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AFFIRMATIVE ACTION AFTER *STOTTS*: THE UNITED STATES SUPREME COURT'S 1985 TERM

ALBERT BRODERICK^{*}

Lawyers often sense the moment when the United States Supreme Court is prepared to explicitly reaffirm a doctrine that has long been implicitly accepted or, on the other hand, to distinguish the doctrine out of existence. Such a moment may be at hand in the Court's 1985 Term with respect to affirmative action as a remedy for past race and sex discrimination. Until *Firefighters Local Union No. 1784 v. Stotts*¹ in 1984, the Court had confined itself to fixing limits for affirmative group relief. In *Stotts* the majority opinion hinted, for the first time, that affirmative group relief might henceforth be limited to "specific victims" of discrimination. The Court has firmly entrenched the "specific victim" requirement where individual relief is concerned. However, imposing such a requirement on *group* relief could sound the death knell for affirmative action goals as race-conscious and sex-conscious remedies for egregious identified discrimination.

This Term, the Supreme Court once again has heard argument on an affirmative action case.² Two more affirmative action cases have been accepted for hearing by the Court.³ As of the time of this writing, three other such cases remain on the Court's 1985 docket,⁴ their petitions for certiorari review, as yet, having been neither granted nor denied.⁵ Friend

^{*} A.B. 1937, Princeton University; LL.B 1941, S.J.D. 1963, Harvard University; D.Phil. 1968, Oxford University; Professor of Law, North Carolina Central University.

1. 104 S. Ct. 2576 (1984) (discussed *infra* text accompanying notes 116-138).

2. On November 7, 1985, the Court heard oral argument in *Wygant v. Jackson Bd. of Educ.*, 746 F.2d 1152 (6th Cir. 1984), *cert. granted*, 105 S. Ct. 2015 (1985).

3. On October 7, 1985, the first day of the 1985 Term, the Court granted certiorari petitions in *Vanguards v. City of Cleveland*, 753 F.2d 479 (6th Cir. 1985), *cert. granted sub. nom. Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 106 S. Ct. 59 (1985), and *EEOC v. Local 638*, 753 F.2d 1172 (2d Cir. 1985), *cert. granted sub nom. Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 58 (1985). Due to the timing of the granting of these petitions and the writing of this Article, *Vanguards* and *Local 638* generally will be referred to by their names in the respective courts of appeals. These cases perhaps will be heard by March 1986.

4. *Turner v. Orr*, 759 F.2d 817 (11th Cir. 1985), *petition for cert. filed* 54 U.S.L.W. 3149 (U.S. Sept. 10, 1985) (No. 85-177); *Janowiak v. Corporate City of South Bend*, 750 F.2d 577 (7th Cir. 1984), *petition for cert. filed*, 54 U.S.L.W. 3016 (U.S. July 16, 1985) (No. 84-1936); *Marsh v. Board of Educ.*, 581 F. Supp. 614 (E.D. Mich. 1984), *aff'd mem.*, 762 F.2d 1009 (6th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3071 (U.S. Aug. 6, 1985) (No. 84-1859).

5. The grant of certiorari constitutes a discretionary determination by the Supreme Court that it will decide a case from a state's highest court (pursuant to 28 U.S.C. § 1257 (1982)) or from a federal court (pursuant to 28 U.S.C. § 1254 (1982)), after briefing and oral argument. This determi-

and foe alike anticipate the 1985 Term to be crucial for affirmative action jurisprudence, which has been unsteady since 1984 and the Court's puzzling majority opinion in *Stotts*. What is at stake in these cases? How is the Court likely to resolve the issues they present? These are the questions to be examined here.

The lawyers arguing *Wygant v. Jackson Board of Education*,⁶ as in most cases heard by the Court, sought to persuade the Justices that judicial precedents require that the Court should sustain their clients' position. In *Wygant*, that would mean a decision for or against a particular variety of affirmative action. Will the Court stake out its position in continuity with its prior decisions? In some instances the Court is asked to recognize its past positions as erroneous or outdated by more recent developments or perceptions and to repudiate those positions. In other instances, attorneys will advise the Supreme Court that its past pronouncements have been read by lower courts too broadly or too narrowly, and that what is needed is not repudiation, but clarification.

In the context of *Wygant* and the preponderance of federal court cases which have dealt with "affirmative action" over the past decade, the term is used as shorthand for plans to remedy past race or sex discrimination. These plans set certain goals with respect to the hiring or promotion of the deprived group (e.g., blacks or women). These plans are sometimes judicially or administratively established after litigation before a court or a governmental quasi-judicial commission.⁷ Affirmative action goals are also established as a remedy for the violation of the equal protection clause of the United States Constitution.⁸ An affirmative plan might be incorporated within a consent decree by which adversary parties accept settlement of litigation in terms of affirmative hiring or promotion goals found "reasonable" by the court. Sometimes these affirmative action goals are included voluntarily in collective bargaining agreements between governmental bodies or private employers and unions. A governmental body or private employer unilaterally might adopt an affirmative action plan in view of past discrimination that might form the basis of a race or sex discrimination suit under title VII or equal protection. More-

nation is made when four Justices vote to hear a particular case selected from the multitude of petitions filed each Term seeking discretionary review (the so-called "Rule of Four"). In other cases specified by the above statutes a party may have a "right" to an "appeal." A litigant qualifying for review of a decision via "appeal" is entitled to review by the Supreme Court. However, the Court has formulated restrictions on an appellant's claim to submit briefs and argue orally before the Court. For further reference to petitions for certiorari and appeals, see *infra* notes 195, 443.

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

7. Such a commission, the Equal Employment Opportunity Commission (EEOC), was established by the Civil Rights Act of 1964, §§ 701-716, 42 U.S.C. §§ 2000e to 2000e(17) (1982).

8. The equal protection clause of the fourteenth amendment of the constitution applies directly only to state action. However, since *Bolling v. Sharpe*, 347 U.S. 497 (1954), a companion case to *Brown v. Board of Educ.*, 347 U.S. 483 (1954), the Supreme Court has held that equal protection considerations apply against the federal government as a component of fifth amendment due process.

over, specific national or state legislation, or executive action, can require or establish such plans. These situations have caused courts to respond to claims by persons who claim to be disadvantaged by the affirmative relief which had been given to blacks or women to remedy the disadvantages suffered by these groups because of past discrimination in employment or some other field. Objections to affirmative action are usually rooted in either or both of two legal grounds: (1) constitutional (the equal protection clause); (2) statutory (title VII of the Civil Rights Act of 1964).

This article discusses affirmative action relief granted by the federal courts under title VII and the equal protection clause of the Constitution.⁹ Many affirmative action cases involve judicial determinations under both title VII and equal protection.¹⁰ If a case involves governmental action and employment, then both title VII and equal protection come into play. In this situation, the Supreme Court strictly mandates that federal courts give primary consideration to the statutory provision, reaching the constitutional question only if title VII does not dispose of the case.¹¹ Part I examines the law of affirmative action in cases of employment discrimination as applied prior to the 1985 Term. Part II analyzes the cases pending on the 1985 docket at the time of this writing. Part III discusses the questions of policy upon which any of the pending cases may be decided.

I. THE "LAW" TO DATE

A. *Title VII¹² and the Problem of Stotts¹³*

The Civil Rights Act of 1964¹⁴ passed by a narrow margin after "the longest debate"¹⁵ on a single piece of legislation in the history of Con-

9. Remedial affirmative action in other federal legislation and in Executive Order 11246, 3 C.F.R. 339 (1965), reprinted in 42 U.S.C. § 2000e, at 28 (1982), as amended by Executive Order 11375, 3 C.F.R. 684 (1967), reprinted in 42 U.S.C. § 2000e, at 28 (1982) (concerning government contractors), will be discussed only in passing.

10. Some cases necessarily concern only title VII because state governmental action is necessary to trigger the equal protection clause of the fourteenth amendment (*i.e.*, "no State shall . . .," U.S. CONST. Amend. V) or the equal protection component of the due process clause of the fifth amendment (*i.e.*, federal governmental action, U.S. CONST. Amend. XIV, § 1). Other affirmative action cases concern only the constitutional ground of equal protection because they do not involve discrimination in employment, the central area of title VII.

11. Leading reminders by the Supreme Court include *Hagans v. Lavine*, 415 U.S. 528 (1974) and *Siler v. Louisville & N.R. Co.*, 213 U.S. 175 (1909).

12. 42 U.S.C. §§ 2000e to 2000e(17) (1982).

13. *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984).

14. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 255 (codified at 42 U.S.C. §§ 2000(e) to 2000e(17) (1982)).

15. C. WHALEN & B. WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* (1985) (detailed account of the building of the coalition and strategy by which the Act's difficult passage was secured).

gress.¹⁶ Its enactment resulted from a Democratic and Republican coalition,¹⁷ following a sustained campaign of protest against blatant racial discrimination in private employment and public accommodations by black and white civil rights leaders.¹⁸ Momentum for the Act's passage was furnished by the assassination of President Kennedy, whose Department of Justice had introduced the legislation.¹⁹ The most formidable obstacle to passage concerned the public accommodations provision of title II.²⁰ Surprisingly, the employment discrimination section of the Act (*i.e.*, title VII) evoked heated debate, but little analysis.²¹

As originally presented to Congress,²² title VII was directed primarily

16. Introduced on June 19, 1963, the Act passed on July 2, 1964, after 113 days of hard-fought debate. *Id.* at 117.

17. The key contributions of two Republicans to passage of the unprecedented legislation, Representative William McCulloch of Ohio and Senate Minority Leader Everett Dirksen of Illinois, are dealt with in detail in C. WHALEN & B. WHALEN, *supra* note 15. The pilot of the legislation in the Senate was the late Senator Hubert H. Humphrey of Minnesota.

18. Prominent among these protesters were Dr. Martin Luther King, Jr., James Farmer, Roy Wilkins, Whitney Young, A. Philip Randolph, Clarence Mitchell, and Walter Fautroy. C. WHALEN & B. WHALEN, *supra* note 15, at 216-27. A strong reminder that the civil rights movement was "a disciplined mass movement of Southern blacks," and not just the product of charismatic leadership, is given in A. Morris, *The Origins of the Civil Rights Movement: Black Communities Organizing for Change* (1985). This careful sociological study details developments from the Baton Rouge boycott of 1953, through Montgomery (1955) and the student sit-ins (1957-60) to the culminating confrontation in Birmingham in 1963 which produced the change of national climate which made possible the Civil Rights Act of 1964.

Professor Morris examines the crucial factors of strategy, popular involvement, and organization. His central thesis is that the critical organizational center of the civil rights movement was the Southern Christian Leadership Conference (SCLC) which "functioned as the decentralized arm of the black church" under the undisputed presidency of Dr. Martin Luther King, Jr. In documents and in interviews with chief participants (including key local groups in Durham and Greensboro, N.C.), Morris considers the tensions among various collaborating and often competing black "organizational forces" such as the Congress of Racial Equality (CORE), the Student Non-Violent Coordinating Committee (SNCC), and the National Association for Advancement of Colored People (NAACP), and "predominantly white organizations closely allied with the movement" such as the Highlander Folk School (HFS), the Southern Conference Educational Fund (SCEF), and the Fellowship of Reconciliation (FOR). According to Morris, "the black churches were the power centers," the SCLC was the "force that developed the infrastructure of the civil rights movement," and Dr. King presided over all with "charismatic authority" and "organizational power." *Id.* at 77, 93.

19. When President Kennedy was assassinated on November 22, 1963, the bill was still in committees. *Id.* at 69-70. The new president, Lyndon Johnson, made passage of the Civil Rights Act of 1964 his top legislative priority: "We are not going to have anything else hit the Senate floor until this bill is passed." *Id.* at 97. A Senate filibuster was barely defeated by invoking cloture. The final votes are misleading as to how close a call the battle had been (House: 289-126; Senate: 73-27). *Id.* at 226.

20. This section virtually reproduced the public accommodations provisions of the Civil Rights Act of 1870, which had been declared unconstitutional by the Supreme Court in *The Civil Rights Cases*, 109 U.S. 3 (1883). The Johnson Administration's strategy of relying on the recently expanded commerce power of the federal government to sustain the constitutionality of the Act proved successful. The Supreme Court promptly held title II of the Act constitutional in *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

21. Title VII, the equal employment provisions, was not in the original civil rights bill.

22. In its original form, title VII was added to the bill by Congressman Peter Rodino of New Jersey in subcommittee on September 25, 1963. C. WHALEN & B. WHALEN, *supra* note 15, at 35.

towards racial discrimination. An Equal Pay Act for women had been passed by Congress the previous year,²³ and title VII, as introduced,²⁴ did not bar sex discrimination. The addition of "sex" to "race, religion, and national origin" was made on the floor of Congress and passed²⁵ without significant debate. The motion to include "sex" had been made by a vigorous opponent of the civil rights legislation, "Judge" Howard W. Smith of South Carolina, who hoped to secure a few needed votes to block passage of the bill.²⁶ Nevertheless, from the outset, title VII provided that "[i]t shall be an unlawful employment practice for an employee . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex or national origin."²⁷

To enforce the ban on discrimination, the Act established a federal commission, the Equal Employment Opportunity Commission (EEOC), to conduct an initial investigation, to settle when possible, and, in the absence of settlement, to adjudicate claims of discrimination. The Act provided ultimate access to the courts by the EEOC to enforce its decision in favor of a claimant, or by claimants on their own.²⁸

Once a claimant established to the satisfaction of a court that he or she suffered from employment discrimination "because of race, color, sex, religion or national origin," the Act specified that the court may enjoin the employer "from engaging in such unlawful employment practice, and order *such affirmative action as may be appropriate*. The order may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate."²⁹

The usual judicial relief given at common law to a successful claimant was money damages. Equity, when separate from the common law, found more resourceful remedies.³⁰ In addition to awarding damages for a nuisance (such as operation of a glue factory in a residential neighbor-

23. The Equal Pay Act, Pub. L. No. 88-38, § 3, 77 Stat. 56, 56-57 (1963) (codified at 29 U.S.C. § 206(d) (1982)).

24. See *supra* note 22.

25. The House vote was 168 to 133. C. WHALEN & B. WHALEN, *supra* note 15, at 117.

26. The Whalens suggest that "the predominately male House of Representatives were self-righteously indignant at having to take this unexpected stand for or against women." *Id.* Congresswoman Katherine St. George, a Republican from New York, had her moment addressing the House on the motion: "We outlast you—we outlive you—we nag you to death, . . . [but] we are entitled to this little crumb of equality. The addition of the little, terrifying word 's-e-x' will not hurt this legislation in any way." *Id.*

27. 42 U.S.C. § 2000e-2(a) (1982).

28. The focus of this discussion is not on the intricacies of the administrative process established by the 1964 Act or generous theories developed in the courts to prove "discrimination."

29. 42 U.S.C. § 2000e-5(g) (1982) (emphasis added).

30. For consideration of equity in English law, see the classic work of F. MAITLAND, *EQUITY* (1932). Especially, see *id.* at 237-49, 254-65 (specific performance; injunctions). For treatment of equity in American law, see R. POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 10, 155-57 (1938) and R. POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 64-66 (1954).

hood), a court in equity could also enjoin a defendant from continuing the nuisance under penalty of contempt and require him to take action to terminate it. For breach of contract, equity could go beyond the common law remedy of damages, and in special circumstances, compel him to carry out a contract. This doctrine was known as specific performance. When equity and common law courts were combined in both England and the United States,³¹ the newly-created courts acquired the old powers of the common law courts (damages) and the equitable remedy of specific performance. Generally, the new courts preferred to limit the specific action they exacted from a defendant to the negative requirement of an injunction—to cease and desist. Eventually, the courts' use of affirmative remedies increased. The shift was masked by continuing to call the affirmative remedy a "mandatory injunction."³² This affirmative relief was often the only meaningful way of compensating a victim who sought performance rather than mere damages for non-performance.

The use of the affirmative equitable remedy took on a distinctly broader scope in American constitutional law in the second half of this century. This occurred chiefly in three sets of cases in which Supreme Court decisions sharply broke away from previous institutional patterns.

In the 1954 case of *Brown v. Board of Education*,³³ the Court found that the "separate but equal" doctrine, proclaimed in 1896, was indeed a violation of the constitutional rights of four black plaintiffs and other aggrieved members of their class to equal protection of the laws in public education. While a mere award of damages would be inadequate, simply

31. Federal courts had, from the beginning, both "law" and "equity" powers.

The suits in equity of which the federal courts have had 'cognizance' ever since 1789 constituted the body of law which had been transplanted to this country from the English Court of Chancery. . . .

. . . . Equitable relief in a federal court is of course subject to restrictions: the suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery . . . ; a plain, adequate and complete remedy at law must be wanting . . . ; explicit Congressional curtailment of equity powers must be respected, see, e.g., Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 101 et seq.; the constitutional right to trial by jury cannot be evaded. . . .

Guaranty Trust Co. v. York, 326 U.S. 99, 105 (1945) (Frankfurter, J.) (citations omitted). The Norris-LaGuardia Act, referred to by Justice Frankfurter, was Congress' response to excessive grants of ex parte injunctions by federal judges in labor disputes.

32. The overlap between the common law extraordinary remedy (prerogative writ) of mandamus and the equitable mandatory injunction was explored by the Supreme Court in *Panama Canal Co. v. Grace Line Inc.*, 356 U.S. 309 (1958).

33. 347 U.S. 483 (1954) (*Brown I*). The following year, in *Brown II*, the Court reaffirmed the existence of the constitutional violation and remanded the cases to the district courts with directions that there be "good faith compliance at the earliest practicable date." *Brown v. Board of Educ.*, 349 U.S. 294 (1955). The last line of the opinion seemed to lessen the urgency while directing the district courts "to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis *with all deliberate speed* the parties to these [cases]." *Id.* at 294 (emphasis added).

Fourteen years later, little enough had happened—much was "deliberate"—little evidence of speed.

directing that the four victorious plaintiffs and their class members be admitted to public schools from which they had been barred because of their race would leave the social blight and constitutional violation intact. The Supreme Court instead remanded the cases to the federal district courts to supervise the four states' uprooting of the two-race system of schools. The wrong to the black plaintiffs required more than their admission to schools, requiring affirmative directions to defendant school boards to integrate their entire school systems to foreclose similar injury to other present and future black children and—let's face it—to repair the social landscape. The new remedy was put into play (too slowly) in the form of equitable relief to remedy proven wrongs to the four groups whose constitutional rights were violated in *Brown*³⁴.

In 1962, a Tennessee plaintiff in *Baker v. Carr*³⁵ convinced the Court that his equal protection right to an "undiluted" vote was violated by a state arrangement of legislative districts which made his vote count less than did the vote of a citizen of a less populous district. The equitable relief directed by the Supreme Court required the defendant state, under the supervision of the local federal district court, to reapportion its legislative districts so as to prevent future injury to other citizens. This plan also included those citizens living in districts other than those in which the victorious plaintiff had been constitutionally deprived. Here again, the equitable power of the federal court had been enlisted to affirmatively supervise an equitable reapportionment according to a standard which the Court soon established: "one person, one vote."³⁶ Once more, after the Voting Rights Act of 1965 set in motion the practical means to stimulate realistically the participation of black citizens in the voting process, the Court interpreted the statute to prevent voting changes in any state by reapportionment or any other method which would lessen the potentiality of black citizens to participate in elections and elective office.³⁷

In these situations, the Supreme Court viewed its responsibility to effectively interpret and enforce the Constitution and federal statutes as requiring more than simple individual relief for an aggrieved plaintiff.³⁸ Affirmative steps by local federal courts, through use of their equitable

34. The turning point was *Green v. County School Bd.*, 391 U.S. 430 (1968), in which the Court spoke out strongly for "speed" and for effective plans to dismantle two segregated systems of public schools existing side by side (*i.e.*, the black and white neighborhood school model). The vigorous affirmative race-conscious relief to remedy the constitutional violation finally had begun, going as far as requiring busing as a remedy for the continued presence in the society of the dual system of schools. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

35. 369 U.S. 186 (1962).

36. *Reynolds v. Sims*, 377 U.S. 533 (1964).

37. *Beer v. United States*, 425 U.S. 130 (1976). *See also* *United Jewish Orgs. v. Carey*, 430 U.S. 144 (1977) (race-conscious voting districts upheld to increase the likelihood of adequate representation of blacks in the state legislature).

38. The use of these equitable race-conscious remedies for identified discrimination was expressly approved by the Supreme Court in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265

power, were required to translate an important new constitutional doctrine into practice, or a wide-ranging federal statute into imminent practical implementation. As one might guess, widespread mutterings were heard against this new sweep of power assigned to federal judges.³⁹ Advocates of this broad judicial action argue that the alternative is to have each plaintiff receive his/her relief case-by-case as they succeed in establishing themselves as individual "victims." While this approach would make whole the "specific victims," such one-by-one relief hardly would insure that large-scale changes in the law would be implemented.⁴⁰

Congress did not unmistakably design the language of section 706(g) of title VII of the Civil Rights Act of 1964⁴¹ such that an employer

(1978) and two years later in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), provided certain conditions were met.

39. Professor Bickel particularly was incensed at the Court's new initiative:

The general practice is to leave enforcement of judge-made constitutional law to private initiative, and to enforce it case by case, so that no penalties attach to failure to abide by it before completion of a successful enforcement litigation. This means quite literally that no one is under any legal obligation to carry out a rule of constitutional law announced by the Supreme Court until someone else has conducted a successful litigation and obtained a decree directing him to do so.

A. BICKEL, *THE MORALITY OF CONSENT* 111 (1975). Professor Lusky (who as Justice Stone's law clerk authored the first draft of the celebrated *Carolene Products* footnote, *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938)) generally disagreed with the Court's affirmative thrust, but he would except from his dissent the school desegregation cases. Disagreeing with Bickel, Lusky thought the Civil War amendments' (thirteenth, fourteenth and fifteenth) "one pervading purpose" required the administrative injunctions in the school cases. L. LUSKY, *BY WHAT RIGHT?: A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION* 230-40, 364 (1975).

40. Cf. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (Supreme Court's recognition of the ineffectiveness of one-case-at-a-time enforcement of civil rights in approving the drastic remedies of the Voting Rights Act of 1965, 42 U.S.C. §§ 1973 to 1973bb-1 (1982)). Congress, said the *Katzenbach* Court, "had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting. . . ." 383 U.S. at 328. See O. FISS, *THE CIVIL RIGHTS INJUNCTION* (1978):

If nothing more is at stake than the formulation of 'labor policy,' as was true with the property injunction and the labor injunction, then it is fair to assume that the nonrepresentative character of the judiciary is a vice. But if the focus shifts to the civil rights injunction, and either the minority-group orientation or the constitutional basis of the substantive right, then the nonrepresentative quality of the judiciary becomes a virtue rather than a vice. Constitutional rights are supposed to be countermajoritarian, and those emanating from the Equal Protection Clause particularly so.

Id. at 45.

Professor Fiss summarized the broad equitable relief administered by the federal courts in the desegregation cases:

[*Brown*] required new procedures for the assignment of students; new criteria for the construction of schools; reassignment of faculty; revision of the transportation systems to accommodate new routes and new distances; reallocation of resources among schools and among new activities; curriculum modification; increased appropriations; revision of interscholastic sports schedules; new information systems for monitoring the performance of the organization. . . .

Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2-3 (1979). But see the cutback of the "administrative injunction" by the Supreme Court in *Rizzo v. Goode*, 423 U.S. 362 (1976) and *O'Shea v. Littleton*, 414 U.S. 488 (1974), largely on federalism grounds (although concern for over-involvement by the federal courts in supervisory functions was also evident).

