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Joel L. Selig
University of Wyoming

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Affirmative Action in Employment: The Legacy of a Supreme Court Majority

JOEL L. SELIG*

INTRODUCTION

In the first fifteen years after the enactment of Title VII of the 1964 Civil Rights Act, the legality and the utility of remedial employment quotas were widely recognized by the lower federal courts. Numerical goals and timetables for the employment of minority groups appeared in various forms: they were included in court orders to remedy demonstrated violations of Title


At least in the context of court-ordered relief, the difference between “quotas” and “goals and timetables,” see id. § 1607.17(4), is largely semantic because generally the courts have not granted relief embodying the more objectionable attributes sometimes associated with the term “quota.”

For example, quota relief does not mean that employers must hire unqualified applicants. Decrees providing for numerical relief typically define the minimum qualifications for the positions involved, and although a certain percentage of the persons hired must be members of the group previously discriminated against, the quota or goal is expressly or impliedly subject to the availability of qualified minority applicants. See, e.g., United States v. Local 86, Int’l Ass’n of Ironworkers, 315 F. Supp. 1202, 1245-47 (W.D. Wash. 1970), aff’d, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971).

Similarly, quota relief is normally stated in terms of a percentage of hires and does not require anyone to hire unneeded personnel. See, e.g., Arnold v. Ballard, 390 F. Supp. 723, 739 (N.D. Ohio 1975). Moreover, the percentage stated is not a discriminatory cap on minority hiring; it is a minimum.

As to whether the relief might in some cases require an employer to hire a “less qualified” applicant ahead of a “better qualified” applicant, the problem is usually more theoretical than real because there is no valid instrument for “rank-ordering” applicants with sufficient precision to characterize one qualified person as less qualified than another. See generally Albemarle Paper Co. v. Moody, 422 U.S. 405, 425-36 (1975) (discriminatory employment tests not shown to be validated); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (discriminatory education requirement and employment test not shown to be job-related). Federal agency guidelines endorsing the use of “goals and timetables” proscribe preferences for minority applicants over demonstrably better qualified nonminority applicants. See Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.17(5)(a), (4) (1986). But see infra text accompanying notes 280-81.
VII or other statutory or constitutional prohibitions;\(^4\) in consent decrees settling lawsuits alleging such violations;\(^5\) in entirely voluntary affirmative action plans;\(^6\) and in plans adopted by federal contractors subject to Executive Order 11246.\(^7\) The lower courts upheld the statutory and constitutional validity of this kind of affirmative action both in the private sector and in the public sector, and they afforded district courts and consenting parties broad discretion in their efforts to fashion such remedies.

Over the years, the Supreme Court regularly denied certiorari in cases presenting challenges to numerical remedies.\(^8\) The Court did not address the merits of affirmative action in general until 1978, in *Regents of University of California v. Bakke*,\(^9\) and it did not rule directly on affirmative action in employment until 1979, in *United Steelworkers of America v. Weber*.\(^10\)

In *Bakke*, five justices endorsed the concept of taking race into account in medical school admissions, but they were split among themselves, 4-1, both on the test to be applied to affirmative action programs and on the constitutionality of the particular program before the Court.\(^11\) In *Weber*, five justices, one of whom is no longer on the Court, agreed on both an opinion and a result upholding an affirmative action plan for skilled craft training in the steel industry which reserved 50% of certain openings for blacks.\(^12\)

In the following year, 1980, the Court decided *Fullilove v. Klutznick*.\(^13\) Voting 6-3, but without a majority opinion, the Court upheld the constitutionality of a minority business enterprise provision requiring that 10% of federal funds for local public works projects be set aside and reserved for minority contractors.

Then in 1984, in *Firefighters Local Union No. 1784 v. Stotts*,\(^14\) the Court considered an order requiring that race override seniority for purposes of layoffs so that a specified level of black employment could be maintained.

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8. See, e.g., cases cited *supra* notes 4-7.


11. See 438 U.S. at 291, 305, 319-20 (opinion of Powell, J.); *id.* at 359, 379 (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part); *id.* at 387 & n.7 (opinion of White, J.).

12. See *infra* text accompanying notes 239-46.


In striking down the order, the Court held that it was inconsistent with Title VII's explicit statutory protection of bona fide seniority systems. Certain dicta in the Court's opinion also suggested that even when seniority rights are not overridden, quota remedies might inherently exceed the scope of a court's remedial authority under Title VII.

In 1986, however, the Court receded from the broader implications of the Stotts dicta. In three decisions, the Court addressed statutory and constitutional issues, approving quotas in one case, striking them down in another, and producing a number of opinions representing different views on various issues. These cases, discussed below, were Wygant v. Jackson Board of Education; Local 28, Sheet Metal Workers' International Association v. EEOC; and Local Number 93, International Association of Firefighters v. City of Cleveland. Although in each of these cases a (different) majority of justices was able to agree on a result, a prominent labor lawyer could say with some accuracy:

[There is no single conception of the permissible scope of affirmative action that commands the respect of five justices. Rather, there appear to be no fewer than six different viewpoints, and most cases are decided without a "majority" opinion, the outcome emerging from the confluence of distinctive viewpoints that happen to overlap on the facts of a particular case.]

Nevertheless, despite the lack of a plainly articulated majority position on some issues, the Court's 1986 decisions cleared the air to a significant degree and made substantial progress toward an acceptable framework within which the controversial issues raised by affirmative action in employment could become manageable. Although the cacophony of contending theories had not abated in the 1986 opinions, Justice O'Connor perceived "a fair measure of consensus" among the justices on the constitutional issue in the Wygant case. A similar measure of consensus existed on various statutory issues in the Sheet Metal Workers and Firefighters cases.

Justice O'Connor, however, did not join in all aspects of the emerging consensus, and the full implications of her position and of Justice Powell's

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15. See infra text accompanying notes 42-56.
16. See infra text accompanying notes 70-77.
17. See infra text accompanying notes 78-85.
22. See Wygant, 106 S. Ct. at 1853-54 (O'Connor, J., concurring in part and concurring in the judgment); infra text accompanying notes 136-39.
24. See, e.g., Sheet Metal Workers, 106 S. Ct. at 3057-62 (O'Connor, J., concurring in part and dissenting in part); infra text accompanying note 66; infra notes 74, 77, 90, 92, 101 and accompanying text.
position remained less than clear. It seemed apparent in 1986 that Justice Powell was the pivotal figure on most of the important constitutional and statutory issues in this area.\textsuperscript{25} It was Justice Powell who decided whether to cast the deciding vote with four justices who were generally supportive of race-conscious remedies or with three who were not. Therefore, his views were of paramount importance.

The Court remained closely divided, and its position in any particular case depended on a fragile and shifting intersection between a middle ground and two opposing perspectives. This situation simply reflected the facts of life on the current Court.\textsuperscript{26} But in its 1986 decisions, the Court decisively rejected the extreme positions advocated by the Reagan administration, which had hoped to deal a death blow to the very concept of affirmative action.\textsuperscript{27} After these decisions, it seemed possible that, with some additional fine-tuning and a reasonably flexible interpretation of the limiting principles he had articulated, Justice Powell could enable the Court to answer the call issued in 1979 by another distinguished judge of a somewhat different philosophical orientation:

> It is time for the legal community to stop its squabbling: to admit that the Constitution and the Civil Rights Act permit us to remedy the wrongs of the past. It is time to abandon the abstractions of "color-blind" theory and admit that there can be no such thing as a "color-blind" approach to achieving racial equality. It is time now to concentrate our efforts on ensuring that the remedies we construct are humane and effective, that they respect, so much as is possible, the rights of all.\textsuperscript{28}

In 1987, Justice Powell joined with Justice Brennan in meeting this challenge. The Court decided two cases which substantially clarified the voting pattern among the justices and further illuminated a working majority position on major issues. In \textit{United States v. Paradise},\textsuperscript{29} Justice Powell joined Justice Brennan's opinion upholding court-ordered promotion quotas, and in \textit{Johnson v. Transportation Agency, Santa Clara County},\textsuperscript{30} Justice Powell again joined Justice Brennan's opinion upholding a promotion decision that took sex into account pursuant to an affirmative action plan.

\textsuperscript{25} See, e.g., infra text accompanying notes 63-64, 79, 102-06, 122-23, 135, 149-61.
\textsuperscript{29} 107 S. Ct. 1053 (1987).
\textsuperscript{30} 107 S. Ct. 1442 (1987).
The effect of these developments was extremely significant. It became clear that Justice Powell's legal position was sufficiently flexible and supportive of affirmative action in employment to uphold reasonable numerical remedies in a variety of contexts. With Justice Powell willing and able to join Justice Brennan’s opinions in Paradise and Johnson, both the voting pattern and the doctrinal basis were established for an emergent five-justice majority in support of reasonable affirmative action. This majority consisted of Justices Brennan, Marshall, Blackmun, Powell, and Stevens. It was opposed by a minority consisting of Chief Justice Rehnquist and Justices White and Scalia. Justice O'Connor, while attempting to stake out what she perceived as a middle ground, did not attract support from other justices for her individual views on statutory issues, and she was in the dissenting minority on the constitutional issue in Paradise. Justice O'Connor's positions were substantially less flexible and less supportive of affirmative action than Justice Powell's, placing her closer to the Rehnquist minority than to the Brennan-Powell majority. Absent a change in the Court's membership, the basic law in this area had been established and would continue to be enunciated by the Brennan-Powell majority.

32. The voting patterns of the justices in the cases discussed in the text may be represented in tabular form as follows. The justices are listed by seniority in descending order of receptivity to affirmative action. With the exceptions presently to be noted, the degree of receptivity is determined simply by counting the justice's votes in the cases in which he or she participated. These votes, when added together, provide a numerical index of receptivity.

Despite a slightly lower total index, Justice Stevens is placed higher than Justice Powell because greater weight is given to his present views on constitutional issues as expressed in Wygant and Paradise, and to his votes in the five most recent cases, than to his votes in Bakke and Fullilove. Justice Scalia's placement is based not only on his votes in Paradise and Johnson but also on assumptions concerning what his votes might have been in other cases based on his views as expressed in Johnson. It is more difficult to place Justice Stewart based on assumptions concerning what his votes might have been in the statutory cases; his placement is based in part on his constitutional views as expressed in Fullilove.

A plus (+) indicates a vote in favor of affirmative action while a minus (−) indicates a vote opposed to affirmative action. The letters "dnp" indicate that the justice, although a member of the Court at the time of the decision, did not participate.

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Justice Powell's retirement could substantially change this situation, perhaps increasing the significance of Justice O'Connor's views and, of course, the views of Justice Powell's successor. However, if the justices are faithful to the concept of *stare decisis*, the degree of change possible will depend very much on what has and has not been decided by the existing Supreme Court precedents. It is therefore of critical importance to analyze the Court's decisions closely, carefully, and thoroughly.

This Article reviews the current status of affirmative action in employment in the wake of the Court's 1986 and 1987 decisions. It explores the contours of the majority views that emerged on various issues, identifying those points that have been definitively decided and those that remain open to further development. The Article concludes that the Brennan-Powell majority position is a legacy that should be preserved. That position recognizes the values of affirmative action without ignoring the costs. It articulates the difference between the permissible and the impermissible in a way that gives generous scope to the exercise of responsible discretion. It wisely resists the temptation to constitutionalize any inflexible standard of judgment in this area.

I. The Present State of the Law

There are three contexts in which questions about numerical remedies arise: litigated court orders, consent decrees, and affirmative action programs adopted without litigation. Each involves issues of statutory and constitutional significance. The legal principles established by the recent Supreme Court decisions are best analyzed by considering each of these contexts separately.

