *The Partisan: A Talk With Justice Rehnquist*, N.Y. Times, Mar. 3, 1985, § 6 (Magazine), at 33–34. It is interesting to speculate whether the frequency of his lone dissents and concurring opinions will decrease over the years following his appointment as Chief Justice. During the confirmation hearings, then Justice Rehnquist testified that even when he only differed slightly with the other Justices he would issue a separate opinion, feeling "it won't harm anyone." Acknowledging "it does muddy the message," he promised that as Chief Justice he would seek to curb the proliferation of opinions. N.Y. Times, July 31, 1986, at A14, col. 3–4. It is difficult to measure his success by *Paradise and Johnson*. Although they contain fewer separate opinions than the earlier cases, their jurisprudence remains mired. He was unable to mend the Court's divisions in his first year as Chief Justice. In the 1986 Term, the Court split 5 to 4 in 43 cases; in the 1985 Term the Court split 5 to 4 in 35 cases. Nat'l L.J., Aug. 17, 1987, at 5-3, col. 1.

advantage of a few loyal players who will vote with him as consistently as Justices Marshall and Blackmun have voted with Justice Brennan. For example, in *Fullilove*, Chief Justice Burger, his ally in *Weber*, abandoned the conservative camp, writing an opinion upholding the constitutionality of the ten percent set-aside. Justice Powell, whose opinion Chief Justice Rehnquist joined striking down the layoff provision in *Wygant*, voted to uphold the gender-conscious promotion plan in *Johnson*. Given the shifting and uncertain composition of the conservative camp, it is remarkable that Chief Justice Rehnquist has managed to contain liberal camp victories. The closeness of the voting in each case reflects the intellectual vigor, keen logic, and persuasive rhetoric that he brings to this highly complex area of the law.

### 1. Title VII Cases

Chief Justice Rehnquist's views on affirmative action set the tone for the conservative camp's Title VII jurisprudence:

There is perhaps no device more destructive to the notion of equality than the *numerus clausus* — the quota. Whether described as "benign discrimination" or "affirmative action," the racial quota is nonetheless a creator of castes, a two-edged sword that must demean one in order to prefer another.<sup>160</sup>

Despite the directness and vigor of this view, the opinions Justice Rehnquist wrote and those he joined are considerably more nuanced. In Title VII cases, for example, his opinions predominantly focus on the language of the particular provision under review and the intent of Congress as manifested in its legislative history. Even the most ardent supporters of affirmative action would acknowledge that his views have a strong legal basis, especially in the statute's 1964 legislative history.

According to the Chief Justice, the question posed in *Weber* was straightforward: what did Congress intend when it enacted the antidiscrimination language in sections 703(a) and (d) and 706(g)? His response rested on the plain, surface meaning of the provisions' language. Accordingly, he eschewed any recourse to the "spirit" of Title VII invoked by Justice Brennan's majority opinion to go beyond the statutes' language. In an exhaustive and excruciatingly

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<sup>160</sup> *Weber*, 443 U.S. at 254 (Rehnquist, J., dissenting).

detailed examination of the congressional debate surrounding the passage of Title VII, he pointed out the repeated occasions when supporters of Title VII assured opponents and skeptics that it would not tolerate any form of racial quota.<sup>161</sup>

Chief Justice Rehnquist's clash with the liberal camp over Congress's intent has never subsided. In *Local 28* and in *City of Cleveland*, he again insisted that the language Congress selected in drafting section 706(g) should dictate the outcome of the cases.<sup>162</sup> There is, however, one notable difference between his dissent in those cases and in *Weber*, a difference that reflects his power of intellectual discernment and candor. In *Weber*, he adamantly maintained that both the language of the statutory provisions and their legislative history reflected Congress's clear intent to prohibit race-conscious remedies. In *City of Cleveland*, he conceded that "the legislative history [of section 706(g)] may be fairly apportioned among both sides."<sup>163</sup> His willingness to make this concession reflects a mature judgment, one from which a pure ideologue might easily have been dissuaded.

Title VII quota cases in particular seem to stimulate Chief Justice Rehnquist's interest. In only one such case has he ever refrained from filing a separate opinion and joined in another Justice's opinion. The case in question is *Johnson*; the dissenting opinion was written by Justice Scalia. His deference to Justice Scalia is not surprising. Both the opinion's tone and its analysis of the merits of the promotion scheme are starkly reminiscent of Justice Rehnquist's *Weber* dissent.<sup>164</sup> Part II of the *Weber* dissent begins: "Were Congress to act today specifically to prohibit the type of racial discrimination suffered by Weber, it would be hard pressed to draft language better tailored to the task than that found in § 703(d) of Title VII . . . ."<sup>165</sup> The opening sentence of Justice Scalia's dissent reads: "With a clarity which, had it not proven so unavailing, one might well recommend as a model of statutory draftsmanship, Title VII of the Civil Rights Act of 1964 declares . . . ."<sup>166</sup> Immediately

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<sup>161</sup> *Id.* at 226-55.

<sup>162</sup> *City of Cleveland*, 106 S. Ct. at 3085-87 (Rehnquist, J., dissenting); *Local 28*, 106 S. Ct. at 3082 (Rehnquist, J., dissenting).

<sup>163</sup> 106 S. Ct. at 3087 (Rehnquist, J., dissenting).

<sup>164</sup> In addition to sharing a common conservative philosophy, Chief Justice Rehnquist and Justice Scalia have similar writing styles. Both delight in aphorisms and metaphor; their opinions radiate intellectual vigor and intensity and are aggressive and witty in tone; their dissents are sharp and biting.

<sup>165</sup> 443 U.S. at 226 (Rehnquist, J., dissenting).

<sup>166</sup> 107 S. Ct. at 1465 (Scalia, J., dissenting).

following these excerpts, both opinions quote section 703 of Title VII. The rhetoric of Justice Scalia's dissent is acerbic, matching *Weber's*. Its logic rests on the Court's antecedent decisions in *Local 28* and *City of Cleveland*, claiming in effect that *Johnson* shunted them aside, just as Chief Justice Rehnquist claimed *Weber* shunted aside Congress's intent.

Justice Scalia's dissent, however, reaches beyond the question of statutory interpretation to a larger issue: if *Weber* was incorrectly decided, should the Court nonetheless respect the principle of *stare decisis*? Because he joined Justice Scalia's dissent, without reservation, presumably Chief Justice Rehnquist also answers that question in the negative.<sup>167</sup> It is noteworthy that in urging the abandonment of *Weber*, Justice Scalia turned to two arguments, the first of which held the Chief Justice's interest in *Weber*: the fiction that employers adopt affirmative action plans "voluntarily," rather than under the threat of adverse government action or in response to the demands of organized groups for economic benefit for their constituencies.<sup>168</sup> The second argument is one that Justice Scalia has advanced for some time, namely, that race/gender-conscious plans cause an employer to dilute the quality of its work force because it will select a minimally qualified member of the underrepresented race or gender over a better qualified applicant who does not share the desired characteristics.<sup>169</sup>

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<sup>167</sup> *Id.* at 1473-74 (Scalia, J., dissenting).

<sup>168</sup> Compare *id.* at 1474 (Scalia, J., dissenting) with *Weber*, 443 U.S. at 246 (Rehnquist, J., dissenting).

<sup>169</sup> 107 S. Ct. at 1474-75 (Scalia, J. dissenting); Scalia, *The Disease as Cure: "In order to get beyond racism, we must first take account of race."*, 1979 WASH. U.L.Q. 147. In that law review article, which received much prominence during his confirmation hearings, Justice Scalia wrote:

Unfortunately, the world of employment applicants does not divide itself merely into "qualified" and "unqualified" individuals. There is a whole range of ability — from unqualified, through minimally qualified, qualified, well-qualified, to outstanding. If I can't get Leontyne Price to sing a concert I have scheduled, I may have to settle for Erma Glatt. La Glatt has a pretty good voice, but not as good as Price. Is she unqualified? Not really — she has sung other concerts with modest success. But she is just not as good as Price. Any system that coerces me to hire her in preference to Price, because of her race, degrades the quality of my product and discriminates on racial grounds against Price. And it is no answer to either of these charges that Glatt is "qualified." To seek to assuage either the employer's demand for quality or the disfavored applicant's demand for equal treatment by saying there is no need to hire any unqualified individuals is a sort of intellectual shell game, which diverts attention from the major issue by firmly responding to a minor one.

*Id.*

It is difficult and often foolhardy to make predictions about the career of a player after he has been in the major leagues for only a year. The same is true of a Supreme Court Justice, especially if he has written only one opinion in the area. Yet Justice Scalia's opinion in *Johnson*, supported by his earlier writings,<sup>170</sup> leads to the inescapable conclusion that he accepts without hesitation the core principles of the conservative camp. Under these circumstances, it is readily apparent why Chief Justice Rehnquist assigned him the task of writing the dissent in *Johnson*.

## 2. Equal Protection Clause Cases

In equal protection clause cases, unlike Title VII cases, Chief Justice Rehnquist generally does not write a separate opinion. In *Fullilove*, he joined Justice Stewart's dissenting opinion, and in *Wygant*, he joined Justice Powell's plurality opinion. Dominating those opinions are two inquiries: for what purpose was the race-conscious relief designed, and how narrowly was the relief crafted?

Justice Stewart's strident dissent in *Fullilove* literally interpreted the first Justice Harlan's call in *Plessy*<sup>171</sup> for a color-blind Constitution.<sup>172</sup> Justice Stewart's dissent insisted upon the application of the strict scrutiny test and would have invalidated the ten percent set-aside program. Central to the dissenters' position was the absence of any congressional finding of discrimination in the awarding of contracts. Significantly, the dissent did not say that Congress or the courts could never consider race in fashioning an equitable remedy. Indeed, it said just the opposite, citing both prior decisions in employment discrimination cases under Title VII and school desegregation cases under the equal protection clause.<sup>173</sup> The dissent did caution, however, that even if Congress had designed the set-aside provision to remedy past discrimination, a strict scrutiny analysis would still result in the statute's invalidation: although satisfying

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<sup>170</sup> 107 S. Ct. at 1465-76 (Scalia, J., dissenting); accord Scalia, *supra* note 169.

<sup>171</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>172</sup> *Fullilove*, 448 U.S. at 523 (Stewart, J., dissenting).

<sup>173</sup> 448 U.S. at 525 n.4 (Stewart, J., dissenting). Justice Stewart observed:

A court of equity may, of course, take race into account in devising a remedial decree to undo a violation of a law prohibiting discrimination on the basis of race. But such a judicial decree, following litigation in which a violation of law has been determined, is wholly different from generalized legislation that awards benefits and imposes detriments dependent upon the race of the recipients.

*Id.* at 525 n.4 (Stewart, J., dissenting) (citations omitted).

the test's first prong, a compelling governmental interest, it would fail the second prong because the means selected, the across-the-board ten percent set-aside for six racial groups, was "not carefully tailored to fit the nature and extent of the violation."<sup>174</sup>

Because Justice Powell's plurality opinion in *Wygant* borrowed heavily from Justice Stewart's dissent in *Fullilove*, it is not surprising that Chief Justice Rehnquist joined it as well. Opting for a strict scrutiny standard, Justice Powell's opinion too examined, first, the governmental goal and, second, the means. The layoff provision failed both prongs. Because a majority of the Justices declined to remand the case to permit the school district to show that it adopted the lay off provision to remedy past discriminatory conduct, the plurality opinion had to address the issue of whether remedying societal discrimination was a compelling purpose. As noted earlier, Justice Powell's answer, and presumably Justice Rehnquist's too, was a resounding "No."<sup>175</sup> Before such a race-conscious remedy could be implemented, an employer had to possess "a strong basis in evidence" to justify the conclusion that there had been prior discrimination.<sup>176</sup> Other than to endorse *Hazelwood*, the plurality opinion, however, shed no light on what constituted "a strong basis."

Justice Powell's plurality opinion also applied the "means" prong of the strict scrutiny test to the lay-off mechanism itself. As discussed earlier, according to Justice Powell, the plan's impact on innocent third parties, the white teachers with greater seniority, was too great to satisfy the equal protection clause's demand for narrowly-tailored, race-conscious relief.<sup>177</sup>

In the end, what is most remarkable about the conservative camp's performance is that, without constant support from the same set of colleagues, Chief Justice Rehnquist has managed to keep the games' scores so close. Although the liberal camp has outplayed the conservative camp, it has had to fight vigorously every step of the way. Justice Scalia's appointment to the Supreme Court adds a strong, steady hitter to the Chief Justice's line up.<sup>178</sup> On occasion,

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<sup>174</sup> *Id.* at 530 n.12.

<sup>175</sup> 106 S. Ct. at 1848.

<sup>176</sup> *Id.*

<sup>177</sup> See *infra* notes 220-21 and accompanying text.

<sup>178</sup> It is unrealistic to expect that Justice Scalia and Chief Justice Rehnquist will always agree in employment discrimination cases. For example, in *Meritor Savings Bank v. Vinson*, writing for a unanimous Court, Chief Justice Rehnquist concluded that Title VII's prohibition against sex discrimination encompassed sexual harassment. 106 S. Ct. 2399 (1986). Justice Scalia, then a member of the District of Columbia Court of Appeals, had espoused precisely the opposite conclusion in the very same case, joining an opinion by Judge Bork. *Vinson v.*

Justice Kennedy may join these two players in the conservative camp dugout.<sup>179</sup> No longer the Lone Dissenter, Chief Justice Rehnquist may very well lead the conservative camp on to an impressive winning streak — maybe in the end even closing down the affirmative action ballpark.