41. 42 U.S.C. § 2000e-5(g) (1982).

whose proven racial or sexual discrimination had resulted in an entirely white male work force should be visited automatically with a judicial decree mandating that a certain percentage of women or blacks be included in his work force, or in various promotion slots, according to a rigid timetable. On the other hand, *no* evidence shows that Congress intended by section 706(g) that *only* the proven victims be hired and the offending plant be allowed to continue as before, subject only to one-by-one judicial attack by subsequent victim plaintiffs. "Affirmative action" in section 706(g) at least meant that the proven victims be hired or promoted and that they be given their "rightful place" in the seniority order absent race or sex discrimination.⁴² This remedy can vault these victims over the heads of more senior employees to obtain their rightful place.⁴³

This "specific victim" relief was never the complete understanding of "affirmative action," nor was the affirmative remedy limited to injunctive relief to discontinue the discrimination. Affirmative action was conceived initially as an element of a judicial decree where race or sex discrimination was proven. Further affirmative relief would aim the employer in the right direction. Setting hiring or promotional goals without awaiting further individual litigation would lessen the likelihood of renewed discrimination against blacks or women.⁴⁴ The Act was so in-

42. *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976). This interpretation was reinforced the following year in *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). *Teamsters* also indicated that after racial discrimination was proven in violation of title VII, individual members of the class would have, in a second phase, the opportunity to prove that they had been "specific victims" of the identified discrimination. If successful, these victims might receive the *Franks* relief and be awarded the seniority for which they were qualified but for the identified racial discrimination.

Another aspect of *Teamsters* relates to the seniority provision of title VII, § 703(h), 42 U.S.C. § 2000e-2(h) (1982). The Court held that this section established that a bona fide seniority system (*i.e.*, one not intentionally constructed to be racially discriminatory) would not be prejudiced solely because such system tended to perpetuate pre-Act racial discrimination. *Franks'* retroactive seniority relief still would be available to victims of post-Act discrimination at the plant, but plaintiffs could not rely on the discriminatory effect of a "bona fide" seniority system. This part of the *Teamsters* decision set aside the long-standing contrary interpretation of § 703(h) by the courts of appeals, as Justice Marshall underscored in a ringing dissent. *Id.* at 378-79 (Marshall, J., dissenting).

43. The "rightful place," "make whole" relief is available to victims only *if* the discrimination took place after the effective date of the Act (July 1, 1965).

44. A grasp of the distinction between the accepted scope of "specific victim" analysis in *Franks* and *Teamsters*, and the possible extension of such analysis to affirmative action goals, suggested by Justice White's opinion in *Stotts*, is crucial to understanding the issues presented by the cases pending before the Supreme Court which are discussed in this study. Justice Blackmun's explanation is worth repetition:

In determining the nature of 'appropriate' relief under § 706(g), courts have distinguished between individual relief and race-conscious class relief. . . . In a Title VII class-action suit . . . an individual plaintiff is entitled to an award of individual relief only if he can establish that he was the victim of discrimination. That requirement grows out of the general equitable principles of 'make whole' relief; an individual who has suffered no injury is not entitled to an individual award. See *Teamsters v. United States*, 431 U.S. 324, 347-348, 364-376, 97 S.Ct. 1843, 1860-1861, 1869-1872, 52 L.Ed.2d 396 (1977). If victimization is shown, however, an individual is entitled to whatever retroactive seniority, backpay, and promotions are consistent with the stat-

terpreted by many lower federal courts from the beginning.⁴⁵ Was this interpretation correct? When the Supreme Court finally addressed this question in 1978,⁴⁶ the answer was "sometimes" rather than "no".

From the beginning, title VII was written and understood as barring any race discrimination—by blacks as well as whites—and any sex discrimination—by women as well as men. This interpretation was questioned by defendants in *McDonald v. Santa Fe Trail Transportation Co.*⁴⁷ in 1976. Justice Marshall, in a unanimous opinion for the Court, definitively proclaimed, "Title VII prohibits racial discrimination against the white petitioners in this case, upon the same standards as would be applicable were they Negroes and Jackson [the black employee] white."⁴⁸ Justice Marshall stated further: "There is no exception in the terms of the Act for isolated cases; on the contrary, 'Title VII tolerates no racial discrimination, subtle or otherwise.'" ⁴⁹ At this point, Justice Marshall specified that "Santa Fe disclaims that the actions challenged here were any part of an affirmative action program. . . ." ⁵⁰ Would such an affirmative action program pass muster under title VII? The Court saved that question for another day: "[W]e emphasize that we do not consider here the permissibility of such a program, whether judicially required or otherwise prompted."⁵¹

ute's goal of making the victim whole. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 762-770, 96 S.Ct. 1251, 1263-1266, 47 L.Ed.2d 444 (1976). . . .

In Title VII class-action suits, the Courts of Appeals are unanimously of the view that race-conscious affirmative relief can also be 'appropriate' under § 706(g) [citing courts of appeals cases and referring to *Bakke*, 438 U.S. at 301-02 (Powell, J.) and *id.* at 353 n.28 (Brennan, J.)]. . . . The purpose of such relief is not to make whole any particular individual, but rather to remedy the present class-wide effects of past discrimination or to prevent similar discrimination in the future. Because the discrimination sought to be alleviated by race-conscious relief is the class-wide effects of past discrimination, rather than discrimination against identified members of the class, such relief is provided to the class as a whole rather than to its individual members. . . . The distinguishing feature of race-conscious relief is that no individual member of the disadvantaged class has a claim to it, and individual beneficiaries of the relief need not show that they are themselves victims of the discrimination for which the relief was granted.

Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576, 2605-06 (Blackmun, J., dissenting) (footnote omitted). Justice Blackmun's statement of the distinction can hardly be challenged. Open to debate, both here and at the Court, is whether the Supreme Court should extend *Franks-Teamsters'* "specific victim" analysis to bar race-conscious group relief as a remedy for identified past racial discrimination against a racial group.

45. Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); Vulcan Society v. Civil Serv. Comm'n, 490 F.2d 387 (2d Cir. 1973). *But see* Kirkland v. New York State Dep't of Correctional Servs., 520 F.2d 420 (2d Cir. 1975).

46. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 268 (1978) (equal protection) (discussed *infra* note 60 and at text accompanying notes 142-151). The Court's first title VII consideration of affirmative action goals awaited *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (discussed *infra* note 60 and at text accompanying notes 52-78).

47. 427 U.S. 273 (1976).

48. *Id.* at 280.

49. *Id.* at 280-81 n.8 (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973)) (emphasis original).

50. *Id.*

51. *Id.*

1. *United Steelworkers v. Weber*⁵²

"Another day" came three years later in 1979. At the center of the current affirmative action debate, *Weber* is the only Supreme Court decision that specifically has upheld a title VII affirmative action plan that provided for race-conscious goals "to eliminate manifest racial imbalances in traditionally segregated job categories."⁵³

Prior to 1974 only 1.83% of the skilled craft workers were black at the Kaiser plant in Gramercy, Louisiana, while the work force in Gramercy was 39% black. The United Steelworkers of America, Kaiser, and the national union representing employees at fifteen Kaiser plants included in their national collective bargaining agreement "an affirmative action plan designed to eliminate conspicuous racial imbalances in Kaiser's then almost exclusively white craftwork forces."⁵⁴ On-the-job training plans were established to train unskilled workers already employed by Kaiser for higher-paying jobs. Trainees were selected "on the basis of seniority with the proviso that at least fifty percent of the new trainees were to be black until the percentage of black skilled craft workers in the Gramercy plant approximated the percentage of blacks in the local labor force."⁵⁵

Brian Weber, a white employee who was senior to some of the blacks selected for the training program,⁵⁶ sought an injunction against Kaiser and the union, alleging that the plan constituted an "employment preference based on race" in violation of title VII. The district court granted the injunction, and the court of appeals affirmed. The Supreme Court reversed, upholding the "voluntary" plan as permitted by title VII.

The Court entered certain disclaimers at the outset of its decision. One was that the case did not raise equal protection or any other constitutional issue because no state action was involved, only private non-governmental action. Another was that the plan did not concern "what a court might order to remedy a past proved violation of the Act."⁵⁷ While squarely rejecting the argument that "Congress intended in Title VII to prohibit all race-conscious affirmative action plans,"⁵⁸ the Court disavowed any design to "define in detail the line of demarcation between permissible and impermissible affirmative action plans."⁵⁹ Despite this last disclaimer, in upholding the Kaiser plan the Court furnished standards which have been used by the courts of appeals in many cases,⁶⁰

52. 443 U.S. 193 (1979)

53. *Id.* at 197.

54. *Id.* at 198.

55. *Id.* at 199.

56. *Id.*

57. *Id.* at 200.

58. *Id.* at 201.

59. *Id.* at 208.

60. See cases cited *infra* note 81 (courts of appeals cases using race- or sex-conscious affirmative

(and by the Supreme Court the following year in *Fullilove v. Klutznick*⁶¹) as working criteria to separate "permissible and impermissible affirmative action plans."⁶²

The Court noted that both the Kaiser plan and title VII "were designed to break down old patterns of racial segregation and hierarchy."⁶³ Both were structured to "open employment opportunities for Negroes in occupations which have been traditionally closed to them."⁶⁴ The Court said, "Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with the plight of the Negro in our economy."⁶⁵ Citing unemployment figures before Congress as title VII was enacted, the Court recalled that "[i]n 1947 the non-white unemployment rate was only 64% higher than the white rate; in 1962 (two years before enactment) it was 124% higher."⁶⁶ Again, "Congress feared that the goals of the Civil Rights Act—the integration of blacks into the mainstream of American society—could not be achieved unless this trend was reversed. Congress further recognized that this would not be possible unless blacks were able to

action goals as a remedy for identified past discrimination). Although *Weber* is used chiefly by the courts of appeals in title VII cases, most courts recognize that *Weber* should be considered in light of *Fullilove v. Klutznick*, 448 U.S. 448 (1980), although *Fullilove* passed on the constitutionality of a public, affirmative race-conscious plan. Whether considering only *Weber* and title VII, or the equal protection issue, no court of appeals has felt free to disregard *Bakke*'s bar of a rigid race-conscious quota. While not all courts of appeals treated the relation between the title VII and equal protection standards for affirmative action goals in precisely the same way, a consensus developed that a *Bakke-Weber-Fullilove* formula exists that should be applied to test the validity of race- or sex-conscious affirmative action goals, barring some new specific interpretation of title VII. See *infra* text accompanying notes 138-141. See, e.g., *Kromnick v. School Dist.*, 739 F.2d 894 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 782 (1985); *Williams v. City of New Orleans*, 729 F.2d 1554 (5th Cir. 1984) (en banc); *Setser v. Novack Inv. Co.*, 657 F.2d 962 (8th Cir.) (en banc), *cert. denied*, 454 U.S. 1064 (1981); *Lehman v. Yellow Freight Sys., Inc.*, 651 F.2d 520 (7th Cir. 1981); *United States v. City of Miami*, 614 F.2d 1322 (5th Cir. 1980), *aff'd in part and remanded in part on other grounds*, 664 F.2d 435 (5th Cir. 1981). In *Williams*, the controlling opinion dared refer to *Weber* and *Fullilove* as "the two leading Title VII quota cases." 729 F.2d at 1560 (Williams, J.). See also, e.g., *Janowiak v. Corporate City of South Bend*, 750 F.2d 557 (7th Cir. 1984), *petition for cert. filed*, 54 U.S.L.W. 3016 (U.S. July 16, 1985) (No. 84-1936); *Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 2357 (1985). Of course, in a purely constitutional (i.e., equal protection) sense, the decisions directly on point are *Bakke* and *Fullilove*. However, the widespread impression is that *Fullilove* represents *Bakke* refined by the factors identified in *Weber*. Again, in a purely title VII sense, the decision directly in point is *Weber*. Still, the courts of appeals have taken note of *Fullilove*, especially where the affirmative action goals were not voluntarily adopted. The question considered here has greater significance where governmental action is challenged; for in that case, both equal protection and title VII are directly applicable. In this context, the *Bakke-Weber-Fullilove* consensus comes into play.

61. 448 U.S. 448 (1980).

62. *Weber*, 443 U.S. at 208.

63. *Id.* at 208.

64. *Id.* at 203 (quoting Senator Hubert Humphrey, who piloted the Civil Rights Act through the Senate, 110 CONG. REC. 6548 (1964)).

65. *Id.*

66. *Id.*

secure jobs 'which have a future.'"⁶⁷ Rejecting plaintiff's contention that title VII contained an "absolute prohibition" against "race-conscious affirmative action efforts to hasten the elimination of such vestiges,"⁶⁸ the Court said:

It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had been excluded from the American dream for so long . . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.⁶⁹

The Court did not suggest that every race-conscious plan was valid; however, the plan in *Weber* satisfied the criteria for an affirmative action plan to fall "on the permissible side of the line."⁷⁰ The focus of the Kaiser plan was to remedy severe past racial discrimination at the plant and "to eliminate conspicuous racial imbalance in traditionally segregated job categories."⁷¹ Also, "[t]he plan does not unnecessarily trammel the interests of white employees."⁷² Finally, the plan was temporary, with racially preferential selection concluding when "the percentage of black skilled craft workers in the Gramercy plant approximates the percentage of blacks in the local labor force."⁷³

In the face of an angry dissent by Justice Rehnquist arguing that the Court had misread Congress' intent,⁷⁴ Justice Blackmun's concurring opinion reminded that "if the Court has misperceived the political will, it has the assurance that because the question is statutory Congress may set a different course if it chooses."⁷⁵ Since *Weber*, the courts of appeals often have applied the *Weber* criteria of permissibility beyond purely "voluntary" affirmative action plans,⁷⁶ and Congress has made no move to undo the *Weber* result or its progeny. However, under the Reagan Administration, the Department of Justice has moved strongly to eliminate all affirmative action goals.⁷⁷ Such a design would, as the Administration's proponents recognize, require no less than overruling *Weber* itself.⁷⁸

67. *Id.* at 202-03.

68. *Id.* at 204.

69. *Id.*

70. *Id.* at 208.

71. *Id.* at 209.

72. *Id.* The plan "does not require the discharge of white workers," nor does it "create an absolute bar to the advancement of white employees; half of those trained in the program will be white," and the plan was newly created. *Id.*

73. *Id.* at 209.

74. *Id.* at 219-55 (Rehnquist, J., dissenting).

75. *Id.* at 216 (Blackmun, J., concurring).

76. See cases cited *supra* note 60.

77. See *infra* text accompanying note 106 and notes 208, 351, 396.

78. As early as December 1981, William Bradford Reynolds, Assistant Attorney General in charge of the Civil Rights Division of the U.S. Department of Justice, tipped his hand by declaring

2. The Courts of Appeals

Both before and after the Supreme Court first tackled the question of the constitutionality of race-conscious affirmative action goals as a remedy for past discrimination,⁷⁹ and both before and after the Court made its additional, although incomplete, contributions to the subject in later decisions,⁸⁰ each of the federal courts of appeals has agreed that race-conscious affirmative action goals may be used, in appropriate cases, as a remedy for past discrimination. The courts have decided that these goals are available in addition to rendering specific relief to an individual who has been a victim of proven discrimination.⁸¹

As previously discussed,⁸² in a class action, one who establishes a *right* to employment based on the proven discrimination of an employer also must prove that he is a victim of such discrimination. *Franks*⁸³ and *Teamsters*⁸⁴ plainly required this and, therefore, the point is not of much interest. Of considerable interest is the way that the courts of appeals, without guidance from the Supreme Court (other than occasional denials of certiorari), have unanimously decided that once discrimination against blacks as a class has been proven, title VII and equal protection permit race-conscious goals to be used as remedies.⁸⁵ These goals may benefit not just "an individual black as an individual, but . . . blacks as blacks."⁸⁶ As one federal judge who has served throughout the entire period observed: "Thus, when faced with our society's systemic racial discrimination against blacks as a class, an effective remedy must be color conscious."⁸⁷

that *Weber* was "wrongly decided." *Preferred Hiring of Women and Minorities Faces A U.S. Challenge*, Wall St. J., Dec. 8, 1981, at A1, col. 3.

79. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

80. *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

81. *Turner v. Orr*, 759 F.2d 817, 825 (11th Cir. 1985), *petition for cert. filed* 54 U.S.L.W. 3149 (U.S. Sept. 10, 1985) (No. 84-1936); *Thompson v. Sawyer*, 678 F.2d 257, 294 (D.C. Cir. 1982); *Chisholm v. United States Postal Serv.*, 665 F.2d 482, 499 (4th Cir. 1981); *United States v. City of Chicago*, 663 F.2d 1354, 1361-62 (7th Cir. 1981) (en banc); *United States v. City of Alexandria*, 614 F.2d 1358, 1363-66 (5th Cir. 1980); *Firefighters Inst. v. City of St. Louis*, 616 F.2d 350, 364 (8th Cir. 1980), *cert. denied*, 452 U.S. 938 (1981); *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 944 (10th Cir. 1979); *EEOC v. American Tel. & Tel. Co.*, 556 F.2d 167, 174-77 (3d Cir. 1977); *Boston Chapter, NAACP, Inc. v. Beecher*, 504 F.2d 1017, 1027-28 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *Rios v. Enterprise Ass'n Steamfitters Local 638*, 501 F.2d 622, 629 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *United States v. Ironworkers Local 86*, 443 F.2d 544, 553-54 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); *United States v. International Bhd. of Elec. Workers, Local No. 38*, 428 F.2d 144, 149-50 (6th Cir. 1970).

82. See *supra* text accompanying note 42.

83. *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976). See *supra* note 42.

84. *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); see *supra* note 42.

85. See *supra* note 81.

86. *Williams v. City of New Orleans*, 729 F.2d 1554, 1573 (5th Cir. 1984) (Wisdom, J., dissenting).

87. *Id.*

The cases before the courts of appeals have included private discrimination under title VII,⁸⁸ discrimination by governmental bodies under title VII⁸⁹ and equal protection,⁹⁰ and the use of legal affirmative action plans by employers, either private or governmental, to rebut a plaintiff's claim of invidious discrimination under title VII.⁹¹ The cases are endless and citations only serve to indicate the participation of all the circuit courts in the consensus.⁹² In some of these cases, the affirmative action goals have been upheld,⁹³ while in others the goals have been set aside as excessive.⁹⁴ Some circuits have been more reluctant than others to ap-

88. See, e.g., *Setser v. Novack Inv. Co.*, 657 F.2d 962 (8th Cir.) (en banc), *cert. denied*, 454 U.S. 1064 (1981); *Lehman v. Yellow Freight, Inc.* 651 F.2d 520 (7th Cir. 1981); *Parker v. Baltimore & O.R.R.*, 652 F.2d 1012 (D.C. Cir. 1981);

89. *Vanguards v. City of Cleveland*, 753 F.2d 479 (6th Cir.), *cert. granted sub nom.* Local Number 93, Int'l Ass'n of Firefighters, 106 S. Ct. 59 (1985); *Palmer v. District Bd. of Trustees of St. Petersburg Junior College*, 748 F.2d 595 (11th Cir. 1984); *Janowiak v. Corporate City of South Bend*, 750 F.2d 557 (7th Cir. 1984), *petition for cert. filed*, 54 U.S.L.W. 3016 (U.S. July 16, 1985) (No. 84-1936); *Wygant v. Jackson Bd. of Educ.*, 746 F.2d 1152 (6th Cir. 1984), *cert. granted*, 105 S. Ct. 2015 (1985); *Kromnick v. School Dist.*, 739 F.2d 894 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 782 (1985); *Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 2357 (1985); *Williams v. City of New Orleans*, 729 F.2d 1554 (5th Cir. 1984) (en banc); *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 703 (1984); *Valentine v. Smith*, 654 F.2d 503 (8th Cir.), *cert. denied*, 454 U.S. 1124 (1981); *LaRiviere v. EEOC*, 682 F.2d 1275 (9th Cir. 1981); *United States v. City of Chicago*, 663 F.2d 1354 (7th Cir. 1981) (en banc); *Association Against Discrim. v. City of Bridgeport*, 647 F.2d 256 (2d Cir. 1981); *United States v. City of Miami*, 614 F.2d 1322 (5th Cir. 1980), *aff'd in part and remanded in part on other grounds*, 664 F.2d 435 (5th Cir. 1981) (en banc).

90. *Janowiak v. Corporate City of South Bend*, 750 F.2d 557 (1984), *petition for cert. filed* 54 U.S.L.W. 3016 (U.S. July 16, 1985) (No. 84-1936); *Wygant v. Jackson Bd. of Educ.*, 746 F.2d 1152 (1984), *cert. granted*, 105 S. Ct. 2015 (1985); *Kromnick v. School Dist.*, 739 F.2d 894 (1984), *cert. denied*, 105 S. Ct. 782 (1985); *Valentine v. Smith*, 654 F.2d 503, *cert. denied*, 454 U.S. 1124 (1981); *United States v. City of Miami*, 614 F.2d 1322 (5th Cir. 1980), *aff'd in part and remanded in part on other grounds*, 664 F.2d 435 (5th Cir. 1981) (en banc); *Detroit Police Officers Ass'n v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981).

91. *Palmer v. District Bd. of Trustees of St. Petersburg Junior College*, 748 F.2d 595 (11th Cir. 1984); *Setser v. Novack Inv. Co.*, 657 F.2d 962 (8th Cir.) (en banc), *cert. denied*, 454 U.S. 1064 (1981); *Valentine v. Smith*, 654 F.2d 503 (8th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981); *LaRiviere v. EEOC*, 682 F.2d 1275 (9th Cir. 1981).

92. See *supra* note 81.

93. *Vanguards v. City of Cleveland*, 753 F.2d 479 (6th Cir.), *cert. granted sub nom.* Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, 106 S. Ct. 59 (1985); *EEOC v. Local 638*, 753 F.2d 1172 (2d Cir.), *cert. granted sub nom.* Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 106 S. Ct. 58 (1985); *Wygant v. Jackson Bd. of Educ.*, 746 F.2d 1152 (6th Cir. 1984), *cert. granted*, 105 S. Ct. 2015 (1985); *Kromnick v. School Dist.*, 739 F.2d 894 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 782 (1985); *Palmer v. District Bd. of Trustees of St. Petersburg Junior College*, 748 F.2d 595 (11th Cir. 1984); *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 703 (1984); *Valentine v. Smith*, 654 F.2d 503 (8th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981); *LaRiviere v. EEOC*, 682 F.2d 1275 (9th Cir. 1981); *United States v. City of Miami*, 614 F.2d 1322 (5th Cir. 1980), *aff'd in part and remanded in part on other grounds*, 664 F.2d 435 (5th Cir. 1981) (en banc); *Association Against Discrim. v. City of Bridgeport*, 647 F.2d 256 (2d Cir. 1981).

94. See, e.g., *EEOC v. Local 638*, 753 F.2d 1172 (2d Cir. 1985), *cert. granted sub nom.* Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 106 S. Ct. 58 (1985); *Janowiak v. Corporate City of South Bend*, 750 F.2d 557 (7th Cir. 1984), *petition for cert. filed*, 54 U.S.L.W. 3016 (July 16, 1985) (No. 84-1936); *Williams v. City of New Orleans*, 729 F.2d 1554 (5th Cir. 1984) (en banc); *Lehman v. Yellow Freight Sys., Inc.*, 651 F.2d 520 (7th Cir. 1981); *United States v. City of Miami*, 614 F.2d

prove race-conscious affirmative action goals.⁹⁵

This entire development rested on the premise that *Franks*⁹⁶ and *Teamsters*⁹⁷ (with their "specific victim" requirement) did not restrict the grant of prospective affirmative goal relief.⁹⁸ *Williams v. City of New Orleans*⁹⁹ was perhaps the first case in which a court of appeals seriously considered (and rejected) the argument that title VII affirmative race-conscious relief was limited to identified "victims."

The divergent views of affirmative action goals collided before the Fifth Circuit Court of Appeals in *Williams* just months¹⁰⁰ before the *Stotts*¹⁰¹ decision. Black police officers, charging racial discrimination in promotions in the police department, brought a title VII action. The proposed settlement decree provided that whenever a supervisory position became available, one black officer would be promoted for every white officer promoted until blacks constituted fifty percent of all the ranks within the New Orleans Police Department. The district court, after a "fairness hearing," declined to approve this promotion provision although other aspects of the decree were approved. When a panel of the court of appeals ruled that the district court had abused its discretion, the United States was granted permission to intervene. The United States filed a suggestion for rehearing en banc by the Fifth Circuit. The court of appeals ruled seven to six that the district court did not abuse its discretion in rejecting that affirmative goal provision; however, nine of the thirteen judges agreed that "the use of quotas or goals under Title VII without regard to specific victims as one means to remedy past discrimination has been upheld regularly throughout the federal courts of appeals."¹⁰²

The majority rejecting the promotion goals consisted of differing

1322 (5th Cir. 1980), *aff'd in part and remanded in part on other grounds*, 664 F.2d 435 (1981) (en banc); *Sledge v. J.P. Stevens & Co.*, 585 F.2d 625 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979).