A. Litigated Court Orders

1. Statutory Issues

There are three different sections of Title VII which have required interpretation in connection with court-ordered numerical remedies. These sections deal with seniority, racial imbalance, and appropriate relief.

a. Section 703(h): Seniority Systems

Section 703(h) of Title VII provides special protection for the operation of bona fide seniority systems. It declares that if a seniority system was

33. Of course, even if Justice Powell's successor does not consider himself or herself bound by *stare decisis* on these issues, it is also possible that the justices who did not accept the majority position in the 1986 and 1987 cases would consider themselves so bound. This Article will not speculate on the various possibilities or comment on the likelihood of any justice's, or prospective justice's, fidelity to *stare decisis*. 
adopted without an intent to discriminate, then it is not an unlawful employment practice to award jobs and other benefits on the basis of seniority.\(^4\)

However, when an employee or applicant for employment has been denied promotion or hire on a prohibited basis, a court may order that he be offered the next available vacancy in the position from which he was unlawfully excluded, and that he be granted retroactive competitive seniority in that position as of the date of his previous discriminatory rejection.\(^5\) Such an order is permissible even though it interferes to a limited extent with the operation of a bona fide seniority system, because it, like back pay,\(^6\) simply puts an identified victim of discrimination in the position he would have occupied in the absence of the unlawful discrimination against him.\(^7\) Although this grants the discriminatee a competitive advantage over junior employees, the advantage is one that he would have had if he had been treated without discrimination in the first instance. In other words, this remedy does no more and no less than to make a victim of discrimination whole by putting him in his rightful place.\(^8\)

Such make-whole relief, like the theory behind it, is of course available only to persons who are proven victims of discrimination. Accordingly, the Supreme Court has held that even when a general pattern or practice of discrimination against a class of persons has been proven, it cannot simply be assumed that each member of the class is entitled to retroactive seniority relief allowing him to compete with nonminority employees on the basis of company, rather than departmental, seniority. Although the lower courts had unanimously indulged that assumption, holding that such relief should be available on a classwide basis to incumbent minority employees assigned to segregated departments,\(^9\) the Court rejected that position in *International Brotherhood of Teamsters v. United States*\(^4\) \(^0\) Teamsters articulated standards for individualized proof to identify those actual victims of discrimination who are entitled to court-ordered retroactive seniority.\(^4\)

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\(^{34}\) 42 U.S.C. § 2000e-2(h) (1982) states:

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

*Id.*


\(^{36}\) See Albemarle Paper Co. v. Moody, 422 U.S. 405, 415-21 (1975).


\(^{38}\) *Teamsters*, 431 U.S. at 347-48; *Franks*, 424 U.S. at 763-66.

\(^{39}\) See *Teamsters*, 431 U.S. at 346 n.28. See also *Id* at 378-80 (Marshall, J., concurring in part and dissenting in part).

\(^{40}\) *Id.* at 348-56.

\(^{41}\) *Id.* at 356-76.
In the context of court-ordered remedial quotas, the question arises whether special protection against layoff or demotion may be ordered for the beneficiaries of hiring or promotion quotas when such protection conflicts with the operation of a bona fide seniority system. The Court did not address this question directly in Teamsters. Without such protection, the benefits of remedial employment quotas may be substantially reduced because, in times of declining employment, minority employees hired or promoted pursuant to the quotas may be laid off or demoted if they lack sufficient competitive seniority in their new positions. Those positions would then revert to the all-white or all-male occupancy which they previously exhibited as a result of a history of class-based discrimination.

The Court confronted this problem in Firefighters Local Union No. 1784 v. Stotts. In Stotts, the lower courts ordered layoffs to be conducted in a way that would maintain the level of black employment achieved pursuant to racial hiring quotas, and the result was that white employees with greater seniority were laid off ahead of black employees with lesser seniority. The Supreme Court held that the lower courts had exceeded their authority under Title VII by ordering relief that achieved this result.

Although I have previously expressed the view that Stotts was correctly decided, I recognize that a contrary argument may be made. Such an argument would focus on the distinction between individual make-whole relief which is available only to proven victims of discrimination, and class-based relief, which is not restricted to identified victims. Teamsters, it may be argued, simply holds that a bona fide seniority system is not itself unlawful even if it carries forward the effects of pre-Act discrimination, and then defines the circumstances under which make-whole relief is available to individual victims of post-Act discrimination. In explaining when such individual relief is available essentially as a matter of entitlement, Teamsters does not address a court’s discretion to award class-based relief for purposes other than to put identified victims of discrimination in their rightful place; such relief might arguably be permissible even if it would affect the operation of a seniority system that itself is not unlawful. Justice Blackmun emphasized

43. Id. at 566-67.
44. See Selig, supra note 27, at 824. Certain dicta in Stotts, as opposed to the holding of the case, were justly criticized. See, e.g., Daly, Stotts' Denial of Hiring and Promotion Preferences for Non-Victims: Draining the "Spirit" from Title VII, 14 Fordham Urban L. J. 17 (1986); Fallon & Weller, Firefighters v. Stotts: Conflicting Models of Racial Justice, 1984 Sup. Cr. Rev. 1 (1985). See also infra text accompanying notes 70-77. I share a critical view of these dicta and have argued against an overbroad reading of them. See Selig, supra note 27, at 824-26. However, I continue to believe that the decision in the case was correct. See infra text accompanying notes 51-56.
45. See Stotts, 467 U.S. at 612-14 (Blackmun, J., dissenting).
46. See Teamsters, 431 U.S. at 348-76.
47. Id. at 347-48; Franks, 424 U.S. at 762-70.
the distinction between make-whole relief and class relief in his dissent in Stotts,\footnote{48} and Justice Brennan, writing for four justices in \textit{Local 28, Sheet Metal Workers' International Association v. EEOC},\footnote{49} also emphasized this distinction.\footnote{50}

Despite the validity of this distinction, however, it does not follow that the kind of relief which the Court disapproved in \textit{Stotts} should be permissible under Title VII. As Justice Brennan pointed out in \textit{Sheet Metal Workers}, the proper understanding of \textit{Stotts} is that the remedy disapproved in that case was "tantamount to an award of make-whole relief (in the form of competitive seniority)" to persons who were not victims of discrimination.\footnote{51}

In such a context, the distinction between make-whole relief and class-based relief was a distinction without a difference: the effect of the racial quota limiting layoffs of blacks was precisely the same as an award of constructive seniority credits to black employees. Such make-whole relief to persons who had suffered no discrimination for which they needed to be made whole had been rejected by some lower courts long before \textit{Stotts}.\footnote{52} Those courts, like the Supreme Court in \textit{Stotts}, were correct because such relief is contrary to the fundamental policy of section 703(h) as that policy was identified and articulated in \textit{Teamsters}:

\begin{quote}
Were it not for § 703(h), the seniority system in this case would seem to fall under the \textit{Griggs} rationale. The heart of the system is its allocation of the choicest jobs, the greatest protection against layoffs, and other advantages to those employees who have been line drivers for the longest time. Where, because of the employer's prior intentional discrimination, the line drivers with the longest tenure are without exception white, the advantages of the seniority system flow disproportionately to them and away from Negro and Spanish-surnamed employees who might by now have enjoyed those advantages had not the employer discriminated before the passage of the Act. This disproportionate distribution of advantages does in a very real sense "operate to 'freeze' the status quo of prior discriminatory employment practices." \textit{But both the literal terms of § 703(h) and the legislative history of Title VII demonstrate that Congress considered this very effect of many seniority systems and extended a measure of immunity to them.} \footnote{53}
\end{quote}

\begin{thebibliography}{99}
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\bibitem{48} 467 U.S. at 612-14 (Blackmun, J., dissenting).
\bibitem{49} 106 S. Ct. 3019 (1986).
\bibitem{50} Id. at 3048-49 (opinion of Brennan, J.).
\bibitem{51} Id. at 3049 (opinion of Brennan, J.).
\bibitem{53} 431 U.S. at 349-50 (emphasis added) (discussing \textit{Griggs v. Duke Power Co.}, 401 U.S. 424 (1971)).
\end{thebibliography}
In other words, except to the extent necessary to award make-whole relief to identified victims of post-Act discrimination, the policy of Title VII, as expressed in section 703(h), is to prohibit courts from diluting seniority rights created by bona fide seniority systems. This policy fully applies even when bona fide seniority rights perpetuate the effects of prior discrimination. Indeed, the sole purpose of section 703(h) is to protect the exercise of seniority in precisely that situation; a bona fide seniority system which did not perpetuate the effects of past discrimination would have no need of a special definitional subsection (section 703(h)) to establish its legality and viability under Title VII. The difficulty with relief such as that disapproved in Stotts is that it undermines, and is inconsistent with, the statutory policy protecting existing seniority rights. The proper interpretation of Stotts, therefore, is that it simply holds that "a court may abridge a bona fide seniority system in fashioning a Title VII remedy only to make victims of . . . discrimination whole . . . ." In ordering quota remedies under Title VII for nonvictims, a court may not interfere with the operation of a bona fide seniority system. This limitation applies to layoffs, demotions, promotions, job and shift assignments, and any other terms or conditions of employment otherwise determined by competitive seniority under a bona fide seniority system.

b. Section 703(j): Racial Imbalance

Section 703(j) of Title VII, like section 703(h), appears in the portion of the statute defining what is and is not an unlawful employment practice. It

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54. An award of make-whole relief to an individual who is not a victim of discrimination is also inconsistent with section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g) (1982). Sheet Metal Workers, 106 S. Ct. at 3049 (opinion of Brennan, J.; Stotts, 467 U.S. at 579-80.

Since the relief disapproved in Stotts was "tantamount to an award of make-whole relief (in the form of competitive seniority)" to nonvictims, it was improper under section 706(g). Sheet Metal Workers, 106 S. Ct. at 3049 (opinion of Brennan, J.). This basis for the Stotts holding was, however, incidental to the primary basis of the decision, section 703(h). Id. at 3048-49 (opinion of Brennan, J.). The Court has rejected the broader implications of Stotts' discussion of section 706(g). See infra text accompanying notes 70-85.

55. Sheet Metal Workers, 106 S. Ct. at 3048 (opinion of Brennan, J.).


It seems likely, however, that the Court would hold that the policy embodied in section 703(h) of Title VII requires a court acting under section 1981 or section 1983 to observe the same limitation on its remedial authority under those statutes. See, e.g., Chance v. Board of Examiners of City of New York, 534 F.2d 993, 998 (2d Cir. 1976), cert. denied, 431 U.S. 965 (1977); Watkins, 516 F.2d at 49-50; Waters, 502 F.2d at 1320 n.4.
is now established, however, that unlike section 703(h), section 703(j) does not place any limitation on remedial employment quotas.

Section 703(j) provides that Title VII shall not be interpreted to require anyone to grant preferential treatment on account of racial or other "imbalance" in the work force.\(^{57}\) Long before the recent Supreme Court decisions, the courts of appeals had unanimously held that section 703(j) in no way affects a court's ability to order quota relief to remedy proven violations of Title VII.\(^{58}\) Section 703(j), the lower courts had held, merely prohibits any requirement of preferential treatment to correct racial or other imbalance; it does not address, much less prohibit, preferential treatment to correct racial or other discrimination.\(^{59}\)

In *Sheet Metal Workers*, the Supreme Court endorsed this analysis. Justice Brennan, speaking for four justices, carefully reviewed and explicated the relevant legislative history that culminated in section 703(j). He noted that Congress made it clear that no one would violate Title VII merely by having an imbalanced work force, and that a court could not order anyone to adopt racial preferences merely to correct such an imbalance. He concluded, however, that Congress in no way suggested in section 703(j) (or elsewhere) that a court could not order preferential relief to remedy past discrimination.\(^{60}\)

"[T]he use of racial preferences as a remedy for past discrimination simply was not an issue at the time Title VII [and section 703(j) were] being considered."\(^{61}\) Accordingly, Justice Brennan rejected "the notion that § 703(j) somehow qualifies or proscribes a court's authority to order relief...


Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

*Id.*

\(^{58}\) See, e.g., United States v. Ironworkers Local 86, 443 F.2d 544, 552-54 (9th Cir.), cert. denied, 404 U.S. 984 (1971).


\(^{60}\) *Sheet Metal Workers*, 106 S. Ct. at 3038-44 (opinion of Brennan, J.). In *United Steelworkers of Am. v. Weber*, the Court had previously held that although section 703(j) states that nothing in Title VII shall be interpreted to "require" preferential treatment to overcome racial or other imbalance, it in no way limits voluntary affirmative action including such preferential treatment. 443 U.S. 193, 204-07 (1979).

\(^{61}\) *Sheet Metal Workers*, 106 S. Ct. at 3044 (opinion of Brennan, J.).
otherwise appropriate under § 706(g) in circumstances where an illegal discriminatory act or practice is established.”

Although Justice Powell did not join Justice Brennan’s opinion in Sheet Metal Workers, his concurring opinion attached no significance to section 703(j). Justice Powell’s opinion in Sheet Metal Workers also explicitly stated that he was “unpersuaded by petitioners’ reliance on the legislative history of Title VII,” and thus he apparently accepted Justice Brennan’s conclusions concerning the legislative history and section 703(j). In addition, Justice White’s dissenting opinion effectively conceded the correctness of this aspect of Justice Brennan’s analysis. Therefore, although Justice O’Connor disagreed with these six justices on this question, it is now settled that section 703(j) has no effect on a court’s ability to order quotas or other preferential treatment to remedy proven statutory violations.

c. Section 706(g): Appropriate Relief

In interpreting section 706(g) of Title VII, the section which defines the scope of a court’s remedial powers, the Court has now eliminated the

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62. Id. at 3044 n.37 (opinion of Brennan, J.).
63. See id. at 3054 (Powell, J., concurring in part and concurring in the judgment). See also Regents of Univ. of Calif. v. Bakke, 438 U.S. 265, 301 (1978) (opinion of Powell, J.) (“Such preferences also have been upheld where a legislative or administrative body charged with the responsibility made determinations of past discrimination by the industries affected, and fashioned remedies deemed appropriate to rectify the discrimination.”).
64. Sheet Metal Workers, 106 S. Ct. at 3054 (Powell, J., concurring in part and concurring in the judgment).
65. Id. at 3062 (White, J., dissenting) (“I generally agree with Parts I through IV-D of [Justice Brennan’s] opinion.”).
66. Id. at 3057-62 (O’Connor, J., concurring in part and dissenting in part).

In Weber, Justice Rehnquist disagreed with the Court’s interpretation of section 703(j) and the relevant legislative history in the context of voluntary affirmative action. Compare Weber, 443 U.S. at 227-28, 230-53 (Rehnquist, J., dissenting) (race-conscious affirmative action is prohibited by Title VII) with id. at 204-07 (opinion of the Court) (race-conscious affirmative action is permitted by Title VII). Justice Scalia joined Chief Justice Rehnquist in this view in Johnson v. Transportation Agency, Santa Clara County, 107 S. Ct. 1442, 1475 (1987) (Scalia, J., dissenting). However, the issue under section 703(j) is somewhat different in the court order context, where the question revolves around the statute’s use of the phrase “racial imbalance” rather than its use of the word “require.” See Weber, 443 U.S. at 204-07.

Justice Rehnquist relied on section 706(g) rather than section 703(j) for his dissenting position in the court order context. See Sheet Metal Workers, 106 S. Ct. at 3063 (Rehnquist, J., dissenting); Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland, 106 S. Ct. 3063, 3085-87 (1986) (Rehnquist, J., dissenting). In addition, in Firefighters he stated that “Section 706(g) is the one section in the entire text of Title VII which deals with the sort of relief which a court may order in a Title VII case.” 106 S. Ct. at 3087 (Rehnquist, J., dissenting).

Therefore, despite his overall interpretation of Title VII’s legislative history in Weber and his position in Sheet Metal Workers and Firefighters that court-ordered quotas are impermissible under Title VII, Chief Justice Rehnquist has not challenged Justice Brennan’s interpretation of section 703(j) in the court order context. Justice Scalia, who was not a member of the Court when Sheet Metal Workers and Firefighters were decided, did not address this question in Johnson, the only Supreme Court case in which he has been presented with an affirmative action issue in a Title VII context.
confusion which resulted from its opinion in Stotts. In Sheet Metal Workers, the Court made it clear that quota relief is available under section 706(g) in appropriate circumstances.

i. The statutory language

Section 706(g), which describes a court's ability to order appropriate relief upon a finding of unlawful discrimination, appears on its face to be an extremely broad grant of discretionary authority. Its language includes authorization to "order such affirmative action as may be appropriate . . . or any other equitable relief as the court deems appropriate . . . ." Section 706(g) also includes a final sentence which, on its face, appears simply to provide that the court shall not order make-whole relief to any individual who was denied an employment opportunity for a valid, nondiscriminatory reason.

In view of the apparent breadth and clarity of section 706(g)'s language, the courts of appeals had uniformly concluded that it supported the availability of court-ordered quotas as one weapon in the Title VII chancellor's remedial arsenal. In addition, the courts of appeals did not consider the final sentence of section 706(g) to have any bearing on this question. That was the state of the law prior to the Supreme Court's decision in Stotts.

ii. The Stotts confusion

Justice White's opinion for the Court in Stotts substantially muddied the waters in this area. A portion of that opinion began with an uncontroversial statement: "Our ruling in Teamsters that a court can award competitive seniority only when the beneficiary of the award has actually been a victim of illegal discrimination is consistent with the policy behind § 706(g) of Title

   If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . , the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which 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 . . . . No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin . . . .

Id.

68. Id.

69. See, e.g., Ironworkers, 443 F.2d at 553-54.
The opinion then continued: "That policy, which is to provide make-whole relief only to those who have been actual victims of illegal discrimination, was repeatedly expressed . . . during the congressional debates."\(^{71}\) This statement is both unexceptionable and innocuous if it is interpreted as addressing only the availability of make-whole relief. Justice White went on, however, to quote certain language from the legislative history describing the last sentence of section 706(g) and to characterize this language as making "clear that a court was not authorized to give preferential treatment to nonvictims."\(^{72}\) He also quoted other language lending support to the argument that under no circumstances could a court order quotas that would benefit persons who were not proven victims of discrimination.\(^{73}\) These juxtapositions in Justice White's opinion rendered ambiguous the Court's statement that the policy behind section 706(g) "is to provide make-whole relief only to . . . actual victims of . . . discrimination." Notwithstanding the position of the word "only," the statement could be interpreted to mean that the only kind of relief available under section 706(g), other than a prophylactic injunction, is make-whole relief to actual victims of discrimination.\(^{74}\)

If this is what Justice White meant to convey in Stotts, it was plainly unnecessary to the case's result, which is properly understood as based primarily on section 703(h), not section 706(g).\(^{75}\) The dissenting opinion in Stotts pointed out that the portions of the opinion discussing section 706(g) were dicta, and disagreed with the possible implications of the dicta discussed above.\(^{76}\) However, three of the justices who joined Justice White's opinion apparently considered these portions of it to be more than dicta. They attributed to these portions of the opinion the meaning that Title VII does not permit any preferential relief whatsoever to nonvictims of discrimination.\(^{77}\)

iii. The Sheet Metal Workers clarification

In Sheet Metal Workers, six justices—including Justice White, the author of the Stotts opinion—disclaimed (or receded from) the foregoing interpre-

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70. 467 U.S. at 579.
71. Id. at 580.
72. Id. at 581.
73. Id. at 580-82.
74. In a concurring opinion, Justice O'Connor emphasized that this was her interpretation. Id. at 587-88 (O'Connor, J., concurring) ("[A] court may use its remedial powers . . . only to prevent future violations and to compensate identified victims of unlawful discrimination."); id. at 589-90 (O'Connor, J., concurring) ("The District Court had no authority to order the Department . . . to provide preferential treatment to blacks.").
75. See supra text accompanying notes 34-56. See also supra note 54.
76. Stotts, 467 U.S. at 612-13, 617-20 (Blackmun, J., dissenting).
77. See id. at 587-88, 589-90 (O'Connor, J., concurring) (quoted supra note 74); Sheet Metal Workers, 106 S. Ct. at 3057 (O'Connor, J., concurring in part and dissenting in part); id. at 3063 (Rehnquist, J., joined by Burger, C.J., dissenting); Firefighters, 106 S. Ct. at 3085-87 (Rehnquist, J., joined by Burger, C.J., dissenting).
tation. Justice Brennan’s opinion for four justices convincingly demonstrated the incorrectness of such a reading of section 706(g) or any other portion of Title VII. Justice Powell, while not joining Justice Brennan’s opinion, agreed that neither the language nor the legislative history of Title VII supports the proposition that section 706(g) authorizes preferential relief only to actual victims of discrimination. Justice White, while disapproving the particular relief ordered in the Sheet Metal Workers case, agreed that section 706(g) “does not bar relief for nonvictims in all circumstances,” and expressed his general agreement with Justice Brennan’s analysis in support of that conclusion. Justice O’Connor, who had interpreted Stotts as indicating otherwise, acknowledged the contrary holding of six justices. She argued in dissent, however, that section 706(g), while now held not to prohibit numerical relief in all circumstances, should be read, in conjunction with section 703(j), to place considerably stricter limits on the availability of such relief than those expressed in Justice Brennan’s plurality opinion or reflected in Justice Powell’s concurrence in affirming the judgment in the Sheet Metal Workers case. Justice Rehnquist, joined by Chief Justice Burger, argued in dissent that section 706(g) absolutely prohibits numerical relief benefitting nonvictims.