### C. *Justice White and Justice Stevens*

The voting strength of the two core groups of Justices has remained fairly constant due to an almost equal number of players — three certain votes being cast by Justices Brennan, Marshall and Blackmun in favor of race/gender-conscious plans and two certain votes against such plans being cast by either Justices Rehnquist and Stewart or Chief Justice Rehnquist and Justice Scalia. Essentially, the jurisprudence of the two groups has been static, with each Justice voting in accordance with the core principles reflecting his or her views. In contrast, the jurisprudence of Justices White and Stevens has been dynamic, evolving with each case. The evolution of their views has contributed to the Court's overall jurisprudential instability, a problem well illustrated by the number of separate opinions they have each filed, especially in the more recent cases.

#### I. Justice White: An Unexplained Journey from the Liberal Camp to the Conservative Camp and the Possibility of Return

Initially, Justice White was a silent member of the liberal camp. In *Weber*, he joined Justice Brennan's majority opinion.<sup>180</sup> In *Bakke*, again following Justice Brennan's lead, he voted to adopt the intermediate standard of review and rejected the equal protection challenge to the medical school's special admissions program.<sup>181</sup> The first suggestion of any misgivings appeared in *Fullilove*. Without explanation, he joined Chief Justice Burger's opinion, which specifically declined to adopt the strict scrutiny or intermediate standard, expressing the belief that the "MBE provision would survive judicial review under either 'test' . . . ."<sup>182</sup> Of course, this left only

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Taylor, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Bork, J., dissenting from the denial of a *reh'g en banc*).

<sup>179</sup> See *infra* notes 257–60 and accompanying text.

<sup>180</sup> 443 U.S. at 195.

<sup>181</sup> 438 U.S. at 355–62.

<sup>182</sup> 448 U.S. at 492. Professor Choper has speculated that Justice White joined Chief Justice Burger's opinion as a matter of politics "to lend sufficient numerical strength to the Burger opinion so as to allow the Chief Justice to announce the judgment of the Court."

Justices Brennan, Blackmun, and Marshall expressly supporting application of the intermediate standard to programs benefitting underrepresented groups.

The evolution of Justice White's jurisprudence became more pronounced in *Firefighters Local Union Number 1784 v. Stotts*.<sup>183</sup> In that case, the district court, over the objection of the defendant city, modified the city's layoff procedures in order to preserve gains in minority employment. The gains resulted from an affirmative action plan adopted by the city as part of a consent judgment settling a Title VII action filed by minority firefighters.<sup>184</sup> The opinion, however, included very pointed dicta limiting Title VII relief to actual, identified victims of discrimination. Undoubtedly, the dicta did not slip by unnoticed; nor was this language's inclusion inadvertent. To begin with, the dicta stretched over five pages.<sup>185</sup> Furthermore, Justice O'Connor reaffirmed its correctness in her concurring opinion.<sup>186</sup> Finally, Justices Stevens and Blackmun attacked the dicta vigorously in their respective concurring and dissenting opinions.<sup>187</sup> That dicta triggered a wave of intense apprehension among affirmative action proponents because it undercut the legitimacy of tens of thousands of race/gender-conscious plans in the public and private sector. It also spurred the Reagan Administration to a controversial attempt to reopen fifty settlements to which the United States had been a party for the purpose of exorcising such relief.<sup>188</sup>

Since *Stotts*, Justice White has consistently voted against race/gender-conscious plans in each of the five cases to come before the Court.<sup>189</sup> Regrettably, his subsequent opinions shed little light on

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Choper, *The Constitutionality of Affirmative Action: Views from the Supreme Court*, 70 Ky. L.J. 1, 5-6 n.30 (1981).

<sup>183</sup> 467 U.S. 561 (1984).

<sup>184</sup> *Id.* at 565-68.

<sup>185</sup> 467 U.S. at 578-83.

<sup>186</sup> *Id.* at 587-89 (O'Connor, J., concurring).

<sup>187</sup> *Id.* at 590-92 (Stevens, J., concurring); *id.* at 611-20 (Blackmun, J., dissenting).

<sup>188</sup> N.Y. Times, Aug. 13, 1986, at B8, col. 1.

<sup>189</sup> *Johnson*, 107 S. Ct. 1465 (White, J., dissenting); *Paradise* 107 S. Ct. at 1080 (White, J., dissenting); *City of Cleveland*, 106 S. Ct. at 3081-82 (White, J., dissenting); *Local 28*, 106 S. Ct. at 3062-63 (White, J., dissenting); *Wygant*, 106 S. Ct. at 1857-58 (White, J., concurring in the judgment). Justice White's jurisprudence has always displayed a conservative bent. For example, he dissented along with Justice Rehnquist in *Roe v. Wade*, 410 U.S. 113, 221-23 (1973) (White, J., dissenting). In the *Roe* dissent, Justice White wrote:

[a]s an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to

the reasons prompting his new allegiance. His refusal to adopt either camp's core principals significantly contributes to the Court's institutional instability.

Two cases in particular demonstrate the absence of elaboration that characterizes Justice White's opinions. In *Wygant*, he filed a one-paragraph opinion concurring in the judgment. It stated only that laying off white teachers to retain black teachers violated the equal protection clause.<sup>190</sup> No cases were cited; nor was any explanation given why the dissent was incorrect or why he declined to join the plurality opinion. Similarly, in his dissenting opinion in *Paradise*, he was content to state: "Agreeing with much of what Justice O'CONNOR has written in this case, I find it evident that the District Court exceeded its equitable powers in devising a remedy in this case. I therefore dissent from the judgment of affirmance."<sup>191</sup> Again, he failed to identify with any degree of particularity with which parts of the dissent he agreed and disagreed. Justice White left unanswered several questions. What made the remedy "excessive?" Was it because the one-for-one ratio exceeded the percentage of minority troopers in the entry level positions as Justice O'Connor suggested? What percentage would have been appropriate?

The closest Justice White came to an articulation of principle was in *City of Cleveland*.<sup>192</sup> That he chose to write in this case is not surprising because the majority used *City of Cleveland* and its companion case, *Local 28*, to cut back on the dicta in his *Stotts* opinion, limiting Title VII relief to actual victims. Although he retreated from his blanket disavowal of non-victim relief in *Stotts* without elaboration, Justice White did explain why he believed the consent judgment was invalid. He characterized the promotion plan as a

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this Court . . . . In a sensitive area such as this, involving as it does issues over which reasonable men may easily and heatedly differ, I cannot accept the Court's exercise of its clear power of choice by interposing a constitutional barrier to state efforts to protect human life and by investing mothers and doctors with the constitutionally protected right to exterminate it. This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs.

*Id.* at 222. Justices Rehnquist and White have not abandoned their position on the abortion issue. *Thornburgh v. American College of Obstetricians & Gynecologists*, 106 S. Ct. 2169, 2192 (1986) (White, J., dissenting). Additionally, Justice White authored the majority opinion in *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986), refusing to extend the constitutional right of privacy to homosexual conduct between consenting adults.

<sup>190</sup> 106 S. Ct. at 1857-58 (White, J., concurring in the judgment).

<sup>191</sup> 107 S. Ct. at 1080 (White, J., dissenting).

<sup>192</sup> 106 S. Ct. at 3082 (White, J., dissenting).

"kind of [racial] leapfrogging," denying senior white firefighters promotions in favor of minorities.<sup>193</sup> Three facts seemed to rankle his sensibilities: the promoted black employees were not victims of discrimination; the white employees were not responsible for any discriminatory practices; and the white employees were better qualified.<sup>194</sup>

In the end, his focus on these three facts, along with his opinions in *Stotts* and *Johnson*,<sup>195</sup> may provide the most insight into Justice White's jurisprudence. As more cases have come before the Court, his attention has turned from class relief, which was at the core of *Bakke*, *Weber*, and *Fullilove*, to the impact of that relief on the non-minority employees and applicants. Underlying his opinions and votes is an intensification of concern for those individuals whose promotion expectations have been diminished because of their race.

Despite Justice White's concern for non-minority employees and applicants, he does not necessarily condemn all race/gender-conscious programs. For example, he disagreed with *Johnson's* gloss on *Weber's* "manifest imbalance" test not necessarily the original formulation of the "manifest imbalance" test.<sup>196</sup> He admitted that non-victim relief may be permitted under limited circumstances and has never formally endorsed the strict scrutiny test.<sup>197</sup> In sum, Justice White remains less ideologically opposed to race/gender-conscious criteria than his recent voting pattern implies and may yet join future liberal camp opinions, particularly if the race/gender plan has minimal impact on current employees.

## 2. Justice Stevens's Evolving Jurisprudence

Unlike Justice White, Justice Stevens, especially in the most recent cases, is quick to justify his vote directly and willing to explain at length why, how, and to what degree his thoughts have changed. Justice Stevens's candor is particularly welcome because of the nature of the criticism he directed to Congress in *Fullilove* and because of his continuing belief that *Weber* was wrongly decided.<sup>198</sup>

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<sup>193</sup> *Id.*

<sup>194</sup> *Id.* This last assertion is highly dubious.

<sup>195</sup> 107 S. Ct. at 1465 (White, J., dissenting).

<sup>196</sup> *Id.*

<sup>197</sup> See *supra* notes 35-41 and accompanying text.

<sup>198</sup> Justice Stevens's views on the statutory and constitutional issues raised in the earliest cases involving race-conscious plans are shrouded. In *Bakke*, he avoided the constitutional issue by finding a dispositive statutory issue. 438 U.S. at 408-21 (Stevens, J., concurring in the judgment in part and dissenting in part). He did not take part in *Weber*.

## a. Justice Stevens and the Equal Protection Clause

Justice Stevens's constitutional jurisprudence concerning race/gender-conscious programs contains a strong strain of the maverick. His independent thinking first manifested itself in *Fullilove*. His dissent in that case was idiosyncratic, both in tone and on the merits. The tone was one of controlled anger. He labeled the set-aside program "a somewhat perverse form of reparation," "a slapdash statute,"<sup>199</sup> and suggested that Congress look to the laws of Nazi Germany as "precedents" for defining racial characteristics.<sup>200</sup> On the merits, his quarrel with Congress was four-fold: Congress failed to explain why each of the six racial groups was entitled to share equally in the set-aside; the set-aside would inevitably lead to a permanent distribution of benefits along racial lines; it was over-inclusive because it benefitted firms not suffering from the present effects of discrimination; and it was the product of an inattentive Congress.<sup>201</sup> Despite his stridency, Justice Stevens did not take as firm an anti-affirmative action stand as the other dissenters in *Fullilove*. On at least three occasions, he stated that he was not closing the door on race-conscious relief permanently, but rather merely rejecting it in this case.<sup>202</sup> His later opinions, of course, endorsed such relief.

*Wygant* also reflects the maverick in Justice Stevens's jurisprudence. Two features of his dissenting opinion particularly stand out. The first is his formulation of the appropriate standard of review. The second is his apparent acceptance of remediation of societal discrimination and the provision of role-models for minority school children as acceptable predicates for race/gender-conscious plans.

For a number of years, Justice Stevens has criticized the Court's formulation of the traditional standards of review, maintaining "what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion."<sup>203</sup> He would replace the traditional standards of

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<sup>199</sup> 448 U.S. at 538-39 (Stevens, J., dissenting).

<sup>200</sup> *Id.* at 534 (Stevens, J., dissenting).

<sup>201</sup> *Id.* at 537-39, 549-50, 554 (Stevens, J., dissenting).

<sup>202</sup> *Id.* at 537-45 (*passim*), 548, 553 (Stevens, J., dissenting).

<sup>203</sup> *Craig v. Boren*, 429 U.S. 190, 212 (1976) (Stevens, J., concurring); *accord City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 452 (1985) (Stevens, J., concurring);

review with a rational basis test consisting of four questions: "What class is harmed by the legislation, and has it been subjected to a 'tradition of disfavor' by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment?"<sup>204</sup> He applied this personal test in *Wygant*. Thus, his dissenting opinion addressed the question whether the public interest "in educating children for the future . . . and the manner in which it is pursued, justif[y] any adverse effects on the disadvantaged group."<sup>205</sup> He concluded that the Board's pedagogical drive for "multi-ethnic representation on the teaching faculty" had constituted "a rational and unquestionably legitimate basis"<sup>206</sup> for the layoff provision. Not even Justices Brennan, Marshall, or Blackmun have ever argued in favor of a rational basis test for race/gender-conscious decisions.

In analyzing the second prong of *his* test, the effects of an affirmative action plan on the disadvantaged group, Justice Stevens looked first to the procedures used to adopt the program, and second, to the harm inflicted. His concern with process here echoes his dissenting opinion in *Fullilove*, but the result is very different. The participation of the disadvantaged group members in the decision to implement the race-conscious layoff provision greatly influenced him in *Wygant*.<sup>207</sup> Since Justice Stevens regarded the collective-bargaining process as scrupulously fair, he concluded that the layoff provision was "narrowly circumscribed."<sup>208</sup> With respect to the harm inflicted, he could find no stigma, no lack of respect for the white race, and no blind habit and stereotype, because the lay-offs resulted from unfortunate economic conditions and the need to preserve an integrated faculty.<sup>209</sup>

Justice Stevens also approached *Paradise* from a unique perspective. Emphasizing that the Court was reviewing a district court *order* based on a finding of discrimination, he took a sweeping view of the district court's remedial powers, relying on the Court's school

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United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 180-81 (1980) (Stevens, J., concurring in judgment). See generally Note, *Justice Stevens' Equal Protection Jurisprudence*, 100 HARV. L. REV. 1146 (1987). Justice Marshall is similarly troubled by the Court's tiered formula. Note, *Justice Marshall and Equal Protection Review: A Spectrum of Standards?*, 64 WASH. U.L.Q. 1251 (1986).