95. Among the most reluctant are the Fourth Circuit, *see Sledge v. J.P. Stevens & Co.*, 585 F.2d 625 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979), the Second Circuit, *see EEOC v. Local 638*, 753 F.2d 1172 (2d Cir.), *cert. granted sub nom. Local 28 of the Sheet Metal Workers' Int'l Ass'n*, 106 S. Ct. 58 (1985) and *Kirkland v. New York State Dep't of Correctional Servs.*, 520 F.2d 420, *cert. denied*, 429 U.S. 823 (1976) (racial quotas are appropriate only where "a clear-cut pattern of long-continued and egregious discrimination" is found and the reverse discriminatory effects are not felt by "a small number of readily identifiable individuals"), and the D.C. Circuit, *see Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 2357 (1985).

96. *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976). *See supra* note 42 and accompanying text.

97. *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). *See supra* note 42.

98. *See supra* note 44.

99. 729 F.2d 1554 (5th Cir.1984) (en banc).

100. *Williams* was decided on April 23, 1984. *Stotts* was argued before the United States Supreme Court on December 6, 1983, but was not decided until July 12, 1984.

101. *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984).

102. *Williams*, 729 F.2d at 1557.

views. Three of the judges read *Bakke-Weber-Fullilove*¹⁰³ so strictly as to bar any approval of race-conscious promotion goals here. Two judges found a constitutional bar to "the imposition of a [consent] decree that requires a unit of state government to discriminate on the basis of race without reference to whether those favored have ever been the victims of discrimination or those injured have either practiced or benefited from it."¹⁰⁴ Two other judges, Williams and Clark, expressly rejected the position advocated by the Assistant Attorney General, William Bradford Reynolds, on behalf of the United States that "§ 703(g) of Title VII proscribes the use of any remedy which is not limited to actual victims of past discrimination."¹⁰⁵ However, they concluded that the district judge had not abused his discretion when that court failed to approve the race-conscious promotion goals in the consent decree because he had been within the bounds of the *Bakke-Weber-Fullilove* standards.¹⁰⁶ These seven judges constituted the majority of the court which affirmed the district judge's rejection of the race-conscious promotion goals provision of the proposed settlement; however, no one among the majority endorsed the United States' proposition that no race-conscious goals, whether or not responsive to proven past discrimination, can ever constitutionally include non-victims.

In a dissenting opinion for six judges, Judge Wisdom¹⁰⁷ confronted the United States' position squarely, stating that the district court was not only authorized but required by the *Bakke-Weber-Fullilove* analysis to approve the consent decree.¹⁰⁸ Judge Wisdom found no obstacle in title VII to recognizing the promotion goals as "appropriate" race-conscious relief. He read *Bakke-Fullilove* as requiring a standard of review less than that of strict scrutiny to uphold remedial race-conscious affirmative goals.¹⁰⁹ Further, he argued that the present plan survived even the strict scrutiny test of a compelling governmental interest and closely tailored standard of review:

First, the state has a compelling interest in curing the effects of past racial discrimination in the workplace and in insuring an integrated work force. . . . This interest focuses on group representation in employment and is distinct from that focused on the individual's right to be free from discrimination. . . . Thus, the state's interest cannot be served adequately by a remedy that addresses only the rights of identifiable

103. See *supra* note 60.

104. *Williams*, 729 F.2d at 1565 (Gee and Garwood, J.J., specially concurring).

105. *Id.* at 1557 (Williams and Clark, J.J.).

106. See *supra* notes 60, 81 and *infra* note 153.

107. Judge Wisdom is a jurist veteran of the major civil rights decisions of the Fifth Circuit in the 1960's and 1970's. See J. BASS, UNLIKELY HEROES 42-55 (1982).

108. *Williams*, 729 F.2d at 1584 (Wisdom, J. concurring).

109. See *supra* notes 60, 81 and *infra* text accompanying note 153.

victims.¹¹⁰

This dissenting opinion sharply draws the lines of conflict between the United States' "identifiable victim" approach and the race-conscious affirmative goal remedy allowed, with varying degrees, in all the courts of appeals. Judge Wisdom rejects the United States' contention that "prospective race-conscious steps by government employers is proscribed by either Title VII or the Equal Protection Clause of the Fourteenth Amendment."¹¹¹ The opinion further argues that "[w]holly aside from the fourteenth amendment, the thirteenth amendment is an affirmative grant of power to eliminate slavery along with its 'badges and incidents' and to establish universal civil freedom."¹¹² Judge Wisdom contends that affirmative action under title VII should be construed in this thirteenth amendment context.¹¹³

3. *The Problem of Firefighters Local Union No. 1784 v. Stotts*¹¹⁴

Judicial acceptance of affirmative action goals reached a new stage when two courts of appeals enjoined the discharge of minority workers who had been hired pursuant to a court-approved affirmative action plan, despite protests by majority workers claiming protection of seniority systems with "last-hired first fired" provisions. The first of these cases, *Boston Firefighters*,¹¹⁵ briefed and argued in the Supreme Court in the spring of 1983, was dismissed as moot when the majority seniors were rehired.¹¹⁶ However, the Supreme Court immediately granted certiorari in the second of these cases, *Firefighters Local Union No. 1784 v. Stotts*,¹¹⁷ and later decided in favor of the majority seniors in the closing days of the 1984 Term.¹¹⁸

In *Stotts*, the court of appeals had upheld an injunction against the discharge of black firemen who had been hired under an affirmative action plan embodied in a consent decree as a remedy against past racial discrimination in hiring practices by the Memphis Fire Department.¹¹⁹ Justice White, writing for the majority of the Supreme Court, identified the issue "at the heart of this case" as "whether the district court ex-

110. *Williams*, 729 F.2d at 1575 (Wisdom, J. dissenting). He calls the "identifiable victim" approach "the Attorney General's shibboleth." *Id.* at 1576. See *infra* text accompanying notes 138-69 (further discussion of constitutional standard).

111. *Id.* at 1577.

112. *Id.*

113. *Id.* at 1578.

114. 104 S. Ct. 2576 (1984).

115. *Boston Chapter, NAACP v. Boston Firefighters Union, Local 718*, 679 F.2d 965 (1st Cir. 1982).

116. 461 U.S. 477, 479 (1983).

117. 103 S. Ct. 2451 (1983), *granting cert. to Stotts v. Memphis Fire Dep't*, 679 F.2d 541 (6th Cir. 1982).

118. *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984).

119. *Stotts v. Memphis Fire Dep't*, 679 F.2d 541 (6th Cir. 1982).

ceeded its powers in entering an injunction requiring white employees to be laid off, when the otherwise applicable seniority system would have called for the layoff of black employees with less seniority."¹²⁰ The Court reversed the Sixth Circuit Court of Appeals, holding that whether the injunction order be viewed as a construction of the consent decree or as a function of the court's inherent authority to modify the decree because of changed circumstances, the district court had exceeded its authority.

Viewing *Stotts* as a pure title VII seniority case, the Court's decision was straightforward. Interpreting section 703(h)¹²¹ as protecting bona fide seniority systems, the Court long has ruled that only an identified individual victim of post-Civil Rights Act discrimination would be allowed to receive a remedial promotion over an employee whose seniority rights had been established by a bona fide (*i.e.*, non-discriminatory) seniority system.¹²² In the "construction" of the consent decree, the majority found no basis for implying that the affirmative action remedy established by the decree should abridge the protection afforded by section 703(h) to bona fide seniority rights "absent some express provision to that effect"¹²³ in the consent decree. The consent decree remained silent on that point.

The Supreme Court rejected the conclusion of the court of appeals that the district court had "inherent authority" to modify the consent decree because the minority layoffs would undermine the affirmative action relief to which the adversary parties had agreed in reaching the "settlement." Justice White restated that the question of layoffs had *not* been settled in the decree. Then he considered the court of appeals "inherent authority" argument: if the case had been tried and discrimination found, the district court, as an element of its power to grant an "appropriate," "make whole" remedy, could have overridden the seniority system. Justice White flatly denied the district court's authority to disregard a seniority system protected by section 703(h) when fashioning a remedy in a title VII decree. Such denial can be viewed as merely an extension to the affirmative action context of the strong reading given section 703(h) in *Teamsters*:¹²⁴ only if "individual members of a plaintiff class demonstrate that they have been actual victims of the discriminatory practice" can they "be awarded competitive seniority and given their rightful place on the seniority roster."¹²⁵ Under *Teamsters*, mere membership in the class is insufficient for this seniority, "rightful place"

120. *Stotts*, 104 S. Ct. at 2585.

121. 42 U.S.C. § 2000e-2(h) (1982).

122. See *supra* notes 42, 44.

123. *Stotts*, 104 S. Ct. at 2586.

124. *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); see *supra* note 42.

125. *Stotts*, 104 S. Ct. at 2588.

relief.¹²⁶ Because “[h]ere, there was no finding that any of the blacks protected from layoff had been a victim of discrimination,” “no award of competitive seniority to any of them” could be given.¹²⁷

Had the Court stopped here, *Stotts* could be recognized fully with a footnote reference because the case would stand for the unremarkable proposition that *Teamsters* covered this situation, or at most, that abridging such seniority rights would “unnecessarily trammel” the interests of majority employees in violation of *Weber*. However, the White opinion went beyond holding that the *Teamsters* rule would forestall a district court from awarding individual “super-seniority” relief to one not identified as a victim of proven discrimination by a suggestion with totally unexpected implications: that under section 706(g),¹²⁸ the remedy section of the Act, “[n]ot even a Court, much less the [City] Commission, could order racial quotas or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against in violation of this title [VII].”¹²⁹ In his dissent, Justice Blackmun proposed that the majority was undermining the carefully crafted remedy of group relief under title VII in which every court of appeals had previously concurred,¹³⁰ as well as Justice White himself¹³¹ and a majority of the Supreme Court in the trilogy of *Bakke-Weber-Fullilove*.¹³²

The White opinion failed to answer the question “[w]hether the City, a public employer, could have taken this course without violating the law,”¹³³ nor did the majority speak against *Weber*’s qualified green light for “voluntary” affirmative action plans. Furthermore, in emphasizing the legislative reminder in the 1972 amendment of title VII that section 706(g) was directed to “making whole insofar as possible the victims of racial discrimination,”¹³⁴ Justice White suggested no rigid limits on the amount of discrimination needed to identify an employee as a “victim” for the purpose of affirmative goal relief.

The immediate target in *Stotts* was a bitterly opposed injunction, not the “settlement” capacity of a consent decree as a “voluntary” (even if

126. *Id.*

127. *Id.*

128. 42 U.S.C. § 2000e-5(g) (1982).

129. *Id.* at 2590. This passage comes from a “bi-partisan news letter delivered during an attempted filibuster to each senator supporting the bill . . .,” and appears to be accepted by the opinion. *Id.* at 2589-90.

130. See *supra* note 44.

131. Justice White joined the Brennan Four opinion in *Bakke*. See *supra* note 44 and *infra* note 143.

132. *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (Blackmun, J. dissenting). Justices Brennan and Marshall joined Justice Blackmun in his dissenting opinion. *Id.*

133. *Id.* at 2560.

134. *Id.* n.15.

judicially reinforced) instrument. The injunction exceeded judicial limits in the view of the Court.

Some courts of appeals have read *Stotts* as a "seniority system" case,¹³⁵ declining to see cause to change their previous interpretations of the *Bakke-Weber-Fullilove* "formula."¹³⁶ Others have taken seriously the threat to the continued viability of affirmative action goals posed by Justice White's *dicta*.¹³⁷

B. Constitutional Considerations: Equal Protection

While the Supreme Court's guidance to the lower courts respecting affirmative action and title VII has been fragmentary, the Court's guidance as to equal protection has been enigmatic. The federal courts of appeals, therefore, have struggled in the face of, what must seem, almost a deliberate obfuscation. Nevertheless, the courts of appeals have agreed without exception that the Supreme Court has given a constitutional "green light"¹³⁸ to the use of race as a factor in governmental decision-making. This includes the reasonable remedial use of race (and sex) in legislative, executive, or administrative action, in a judicial decree, or in an affirmative action plan of a public entity. Meanwhile, the courts of appeals have edged towards a consensus on the constitutional standards by which the Supreme Court expects them to test the validity of affirmative action. Such standards include the use of race or sex goals to remedy the effects of past identified discrimination.¹³⁹

In 1976, the Supreme Court, after full briefing and oral argument, declined to face the question of preferential racial admission to law schools because the question became moot with the white plaintiff's completion

135. See discussion of 1985 docket cases *infra* at pp. 168-85.

136. *Vanguards v. City of Cleveland*, 753 F.2d 479 (6th Cir.), *cert. granted sub nom.* Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, 106 S. Ct. 59 (1985); *EEOC v. Local 638*, 753 F.2d 1172 (2d. Cir.), *cert. granted sub nom.* Local 28 of the Sheet Metal Workers Int'l Ass'n v. EEOC, 106 S. Ct. 58 (1985); *Van Aken v. Young*, 750 F.2d 43 (6th Cir. 1984); *Palmer v. District Bd. of Trustees of St. Petersburg Junior College*, 748 F.2d 595 (11th Cir. 1984); *Johnson v. Transportation Agency*, 748 F.2d 1308 (9th Cir. 1984); *Wygant v. Jackson Bd. of Educ.*, 746 F.2d 1152 (6th Cir. 1984), *cert. granted*, 105 S. Ct. 2015 (1985); *Kromnick v. School Dist.*, 739 F.2d 894 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 782 (1985); *Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 2357 (1985).

137. See discussion of 1985 docket cases *infra* at pp. 169-85.

138. This "green light" exists within the equal protection clause of the fourteenth amendment with respect to states, see *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), and within the equal protection component of the fifth amendment due process clause as it relates to the federal government, see *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

139. See *supra* note 60 (*Bakke-Weber-Fullilove* criteria). Several courts of appeals hold sex- and race-conscious goals equally applicable to equal protection and to title VII of the Civil Rights Act of 1964. The development of this test in the Supreme Court is discussed only briefly here. For fuller treatment, see Broderick, *Bakke, Weber and Mr. Justice Stewart: Constitutional Theory and Affirmative Action*, 11 N.C. CENT. L.J. 3, 46-68 (1979) and Broderick, *The Nature of the Constitutional Process: Equal Protection and the Burger Court*, 12 N.C. CENT. L.J. 320, 331-39, 352-53, 378-92 (1981).

of the course.¹⁴⁰ However, in 1978, in the heralded *Bakke*¹⁴¹ case, a divided Supreme Court established two equal protection propositions: (1) a rigid racial quota denied equal protection rights of the excluded white plaintiff;¹⁴² and (2) race might be used as one factor in admission standards of a public university, although such use of race might disadvantage another unsuccessful applicant.¹⁴³

In 1980, the Court again considered the use of race as a criterion for participation in a valuable public benefit in a completely different context. In *Fullilove v. Klutznick*,¹⁴⁴ the Court faced the question of the constitutionality of federal legislation which set aside up to ten percent of the \$4,200,000,000 appropriation of the Public Works Employment Act of 1977¹⁴⁵ for qualified "minority business enterprises." The affirmative action promoted by the statute was challenged by white contractors who argued that Congress could not attach conditions to the exercise of its spending power if such conditions violate the equal protection component of the fifth amendment,¹⁴⁶ and that the explicit racial and ethnic criteria used in the statute violated their rights as identified in *Bakke*.¹⁴⁷ The Court, in two three-Justices opinions, disagreed. Congress designed the legislation to remedy past discrimination in the building trades, a

140. *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

141. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

142. This is universally accepted as a "constitutional" conclusion of *Bakke*, although only the opinion of Justice Powell reached such conclusion. Four other Justices concluded that defendant Bakke's rights had been violated by a public medical school's admission plan that reserved 16 of 100 seats for blacks and other minorities, but they reached their conclusion on the basis of title VI of the Civil Rights Act of 1964, avoiding the constitutional question. Any doubts that *Bakke* constituted a "constitutional" conclusion were removed by *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (discussed *infra* at pp. 166-67).

143. This "one factor" specification appears only in the *Bakke* opinion of Justice Powell. The four other Justices who comprised the majority on the proposition (Brennan, Blackmun, Marshall and White) offered a much less rigorous test for approval of affirmative action plans, so much so that they would not have admitted Bakke to the medical school. Their four votes, however, combined with Justice Powell to establish a somewhat indeterminate constitutional position (the broadest that Justice Powell would accept): "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Bakke*, 438 U.S. at 320 (Powell, J.).

In his solo opinion, Justice Powell seemed to identify the rigorous compelling state interest test as applicable to what he called racial discrimination against Bakke. *Id.* at 299. He then found that race, as one factor, could be compelling in the university setting. *Id.* Some courts have seen the compelling state interest test as controlling in affirmative action cases, citing the Powell opinion in *Bakke*. However, in *Fullilove v. Klutznick*, the Supreme Court specified that the plan under attack passed muster under the *Bakke* opinions of either Justice Powell or the Brennan Four. 448 U.S. 492. Also in *Fullilove*, Justice Powell considerably softened his own constitutional requirements for affirmative action goals. *Id.* at 448, 508, 510.

144. 448 U.S. 448 (1980).

145. 42 U.S.C. §§ 6701-6736 (1982).

146. See *supra* notes 8, 138.

147. The opinion of Chief Justice Burger, Justices Powell and White concurring, stressed the federal constitutional power of Congress and found no constitutional obstacle from equal protection. Justices Marshall, Blackmun and Brennan adhered to their position in *Bakke*. See *supra* note 143.

purpose the Court found adequately identified in the legislative history.¹⁴⁸ The quota was not rigid but was instead a flexible allotment made only to those qualified minority contractors who had in fact suffered from effects of prior discrimination. The preference was not available to "minority firms whose access [was] not impaired" by the identified discrimination.¹⁴⁹ In this context, the minority preference was "equitable and reasonably necessary to the redress of identified discrimination."¹⁵⁰ The Court further noted in *Fullilove* that the burden on "non-minority firms is relatively light."¹⁵¹

Considering the Supreme Court's rather rigid *Bakke* formulation in light of *Fullilove*, many courts of appeals concluded that *Fullilove* had adapted the three-prong *Weber* test for title VII¹⁵² to set the constitutional equal protection limits of affirmative action.¹⁵³ First, the congressional set-aside program in *Fullilove* did not "unnecessarily trammel the interests of white"¹⁵⁴ contractors. Second, the program was, indeed, temporary (*i.e.*, limited to the allocation of the funds appropriated under the program). Third, the program was "designed to eliminate conspicuous racial imbalance [discrimination] in traditionally segregated [business] categories."¹⁵⁵ However, Chief Justice Burger's opinion in *Fullilove* contained two caveats: (1) the set-aside program in *Fullilove* pressed the "outer limits of congressional authority,"¹⁵⁶ and (2) the remedial authority of Congress was broader than that of a federal court.¹⁵⁷ The Burger opinion reiterated the Powell position in *Bakke* which insisted that affirmative action goals would be justified ordinarily only as a remedy for past discrimination and that authoritative official findings of this discrimination are required. The program in *Fullilove* satisfied this last requirement, although no formal findings were made because Congress had access to evidence from which to reasonably conclude "that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination."¹⁵⁸ A hint of the "victim" analysis which surfaced in *Stotts*¹⁵⁹ in a title VII setting can be found in

148. *Fullilove*, 448 U.S. at 473.

149. *Id.* at 482.

150. *Id.* at 483.

151. *Id.* at 484.

152. *See supra* note 60.

153. The Court expressly disclaimed *Weber* as dealing with a constitutional requirement or that the Court was prescribing limits of affirmative action. *Weber*, 443 U.S. at 228; *see supra* text accompanying notes 57-60.

154. *Cf. Fullilove*, 448 U.S. at 484; *Weber*, 443 U.S. at 208.

155. *Cf. Fullilove*, 448 U.S. at 478; *Weber*, 443 U.S. at 197.

156. *Fullilove*, 448 U.S. at 490.

157. *Id.* at 483.

158. *Id.* at 478.

159. Compare *supra* text accompanying note 134 with *supra* note 42 and accompanying text. *See supra* note 44.

Fullilove.¹⁶⁰ The set-aside program in *Fullilove* was saved by its "flexibility." Minority members who had not been disadvantaged by the racial discrimination which the affirmative action set-aside program was designed to remedy were not benefited.¹⁶¹

Two questions arise in the context of the interrelation of title VII and equal protection analysis as to the legality and constitutionality of remedial racial (or sexual) affirmative action goals. First: Is any such program which survives title VII likely to run afoul of equal protection? The majority of the courts of appeals which have considered the question have said, "No."¹⁶² In view of *Fullilove*, this would appear to be correct, barring retreat by the Supreme Court. Second: Is the *Weber* test¹⁶³ the practical measure of equal protection in those cases in which remedial affirmative action (*i.e.*, racial/sexual goals) is not subject to title VII standards because they are not relating to employment conditions? A majority of the courts of appeals which have considered this question have held, "Yes,"¹⁶⁴ some stating explicitly that the test for all practical purposes is the same for equal protection and title VII.¹⁶⁵ Given findings of "identified past discrimination," temporariness, and plans that do "no unnecessarily trammelling" of competitors, the federal courts following *Weber*,¹⁶⁶ and *Fullilove*,¹⁶⁷ and and even *Stotts*,¹⁶⁸ almost uniformly conclude that a remedial race- or sex-specific affirmative action plan passes both the title VII and equal protection tests.¹⁶⁹

160. *Fullilove v. Klutznick*, 448 U.S. 448, 488 (1979). But Chief Justice Burger noted that Congress concluded that specified "groups" were "victims of discrimination." *Id.*

161. Consider the distinction between (1) minority persons shown *not* to have been disadvantaged by the identified past discrimination, (2) minority persons who are arguably disadvantaged as members of the group discriminated against, and (3) individual minority persons shown to be specific victims of the past discrimination in the sense that they did not get particular contracts (or jobs) because of their race. *Fullilove* suggests that the approved set-aside plan bars (1), yet admits both (2) and (3). See *supra* text accompanying note 129 as to whether Justice White's opinion in *Stotts* intends to follow *Fullilove* on this or is staking out new ground by limiting affirmative action goals to the *Franks-Teamsters* "specific victims" situation, see *supra* note 42.

162. See *Kromnick v. School Dist.*, 739 F.2d 894 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 782 (1985); *Boston Chapter, NAACP v. Beecher*, 679 F.2d 965 (1st Cir. 1982), *cert. denied*, 104 S. Ct. 2154, 2155 (1985); *Setser v. Novack Inv. Co.*, 657 F.2d 962 (8th Cir.) (en banc), *cert. denied*, 454 U.S. 1064 (1981). But see *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 703 (1984); *Detroit Police Officers Ass'n v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981); Note, *NAACP v. Detroit Police Officers Ass'n—The Demarcation of Title VII and the Fourteenth Amendment in Employment Discrimination*, 15 N.C. CENT. L.J. 295 (1985).

163. See *supra* note 60.

164. See *Setser v. Novack Inv. Co.*, 657 F.2d 962 (8th Cir.) (en banc), *cert. denied*, 454 U.S. 1064 (1981); *Kromnick v. School Dist.*, 739 F.2d 894 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 782 (1985); *Williams v. City of New Orleans*, 729 F.2d 1554 (5th Cir. 1984) (en banc).

165. See, *e.g.*, *Boston Chapter, NAACP v. Beecher*, 679 F.2d 965 (1st Cir. 1982).

166. *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

167. See cases cited *supra* note 93.

168. *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984).

