Affirmative Action after Stotts: The United States Supreme Court's 1985 Term

Albert Broderick

Follow this and additional works at: https://archives.law.nccu.edu/ncclr

Part of the Civil Rights and Discrimination Commons, and the Supreme Court of the United States Commons

Recommended Citation
Available at: https://archives.law.nccu.edu/ncclr/vol15/iss2/2

This Article is brought to you for free and open access by History and Scholarship Digital Archives. It has been accepted for inclusion in North Carolina Central Law Review by an authorized editor of History and Scholarship Digital Archives. For more information, please contact jbeeker@nccu.edu.
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. Stotts1 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.


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.


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-

---

6. 746 F.2d 1152 (6th Cir. 1984).
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. Many affirmative action cases involve judicial determinations under both title VII and equal protection. 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. 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 VII and the Problem of Stotts

The Civil Rights Act of 1964 passed by a narrow margin after "the longest debate" passed on a single piece of legislation in the history of Congress.


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.


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

As originally presented to Congress, 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 Fauntroy. 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-

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.
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."
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, 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.” 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*, 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.

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 Brown34.

In 1962, a Tennessee plaintiff in Baker v. Carr35 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).
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. 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.

Congress did not unmistakably design the language of section 706(g) of title VII of the Civil Rights Act of 1964 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).


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).

whoose 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. Was this interpretation correct? When the Supreme Court finally addressed this question in 1978, 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.* 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." 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." At this point, Justice Marshall specified that "Santa Fe disclaims that the actions challenged here were any part of an affirmative action program. . . ." 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."

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.


1. United Steelworkers v. Weber\textsuperscript{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."\textsuperscript{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."\textsuperscript{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."\textsuperscript{55}

Brian Weber, a white employee who was senior to some of the blacks selected for the training program,\textsuperscript{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."\textsuperscript{57} While squarely rejecting the argument that "Congress intended in Title VII to prohibit all race-conscious affirmative action plans,"\textsuperscript{58} the Court disavowed any design to "define in detail the line of demarcation between permissible and impermissible affirmative action plans."\textsuperscript{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,\textsuperscript{60}

\begin{itemize}
\item \textsuperscript{52} 443 U.S. 193 (1979)
\item \textsuperscript{53} Id. at 197.
\item \textsuperscript{54} Id. at 198.
\item \textsuperscript{55} Id. at 199.
\item \textsuperscript{56} Id.
\item \textsuperscript{57} Id. at 200.
\item \textsuperscript{58} Id. at 201.
\item \textsuperscript{59} Id. at 208.
\item \textsuperscript{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 (10th 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.

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

---

82. See supra text accompanying note 42.
84. International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); see supra note 42.
85. See supra note 81.
87. Id.
The cases before the courts of appeals have included private discrimination under title VII,\(^\text{88}\) discrimination by governmental bodies under title VII\(^\text{89}\) and equal protection,\(^\text{90}\) 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.\(^\text{91}\) The cases are endless and citations only serve to indicate the participation of all the circuit courts in the consensus.\(^\text{92}\) In some of these cases, the affirmative action goals have been upheld,\(^\text{93}\) while in others the goals have been set aside as excessive.\(^\text{94}\) Some circuits have been more reluctant than others to ap-


92. See supra note 81.


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’ Intl`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 (U.S. 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 Franks96 and Teamsters97 (with their “specific victim” requirement) did not restrict the grant of prospective affirmative goal relief.98 Williams v. City of New Orleans99 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 Stotts101 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


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).


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.


102. Williams, 729 F.2d at 1557.
views. Three of the judges read Bakke-Weber-Fullilove 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." 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 prescribes the use of any remedy which is not limited to actual victims of past discrimination." 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. 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 Wisdom 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. 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. 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.
108. Williams, 729 F.2d at 1584 (Wisdom, J. concurring).
109. See supra notes 60, 81 and infra text accompanying note 153.
victims.\textsuperscript{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."\textsuperscript{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."\textsuperscript{112} Judge Wisdom contends that affirmative action under title VII should be construed in this thirteenth amendment context.\textsuperscript{113}

3. The Problem of Firefighters Local Union No. 1784 v. Stotts\textsuperscript{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,\textsuperscript{115} briefed and argued in the Supreme Court in the spring of 1983, was dismissed as moot when the majority seniors were rehired.\textsuperscript{116} However, the Supreme Court immediately granted certiorari in the second of these cases, Firefighters Local Union No. 1784 v. Stotts,\textsuperscript{117} and later decided in favor of the majority seniors in the closing days of the 1984 Term.\textsuperscript{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.\textsuperscript{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-

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

\textsuperscript{111} \textit{Id.} at 1577.