It is settled, therefore, that Title VII permits numerical relief in some circumstances, and that section 706(g) does not limit preferential relief to identified victims of discrimination. The Court has properly rejected a contrary interpretation that would “distort the language of § 706(g)” and “frustrate [a] court’s ability to enforce Title VII’s mandate.”

iv. The statutory standard

Although section 706(g) does not absolutely prohibit non-victim-specific preferential relief, the Court has not undertaken to define precisely when it is appropriate to order such relief under Title VII and when it is inappropriate. Justice Brennan’s plurality opinion in Sheet Metal Workers contains a fair amount of guidance on this question, without purporting to cover all possibilities. However, Justice Powell did not join that portion of Justice

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78. Sheet Metal Workers, 106 S. Ct. at 3034-50 (opinion of Brennan, J.).
79. Id. at 3054 (Powell, J., concurring in part and concurring in the judgment).
80. Id. at 3062 (White, J., dissenting).
81. See supra note 74.
82. Sheet Metal Workers, 106 S. Ct. at 3058-62 (O’Connor, J., concurring in part and dissenting in part).
83. Id. at 3063 (Rehnquist, J., dissenting); Firefighters, 106 S. Ct. at 3085-87 (Rehnquist, J., dissenting).
84. Sheet Metal Workers, 106 S. Ct. at 3049-50 (opinion of Brennan, J.).
85. Id. at 3044 (opinion of Brennan, J.).
86. Id. at 3034-37, 3044-47, 3050-52 (opinion of Brennan, J.).
Brennan's opinion, contenting himself instead with the following observation in the statutory portion of his concurring opinion: "[I]n cases involving particularly egregious conduct a District Court may fairly conclude that an injunction alone is insufficient to remedy a proven violation of Title VII. This is such a case."87

Since Sheet Metal Workers did involve "particularly egregious" conduct, including contemptuous refusal to comply with previous court orders,88 it was unnecessary for Justice Powell to consider whether quota relief would be appropriate in less compelling factual circumstances. It would be incorrect, however, to read Sheet Metal Workers as holding or even suggesting that such relief may be ordered only in particularly egregious cases.89 Although Justice O'Connor90 and Justice White91 made some efforts to characterize the majority's position in this way, it must be remembered that these justices were dissenting from the majority's approval of preferential relief even in the context of the egregious and contemptuous conduct presented by the record in the Sheet Metal Workers case. The views of these dissenting justices on the statutory standard for reviewing awards of preferential relief have been rejected by a majority of the Court and are unpersuasive on their merits.92

87. Id. at 3054 (Powell, J., concurring in part and concurring in the judgment).
88. Id. at 3025-31 (opinion of Brennan, J.); id. at 3054 (Powell, J., concurring in part and concurring in the judgment).
89. See infra text accompanying notes 93-108, 111-23.
90. Compare Sheet Metal Workers, 106 S. Ct. at 3058 (O'Connor, J., concurring in part and dissenting in part) ("Even assuming . . . racial hiring goals . . . are permissible as remedies for egregious and pervasive violations of Title VII. . . ." (emphasis added)) with id. at 3034 (opinion of Brennan, J.) ("Such relief may be appropriate where an employer . . . has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination." (emphasis added)). See also Sheet Metal Workers, 106 S. Ct. at 3059, 3061 (O'Connor, J., concurring in part and dissenting in part).
91. See Firefighters, 106 S. Ct. at 3082 (White, J., dissenting). Justice White stated:

I . . . agree with Justice BRENNAN's opinion in [Sheet Metal Workers] that in Title VII cases enjoining discriminatory practices and granting relief only to victims of past discrimination is the general rule, with relief for non-victims being reserved for particularly egregious conduct that a District Court concludes cannot be cured by injunctive relief alone.

Id. See also Sheet Metal Workers, 106 S. Ct. at 3062 (White, J., dissenting).
92. See infra text accompanying notes 93-108, 111-23.

Justice White dissented in each of the four recent cases where the Court issued rulings favorable to affirmative action: Johnson, 107 S. Ct. at 1465; United States v. Paradise, 107 S. Ct. 1053, 1082-83 (1987); Firefighters, 106 S. Ct. at 3081-82; and Sheet Metal Workers, 106 S. Ct. at 3062-63. See also supra note 32. In none of these cases did he articulate or support a coherent theory of his own with regard to the proper statutory standard for review of court-ordered numerical relief.

In Sheet Metal Workers, Justice White considered the remedy "inequitable" based on a reading of the factual record that was inconsistent with the decisions of the district court and the court of appeals and that was rejected by five justices. Compare Sheet Metal Workers, 106 S. Ct. at 3062-63 (White, J., dissenting) with id. at 3025-31 (opinion of the Court) and id. at 3050-52 (opinion of Brennan, J.) and id. at 3054-57, 3057 n.4 (Powell, J., concurring in part
Once it is conceded that a court of equity has statutory authorization under Title VII to grant preferential relief for nonvictims in some circumstances, the logical basis for reviewing the court’s exercise of its equitable remedial power would be an abuse of discretion standard. While this may not be the appropriate constitutional standard of review, and while the constitutional standard will also have to be met in any case where a court


94. See id. at 1075 n.2 (Powell, J., concurring).
orders quota remedies, the Court’s previous Title VII decisions clearly and emphatically stand for the proposition that abuse of discretion is the statutory standard. Section 706(g)'s grant of remedial authority is, after all, phrased in extremely broad terms: the court "may ... order such affirmative action as may be appropriate ... or any other equitable relief as the court deems appropriate ...". The legislative history of Title VII also supports an abuse of discretion standard. Of course, the court's discretion must be exercised in conformity with the purposes of the statute. But properly formulated numerical relief designed to remedy a proven history of discrimination is consistent with those purposes.

Justice Brennan's plurality opinion in Sheet Metal Workers articulated and applied an abuse of discretion standard. It repeatedly emphasized that section 706(g) vests the courts with broad discretion to afford the most complete relief possible to remedy unlawful discrimination. Justice Powell, who did not join this portion of Justice Brennan's opinion, did not attempt to articulate a statutory standard.

Several reasons could explain Justice Powell's forbearance. First, as already noted, it was unnecessary for him to articulate a statutory standard in Sheet Metal Workers because the conduct there had been so egregious that the relief would have been justified under any reasonable standard. Second, in the court order context, the remedy must also meet the constitutional stan-

95. See Sheet Metal Workers, 106 S. Ct. at 3052-53 (opinion of Brennan, J.); id. at 3054-57 (Powell, J., concurring in part and concurring in the judgment).
99. Id. at 3050 (opinion of Brennan, J.); Teamsters, 431 U.S. at 364-65, 367; Franks, 424 U.S. at 764-65, 770, 779; Albemarle, 422 U.S. at 415-25.
100. Sheet Metal Workers, 106 S. Ct. at 3025-37 (opinion of Brennan, J.).
101. Id. at 3035 (opinion of Brennan, J.) ("The language of § 706(g) plainly expresses Congress's intent to vest district courts with broad discretion to award 'appropriate' equitable relief to remedy unlawful discrimination."); id. at 3036 ("In order to foster equal employment opportunities, Congress gave the lower courts broad power under § 706(g) to fashion 'the most complete relief possible' to remedy past discrimination."); id. at 3044 (citation omitted) ("Congress deliberately gave the district courts broad authority under Title VII to eliminate 'the last vestiges of an unfortunate and ignominious page in this country's history.'"); id. at 3045 ("[The] language [of amended section 706(g)] was intended 'to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible.'"); id. at 3047 ("Congress reaffirmed the breadth of the court's remedial powers under § 706(g) by adding language authorizing courts to order 'any other equitable relief as the court deems appropriate.'"); id. at 3050 (citation omitted) ("[The] fashioning of 'appropriate' remedies for a particular Title VII violation invokes the 'equitable discretion of the district courts.'"). Cf. id. at 3059 (O'Connor, J., concurring in part and dissenting in part) ("[T]he plurality ... prefers to cut the congressional rejection of racial quotas loose from any statutory moorings and make this policy simply another factor that should inform the remedial discretion of district courts.").
102. See supra text accompanying notes 87-88.
standard of the equal protection component of the due process clause of the fifth amendment. Justice Powell apparently believed that the proper statutory standard of review was either less stringent than his version of the proper constitutional standard, or, in any case, no more stringent than the constitutional standard. From this point of view, Justice Powell may have considered the statutory standard to be of little significance in this context because the constitutional standard must also be met in every case. Third, Justice Powell may well have been in basic agreement with Justice Brennan's articulation of the statutory standard. Justice Powell previously had expressed the view that a court exercising its equitable remedial powers under Title VII is vested with a broad range of discretion. In the portion of his Sheet Metal Workers opinion applying the constitutional standard, Justice Powell again made reference to the trial court's superior position to make discretionary remedial judgments. Later, in United States v. Paradise, Justice Powell joined Justice Brennan's opinion applying the constitutional standard in a manner emphasizing the trial court's equitable remedial discretion. Thus, there is substantial reason to believe that Justice Powell applied an abuse of discretion standard as the appropriate basis for reviewing court-

103. See infra text accompanying note 145.

104. See Paradise, 107 S. Ct. at 1075 nn.1, 2 (Powell, J., concurring); Johnson, 107 S. Ct. at 1449-50 n.6 (opinion of the Court, joined by Powell, J.).

If there is a difference between the constitutional and the statutory standard in the court order context, that difference may be considered anomalous. Be that as it may, the fact that the Court has not adopted and is unlikely soon to adopt a constitutional standard completely congruent with the proper statutory standard is no reason to distort the statutory standard. See also infra text accompanying notes 146-48 (anomaly of applying heightened scrutiny to court orders remedying discrimination). Cf. infra text accompanying notes 353-57 (anomaly of applying more permissive standard to voluntary affirmative action than to court-ordered remedies); infra text accompanying notes 374-83 (anomaly of applying different standards to voluntary action in public and private sectors).


Although federal courts may not order or approve remedies that exceed the scope of a constitutional violation, this Court has not required remedial plans to be limited to the least restrictive means of implementation. We have recognized that the choice of remedies to redress racial discrimination is "a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court."

Id. (citations omitted). See also Franks, 424 U.S. at 785-86, 789-90, 794 (Powell, J., concurring in part and dissenting in part).

106. Sheet Metal Workers, 106 S. Ct. at 3056 (Powell, J., concurring in part and concurring in the judgment) ("[The District Court], having had the parties before it over a period of time, was in the best position to judge whether an alternative remedy, such as a simple injunction, would have been effective in ending petitioners' discriminatory practices.").


108. Id. at 1072, 1073-74 (opinion of Brennan, J.). See also infra text accompanying notes 157-61, 180-94.
ordered remedial quotas under Title VII. Nevertheless, since Justice Powell did not join the portion of Justice Brennan’s *Sheet Metal Workers* opinion articulating this standard, it may be argued that the statutory standard has not been definitively settled. A new justice who accepted that argument would not consider himself or herself bound by *stare decisis* in this regard.

If the statutory standard is different from the constitutional standard, the extent of the difference should not be exaggerated. In applying the abuse of discretion standard under Title VII, a court would examine the same kinds of factors that are relevant in applying the constitutional standard. Like the constitutional standard, the abuse of discretion standard does not sanction the “indiscriminate” imposition of quota relief. There must be a reason for imposing numerical relief, and if the trial court does not adequately explain the reason, an appellate court may conclude that an abuse of discretion has occurred. Under the statutory as well as the constitutional standard, quota remedies must bear a reasonable relationship to the violation they are designed to correct, and the numbers chosen must also be logically and factually defensible. A remedy that required an employer to hire unqualified or unneeded personnel would no doubt be deemed an abuse of discretion. Similarly, a remedy that imposed excessively harsh burdens on nonminority employees or applicants—such as, to take an extreme example, a requirement that 100% of new hires for a ten-year period be minorities—also would exceed the bounds of a trial court’s discretion.

At the same time, it should be recognized that quota relief is permissible in a variety of contexts. The range of permissible contexts includes, but is not limited to, cases such as *Sheet Metal Workers* where the defendant’s conduct has been so egregious that quota relief is necessary for the prophylactic purpose of assuring nondiscrimination and obedience to court orders. Justice Brennan’s opinion in *Sheet Metal Workers* noted that although quota relief may be unnecessary “[i]n the majority of Title VII cases,” it may be appropriate in a number of different situations. For example, it “may be appropriate where an employer or a labor union has engaged in persistent or egregious discrimination or where necessary to dissipate the lingering effects of pervasive discrimination.” In some cases, “requiring recalcitrant employers or unions to hire and to admit qualified minorities roughly in proportion to the number of qualified minorities in the work force may be the only effective way to ensure the full enjoyment of the rights protected by Title VII.” In other cases, even where discrim-

109. See infra text accompanying note 162.
110. *Sheet Metal Workers*, 106 S. Ct. at 3057 (Powell, J., concurring in part and concurring in the judgment).
111. Id. at 3050 (opinion of Brennan, J.).
112. Id. at 3034 (opinion of Brennan, J.) (emphasis added).
113. Id. at 3036 (opinion of Brennan, J.).
In addition, race-conscious affirmative action "may be necessary to dissipate the lingering effects of pervasive discrimination."