<sup>204</sup> *Cleburne*, 473 U.S. 432, 453 (1985) (Stevens, J., concurring) (footnotes omitted).

<sup>205</sup> 106 S. Ct. at 1867 (Stevens, J., dissenting) (footnotes omitted).

<sup>206</sup> *Id.* at 1868.

<sup>207</sup> *Id.* at 1870.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

desegregation cases. He rejected "calculations of hardship" suffered by white employees, focusing entirely on the defendant's egregious violations of the equal protection clause.<sup>210</sup> Because cases involving deliberate flouting of the law argue for broad and flexible powers, he similarly rejected the second prong of the strict scrutiny standard and apparently substituted in its place a test of reasonableness.<sup>211</sup>

Justice Stevens's opinions in *Wygant* and *Paradise* seem entirely consistent with the core principles of the liberal camp Justices. Although he did not take the identical jurisprudential path they did, he ultimately voted for the same result. His opinions further resemble those of the liberal camp Justices because they too have the effect of encouraging the voluntary adoption of race/gender-conscious programs by employers and the ordering of such relief by the district courts following a trial on the merits.

It would be a mistake, however, to assume Justice Stevens's complete subscription to the core principles of the liberal camp. Even in *Wygant* he made it quite clear that he was not abandoning his position in *Fullilove*. Justice Stevens applauded the Jackson School District's layoff plan "in striking contrast to the procedural inadequacy and unjustified breadth of the race-based classification in *Fullilove v. Klutznick* . . . ."<sup>212</sup> That he specifically included this language suggests the possibility of an institutional instability in future cases much greater than a mere tallying of his recent votes might suggest. Many public and private sector employers have been quite casual in benefitting virtually all minority group members in their race-conscious plans.<sup>213</sup> Especially in light of his already eclec-

<sup>210</sup> 107 S. Ct. at 1079 n.4 and *id.* at 1078 n.2 (Stevens, J., concurring in the judgment).

<sup>211</sup> *Id.* at 1078.

<sup>212</sup> 106 S. Ct. at 1870 (Stevens, J., dissenting).

<sup>213</sup> In his *Fullilove* dissent Justice Stevens commented:

Indeed, the broad racial classification in this Act is totally unexplained. Although the legislative history discussed by THE CHIEF JUSTICE and by MR. JUSTICE POWELL explains why Negro citizens are included within the preferred class, there is absolutely no discussion of why Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts were also included.

448 U.S. at 550 n.25 (Stevens, J., dissenting). For a spirited defense of Congress's selection of these groups, see Duncan, *The Future of Affirmative Action: A Jurisprudential/Legal Critique*, 17 HARV. C.R.-C.L. L. REV. 503, 546-47 (1982). The Alabama Supreme Court struck down a Birmingham ordinance modeled on the federal statute because the municipality offered no proof that any group other than Blacks were entitled to remedial relief. *Arrington v. Associated Gen. Contractors*, 403 So. 2d 893, 903 (Ala. 1981).

The question concerning which minorities should benefit from race-conscious programs remains unanswered. For example, the MBE provision in *Fullilove* included all Spanish-speaking citizens. 448 U.S. at 459. The minority set-aside in *Bakke* limited its preference to "Chicanos" (*i.e.*, Mexican Americans); all other Hispanics were ineligible. 438 U.S. at 274-

tic jurisprudence, Justice Stevens's reference to the "unjustified breadth" of the *Fullilove* plan may foreshadow a negative vote in future affirmative action cases.

b. Justice Stevens and Title VII

What has just been said about Justice Stevens's nonconformist approach to the equal protection clause can equally be said of his Title VII jurisprudence. As noted earlier, Justice Stevens did not participate in *Weber*. In *Local 28*, he joined Justice Brennan's majority opinion, but did not write separately. In *Stotts*, he distanced himself from the liberal camp Justices by refusing to join Justice Blackmun's dissent, which by implication approved race-conscious layoffs under certain circumstances. Although Justice Stevens actually voted with a coalition of conservative camp Justices to reverse the district court's injunction ordering race-conscious layoffs to preserve minority hiring, he also distanced himself from the conservative camp Justices by refusing to join Justice White's majority opinion. He filed an opinion concurring in the judgment. That opinion focused on a narrow, non-Title VII issue, the district court's improper issuance of a preliminary injunction.<sup>214</sup>

Justice Stevens's concurring opinion in *Johnson* also reflects the uncertain dynamic of his jurisprudence. The opinion is an odd mixture of restraint and activism. On the one hand, he acknowledged his belief that *Weber* was wrongly decided.<sup>215</sup> On the other hand, believing himself bound by *stare decisis*, he went far beyond *Weber* (and *Bakke*) by maintaining that an employer is free to adopt a race/gender-conscious affirmative action plan for just about any reason at all. While Justices Brennan and O'Connor debate the quantum of proof an employer needs before implementing such a program, Justice Stevens would do away with the requirement altogether! Urging the Court to adopt a sweeping interpretation of *Weber*, he argued:

I see no reason why the employer has any duty, prior to granting a preference to a qualified minority employee, to determine whether his past conduct might constitute

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76. The layoff provision in *Wygant* applied to "employees . . . of Spanish descendency." 106 S. Ct. at 1845 n.2. In other words, if A, a citizen of Irish descent and B, a citizen of Puerto Rican descent, were the parents of C, who never learned to speak Spanish, C would qualify only for the *Wygant* preference.

<sup>214</sup> 467 U.S. at 590-92.

<sup>215</sup> 107 S. Ct. at 1458-59 (Stevens, J., concurring).

an arguable violation of Title VII. Indeed, in some instances the employer may find it more helpful to focus on the future. Instead of retroactively scrutinizing his own or society's possible exclusions of minorities in the past to determine the outer limits of a valid affirmative-action program — or indeed, any particular affirmative-action decision — in many cases the employer will find it more appropriate to consider other legitimate reasons to give preferences to members of under-represented groups.<sup>216</sup>

Even more surprising than his dismissal of the factual predicate requirement are the reasons Justice Stevens suggests to justify an employer's decision: to provide better services to black citizens, to prevent racial tension, to enhance diversity, or to eliminate a system of racial caste.<sup>217</sup> It is hard to imagine that these suggestions come from the same Justice who decried the distribution of benefits along racial lines in *Fullilove*.<sup>218</sup>

After *Johnson*, there is strong temptation in analyzing Justice Stevens's Title VII jurisprudence to rank him with Justices Brennan, Marshall, and Blackmun in the liberal camp. Certainly, the principles enunciated in *Johnson* are congruent with the core principles of the liberal camp Justices. His arguments even extend beyond the parameters of liberal camp opinions by acknowledging a virtually unchecked discretion in public and private sector employers concerning the motives that prompt their adoption of race/gender-conscious programs.

Temptations are meant to be resisted, however, and this one should be no different. The troubling fact remains that even in *Johnson*, Justice Stevens expressed the belief that *Weber* was wrongly decided. Although Justice Stevens represented that he would continue "to adhere to an authoritative construction of the Act that is at odds with my understanding of the actual intent of the authors of the legislation,"<sup>219</sup> the certainty of that outcome is not wholly free from doubt. If presented with a powerful enough case in which a public employer acted with the same "procedural inadequacy and unjustified breadth of the race-based classification" as Congress acted in *Fullilove*, Justice Stevens might well reconsider and withdraw his support for *Weber*. Although his opinion in *Johnson* suggests

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<sup>216</sup> *Id.* at 1460 (Stevens, J., concurring).

<sup>217</sup> *Id.*

<sup>218</sup> 448 U.S. at 539 (Stevens, J., dissenting).

<sup>219</sup> 107 S. Ct. at 1459 (Stevens, J., concurring).

that this is not a likely occurrence, it cannot be ruled out entirely given the maverick character of Justice Stevens's overall affirmative action jurisprudence.

*D. Justice Powell and Justice O'Connor: The Court's Free Agents*

As the case analysis contained in Part II demonstrates, Justice Powell and Justice O'Connor share a highly nuanced jurisprudence of affirmative action, which escapes the "liberal/conservative" designation. Their irregular voting patterns, coupled with their practice of writing concurring opinions to supplement majority or plurality opinions, has incontrovertibly contributed to the Court's institutional instability. The uncertainty with which they approach race/gender-conscious relief is not a sign of intellectual skittishness, however. It is quite the opposite. They are more willing than other members of the Court to grapple with the legal and moral ambivalence surrounding this issue. Their opinions are an acknowledgment of an ongoing struggle.

Although these Justices share an absence of firm allegiance to either the liberal or conservative framework, it would be a mistake to assume that their concerns are identical. For Justice Powell, the overriding questions have always been why was the race/gender-conscious program adopted and what is its impact on the affected non-minority applicant or employee who is competing for the job or promotion? Although not insensitive to these concerns, Justice O'Connor has addressed two very different issues: harmonization of the strict scrutiny and intermediate tests and the character of the evidence needed by a public employer as a factual predicate before implementing a race/gender-conscious affirmative action program.

1. Justice Powell and the Protection of Non-Minority Interests: A "Moderate" Contribution

Justice Powell's opinions in *Bakke* and *Wygant* make clear, as noted earlier, that an employer's desire to correct societal discrimination will never pass constitutional muster. Correcting societal discrimination with its subsidiary goal of providing role models is simply "too amorphous . . . insufficient and over expansive."<sup>220</sup> According to Justice Powell, an employer may act *only* to correct its own discrimination. A formal finding of discrimination is not nec-

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<sup>220</sup> *Wygant*, 106 S. Ct. at 1848 (opinion of Powell, J.).

essary, however. "[S]ome showing of prior discrimination" will suffice.<sup>221</sup>

Even if the factual predicate is sufficient, Justice Powell's vote is not guaranteed. The second question, directed to impact, must also be satisfactorily answered. Central to Justice Powell's jurisprudence is the view that, although coworkers and competing applicants may be asked to share the burden of affirmative action, their interests may not be entirely extinguished. The difference between "sharing" and "extinction" is more than a verbal sleight-of-hand and explains why he voted to strike down the plans in *Bakke* and *Wygant* and to uphold the plans in *Fullilove*, *Local 28*, and *Paradise*.

In *Bakke*, the medical school set aside sixteen of the one hundred seats exclusively for minority applicants. In *Wygant*, the school district automatically laid off more experienced white teachers while retaining minority teachers with less seniority. No matter how good a white teacher might be, that individual was subject to layoff in order to maintain racial parity.<sup>222</sup> In each case, the burden of the affirmative action plan completely extinguished any interest of competing non-minority members. In Justice Powell's jurisprudence, that impact was simply too draconian.

In contrast, in *Fullilove*, vast sums of money remained available in both the public and private sectors for non-minority construction firms.<sup>223</sup> In *Local 28* and *Paradise*, no non-minority applicants or employees were completely excluded from apprenticeship or promotion opportunities.<sup>224</sup> Thus, from Justice Powell's perspective, the non-minority group members in these cases were "sharing" the burden, not bearing its brunt.

A less obvious thread connecting his views in these cases concerns the culpability of the defendant. Neither *Bakke* nor *Wygant* involved a finding or admission of prior discrimination.<sup>225</sup> On the other hand, in *Local 28*<sup>226</sup> and *Paradise*,<sup>227</sup> the defendants had displayed a lengthy and deliberate hostility to the district courts' re-

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<sup>221</sup> *Id.* at 1847.

<sup>222</sup> *Cf. id.* at 1844-46, 1849-50.

<sup>223</sup> 448 U.S. at 510-15 (Powell, J., concurring).

<sup>224</sup> *Paradise*, 107 S. Ct. 1075-76 (Powell, J., concurring); *Local 28*, 106 S. Ct. at 3054 (Powell, J., concurring in part and concurring in the judgment).

<sup>225</sup> *Compare Bakke*, 438 U.S. at 307-10 (opinion of Powell, J.) with *Wygant*, 106 S. Ct. at 1848-49.

<sup>226</sup> 106 S. Ct. at 3025-32.

<sup>227</sup> 107 S. Ct. at 1058-64.

medial orders, which were themselves predicated upon the defendants' wholesale resistance to Title VII and the equal protection clause, respectively. In both cases, Justice Powell repeatedly drew attention to the defendants' egregious conduct; he duly noted the absence of such conduct in *Bakke* and *Wygant*.<sup>228</sup> In *Fullilove*, he commented extensively on the evidence of government discrimination which Congress had available to it while enacting the MBE legislation.<sup>229</sup> The cases suggest that Justice Powell may have tolerated a greater degree of impact on "innocent" non-minority group members in instances in which the defendant had been overtly hostile to the applicable antidiscrimination norm and to judicial efforts to assure compliance and procure remedial action.

In terms of the degree of impact, Justice Powell's jurisprudence recognizes a distinction among hiring goals, promotion goals, and layoff provisions. He is least troubled by hiring goals because they "impose a diffuse burden, often foreclosing only one of several opportunities . . . ." <sup>230</sup> He is most troubled by layoffs because they "impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives."<sup>231</sup> Promotion goals fall somewhere in the middle. Precisely where they fall is a function of other conditions. Justice Powell has considered questions such as do the plans entirely foreclose promotion opportunities? How long will they be in place? Do they advance unqualified workers? In *Paradise*, for example, Justice Powell carefully noted in his concurring opinion that the one-time quota benefitted only qualified blacks, that it did not deny non-minority troopers the chance to compete for promotions, and that it was "uncertain whether any individual trooper, white or black, would have achieved a different rank, or would have achieved it at a different time, but

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<sup>228</sup> *Wygant*, 106 S. Ct. at 1844-48; *Bakke*, 438 U.S. at 300-05.