\textsuperscript{112} \textit{Id.}

\textsuperscript{113} \textit{Id.} at 1578.

\textsuperscript{114} 104 S. Ct. 2576 (1984).

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

\textsuperscript{116} 461 U.S. 477, 479 (1983).

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

\textsuperscript{118} Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984).

\textsuperscript{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." 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) 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. 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" 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: 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." Under Teamsters, mere membership in the class is insufficient for this seniority, "rightful place"

120. Stotts, 104 S. Ct. at 2585.
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 himself 131 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.
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.
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.


\(^{137}\) 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).

of the course. However, in 1978, in the heralded Bakke case, a divided Supreme Court established two equal protection propositions: (1) a rigid racial quota denied equal protection rights of the excluded white plaintiff; 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.

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, 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 1977 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, and that the explicit racial and ethnic criteria used in the statute violated their rights as identified in Bakke.

The Court, in two three-Justices opinions, disagreed. Congress designed the legislation to remedy past discrimination in the building trades, a

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).
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. 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. In this context, the minority preference was "equitable and reasonably necessary to the redress of identified discrimination." The Court further noted in Fullilove that the burden on "non-minority firms is relatively light."

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 VII to set the constitutional equal protection limits of affirmative action. First, the congressional set-aside program in Fullilove did not "unnecessarily trammel the interests of white" 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." 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," and (2) the remedial authority of Congress was broader than that of a federal court. 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." A hint of the "victim" analysis which surfaced in Stotts 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.
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.
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.

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." In view of Fullilove, this would appear to be correct, barring retreat by the Supreme Court. Second: Is the Weber test 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," some stating explicitly that the test for all practical purposes is the same for equal protection and title VII. Given findings of "identified past discrimination," temporariness, and plans that do "no unnecessarilly trammelling" of competitors, the federal courts following Weber, and Fullilove, and even Stotts, almost uniformly conclude that a remedial race- or sex-specific affirmative action plan passes both the title VII and equal protection tests.

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.


163. See supra note 60.


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


167. See cases cited supra note 93.


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—\textit{Wygant v. Jackson Board of Education};\textsuperscript{170} next, the two cases for which certiorari has been granted—\textit{Vanguards v. City of Cleveland}\textsuperscript{171} and \textit{EEOC v. Local 638};\textsuperscript{172} and finally, the three cases in which certiorari petitions are still pending—\textit{Marsh v. Board of Education},\textsuperscript{173} \textit{Turner v. Orr},\textsuperscript{174} and \textit{Janowiak v. Corporate City of South Bend}.\textsuperscript{175} Each of these cases illuminates some aspect of the status of affirmative action goals after \textit{Stotts}.\textsuperscript{176}

A. \textit{Wygant v. Jackson Board of Education}\textsuperscript{178}

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

In \textit{Wygant}, the district court, on summary judgment, denied the request of plaintiff, a white school teacher,\textsuperscript{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
ewt
\begin{itemize}
  \item 106. 746 F.2d 1152 (6th Cir. 1984), \textit{cert. granted}, 105 S. Ct. 2015 (1985).
  \item 117. 753 F.2d 817 (6th Cir.), \textit{cert. granted sub nom. Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland}, 106 S. Ct. 59 (1985).
  \item 118. 753 F.2d 1172 (2d Cir.), \textit{cert. granted sub nom. Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC}, 106 S. Ct. 58 (1985).
  \item 119. 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.
  \item 121. 759 F.2d 817 (11th Cir. 1985), \textit{petition for cert. filed}, 54 U.S.L.W. 3149 (U.S. Sept. 10, 1985) (No. 85-177).
  \item 122. 759 F.2d 557 (7th Cir. 1984), \textit{petition for cert. filed}, 54 U.S.L.W. 3016 (July 16, 1985) (No. 84-1936).
  \item 124. 746 F.2d 1152 (6th Cir. 1984), \textit{cert. granted}, 105 S. Ct. 2015 (1985).
  \item 125. \textit{Stotts v. Memphis Fire Dep't}, 679 F.2d 541 (6th Cir. 1982).
  \item 127. \textit{Wygant was the representative plaintiff in a class action.}
\end{itemize}
population. 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. 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" discrimination was found by a competent body and the layoff plan constituted a "reasonable" remedy to cure the identified discrimination. 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). 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. 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.