169. For pre-*Stotts* cases, see *Williams v. City of New Orleans*, 729 F.2d 1554 (5th Cir. 1984) (en

II. THE 1985 DOCKET CASES

The stage is set for considering the six affirmative action cases on the Supreme Court's 1985 docket: first, the case already argued—*Wygant v. Jackson Board of Education*,¹⁷⁰ next, the two cases for which certiorari has been granted—*Vanguards v. City of Cleveland*¹⁷¹ and *EEOC v. Local 638*,¹⁷² and finally, the three cases in which certiorari petitions are still pending¹⁷³—*Marsh v. Board of Education*,¹⁷⁴ *Turner v. Orr*,¹⁷⁵ and *Janowiak v. Corporate City of South Bend*.¹⁷⁶ Each of these cases illuminates some aspect of the status of affirmative action goals after *Stotts*.¹⁷⁷

A. *Wygant v. Jackson Board of Education*¹⁷⁸

The first affirmative action case which the Supreme Court agreed to hear this Term, *Wygant*, derives from the Sixth Circuit Court of Appeals, the same court of appeals which heard *Stotts*.¹⁷⁹ Over the years, this circuit court has given the broadest interpretation to Supreme Court decisions on permissible affirmative action goals.¹⁸⁰

In *Wygant*, the district court, on summary judgment, denied the request of plaintiff, a white school teacher,¹⁸¹ to enjoin enforcement of a provision of a collective bargaining agreement existing between the defendants, the Jackson Board of Education and the teachers union. The provision provided, in effect, that the board could lay off no greater percentage of minority teachers than the percentage of the minority student

banc) and *United States v. City of Miami*, 614 F.2d 1322 (5th Cir. 1980), *aff'd in part and remanded in part on other grounds*, 664 F.2d 435 (5th Cir. 1981). For post-*Stotts* cases, see *Wygant v. Jackson Bd. of Educ.*, 746 F.2d 1152 (6th Cir. 1984), *cert. granted*, 105 S. Ct. 2015 (1985); *Kromnick v. School Dist.*, 739 F.2d 894 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 782 (1985) and *Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 2357 (1985).

170. 746 F.2d 1152 (6th Cir. 1984), *cert. granted*, 105 S. Ct. 2015 (1985).

171. 753 F.2d 817 (6th Cir.), *cert. granted sub nom. Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 106 S. Ct. 59 (1985).

172. 753 F.2d 1172 (2d Cir.), *cert. granted sub nom. Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 58 (1985).

173. Any or none of these latter petitions may be granted. In the event of the Court's agreeing to hear any of these cases, the Court could direct they be heard jointly or separately in either this or the 1986 Term.

174. 581 F. Supp. 614 (E.D. Mich. 1984), *aff'd mem.*, 762 F.2d 1009 (6th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3071 (U.S. Aug. 6, 1985) (No. 84-1859).

175. 759 F.2d 817 (11th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3149 (U.S. Sept. 10, 1985) (No. 85-177).

176. 750 F.2d 557 (7th Cir. 1984), *petition for cert. filed*, 54 U.S.L.W. 3016 (July 16, 1985) (No. 84-1936).

177. *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984).

178. 746 F.2d 1152 (6th Cir. 1984), *cert. granted*, 105 S. Ct. 2015 (1985).

179. *Stotts v. Memphis Fire Dep't*, 679 F.2d 541 (6th Cir. 1982).

180. See *id.*; *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 703 (1984); *Detroit Police Officers Ass'n v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981).

181. *Wygant* was the representative plaintiff in a class action.

population.¹⁸² Plaintiff's action was based on both title VII and equal protection grounds. The court of appeals affirmed the district court on the title VII claim.¹⁸³ *Stotts* did not apply because the plan included a "voluntary," rather than a court-ordered protective layoff provision; however, the layoff plan satisfied the applicable *Weber* test. The court said "substantial and chronic"¹⁸⁴ discrimination was found by a competent body and the layoff plan constituted a "reasonable" remedy to cure the identified discrimination.¹⁸⁵ Two chief concerns seem to underly the grant of certiorari by the Supreme Court. First, *Wygant* raises a question which the Court expressly left open in *Stotts*: whether an explicit minority layoff provision in a governmental collective bargaining agreement could override seniority rights otherwise protected by section 703(h).¹⁸⁶ Second, *Wygant* raises the question of whether adequate evidence of "conspicuous racial imbalance" existed to justify the layoff provision, even in a voluntary context. In pattern and practice cases under title VII that rely largely on statistical proof of discrimination, the Supreme Court has rejected the use of a statistical disproportion between minority teachers and the minority student body. The Court instead has required a comparison of minority teachers in the particular school district charged with discrimination with the total minority population in the relevant geographical area.¹⁸⁷ The Court has yet to require the same statistical rigidity in title VII cases claiming to demonstrate "conspicuous racial imbalance." However, the Court may wish to consider whether an adequate showing has been made here to justify the Jackson Board's findings

182. The challenged collective bargaining provisions determined that seniority ordinarily would govern layoffs "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." *Wygant*, 746 F.2d at 1154. Because the percentage of minority personnel employed was in turn keyed to the minority student percentage in an individual school, layoffs were not to reduce the percentage of minority teachers below that of minority student population.

183. Since it upheld the affirmative action provision under title VII, the Court did not feel the need to consider equal protection (standards of which were equivalent in the Sixth Circuit to title VII). Compare discussion of the *Bakke-Weber-Fullilove* factors *supra* note 60.

184. This term comes from Brennan's dissenting opinion in *Bakke*, in which only four Justices joined. See *supra* note 143. Curiously, the Sixth Circuit has used the Brennan opinion, rather than that of Justice Powell, as the measure of permissible affirmative action, perhaps deriving increasing confidence from the Supreme Court's denial of certiorari in *Detroit Police Officers Ass'n v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981), and *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 703 (1984). Although the use of a standard that did not command a court majority is troublesome (i.e., "substantial and chronic"), the much-cited *Bakke* opinion of Justice Powell similarly used a troublesome standard. With Justice Powell removing some of the rigidity from his *Bakke* approach in *Fullilove*, see *supra* text accompanying note 150, and the substantial acceptance of the *Weber* factors in *Fullilove*, the so-called *Bakke-Weber-Fullilove* formula is hardly distinguishable from the approach of the Brennan Four in *Bakke*.

185. *Wygant*, 746 F.2d at 1156.

186. *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984). "Whether the City, a public employer, could have taken this course [of unilaterally adopting the layoff priority over seniority] is an issue we need not decide [since] the City took no such action." *Id.* at 2590.

187. *Hazlewood School Dist. v. United States*, 433 U.S. 299 (1977).

of "substantial underrepresentation" of minorities on the faculty¹⁸⁸ to justify a measure as strong as the protective race-conscious layoff provision, particularly in light of the conceded fact that the provision cost the plaintiff her job.

In *Wygant*, the Supreme Court may focus further on the traditionally "soft" approach of the Sixth Circuit to equal protection analysis. While appearing to substantially equate the title VII and equal protection tests in the same manner as some other circuits, the Sixth Circuit's analysis of *Bakke* has been rooted not in the Powell opinion which is generally regarded as controlling, but in the Brennan opinion which never has commanded a majority of the Court. The Supreme Court denied certiorari in the leading sixth circuit cases of *Young*¹⁸⁹ and *Bratton*¹⁹⁰ in which this approach was developed. Although an affirmative action plan which survives a proper *Weber* analysis as suggested above,¹⁹¹ should survive the *Bakke-Fullilove* analysis on equal protection grounds, perhaps the four¹⁹² Justices voting for certiorari in *Wygant* thought the Sixth Circuit Court of Appeals had misinterpreted the *Young* and *Bratton* certiorari denials; therefore, granting certiorari to align the Sixth Circuit cases with the *Bakke-Fullilove* equal protection analysis of the other circuits and of the Supreme Court itself. The Supreme Court could reverse *Wygant* on any of these grounds, and leave the status of affirmative action goals intact.

The Supreme Court has several alternatives in deciding *Wygant*, as the case raises both equal protection and title VII considerations.¹⁹³ For the Supreme Court to affirm *Wygant* on title VII grounds, the Court would have to conclude that section 703(h),¹⁹⁴ title VII's seniority protection provision, did not apply to a voluntarily adopted protective layoff provision (as distinguished from an injunction).¹⁹⁵ Further, the Court would have to conclude that in the special circumstances of a school setting, the

188. Before 1953, no black teachers were employed in the Jackson City Schools. By 1969 black students totaled 15.2% of the school population, while only 3.9% of the school teaching staff consisted of blacks. By November 1971, blacks constituted 15.9% of the student population and 8.3-8.5% of the faculty. *Wygant*, 746 F.2d at 1156.

189. *Detroit Police Officers Ass'n v. Young*, 608 F.2d 671 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981).

190. *Bratton v. City of Detroit*, 704 F.2d 873 (6th Cir. 1983), cert. denied, 104 S. Ct. 703 (1984).

191. See *supra* text accompanying notes 144-61.

192. Four Justices' votes are needed to grant a petition for certiorari. More than four may, of course, vote to grant a petition, but no public record is made of these votes. Once a petition for certiorari has been granted, the Court ordinarily sets the case for briefing and oral argument. However, the Court has stressed that no substantive legal conclusion is to be drawn from the denial of certiorari beyond the fact that the end of appellate review has been reached in that case.

193. Two key questions concerning affirmative action goals are not directly raised by *Wygant*: (1) whether or not a consent decree may be viewed as "voluntary" for purposes of title VII; and (2) whether or not a court may order affirmative action goals as a remedy for past discrimination. I shall return to these issues in discussing the other cases on the 1985 docket. See *infra* pp. 181-85.

194. 42 U.S.C. § 2000e-2(h) (1982).

195. See *supra* text accompanying note 186.

criteria of *Weber*¹⁹⁶ had been satisfied. This would include a determination that the racial make-up of the teacher/student body ratio was an adequate measure of past discrimination. Such requirement is necessitated by *Weber*'s requirement of "conspicuous racial imbalance in traditionally segregated job categories."¹⁹⁷ Such a decision also would entail a conclusion that, even apart from section 703(h), the layoff provision in *Wygant* did not constitute such a burden as to "unnecessarily trammel" the interests of white teachers. An affirmance would require the determination that the burden, on its face, was sufficiently insubstantial to warrant the district court's disposition of *Wygant*'s claim by summary judgment.

If the Supreme Court agrees with the Sixth Circuit's disposition of *Wygant* under title VII, theoretically, the Court still could reverse the case on equal protection grounds. However many misgivings the Court may have concerning the Sixth Circuit's formulation of equal protection standards in an affirmative action context in applying the *Young-Bratton*¹⁹⁸ analysis, the Court would be hard-pressed to find an independent constitutional basis for reversal¹⁹⁹ in view of *Bakke-Weber-Fullilove*.²⁰⁰

The Supreme Court could, of course, reverse on the title VII claim by extending protection of the seniority provision under title VII section 703(h) to voluntary racial layoff plans. However, if reversing, the Court is more likely to rule that the Jackson plan did not meet the *Weber* test either because (1) the possibility of "unnecessarily trammeling"²⁰¹ the interests of white teachers was too substantial to allow a summary judgment or (2) the teacher/student body ratio was too tenuous a predicate of past discrimination to establish the "conspicuous racial imbalance in traditionally segregated job categories."²⁰² The Court has yet to apply the same rigor to defensive justifications of an affirmative action plan as to a plaintiff's establishment of a pattern of discrimination in a title VII complaint.²⁰³ However, disfavor for teacher/student ratios, as distinguished

196. *United Steelworkers v. Weber*, 443 U.S. 193 (1978).

197. *Id.* at 209. This would mean that the statistical rigors of *Hazlewood School Dist. v. United States*, 433 U.S. 299 (1977), see *supra* text accompanying note 187, would not be insisted upon in establishing past discrimination under *Weber*.

198. See *supra* notes 190-91 and accompanying text.

199. In fact, the Sixth Circuit cases argue that the task of a governmental employer in justifying affirmative action goals is, in one sense, easier under the equal protection clause than under title VII. The argument is that once the constitutional violation of intentional racial discrimination is established, the state (or local governmental body) has the affirmative constitutional obligation to remedy the discrimination, citing the school desegregation cases, which Chief Justice Burger expanded in *Fullilove*: "Where federal anti-discrimination laws have been violated, an equitable remedy may in the appropriate case include a racial or ethnic factor." 448 U.S. at 483. This may include affirmative race-conscious goals that are otherwise "appropriate."

200. See *supra* note 60.

201. *Weber*, 443 U.S. at 208.

202. *Id.* at 209.

203. See *supra* note 188.

from work force/relevant labor market ratios such as those found in *Weber*, to establish racial discrimination was made so manifest in *Hazlewood*²⁰⁴ that the Court could use this ground to justify a reversal in *Wygant*.

The objective of the United States, as *amicus curiae* in *Wygant*, undoubtedly will be larger game than the narrow frameworks for reversal suggested in the above discussion. Nothing less than the Court's repudiation of *Weber*, and all affirmative action goals, will satisfy the Department of Justice.²⁰⁵ *Wygant* would seem a strange case for the Court to select for such an outcome. In fact, the Court's decision on the first day of the 1985 Term to grant certiorari in two other cases²⁰⁶ seems hinged to its desire to confront directly this larger issue that first surfaced in *Stotts*.²⁰⁷

B. *EEOC v. Local 638*²⁰⁸

In 1972, the Department of Justice²⁰⁹ brought a title VII action against Union Local 638, alleging a pattern and practice of discrimination against racial minorities with respect to admission to membership in the union. In 1975, the district court found purposeful discrimination against blacks and established a goal of twenty-nine percent minority membership to be reached by 1981. The Second Circuit Court of Appeals approved the plan as a reasonable remedy under *Bakke-Weber-Fullilove*.²¹⁰

In 1982, the EEOC sought to have the union held in contempt for violation of the decree. The EEOC alleged that the union had violated various provisions of the 1975 court decree that had been devised as a means of achieving the 29% goal. By 1982, the union had reached only 10.8% minority membership. The EEOC did not seek contempt on that specific ground. Instead, the Commission cited the "collective effect of

204. *Hazlewood School Dist. v. United States*, 433 U.S. 299 (1977).

205. See *supra* note 78 and *infra* text accompanying note 286. The Department of Justice, heartened by *Stotts*, is reasserting its *Franks-Teamsters* "specific victim" limitation to affirmative action which it asserted in *Williams v. New Orleans*, 729 F.2d 1554 (5th Cir.1984), see *supra* text accompanying note 105, and *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984).

206. *Vanguards v. City of Cleveland*, 753 F.2d 479 (6th Cir.), cert. granted sub nom. *Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 106 S. Ct. 59 (1985); *EEOC v. Local 638*, 753 F.2d 1172 (2d Cir.), cert. granted sub nom. *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 58 (1985).

207. *Firefighters Local Union No. 1784*, 104 S. Ct. 2576 (1984) (discussed *supra* at text accompanying notes 115-38).

208. *EEOC v. Local 638*, 753 F.2d 1172 (2d Cir. 1985), cert. granted sub nom. *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 58 (1985).

209. Pursuant to the 1972 amendments to title VII, Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, § 4 (codified at 42 U.S.C. § 2000e-5(a) (1982)). The EEOC was substituted for the Department of Justice as plaintiff. *Id.* at 1175.

210. *EEOC v. Local 638*, 565 F.2d 31, 33-36 (2d Cir. 1985); *EEOC v. Local 638*, 532 F.2d 821, 829-33 (2d Cir. 1976). See *supra* note 60.

violations" to thwart the achievement of the 29% goal as grounds for contempt. The union made a cross-motion to terminate the goal and the detailed plan which had been established by the court to help achieve that goal. The district court found the union in contempt, imposed a fine of \$150,000, and denied the union's cross-motion to cancel the goal. Subsequently, the district court amended the affirmative action plan to provide that the goal should be achieved by 1987. The union appealed the contempt decree and the denial of its cross-motion to terminate the affirmative action goals to the court of appeals.²¹¹

The court of appeals affirmed the district court on both grounds, citing "egregious non-compliance" with the 1975 decree. The court stressed that the affirmative action goals twice previously had been upheld by the court of appeals. The court of appeals' previous affirmation of the district court had been rooted in the appellate court's perception that court-ordered affirmative action goals were valid as a remedy for significant past racial discrimination under the controlling Supreme Court decisions. The union argued that the *Stotts* decision should change that perspective and bar "all race-conscious relief except that benefitting specified victims of past discrimination."²¹²

In affirming the district court, the court of appeals ruled that *Stotts* did not affect this case. Unlike *Stotts*, an express judicial finding of an intent by the union to discriminate had been made. Also, this case did not intrude upon a bona fide seniority plan under section 703(h) as did *Stotts*. Furthermore, the court of appeals ruled that the Supreme Court's discussion in *Stotts* of section 703(g),²¹³ the general title VII remedial section, related only to the individualized "make whole" relief ordered by the district court in *Stotts*; therefore, this discussion had no reference to the "prospective relief like that ordered" by the district court in this case.²¹⁴ In effect, the court of appeals declined to view Justice White's opinion in *Stotts* as targeting *all* non-voluntary judicially formulated affirmative action goals. Judge Winter, dissenting from the panel discussion, concluded that the court's ruling in this case "is at odds with" *Stotts*, "which rejected such a use of racial preference as a remedy to Title VII."²¹⁵ Further, said Judge Winter, such relief ran afoul of the constitutional barriers cited by Judge Powell in *Bakke*.²¹⁶

The Second Circuit Court of Appeals has been one of the most restrained appeals courts in endorsing affirmative action goals. In *Local 638*, the Second Circuit rejected certain other race-conscious remedies

211. *Local 638*, 753 F.2d at 1176-78.

212. *Id.* at 1185.

213. 42 U.S.C. § 2000e-2(g) (1982).

214. *Local 638*, 753 F.2d at 1186.

215. *Id.* at 1193-94.

216. *Id.* at 1194 (Winter, J., dissenting) (plan was "a strict racial quota").

provided by the district court as an abuse of discretion.²¹⁷ The court restated its interpretation of the *Bakke-Weber-Fullilove* limits for affirmative action goals as follows: (1) a "clear cut pattern of long continued and egregious racial discrimination"²¹⁸ must be present; (2) the burden of affirmative action relief must not be "concentrated upon a relatively small, ascertainable group of non-minority persons;"²¹⁹ and, (3) the plan must be "temporary," in the context of *Weber-Fullilove*, meaning that the affirmative relief can extend "only until the effects of the past discrimination have been eliminated."²²⁰

Of the six cases on the 1985 docket, *Local 638* raises most squarely the question whether the Supreme Court intended *Stotts* to signal the end of judicially promulgated affirmative action goals as a type of "prospective relief" for proven past racial discrimination. The grant of certiorari in this case gives affirmative action advocates cause for grave concern.

C. *Vanguards v. City of Cleveland*²²¹

In *Vanguards*, a union of white firefighters is appealing a consent decree that includes race-conscious affirmative action goals approved by the district court. Black and Hispanic firefighters, alleging a long history of racially discriminatory hiring and promotion practices in the Cleveland Fire Department, sued the City of Cleveland for violation of their title VII and equal protection rights. Plaintiffs sought an injunction against the continuation of such practices and the further remedy of affirmative action hiring and promotion goals.

Before the case came to trial, plaintiffs and the defendant City entered into settlement negotiations.²²² After a proposed consent decree was drafted by plaintiffs and Cleveland, the district court held an evidentiary hearing in which the white union's objections to promotion goals were heard. At the hearing, the union made no objection to the hiring goals. The district court accepted the proposed consent decree which provided for departmental examinations for the positions of lieutenant and above. The consent decree further delayed the preferential treatment of qualified minority applicants for promotion until certain specified goals were reached.

The court of appeals agreed with the district court that "[t]he documents, statistics and testimony at the hearings . . . reveal a historical

217. *Id.* at 1188.

218. *Id.* at 1186.

219. *Id.*

220. *Id.* at 1187.

221. 753 F.2d 479 (6th Cir. 1985), *cert. granted sub. nom.* Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, 106 S. Ct. 59 (1985).

222. Local 93, a union of white employees, was allowed to intervene in these negotiations. *Id.* at 481.

pattern of racial discrimination in promotions.”²²³ The court of appeals further agreed that the promotional goals established in the decree met the *Weber-Fullilove* measure of “a fair, reasonable, and adequate resolution of the claims raised in this action.”²²⁴

After oral argument, but before the court of appeals made its decision, the Supreme Court decided *Stotts*.²²⁵ The Sixth Circuit Court of Appeals allowed supplemental briefs from the parties addressing the possible effect of *Stotts* on the outcome of *Vanguards*. However, the majority concluded that *Stotts* did not affect this case, because the court viewed *Vanguards* as involving a “voluntary” plan despite the embodiment of the plan in a judicial decree. Although judicial in form, the court of appeals identified the plan as essentially “voluntary” and, therefore, controlled by *Weber*, which was left intact by the *Stotts* decision. The court further concluded that in *Stotts*, where “the decree was essentially coercive and consensual in name only,”²²⁶ the Supreme Court had not specified that voluntary settlement provisions could not exceed the limits that a court might require in a coercive action. Accordingly, the court of appeals affirmed, holding that the district court had not “abused its discretion in approving the proposed consent decree.”²²⁷

In her dissent, Judge Kennedy disagreed with the majority on the impact of *Stotts*, concluding that “the language and reasoning of the Supreme Court in *Stotts* indicated that the consent decree in the present case should be governed by the principles applicable to court-ordered relief rather than those applicable to purely voluntary actions.”²²⁸ Judge Kennedy, while agreeing with the majority that the analysis of *Weber* survived *Stotts*, disagreed that the consent decree was “voluntary” so as to bring the case within the purview of *Weber*.²²⁹

The Supreme Court’s avenue of decision here will not be as narrow as in *Wygant*. Obviously, a reversal based on the analysis of Judge Kennedy as to the “involuntariness” of a consent decree would have serious implications for affirmative action goals without overruling *Weber* because without the practical availability of consent decrees, little incentive would exist for parties to program affirmative action goals or to resolve differences without a full trial.²³⁰ Still, *Vanguards* could be affirmed or reversed without the Supreme Court’s deciding the crucial “specific victim” issue; however, that issue hardly can be skirted in deciding the third

223. *Id.* at 485.

224. *Id.* at 484-85.

225. *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984).

226. *Vanguards*, 753 F.2d at 489.

227. *Id.* at 485.

228. *Id.* at 489.

229. *Id.* at 491, 493.

230. See *supra* text accompanying note 28 and *infra* note 289.

and final case in which the Court has granted certiorari—*EEOC v. Local 638*.²³¹

Three other affirmative action petitions for certiorari remain on the Supreme Court's 1985 docket, neither granted nor denied.²³² The possibility exists that the Court may take early action with respect to each. More than likely, in light of the Court's past practice, these cases will remain on the docket and be disposed of in light of the decisions which the Court reaches in *Wygant*, *Vanguards*, and *Local 638*. These cases bear discussion here to further illuminate the courts of appeals' interpretation of the significance of *Stotts*.

D. *Marsh v. Board of Education*²³³

Plaintiff, a white employee of the Flint Board of Education since 1965, was promoted to the position of counselor in 1969. In a 1979-82 collective bargaining agreement between the Flint Board of Education and the United Teachers of Flint, an affirmative action plan provided for the racial composition of the counselor and librarian staffs to be proportional to the secondary teaching staff. The racial composition of the teaching staff was to be proportional to the racial composition of the student body. To maintain these proportions, plaintiff was dislodged from the counselor position and was required to assume duties as a classroom teacher. Simultaneously, four blacks with less seniority than plaintiff were retained as counselors in that school year.

Marsh is an unusual case because the plaintiff challenged alleged racial discrimination in government employment on equal protection grounds in his action brought under 42 U.S.C. § 1983,²³⁴ rather than under title VII. The district judge, sympathetic to plaintiff's claim,²³⁵ felt foreclosed from granting him relief by the express holdings of the Sixth Circuit in *Young*²³⁶ and *Bratton*,²³⁷ two cases in which the Supreme Court denied certiorari.²³⁸ The court of appeals affirmed the district court, apparently

231. *EEOC v. Local 638*, 753 F.2d 1172 (2d Cir.), *cert. granted sub nom. Local 28 of the Sheet Metal Workers' Int'l Ass'n*, 106 S. Ct. 58 (1985); *see supra* pp. 171-72.

232. *See* cases cited *supra* note 3.

233. 581 F. Supp. 614 (E.D. Mich. 1984), *aff'd mem.*, 762 F.2d 1009 (6th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3071 (U.S. Aug. 6, 1985) (No. 84-1859).

234. Plaintiff also made claims under 42 U.S.C. § 1981 and § 1985(3) which are not relevant here.

235. District Judge Newblatt's opinion is permeated with doubts of the soundness of prevailing Sixth Circuit opinions on affirmative action goals, especially *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981) and *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 703 (1984). *Marsh v. Board of Educ.*, 581 F. Supp. 614 (E.D. Mich. 1984).

236. *Detroit Police Officers Ass'n v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981).

237. *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 703 (1984).