<sup>229</sup> 448 U.S. at 499-506 (Powell, J., concurring).

<sup>230</sup> 106 S. Ct. at 1851-52; *Sheet Metal Workers*, 106 S. Ct. at 3056-57 (Powell, J., concurring in part and concurring in the judgment). Justice Powell has cautioned, however:

[I]t is too simplistic to conclude from the combined holdings in *Wygant* and this case that hiring goals withstand constitutional muster whereas layoff goals and fixed quotas do not. There may be cases, for example, where a hiring goal in a particularly specialized area of employment would have the same pernicious effect as the layoff goal in *Wygant*. The proper constitutional inquiry focuses on the effect, if any, and the diffuseness of the burden imposed on innocent nonminorities, not on the label applied to the particular employment plan at issue.

*Id.* at 3057 n.3.

<sup>231</sup> *Wygant*, 106 S. Ct. at 1851.

for the promotion requirement."<sup>232</sup> Hence, he found the burden on non-minority troopers acceptable.

In light of Justice Powell's repeated, expressed concerns regarding the "why" of the affirmative action plan and its impact, his silence in *Johnson* is quite perplexing. Prior to that case, he had expressed his views on these issues in almost every single case. Why not *Johnson*? In announcing his retirement at the end of the 1986 Term, Justice Powell commented upon his frail health.<sup>233</sup> Perhaps because *Johnson* so acutely raised the difficult, fundamental issues that had managed to escape review before, Justice Powell was unable to muster the intellectual and emotional commitment necessary to resolve them. Here was a case that might have prompted a younger, more vigorous Justice Powell to re-examine, repudiate, or reaffirm *Bakke*'s key concept of race/gender as a non-determinative "plus."

Depending on how you read the lower court record in *Johnson* — Justice Scalia read it one way and Justice Brennan the other way — Joyce's sex was either the reason why she was promoted or simply a "plus," one of many variables the selecting official considered in making his final decision. The fact that the district court had made a factual finding that Joyce's sex was "*the determining factor*"<sup>234</sup> further complicated the case. Moreover, the two candidates had almost equal qualifications; they ranked first and second on the selection list, separated by a mere two points. It would have been difficult for Justice Powell to conclude, like Justice Scalia, that Joyce, because of the difference of two points, was "unqualified." Perhaps in his view their close rank also deflated Justice Scalia's argument that affirmative action plans encourage the promotion of "minimally qualified" employees of the underrepresented race or gender.<sup>235</sup>

Undoubtedly, Justice Powell was also acutely aware of the very practical problems raised in *Johnson*, which prompted the filing of numerous amicus briefs. In at least two respects, the county's plan was typical of affirmative action plans adopted nationwide by public employers at municipal, county, and state levels. First, the plan

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<sup>232</sup> 107 S. Ct. at 1076 (Powell, J., concurring).

<sup>233</sup> N.Y. Times, June 27, 1987, at 1, col. 6.

<sup>234</sup> 107 S. Ct. at 1469 (Scalia, J., dissenting).

<sup>235</sup> *Id.* at 1474-75 (Scalia, J., dissenting). He was certainly aware of the difficulties inherent in merit selection procedures. It is almost impossible for many employers to satisfy the federal guidelines concerning the validation of employment tests. See Uniform Guidelines on Employer Selection Procedures, 29 C.F.R. § 1607 (1988); see also E. POTTER, EMPLOYEE SELECTION: LEGAL AND PRACTICAL ALTERNATIVES TO COMPLIANCE AND LITIGATION (2d ed. 1986).

rested on a general imbalance between the race/gender make-up of the work force and that of the labor pool, not on refined statistical analysis. Second, it relied on personnel managers and affirmative action coordinators to put teeth into the plan by judging the performance of the selecting official in terms of how well he or she met the affirmative action plan's targets. Invalidation of the plan, it was feared, would jeopardize thousands of other plans across the country, unsettling employment expectations of whites and blacks alike.<sup>236</sup> As a centrist, a moderate, and a pragmatist, Justice Powell could not be insensitive to these fears.<sup>237</sup>

Nor could he be insensitive to the views of numerous organizations that filed amicus briefs on behalf of private employers. Claiming reliance on *Weber* in adopting similar plans, these organizations maintained that such plans made equal employment opportunity for women and minorities a reality rather than a social shibboleth.<sup>238</sup> Public and private sector briefs uniformly expressed the belief that, without race-conscious hiring and promotion decisions, minority integration into the mainstream of the American economy would have been severely handicapped in the twenty-odd years following the passage of Title VII.

In reviewing the briefs in *Johnson*, Justice Powell undoubtedly reflected on his experiences in successfully overseeing the peaceful integration of Richmond, Virginia's segregated school system and improving the educational opportunities of minority students, first as a member, and then as president, of the Virginia State Board of Education. Those experiences most certainly deepened his appreciation of the value of steady, non-confrontational advances by mi-

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<sup>236</sup> Brief of the National League of Cities, National Ass'n of Counties, U.S. Conference of Mayors, and Int'l City Management Ass'n, as Amici Curiae in Support of Respondents at 2-3, 11-12, *Johnson* (No. 85-1129); see Brief of the State of Cal., Cal. Fair Emp. & Housing Com'n, States of Idaho, Louisiana, Maryland, Michigan, Minnesota, Nebraska, New York, Oregon, Wisconsin, and the Pennsylvania Human Relations Comm'n as Amici Curiae in Support of Respondents, at 1-2, 3-4, 6-8, *Johnson* (No. 85-1129); U.S. CONFERENCE OF MAYORS, *AFFIRMATIVE ACTION PROGRAMS IN CITY GOVERNMENTS* (1986).

Similar arguments were made in *Paradise*. See, e.g., Brief of City of Detroit, The District of Columbia and the City of Los Angeles as Amici Curiae in Support of Respondents at 2-4, 20-23, *Paradise* (No. 85-999).

<sup>237</sup> For an insightful examination of Justice Powell's jurisprudence analyzed by one of his former clerks, see Whitman, *Individual and Community: An Appreciation of Mr. Justice Powell*, 68 VA. L. REV. 303 (1982); cf. Howard, *Mr. Justice Powell and the Emerging Nixon Majority*, 70 MICH. L. REV. 445 (1972); Urofsky, *Mr. Justice Powell and Education: The Balancing of Competing Values*, 13 J.L. & EDUC. 581 (1984).

<sup>238</sup> Brief of Amicus Curiae of the Equal Employment Advisory Counsel at 5, 6, 8-16, *Johnson* (No. 85-1120).

norities. The prospect of the Supreme Court's abolition of affirmative action programs must have appeared to him as a step backwards in race-relations, one certain to provoke confrontation and conflict among minority and non-minority employees, unions, and employers. This result would be wholly anathema to Justice Powell's concept of a lawful, orderly integration of American society.

By refusing to put the determinative gloss on Justice Harlan's cry for a color-blind Constitution and, by extension, a color-blind Title VII, Justice Powell's contribution to the Court's affirmative action jurisprudence has been both a malediction and a blessing: a malediction because it contributed to its institutional instability; a blessing because it represented an ongoing struggle at the highest level of intellect to insure equal justice under law.

## 2. Justice O'Connor: Vacillation or Reconciliation?

When Justice O'Connor joined the Supreme Court, the essential doctrines of the Court's affirmative action jurisprudence had already crystallized. *Weber*, *Bakke*, and *Fullilove* were Supreme Court law and lore. It is obvious that affirmative action issues have sparked Justice O'Connor's interest. She has written separately to explain her views in each of the six cases subsequent to *Weber*, *Bakke*, and *Fullilove*. In four cases, she voted expressly against the race/gender-conscious plans.<sup>239</sup> In the remaining two cases, she voted in favor of the plan, but significantly qualified her approval in concurring opinions.<sup>240</sup> Although these statistics suggest a more negative than positive view toward affirmative action, it would be a mistake to describe her jurisprudence as "conservative." Certainly, it is not conservative in the same sense as that term has been used in this article to describe the jurisprudence of Chief Justice Rehnquist and Justices Scalia and White.

On a surface level, Justice O'Connor's opinions appear to vacillate. Mature study, however, shows them to be open-textured reflections and elaborations on pre-existing doctrines. Reconciliation of the Justices' differing views is her primary motif. Given that she has not ventured out on her own to suggest new doctrines, her

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<sup>239</sup> *Paradise*, 107 S. Ct. at 1080 (O'Connor, J., dissenting); *Local 28*, 106 S. Ct. at 3057 (O'Connor, J., concurring in part and dissenting in part); *Wygant*, 106 S. Ct. at 1852 (O'Connor, J., concurring in part and concurring in the judgment); *Stotts*, 467 U.S. at 583 (O'Connor, J., concurring).

<sup>240</sup> *Johnson*, 107 S. Ct. at 1460 (O'Connor, J., concurring in the judgment); *City of Cleveland*, 106 S. Ct. at 3080 (O'Connor, J., concurring).

jurisprudence is best examined against the backdrop of the core principles of the liberal and conservative camps.

a. Points of Convergence and Divergence with the Core Principles of the Conservative and Liberal Camp Justices

As noted earlier, the conservative camp Justices reject the remediation of societal discrimination as an acceptable predicate for race/gender-conscious plans, limiting a public sector employer to correcting the vestiges of its own discrimination. To the extent the conservative Justices accept the concept of a voluntary plan at all, they insist upon proof demonstrating a "manifest imbalance in traditionally segregated job categories" in Title VII cases and proof demonstrating "a strong basis in evidence" in equal protection cases. Finally, in the case of a public sector employer, the conservative Justices subject all such plans to a strict scrutiny standard of review.

The principles animating Justice O'Connor's jurisprudence both converge and diverge with these axioms. She too rejects remediation of societal discrimination as an acceptable predicate for public sector remedial efforts irrespective of the identity of the antidiscrimination norm at issue.<sup>241</sup> But Justice O'Connor has also very pointedly withheld endorsing the corollary view that remediation of an employer's own discrimination is the only acceptable predicate. Her opinions admit the possibility of other permissible predicates, such as the need for an integrated faculty.<sup>242</sup> In this respect, her views are doctrinally closer to those of the "Brennan" group Justices in *Bakke* and Justice Stevens in *Wygant* and *Johnson*, who have endorsed the statutory and constitutional validity of other predicates.

As represented by Justice Scalia's dissenting opinion in *Johnson*, to the extent that the conservative camp Justices acknowledge the right of a public sector employer to implement a race/gender-conscious plan in the absence of a formal finding of discrimination, they rigorously insist that the employer have hard evidence of its own discriminatory conduct.<sup>243</sup> Justice O'Connor also subscribes to this view, but as her opinions in *Johnson* and *Wygant* illustrate, her analysis is nuanced, ultimately making her more accepting of the statutory and constitutional validity of these plans.

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<sup>241</sup> *Wygant*, 106 S. Ct. at 1854-55 (O'Connor, J., concurring in part and concurring in the judgment).

<sup>242</sup> *Id.* at 1854 n.\*.

<sup>243</sup> 107 S. Ct. at 1469-71 (Scalia, J., dissenting).

In her opinion concurring in the judgment in *Johnson*, Justice O'Connor emphatically rejected any suggestion of a different standard for evaluating reverse discrimination claims under Title VII and the equal protection clause. She insisted that a public sector employer could adopt a voluntary plan only if it possessed evidence of "a statistical disparity sufficient to support a *prima facie* claim under Title VII."<sup>244</sup> Thus, she rejected the majority's gloss on *Weber*, which called simply for evidence of a "manifest imbalance." Her standard was much higher and rested on *Hazelwood*.<sup>245</sup>

Justice O'Connor's opinion in *Johnson* shows how great the doctrinal gap between the conservative and liberal camp Justices is, and, at the same time, how she steers a middle course between the two. Like the conservative camp Justices, Justice O'Connor criticized the majority's approach as "expansive and ill-defined." Accordingly, she rejected the reliance on general labor pool statistics, substituting a much more refined analysis that looked to the gender composition of the skilled craft workers in the local labor pool. That analysis yielded a 5% female figure. Because the county's craft work force was all male, she concluded that there was a statistical imbalance sufficient to support a *prima facie* Title VII case; therefore, she concurred in the judgment accepting the plaintiff's claim of gender discrimination.<sup>246</sup> This analysis, of course, was far more rigorous than the majority's and represented a much more restrictive view of *Weber*. But it was also far more lenient than Justice Scalia's dissent, which attributed the absence of women to societal discrimination and not to the employer's conduct.

*Wygant* is an even more striking example of how resolutely Justice O'Connor's treatment of the factual predicate issue steers a middle course. She specifically declined to join Part IV of Justice Powell's opinion, which struck down the layoff provision as not "sufficiently narrowly tailored." In her view, Justice Powell's conclu-

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<sup>244</sup> *Id.* at 1461 (O'Connor, J., concurring in part and concurring in the judgment).

<sup>245</sup> In examining a race/gender-conscious plan's factual predicate, Justice O'Connor often weaves in strands of the conservative camp's core principles. For example, in *Paradise*, she condemned the district court's selection of the 50/50, black/white promotion quantum because it "far exceeded the percentage of blacks in the trooper force." 107 S. Ct. at 1081. Her condemnation of the ratio, in turn, rested on the need to protect "the rights of nonminority troopers," and she faulted the district court for not "first considering the effectiveness of alternatives that would have a lesser effect on the rights of nonminority troopers." *Id.* at 1082. In *Johnson*, too, she emphasized that the important interest underlying the factual predicate analysis was "the congressional intent to provide some measure of protection to the interests of the employer's nonminority employees." 107 S. Ct. at 1461.