of "substantial underrepresentation" of minorities on the faculty\textsuperscript{188} 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 \textit{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 \textit{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 \textit{Young}\textsuperscript{189} and \textit{Bratton}\textsuperscript{190} in which this approach was developed. Although an affirmative action plan which survives a proper \textit{Weber} analysis as suggested above,\textsuperscript{191} should survive the \textit{Bakke-Fulilove} analysis on equal protection grounds, perhaps the four\textsuperscript{192} Justices voting for certiorari in \textit{Wygant} thought the Sixth Circuit Court of Appeals had misinterpreted the \textit{Young} and \textit{Bratton} certiorari denials; therefore, granting certiorari to align the Sixth Circuit cases with the \textit{Bakke-Fulilove} equal protection analysis of the other circuits and of the Supreme Court itself. The Supreme Court could reverse \textit{Wygant} on any of these grounds, and leave the status of affirmative action goals intact.

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

\textsuperscript{188} Before 1953, no black teachers were employed in the Jackson City Schools. By 1969 black students totalled 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. \textit{Wygant}, 746 F.2d at 1156.

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

\textsuperscript{190} Bratton v. City of Detroit, 704 F.2d 878 (6th Cir. 1983), cert. denied, 104 S. Ct. 703 (1984).

\textsuperscript{191} See supra text accompanying notes 144-61.

\textsuperscript{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.

\textsuperscript{193} Two key questions concerning affirmative action goals are not directly raised by \textit{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.


\textsuperscript{195} See supra text accompanying note 186.
criteria of Weber\textsuperscript{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."\textsuperscript{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\textsuperscript{198} analysis, the Court would be hard-pressed to find an independent constitutional basis for reversal\textsuperscript{199} in view of Bakke-Weber-Fullilove.\textsuperscript{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"\textsuperscript{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."\textsuperscript{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.\textsuperscript{203} However, disfavor for teacher/student ratios, as distinguished

\begin{footnotes}
\item 197. Id. at 209. This would mean that the statistical rigors of Hazelwood 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.
\item 198. See supra notes 190-91 and accompanying text.
\item 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."
\item 200. See supra note 60.
\item 201. Weber, 443 U.S. at 208.
\item 202. Id. at 209.
\item 203. See supra note 188.
\end{footnotes}
from work force/relevant labor market ratios such as those found in *Weber*, to establish racial discrimination was made so manifest in *Hazelwood*\(^{204}\) 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 cases\(^{206}\) 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 Justice\(^{209}\) 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


\(^{205}\) 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).


\(^{210}\) *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.
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. 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" must be present; (2) the burden of affirmative action relief must not be "concentrated upon a relatively small, ascertainable group of non-minority persons" 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."

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

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. 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.
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.
234. Plaintiff also made claims under 42 U.S.C. § 1981 and § 1985(3) which are not relevant here.
without opinion, and plaintiff petitioned for certiorari.\textsuperscript{239}

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

\section*{E. Turner v. Orr\textsuperscript{243}}

The most recent of the affirmative action petitions for certiorari filed this Term, \textit{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.\textsuperscript{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.”\textsuperscript{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

\begin{itemize}
\item \textsuperscript{239} Marsh v. Board of Educ., 762 F.2d 1009 (6th Cir. 1985) (mem.), \textit{petition for cert. filed}, 54 U.S.L.W. 3071 (U.S. Aug. 6, 1985) (No. 84-1859).
\item \textsuperscript{240} See supra text accompanying notes 187-88.
\item \textsuperscript{242} This conclusion is valid unless the Supreme Court gives the broadest reading to Justice White’s opinion in \textit{Stotts}. See supra note 162.
\item \textsuperscript{243} Turner v. Orr, 759 F.2d 817 (11th Cir. 1985), \textit{petition for cert. filed}, 54 U.S.L.W. 3149 (U.S. Sept. 10, 1985) (No. 85-177).
\item \textsuperscript{245} Turner, 759 F.2d at 820.
\end{itemize}
awarded an “appropriate” remedy authorized by the consent judgment.\textsuperscript{246} The court further found \textit{Stotts} inapplicable because the consent judgment here was “voluntary” and, therefore, was protected by the Supreme Court’s \textit{Weber} analysis, because no third party rights were involved in the remedy of appointment to a vacant position.\textsuperscript{247}