238. *Marsh v. Board of Educ.*, 581 F. Supp. 614 (E.D. Mich. 1984).

without opinion, and plaintiff petitioned for certiorari.²³⁹

The Supreme Court could grant certiorari in *Marsh* for the purpose of reexamining *Young* and *Bratton*. *Marsh* raises the same question presented in *Wygant*,²⁴⁰ i.e., whether the counselor/student ratio is an adequate means of proving past discrimination.²⁴¹ As noted above, review by the Supreme Court would reach only equal protection and not title VII considerations; therefore, this case is not directly related to *Stotts*.²⁴²

E. *Turner v. Orr*²⁴³

The most recent of the affirmative action petitions for certiorari filed this Term, *Turner* is also the only such petition filed by the Department of Justice. Here, as in other cases still in the lower federal courts, the United States seeks to renounce a consent judgment to which the federal government was a party.²⁴⁴

Turner, a black civilian employee of the United States Air Force, brought a class action on behalf of black civilian employees at the Eglin Air Force Base in Florida, alleging racial discrimination in promotions. Prior to trial, the United States entered into a settlement in the form of a consent decree with Turner on behalf of the class. The decree provided that the defendant United States would make "every good faith effort" to fill supervisory positions at Eglin with blacks "in proportion to the percentage of blacks in the occupational category wherein the vacancy arises," and that "seniority, back pay and other appropriate relief might be awarded to individuals injured by government failure to enforce the terms of the consent judgment."²⁴⁵

Raymond Little, a member of plaintiff class, claimed that defendant Air Force violated the consent judgment in the course of twice failing to appoint him to vacant positions. The district court, finding that defendant Air Force had failed to make the required "good faith effort" in Little's case, ordered that Little be placed in a vacant supervisory position and awarded back pay. Defendant Air Force appealed. In affirming, the court of appeals found that the Air Force indeed had violated the "good faith" provisions of the consent judgment, and that the district court had

239. *Marsh v. Board of Educ.*, 762 F.2d 1009 (6th Cir. 1985) (mem.), *petition for cert. filed*, 54 U.S.L.W. 3071 (U.S. Aug. 6, 1985) (No. 84-1859).

240. See *supra* text accompanying notes 187-88.

241. See *Hazlewood School Dist. v. United States*, 433 U.S. 299 (1977).

242. This conclusion is valid unless the Supreme Court gives the broadest reading to Justice White's opinion in *Stotts*. See *supra* note 162.

243. *Turner v. Orr*, 759 F.2d 817 (11th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3149 (U.S. Sept. 10, 1985) (No. 85-177).

244. Tofani, *Lawmakers Seek to Preserve Affirmative Action*, Wash. Post, May 4, 1985, at A6, col. 1; Tofani, *U.S. Takes New Tack Against Use of Quotas*, Wash. Post, March 1, 1985, at A3, col. 4.

245. *Turner*, 759 F.2d at 820.

awarded an "appropriate" remedy authorized by the consent judgment.²⁴⁶ The court further found *Stotts* inapplicable because the consent judgment here was "voluntary" and, therefore, was protected by the Supreme Court's *Weber* analysis, because no third party rights were involved in the remedy of appointment to a vacant position.²⁴⁷

The court of appeals considered whether *Stotts* should be read to bar relief awarded under a consent decree when that relief could not be awarded in a coercive judicial action. Agreeing with the Sixth Circuit in *Vanguards*,²⁴⁸ the court of appeals found the "voluntary consent judgment in this case entirely consistent with Title VII, a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had been 'excluded from the American dream for so long.'"²⁴⁹ For this reason, the court rejected the United States' argument that *Stotts* barred relief: "As *Weber* made clear, Section 706(g) [the remedial section of title VII] does not bar voluntary affirmative action agreements, such as the consent judgment in this case; it is merely a limit on what a court may require in a coercive action under Title VII."²⁵⁰

F. *Janowiak v. Corporate City of South Bend*²⁵¹

The South Bend Board of Public Safety concluded in June 1979 that a "disparity existed between the percentage of minorities in the [Police and Fire] Departments and the percentage of minorities in the City."²⁵² The Board noted that the work force of the departments was composed of 5.3% minorities, while the city of South Bend was composed of 14.1% minorities.²⁵³ The task force had recommended in January, 1983 that the city hire minorities according to a two-to-one preferential hiring plan.²⁵⁴ The plan was designed to produce a work force reflecting the minority population of South Bend within five years. The board ac-

246. *Id.* at 826.

247. *Id.* at 824.

248. *Vanguards v. City of Cleveland*, 753 F.2d 479 (6th Cir.), *cert. granted sub nom. Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 106 S. Ct. 59 (1985).

249. *Turner*, 759 F.2d at 826 (citing *United Steelworkers v. Weber*, 443 U.S. 265, 304 (1979)). The *Turner* court did not address the question of whether judicially prescribed race-conscious goals could exist in a contested litigation. The Court limited itself to holding that a consent decree is "voluntary" within *Weber*. *Turner* did not concern itself with *Stotts*' intimation that there cannot be affirmative race-conscious goals that may benefit a minority person who is not a "specific victim" in the *Franks-Teamsters* sense, see *supra* note 42.

250. *Turner*, 759 F.2d at 821.

251. 750 F.2d 557 (7th Cir. 1984), *petition for cert. filed*, 54 U.S.L.W. 3016 (U.S. July 16, 1985) (No. 84-1936).

252. *Id.* at 559.

253. *Id.* at 558.

254. The task force made this proposal although it "did not find that the hiring procedures were discriminatory." *Id.*

cepted the proposed plan and maintained two hiring lists, one each for minority and non-minority applicants.²⁵⁵ A continuing departmental panel also was established which periodically would recommend the number of applicants to be hired. In November 1980, the Board, on recommendation of the panel, hired four minority applicants and one non-minority applicant.

Plaintiff Janowiak, a white male applicant for a post in the fire department, alleged racial discrimination and pursued a title VII action, first through the EEOC and then in federal court. Janowiak claimed violations of both his title VII and equal protection rights. The city defended the alleged discrimination on the ground that the action taken was pursuant to a valid voluntary title VII affirmative action plan, which was "designed to remedy the statistical disparity between the percentage of minorities in the population of the city and the percentage of minorities in the Fire Department."²⁵⁶ The district court granted the city's motion for summary judgment. The court of appeals reversed.

The court of appeals agreed that the *Bakke-Weber-Fullilove* test allows a voluntary affirmative action plan to remedy past racial discrimination. The *Bakke* requirement of "findings of past discrimination by a competent body" was satisfied because the Board of Public Safety was such a "competent body,"²⁵⁷ but the court was dissatisfied with the substance of the Board's finding. No circumstances here approached those in *Weber*: no "glaring statistical disparity between the percentage of black craftworkers employed and the percentage of blacks in the work force"²⁵⁸ and no "conspicuous racial imbalance in *traditionally segregated job categories*"²⁵⁹ was found. Turning to the equal protection issue, the court reached the same result. In *Bratton*,²⁶⁰ statistical disparity was complemented by other evidence of racial discrimination, while here only weak statistics were offered. Not enough evidence existed for a summary judgment upholding the plan on the basis of either title VII or equal protection.

The decision in *Janowiak* was handed down over six months after *Stotts*,²⁶¹ yet the court of appeals made no reference to that case. This is understandable because *Janowiak* involves not a court judgment but a purely voluntary affirmative action plan; therefore, *Stotts* does not apply

255. The operating principle accepted by the Board was that "minority representation on the Police and Fire Departments should be consistent with the minority composition of the community." *Id.* at 559.

256. *Id.*

257. *Id.* at 561.

258. *Id.* at 562.

259. *United Steelworkers v. Weber*, 443 U.S. 193, 209 (1979) (emphasis added).

260. *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 703 (1984).

261. *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984).

by any reasonable interpretation.²⁶²

Unlike the other docket cases, the proponent of the affirmative action goals in *Janowiak*, the municipal department, lost in the court of appeals and has petitioned the Supreme Court for certiorari.²⁶³

Other affirmative action cases have been decided in the courts of appeals since *Stotts*.²⁶⁴ In some of those cases, the Supreme Court already has denied certiorari. Still other cases raising affirmative action issues have been decided in the district courts but have yet to produce appellate court rulings.²⁶⁵ However, the cases already on the Supreme Court docket for this Term fairly raise the arguably open questions. Assuming that the Supreme Court is not prepared to demolish entirely the structure of possible affirmative action goals as a remedy for past racial discrimination, the following questions are posed in these 1985 docket cases:²⁶⁶

1. Was adequate substantiation of past discrimination found?²⁶⁷
2. Was the substantiation of past discrimination authenticated by a responsible body (or bodies)?²⁶⁸
3. Were affirmative action goals reasonably necessary to remedy the demonstrated past racial discrimination?

*United Steelworkers v. Weber*²⁶⁹ (title VII) and *Fullilove v. Klutznick*²⁷⁰ (equal protection) require that affirmative action goals answer the following additional questions affirmatively:

4. Does the affirmative action plan not "unnecessarily trammel the

262. Like *Turner*, *Janowiak* is clearly distinguishable from *Stotts*. However, equally like *Turner*, the *Janowiak* court did not explore the ramifications of *Stotts*' "specific victim" intimation. See *supra* note 249.

263. *Janowiak v. Corporate City of South Bend*, 750 F.2d 557 (7th Cir. 1984), *petition for cert. filed*, 54 U.S.L.W. 3016 (U.S. July 16, 1985) (No. 84-1936).

264. *Johnson v. Transportation Agency*, 748 F.2d 1308 (9th Cir. 1984); *Bushey v. New York State Civil Serv. Comm'n*, 571 F. Supp. 1562 (N.D.N.Y. 1983), *aff'd mem.*, 767 F.2d 907 (2d Cir. 1985); *Board of Educ. v. United States*, 744 F.2d 1300 (7th Cir. 1984); *Kromnick v. School Dist.*, 739 F.2d 894 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 782 (1985); *Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 2357 (1985).

265. *United States v. City of Buffalo*, 609 F. Supp. 1252 (W.D.N.Y. 1985); *United States v. City of San Diego*, 43 FED. CONT. REP. (BNA) 868 (S.D. Cal. May 8, 1985); *Hammon v. Barry*, 606 F. Supp. 1082 (D.C. 1985); NAACP, *Detroit Branch v. Detroit Police Officers Ass'n*, 36 Fair Empl. Prac. Cas. 434 (BNA) (E.D. Mich. 1984); *Geier v. Alexander*, 593 F. Supp. 1263 (M.D. Tenn. 1984); *Britton v. South Bend Community School Corp.*, 593 F. Supp. 1223 (N.D. Ind. 1984); NAACP v. *Detroit Police Officers Ass'n*, 591 F. Supp. 1194 (E.D. Mich. 1984).

266. See cases cited *supra* notes 1-3.

267. This question is central in *Wygant v. Jackson Bd. of Educ.*, 746 F.2d 1152 (6th Cir. 1984), *cert. granted*, 105 S. Ct. 2015 (1985) (discussed *supra* at text accompanying notes 179-92).

268. This question is most strikingly involved in *Wygant*. Considerations of the impact of a consent decree on substantiation are presented by *Vanguards v. City of Cleveland*, 753 F.2d 479 (6th Cir.), *cert. granted sub nom. Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 106 S. Ct. 59 (1985) and *Turner v. Orr*, 759 F.2d 817 (11th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3149 (U.S. Sept. 10, 1985) (No. 85-177).

269. 443 U.S. 193 (1979); see *supra* text accompanying notes 52-78.

270. 448 U.S. 448 (1980); see *supra* text accompanying notes 144-69.

interests of white employees”²⁷¹

5. Is the affirmative action plan “temporary?”²⁷²

6. Is the affirmative action plan sufficiently “flexible?”²⁷³

If these questions are answered affirmatively, and a “voluntary” plan is involved, little question exists that the affirmative action plan is controlled by *Weber*, at least when the plan concerns employment and, therefore, title VII. In *Weber*, craft training jobs were allocated on a fifty-fifty basis between black and white applicants. The plan had been adopted “voluntarily,” although not entirely spontaneously, by the employer and the plant union. The union and employer defended the plan, both arguing that they had been stimulated to adopt the plan out of fear of suit by black employees, and from the pressures on them from the Office of Contract Compliance, the office charged with enforcing Executive Order 11246, which demanded affirmative action from government contractors.²⁷⁴ The Court found these fears or pressures unwarranted; the plan was still “voluntary,” and a voluntary plan which satisfied the above listed factors was permissible under title VII.

The *Weber* Court expressly excluded from its decision “what a court might order to remedy a past proven violation of the Act.”²⁷⁵ Avoiding the similar issue in *Fullilove*, the Court gave constitutional approval to a congressionally-enacted, race-conscious “set-aside” that met the *Weber* test but twice warned that no decision on the power of a court to order remedial racial preferences was being made.²⁷⁶

The *Fullilove* Court did recall those school desegregation, employment discrimination, and voting rights legislation cases in which court-proposed, race-conscious remedies had been upheld.²⁷⁷ The “limited” powers of a federal court allow a racial or ethnic factor to be used as an equitable remedy “[w]here federal anti-discrimination laws have been violated.”²⁷⁸ This judicial power is limited in that a “federal court is required to tailor ‘the scope of the remedy’ to fit the nature and extent of

271. *Weber*, 443 U.S. at 208.

272. *Id.* at 208-09. In *Weber*, this test was satisfied in that the “[p]referential selection of craft trainees at the Gramercy plant will end as soon as the percentage of black skilled craft workers in the Gramercy plant approximates the percentage of blacks in the local labor force.” *Id.* at 208-09.

273. This requirement includes not only the *Bakke* ban against a rigid quota (assuring 16 places to minority applicants among the 100-place admission total), *Bakke*, 438 U.S. at 289, 319, but also embraces the *Fullilove* caution that the plan should exclude both the unqualified, and those blacks who have not actually suffered in some way from the past racial discrimination that the preferential plan was designed to remedy, *Fullilove*, 448 U.S. at 482, 487-88. Therefore, the black contractors in *Fullilove* who had prospered in the period of general race discrimination in the business could not benefit from the preference.

274. See *supra* note 9 and *infra* note 350.

275. *Weber*, 443 U.S. at 200.

276. *Fullilove*, 448 U.S. at 480, 483. See *supra* text accompanying notes 157-58.

277. *Id.* at 483.

278. *Id.*

the . . . violation.”²⁷⁹ Reviewing the federal anti-discrimination laws, Chief Justice Burger did not cite an affirmative action goals case, but did cite the trilogy of *Franks*,²⁸⁰ *Teamsters*,²⁸¹ and *Albemarle*,²⁸² all individual victim redress cases.

One could argue that in *Stotts*²⁸³ the Court, for the first time, dropped the other shoe. The Department of Justice, for many years a supporter of affirmative action goals, now argues that the courts of appeals have gone astray; that the Supreme Court never approved affirmative action goals²⁸⁴ in a coercive judicial decree beyond the “individual victim” situation of *Franks*, *Teamsters*, and *Albermarle*. Assistant Attorney General William Bradford Reynolds, the chief Department of Justice point man on this issue, concedes that the Court upheld affirmative action goals in “voluntary” plans satisfying certain conditions in *Weber*.²⁸⁵ However, Reynolds maintains *Weber* was “wrongly decided” and should be overruled.²⁸⁶

Several of the courts of appeals decisions on the 1985 Supreme Court docket seriously considered the possibility that the Court is prepared to take the additional step intimated by Justice White in *Stotts* (although this step was not necessary to the decision). Read most expansively, Justice White’s language would limit judicial power to prescribe affirmative action goals as an “appropriate” remedy under title VII’s remedial section²⁸⁷ to “specified victims.” Several of these majority opinions rest their “case” squarely on the ground that a “consent judgment,” while containing both “consent” and “judicial” elements, should be considered “voluntary” within the scope of *Weber*.²⁸⁸

The Court, in view of the “foster settlement” design of title VII²⁸⁹—

279. *Id.*

280. *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976). *See supra* notes 42-44

281. *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). *See supra* notes 42-44.

282. *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

283. *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984). *See supra* notes 130-51 and accompanying text.

284. Compare the United States’ amicus briefs in support of affirmative action goals in *Bakke* and *Weber* (and, of course, the United States’ brief defending congressional set-asides in *Fullilove*) with the government’s amicus briefs opposing affirmative action in *Williams* and *Stotts*. In *Williams* Judge Wisdom recited that the Department of Justice was reported to have pressured the EEOC to withdraw its brief in support of affirmative action. *Williams*, 727 F.2d at 1572 n.5 (Wisdom, J., dissenting). The EEOC brief was brought to the attention of the Fifth Circuit Court of Appeals by two amici curiae who filed the brief as an appendix to their brief. *Id.*

285. *United Steelworkers v. Weber*, 443 U.S. 448 (1978). *See supra* notes 52-73.

286. *See supra* note 78.

287. 42 U.S.C. § 2000e-2(g) (1982).

288. *Turner v. Orr*, 759 F.2d 817 (11th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3149 (U.S. Sept. 10, 1985) (No. 85-177); *Vanguards v. City of Cleveland*, 753 F.2d 479 (6th Cir.), *cert. granted sub nom.* *Local Number 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 106 S. Ct. 59 (1985).

289. *See Williams*, 729 F.2d at 1572 n.6, where Judge Wisdom calls attention to “the clear intent of Congress [in title VII] to favor voluntary settlement.” The Supreme Court has stated that “Con-

that consent decrees and EEOC conciliation agreements²⁹⁰ should be considered "voluntary"—could dispose of certain cases on the docket on this ground.²⁹¹ However, the grant of certiorari in *Local 638*²⁹² raises a broader issue: Can affirmative action goals be prescribed as an extraordinary judicial remedy for identified past racial discrimination that is *not* limited to "specific victims" in the *Franks-Teamsters* sense²⁹³ by a federal court after trial? The courts of appeals presently assume they have such power, absent instructions otherwise from the Supreme Court. They uniformly have concluded that such affirmative relief may constitute an "appropriate" exercise of remedial power that is well within the Supreme Court's admonition that a "federal court is required to tailor 'the scope of the remedy' to fit the nature and extent of the . . . violation."²⁹⁴

Assuming that *Weber's* "voluntary" affirmative action goals are left intact by *Wygant*, a crucial question still awaits Supreme Court decision: Should a consent judgment, which obviously has both "voluntary" and "coercive" aspects be considered "voluntary" for purposes of *Weber*? We have seen this question raised squarely by *Vanguards*²⁹⁵ and *Turner*.²⁹⁶

Whatever is decided regarding "consent judgments," a still broader question remains: Will the Supreme Court carry out the threat of Justice White's ominous language in *Stotts* when an outcome depends on such threat?²⁹⁷ Against the expressed views and practice of every court of appeals, will the Court proclaim the death knell of the carefully crafted judicial remedy of rare and moderate affirmative action goals? Of the cases now on the 1985 docket, *Local 638*²⁹⁸ directly raises this question.

Some courts of appeals seriously considered the intimations of Justice White's opinion in *Stotts* that the Court may be on the verge of limiting affirmative remedial relief to identified "victims" of discrimination. However, the Supreme Court may not insist on specific "victims" in the

gress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims." *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981). See *supra* text accompanying note 28.

290. For the consequences to an employer when entering a conciliation agreement which disadvantages a majority employee, see *W.R. Grace v. Local Union 759*, 461 U.S. 757 (1983).

291. See *supra* text accompanying notes 195, 226, 247.

292. *EEOC v. Local 638*, 753 F.2d 1172 (2d Cir. 1985).

293. *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976). See also *supra* text accompanying notes 42-39, 83-84, 124.

294. *Fullilove*, 448 U.S. at 483.

295. *Vanguards*, 753 F.2d 479 (6th Cir.), cert. granted sub nom. *Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 106 S. Ct. 59 (1985); see *supra* text accompanying notes 224-33.

296. *Turner*, 759 F.2d 817 (11th Cir. 1985), petition for cert. filed 54 U.S.L.W. 3149 (U.S. Sept. 10, 1985) (No. 85-177); see *supra* text accompanying notes 246-253.

297. See *supra* text accompanying note 130.

298. *EEOC v. Local 638*, 753 F.2d 1172 (2d Cir.), cert. granted sub nom. *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 58 (1985); see *supra* text accompanying notes 211-22.

same limited sense of *Franks* and *Teamsters*.²⁹⁹ Justice White's design may require only that the beneficiaries of affirmative action goals be "victims" of the identified discrimination *in some sense* just as the black beneficiaries of the preferential training program in *Weber* were perceived to be, in some sense, victims of the "manifest racial imbalances in traditionally segregated job categories."³⁰⁰ In *Turner*,³⁰¹ the plaintiff, as a long time employee, was in some sense the victim of the proven racial discrimination in appointments to supervisory positions at Eglin Air Force base, while in *Marsh*,³⁰² the benefited employees were in some sense victims of the long-standing racial discrimination in the Jackson school system. A somewhat more relaxed interpretation of "victim" might call for additional elements of proof but would not be a critical obstacle to all race-conscious affirmative action goals. In contrast, should the Supreme Court restrict its "victim" analysis to the "specific victims" of *Franks* and *Teamsters*,³⁰³ race-conscious affirmative action goals would be all but laid to rest as the courts have understood them.

In reaching such a drastic result, the Court could hold that this issue never has been expressly considered³⁰⁴ and that the Court's past denials of certiorari carry no substantive implication.³⁰⁵ Neither the text nor the legislative history of title VII or the history of the equal protection clause would explain such a turnabout in judicial practice. The Supreme Court's controlling concern would be the Court's "new" view of legislative and constitutional "policy." Policy would be at the root of a decision whether or not a consent decree could ever be considered "voluntary" under a *Weber* analysis, whether being "victims" *in some sense* would suffice for race-conscious relief, or whether the strict *Franks-Teamsters* view of "victims" would be required despite the contrary conclusion of all courts of appeals reading the same statute and the same constitution.

What policy considerations could move the Supreme Court to definitively terminate use of affirmative action goals as a remedy for past discrimination by adopting the strict "victim" analysis? Conversely, what (perhaps unspoken) policy considerations would give the Court pause?

299. See *supra* text accompanying notes 42-39, 83-84.

300. *Weber*, 443 U.S. at 209. Similarly, the unspecified group beneficiaries of race-conscious goals in school desegregation or voting rights cases were, in some sense, "victims" of the identified racial discrimination.

301. *Turner v. Orr*, 759 F.2d 817 (11th Cir. 1985); see *supra* text accompanying notes 248-49.

302. *Marsh v. Board of Educ.*, 762 F.2d 1009 (6th Cir. 1985); see *supra* text accompanying notes 233-42.

303. See *supra* text accompanying notes 243-50.

304. The constant interpretation of *Bakke-Weber-Fullilove* by the courts of appeals, see *supra* note 60, and the explicit, yet cautious, language of *Fullilove* (Burger, C.J., and Powell, J.) and *Bakke* itself (Powell, J.), see *supra* text accompanying notes 141-61, would make such a suggestion disingenuous.

305. See *supra* note 195.

III. THE QUESTION OF POLICY

The method by which the Supreme Court decides questions of constitutional and statutory law, when the constitutional or statutory text, legislative history, or recent decisions of the Court are not clear, is a vexing question upon which judges and scholars speak with conflicting voices.³⁰⁶ Most agree, however, that Justices weigh background reasons that loosely may be called considerations of policy. When different Justices give different weight to the same policy reason, the end-product often is the decision of a closely divided Supreme Court. The questions concerning race-conscious affirmative action goals obviously fall into this category. Although the Supreme Court has decided only four such cases,³⁰⁷ petitions for certiorari in numerous others have been considered and rejected.³⁰⁸ The Supreme Court undoubtedly has read and reread countless opinions from judges on the courts of appeals and petitions and jurisdictional statements from attorneys seeking Supreme Court review.³⁰⁹

306. Compare Justice White's discussion in *Stotts* of the legislative history of title VII, 104 S. Ct. at 2590 n.15, with the analysis of the same legislative history by Justice Blackmun, *id.* at 2609-10, and Judge Skelly Wright, *Segar v. Smith*, 738 F.2d 1249, 1293 n.39 (D.C. Cir. 1984).