<sup>246</sup> *Id.* at 1463-65.

sion was correct, but his reasoning was wrong: correct, because the plan failed the second prong of the strict scrutiny test; wrong, because it was the lack of an accurate labor pool comparison in the underlying *hiring* plan that precluded the plan from being "adjudged 'narrowly tailored' to effect its asserted remedial purpose."<sup>247</sup> Although she joined the conservative camp Justices in voting to strike down the plan, Justice O'Connor left open the possibility that a race/gender-conscious layoff plan might be permissible and that other predicates beyond remediation of the employer's own discrimination might be acceptable.<sup>248</sup>

Fundamental to the core principles of the conservative camp is the insistence that racial classifications, whether benefitting or stigmatizing minority group members, are so inherently pernicious that they can be judged by no standard less rigorous than the strict scrutiny-test. Justice O'Connor has put herself solidly in the conservative camp by unequivocally endorsing this proposition. What sets her jurisprudence apart, however, are her repeated attempts to reconcile the divided views of the Justices on this point:

In the final analysis, the diverse formulations and the number of separate writings put forth by various members of the Court in these difficult cases do not necessarily reflect an intractable fragmentation in opinion with respect to certain core principles. Ultimately, the Court is at least in accord in believing that a public employer, consistent with the Constitution, may undertake an affirmative action program which is designed to further a legitimate remedial purpose and which implements that purpose by means that do not impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals directly and adversely affected by a plan's racial preference.<sup>249</sup>

As noted earlier, two concerns underlie the liberal camp's jurisprudence: first, the integration of minority group members into the mainstream of the American economy, and second, the promotion of voluntary resolutions of race/gender disputes. Justice O'Connor's opinions do not directly address the first concern of integrating minorities into the mainstream.<sup>250</sup> In contrast to their

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<sup>247</sup> 106 S. Ct. at 1857 (O'Connor, J., concurring in part and in the judgment).

<sup>248</sup> *Id.* at 1857.

<sup>249</sup> 107 S. Ct. at 1081 (O'Connor, J., dissenting).

<sup>250</sup> In *Stotts*, however, she explored a related concern, relief for non-victims. The two

relative silence on the economic integration concern, her opinions contain repeated references to the importance of voluntary resolutions of claims of race or gender discrimination.<sup>251</sup> Inexorably intertwined with her emphasis on voluntary settlements is the reluctance to require a formal finding of discrimination as a statutory or constitutional prerequisite to the voluntary adoption of a race/gender-conscious program:

The imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations . . . . This result would clearly be at odds with this Court's and Congress' consistent emphasis on "the value of voluntary efforts to further the objectives of the law . . . ." The value of voluntary compliance is doubly important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance.<sup>252</sup>

As this statement suggests, Justice O'Connor is among the group of Justices referred to in Part II for whom the value of "voluntarism" significantly colors her review of the underlying substantive issues.<sup>253</sup>

One final measure of the jurisprudential differences between the liberal camp Justices and Justice O'Connor may be seen in her explanation for selecting the *prima facie* standard. In her view, such a standard is necessary to effectuate "the congressional intent to

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concerns are linked because non-victim relief also serves as an economic integration tool, speeding the entry of minorities into better paying jobs with greater prospects of advancement. If Title VII relief were limited to actual victims, fewer minorities would gain these benefits. In *Stotts*, she specifically endorsed the dicta in Justice White's majority opinion restricting race-conscious relief to actual victims of discrimination. 467 U.S. at 586-90 (O'Connor, J., concurring). Her agreement that Title VII limited remedial relief in this fashion is, of course, thematically consistent with the conservative camp's repeated citations to Congress's intent in enacting Title VII. When a majority of the Court later abandoned that *Stotts* dicta in *Local 28* in favor of class-wide relief, she upbraided their decision. She did not, however, take specific issue with Justice Brennan's majority/plurality opinion which argued that such relief was necessary to dissipate the lingering effects of discrimination or to remedy the egregious behavior of the defendant union.

<sup>251</sup> E.g., *Johnson*, 107 S. Ct. at 1463 (O'Connor, J., concurring in the judgment); *Wygant*, 106 S. Ct. at 1855-57 (O'Connor, J., concurring in part and concurring in the judgment).

<sup>252</sup> *Id.* at 1855 (citations omitted).

<sup>253</sup> See *supra* notes 45-55 and accompanying text.

provide some measure of protection to the interests of the employer's nonminority employees . . . ."<sup>254</sup> Liberal camp opinions emphasize Congress's intent to bring minorities into the mainstream of the American economy.<sup>255</sup> Although neither concern flatly contradicts the other, the focus of their comments does illuminate the very sharp difference in their approach to race/gender-conscious programs.

b. The Future Direction of Justice O'Connor's Affirmative Action Jurisprudence

In sum, Justice O'Connor's jurisprudence reflects the concerns underlying the core principles of both the liberal and conservative camps. Like the conservative camp Justices, she rejects societal discrimination as a substitute for an employer-specific factual predicate, endorses the strict scrutiny test, and insists upon the more restrictive *prima facie*, *Hazelwood* standard under both Title VII and the equal protection clause. At the same time, however, Justice O'Connor is not unsympathetic to the core principles of the liberal camp. "Voluntarism" is almost as much an affirmative action virtue for her as it is for Justice Brennan. Although unwilling to give public sector employers as much leeway as Justice Brennan in establishing a factual predicate and in constructing the plan's percentage requirement, she is far from overtly hostile to the need for such programs.

As noted at the beginning of this discussion, Justice O'Connor joined the Court after *Bakke*, *Weber*, and *Fullilove* had been decided and at a time when the Court had been vigorously criticized for its inability to achieve even a semblance of a coherent jurisprudence. Her frequent opinion writing in this area, with its motifs of reconciliation and harmonization, is a response to this criticism. Her extended analysis of the factual predicate issue reflects her concern for the Court's institutional responsibility to all the affirmative action players: the lower courts, employers, unions, and minority and non-minority employees and applicants. The tenor of her opinions suggests that Justice O'Connor has written separately in each case to help interested institutions and individuals avoid statutory and constitutional pitfalls in an area of the law where few principles are free from doubt. Her appreciation for the Court's institutional re-

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<sup>254</sup> *Johnson*, 107 S. Ct. at 1461; cf. *Paradise*, 107 S. Ct. at 1081.

<sup>255</sup> *E.g.*, *Weber*, 443 U.S. at 202-04.

sponsibilities is also reflected in her extended commentary on the standard of review to be applied to race/gender-conscious employment decisions under the equal protection clause.

Justice O'Connor has been a vigorous player in the affirmative action ballpark. Rather than join one camp or the other on a permanent basis, she has preferred to remain a free agent. Her recognition of the values supporting the two camp's jurisprudence has, of course, contributed to the Court's jurisprudential instability, and is likely to continue to do so in the future. This comment, however, is simply a conclusion and not a criticism. Justice O'Connor, like Justice Powell, is a "free agent" not because of ideological fickleness, but because the core principles of the two camps represent important values that on occasion may be irreconcilable. Justice O'Connor has assumed the difficult task of forging a unified body of legal axioms from nine ambiguous, contradictory, and incohesive cases decided by a divided Court. That she has not been entirely successful does not undermine her prospects of success in the future. The nonaligned character of her jurisprudence makes her an ideal "play-maker" for the next nine innings.

#### E. *Justice Kennedy: A Key Player Without A Track Record*

As the foregoing analysis demonstrated, Justice Powell's vote was critical in each of the eight reverse discrimination cases in which he participated. The Justice's pivotal role was obviously in the forefront of the Reagan Administration's concerns in searching for his successor. Judge Bork's writings leave no doubt that if he had been confirmed by the Senate, he would have supported the core principles of the conservative camp.<sup>256</sup>

In contrast to Judge Bork, Judge Kennedy emerged from the Senate confirmation proceedings as a "centrist" and a "moderate."<sup>257</sup> Although the overall tenor of his jurisprudence provides a great deal of support for this conclusion, his opinions as a circuit judge do not shed any light on his views concerning affirmative action. Nor do his votes or opinions during his first term on the Court give any insight into how he might approach the issues discussed in this article.

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<sup>256</sup> E.g., Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986); Bork, *Styles in Constitutional Theory*, 26 SO. TEX. L.J. 383 (1985); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

<sup>257</sup> E.g., N.Y. Times, Feb. 19, 1988, at A10, col. 1; N.Y. Times, Nov. 15, 1987, at 1, col. 2; Marcotte, *Bork to Ginsberg to Kennedy*, A.B.A. J., Jan. 1988, at 15; Williams, *The Opinions of Anthony Kennedy: No Time for Ideology*, A.B.A. J., Mar. 1988, at 56.

Although he sat on the Court of Appeals for the Ninth Circuit for twelve years, Justice Kennedy did not hear any significant appeals in employment discrimination cases involving the equal protection clause.<sup>258</sup> He has authored only one major Title VII decision. In *American Federation of State, County, and Municipal Employees, AFL-CIO (AFSCME) v. Washington*,<sup>259</sup> writing for a unanimous panel, he rejected a comparable worth challenge to the public employer's wage structure under Title VII. According to comparable worth theorists, gender-based discrimination results if jobs traditionally held by women are paid less than jobs traditionally held by men, where the jobs are of equal value to the employer. Finding both the disparate treatment and disparate impact models of liability inapplicable, Justice Kennedy concluded that the public employer's "initial reliance on a free market system in which employees in male-dominated jobs are compensated at a higher rate than em-

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<sup>258</sup> In general, Justice Kennedy has written few decisions involving the equal protection clause. The one case that did receive some notoriety in the course of the Senate confirmation hearings was *Spangler v. Pasadena*, 611 F.2d 1239 (9th Cir. 1979). In that case, the district court had denied a school board's request to end its continuing supervision of the district's desegregation efforts. The Ninth Circuit reversed the district court's denial. Justice Kennedy wrote a concurring opinion emphasizing the Supreme Court's repeated insistence in desegregation cases on the principle "that when a court ordered remedy has accomplished its purpose, jurisdiction should terminate." *Id.* at 1242. Although some critics of his nomination charged this opinion demonstrated an insensitivity to the plight of racial minorities, their criticism seems unwarranted in light of his correct reading of the Supreme Court's doctrine and further comments he made in the opinion warning the school district of the possibility of new lawsuits if it acted unconstitutionally in pupil assignments.

Other unrelated opinions detract from any charge of insensitivity. *E.g.*, *Aranda v. Van Sickel*, 600 F.2d 1267, 1275 (9th Cir. 1979) (Kennedy, J., concurring) (section 1983 challenge to at-large election scheme brought by Mexican-American voters); *Flores v. Pierce*, 617 F.2d 1386 (9th Cir. 1980) (opinion by Kennedy, J., affirming a finding of section 1983 liability against city officers who had delayed issuance of liquor license to Mexican-Americans because of their race and/or national origin).

The single other case cited by critics as evidence of insensitivity is *TOPIC v. Circle Realty*, 532 F.2d 1273 (9th Cir. 1976), in which Justice Kennedy, writing for a unanimous panel, concluded that civil rights "testers" lacked standing to sue real estate brokers under Section 3612 of the Fair Housing Act. The Supreme Court, in an opinion written by Justice Powell, later reached the opposite conclusion in *Gladstone v. Ball*, 441 U.S. 91 (1979).

<sup>259</sup> 770 F.2d 1401 (9th Cir. 1985). Only one other Title VII case received any attention during Justice Kennedy's confirmation hearings. That case is not even remotely illuminating on the question of the propriety of race/gender-conscious hiring and promotion provisions in affirmative action plans. In *Gerdorn v. Continental Airlines, Inc.*, 692 F.2d 602 (9th Cir. 1982), *cert. dismissed*, 460 U.S. 1074 (1983), the Court of Appeals for the Ninth Circuit held in an *en banc* decision that the defendant's policy of requiring female flight attendants to observe strict weight requirements violated Title VII. Justice Kennedy and four of his colleagues joined in a dissenting opinion written by Justice Farris. The opinion argued that the majority improperly decided the liability issue and should have ordered a remand for a trial on the merits.

ployees in dissimilar female-dominated jobs is not in and of itself a violation of Title VII."<sup>260</sup> Although proponents of the comparable worth doctrine have criticized his opinion, no serious argument can be raised that it evidences any biases toward women or hostility toward Title VII. No court — other than the district court in *American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME)* — has ever interpreted Title VII's prohibition against sex discrimination to include liability premised upon the comparable worth doctrine.

Although the absence of any relevant Title VII or equal protection clause cases makes prognostication more risky, the overall tenor of Justice Kennedy's jurisprudence suggests that he is well-suited to take Justice Powell's place in the Supreme Court line-up. Repeatedly described as a moderate and a centrist in the Senate confirmation hearings, he is unlikely to heed the extreme call for the overruling of *Weber*, which would unsettle employment practices throughout the public and private sector. He is likely to accept race/gender-conscious programs as being in the "spirit" of Title VII and the equal-protection clause, thereby aligning himself in the liberal camp with Justices Brennan, Marshall, and Blackmun. On the other hand, he may well be sympathetic to Justice O'Connor's insistence on a refined statistical predicate for the plan's goals and Justice White's solicitude for the legitimate employment expectations of innocent white employees.

#### IV. TOWARD THE FUTURE OF AFFIRMATIVE ACTION: THREE SUGGESTIONS TO REPAIR A FRACTURED JURISPRUDENCE

Given the general instability in the Court's affirmative action jurisprudence and the ideological divisions of the Justices, it is obvious that the future validity of race/gender-conscious plans adopted by public sector employers is far from settled. Part IV offers three suggestions to repair the Court's fractured jurisprudence.