While racial imbalance unattributable to past discrimination is not such a lingering effect, imbalance that is attributable to past discrimination and defective current procedures is such a lingering effect. "Whether there might be other circumstances that justify the use of court-ordered affirmative action is a matter that we need not decide here."

The lower courts have approved the use of remedial employment quotas in a number of different contexts which commentators have categorized in various ways. Justice Brennan, writing for four justices in *Sheet Metal Workers*, cited many of the lower court decisions with approval, and Justice Powell has also cited several of these cases with approval. The same five justices held in *Paradise* that the trial courts enjoy a substantial measure of discretion in designing affirmative action remedies. The conclusion to be drawn is that the Brennan-Powell majority has endorsed the use of properly constructed numerical remedies in appropriate cases, and has not limited this endorsement to the most egregious situations. Unless and until the Court holds otherwise, it should be assumed that court-ordered

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114. Id. at 3036-37 (opinion of Brennan, J.).
115. Id. at 3037 (opinion of Brennan, J.).
116. Id. at 3050 (opinion of Brennan, J.).
117. Cf. id. (opinion of Brennan, J.) ("[R]ace-conscious affirmative measures [should] not be invoked simply to create a racially balanced work force.").
numerical remedies are lawful if they meet the statutory abuse of discretion standard and the constitutional standard presently to be discussed. In exercising its discretion, "a court should consider whether affirmative action is necessary to remedy past discrimination in a particular case before imposing such measures, and . . . the court should also take care to tailor its orders to fit the nature of the violation it seeks to correct."123

2. Constitutional Issues

In addition to the statutory issues discussed above, the Court has been required to face the question of the constitutionality of court-ordered quotas. The issues here revolve around the level of constitutional scrutiny to be applied to such remedies and their justifications, and the degree to which such orders must be "narrowly tailored."

a. Heightened Scrutiny

The Supreme Court has never definitively settled on a standard for reviewing the constitutionality of race-conscious affirmative action. Justices Brennan, Marshall, and Blackmun maintain that the remedial use of race is permissible if it is "substantially related" to achievement of "important governmental objectives."124 Justices Powell and O'Connor maintain that a remedial racial classification must be "narrowly tailored" to achieve a "compelling governmental interest."125 Justice White has subscribed both to the Brennan-Marshall-Blackmun test, which he co-authored,126 and to the notion of "strict scrutiny."127 Justice Rehnquist, who with Justice Stewart was the only justice to assert that race-conscious affirmative action is presumptively invalid in all circumstances,128 subsequently appeared to subscribe to the Powell test. However, Justice Rehnquist's apparent acceptance of the Powell test occurred in a case in which the test was applied to find an affirmative

123. Sheet Metal Workers, 106 S. Ct. at 3050 (opinion of Brennan, J.).
125. Paradise, 107 S. Ct. at 1064 n.17 (opinion of Brennan, J.); Sheet Metal Workers, 106 S. Ct. at 3054-55 (Powell, J., concurring in part and concurring in the judgment); Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842, 1846-47, 1849-51 (opinion of Powell, J.); id. at 1852-53 (O'Connor, J., concurring in part and concurring in the judgment); Fullilove, 448 U.S. at 496-98 (Powell, J., concurring); Bakke, 438 U.S. at 299 (opinion of Powell, J.).
126. Bakke, 438 U.S. at 359 (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part); id. at 387 (opinion of White, J.).
127. Id. at 291 (opinion of Powell, J.); id. at 387 n.7 (opinion of White, J.).
128. Fullilove, 448 U.S. at 522-27, 531-32 (Stewart, J., dissenting).
action program unconstitutional.\textsuperscript{129} Chief Justice Burger also subscribed to the Powell test.\textsuperscript{130} Justice Stevens has articulated different standards in different contexts. In one instance he disapproved a racial classification that a majority of the Court approved,\textsuperscript{131} while in other instances he voted with Justices Brennan, Marshall, and Blackmun to uphold affirmative action.\textsuperscript{132} Justice Scalia has not expressed himself individually on the issue. In the only case where he faced the issue, he joined Justice O'Connor's opinion dissenting from approval of race-conscious relief and purporting to apply the Powell test, but reaching a conclusion different from that reached by Justice Powell.\textsuperscript{133} In no case has one theoretical formulation of the controlling standard garnered the adherence of a five-justice majority.

In sorting out the foregoing configurations, and leaving Justice Stewart and Chief Justice Burger out of the analysis, the following conclusions of prospective significance emerge. Three justices are committed to the Brennan-Marshall-Blackmun standard, and Justice Stevens is committed to a standard that is in most instances more permissive than that standard. Two justices, Powell and O'Connor, are committed to the Powell standard, and two other justices, Rehnquist and Scalia, are apparently committed to that standard. Three of these four, however, have understood and applied that standard more strictly than Justice Powell.\textsuperscript{134} Justice White has supported both standards, but he has consistently voted against affirmative action in employment in the recent cases. Therefore, on the Court as constituted before Justice Powell's retirement, race-conscious affirmative action in employment (other than purely private affirmative action, which is not subject to constitutional constraints) had to meet Justice Powell's standard, as applied by Justice Powell, in order to survive constitutional scrutiny.\textsuperscript{135}

\begin{footnotes}
\item[129] Wygant, 106 S. Ct. at 1846-47, 1849-51 (opinion of Powell, J.).
\item[130] Id.
\item[131] Fullilove, 448 U.S. at 532-54 (Stevens, J., dissenting).
\item[132] Paradise, 107 S. Ct. at 1076-79 (Stevens, J., concurring in the judgment); Sheet Metal Workers, 106 S. Ct. at 3052-53 (opinion of Brennan, J.); Wygant, 106 S. Ct. at 1867-71 (Stevens, J., dissenting).
\item[133] Paradise, 107 S. Ct. at 1080-82 (O'Connor, J., dissenting).
\item[134] Compare Paradise, 107 S. Ct. at 1080-82 (O'Connor, J., dissenting) (court-ordered promotion quota does not satisfy Powell standard) with id. at 1066-74 (opinion of Brennan, J.) (court-ordered promotion quota does satisfy Powell standard) and id. at 1074-76 (Powell, J., concurring) (court-ordered promotion quota does satisfy Powell standard). See also infra text accompanying notes 159-61, 187-94.
\item[135] The Court has not yet addressed the question of the constitutional standard applicable in the context of gender-conscious affirmative action in employment. No constitutional issue was raised in Johnson. 107 S. Ct. at 1446 n.2.
\end{footnotes}
The theoretical differences between the Brennan-Marshall-Blackmun test and the Powell test should not be exaggerated. Both call for a form of heightened scrutiny of racially preferential affirmative action. As Justice O'Connor has noted, "the distinction between a 'compelling' and an 'important' governmental purpose may be a negligible one." Moreover, it is established that "remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program," and that the beneficiaries of such a program may include persons who are not themselves identified victims of discrimination.

With this much definitively settled, the manner in which the constitutional standard is applied is much more important than the theoretical formulation of the standard. In the context of court-ordered numerical relief in particular, it is clear that the governmental interest in overcoming a proven history of discrimination is a sufficient predicate for such relief against either a public sector or a private sector defendant. In addition, it is clearly permissible for the relief to benefit nonvictims.

Blackmun standard for review of race-conscious affirmative action. See supra note 124 and accompanying text.

The potential ironies of applying a more stringent standard to race-conscious affirmative action than to gender discrimination or to gender-conscious affirmative action have not escaped the notice of commentators. See, e.g., , L. TRIBE, AMERICAN CONSTITUTIONAL LAW 91-92 (Supp. 1979). Tribe states:

It is disturbing that, while the Court has not applied strict scrutiny to discrimination against women, against the young, or against aliens, Justice Powell was willing [in Bakke] to apply such scrutiny on behalf of a white male who not merely vicariously but individually had enjoyed a full measure of "power, authority, and goods."

Id. at 92 (footnotes omitted). See also Wright, supra note 28, at 219 ("Since the 'depressed condition' of minority persons in the United States is more intractable, and arguably more severe and politically divisive, than that of women, what supports the proposition that it is legitimate to help the latter, but not the former, to overcome past discrimination?"); Lamber, Observations on the Supreme Court's Recent Affirmative Action Cases, 62 IND. L.J. 243, 259 (1987). See also generally L. Tribe, supra, at 1043-52, 1063-70 (1978).

136. See, e.g., Wygant, 106 S. Ct. at 1846 (opinion of Powell, J.); id. at 1852-53 (O'Connor, J., concurring in part and concurring in the judgment); id. at 1861 (Marshall, J., dissenting). Cf. id. at 1868-71 (Stevens, J., dissenting) (evaluating legitimacy of governmental purpose and harm to white teachers).

137. Wygant, 106 S. Ct. at 1853 (O'Connor, J., concurring in part and concurring in the judgment).

138. Id.

139. See id.


141. Paradise, 107 S. Ct. at 1064-74 (opinion of Brennan, J.); id. at 1076-79 (Stevens, J., concurring in the judgment); Sheet Metal Workers, 106 S. Ct. at 3052-53 (opinion of Brennan, J.); id. at 3055-57 (Powell, J., concurring in part and concurring in the judgment).

142. See id.; supra note 139. See also supra text accompanying notes 78-95 (relief for nonvictims permissible under Title VII).
battleground is the interpretation of the requirement in the Powell test that the affirmative action be narrowly tailored to the governmental interest it is designed to serve.\textsuperscript{143} On this central issue, it is of paramount significance that the five-justice Brennan-Powell majority that emerged last term agreed on a flexible application of the Powell standard.\textsuperscript{144}

Before discussing that important development, a preliminary question concerning the constitutional standard in the context of court-ordered remedies must be addressed. That question is why any form of heightened constitutional scrutiny should be applicable at all in this context.

Federal court orders, unlike voluntary affirmative action programs by state agencies, are not state action under the fourteenth amendment. That amendment's limitations, therefore, are simply inapplicable in this context. However, federal court orders do constitute governmental action subject to the strictures of the equal protection component of the due process clause of the fifth amendment. The Court has assumed that such orders, whether issued against private sector or public sector defendants, are to be scrutinized under the same standard as state action establishing racial classifications.\textsuperscript{145}

The correctness of this assumption is not self-evident, because the federal court orders in question are issued for the purpose of remedying proven constitutional or statutory violations. In \textit{Paradise}, Justice Stevens argued forcefully and persuasively that it is anomalous for a federal court's equitable remedial discretion in such cases to be reviewed under a test that requires the court's orders to be narrowly tailored to achieve a compelling governmental interest.\textsuperscript{146} As Justice Stevens pointed out, "The notion that this Court should craft special and narrow rules for reviewing judicial decrees in racial discrimination cases was soundly rejected in \textit{Swann}."\textsuperscript{147}

In Justice Stevens' view, an employment discrimination case in which a judge orders a quota remedy does not differ from other cases involving equitable remedies for violations of constitutional (or, presumably, statutory) rights: the proper standard for review of such a remedy is whether the judge abused his discretion.\textsuperscript{148} This conclusion seems correct. Be that as it may, the Court has not accepted Justice Stevens' contention that close scrutiny is inappropriate in the court order context. Rather, it is settled that court-

\textsuperscript{143} See \textit{Wygant}, 106 S. Ct. at 1833 (O'Connor, J., concurring in part and concurring in the judgment).
\textsuperscript{144} See infra text accompanying notes 149-61, 163-95.
\textsuperscript{145} See \textit{Paradise}, 107 S. Ct. at 1064 (opinion of Brennan, J.); \textit{id.} at 1076 (Powell, J., concurring); \textit{id.} at 1080 (O'Connor, J., dissenting); \textit{Sheet Metal Workers}, 106 S. Ct. at 3052-53 (opinion of Brennan, J.); \textit{id.} at 3054-57 (Powell, J., concurring in part and concurring in the judgment).
\textsuperscript{146} 107 S. Ct. at 1076-77 (Stevens, J., concurring in the judgment).
\textsuperscript{147} \textit{Id.} at 1077 (Stevens, J., concurring in the judgment) (discussing \textit{Swann} v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971)).
\textsuperscript{148} \textit{Id.} at 1079 (Stevens, J., concurring in the judgment).
ordered quota relief is subject to some form of heightened constitutional scrutiny.

b. Tailoring

Given the lack of a five-justice majority for the Brennan-Marshall-Blackmun formula describing their heightened scrutiny test, the controlling question is the meaning of the Powell formula’s requirement that the court’s order be narrowly tailored to the remedial purpose it is designed to serve. Prior to the Sheet Metal Workers and Paradise cases, Justice Powell’s pronouncements on this question were ambiguous.