In *Segar v. Smith*, Judge J. Skelly Wright concedes that "[m]any in Congress spoke in 1964, and again in 1972 when Title VII was amended, to assure wavering supporters that Title VII could not be applied to grant preferences for those who were not victims of discrimination." 738 F.2d 1249, 1293 n.39 (D.C. Cir. 1984). Judge Wright denies that this establishes "that promotion goals and timetables are invalid if they benefit any individuals who are not proven victims of discrimination." *Id.* On the contrary, Judge Wright insists that:

[t]hese statements are . . . inapposite to the question before us in this case. Those in Congress who made such statements were not considering the issue whether in affording relief for proven discrimination against a broad class some individual nonvictims benefited. Rather, these statements were made with reference to the question whether Title VII could be used as a mandate, to correct overall racial imbalance in an employer's workforce when such an imbalance had not been shown to be the result of discrimination.

Id.

Among copious scholarly comment, see R. DWORKIN, *A MATTER OF PRINCIPLE* 316-31 (1985) (interpretation of of the 1964 Civil Rights Act favorable to affirmative action goals); Duncan, *The Future of Affirmative Action: A Jurisprudential Legal Critique*, 17 CIV. RTS. & CONST. L. L. REV. 503 (1982); Jones, 'Reverse Discrimination' in Employment: Judicial Treatment of Affirmative Action Programs in the United States, 25 HOW. L.J. 217 (1982); and, Mishkin, *The Use of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907 (1983). See also A. BICKEL, *supra* note 39, at 133; CITIZENS' COMM'N ON CIVIL RIGHTS, *AFFIRMATIVE ACTION TO OPEN THE DOORS OF JOB OPPORTUNITY—A POLICY OF FAIRNESS AND COMPASSION THAT HAS WORKED* (1984) [hereinafter cited as CITIZENS' COMM'N]; Meltzer, *The Weber Case: The Judicial Abrogation of the Anti-Discrimination Standard in Employment*, 47 U. CHI. L. REV. 423 (1980) (critical of affirmative action goals); Nickel, *Preferential Policies in Hiring and Admissions: A Jurisprudential Approach*, 75 COL. L. REV. 534 (1975).

307. *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *United Steelworkers v. Weber*, 443 U.S. 265 (1979); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

308. See cases cited *supra* notes 81, 91, 93-95, 162.

309. A petition for certiorari (and the opponent's reply thereto) are often mini-briefs making specific legal arguments why the Supreme Court should (or should not) grant discretionary review in this one particular case among many. Likewise, the jurisdictional statement which is submitted on

In deciding any of the docket cases in which the Court has granted, or may grant, certiorari this Term, the Justices will unlikely be introduced to, or moved by, any new policy considerations. By now, they are surely acquainted with all the arguments. Nevertheless, some of these policy arguments are worth recalling when considering the most crucial issue in these cases: whether affirmative action goals should be limited to the *Franks-Teamsters* "specific victim" relief.³¹⁰

A. Policies Favoring Limitation Of Affirmative Action Goals

1. The "Philosophical" Arguments

The "moral" argument³¹¹ suggests that affirmative action beyond "specific victim" relief is "immoral" because all should agree that racial discrimination against anyone, white persons or otherwise, is immoral. The counterargument is that "morality" always has included "justice," and justice entails a group restorative remedy for a group wrong, here, identified past race discrimination. Both moral and political philosophers and moralists have differed in their conclusions depending upon whether they accept as dominant the original wrong of identified race discrimination, or the remedy of affirmative action goals.

Another argument advanced is the "equality argument," *i.e.*, preferential goals do not treat whites, blacks, and other minorities equally. By definition, preferential goals advantage present blacks over present whites; therefore, whites and blacks are not treated with "equality." As with the moral argument, the counterargument and conclusion depend on the starting point. The counterargument also recalls that equality relates to persons similarly situated. One thing equality is *not*, and that is treating equally those who are unequally situated.

Largely philosophical, the "merit" argument asserts that the United States is a meritocracy.³¹² Individuals should advance on the basis of individual merit, and not on the basis of race, or other preference. The counterargument takes a variety of forms.³¹³ First, the premise that we

appeals of right (and the opponent's reply) are mini-briefs to convince the Court to set down the appeal for briefing and oral argument, rather than decide the case summarily on the appeal papers.

310. See *supra* note 44.

311. "[A] racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as practice." A. BICKEL, *supra* note 39, at 133. See also *infra* note 430.

312. A complete equation of merit with justice may be found in Kristol, "When Virtue Loses All Her Loveliness"—Some Reflections on Capitalism and "The Free Society," PUB. INTEREST, Fall 1970, at 3 (cited in R. NOZICK, ANARCHY, STATE, AND UTOPIA 344 (1974)). At opposite philosophical poles from Rawls, see J. RAWLS, A THEORY OF JUSTICE (1971), Nozick justifies only "a minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on. . . ." R. NOZICK, *supra* at ix. See also R. NOZICK, PHILOSOPHICAL EXPLANATIONS (1981).

313. See J. RAWLS, *supra* note 312.

are or should be a meritocracy is denied. As much as merit, political friendships or campaign contributions lead to important posts such as ambassadorships. Also, judgments of merit are hard to justify even where posts ostensibly pass by merit. Such judgments often are an illusion, or a camouflage, for less becoming bases of choice.³¹⁴ The "camouflage" concern here is that the unexpressed racial preference for whites (already identified in proven past racial discrimination) will likely prevail, styled as merit, without at least a moderate legitimate express remedial racial preference for minorities.

2. The "Color-Blind" Constitution Argument

The "color-blind" argument purports to be a "constitutional" argument, rather than one of morals or philosophy. Proponents of this argument usually cite the *dissenting* opinion of the first Justice Harlan in *Plessy v. Ferguson*,³¹⁵ the unfortunate Supreme Court decision which laid the groundwork for seventy-five years of segregated schools and Jim Crow laws. The argument boldly states that "the Constitution is color-blind"; and because "race-conscious goals" by definition are not "color-blind," they are not constitutionally acceptable. Among many versions of the counterargument one might recall those of Justice Blackmun,³¹⁶ Justice Powell,³¹⁷ Judge Skelly Wright,³¹⁸ and, surprisingly, the Reagan

[A] meritocratic society . . . follows the principle of careers open to talents and uses equality of opportunity as a way of releasing men's energies in the pursuit of economic prosperity and political dominion. There exists a marked disparity between the upper and lower classes in both means of life and the rights and privileges of organizational authority. The culture of the poorer strata is impoverished while that of the governing and technocratic elite is securely based on the service of the national ends of power and wealth. Equality of opportunity means an equal chance to leave the less fortunate behind in the personal quest for influence and social position.

Id. at 106-07.

In his path-breaking, but controversial book, Rawls rejects meritocracy as the hallmark of justice in a democratic society. He also rejects the utilitarian criterion of the greatest good for the greatest number in favor of what he calls "the difference principle" as the foundation of "justice as fairness": "the social order is not to establish and secure the more attractive prospects of those better off unless doing so is to the advantage of those less fortunate." *Id.* at 75. Rawls' notion has been under steady attack by Nozick, *see supra* note 317, and other philosophers, *see* N. DANIELS, *READING RAWLS* (n.d.).

314. For example, consider a situation where the choice is among closely ranked candidates for one available faculty post. A recent television program focusing on affirmative action posed this situation involving three white and one black faculty tenure aspirants as a case study.

315. 163 U.S. 537 (1896).

316. I suspect that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetrate [sic] racial supremacy.

Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1977) (Blackmun, J.).

317. "The time cannot come too soon when no governmental decision will be based upon immutable characteristics of pigmentation or origin. But in our quest to achieve a society free from racial classification, we cannot ignore the claims of those who still suffer from the effects of identifiable discrimination." *Fullilove v. Klutznick*, 448 U.S. 448, 516 (1980) (Powell, J., concurring). "As this

Administration's Secretary of Labor, William Brock.³¹⁹

3. The Pragmatic Arguments

One pragmatic argument often advanced is that affirmative action does not work. The perception that affirmative action has not succeeded in accomplishing its goals of increasing the participation of black citizens in American economic and social life concerns many people.³²⁰ The counterargument is that affirmative action goals have resulted in significant gains, but not enough gains to discontinue their use.³²¹ The evi-

Court has recognized, the implementation of any affirmative remedy for redress of racial discrimination is likely to affect persons differently depending upon their race. See, e.g., *North Carolina Board of Education v. Swann*, 402 U.S. at 45-46." *Id.* at 508.

318. The purpose of this legislation [Civil Rights Act of 1964] cannot be denied: to help blacks and members of other minority groups overcome the prejudice that oppresses them. Its effect is to give special advantage to those minority groups. To call such legislation 'color blind' is a meaningless abstraction. Legislation against invidious discrimination helps one race and not the other because one race and not the other needs such help.

Wright, *Color-Blind Theories and Color-Conscious Remedies*, 47 U. CHI. L. REV. 213, 220-21 (1980).

319. "I think this country is going to have some form of affirmative action for a considerable period of time into the future. There is a distinction which you can make between absolute numbers and quotas and so-called goals approaches." Address by Secretary of Labor William E. Brock, NAACP Convention, Dallas, Tex. (June 24, 1985) (*cited in* Wash. Post, June 25, 1985, at A4, col. 2).

320. The economic arguments advanced since the early 1970's by certain black economists, such as Professor Thomas Sowell and Walter Williams, see Douglas, *Rights Groups Move to Protect Gains*, N.Y. Times, June 23, 1985, at 10, col. 1, that blacks have not been economically advantaged by the preferential programs of the 1970's and 1980's seem to have been outdistanced by impressive statistics compiled by others, see *infra* note 326. However, criticism of affirmative action goals by some black intellectuals has continued, with emphasis now being placed on psychological and prestige costs. See, e.g., Loury, *Beyond Civil Rights*, NEW REPUBLIC, Oct. 7, 1985, at 22; Howard & Hammond, *Rumours of Inferiority*, NEW REPUBLIC, Sept. 9, 1985, at 17.

An observer of these contentions from outside the black community concedes that the "calculation is complex," but adds that "it is hard to credit the argument that on balance affirmative action actually harms blacks." Krauthammer, *A Defense of Quotas*, THE NEW REPUBLIC, Sept. 16 & 23, 1985, at 9, 11. Krauthammer concludes: "Usually advanced by opponents of affirmative action, this argument is about as ingenuous as Jerry Falwell's support of the Botha regime out of concern for South African blacks." *Id.* at 11.

321. See R. FARLEY, *BLACKS AND WHITES, NARROWING THE GAP?* (1984). Using Labor Department (Bureau of Labor Statistics) and Bureau of Census statistics, Farley concludes that of the three suggested appraisals, (1) that no progress had been made since the 1960's, (2) that the black population had been polarized into a black elite which had prospered and a black underclass which had not, and (3) that black gains are widespread and significant, the third is the most accurate. A brief selection from Farley's study includes the following data:

Black income in 1959 was 53.1% of white income; in 1982 it was 55.3%. *Id.* at 13. Overall unemployment figures showed 9% black compared to 5% white in 1950, and 16% black compared to 8% white in 1982. *Id.* at 39. In 1960, 39% of whites held white-collar jobs compared to 14% blacks; in 1982 there were 44% whites and 30% blacks in white collar jobs. *Id.* at 48. Annual earnings in 1959 were \$10,200 for whites compared with \$5,000 for blacks. In 1969 annual earnings were \$15,000 for white men and \$8,800 for black men. By 1979 the gap narrowed to \$14,600 for whites and \$9,300 for blacks; white women earned \$4,000 compared to \$2,000 for black women. By 1979 black women were earning \$4,800, in advance of white women, \$4,700. *Id.* at 66. But in 1982, 35% of black families were below the poverty line, compared to 11% of white families. *Id.* at 206. In 1960, 16% of whites and 5% of blacks had completed college. By 1982, 25% of whites and less than 12% of blacks had completed college. *Id.* at 19.

dence is impressive as to gains made, but inconclusive on the contribution of affirmative action in producing such gains. A partial answer may be sought in the decline in black admissions to professional schools following the *Bakke*³²² decision. Some fragmentary evidence exists in the experience³²³ of some business concerns with affirmative action programs, and in the leverage that Executive Order 11246³²⁴ has had in fostering "voluntary" affirmative action plans.³²⁵

Some argue that sufficient gains have been made already, therefore, the use of affirmative action goals should be discontinued. This surprising argument contradicts the previous one. While applauding the gains made through the use of affirmative action goals, and reaffirming their necessity in the 1960's and 1970's, the proponents of this argument conclude that the time is at hand to discontinue special legal helps to remedy past discrimination.³²⁶ Professor Blumrosen, a keen student of employment discrimination law, cites several instances in which the Supreme Court has backed away from earlier endorsements of what he calls "southern jurisprudence."³²⁷ Blumrosen believes these early decisions were necessary in those decades; however, he points out that "[i]n 1980, some 2,461,000 minority employees, or 22.6% of the minority employees, were in significantly higher occupations than those in which they would have been if the occupational distribution of 1965 had been cur-

322. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

323. Testimony of American business concerns as to the impact of affirmative race- and sex-conscious goals in dismantling racial discrimination in the American work force is contained in the distinguished report of the Citizens' Commission on Civil Rights. See CITIZENS' COMM'N, *supra* note 307, at 122-46. The report specifies the experience and testimony of some major American corporations including American Telephone and Telegraph Co., *id.* at 126; IBM, *id.* at 126-27; Peabody Coal Company (the nation's largest coal producer), *id.* at 128; the five largest banks in Cleveland, Ohio, *id.* at 129; the Equitable Life Assurance Society, Hewlett-Packard Company, the Kaiser Foundation Health Plan, Control Data Corporation, Xerox Corporation and Federated Department Stores, *id.* at 130-41; McDonald's, Miller Brewing Co., Merck & Co., and Johnson and Johnson, *id.* at 142-46.

The sixteen members of the Citizens' Commission include three former Secretaries of the Department of Health, Education and Welfare, a former Republican attorney general, a former Republican solicitor general, a former Republican deputy attorney general, a former assistant attorney general for civil rights, a former Secretary of Labor, two former Chairs of the EEOC, one former EEOC member, two former Chairs of the United States Commission on Civil Rights (USCCR), and three former members of the USCCR. The Director of the Citizens' Commission, and an editor of the report, is William L. Taylor, former Staff Director of the USCCR. For anyone interested in a non-ideological, experienced approach to the problem of affirmative action, with all its complexities, this report is an excellent place to begin.

324. Exec. Order No. 11246, 3 C.F.R. 339 (1965), *amended by* Exec. Order No. 11375, 3 C.F.R. 654 (1967), *reprinted in* 42 U.S.C. § 2000e, at 28 (1982).

325. *Weber*, 443 U.S. at 209 n.9.

326. Blumrosen, *The Law Transmission System and the Southern Jurisprudence of Employment Discrimination*, 6 INDUS. REL. L.J. 313 (1984).

327. "Southern jurisprudence" is used to mean the sympathetic race discrimination decisions emanating from the Fifth Circuit Court of Appeals in the 1960's and 1970's. *Id.*

rent.”³²⁸ He also relates that 21.6% of all blacks included in the 1980 EEOC data “were employed in higher-paying and higher-status categories than would have been the case had black workers been distributed through the occupational categories in the proportions of 1966.”³²⁹ Blumrosen acknowledges that “there is serious concern that once the Supreme Court has narrowed the scope of Title VII, a resurgence of discrimination could resegregate the work force.”³³⁰ He confidently affirms that “[t]his will probably not happen,”³³¹ and he suggests that a twilight of such “southern jurisprudence” would be appropriate. The counter-argument to Blumrosen’s theory is that a twenty-one to twenty-three percent improvement leaves seventy-seven to seventy-nine percent of blacks still disadvantaged. Most certainly, this disadvantage results from the racial discrimination in education and employment that functioned openly under legal and constitutional protection until the 1960’s. “At this point,” counters Blumrosen, “the questions become political. How much of a change is ‘enough’ is a basic value judgement which cannot be made through rational processes alone.”³³² Blumrosen’s preference is that “the law should withdraw when the industrial relations system operates fairly without such extensive judicial or administrative supervision.”³³³ The counter-question is again whether the system is operating “fairly” when seventy-seven to seventy-nine percent of blacks are unaccounted for in terms of equal treatment, and when unchallenged black unemployment figures cry out for repair. The concern cited by Blumrosen himself remains whether further Supreme Court “withdrawal” could lead to “a resurgence of discrimination [which] could resegregate the work force.”³³⁴

4. The “Goals” Are “Quotas” Argument

The argument that affirmative action “goals” are simply “quotas” advances the idea that no distinction can be made between affirmative action “goals” and the rigid “quotas” which have been banned by the Supreme Court since *Bakke*.³³⁵ The premise is that the mere use of an arithmetic measure for progress in an affirmative action plan constitutes

328. *Id.* at 347-48.

329. *Id.* at 340.

330. *Id.* at 348.

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

335. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). In *Bakke*, the Supreme Court struck down the reservation for minorities of 16 of 100 available seats in the state medical school. The five Justices constituting the Court majority on this point did so for differing reasons, *see supra* note 144. Nevertheless the federal courts have uniformly accepted the *Bakke* result to rule out a rigid race-conscious “quota.” *See, e.g., infra* text accompanying note 342.

a "quota."³³⁶ Hyman Bookbinder, the Washington representative of the American Jewish Committee, and a long-standing opponent of rigid quotas, offers the counterargument. Bookbinder says "quota means that a given number or percentage of positions is set aside for the exclusive use of a particular group; it means that no others need apply."³³⁷ The sixteen reserved minority seats in *Bakke* constituted a "quota."³³⁸ However, continues Bookbinder, "[a] goal means a reasonable, realistic target that could be reached by diligent, nondiscriminatory recruiting and training from among qualified job-seekers; no penalties or sanctions are possible when good faith efforts are established."³³⁹ Bookbinder opposes the Reagan Administration's proposed revision of Executive Order 11246³⁴⁰ because such a revision would ban these "goals" as well as "quotas."³⁴¹

Admittedly, many courts have tended to use the terms "goals" and "quotas" interchangeably, while conceding that a rigid quota was barred by *Bakke*.³⁴² Lately, the federal courts have refined the terminology in accord with the definitions given by Bookbinder.³⁴³ As Bookbinder concludes, to outlaw "goals and timetables . . . would have a devastating chilling effect on all affirmative action."³⁴⁴ That is the aim of the Reagan Administration in revising Executive Order 11246³⁴⁵ and of the Justice

336. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

[O]ur cases make it unmistakably clear that . . . '[s]tatistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue. . . . We have repeatedly approved the use of statistical proof, where it reached proportions comparable to those in this case, to establish a prima facie case of racial discrimination in jury selection cases. . . . Statistics are equally competent in proving employment discrimination.

Id. at 339 (citations and footnote omitted).

337. Bookbinder, *What A Quota Is—And Isn't*, Wash. Post, Sept. 19, 1985, at A22, col. 4.

338. *Bakke*, 438 U.S. at 307 (Powell, J.) ("If petitioner's purpose is to assure within the student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid."). See *supra* note 335.

339. Bookbinder, *supra* note 337.

340. See *infra* note 345.

341. Bookbinder, *supra* note 337.

342. As recently as *Williams v. New Orleans*, 729 F.2d 1554 (5th Cir. 1984), the Fifth Circuit, a leading edge in affirmative action development, was using the terms in this way.

343. See, e.g., *EEOC v. Local 638*, 753 F.2d 1172 (2d Cir.), cert. granted sub nom. *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 58 (1985).

344. Bookbinder, *supra* note 337.

345. On July 23, 1985, the Administration's consideration of substantial modification of Executive Order 11246 became known. Williams, *White House Split on Bias Underscored*, Wash. Post, July 24, 1985, at A8, col. 1. Secretary of Labor William Brock, whose department is charged with administration of the Executive Order, had stated earlier that:

[t]here is a distinction which you can make between absolute numbers and quotas and so-called goals approaches. . . . But we as a country have lived for 200 years with a major part of our population in remarkable disadvantage, and it takes some time to recover from that. Maybe we (the generation of white Americans) were not here then. But that does not change the obligation we have as citizens to respond to that situation. . . .

Department in opposing any relief other than "specific victim" affirmative action in the courts.³⁴⁶

5. The "Fairness" Arguments

One "fairness" argument proposes that affirmative action goals place an unfair burden on whites. This aspect of "fairness" centers on the fact that white employees are disadvantaged under title VII. For example, sometimes whites are not employed or promoted so that the employer may exercise the required "good faith effort" to achieve an affirmative action goal.³⁴⁷ The counterargument is that the so-called "innocent" white employee is not completely "innocent." Although he has not actually participated in the identified racial discrimination,³⁴⁸ he has benefited from the racial atmosphere which led to the discriminatory preference for whites. This counterargument is not entirely convincing. A more adequate response is that the "disadvantage" concern already is embodied in the *Weber-Fullilove* requirement that the affirmative action goals not "unnecessarily trammel"³⁴⁹ the interests of white employees. When the "disadvantage" is held to be so great as to "unnecessarily

Williams, *Brock Backs Affirmative Action*, Wash. Post, June 25, 1985, at A4, col. 1.

On October 11, 1985, the headline read: "*Brock May Lose Authority Over Affirmative Action—Revised Executive Order Would Be Victory for Meese*." Wash. Post, Oct. 11, 1985, at A2, col. 3. The text of the article noted that the current draft, "which is all but final," would permit "voluntary use of numerical goals and timetables . . . so long as they are not used and do not operate to discriminate and grant a preference to any person on the account of race, color, sex, religion or national origin." *Id.* However, the article continues, "the order would virtually eliminate the Labor Department's only real enforcement weapon, the power to debar companies from federal contracts. *Id.* This power, in force since the Nixon Administration, has rarely been used, but its presence has been a lever for the department to secure compliance by recalcitrant companies." *Id.*

The Washington Post labels the latest development, *Affirmative Action Policy Gains a Reprieve—Cabinet Moderates Mount a Surprisingly Strong Defense*. Wash. Post, Oct. 25, 1985, at A1, col. 4. The article states that "what looked like a fait accompli two weeks ago was suddenly in question again." *Id.* Two days later, the N.Y. Times reported: "Rarely has an issue divided the Reagan Administration as deeply as a proposal to rewrite a 20-year-old executive order that requires affirmative action by government contractors." Pear, *The Cabinet Searches for Consensus on Affirmative Action*, N.Y. Times, Oct. 27, 1985, at E5, col. 3.

The question remains unresolved as this Article goes to press, but the incomplete narrative tells something of the process at work.

346. *E.g.*, Williams v. City of New Orleans, 729 F.2d 1554 (5th Cir. 1984); see *supra* note 110 and accompanying text. In *Firefighter's Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984), the Solicitor General, Rex E. Lee, presented this position for the United States as *amicus curiae*. *Id.* at 2581.

347. A recent district court case rejected race-conscious promotion goals on this ground, while approving race-conscious hiring goals. *Hammon v. Barry*, 606 F. Supp. 1082 (D.D.C. 1985).

348. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such 'a sharing of the burden' by innocent parties is not impermissible. . . . Moreover, although we may assume that the complaining parties are innocent of any discriminatory conduct, it was within congressional power to act on the assumption that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contractive opportunities.

Fullilove v. Klutznick, 448 U.S. 448, 484-85 (1980) (Burger, C.J.).

349. See cases cited *supra* note 94.

trammel" the interests of white employees, the affirmative action goals are disallowed. This "fairness" concern is a strong consideration in those circuits which expressly have ruled that affirmative action goals should be employed rarely—and not at all when other remedies would suffice.³⁵⁰ For example, the Second Circuit Court of Appeals used this ground in *Local 638* to strike down part of the affirmative action relief awarded by the district court.³⁵¹ This "fairness" argument also is heeded in the warning of the Supreme Court in *Fullilove*. There the Court stated that the affirmative action remedy must be "narrowly tailored" to remedy the identified past discrimination.³⁵² Furthermore, the *Fullilove* Court indicated that merely disappointing non-minority expectations is not in itself a constitutional defect barring affirmative action goals.³⁵³

Another "fairness" argument contends that affirmative action goals benefit some minorities who have not been disadvantaged by the identified discrimination. This contention is that affirmative action goals permit benefits to be awarded preferentially to minority individuals who were not in any sense victims of the identified discrimination. For example, black persons who have themselves prospered in the midst of the identified past discrimination would gain an unfair disadvantage if they were to be beneficiaries of affirmative action goals. A counterargument has been made that such successful black persons should be entitled to preferential treatment. Because the past discrimination was directed to all blacks, the remedy should be given to all blacks, even to those who nevertheless have managed to prosper. The Supreme Court seems to have rejected this contention. A more adequate counterargument is the Court's stipulation in *Fullilove* that for affirmative action goals to be valid, these goals must be "flexibly" administered. Only "qualified" members of a minority group may be beneficiaries of the affirmative preference. However, "flexible" also means denying a racial preference to one who has been in no way disadvantaged by the identified discrimination. The existing *Bakke-Weber-Fullilove*³⁵⁴ formula already gives ample scope to this "fairness" argument.