The court of appeals considered whether \textit{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 \textit{Vanguards},\textsuperscript{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.’”\textsuperscript{249} For this reason, the court rejected the United States’ argument that \textit{Stotts} barred relief: “As \textit{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.”\textsuperscript{250}

\section*{F. Janowiak v. Corporate City of South Bend\textsuperscript{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.”\textsuperscript{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.\textsuperscript{253} The task force had recommended in January, 1983 that the city hire minorities according to a two-to-one preferential hiring plan.\textsuperscript{254} The plan was designed to produce a work force reflecting the minority population of South Bend within five years. The board ac-

\begin{thebibliography}{99}
\bibitem{246} Id. at 826.
\bibitem{247} Id. at 824.
\bibitem{248} Vanguards v. City of Cleveland, 753 F.2d 479 (6th Cir.), \textit{cert. granted sub nom.} Local Number 93, Int’l Ass’n of Firefighters v. City of Cleveland, 106 S. Ct. 59 (1985).
\bibitem{249} \textit{Turner}, 759 F.2d at 826 (citing United Steelworkers v. Weber, 443 U.S. 265, 304 (1979)). The \textit{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 \textit{Weber}. \textit{Turner} did not concern itself with \textit{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.
\bibitem{250} \textit{Turner}, 759 F.2d at 821.
\bibitem{251} 750 F.2d 557 (7th Cir. 1984), \textit{petition for cert. filed}, 54 U.S.L.W. 3016 (U.S. July 16, 1985) (No. 84-1936).
\bibitem{252} Id. at 559.
\bibitem{253} Id. at 558.
\bibitem{254} The task force made this proposal although it “did not find that the hiring procedures were discriminatory.” \textit{Id.}
Accepted the proposed plan and maintained two hiring lists, one each for minority and non-minority applicants. 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." 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," 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" and no "conspicuous racial imbalance in traditionally segregated job categories" was found. Turning to the equal protection issue, the court reached the same result. In Bratton, 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, 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.


by any reasonable interpretation.\textsuperscript{262}

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

Other affirmative action cases have been decided in the courts of appeals since \textit{Stotts}.\textsuperscript{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.\textsuperscript{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:\textsuperscript{266}

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

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

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

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.
276. Fullilove, 448 U.S. at 480, 483. See supra text accompanying notes 157-58.
277. Id. at 483.
278. Id.
Reviewing the federal anti-discrimination laws, Chief Justice Burger did not cite an affirmative action goals case, but did cite the trilogy of Franks, Teamsters, and Albemarle all individual victim redress cases.

One could argue that in Stotts 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 goals in a coercive judicial decree beyond the “individual victim” situation of Franks, Teamsters, and Albemarle. 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. However, Reynolds maintains Weber was “wrongly decided” and should be overruled.

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 section 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.

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

279. Id.
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 brief 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.
286. See supra note 78.
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 agreements should be considered "voluntary"—could dispose of certain cases on the docket on this ground. However, the grant of certiorari in Local 638 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 sense 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."

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 and Turner.

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? 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 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

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).
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.
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*.\textsuperscript{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.”\textsuperscript{300} In *Turner*,\textsuperscript{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*,\textsuperscript{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*,\textsuperscript{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 considered\textsuperscript{304} and that the Court’s past denials of certiorari carry no substantive implication.\textsuperscript{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?

\textsuperscript{299} See supra text accompanying notes 42-39, 83-84.

\textsuperscript{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.

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

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

\textsuperscript{303} See supra text accompanying notes 243-50.

\textsuperscript{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.

\textsuperscript{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. 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, petitions for certiorari in numerous others have been considered and rejected. 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.


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:

[i]napposite 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.


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.  