##### *A. The Court Should Reaffirm Weber in an Opinion Unmarred by Ambiguity and Should Symmetrize its Title VII and Equal Protection Clause Jurisprudence*

As noted earlier, the three dissenting Justices in *Johnson* have called upon the Court to overrule *Weber*. Their plea should be

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<sup>260</sup> 770 F.2d at 1408.

rejected. Overruling *Weber* would be flatly inconsistent with the controlling principles of the doctrine of *stare decisis*. It would also profoundly contradict the "spirit" of Title VII which the Court correctly invoked in *Weber* to carry out Congress's intent.

*Stare decisis* is the doctrine that once a court has determined that a particular principle is applicable to a given state of facts, it should continue to apply that principle in all future cases to facts that are substantially the same. *Stare decisis* exists to give stability and predictability to the law — virtues conspicuously absent from the Court's reverse discrimination jurisprudence. As Justice Brandeis observed in a frequently quoted passage, "[s]tare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right."<sup>261</sup>

Notwithstanding the Court's acknowledgment of the doctrine's importance, it has constructed one or two escape hatches to permit judicial unsettling of previously established case law. The Court draws a distinction between cases resting on statutory interpretation and those resting on constitutional interpretation. It strongly disfavors correcting errors of statutory interpretation, preferring to leave that task to Congress. Justice Harlan best expressed this view when he said: "[I]t must appear *beyond doubt* from the legislative history of the . . . statute that [the Court] misapprehended the meaning of the controlling provision, before a departure from what was decided in those cases would be justified."<sup>262</sup> While hardly eager to overturn cases resting on constitutional interpretation, the Court grants itself more leeway because "correction through legislative action is practically impossible."<sup>263</sup>

Applied to the question at hand, these interpretative principles clearly blunt the force of the appeal to overrule *Weber*. Given both

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<sup>261</sup> *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-07 (1932) (Brandeis, J., dissenting). The Court will have an extended opportunity to review the doctrine of *stare decisis* this Term in deciding *Patterson v. McLean Credit Union*, 805 F.2d 1143 (4th Cir. 1986), *cert. granted*, 108 S. Ct. 65 (1987) (No. 87-107). A major issue in that case is whether the Court should overrule *Runyon v. McCrary*, 427 U.S. 160 (1976), a seminal civil rights case, which interpreted 42 U.S.C. § 1981 as outlawing private acts of discrimination in contracting.

<sup>262</sup> *Monroe v. Pape*, 365 U.S. 167, 192 (1961) (Harlan, J., concurring) (footnote deleted; emphasis added). Mr. Justice White has similarly insisted that "in a statutory case, a particularly strong showing is required that [the Court] misread the relevant statute and its history." *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 517 (1982) (White, J., concurring).

<sup>263</sup> *Burnet*, 285 U.S. at 406-07 (Brandeis, J., dissenting); *accord Maine v. Thiboutot*, 448 U.S. 1, 33 (1980) (Powell, J., dissenting); *New York v. United States*, 326 U.S. 572 (1946) (Douglas, J., dissenting); *Smith v. Allwright*, 321 U.S. 649, 664-66 (1944).

Congress's failure to act in the almost ten years since *Weber* and its awareness of race/gender-conscious plans when it amended Title VII in 1972,<sup>264</sup> it most certainly does not "appear *beyond doubt*" that *Weber* was wrongly decided. Congress's inaction respecting *Weber*, moreover, contrasts sharply with its willingness to overrule other civil rights decisions by the Court involving issues of statutory construction during the same period.<sup>265</sup> Congress's inaction subsequent to *Weber* clearly supports the proposition "that the interpretation of the Act . . . has legislative approval."<sup>266</sup>

Furthermore, overruling *Weber* would undermine the law's need for stability and predictability. As Chief Justice Rehnquist, one of the doctrine's staunchest supporters has observed: "In all cases, private parties shape their conduct according to this Court's settled construction of the law . . . . Only the most compelling circumstances can justify this Court's abandonment of such firmly established statutory precedents."<sup>267</sup> As mentioned earlier, literally tens

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<sup>264</sup> By 1972, several courts had ordered race-conscious hiring and promotion relief to remedy employment discrimination. In addition, two courts in well publicized cases had upheld race-conscious hiring and promotion goals imposed upon federal contractors pursuant to E.O. 11246. *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); *Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). During the course of debate on the 1972 amendments, Senator Ervin proposed two separate amendments to overturn these decisions. Senator Javits, the floor manager for the bill under consideration, vigorously opposed their adoption, arguing that the amendments would emasculate E.O. 11246 and "deprive the courts of the opportunity to order affirmative action under Title VII of the type which they have sustained in order to correct a history of unjust and illegal discrimination . . ." 118 CONG. REC. 1665 (1972). Ultimately, the Senate overwhelmingly rejected both amendments. *Id.* at 1676, 4917-18. Although it is difficult to know how much weight this incident should be given, it certainly reflects Congress's awareness of race-conscious remedies. An intelligent — but not overwhelming — argument for congressional approval rests on the proposals rejected by the Senate in 1972. It is interesting to note in passing that the contractors subject to E.O. 11246 formulate their goals and timetables based on underrepresentation of women and minorities in their labor force. Thus, these plans resemble the one adopted by the Santa Clara Transportation Agency and approved by the Supreme Court in *Johnson*.

<sup>265</sup> *E.g.*, Civil Rights Restoration Act of 1988, Pub. L. 100-259, 102 Stat. 28 (codified at 42 U.S.C. § 2000d, overturning *Grove City College v. Bell*, 465 U.S. 555 (1984)); Handicapped Children's Protection Act of 1986, Pub. L. 99-3722, 100 Stat. 796 (codified at 20 U.S.C. § 1415(e)(4)(B)-(G), overturning *Smith v. Robinson*, 468 U.S. 992 (1984).

<sup>266</sup> *United States v. Elgin, Joliet & Eastern Ry. Co.*, 298 U.S. 492, 500 (1936); *accord Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977); *Edelman v. Jordan*, 415 U.S. 651, 671 (1974).

<sup>267</sup> *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 714-15 (1978) (Rehnquist, J., dissenting). Correspondingly, Chief Justice Rehnquist has acknowledged the Court's broader discretion in overturning previous decisions resting on constitutional interpretation. *E.g.*, *Thornburgh v. American College of Obstetricians & Gynecologists*, 106 S. Ct. 2169,

of thousands of public sector employers have adopted race/gender-conscious affirmative action programs.<sup>268</sup> Overruling *Weber* would create profound instability in labor-management affairs and encourage racial and gender divisiveness in the workplace. Furthermore, as Justice Jackson observed, "practical . . . and policy considerations"<sup>269</sup> merit careful review before the Court departs from the doctrine of *stare decisis*. In light of the pervasiveness of affirmative action programs in the American workplace, both "practical . . . and policy considerations" weigh heavily against the Court's departing from the rule of *stare decisis*. This is not an instance, moreover, in which the original disputed doctrine proved unworkable. While the Court has acknowledged that a principle of law sound in theory but unworkable in practice does not merit *stare decisis* protection,<sup>270</sup> that exception has no place in this discussion. As their telling numbers suggest, employers in both the public and private sector have endeavored to conform to the general dictates of *Weber*.

Finally, overruling *Weber* would be an unrestrained manifestation of judicial activism. The Court itself recently described the relationship between the doctrine of *stare decisis* and the concept of rule of law:

[S]*tare decisis* [is] the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion. That doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.<sup>271</sup>

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2192-93 (1986) (dissenting opinion of White, J., in which Rehnquist, J., joined); *Batson v. Kentucky*, 106 S. Ct. 1712, 1731 (1986) (dissenting opinion of Burger, C.J., in which Rehnquist, J., joined); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 381 (1977) (majority opinion by Rehnquist, J.); *see also* *United States v. Scott*, 437 U.S. 82, 101 (1978) (majority opinion by Rehnquist, J.); *Fry v. United States*, 421 U.S. 542, 559 (1975) (Rehnquist, J., dissenting).

<sup>268</sup> *See supra* note 93.

<sup>269</sup> *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 594 (1944) (Jackson, J., dissenting).

<sup>270</sup> *Compare* *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 108 S. Ct. 1133 (1988) (overruling *Ettelson v. Metropolitan Life Insurance Co.*, 317 U.S. 188 (1942) and *Enelow v. New York Life Ins. Co.*, 293 U.S. 379 (1935)) *with* *Batson v. Kentucky*, 476 U.S. 79 (1986) (overruling *Swain v. Alabama*, 380 U.S. 202 (1965)).

<sup>271</sup> *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986).

For the Court to reject *Weber* would inevitably lead to the public perception that "the proclivities of individuals" outweighed a bed-rock principle of Title VII construction.

In addition to respect for the doctrine of *stare decisis*, the Court should reject the appeal of the *Johnson* dissenters for a second reason. The principle underlying *Weber's* approval of race-conscious criteria was the Court's conclusion that such employment decisions were consistent with the "spirit" of Title VII, *i.e.*, Congress's goal of bringing blacks into the employment mainstream of the American economy. In recent years, even under the Reagan Administration,<sup>272</sup> there has been an abundance of reports and studies concluding that race/gender-conscious programs are doing just that. For example, in 1984, the Potomac Institute issued an exhaustive study of minority and female employment in the 1970s. It concluded that affirmative action programs provided minorities and women with higher paying jobs from which they traditionally had been excluded.<sup>273</sup> The Department of Labor<sup>274</sup> and the Office of Federal Contract Compliance have reached the same conclusion.<sup>275</sup>

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<sup>272</sup> The Reagan Administration seriously considered amending OFCCP goals and timetable requirements. See *supra* note 264. The proposal set off considerable debate within the Administration, pitting Secretary of Labor William Brock, who favored their retention, against Attorney General Edwin Meese and Associate Attorney General for Civil Rights William Bradford Reynolds, who vigorously supported their deletion. See N.Y. Times, May 26, 1986, at A1, col.4; N.Y. Times, Dec. 9, 1985, at A22, col.3; N.Y. Times, Nov. 29, 1985, at A28, col.1; N.Y. Times, Nov. 1, 1985, at A19, col.1. The controversy became such a political hot potato that the Administration decided to postpone its resolution until the Supreme Court decided *Paradise* and *Johnson*. Not surprisingly, it has shown no interest in reviving the proposed amendments. Present and former Administration officials have been highly critical of the Court's decisions in these cases. N.Y. Times, Mar. 29, 1987, § 4 (The Week in Review) at 1, col.1; N.Y. Times, May 14, 1987, at A1, col.4.

<sup>273</sup> H. HAMMERMAN, A DECADE OF NEW OPPORTUNITY: AFFIRMATIVE ACTION IN THE 1970's 5 (1984).

<sup>274</sup> EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEP'T OF LABOR, EMPLOYMENT PATTERNS OF MINORITIES AND WOMEN IN FEDERAL CONTRACTOR AND NON-CONTRACTOR ESTABLISHMENTS (1984). An earlier study, also commissioned by the Department of Labor, had reached a similar conclusion with respect to black males, but was uncertain of the impact of Executive Order 11246 on other minority-group members and women. J. LEONARD, THE IMPACT OF AFFIRMATIVE ACTION (1983). This study also addressed Justice Scalia's argument that race/gender-conscious plans result in hiring minimally qualified minority-group members and women. Leonard rejected this conclusion on the ground that the productivity level of these two groups had actually increased in proportion to that of white males. *Id.*

A small number of critics maintain that affirmative action programs have actually hurt the economic progress of minorities. Butler & Heckman, *The Government's Impact on the Labor Market Status of Black Americans: A Critical Review*, in EQUAL RIGHTS AND INDUSTRIAL RELATIONS 248-67 (1977); Sowell, *Myths About Minorities*, 68 COMMENTARY 33 (Aug. 1979).

<sup>275</sup> OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, EMPLOYMENT PATTERNS OF MINORITIES AND WOMEN IN FEDERAL CONTRACTOR AND NON-CONTRACTOR ESTABLISHMENTS,

The fact that affirmative action has been effective in eradicating barriers to the advancement of minorities and women does not mean that Congress's goal has been met. Indeed, despite the progress it reported, the Potomac Institute warned against dismantling race/gender-conscious programs because of the continuing adverse economic and social conditions confronting minorities and women. Recent studies show that the economic gap between minorities and non-minorities remains large. For example, in 1985 the unemployment rate for Blacks and Hispanics was 13% and 8.8%, respectively, whereas the White unemployment rate was 5.3%.<sup>276</sup> Even those minorities who are fortunate enough to be regularly employed are at a disadvantage. The median income for White families in 1986 was \$30,809; the median income for Black and Hispanic families was \$17,604 and \$19,995, respectively.<sup>277</sup> The median net worth of White households is approximately twelve times greater than the median for Black households (\$39,135 as compared to \$3,397).<sup>278</sup>

The economic status of women is equally distressing. The median income of women in 1985 was \$7,217 compared to the median income of men which was \$16,311.<sup>279</sup> The median income of full-time female workers in 1986 was \$16,843 compared to the median income of full-time male workers which was \$25,894.<sup>280</sup> More recent data compiled by the Department of Labor shows that women on the average earn only 70 percent as much as men.<sup>281</sup>

In sum, a careful examination of the economic data available shows that, although affirmative action plans are working, much remains to be done to insure the full participation of women and minorities in the American economy. Dismantling race/gender-conscious programs would clearly be counter-productive.

At first glance, it might appear that a policy argument such as the one just described is more properly made to the politically accountable branches than to the Court. Reflection reveals this criticism is meritless, however. The Court cannot fulfill its duty to say what the law is in a vacuum. It must understand how "the law" (in

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1974-1980, 37 (1984). See Leonard, *The Impact of Affirmative Action on Employment*, 12 J. LAB. ECON. 439 (1984).