A third "fairness" argument advances the idea that permitting affirmative action goals as a remedy for past sexual and racial discrimination

350. See, e.g., *EEOC v. Local 638*, 753 F.2d 1172, 1188 (2d Cir.), cert. granted sub nom. *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 58 (1985); *Sledge v. J.P. Stevens & Co.*, 585 F.2d 625, 646 (4th Cir. 1978), cert. denied, 440 U.S. 981 (1979). See also *supra* text accompanying notes 208-17.

351. 753 F.2d 1172, 1188 (2d Cir. 1985).

352. *Fullilove v. Klutznick*, 448 U.S. 448, 490 (1979).

353. "It is not a constitutional defect in this program that it may disappoint the expectation of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible." *Id.* at 484 (Burger, C.J.).

354. See *supra* text accompanying notes 155-60.

leaves white male employees at an additional disadvantage. According to this argument, fostering affirmative action goals in employment and promotion of both women and minorities in certain companies and governmental agencies results in a double obstacle to white male employment. The counterargument is that this admitted difficulty is already within the control of the courts under the "unnecessarily trammels" prong of the *Bakke-Weber-Fullilove* formula. The courts have taken pains to insure that affirmative action goals do not double-dip at the expense of white male employees and prospective employees.³⁵⁵ An additional and somewhat questionable counterargument would be available should the Supreme Court adopt Judge Wisdom's additional ground for upholding affirmative race-conscious goals, the thirteenth amendment.³⁵⁶ Because the thirteenth amendment concerns only race and not sex, this would root title VII more squarely in remedying race discrimination than in remedying sex discrimination.³⁵⁷ Some support for this view derives from the undoubted fact that the Civil Rights Act of 1964 was primarily directed at eliminating race discrimination.³⁵⁸ The addition of sex discrimination to the Act's prohibition was an unscheduled fortuity.³⁵⁹ However, because the congressional statute bars both race and sex discrimination, the Court is unlikely to interpret the statute in such a way as to give lesser remedial relief for sex discrimination.

6. The Black Majoritarian Argument

The "black majoritarian" argument, almost unspoken, states that in many political subdivisions, blacks are no longer a political minority because of enhanced black participation in government.³⁶⁰ In these situations, a danger exists that the black majority officialdom will adopt race-conscious affirmative action hiring and promotional goals which will unduly restrict white access to jobs and promotions. The counterargument concedes that any affirmative action goals which "unduly" restrict white employment and promotional access should not be enforced; however,

355. *Thompson v. Sawyer*, 678 F.2d 257 (D.D.C. 1982); *United States v. City of Chicago*, 663 F.2d 1354 (7th Cir. 1981) (en banc).

356. *Williams v. City of New Orleans*, 727 F.2d 1554, 1577 (5th Cir. 1984) (en banc) (Wisdom, J., dissenting); see *supra* text accompanying note 114. Justice Powell twice has cited the thirteenth amendment as giving additional grounds of support to appropriate race-conscious goals. *Fullilove*, 448 U.S. at 500, 508; *Bakke*, 438 U.S. at 302 n.41.

357. In the contrasting constitutional setting, the *Bakke* Court has been taken as requiring a compelling state interest to justify affirmative action goals at the same time justifying sex-conscious affirmative action goals with a less strict test—"substantial relation to an important state interest." *Craig v. Boren*, 429 U.S. 190 (1976); see *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Califano v. Webster*, 430 U.S. 313 (1977). This is one anomaly that the Court must be anxious to eliminate at the earliest opportunity.

358. See *supra* text accompanying notes 28, 65-69.

359. See *supra* text accompanying note 26.

360. For example, in Detroit, Mich. and Washington, D.C.

affirmative action plans by both black and white officials are subject to the same rules of appropriateness of race-conscious relief for past discrimination. One fairly may expect these rules would be enforced uniformly by the federal courts. The careful limits set by the *Bakke-Weber-Fullilove*³⁶¹ standards for determining the appropriateness of race-conscious affirmative action goal relief in these situations would apply as central safeguards in the use of these rules. Understood in this context, the black majoritarian argument appears so offensive that understandably this is one argument that remains almost unspoken.

7. The "Demeaning to Blacks" Argument

A final argument for limiting affirmative action goals to specific victim relief states that these goals are in fact demeaning to blacks and, therefore, disadvantageous to blacks. Racial preference leads blacks to question the validity of their successes, and also lessens their motivation to strive for success. This argument has had surprising vitality and has been cited judicially by friends of affirmative action and by distinguished black intellectuals.³⁶² The counterargument is rooted in the persistent evidence that no matter how valid the anxieties raised, the economics of employment and unemployment³⁶³ at the time, if temporarily, foreclose dispensing with constructive affirmative remedies to repair the damage caused by two centuries of race-conscious burdens.

B. Policy Objections to "Specific Victim" Analysis

1. The Congressional Policy Argument

The congressional policy in enacting title VII furnishes the basis for an argument in support of voluntary affirmative action goals. In *Weber*, the Supreme Court concluded that "Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with 'the plight of the Negro in our economy.'" ³⁶⁴ After citing the significant increase in black unemployment from 1947 to 1962, the Court determined that "Congress feared that the goals of the Civil Rights Act—the integration of blacks into the mainstream of American society—could not be achieved unless this trend were reversed."³⁶⁵ Against the background of this interpretation of congressional purpose, the Court concluded that "it would be ironic indeed

361. See *supra* note 60 and text accompanying notes 152-55.

362. See *United Jewish Orgs. v. Carey*, 430 U.S. 144, 173-74 n.3 (1977) (Brennan, J., concurring in part) ("[P]referential treatment may act to stigmatize its recipient groups, for although intended to correct systemic or institutional inequities, such a policy may imply to some the recipient's inferiority and especial need for protection."); Howard & Ray, *supra* note 321; Loury, *supra* note 321.

363. See *supra* note 322.

364. *Weber*, 443 U.S. at 202.

365. *Id.* at 202-03.

if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long'. . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy."³⁶⁶

Although the Supreme Court was concerned with a voluntary plan in *Weber*, the Court's assessment of congressional policy in enacting title VII is of primary relevance in considering any interpretation of title VII which would change the conclusions of all the courts of appeals that affirmative action goals meeting the *Bakke-Weber-Fullilove* test are also responsive to the same congressional design.³⁶⁷ The argument is not that the result in *Weber* entails permitting affirmative action goals in non-voluntary cases. *Weber* left that question to be decided at another time.³⁶⁸ However, the *Weber* Court's determination of congressional policy tilts strongly against the view that Congress intended to bar affirmative action goals in all cases that do not involve "specific victims" in the strict *Franks-Teamsters*³⁶⁹ sense.

The counterargument would confine *Weber*, and all that was said by the Court in that case, to the voluntary situation. The Court's heavy borrowing from *Weber* in *Fullilove*,³⁷⁰ a non-voluntary case involving identified Congressional goals, undermines the counterargument. Oddly enough, the public pronouncement by Assistant Attorney General Reynolds (speaking for the Department of Justice and the Reagan Administration) that *Weber* was "wrongly decided" also undermines this argument. Reynolds sees *Weber* as inconsistent with the "specific victim" restriction and desires to see *Weber* overruled.³⁷¹

2. The Constitutional Argument

One well known constitutional argument originated in the three Civil War amendments³⁷² and the *Slaughter-House Cases*.³⁷³ In *Slaughter-House*, the first case to interpret the Civil War amendments, the Supreme Court declared that:

366. *Id.* at 204.

367. Justice Blackmun confirms this in *Stotts*, 104 S. Ct. at 2606 n.10 (Blackmun, J., dissenting). See *supra* note 42

368. *Weber*, 443 U.S. at 200.

369. See *supra* notes 42-44.

370. *Fullilove*, 448 U.S. at 486, 490.

371. See *supra* note 78.

372. U.S. CONST. amends. XIII, XIV, XV. Justice Powell in *Bakke* conceded the force of this constitutional argument but said such force was outdistanced by later events. *Bakke*, 438 U.S. at 291-95. In *Fullilove* he seemed to relent somewhat: "[I]n our quest to achieve a society free from racial classification, we cannot ignore the claims of those who still suffer from the effects of identifiable discrimination." 448 U.S. at 516.

373. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested [was] the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.³⁷⁴

In that case we also find the Court's first interpretation of the equal protection clause of the fourteenth amendment:

We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case will be necessary for its application to any other.³⁷⁵

The *Slaughter-House* Court then adverted to the enforcement power of Congress: "If, however, the States did not conform their laws to its requirements, then by the fifth section of the article of [the fourteenth] amendment Congress was authorized to enforce it by suitable legislation."³⁷⁶ Equally well known is that neither the Supreme Court nor Congress began to fulfill these commitments until the turn-around in *Brown v. Board of Education*³⁷⁷ in 1954 and the Civil Rights Acts of the 1960's.

The argument is that this national commitment, verified by the contemporary Supreme Court, has been neither expressly repudiated nor adequately fulfilled. One would have thought this commitment had been renewed by the civil rights legislation of the 1960's³⁷⁸ and the concordant judicial decisions of the 1960's and 1970's.³⁷⁹ If anything, this declared constitutional policy would call for extending³⁸⁰ rather than narrowing

374. *Id.* at 71.

375. *Id.* at 81.

376. *Id.*

377. 347 U.S. 483 (1954). Judicial implementation of this turn-around was tortuously slow with respect to school desegregation, as the Supreme Court itself finally recognized in *Green v. County School Bd.*, 391 U.S. 430 (1968).

378. Besides the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e(17) (1982), with its emphasis on desegregation of public facilities (title II) and employment discrimination (title VII), there was the notable Voting Rights Act of 1965, 42 U.S.C. §§ 1973 to 1973dd-6 (1982), and the Civil Rights (Fair Housing) Act of 1968, 42 U.S.C. §§ 3601-3631 (1982).

379. Notably, two sets of Supreme Court decisions exist: (1) those banning government-sponsored racial discrimination against blacks and other aggrieved minorities and (2) those granting exceptional affirmative equitable remedial relief for identified discrimination. See *supra* notes 34, 37, 40 and accompanying text. Perhaps the culmination of the first set of cases was the Court's pronouncement in *Bob Jones Univ. v. United States*:

Congress, in Titles IV and VI of the Civil Rights Act of 1964 . . . clearly expressed its agreement that racial discrimination in education violates an important public policy.

. . . .
The government interest at stake here is compelling. As discussed [earlier] the Government has a fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this nation's history. 103 S. Ct. 2017, 2030, 2035 (1983).

380. Two prime candidates for reconsideration would be *San Antonio Indep. School Dist. v.*

available remedies to insure "the security and firm establishment of that freedom, and the protection of the newly [desegregated, newly-freed from discrimination in employment, newly-emancipated from Jim Crow, black] citizens from the oppressions [generated from seventy-five years of Supreme Court decisions prior to *Brown*]." ³⁸¹ This passage contains strong language, but the recent Supreme Court has used stronger. ³⁸²

The counterargument is that this commitment has been outdated by later events: the equal protection clause now has other clients that make renewal of its original design unfeasible. ³⁸³ Even Congressional legislation concededly enacted in reparation to black citizens should not be interpreted so as to in any way disadvantage others. ³⁸⁴

One reply to the counterargument is that the new clients, women and new minorities, along with blacks, should be given remedies adequate to undo past discrimination without unduly trammeling others. ³⁸⁵ A second reply is that suggested by Judge Wisdom, ³⁸⁶ and hinted at by Justice Powell, ³⁸⁷ that the thirteenth amendment, which concerns race alone, could be used to give adequate scope to the remedies afforded by the Civil Rights Act of 1964.

A related argument states that the Supreme Court's renewal of the original promise of the Civil War amendments should be continued. After *Brown*, ³⁸⁸ the Supreme Court has expressly authorized group race-conscious relief upon proof of past discrimination, particularly in the school desegregation, voting rights, and employment discrimination fields. ³⁸⁹ In his influential *Bakke* opinion, Justice Powell insisted upon

Rodriguez, 411 U.S. 1 (1973) (permitting differential state and local expenditures for education keyed to the wealth of the school district) and *Milliken v. Bradley*, 433 U.S. 267 (1977) (restricting interdistrict remedies for school desegregation short of a proven constitutional violation in each district).

381. This passage purports to portray the current plight in the framework of *Slaughter-House*. See *supra* text accompanying note 374.

382. Consider the "strong language" of Justice Powell in *Fullilove*: "In the history of this Court and this country, few questions have been more divisive than those arising from governmental action taken on the basis of race. Indeed, our own decisions played no small part in the tragic legacy of government-sanctioned discrimination. See *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Dred Scott v. Sandford*, 19 How. 393 (1857)." 448 U.S. at 516.

383. See *Bakke*, 438 U.S. at 292-94 (Powell, J.) ("As the Nation filled with the stock of many lands, the reach of the Clause was gradually extended to all ethnic groups seeking protection from official discrimination.").

384. This position is recognizable in the "constitution is color-blind," "race-conscious goals are immoral," and "equality excludes preferential race-conscious goals" language emanating from high governmental sources. See *supra* notes 311-19.

385. Judge Skelly Wright asserts that this has been, in fact, the design of the federal courts of the past generation. If anything, he sees greater tolerance for affirmative remedial relief for non-racial groups. Wright, *supra* note 319, at 213.

386. See *supra* notes 113-14.

387. *Fullilove*, 448 U.S. at 608, 610; *Bakke*, 438 U.S. at 302 n.41.

388. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

389. See *supra* notes 34, 37, 40. This has been acknowledged by Chief Justice Burger in *Fulli-*

authoritative findings of past racial discrimination as a predicate for affirmative relief.³⁹⁰ Once that predicate is established, Justice Powell gives no hint of disapproval of group (rather than merely "specific victim") relief. For the Executive Department to demand such a retrogressive requirement before the reparative task had fairly begun raises questions beyond mere callousness and infidelity to national promises.³⁹¹

The counterargument truthfully recites that equal protection never was applied exclusively to blacks and relies on Justice Powell's *Bakke* dismissal of *Slaughter-House*: "The clock of our liberties, however, cannot be turned back to 1868. . . . It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others."³⁹²

The question, of course, is not a revival of special wardship, but effective relief for severely disadvantaged groups. One does Justice Powell an injustice to treat this passage from *Bakke* as his last word on the subject. Two years later in *Fullilove* he softened the rigorous compelling state interest test he had proposed in *Bakke* to "means . . . equitable and reasonably necessary to the redress of identified discrimination."³⁹³ He also rejected the "color-blind" principle: "The time cannot come too soon when no governmental decision will be based upon immutable characteristics of pigmentation or origin. But in our quest to achieve a society free from racial classification, we cannot ignore the claims of those who still suffer from the effects of identifiable discrimination."³⁹⁴ Justice Powell then, in passing on the constitutionality of the Congressional minority set-aside, went on to state: "I believe that the Enforcement Clauses of the *Thirteenth* and *Fourteenth* Amendments give Congress a similar measure of discretion to choose a suitable remedy for the redress of racial discrimination."³⁹⁵ One would expect these words to support similar "discretion to choose a suitable remedy" under title VII³⁹⁶ of the Civil Rights Act of 1964.

Another argument is that universal concurrence of the courts of appeals in affirmative action goal relief beyond "specific victims" adds

love, 448 U.S. at 484, 490, Justice Powell in both *Bakke*, 438 U.S. at 307, and *Fullilove*, 448 U.S. at 508, and the Brennan Four (Brennan, Marshall, Blackmun and White) in *Bakke*, 438 U.S. at 378.

390. *Bakke*, 438 U.S. at 307.

391. See *supra* discussion at notes 84, 205, and 344, concerning filing of amicus briefs by the United States in *Williams*, *Stotts*, and *Wygant*, seeking restriction of reparative relief to the "specific victim" category of *Franks* and *Teamsters*, see *supra* note 42.

392. *Bakke*, 438 U.S. at 295 (emphasis original).

393. *Fullilove*, 448 U.S. at 510

394. *Id.* at 516.

395. *Id.* at 508 (emphasis in original).

396. 42 U.S.C. § 2000e-2(g) (1982).

weight. The argument is that when all the courts of appeal,³⁹⁷ reading the same Constitution, the same statute, and the same Supreme Court decisions, agree that affirmative action goals beyond "specific victim" relief are within statutory and constitutional limits, the Supreme Court should hesitate to proscribe non-specific victim relief.

The counterargument is that the Supreme Court has the final word in the federal judicial system as to what the Constitution and statutes "mean" and that the Court has not hesitated to dislodge views of the courts of appeals in the context of title VII interpretation. In *Teamsters*,³⁹⁸ for example, against the views of several courts of appeals, the Supreme Court held that bona fide seniority systems which perpetuate past discrimination are not for that reason in violation of title VII.

No one questions that the Supreme Court has the last word. The question is what that word will be. One may wait long for the citation of an instance in which the Supreme Court holds that *all* the courts of appeals were wrong in their interpretation of constitutional or statutory language. Certainly the unanimous position of the courts of appeals adds weight; that is all this argument contends.

3. The "General Caste" Argument

This argument contends that the general caste nature of the wrong of racial discrimination justifies a group-wide rather than merely a "specific victim" remedy. The school desegregation³⁹⁹ and voting rights cases⁴⁰⁰ illustrate the Court's acceptance of group-wide, rather than merely "specific victim" relief. As Justice Blackmun has said, "The purpose of such relief is not to make whole any individual, but rather to remedy the present class-wide effects of past discrimination or to prevent similar discrimination in the future."⁴⁰¹ For this reason,

such relief is provided to the class as a whole rather than to its individual members. . . . The distinguishing feature of race-conscious relief is that no individual member of the disadvantaged class has a claim to it and individual beneficiaries of the relief need not show that they were themselves victims of the discrimination for which the relief was granted.⁴⁰²

A further reason for this relief was suggested by a veteran senior judge of the court of appeals who earned his stripes in the "southern jurispru-

397. See cases cited *supra* note 81.

398. *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

399. See *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 401 U.S. 1 (1971); *Green v. County School Bd.*, 391 U.S. 430 (1968).

400. See, e.g., *United Jewish Orgs. v. Carey*, 430 U.S. 144 (1977); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

401. *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576, 2606 (1984) (Blackmun, J., dissenting).

402. *Id.*

dence"⁴⁰³ of the 1960's and 1970's: Where "discrimination in a state governmental unit is system-wide, institutional, and the product of a long history of discrimination against blacks as a group to continue *what amounts to a caste system*. . . . I would hold that the requested relief is within the district court's power to grant."⁴⁰⁴

The counterargument would dismiss these comments as merely contrary views culled from dissenting opinions. The question here, however, is not the "authoritativeness" of these views. Rather, of concern is the accuracy with which they reflect the remedial relief which the Supreme Court had already countenanced,⁴⁰⁵ and the underlying justification.

4. The "Domestic Tranquillity" Arguments

An argument often is made of a state interest in the domestic tranquility in curing the effects of past discrimination. Since the time of Justice Powell's opinion in *Bakke*, the Court has agreed that a compelling state interest exists in remedying the effects of past racial discrimination.⁴⁰⁶ As Judge Wisdom points out, "This interest focuses on group representation in employment and is distinct from that focused on the individual's right to be free from discrimination. . . . Thus, the state's interest cannot be served adequately by a remedy that addresses only the rights of identifiable victims."⁴⁰⁷

The counterargument is that Justice Powell spoke only for himself in *Bakke* on this point and that the other four Justices who would have upheld race as a factor in an affirmative remedy did not accept a "compelling state interest" analysis, but rather an intermediate "substantial relation to an important state interest" test. The counterargument is accurate, but inconclusive. Five Justices in *Bakke* agreed that, with appropriate findings of past discrimination, affirmative group relief is appropriate to satisfy the state's interest in remedying the effects of that racial discrimination.⁴⁰⁸ Furthermore, Justice Powell in *Fullilove* re-

403. Blumrosen, *supra* note 326.

404. *Williams v. New Orleans*, 729 F.2d 1559, 1573 (5th Cir.1984) (Wisdom, J., dissenting) (emphasis added).

405. See *supra* text accompanying notes 34, 37, 40, 152-55.

406. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (Powell, J.). *Id.* at 369 (Brennan, J.). The Brennan Four used a less strict test, characterizing the required state interest as merely "important" rather than "compelling." See *infra* note 408.

407. *Williams*, 729 F.2d at 1575 (Wisdom, J., dissenting) (citations omitted).

408. *Bakke*, 438 U.S. at 307 (Powell, J.). *Id.* at 362 (Brennan, Marshall, Blackmun and White, JJ., concurring). As previously noted, the Brennan Four used a less strict test. See *supra* note 412. This test, although adapted to the past racial discrimination situation, was in design the same test which the Court had used in judging the constitutionality of "benign" gender discrimination. *Califano v. Webster*, 430 U.S. 313, 317 (1977); *Craig v. Boren*, 429 U.S. 190 (1976). On the other hand, Justice Powell's "compelling state interest" test made sustaining affirmative race-conscious goals as remedies for identified past discrimination more difficult than doing the same with affirmative sex-conscious goals.

lented from his strict compelling state interest test.⁴⁰⁹

A related argument concerns the state's interest in "operational needs." The Sixth Circuit Court of Appeals has repeatedly recognized that improved law enforcement resulting from minority participation in the police force constitutes a compelling reason for affirmative action goals.⁴¹⁰ The same reasoning would extend to fire departments and, arguably, to teacher staffs measured by minority student population. This last element borrows strength from the judicial developments concerning school desegregation⁴¹¹ and first amendment support for educational choices.⁴¹² The Supreme Court will face this concern this Term in *Wygant*.⁴¹³

The counterargument correctly denies that the "operational needs" defense has ever received the approval of the Supreme Court and questions whether, in any event, such an agreement could be extended to justify the teacher-student ratio used in *Wygant*.⁴¹⁴

5. The Pragmatic Arguments

One pragmatic argument is that a "specific victim" limitation to affirmative action goals would present a difficult evidentiary problem of identifying "specific victims" of the identified racial discrimination. The argument is that many black citizens would not have applied for positions in a racially discriminatory company or government department because of perceived obstacles to being hired, or, if hired, promoted.⁴¹⁵ Further, Congress' intent in title VII to secure voluntary settlement would be set back by a requirement that a "victim identification" phase be a part of every consent decree proceeding.⁴¹⁶ The counterargument concedes the difficulties, but insists that title VII nevertheless will bear a "specific victim" interpretation.

409. *Fullilove v. Klutznick*, 448 U.S. 448, 508, 510 (1980).

410. *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 703 (1984); *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981).

411. See *supra* text accompanying note 34.

412. See *Bakke*, 438 U.S. at 312 (Powell, J.).

413. *Wygant v. Jackson Bd. of Educ.*, 746 F.2d 1152 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 2015 (1985).

414. *Id.*

415. "A police department that is perceived as anti-black in hiring and promoting inhibits applications from blacks who are deterred from applying by the department's discriminatory practices. It would be impossible to identify these individual victims." *Williams*, 729 F.2d at 1572 (Wisdom, J., dissenting).

416. A consent decree is not an appropriate vehicle to identify actual victims. Every Title VII suit would require a phase II judicial proceeding to determine which individuals would be entitled to relief. This approach would contravene the clear intent of Congress to favor voluntary settlement and would place additional strain on the already-strained dockets of the district courts.

Id.

Another pragmatic argument contends that improvements to date in desegregation of the national work force do not justify termination of the remedy of affirmative action goals. This argument is the converse of the Blumrosen argument, which cited a twenty-one to twenty-two percent improvement in the status of black workers since the enactment of title VII as justifying withdrawal of sympathetic reparative judicial interpretation of the Civil Rights Act,⁴¹⁷ including affirmative action goals beyond "specific victims." With seventy-eight to seventy-nine percent of the potential black work force still disadvantaged from past discrimination, the task is hardly complete. The counterargument parallels the Blumrosen argument.