A. Policies Favoring Limitation Of Affirmative Action Goals

1. The "Philosophical" Arguments

The "moral" argument 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. 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. First, the premise that we
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. 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*, 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, Justice Powell, Judge Skelly Wright, and, surprisingly, the Reagan..
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.
evidence 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 decision. Some fragmentary evidence exists in the experience of some business concerns with affirmative action programs, and in the leverage that Executive Order 11246 has had in fostering “voluntary” affirmative action plans. 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. 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.” 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-

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.
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."\textsuperscript{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."\textsuperscript{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."\textsuperscript{330} He confidently affirms that "[t]his will probably not happen,"\textsuperscript{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."\textsuperscript{332} Blumrosen's preference is that "the law should withdraw when the industrial relations system operates fairly without such extensive judicial or administrative supervision."\textsuperscript{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."\textsuperscript{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 \textit{Bakke}.\textsuperscript{335} The premise is that the mere use of an arithmetic measure for progress in an affirmative action plan constitutes

\textsuperscript{328} Id. at 347-48.

\textsuperscript{329} Id. at 340.

\textsuperscript{330} Id. at 348.

\textsuperscript{331} Id.

\textsuperscript{332} Id.

\textsuperscript{333} Id.

\textsuperscript{334} Id.

\textsuperscript{335} Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). In \textit{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 \textit{Bakke} result to rule out a rigid race-conscious "quota." See, e.g., infra text accompanying note 342.
a "quota." 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." The sixteen reserved minority seats in *Bakke* constituted a "quota." 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." Bookbinder opposes the Reagan Administration's proposed revision of Executive Order 11246 because such a revision would ban these "goals" as well as "quotas."

Admittedly, many courts have tended to use the terms "goals" and "quotas" interchangeably, while conceding that a rigid quota was barred by *Bakke*. Lately, the federal courts have refined the terminology in accord with the definitions given by Bookbinder. As Bookbinder concludes, to outlaw "goals and timetables . . . would have a devastating chilling effect on all affirmative action." That is the aim of the Reagan Administration in revising Executive Order 11246 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 statistical 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.


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.


340. See infra note 345.


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).


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:

[i]there 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" the interests of white employees. When the "disadvantage" is held to be so great as to "unnecessarily

---

\(^{346}\) Eg., 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. \(\text{id.}\) at 2581.


\(^{348}\) 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.

\(^{349}\) 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.\footnote{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.}

For example, the Second Circuit Court of Appeals used this ground in \textit{Local 638} to strike down part of the affirmative action relief awarded by the district court.\footnote{753 F.2d 1172, 1188 (2d Cir. 1985).} This "fairness" argument also is heeded in the warning of the Supreme Court in \textit{Fullilove}. There the Court stated that the affirmative action remedy must be "narrowly tailored" to remedy the identified past discrimination.\footnote{Fullilove v. Klutznick, 448 U.S. 448, 490 (1979).} Furthermore, the \textit{Fullilove} Court indicated that merely disappointing non-minority expectations is not in itself a constitutional defect barring affirmative action goals.\footnote{"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." \textit{Id.} at 484 (Burger, C.J.).}

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 \textit{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 \textit{Bakke-Weber-Fullilove} 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

\footnote{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. 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. 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. Some support for this view derives from the undoubted fact that the Civil Rights Act of 1964 was primarily directed at eliminating race discrimination. The addition of sex discrimination to the Act’s prohibition was an unscheduled fortuity. 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. 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,
affirmative action plans by both black and white officialdoms 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\textsuperscript{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.\textsuperscript{362} The counterargument is rooted in the persistent evidence that no matter how valid the anxieties raised, the economics of employment and unemployment\textsuperscript{363} 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\textit{ 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.'"\textsuperscript{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."\textsuperscript{365} Against the background of this interpretation of congressional purpose, the Court concluded that "it would be ironic indeed

\textsuperscript{361} See supra note 60 and text accompanying notes 152-55.
\textsuperscript{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.
\textsuperscript{363} See supra note 322.
\textsuperscript{364} Weber, 443 U.S. at 202.
\textsuperscript{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-Teamsters369 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

369. See supra notes 42-44.

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.

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's\(^{378}\) and the concordant judicial decisions of the 1960's and 1970's.\(^{379}\) If anything, this declared constitutional policy would call for extending\(^{380}\) 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

---


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.


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 VII\(^{396}\) 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

\(^{390}\) Bakke, 438 U.S. at 307.
\(^{391}\) Fullilove, 448 U.S. at 508, and the Brennan Four (Brennan, Marshall, Blackmun and White) in Bakke, 438 U.S. at 378. 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.
\(^{392}\) Id. at 295 (emphasis original).
\(^{393}\) Fullilove, 448 U.S. at 510
\(^{394}\) Id. at 516.
\(^{395}\) Id. at 508 (emphasis in original).
weight. The argument is that when all the courts of appeal, 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, 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 desegregation and voting rights cases 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." 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.