In upholding a minority business enterprise set-aside in Fullilove v. Klutznick, Justice Powell emphasized that the Constitution vests both the federal courts and the Congress with substantial discretion in choosing remedies to redress racial discrimination. He noted that the Court “has not required remedial plans to be limited to the least restrictive means of implementation.” In articulating a standard of judicial review, he declared that “[c]ourts must be sensitive to the possibility that less intrusive means might serve the compelling state interest equally as well. I believe that Congress’ choice of a remedy should be upheld, however, if the means selected are equitable and reasonably necessary to the redress of identified discrimination.”

In Wygant v. Jackson Board of Education, Justice Powell’s opinion striking down an affirmative action plan included an ambiguous footnote that could be read to call into question the foregoing statements in Fullilove. This footnote stated that “‘[t]he term ‘narrowly tailored’ . . . has acquired a secondary meaning. . . . [T]he term may be used to require consideration whether lawful alternative and less restrictive means could have been used. Or . . . the classification at issue must ‘fit’ with greater precision than any alternative means.”

In upholding the numerical relief ordered in Sheet Metal Workers, Justice Powell did not repeat or advert to the language in Wygant italicized in the preceding paragraph. In upholding the relief ordered in Paradise, Justice Powell joined Justice Brennan’s opinion, which reiterated Justice Powell’s language in Fullilove:

Nor have we in all situations “required remedial plans to be limited to the least restrictive means of implementation. We have recognized that

149. 448 U.S. 448 (1980).
150. Id. at 508-10 (Powell, J., concurring).
151. Id. at 508 (Powell, J., concurring).
152. Id. at 510 (Powell, J., concurring).
154. Id. at 1850 n.6 (opinion of Powell, J.) (emphasis added).
155. See Sheet Metal Workers, 106 S. Ct. at 3054-57 (Powell, J., concurring in part and concurring in the judgment).
the choice of remedies to redress racial discrimination is 'a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court.' "\textsuperscript{156}

Similarly, in \textit{Paradise} Justice Powell also subscribed to Justice Jackson's oft-quoted paean to equitable remedial discretion: "The framing of decrees should take place in the District rather than in Appellate Courts. They are invested with large discretion to model their judgments to the exigencies of the particular case."\textsuperscript{157}

Justice Powell's actions in \textit{Sheet Metal Workers} and \textit{Paradise}—in both cases over the dissents of the justices who are less receptive to affirmative action—have removed any ambiguity created by his opinion in \textit{Wygant}. The Brennan-Powell majority has established that the "narrowly tailored" prong of the Powell constitutional test is to be interpreted flexibly.\textsuperscript{158} Indeed, the dissenters in \textit{Paradise} challenged the majority on precisely this point: "The Court today purports to apply strict scrutiny, and concludes that the order in this case was narrowly tailored for its remedial purpose. Because the Court adopts a standardless view of 'narrowly tailored' far less stringent than that required by strict scrutiny, I dissent."\textsuperscript{159} According to the dissenters, "to survive strict scrutiny, the District Court order must fit with greater precision than any alternative remedy."\textsuperscript{160}

It is clear, therefore, that the five-justice Brennan-Powell majority has decisively rejected the stringent view of the tailoring concept advanced by Justice O'Connor and subscribed to by Chief Justice Rehnquist and Justice Scalia. Although the Brennan-Powell majority has not agreed on whether the Brennan-Marshall-Blackmun test or the Powell test is the appropriate theoretical formulation, it has agreed upon and emphasized two points: the Powell test must not be applied to make constitutional review of racial classifications "'strict' in theory and fatal in fact,"\textsuperscript{161} and the test leaves room for substantial discretion in the design of numerical remedies. This convergence of views greatly reduces the significance of the difference in the phrasing of the two contending tests. It should now be regarded as settled by \textit{Paradise} that the appropriate interpretation of the Powell test is the flexible interpretation articulated by the Brennan-Powell majority, not the more restrictive one adopted by the dissenting justices.

\begin{itemize}
  \item [156.] \textit{Paradise}, 107 S. Ct. at 1073 (opinion of Brennan, J.) (emphasis added) (citations omitted).
  \item [157.] \textit{Id.} at 1074 n.34 (opinion of Brennan, J.) (quoting International Salt Co. v. United States, 332 U.S. 392, 400-01 (1947)).
  \item [158.] Since Justice Stevens would apply a test that is more permissive than the Powell test, \textit{see supra} text accompanying notes 146-48, it follows \textit{a fortiori} that he would favor the most flexible application of the Powell test.
  \item [159.] \textit{Paradise}, 107 S. Ct. at 1080 (O'Connor, J., dissenting).
  \item [160.] \textit{Id.} at 1081 (O'Connor, J., dissenting).
  \item [161.] \textit{Id.} at 1084 n.17 (citations omitted) (opinion of Brennan, J.).
\end{itemize}
Various factors are taken into account in judging the acceptability of court-ordered numerical remedies and determining whether they are sufficiently narrowly tailored. Here again there is a convergence both of theoretical views and of practical application among the members of the Brennan-Powell majority. Under all three legal standards previously discussed—the abuse of discretion standard under Title VII, the Brennan-Marshall-Blackmun constitutional test, and the Powell constitutional test—the same factors are considered:

In determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.\(^\text{162}\)

c. Applying the Constitutional Standard to Court Orders

The Court applied the factors mentioned above in two cases involving court-ordered numerical remedies. In \textit{Sheet Metal Workers}, the Brennan-Powell majority approved an order establishing a goal of 29\% nonwhite union membership to be met within a specified time period. The order also required the defendants to contribute to a special employment, training, education and recruitment fund to be used to increase nonwhite membership in the union and its apprenticeship program.\(^\text{163}\) In \textit{Paradise}, the same majority approved an order that, subject to the availability of qualified black candidates, required at least 50\% of those promoted to each higher-than-entry-level rank in the Alabama Department of Public Safety to be black. The order was to remain in force until either the rank was 25\% black or the Department had developed and implemented a promotion plan for the rank that had no adverse racial impact.\(^\text{164}\) In both cases, the majority considered the factors mentioned above and concluded that the orders in question were narrowed tailored to achieve the compelling interests of remedying past discrimination and ensuring obedience to federal court orders.\(^\text{165}\)

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\(^{162}\) \text{id. at 1067 (opinion of Brennan, J.). Accord, id. at 1075 (Powell, J., concurring); Sheet Metal Workers, 106 S. Ct. at 3050-53 (opinion of Brennan, J.); id. at 3055-57 (Powell, J., concurring in part and concurring in the judgment).}

\(^{163}\) \text{Sheet Metal Workers, 106 S. Ct. at 3029-31 (opinion of Brennan, J.).}

\(^{164}\) \text{Paradise, 107 S. Ct. at 1062-64 (opinion of Brennan, J.).}

\(^{165}\) \text{id. at 1064-74 (opinion of Brennan, J.); id. at 1074-77 (Powell, J., concurring); Sheet Metal Workers, 106 S. Ct. at 3052-53 (opinion of Brennan, J.); id. at 3054-57 (Powell, J., concurring in part and concurring in the judgment). Cf. Paradise, 107 S. Ct. at 1076-79 (Stevens, J., concurring in the judgment) (not applying "narrowly tailored" criterion).}
i. Sheet Metal Workers

In *Sheet Metal Workers*, the Court held that the orders in question were necessary to remedy pervasive and egregious discrimination, and to vindicate the interest in obtaining compliance by recalcitrant defendants with other aspects of the district court’s orders. The Court also held that the quota relief was necessary to combat the lingering effects of past discrimination. The Court noted that these lingering effects included the lack of a number of nonwhite workers sufficiently substantial to make the system of employment through informal contacts nondiscriminatory and to negate the deterrent effect of the union's reputation for discrimination.166 As to the availability of alternative remedies, the Court held that the defendants' egregious and contumacious history of discriminatory actions and disobedience to court orders rendered the efficacy of less drastic relief highly questionable.167

The Court found the membership goal to be sufficiently flexible because it was subject to the availability of qualified nonwhite applicants and amenable to revision in light of changed economic circumstances. In the Court's view, the goal could not accurately be characterized as an excessively strict racial quota.168 Justices White and O'Connor disagreed with the majority on this point, contending that compliance with the goal would necessarily entail the displacement of incumbent white journeymen by minority apprentices.169 However, Justice Powell specifically noted that such displacement had not occurred and that if it did occur in the future, the defendants would be free to argue for relief from the goal's requirements.170 The membership goal, which coincided with the percentage of nonwhites in the available labor force, was appropriately calculated.171 The relief was sufficiently temporary since the preference for nonwhites would end as soon as the percentage of minority union members approximated the percentage of minorities in the local labor force. Therefore, the orders simply would remedy past discrimination, without attempting to maintain racial balance after it had been achieved.172

166. *Sheet Metal Workers*, 106 S. Ct. at 3050-53 (opinion of Brennan, J.); *id.* at 3054-57 (Powell, J., concurring in part and concurring in the judgment).
167. *Id.* at 3050-51, 3053 (opinion of Brennan, J.); *id.* at 3055-56 (Powell, J., concurring in part and concurring in the judgment).
168. *Id.* at 3051 (opinion of Brennan, J.); *id.* at 3056 (Powell, J., concurring in part and concurring in the judgment).
169. *Id.* at 3061-62 (O'Connor, J., concurring in part and dissenting in part); *id.* at 3062-63 (White, J., dissenting).
170. *Id.* at 3057 n.4 (Powell, J., concurring in part and concurring in the judgment).
171. *Id.* at 3056 (Powell, J., concurring in part and concurring in the judgment). *Cf.* *id.* at 3031-32 (opinion of Brennan, J.) (also noting that the correctness of the original 29% goal was not an issue properly before the Court).
172. *Id.* at 3052 (opinion of Brennan, J.); *id.* at 3056 (Powell, J., concurring in part and concurring in the judgment).
Finally, the relief’s impact on innocent third parties was not unacceptably severe even if, as Justice O’Connor contended, it would “spawn a sharp curtailment in the opportunities of nonminorities to be admitted to the apprenticeship program.” Justice Brennan noted that the order “did not require any member of the union to be laid off, and did not discriminate against existing union members.” He considered it significant that although whites “may be denied benefits extended to their nonwhite counterparts, the court’s orders do not stand as an absolute bar to such individuals; indeed, a majority of new union members have been white.” Justice Powell pointed out that the case was “distinguishable from Wygant where . . . ‘layoffs impose[d] the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives.’” As he explained, “‘[i]n cases involving valid hiring goals, the burden to be borne by individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose.’”