<sup>276</sup> U.S. DEP'T OF LABOR, 108 MONTHLY LABOR REVIEW 62 (July 1988).

<sup>277</sup> BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1988, 427, Table 700.

<sup>278</sup> *Id.* at 440, Table 727.

<sup>279</sup> *Id.* at 432, Table 710.

<sup>280</sup> *Id.* Table 711.

<sup>281</sup> N.Y. Times, Feb. 2, 1988, at A20, col. 3.

this instance, race/gender-conscious plans adopted by public employers) operates. Undoubtedly, the Court would overstep its role as an interpreter of the law if it approved such plans simply because a majority of the Justices endorsed their use as a matter of policy. On the other hand, when the Court is being asked to overrule the decision that upheld such programs as consistent with Title VII, it should not be faulted for considering whether they are fulfilling the "spirit" that inspired Congress to enact Title VII in the first place and that has so dramatically shaped its own jurisprudence.

In sum, for the Court to overrule *Weber* would not only be flatly inconsistent with the doctrine of *stare decisis*, but it would also wreak havoc with widespread employment practices. Overruling *Weber* would frustrate the "spirit" of Title VII. It would undermine the goal of Congress, which prompted Title VII's original enactment in 1964 and its amendment in 1972.

The Court's reaffirmation of *Weber*, moreover, should transcend its divided jurisprudence. There should be no more hedging, no more majority/plurality opinions, no more opinions concurring in part, and no more opinions concurring in the judgment. Those Justices who believe that *Weber* was correctly decided should say so in unison. Their opinion should offer concrete guidance, not vague platitudes.

Ideally, in reaffirming *Weber* in the context of public sector employment, the Court should select a case raising reverse discrimination claims under both Title VII and the equal protection clause to resolve the uncertain relationship between the two norms. The Court should use the case, moreover, as a vehicle for resolving the two issues analyzed in Part II of this article: (1) the inconsistency between *Wygant's* *prima facie* standard and *Johnson's* "manifest imbalance" standard and (2) the conflict between the Court's approval of the disparate impact theory of liability under Title VII and the Court's disapproval of remediation of societal discrimination as an acceptable predicate for race/gender-conscious relief under the equal protection clause.

In this author's view, the Court should adopt the "manifest imbalance" standard. A public employer needs the certainty of a safety net, not the tension of a tightrope, in fashioning race/gender-conscious plans. Since the *prima facie* standard is more rigorous than the "manifest imbalance" standard, its adoption would inhibit the implementation of race/gender-conscious programs. The "manifest imbalance" standard provides a public employer with a safety net because it diminishes the likelihood a court will subsequently second

guess the employer's evaluation of the statistical disparity between the racial composition of its workforce and the racial composition of the appropriate labor pool. It will encourage voluntary settlements and discourage protracted litigation. Protracted litigation under Title VII is time-consuming for the courts, counsel, and corporate management, and promotes racial divisiveness among employees. A rule of law which encourages settlement advances Congress's intent in enacting Title VII.<sup>282</sup>

In resolving the issue of which standard to apply, the Court should admit, moreover, that "manifest imbalance" is really the flip side of *Hazelwood's* adverse-impact liability standard. As such, "manifest imbalance" is actually premised upon societal discrimination, not discrimination by the public sector employer. In withholding from the state the right to correct a wrong that ultimately operates to injure the entire society — not just the victims of discrimination — the Court is usurping the role of the politically responsive branches of government. If, consistently with the Constitution, the state can legislate the price of a quart of milk to help the farmer, or the price of a taxi-ride to help the consumer, why should the Court prohibit the state from helping the entire society by eradicating the vestiges of discrimination?

The standard rejoinder to this question is, of course, that race, because of its immutability, is inherently different from other characteristics such as economic status; and as a matter of principle, it should be irrelevant to government decision-making. This answer, however, is fundamentally destructive of society. It results in the states possessing limited discretion in resolving the pressing problem of eradicating the vestiges of discrimination and virtually unchecked discretion in resolving problems of a more mundane character.

A further anomaly in the Court's position denying public employers the right to correct societal discrimination lies in a misallocation of power between the public and private sector. By imposing a more rigorous standard on public employers under the equal protection clause, the Court grants private employers greater power than the state to correct societal discrimination. The citizenry elects public officials — not corporate officials — to resolve society's most vexatious ills. The Court should not render those officials constitutionally impotent to address societal discrimination that infects their own workplace.

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<sup>282</sup> See *supra* notes 45–55 and accompanying text.

B. *Congress Should Amend Title VII to Authorize Public Employers to Implement Race/Gender-Conscious Plans*

When Congress amended Title VII in 1972 to broaden its coverage to include state employees, it did so pursuant to its authority under section 5 of the fourteenth amendment.<sup>283</sup> Although the Supreme Court has not directly passed on the constitutionality of the 1972 amendment, there can be no serious question concerning Congress's power to outlaw employment discrimination by the states. Nor should there be any serious question concerning Congress's power under section 5 to amend Title VII further to permit the states to implement race/gender-conscious programs to remedy the vestiges of discrimination.

Section 5 provides: "Congress shall have the power to enforce by appropriate legislation, the provisions of this article."<sup>284</sup> The leading case in which the Court addressed the scope of Congress's section 5 power is *Katzenbach v. Morgan*.<sup>285</sup> That case involved a challenge to section 4(e) of the Voting Rights Act of 1965, which Congress specifically adopted pursuant to section 5. Congress enacted section 4(e) to overcome the effects of a New York state statute which had effectively disenfranchised New York's Puerto Rican citizens through the use of an English language literacy test. Section 4(e) affirmatively mandated that any citizen with a sixth-grade education from any public school under the jurisdiction of the United States, including Puerto Rico, be permitted to vote in all American elections.<sup>286</sup>

Prior to *Katzenbach*, the Court had upheld a North Carolina literacy requirement similar to New York's.<sup>287</sup> The challengers to the constitutionality of section 4(e) argued that Congress lacked the

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<sup>283</sup> Congress enacted Title VII in 1964 pursuant to its Commerce Clause authority. Although Congress's authority pursuant to the Commerce Clause is broad, it is not absolute. Legislation premised on Congress's Commerce Clause authority must be consistent with the equal protection component of the due process clause of the fifth amendment. See R. ROTUNDA, J. NOWAK, & J. YOUNG, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 4.8, at 293 n.3 (1986). *Weber* strongly suggests that race/gender-conscious programs do not violate the equal protection guarantee of the fifth amendment and should not therefore violate the equal protection clause of the fourteenth amendment. "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (*per curiam*); accord *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975).

<sup>284</sup> U.S. CONST. amend. XIV, § 5.

<sup>285</sup> 384 U.S. 641 (1966).

<sup>286</sup> *Id.* at 652-53.

<sup>287</sup> *Lassiter v. Northhampton County Bd. of Elections*, 360 U.S. 45 (1959).

authority to outlaw a practice previously found by the Court not to violate the fourteenth amendment. The *Katzenbach* Court, however, rejected this argument, adopting a sweeping view of Congress's authority to define the rights protected by the equal protection clause. Observing that the drafters of the fourteenth amendment intended to give Congress "the same broad powers expressed in the Necessary and Proper Clause,"<sup>288</sup> the Court specifically held that section 5 did not "confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the 'majestic generalities' of § 1 of the Amendment."<sup>289</sup>

The implications of this language are highly significant for solving the Title VII/equal protection clause conundrum created by the Court's affirmative action jurisprudence. Congress in 1972 used its section 5 power to create a right to be free from employment discrimination. Under the rationale of *Katzenbach v. Morgan*, it can now use its section 5 power to amend Title VII to authorize the states to protect that right in a particular fashion.<sup>290</sup>

Opponents of such an amendment are likely to invoke the so-called "one way ratchet theory" of section 5 which restricts Congress to affirmatively expanding rights. *Katzenbach* expressly disavowed the proposition that Congress could use section 5 to dilute the guarantee of equal protection. In the opponents' view, permitting the states to adopt race/gender-conscious plans would dilute the rights of non-minority employees. The Court's decision in *Fullilove*,

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<sup>288</sup> 384 U.S. at 650. The sweep of Congress's powers under the Necessary and Proper Clause is virtually unbounded, except for the protections guaranteed by the Bill of Rights. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 319 (1819). See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-14 (2d ed. 1988); Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 STAN. L. REV. 387 (1983); Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 614 (1975).

<sup>289</sup> 384 U.S. at 648-49. The Court's post-*Katzenbach* jurisprudence concerning the scope of section 5 is less than crystalline. E.g., *EEOC v. Wyoming*, 460 U.S. 226, 259-64 (1983) (Burger, C.J., dissenting); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 732-33 (1983).

<sup>290</sup> 384 U.S. at 648-49. A student commentator has argued that even without an amendment, a court could read Title VII in light of section 5 and *Katzenbach v. Morgan* to permit the state to adopt race/gender-conscious programs. Note, *Voluntary Affirmative Action Plans by Public Employers: The Disparity in Standards Between Title VII and The Equal Protection Clause*, 56 FORDHAM L. REV. 403, 424-29 (1987). This argument seems strained. Congress's intent in *Katzenbach v. Morgan* was clear and undisputed. No similar claim can be made respecting the 1972 amendments to Title VII.

however, undercuts any reliance on the "one-way ratchet" theory. In that case, six of the Justices rejected a similar argument addressed to Congress's power under the equal protection component of the due process clause of the fifth amendment.<sup>291</sup> Although *Fullilove* involved a minority business set-aside program, the rationale in that case can be directly applied to employment-related decisions. *Fullilove* clearly indicates that Congress possesses the authority to authorize the states to adopt race/gender-conscious affirmative action plans without the necessity of a prior, formal finding of government-sponsored discrimination by an administrative, legislative or judicial body.<sup>292</sup>

Such a congressional enactment contains obvious advantages. Foremost, it would provide a solution worked out by the political branches of government. The statute, therefore, would possess a greater claim to democratic legitimacy than any "doctrine of affirmative action" formulated by the Court.<sup>293</sup> By casting race/gender-

<sup>291</sup> Congress's affirmative power to create substantive rights under section 5 has been ably defended. *E.g.*, Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199 (1971); Cox, *The Supreme Court 1965 Term — Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966); Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

<sup>292</sup> In *Fullilove*, there was no opinion of the Court. Chief Justice Burger's opinion in which Justices Powell and White joined expressly acknowledged the authority of Congress under section 5 to enact the 10 percent set-aside program for minority business enterprises; it noted "congressional authority extends beyond the prohibition of purposeful discrimination to encompass state action that has discriminatory impact perpetuating the effects of past discrimination." 448 U.S. at 477. Justice Marshall's concurring opinion in the judgment in which Justices Brennan and Blackmun joined did not specifically address the issue of Congress's power under section 5. Their position on this issue is clear, however. Justice Brennan's opinion in *Bakke*, in which Justices Blackmun and Marshall joined, took a very sweeping view of Congress's authority under section 5 "to accord preferential treatment to the victims of past discrimination in order to overcome the effects of segregation." 438 U.S. at 368. That opinion, moreover, recognized the state's right to correct societal discrimination. Although Justice Stevens dissented on the merits in *Fullilove* and did not reach the equal protection issue in *Bakke*, his opinions in *Wygant* and *Johnson* leave little doubt that he would recognize Congress's authority under section 5 to amend Title VII to permit the states to adopt race/gender-conscious plans.

<sup>293</sup> See Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1188 (1977). Professor Sandalow has observed:

[I]f governmental action trenches upon values that may reasonably be regarded as fundamental, that action should be the product of a deliberate broadly based political judgment. The stronger the argument that governmental action does encroach upon such values, the greater the need to assure us that it is the product of a process that is entitled to speak for the society. Legislation that has failed to engage the attention of Congress, like the decision of subordinate governmental institutions, does not meet that test, for it is likely to be the

conscious programs as part of the nation's labor policy, Congress would take a significant step in reducing the divisiveness that such plans cause. Non-minority employees might still disagree with the policy of conferring a benefit on non-victim, minority employees, but they would accept it as a policy that won out in the give-and-take of the political process, rather than seeing it as a measure imposed on an *ad hoc* basis by an employer or a court. Such an amendment to Title VII might actually benefit non-minority employees in several respects. For example, Congress could adopt in statutory form *Weber's* "impact" analysis to insure that non-minority employees were not entirely foreclosed from hiring and promotion opportunities.<sup>294</sup> Such an amendment might put a cap on the numerical goals that a public employer could adopt. Congress could even require some due process form of notice and an opportunity to be heard before a public employer implemented a race/gender-conscious program in order to insure public participation in the decision-making process.

The advantages of such an amendment to the public employer are obvious as well. An amendment could provide a safety net, rather than a tightrope, by defining the kind and quantum of statistical evidence needed before a public employer could implement a race/gender-conscious plan. The amendment could strengthen the net by explicitly forbidding the introduction of evidence of such a plan in a Title VII liability case. Finally, to encourage the voluntary adoption of meaningful plans, it might even create a "good faith" defense in adverse-impact liability cases, if the public employer could show it acted reasonably in discovering the adverse impact and in attempting to correct it prior to the institution of litigation.

C. *The Court Should Limit Wygant to Its Facts and Permit the States to Adopt Reasonable, Short-Term MBE Legislation*

After the Supreme Court's decision in *Fullilove* sustaining the ten percent set-aside for minority business enterprises, many states and municipalities enacted legislation similar to the federal statute. Challenges to these statutes generally centered on the competence

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product of partial political pressures that are not broadly reflective of the society as a whole.