6. The "Bulwark-Court-in-the-Face-of-an-Unsympathetic-Administration" Argument

In interpreting the Constitution, the courts, particularly the Supreme Court, are notably the countermajoritarian force, expected to protect minorities against the sweep of current hostile political tides.⁴¹⁸ In a comparable way, with statutes, the courts do not allow a perceived later popular consensus to abridge rights which an earlier Congress has embodied in reparative legislation.⁴¹⁹ Quite contrary to Mr. Dooley's aphorism ("The Supreme Court follows the election returns."),⁴²⁰ the Court ideally is the one institution of government sufficiently independent to withstand either a sudden regressive turn or an active majoritarian indifference to minority rights.

Congress has the power to repeal or amend reparative statutes and to alter judicial interpretations of provisions which it deems excessive. As yet, Congress has not so acted as to title VII.⁴²¹ The Executive branch

417. See *supra* text accompanying notes 326-33.

418. This proposition has been widely recognized as almost self-evident with respect to the Bill of Rights, and the Civil War amendments (*i.e.*, thirteenth, fourteenth, and fifteenth), which were obviously designed as curbs on majoritarian power. See, *e.g.*, L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 454-55 (1969); Fiss, *supra* note 40.

419. Consider, for example, the adjacent field of jurisdictional statutes, where the Court has assumed Congressional awareness (and implied endorsement) of the Court's interpretation (or gloss). Absent congressional revision, the Court continued to apply its judicial "gloss." See, *e.g.*, *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978); *Aldinger v. Howard*, 427 U.S. 1 (1976); *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). But see *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978) (Court confessed its past "error").

420. See MR. DOOLEY ON THE CHOICE OF LAW (E. Bander ed. 1963). "[N]o matter whether th' constitution follows th' flag or not, th' supreme court follows th' iliction returns." *Id.* at 52. Mr. Dooley, the alter ego of the celebrated American humorist Finley Peter Dunne, wrote in Irish dialect in "approximately five hundred essays that appeared from 1892 to 1914 in Sunday newspapers and magazines." *Id.* at vi. The editor of this anthology cites Professor Arthur John Keffe: "Time has come for Law Schools to require that applicants have a knowledge of Finley Peter Dunne and Mr. Dooley. The ones that think like Dooley are sure bets." *Id.* at v. (citing Keffe, *Practicing Lawyer's Guide to the Current Law Magazines*, 44 A.B.A. J. 994, 996 (1958)).

421. A strong argument, not accepted by the Supreme Court, is that Congress by its 1972

can insure weak or unsympathetic enforcement of civil rights statutes by its power of appointment to the Department of Justice⁴²² and the EEOC.⁴²³ The Administration can chill civil rights research by its appointments to the Civil Rights Commission⁴²⁴ and can cancel or nullify an executive order, even one which has for over twenty years stimulated minority employment among government contractors by use of affirmative action goals.⁴²⁵ The Executive branch can, by its power of appointment, constitutionally seek to change the policy posture of the federal courts.⁴²⁶ High-level Justice Department officials may even have a first

amendments of title VII in effect ratified the affirmative goal remedy decisions of the federal courts. See *Stotts*, 104 S. Ct. at 2590 n.15; *supra* note 306.

422. On June 27, 1985, the Senate Judiciary Committee voted 10 to 8 against the nomination, *Wash. Post.*, July 16, 1985, at A5, col. 1, "amid criticism that [Reynolds] had been lax in enforcing civil rights laws and had misled the Senate Judiciary Committee in sworn testimony," Kurtz & Williams, *Democrats Oppose Reynolds Promotion*, *Wash. Post.*, July 17, 1985, at A3, col. 1. On July 17, 1985, Senate Majority Leader Robert Dole announced that "the Reagan administration has abandoned efforts to salvage the nomination of William Bradford Reynolds to be associate attorney general." Kurtz, *Administration Drops Reynolds Nomination*, *Wash. Post.*, July 18, 1985, at A4, col. 1.

423. Members appointed to the EEOC require Senate confirmation of their appointments.

424. The Citizens' Commission report recounts that "[o]ne of the most sudden and striking reversals of federal affirmative action policy occurred with respect to the U.S. Commission on Civil Rights." CITIZENS' COMM'N, *supra* note 263, at 115. From its founding in 1957 during the Eisenhower Administration, "[t]he [Civil Rights] Commission has traditionally served as the conscience of federal civil rights enforcement and policy, establishing the facts and urging federal action." *Id.* at 115. As late as November 1981, the Civil Rights Commission concluded that "[w]ithout affirmative intervention, discriminatory processes may never end. Properly designed and administered affirmative action plans can create a climate of equality that supports all efforts to break down the structural, organizational and personal barriers that perpetuate injustice." *Id.* at 118. This policy statement was "unanimously approved on a bipartisan basis after more than two years work." *Id.* By contrast, the Commission (newly constituted by the Reagan Administration with five new members and two holdover members), "reversed the prior endorsement of numerical race-conscious remedies after a single day's meeting at which no witnesses were asked to, or did testify." *Id.* at 118-19.

425. See *supra* note 345.

426. In a remarkably candid interview with the National Public Radio (NPR) program "All Things Considered" on August 28, 1985, Fred Fielding, counsel to President Reagan and chairman of the White House committee which recommends to the President the appointment of federal judges, frankly avowed the ideological criteria of the Reagan Administration's judicial selection process. After candidates have been interrogated and proposed by the Department of Justice, "[W]e work very hard to try to identify the kind of candidate to recommend to the President for nomination"—those whose philosophical views accord with the President's, "our client."

Fielding insists that "[w]e do not have a litmus test on specific issues. The kind of question that would be asked of you by the Department of Justice would be to try to elicit from you your outlook as to what the role of the court should be. Now they may ask you about specific cases in the past, but the question is not directed to would you decide the case the same way but more to see *how* you would decide it, how you would approach the case. . . . There is no one factor."

The interviewer, Nina Totenberg of NPR, asked Fielding if he would be surprised to hear that unsuccessful women candidates for the federal bench had been asked their views on abortion. Fielding said he would, but quickly added: "However, I'm not one who asks the questions so I'm not the person who really should be answering that. I don't know what they're asking in that specific regard. It's my understanding that they're not asked specifically about their views."

Asked about the status before his committee of a candidate who had been "active in the pro-choice movement" or "very active for defendants' rights," Fielding conceded that "[t]he example you just gave is someone whose philosophy probably is not one that would make the final cut." On the other

Amendment right to call Supreme Court decisions "wrongly decided,"⁴²⁷ and an executive right to ask the courts to change them.⁴²⁸ However, the Chief Executive also has the constitutional duty to "take care that the Laws be faithfully executed."⁴²⁹ Such would seem to require more reaction to appointed officials who flout the Civil Rights Act than to reward them with higher posts.⁴³⁰

In this posture the Supreme Court is, indeed, a lonely eminence, beleaguered and nagged at to cut back on its proudest claim: *Ubi ius, ibi remedium*—where there is a right, there is a remedy. An old maxim of the common law, this claim was given a center place by Chief Justice Marshall in *Marbury v. Madison*⁴³¹:

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protec-

hand, when asked if the committee favored "particularly young" candidates in view of the life tenure of federal judges, Fielding said, "Yes, we do."

In contrast, Judge Lawrence Walsh, chief judicial selector (as Deputy Attorney General) for the Eisenhower Administration, told the interviewer he would not ask judicial candidates how they would analyze a particular case, but rather process them on the basis of "complete integrity, and their judicial temperament and their professional qualifications."

In contrast to President Carter's appointment of 37 black federal judges and 40 women among his 175 appointments to the federal judiciary, in his first term President Reagan appointed 2 black and 13 female judges among his 160 judicial appointments as of the date of the program. Asked whether there was anything improper in the philosophical bias of the Reagan Administration judicial selection process, Professor Herman Schwartz of American University Law School responded: "I don't think so. But I don't think that it's good for the country if he's too successful." Interview with Fred Fielding, "All Things Considered," National Public Radio, Aug. 28, 1985 (discussing White House efforts to recruit federal judges).

427. See *supra* note 78.

428. See *supra* note 391.

429. U.S. CONST. art. II, § 3.

430. In January 1984, William J. Bennett, as Chairman of the National Endowment for the Humanities, a Reagan appointee to that government department, refused to set numerical goals for women and minorities employed by the endowment, as required by the Equal Employment Opportunity Commission, because, he said, he believes in 'human equality.'

'Under its current leadership, this agency will neither favor nor slight anyone because of race, color, national origin, religion, or gender,' Bennett wrote to the EEOC.

'To believe in human equality and equal liberty can mean nothing less than to treat white and black, male and female, Jew and Gentile as morally equal,' Bennett continued. 'We strongly believe that different or special treatment by this agency on the basis of these characteristics offends our best principles. . . .

Feinberg, *Rival Teacher Unions Split on Bennett*, Wash. Post, Jan. 11, 1985, at A20, col. 1.

In January 1985 Bennett was nominated by President Reagan as his Secretary of Education. *Id.* Bennett was in good company. The Department of Justice itself "has maintained its refusal to submit goals and timetables (to the EEOC) as part of its own affirmative action plan, making it, as of January 1984, one of two agencies whose plans have not been approved by the EEOC; 110 federal agencies have complied and had their plans approved." CITIZENS' COMM'N, *supra* note 307, at 101-02.

In early 1985, William Bradford Reynolds, the leading advocate in the Administration of the non-compliance-with-the-EEOC program, was nominated to the number three post in the Department of Justice. On July 16, 1985, this nomination was rejected by the Senate. See *supra* note 422.

431. 5 U.S. (1 Cranch) 137 (1803).

tion. . . .The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.⁴³²

Affirmative action goals beyond "specific victims" may not be, in Marshall's sense, a "vested right." "Equal protection of the laws"⁴³³ may be more a promise than a "vested right"—long promised, still unfulfilled. But the Civil Rights Act of 1964, as interpreted by the Supreme Court, certainly covenanted to the nation's black citizens a "right"—"the integration of blacks into the mainstream of American society."⁴³⁴ In *Bakke*, a majority of the Supreme Court acknowledged that, given findings of past discrimination, affirmative group relief was a proper constitutional and statutory remedy to secure that right.⁴³⁵ Only the Supreme Court can take back that promise—practically speaking.⁴³⁶ *Ubi ius, ibi remedium.*

IV. CONCLUSION

The affirmative action cases already heard, and to be heard, by the Supreme Court in its 1985 Term raise three significant questions:⁴³⁷ (1) whether a consent decree will be deemed "voluntary" for purposes of affirmative action;⁴³⁸ (2) whether a consent decree may embody relief which a judge could not award in a contested action;⁴³⁹ and—most important of all—(3) whether in a contested action, a federal court may award affirmative goal relief that may advantage persons who have not been proven to be "specific victims" of particular invidious discrimination as a remedy for past racial or sexual discrimination.⁴⁴⁰

432. *Id.* at 163.

433. U.S. CONST. amend. XIV.

434. *Weber*, 443 U.S. at 202.

435. *Bakke*, 438 U.S. at 202-03.

436. Perhaps Congress might take back this promise through its control over the jurisdiction and remedies of the federal courts. The limits of that congressional power over remedies are severely contested with respect to constitutional rights. Of course, there is always the possibility of a constitutional amendment to repeal *pro tanto* the fourteenth amendment—but not a lively possibility.

437. "The petition for certiorari shall contain . . . [t]he questions presented for review. . . . The statement of the question presented will be deemed to comprise every subsidiary question fairly included therein." Sup. Ct. R. 21.

438. Implicitly raised in the "questions presented" as to which certiorari was granted in *Vanguards v. City of Cleveland*, 753 F.2d 479 (6th Cir.), *cert. granted*, 54 U.S.L.W. 3191-92 (U.S. Oct. 8, 1985) (No. 84-1999).

439. Specifically raised in the "questions presented" as to which certiorari was granted in *Vanguards*. *Id.*

440. Specifically raised in the "questions presented" as to which certiorari was granted in *Vanguards*, *id.*, and *EEOC v. Local 638*, 753 F.2d 1172 (2d Cir.), *cert. granted*, 54 U.S.L.W. 3191 (Oct. 8, 1985) (No. 84-1656). The Supreme Court's grant of certiorari reads: "The petition for certiorari is granted. The case is set for oral argument in tandem with No. 84-1999, *Local No. 93, Int'l Ass'n of Firefighters v. Cleveland*. . . ." *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106

The "specific victim" issue—first surfaced in a Supreme Court opinion in *Stotts*⁴⁴¹—constitutes the whole enchilada of affirmative action as it has been understood for a generation by friend and foe alike. If affirmative relief is to be reduced by the Court to the kind of "specific victim" relief awarded in *Franks* and *Teamsters*⁴⁴² (as urged by the Department of Justice) affirmative goals and time tables to remedy past discrimination will be an episode of the past.

Two considerations beyond broken national promises may influence the Court to decline to discard prematurely this moderate and carefully crafted incentive to eliminate racial polarization in the nation's work force and other national institutions. One of these considerations responds to the question: What kind of society do we want? The second raises an institutional question long felt keenly by the Supreme Court: What is the place of the Court in the American constitutional system of government? The Court's answer this Term to the "specific victim" issue in these affirmative action cases seems intimately related to its degree of concern with each of these questions.

What kind of society do we want? For a time—between the *Civil Rights Cases*⁴⁴³ in 1883 and *Brown v. Board of Education*⁴⁴⁴ in 1954—the answer was clear: a racially polarized society. Present Justices have acknowledged the active participation of the Supreme Court in this unfortunate national decision.⁴⁴⁵ The more recent answer—starting with *Brown* and nourished by the congressional legislation and executive orders of the 1960's and 1970's, and the judicial remedial response of the 1970's and 1980's—was that such racial polarization was invidious and must be erased. Now comes the national administration with the soothing message that it is time for business as *was* usual: away with un-American group remedial relief.⁴⁴⁶ An economist, Professor Lester C.

S. Ct. 58 (1985). Interestingly, the attorney of record for the EEOC is the Solicitor General of the United States.

441. *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984).

442. See *supra* note 44 and text accompanying notes 297-303.

443. *Civil Rights Cases*, 109 U.S. 3 (1883).

444. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

445. See *supra* note 387.

446. See *supra* notes 430, 436. The Department of Justice's opposition to affirmative action goals, of course, antedates *Stotts*. In *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 703 (1984), the Department of Justice intervened strongly, though unsuccessfully, to persuade the Supreme Court to grant certiorari, furnishing the Court with the following statement of its position:

We are concerned about the adoption of race-conscious, non-victim-specific remedies, particularly by any institution other than Congress. We have profound doubts whether the Constitution permits governments to adopt remedies involving racial quotas to benefit persons who are not themselves the victims of discrimination — at least in the absence of a clear statement by Congress itself acting pursuant to its broad remedial authority under the Thirteenth and Fourteenth Amendments, requiring the use of such remedies.

Memorandum of U.S. in Support of Petition for Certiorari, at 9, *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *cert. denied*, 452 U.S. 938 (1984).

Thurow, of the Massachusetts Institute of Technology, sharply focuses on premature abrogation of group relief as the surest medicine for insuring a permanently racially polarized society. In his well-known study, *The Zero-Sum Society*,⁴⁴⁷ Thurow's thesis is that "[a] zero-sum game is any game where the losses exactly equal the winnings," and that even when "[o]n average, society may be better off . . . this average hides a large number of people who are much worse off."⁴⁴⁸ Thurow cites familiar statistics with respect to black employment,⁴⁴⁹ emphasizing that "[b]lack unemployment has been exactly twice that of whites in each decade since World War II," and concluding that without affirmative relief "there is nothing that would lead anyone to predict improvements in the near future."⁴⁵⁰

No substitute exists for providing "extra aid to those who were handicapped in the past until they catch up,"⁴⁵¹ unless we are content to perpetuate present disparities: "An individualistic ethic is acceptable if society has never violated this individualistic ethic in the past. To shift from a system of group discrimination to a system of individual performance is to perpetuate the effects of past discrimination into the present and the future."⁴⁵²

Thurow does not deny the costs of affirmative action. "[A]ny government program to aid economic minorities must hurt economic majorities. This is the most direct of all our zero-sum conflicts,"⁴⁵³ but he questions the sincerity of dismissing group relief, as such.

Affirmative action for economic minorities may be on the defensive, but we are in an age when industrial and regional programs are expanding rapidly. The same people who oppose special programs for blacks support special programs for textiles. Imagine the furor that would arise if we started a program for blacks similar to that now in place for farmers. It would be denounced as 'un-American' from every rooftop.⁴⁵⁴

What kind of society do we really want? Thurow truly "zeroes" in on an answer: "Given that our society clearly is not willing to be consistent and use an individual focus when it comes to politically popular groups, it is easy to see why the insistence on an individual focus for minorities can be viewed as simply a more sophisticated version of discrimination."⁴⁵⁵ If one's answer is the unacceptability of perpetual racial polarization there is thus no immediate escape from at least the moderate

447. L. THUROW, *THE ZERO-SUM SOCIETY* (1980).

448. *Id.* at 11-12.

449. *Id.* at 185-86.

450. *Id.* at 185.

451. *Id.* at 188.

452. *Id.*

453. *Id.*

454. *Id.* at 183.

455. *Id.* at 182.

affirmative action enforced in the federal courts. In Thurow's words, "The problem . . . cannot be left to the economy to solve. Major elements of the problem are not being solved at all and where progress is being made it is so slow that economic minorities would have to be patient for many more years."⁴⁵⁶

What is the place of the Supreme Court in our governmental system? In the posthumous publication of his Godkin Lectures,⁴⁵⁷ Justice Robert H. Jackson cited the role of the Supreme Court: "to establish an independent judicial branch, neutral as between government and individual, class and class, party and party, and to utilize this independence and neutrality to maintain the principle balances upon which our system rests."⁴⁵⁸ The recent vehement reactions by members of the Court⁴⁵⁹ against Executive Department attacks on its constitutional decision-making⁴⁶⁰ constitute reminders that the Court remains jealous of its independence and constitutional charge.

Executive pressures on the Court are no new development. Current Justices recall the defeat in 1937 of President Roosevelt's plan to add six new Justices, a plan proposed just months after his popular sweep of forty-six of forty-eight states.⁴⁶¹ The "Court-packing plan" was sufficiently popular to be the central issue on which Lyndon Johnson won his first election to Congress.⁴⁶² That Court was sufficiently unpopular to be

456. *Id.* at 189.

457. R. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* (1955). Justice Jackson died on Oct. 9, 1954 before delivering the lectures at Harvard University. The drafts he had prepared were edited and published by his law clerk and his son. *Id.* at vii.

458. *Id.* at 2.

459. Exhibiting the most recent reactions are Justice William Brennan, *see, e.g.*, Taylor, *Brennan Opposes Legal View Urged By Administration*, N.Y. Times, Oct. 13, 1985, at A4, col. 2, and Justice John Paul Stevens, *see, e.g.*, Kamen, *Stevens Rebuts Meese Criticism of High Court*, Wash. Post, Oct. 26, 1985, at A1, col. 1.

460. Thornton, *Meese Attacks Miranda Decision*, Wash. Post., Aug. 26, 1985, at A6, col. 1. The first paragraph of that article read, "Attorney General Edwin Meese III yesterday attacked the Supreme Court's Miranda decision on the rights of criminal suspects as 'infamous' and wrong." *Id.* Referring to the Warren Court, Meese also stated in the same interview on "This Week With David Brinkley" that the Supreme Court was engaged in "wholesale upsetting cases and inventing new law." *Id.*

Criticising a 1985 Supreme Court decision on establishment of religion, Education Secretary William Bennett stated that the Constitution "now became, in the hands of aggressive plaintiffs and beguiled judges, the instrument for nothing less than a kind of ghettoizing of religion." Rasky, *Bennet Assails Curb on Aid to Parochial Schools*, N.Y. Times, Aug. 7, 1985, at A18, col. 4.

Apparently it was in response to such media attacks on the Supreme Court that Justices Brennan and Stevens made their out-of-court responses. *See supra* note 459.

461. Useful accounts of the "Court-packing plan" are contained in J. BURNS, *ROOSEVELT: THE LION AND THE FOX* 293-315 (1956), Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing Plan"*, 1966 SUP. CT. REV. 347, and Mason, *Harlon Fiske Stone and FDR's Court Plan*, 61 YALE L.J. 791 (1952).

462. R. CARO, *THE YEARS OF LYNDON JOHNSON: THE PATH TO POWER* 395-436 (1983). It was not a general election, Caro reminds us, but an isolated midwinter election to fill a single Congressional seat when the previous incumbent died. Apparently, this west Texas congressional contest was the only actual voters' test of the Roosevelt Court-packing plan. *Id.* at 417.

widely castigated as the "nine old men."⁴⁶³ Yet when the lines were drawn, the Senate and the nation rallied to the defense of the independence of the Supreme Court.⁴⁶⁴ The "Court-packing plan" was defeated in Committee and never brought to the floor of either the Senate or the House.⁴⁶⁵

The final measure of the Court's success in achieving its goal has been history, the end-product of its day-to-day-work. In retrospect the Court itself has seen⁴⁶⁶ that its unfortunate decision in *Plessy*⁴⁶⁷ in 1896 saddled the nation with seventy-five years of Jim Crow and enforced segregation. The unanimous Court in *Brown*,⁴⁶⁸ where *Plessy* was recanted and the road back to depolarization commenced, was gentle in admonishing its predecessors.⁴⁶⁹ Yet the verdict of history is clear. Justice Harlan, the dissenter in *Plessy*, alone of that Court is remembered favorably.⁴⁷⁰

The Warren and Burger Courts have been consistent in rejecting inroads on the *Brown* principle against racial segregation and discrimination.⁴⁷¹ But, as Thurow suggests, mere present and future nondiscrimination is not enough to accomplish depolarization;⁴⁷² affirmative redress is required. The ultimate effect of premature abandonment of this remedial weapon—in favor of an individualistic ethic—must, like *Plessy*'s "separate but equal," await the unfolding of history. But, like "separate but equal," the outcome of abandonment is predictable to reasonable persons.⁴⁷³ And no one can miss the risk.

Justice Jackson also directed attention to the educational function of

463. Leuchtenburg reports that by late 1936 "it had become commonplace to refer to the Justices as the 'nine old men.'" Leuchtenburg, *supra* note 455, at 390. He adds: "[I]t was the publication on October 26, 1936 of *The Nine Old Men* by Drew Pearson and Robert Allen which made the phrase a household word. The book quickly climbed onto the best seller lists, and it was serialized in newspapers across the country." *Id.*

464. Chief Justice Hughes actually wrote a letter to Senator Wheeler which became testimony before the Senate Judiciary Committee in opposition to the Roosevelt plan. See J. BURNS, *supra* note 461, at 301-02. Other Justices, even those (such as Brandeis and Stone) friendly to Roosevelt's New Deal program (which the Court had been opposing) gave signal of opposition to the Executive's move against the Court. See Mason, *supra* note 461, at 798, 805.

465. The 10 to 8 unfavorable vote in the Senate Judiciary Committee (in which Roosevelt's own party was in majority) sealed the fate of the Court-packing plan. J. BURNS, *supra* note 467, at 306.

466. See *supra* note 445.

467. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

468. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

469. "Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority." *Id.* at 494.

470. Unfortunately, Justice Harlan's plea for a "color-blind" Constitution has been cited of late to rally opponents of affirmative remedial goals. But as Thurow notes, "To shift from a system of group discrimination to a system of individual performance is to perpetuate the effects of past discrimination into the present and the future." L. THUROW, *supra* note 447, at 189.

471. See *supra* note 384 and accompanying text.

472. L. THUROW, *supra* note 453, at 188.

473. Justice Harlan, in *Plessy*, had 20/20 vision: "In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case." 163 U.S. at 559.

the Supreme Court, which is surely in play as the Court confronts these affirmative action cases in the 1985 Term: "If an organized society wants the kind of justice that an independent, professional judicial establishment is qualified to administer, our judiciary is certainly a most effective instrument for applying law and justice to individual cases and for cultivating public attitudes which rely upon law and seek justice."⁴⁷⁴

474. R. JACKSON, *supra* note 457, at 80.