ii. Paradise

In Paradise, for the reason previously explained, Justice Stevens did not apply the Powell test. He simply noted his conclusion that the district court had not abused its discretion in shaping the quota remedy. The remainder of the Brennan-Powell majority reviewed the 50-50 promotion order in light of each of the relevant factors. Those justices held that the order was necessary to remedy past discrimination and its continuing effects, which included “a departmental hierarchy dominated exclusively by nonminorities.” Furthermore, the order was necessary to enable the Department to make promotions during the interim period in which a valid, nondiscriminatory procedure without adverse racial impact was being developed. The remedy was also supported by the interest in securing compliance with the court’s prior orders. Despite a vigorous dissent complaining of inadequate consideration of possible alternative remedies, the majority

173. Id. at 3062 (O’Connor, J., concurring in part and dissenting in part).
174. Id. at 3052 (opinion of Brennan, J.).
175. Id.
176. Id. at 3057 (citation omitted) (Powell, J., concurring in part and concurring in the judgment).
177. Id. For a further discussion of the differences between layoffs and other burdens on nonminorities, see infra text accompanying notes 327-37.
178. See supra text accompanying notes 146-48.
179. Paradise, 107 S. Ct. at 1079 (Stevens, J., concurring in the judgment).
180. Id. at 1065 (opinion of Brennan, J.).
181. Id. at 1069 (opinion of Brennan, J.).
182. Id. at 1066 (opinion of Brennan, J.).
183. Id. at 1081-82 (O’Connor, J., dissenting).
emphasized that the trial court had substantial discretion in selecting appropriate remedies and was not limited to the least restrictive means available.\textsuperscript{184}

The promotion order in \textit{Paradise} was sufficiently flexible for two reasons. First, it was subject to the availability of qualified black candidates. Second, it was sufficiently temporary because the quota provision would end either when the rank in question had attained the same percentage of blacks as the relevant labor force or when acceptable nondiscriminatory promotion procedures had been established.\textsuperscript{185} The 50-50 quota was acceptable even though the percentage of blacks in the labor force was only 25%; the 50-50 interim promotion rate merely increased the speed at which the ultimate 25\% goal would be attained.\textsuperscript{186} This approval of "catch-up" or "accelerated" quota relief, which the lower courts have ordered with some frequency,\textsuperscript{187} is extremely significant. The approval came over the vigorous objections of the dissenters, who argued:

The one-for-one promotion quota used in this case far exceeded the percentage of blacks in the trooper force, and there is no evidence in the record that such an extreme quota was necessary to eradicate the effects of the Department's delay. . . . [P]rotection of the rights of nonminority workers demands that a racial goal not substantially exceed the percentage of minority group members in the relevant population or work force absent compelling justification.\textsuperscript{188}

The Brennan-Powell response on this point was as follows:

Even within the narrow confines of strict scrutiny, there remains the requirement that the district court not only \textit{refrain} from ordering relief that violates the Constitution, but also that it \textit{order} the relief necessary to cure past violations and to obtain compliance with its mandate. There will be cases—this is one—where some accelerated relief is plainly justified.\textsuperscript{189}

Finally, the promotion order's impact on white employees was acceptable even though, unlike in a hiring case, the interests of identifiable incumbent employees were affected. "Because the one-for-one requirement is so limited in scope and duration, it only postpones the promotions of qualified whites,"\textsuperscript{190} "To be sure," Justice Brennan explained, "black applicants would receive some advantage. But this situation is only temporary, and is subject to amelioration by the action of the Department itself."\textsuperscript{191} Justice Powell noted

\textsuperscript{184} Id. at 1072, 1073-74 (opinion of Brennan, J.); \textit{id.} at 1076-79 (Stevens, J., concurring in the judgment).
\textsuperscript{185} Id. at 1070-71 (opinion of Brennan, J.); \textit{id.} at 1076 (Powell, J., concurring).
\textsuperscript{186} Id. at 1071-72 (opinion of Brennan, J.).
\textsuperscript{187} \textit{See}, e.g., \textit{Beecher}, 504 F.2d at 1026-27.
\textsuperscript{188} \textit{Paradise}, 107 S. Ct. at 1081 (O'Connor, J., dissenting).
\textsuperscript{189} Id. at 1072 n.32 (opinion of Brennan, J.).
\textsuperscript{190} Id. at 1073 (opinion of Brennan, J.).
\textsuperscript{191} Id.
that "[a]lthough the burden of a narrowly prescribed promotion goal . . . is not diffused among society generally, the burden is shared by the non-minority employees over a period of time."\textsuperscript{192}

Again, the dissenters objected that the quota had been imposed "without first considering the effectiveness of alternatives that would have a lesser effect on the rights of nonminority troopers."\textsuperscript{193} But unlike the dissenters, the Court attached weight to the fact that a remedy with a lesser effect on the rights of nonminority employees would provide correspondingly less relief for the proven violation of the rights of minorities. Justice Brennan explained:

\begin{quote}
It would have been improper for the District Judge to ignore the effects of the Department's delay and its continued default of its obligation to develop a promotion procedure, and to require only that, commencing in 1984, the Department promote one black for every three whites promoted. The figure selected to compensate for past discrimination and delay necessarily involved a delicate calibration of the rights and interests of the plaintiff class, the Department, and the white troopers. . . . This Court should not second-guess the lower court's carefully considered choice of the figure necessary to achieve its many purposes . . . .\textsuperscript{194}
\end{quote}

Thus the Court in \textit{Paradise} emphasized the deference to be accorded to the trial court's equitable remedial discretion.

\textbf{iii. Future cases}

\textit{Paradise} and \textit{Sheet Metal Workers} both presented particularly compelling factual circumstances for the award of numerical relief: pervasive, longstanding, egregious patterns of discrimination and recalcitrant foot-dragging in the face of prior court orders. However, the articulation and application of the constitutional test in the opinions of the Brennan-Powell majority in no way suggested that the availability of quota relief is limited to such aggravated cases.\textsuperscript{195} At the same time, the dissenting justices were unwilling, even in such aggravated circumstances, to approve numerical relief that the majority judged reasonable, and this underlines the significance of the 5-4 division on the Court in these cases. Nevertheless, the Brennan-Powell majority has established, at least in the court order context, a constitutional test of heightened scrutiny that is similar in application and result to the statutory test embodying an abuse of discretion standard.

\begin{itemize}
\item \textsuperscript{192} \textit{Id.} at 1076 (Powell, J., concurring).
\item \textsuperscript{193} \textit{Id.} at 1082 (O'Connor, J., dissenting).
\item \textsuperscript{194} \textit{Id.} at 1072 (opinion of Brennan, J.).
\item \textsuperscript{195} Cf. \textit{Supra} text accompanying notes 88-89, 93-108, 111-13 (same observation concerning the statutory test).
\end{itemize}
B. Consent Decrees

Consent decrees—judicial orders agreed to by the parties—are a frequent method of resolving employment discrimination litigation. Many such decrees provide extensive injunctive relief, including quota remedies.196 In Local Number 93, International Association of Firefighters v. City of Cleveland,197 the Supreme Court considered whether section 706(g) of Title VII198 precluded the entry of a consent decree which contained promotion quotas that might benefit individuals who were not identified victims of discrimination.199 The Court held that, whatever limitations section 706(g) places on a court’s ability to order such relief in contested litigation,200 it in no way limits the relief that may be afforded in a consent decree.201

Justice O’Connor and the members of the Brennan-Powell majority joined Justice Brennan’s opinion in this 6-3 decision. In dissent, Justice Rehnquist argued with some persuasiveness that “an order of the Court entered by the consent of the parties does not become any less an order of the Court,”202 and that the proper scope of a consent decree is limited “to that of implementation of the federal statute pursuant to which the decree is entered.”203 In Justice Rehnquist’s view, if section 706(g) would prevent a court from ordering certain relief in contested litigation, it would also prevent the court from ordering the same relief with the parties’ consent.204

The majority, however, did not consider the issue to be quite so simple and straightforward. Rather, it saw consent decrees as “hybrid”205 instruments embodying not only some of the characteristics of judgments entered after litigation, but also some of the characteristics of contracts.206 After reviewing the legislative history and the purpose of section 706(g), the Court held that “consent decrees are not included among the ‘orders’ referred to in § 706(g), for the voluntary nature of a consent decree is its most fundamental characteristic.”207 Therefore, whatever limits section 706(g) places on court-imposed quota relief, “[t]he limits on [voluntary agreements providing for race-conscious remedial action] must be found outside § 706(g).”208

198. See supra note 67.
199. 106 S. Ct. at 3066.
200. The Court discussed those limits in the Sheet Metal Workers case. See supra text accompanying notes 78-123.
201. Firefighters, 106 S. Ct. at 3076.
202. Id. at 3087 (Rehnquist, J., dissenting).
203. Id. at 3085 (Rehnquist, J., dissenting).
204. Id. at 3083, 3087 (Rehnquist, J., dissenting).
205. Id. at 3074.
206. Id.
207. Id. at 3075.
208. Id.
Three important consequences follow from the Court's analysis. First, "a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial." Although section 706(g) permits court-ordered numerical relief in a variety of situations, there are circumstances in which a court could not order such relief in contested litigation, but could approve the inclusion of such relief in a consent decree. For example, since the entire purpose of a consent decree is to arrive at a compromise settlement, the decree need not be supported by findings or admissions of past discrimination. Beyond this, the statutory limitations that do apply in the consent decree or voluntary action situation permit a greater degree of imprecision in connecting the relief ordered to a history of past discrimination than would be acceptable in the context of contested litigation; indeed, even "societal discrimination," as opposed to discrimination by the entity adopting the affirmative action plan, can provide a sufficient factual predicate. But the limitations applicable in the consent decree or voluntary action context are not insignificant. Parties may not agree to a consent decree (nor may a court approve one) that includes quota remedies and either lacks a factual predicate or imposes unduly on the interests of nonminorities.

The second consequence of the Court's analysis in Firefighters is that, for the same reason that section 706(g) does not enter into the analysis in the consent decree context, the equal protection component of the due process clause of the fifth amendment would seem to be inapplicable to consent decrees. This further differentiates the consent decree situation from contested litigation in which a court orders relief against the defendant. It means that constitutional limitations apply in the consent decree context only when the fourteenth amendment is implicated by the involvement of a public sector defendant. A private sector defendant who agrees to a consent decree may derive significant additional flexibility from the fact that the decree need

209. Id. at 3077.
210. See supra text accompanying notes 111-23.
211. See infra text accompanying notes 258-67.
212. See infra text accompanying notes 243-45, 275-81.
213. Compare Sheet Metal Workers, 106 S. Ct. at 3052 (opinion of Brennan, J.) (applying fifth amendment test) and id. at 3054-57 (Powell, J., concurring in part and concurring in the judgment) (applying fifth amendment test) with Firefighters, 106 S. Ct. at 3075 n.11, 3077-78, 3080 (no mention of fifth amendment) and id. at 3080 (O'Connor, J., concurring) (no mention of fifth amendment). See also Firefighters, 106 S. Ct. at 3076. In Firefighters, the Court stated: [I]t is the parties' agreement that serves as the source of the court's authority to enter any judgment at all. . . . [I]t is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree. . . . . . . Judicial enforcement is available whether race-conscious relief is provided in a collective bargaining agreement (as in Weber) or in a consent decree; only the form of that enforcement is different.