*Id.*

<sup>294</sup> See *supra* note 143.

of the legislative authority<sup>295</sup> and the scope of the set-aside.<sup>296</sup> For the most part, the courts rejected these challenges. *Wygant* has spurred new constitutional challenges to such legislation. To date four courts of appeals have invalidated MBE programs based on this decision.<sup>297</sup>

The constitutional challenges in these four cases centered on issues directly analogous to the ones discussed in Part II: (1) the character of the factual predicate needed by the state or municipality before it could adopt the race/gender-conscious plan, and (2) whether the state or municipality could adopt such a plan to remedy societal discrimination.

It will be recalled that in *Wygant* the Court took *Hazelwood*, a pure Title VII liability case, and jurisprudentially inverted it, first by applying it to a case involving the equal protection clause and second, by applying it to a reverse discrimination claim, rather than a liability claim. *Wygant* instructed a public employer that it should follow *Hazelwood's* admonition and compare the racial composition of its workforce to the racial composition of the appropriate labor pool in deciding whether to implement a race/gender-conscious program. *Wygant* also insisted that the employer could act only to remedy its own discrimination, not society's at large.

Subsequent to *Fullilove* in 1980 and prior to *Wygant* in 1986, many states and political subdivisions enacted MBE programs in which the percentage of public contracts set-aside corresponded to the percentage of minorities in the general population or in an undifferentiated labor pool. *Wygant* appears to constitutionally con-

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<sup>295</sup> E.g., *South Fla. Chapter of the Associated Gen. Contractors of Am., Inc. v. Metropolitan Dade County, Fla.*, 723 F.2d 846, 852 (11th Cir.), *cert. denied*, 469 U.S. 871 (1984); *Ohio Contractors Ass'n v. Keip*, 713 F.2d 167, 171-72 (6th Cir. 1983); *Schmidt v. Oakland Unified School Dist.*, 662 F.2d 550, 558-59 (9th Cir. 1981), *vacated on other grounds*, 457 U.S. 594 (1982); *Southwest Wash. Chapter, Nat'l Elec. Contractors Ass'n v. Pierce County*, 100 Wash. 2d 109, 121-22, 667 P.2d 1092, 1099 (1983); *Arrington v. Associated Gen. Contractors of Am., Ala. Branch, Inc.*, 403 So. 2d 893, 899-902 (Ala. 1981); *see also* *M.C. West, Inc. v. Lewis*, 522 F. Supp. 338, 343-49 (M.D. Tenn. 1981); *Central Ala. Paving, Inc. v. James*, 499 F. Supp. 629, 636-38 (M.D. Ala. 1980).

<sup>296</sup> E.g., *South Florida Chapter*, 723 F.2d at 855-56; *Ohio Contractors Ass'n*, 713 F.2d at 173-75; *Schmidt*, 662 F.2d at 559-60; *Michigan Road Builders Ass'n v. Milliken*, 571 F. Supp. 173, 187-90 (E.D. Mich. 1983), *appeal dismissed*, 742 F.2d 1456; *Southwest Wash. Chapter, Nat'l Elec. Contractors*, 100 Wash. 2d at 122-26, 667 P.2d at 1100-01; *Arrington*, 403 So. 2d at 902-04.

<sup>297</sup> *Michigan Builders Ass'n v. Milliken*, 834 F.2d 583 (6th Cir. 1987); *J.A. Croson Co. v. City of Richmond*, 822 F.2d 1355 (4th Cir. 1978), *prob. juris. noted*, 56 U.S.L.W. 3568 (U.S. Feb. 22, 1988); *Associated Gen. Contractors of Cal., Inc. v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987); *J. Edinger & Son, Inc. v. City of Louisville*, 802 F.2d 213 (6th Cir. 1986). *But see* *H.K. Porter Co. v. Metro Dade County*, 825 F.2d 324 (11th Cir. 1987).

demn any MBE program which rested its factual predicate on a general statistical disparity between the minority population and the percentage of contracts awarded to minority contractors. Such reliance would be directly analogous to the school board's reliance on the statistical imbalance between the school district's minority pupil population and the number of minority teachers it actually employed, which the Court struck down in *Hazelwood*.

In almost all instances, the application of *Wygant* creates an insurmountable problem for states and municipalities in adopting MBE-type legislation. In determining whether to extend that case's rationale beyond the realm of employment to encompass government expenditures, the Court must come to grips with the significant societal differences reflected in employment statistics and entrepreneurial statistics. Where entrepreneurial statistics do exist, they often show a very small percentage of local minority contractors. It is estimated that only 4.7% of all construction firms in the United States are owned by minority group members; forty-one percent of those firms are concentrated in five states, leaving 2.8% for the remaining forty-five states.<sup>298</sup> Application of *Wygant's* analysis to these statistics dooms MBE programs in those remaining forty-five states, if they set aside any percentage of contracts except the most minimal.

Application of *Wygant's* analysis should be rejected for three reasons. First, *Wygant* blindly ignores the crucial role played by the employment practices of the construction industry itself. As the Supreme Court noted in *Weber*, so many courts have amassed an abundance of evidence of discrimination in the craft trades that other courts can properly take judicial notice of minority exclusion.<sup>299</sup> If minority group members do not have access to skilled trades training and jobs, how can they be expected to operate their own construction companies? To the extent that *Wygant* requires close parity with the appropriate minority entrepreneurial pool, it locks MBE's into the status quo.

Second, linking the MBE set-aside to the actual percentage of minority contractors in the appropriate labor pool has the anomalous result of making it almost impossible to assist construction firms owned by minority group members in areas where white contractors and businesses have been most successful in discriminating against them. This is a near perfect example of the states' need to correct

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<sup>298</sup> *J.A. Croson Co.*, 822 F.2d at 1363 n.7.

<sup>299</sup> 443 U.S. at 198 n.1.

societal discrimination.<sup>300</sup> Without the ability to remedy the effects of this societal discrimination by setting aside a portion of their public contracts, state and municipal authorities lack a most effective tool to stimulate minority entrepreneurial efforts.

Third, linking MBE percentages to the percentage of local minority contractors overlooks standard business practices in the construction industry. The nature of the construction industry is such that depending upon the subject matter of the contract, a prime contractor can often purchase goods from, or subcontract parts of a job to, businesses outside the immediate area of the project. That these "remote" purchases and subcontracts are made in the regular course of business puts a state's percentage requirement of MBE participation in a public works project in a different light. If market considerations can prompt a prime contractor to purchase goods and services nationwide or regionwide, the equal protection clause should not prohibit a similar result. Forcing the prime contractor to do business with a qualified MBE outside the immediate geographic area should not rise to the level of a constitutional violation, especially when the state is regulating the disbursement of the state's own funds.<sup>301</sup>

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<sup>300</sup> See *supra* note 140. In order to avoid admitting prior discrimination against minority contractors, state and municipal governments often stressed the need to correct societal discrimination. For example, the Birmingham, Alabama City Council included in the opening statement of the "findings and purpose" clause of the municipality's set-aside ordinance the following statement:

Due to historical patterns and practices of racial discrimination, minority business enterprises have not obtained an equitable share of contracts or subcontracts let by the city for construction and for the purchase of goods, materials, equipment or services. Though past official policies of overt discrimination against minorities have now ceased, the existing policies and programs of the city have not effectively eliminated the lingering present effects of this past discrimination. The city has a compelling interest in eradicating the present effects of past discrimination, and in promoting equality of economic opportunity among and between all of its citizens.

*Arrington*, 403 So. 2d at 896.

Similarly, the Michigan legislature in enacting a set-aside program observed that MBEs and WBEs:

receive a disproportionately small share of state spending for construction and goods and services in relation to their proportion of the state's population. That minorities and women have been systematically denied equal opportunity in this country is a sad historical fact now generally accepted and widely recognized in legislation of the past two decades. In the interests of justice as well as the social and economic health of the state, the legislature should do all that it can to ensure that businesses owned by minorities and women obtain their fair share of the state's business.

<sup>301</sup> Cf. *United Bldg. & Constr. Trades Council of Camden County and Vicinity v. Mayor*

There are two principled ways for the Court to distinguish *Wygant* without undermining that case's precedential value in employment discrimination cases. One way is to analogize MBE programs to race/gender-conscious hiring plans. Justice Powell carefully distinguished between hiring plans and layoff plans in *Wygant*, offering a tentative endorsement of the former because "hiring goals impose a diffuse burden."<sup>302</sup> This approach shifts the focus of the Court's constitutional analysis to the program's impact and away from the factual predicate supporting the percentage set-aside. A similar argument proved persuasive in *Fullilove*; the trial record contained exhaustive statistics showing that the 10% set-aside would ultimately deprive white contractors of less than 0.25% of the total monies expended in the United States for construction.<sup>303</sup> In reviewing the constitutionality of state MBE programs, the Court should examine what percentage of funds are being withdrawn from competition with non-minority firms. At a bare minimum, a percentage figure that is comparable to the percentage of minority workers in the local construction industry should be acceptable. Adopting the approach of the Court in *Johnson*, this author would argue by analogy that a percentage figure that is comparable to the percentage of minority workers in the general labor pool is an even more appropriate standard because entry level jobs in the construction industry generally require few specialized skills. This percentage figure based on the general labor pool seems particularly appropriate because, as noted earlier, owning an MBE without first working in the construction industry is an unlikely career path.

A second way to distinguish *Wygant* without undermining its precedential value in employment cases is to elaborate upon the Court's requirement of "identified discrimination" as distinguished from "societal discrimination." Justice Powell rejected societal discrimination in *Wygant* as "too vague" and "too amorphous and over-expansive." This criticism is simply not valid in reviewing MBE legislation. As noted earlier, the Court itself has acknowledged the extraordinary hostility of the construction industry toward minority workers. It is difficult to imagine how the underlying discrimination could be any further "identified." MBE legislation is not aimed at correcting societal discrimination as that term was used in *Wygant*.

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and Council of the City of Camden, 465 U.S. 208 (1984); *White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204 (1983).

<sup>302</sup> 106 S. Ct. at 1851.

<sup>303</sup> 448 U.S. at 484-85 n.72.

It is aimed at correcting identified discrimination in an industry notorious for its opposition to equal employment opportunity.

Furthermore, approving state MBE legislation premised on "identified discrimination" by the construction industry is entirely consistent with *Fullilove*. In that case, the Court permitted Congress to take the very same measures now being adopted by the states to cure the very same evil, that is, the deliberate and continuing exclusion of racial minorities from the construction industry. The Court in *Fullilove* specifically refused to impose upon Congress the requirement that the source of the discrimination be "identified with the exactitude expected in judicial or administrative proceedings."<sup>304</sup> The Court should not require more of the states by way of identified discrimination than it did of Congress.

Finally, forbidding the state to remedy identified discrimination in the absence of a causal link to the state ignores the fact that, by contracting with the discriminatory contractor, the state becomes a passive participant in the discrimination. To require it to continue in this role seems particularly restrictive of the state's traditional police powers, especially because the state is dispensing its *own* funds, not acting as a regulator of private conduct.

In short, *Fullilove* rather than *Wygant* should guide the Court in determining the constitutionality of state MBE programs. Reliance on *Fullilove* is appropriate for another reason as well. That case provides helpful guidelines to insure the reasonableness of MBE programs. The Court should apply to state MBE programs the same standard it applied to the federal program. Under this standard, the percentage set-aside should not be excessive in light of the total amount of construction funds available to non-minority firms, the duration of the program should be limited, and waivers should be available in the event qualified MBE's cannot be located.<sup>305</sup>

### CONCLUSION

The use of race/gender-conscious criteria in affirmative action plans constitutes one of the most vexatious problems in public sector employment law today. The origin of the problem lies in the simultaneous application of two separate antidiscrimination norms, each with a different standard of liability. The difficulty of the

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<sup>304</sup> *Id.* at 478 (opinion of Burger, C.J.); *id.* at 502-03 (Powell, J., concurring).

<sup>305</sup> 448 U.S. at 484-85 n.72.

problem has been compounded by the Supreme Court's unsuccessful efforts to transform the norms' liability principles into criteria for determining whether a public sector employer possesses a sufficient factual predicate to justify implementing an affirmative action plan. The Court has failed to provide adequate guidelines to resolve the constitutional and statutory problems analyzed in this article. Indeed, it has rendered their resolution more difficult by adopting essentially inconsistent principles under Title VII and the equal protection clause: Title VII allows the public sector employer to implement a race/gender-conscious plan to overcome the disparate impact of its employment practices, but the equal protection clause denies it the authority to remedy societal discrimination.

The fundamentally differing views of the Justices concerning race/gender-conscious hiring and promotion decisions by public sector employers have contributed significantly to this highly unstable jurisprudence. The Court has split into three factions: the conservative camp, which almost always opposes the use of race/gender-conscious plans (except to remedy specific acts of discrimination); the liberal camp, which almost always favors their use; and an unaligned group, which lends voting strength to each camp on a case-by-case basis. Close examination of the nine affirmative action cases shows that only the most general principles can command clear support from a majority of the Justices.

Both the Court and Congress have a role to play in repairing the Court's fractured jurisprudence. The Court should unequivocally reaffirm the statutory and constitutional propriety of race/gender-conscious plans in the context of public sector employment. It should adopt the manifest imbalance test under Title VII and interpret the equal protection clause as permitting the states to remedy societal discrimination. Finally, the Court should reject an extension of *Wygant* to state MBE programs that meet the reasonableness criteria suggested by *Fullilove*. Congress should invoke its authority under section 5 of the fourteenth amendment to amend Title VII to expressly permit the adoption of race/gender-conscious programs if a manifest imbalance exists between the racial and gender composition of the public employer's workforce and that of the appropriate labor pool and the plan adequately protects the interests of non-minority employees.

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