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-
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 tranquillity 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-

---

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.
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. 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 desegregation and first amendment support for educational choices. The Supreme Court will face this concern this Term in Wygant.

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.

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. 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. The counterargument concedes the difficulties, but insists that title VII nevertheless will bear a “specific victim” interpretation.

411. See supra text accompanying note 34.
412. See Bakke, 438 U.S. at 312 (Powell, J.).
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, 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. 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. Quite contrary to Mr. Dooley’s aphorism (“The Supreme Court follows the election returns.”), 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. 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 Keeffe: “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 Keeffe, 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 Justice and the EEOC. The Administration can chill civil rights research by its appointments to the Civil Rights Commission 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. The Executive branch can, by its power of appointment, constitutionally seek to change the policy posture of the federal courts. 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.


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

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*:

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 protection.

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).


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.
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.\footnote{432. Id. at 163.}

Affirmative action goals beyond "specific victims" may not be, in Marshall's sense, a "vested right." "Equal protection of the laws"\footnote{433. U.S. CONST. amend. XIV.} 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."\footnote{434. Weber, 443 U.S. at 202.} In \textit{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.\footnote{435. \textit{Bakke}, 438 U.S. at 202-03.} Only the Supreme Court can take back that promise—practically speaking.\footnote{436. Ubi ius, 
\textit{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:\footnote{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.} (1) whether a consent decree will be deemed "voluntary" for purposes of affirmative action;\footnote{438. Implicitly raised in the "questions presented" as to which certiorari was granted in \textit{Van guards v. City of Cleveland}, 753 F.2d 479 (6th Cir.), \textit{cert. granted}, 54 U.S.L.W. 3191-92 (U.S. Oct. 8, 1985) (No. 84-1999).} (2) whether a consent decree may embody relief which a judge could not award in a contested action;\footnote{439. Specifically raised in the "questions presented" as to which certiorari was granted in \textit{Van guards}, \textit{Id.}, and \textit{EEOC v. Local 638}, 753 F.2d 1172 (2d Cir.), \textit{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, \textit{Int'l Ass'n of Firefighters v. Cleveland} . . . ." Local 28 of the Sheet Metal Workers' \textit{Int'l Ass'n v. EEOC}, 106} 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.\footnote{440. Specifically raised in the "questions presented" as to which certiorari was granted in \textit{Van guards}. \textit{Id.}}
The "specific victim" issue—first surfaced in a Supreme Court opinion in *Stotts*—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* (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* in 1883 and *Brown v. Board of Education* 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. 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 usual: away with un-American group remedial relief. 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.

442. See supra note 44 and text accompanying notes 297-303.
445. See supra note 387.
446. See supra notes 430, 436. The Department of Justice's opposition to affirmative action goals, of course, antecedes *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.

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*, 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." Thurow cites familiar statistics with respect to black employment, 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." No substitute exists for providing "extra aid to those who were handicapped in the past until they catch up," 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."

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," 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.

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." If one's answer is the unacceptability of perpetual racial polarization there is thus no immediate escape from at least the moderate

---

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 Court 459 against Executive Department attacks on its constitutional decision-making 460 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.
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 "'whole salely upsetting cases and inventing new law.' " Id.
461. 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, Bennett Assails Curb on Aid to Parochial Schools, N.Y. Times, Aug. 7, 1985, at A18, col. 4.
462. 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.
464. 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." Yet when the lines were drawn, the Senate and the nation rallied to the defense of the independence of the Supreme Court. The "Court-packing plan" was defeated in Committee and never brought to the floor of either the Senate or the House.

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 seen that its unfortunate decision in Plessy in 1896 saddled the nation with seventy-five years of Jim Crow and enforced segregation. The unanimous Court in Brown, where Plessy was recanted and the road back to depolarization commenced, was gentle in admonishing its predecessors. Yet the verdict of history is clear. Justice Harlan, the dissenter in Plessy, alone of that Court is remembered favorably.

The Warren and Burger Courts have been consistent in rejecting inroads on the Brown principle against racial segregation and discrimination. But, as Thurow suggests, mere present and future nondiscrimination is not enough to accomplish depolarization; 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. 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 467, 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.


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.