Id.
only satisfy the statutory standard for voluntary action, not any constitutional standard. The constitutional standard applied to remedies for an employer's past discrimination may not be precisely congruent with the statutory standard for voluntary action.\footnote{214} In addition, the constitutional standard applied to voluntary affirmative action \textit{not} predicated on an employer's own past discrimination may be significantly more stringent than the statutory standard.\footnote{215}

The third consequence of \textit{Firefighters} is that, again for the same reason that section 706(g) does not apply to consent decrees, other provisions of Title VII such as section 703(j) and section 703(h) would seem to be inapplicable. Although section 703(j) does not in any event limit relief based on a finding of discrimination in contested litigation,\footnote{216} section 703(h) does significantly limit a court's ability to interfere with seniority rights.\footnote{217} Under \textit{Firefighters}, it appears that if an employer and a union agree with a plaintiff in a Title VII suit to modify existing seniority rights, section 703(h) will not inhibit their ability to incorporate such relief in a consent decree. This is true whether or not the seniority system is bona fide and would otherwise be protected by section 703(h) (a factual question that will normally be unresolved in the consent decree context). This result is as it should be, since employers and unions normally are free to agree to modify seniority rights through collective bargaining,\footnote{218} and since there is no reason why section 703(h) should prevent collectively-bargained modifications from being included in a consent decree.

This is not to say, however, that there are no limitations on the ability to modify existing seniority rights or to engage in race-conscious preferential relief through the mechanism of a consent decree. For example, consent decrees obviously cannot resolve the claims of parties or intervenors who do not consent to them.\footnote{219} A decree to which a company and a union agree may alter the collectively-bargained seniority system, but a decree to which only the company agrees obviously cannot bind the union or the persons whom it represents, nor can it preclude them from having their objections.

\footnote{214. See \textit{Firefighters}, 106 S. Ct. at 3073 n.8. See also \textit{supra} text accompanying notes 124-62; \textit{infra} text accompanying notes 239-81.}
\footnote{215. See \textit{infra} text accompanying notes 290-307, 374-83.}
\footnote{216. See \textit{supra} text accompanying notes 57-66.}
\footnote{217. See \textit{supra} text accompanying notes 34-56.}
\footnote{218. See, e.g., \textit{Franks}, 424 U.S. at 778-79.}
\footnote{219. \textit{Firefighters}, 106 S. Ct. at 3079. The question whether objectors who do not intervene in a timely fashion may be precluded from a "collateral attack" on a consent decree is an interesting one. See \textit{Schwarzschild}, \textit{supra} note 196, at 922-29. The Court recently reviewed a case raising this issue but, being equally divided, was unable to resolve the issue. See \textit{Marino v. Ortiz}, 806 F.2d 1144 (2d Cir. 1986), \textit{aff'd by an equally divided court}, 56 U.S.L.W. 4090 (U.S. Jan. 13, 1988). See also \textit{Hispanic Soc'y of New York City Police Dep't v. New York City Police Dep't}, 806 F.2d 1147 (2d Cir. 1986), \textit{aff'd per curiam sub nom.} \textit{Marino v. Ortiz}, 56 U.S.L.W. 4090 (U.S. Jan. 13, 1988).}
adjudicated if the objections are raised in a timely fashion in an appropriate forum. Indeed, a company that unilaterally consents to modify a seniority system without adjudication of the system’s lawfulness under Title VII is potentially subject to damage awards for violation of the collective bargaining agreement.220 "Absent a judicial determination, the [Equal Employment Opportunity] Commission, not to mention the Company, cannot alter the collective-bargaining agreement without the Union’s consent."

It is even conceivable that a company entering into such a consent decree could become subject to a conflicting injunctive order enforcing the bargaining agreement. In that event, however, the courts ultimately would have to examine the merits of the underlying discrimination claim to determine whether the bargaining agreement or Title VII takes precedence.

Moreover, a court order modifying (or refusing to modify) a consent decree over the objection of one of the parties is subject to the same statutory and constitutional limitations as any other order in contested litigation.222 In addition, consent decrees themselves are subject to the same statutory (and, in the public sector, constitutional) objections that may be raised with regard to contractual agreements or other voluntary actions.223 The statutory limits on voluntary affirmative action provided by Title VII’s prohibitions of discrimination, sections 703(a)-(d),224 are discussed below,225 as are the constitutional limits provided by the fourteenth amendment in the public sector.226 The effect of Firefighters is simply to mandate that consent decrees in fair employment litigation be subject to and evaluated in terms of the same constraints—statutory, constitutional, and contractual—as voluntary affirmative action programs, and not in terms of whatever additional constraints may be applicable to litigated court orders. In this regard, "‘there does not seem to be any reason to distinguish between voluntary action taken in a consent decree and voluntary action taken entirely outside the context of litigation.’"227

There are, of course, some respects in which consent decrees are subject to a form of judicial review different from that applied to voluntary affir-

221. Id. at 771.
222. Firefighters, 106 S. Ct. at 3078-79; Stotts, 467 U.S. at 578 (‘‘The settlement theory . . . has no application when there is no ‘settlement’ with respect to the disputed issue.’’).
223. See Firefighters, 106 S. Ct. at 3073 n.8, 3075 n.11, 3077-78, 3080; id. at 3080 (O’Connor, J., concurring). As noted above, parties to consent decrees or other agreements are also potentially subject to liability for claims of persons whose contractual rights are adversely affected. See supra text accompanying notes 219-21; supra notes 219-20.
225. See infra text accompanying notes 234-81.
226. See infra text accompanying notes 282-337.
227. Firefighters, 106 S. Ct. at 3073 (footnote omitted).
affirmative action programs. For example, “a consent decree must spring from and serve to resolve a dispute within the court’s subject-matter jurisdiction. Furthermore, . . . the consent decree must ‘come within the general scope of the case made by the pleadings,’ . . . and must further the objectives of the law upon which the complaint was based.” In addition, in a private class action the court is required to review any proposed settlement pursuant to Rule 23(e) of the Federal Rules of Civil Procedure. A “fairness hearing” may also be appropriate in other contexts, and interesting questions arise concerning the proper nature and scope of fairness hearings in cases where the plaintiff is a private class as well as in cases where the plaintiff is a government enforcement agency. Firefighters does not purport to address these questions or other questions that may arise in connection with consent decrees.

C. Voluntary Affirmative Action

1. Statutory Issues

The same sections of Title VII considered in connection with litigated court orders must also be considered briefly here in connection with voluntary affirmative action. However, to the extent that Title VII limits voluntary affirmative action, the limitations are found instead in the basic nondiscrimination provisions of the statute.

a. Sections 703(h), 703(j), and 706(g):

Seniority Systems, Racial Imbalance, and Appropriate Relief

Voluntary affirmative action programs outside consent decrees, like those incorporated in consent decrees, are not limited by section 703(h), section


229. Firefighters, 106 S. Ct. at 3077 (citations omitted). See, e.g., United States v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1980) (trial court abused its discretion in refusing to approve consent decree containing hiring and promotion goals proposed by government and defendants).

230. See, e.g., Cotton v. Hinton, 559 F.2d 1326 (5th Cir. 1977) (trial court did not abuse its discretion in approving consent decree in private class action over objections of some class members).

231. See Schwarzschild, supra note 196, at 909-34. See also United States v. City of Jackson, 519 F.2d 1147 (5th Cir. 1975) (trial court properly denied motion by black employees to intervene in government enforcement action settled by consent decree); United States v. Libbey-Owens-Ford Co., 3 EmpI. Prac. Dec. (CCH) ¶ 8122 (N.D. Ohio 1971) (overruling objections of adversely affected male employees to consent decree in government enforcement action, where government and defendants had agreed to procedure for notice to all employees and opportunity to present objections) (consent decree reported at 3 EmpI. Prac. Dec. (CCH) ¶ 8052 (N.D. Ohio 1971)).

232. This term the Court considered a case raising the “collateral attack” question, but its disposition of the case lacked precedential significance. See supra note 219.
703(j), or section 706(g) of Title VII. Whatever one's view might be as to the correctness of the Firefighters decision concerning consent decrees, voluntary programs adopted outside the context of litigation are obviously neither based on a judicial finding of liability nor embodied in a court order.

b. Sections 703(a)-(d): Nondiscrimination

The only basis for attacking voluntary affirmative action under Title VII—whether or not the affirmative action is contained in a consent decree—is provided by sections 703(a)-(d). These sections define and prohibit unlawful discrimination by employers, employment agencies, unions, and joint apprenticeship and other training programs. They apply not only to discrimination against minorities and women, but to discrimination against white persons and men as well. A person claiming that he has been or will be injured by "reverse discrimination" perpetrated because of an affirmative action program may challenge the program under one of these sections. If the program is not embodied in a consent decree, the aggrieved person must file his own suit against the employer or other entity that allegedly discriminated or will be discriminating against him. The defendant may then raise its affirmative action program as a defense. If the program is embodied in a consent decree, the aggrieved person may present his challenge by intervening in the case in which the consent decree is being considered or has been entered, or he may attempt to pursue his own independent suit which challenges the action taken pursuant to the consent decree.

i. The Weber precedent

The Supreme Court first considered the legality of affirmative action under sections 703(a)-(d) in United Steelworkers of America v. Weber. In Weber, the Court upheld a collectively-bargained affirmative action plan that reserved for blacks 50% of the openings in an in-plant craft training program until the percentage of black craftworkers matched the percentage of blacks in the local labor force (39%). The Court held that in light of the legislative

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233. *Weber* held that although section 703(j) provides that Title VII shall not be interpreted to require preferential treatment to overcome racial or other imbalance, Title VII permits voluntary preferential treatment to overcome such imbalance. *See supra* note 60. *Weber* was reaffirmed in *Johnson*. *See infra* text accompanying notes 252-55.


236. *See Johnson*, 107 S. Ct. at 1449.

237. *See, e.g.*, *Hispanic Soc'y*, 806 F.2d at 1153-54.

238. If he follows this latter route, he may encounter the defense that he is engaged in an impermissible collateral attack on the consent decree. *See supra* note 219.


history and the purposes of Title VII, the statutory nondiscrimination provisions should not be read literally to prohibit all private, voluntary, race-conscious affirmative action plans. The Court abjured any effort to "define in detail the line of demarcation between permissible and impermissible affirmative action plans." The plan at issue was held to be permissible for three reasons: it was "designed to eliminate conspicuous racial imbalance in traditionally segregated job categories;" it did not "unnecessarily tramnel the interests of the white employees;" and it was "a temporary measure ... not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance."

Until last term it was not clear whether a majority of the present Court was committed to continued adherence to Weber. The five-justice majority in that case included Justice Stewart, who is no longer on the Court, and Justice White, who had subsequently raised a question as to the proper interpretation of the Weber opinion. Justice Rehnquist and Chief Justice Burger had dissented in Weber vigorously and at length. Justices Powell and Stevens had not participated, and in Bakke, Justice Stevens had interpreted Title VI of the 1964 Civil Rights Act as enacting a colorblindness standard. Justices O'Connor and Scalia were not on the Court when Weber was decided. Although there were indications in the 1986 decisions that Justices Powell, Stevens, and O'Connor accepted Weber as binding precedent, the indications were not entirely free of ambiguity.

The positions of the justices were clarified, and Weber was fully reaffirmed, in Johnson v. Transportation Agency, Santa Clara County, California. Six justices—the Brennan-Powell majority and Justice O'Connor—announced their adherence to Weber. Justice Stevens explained that stare decisis impelled him to adhere "without hesitation" to Weber's authoritative construction of Title VII even though he believed that construction to be erroneous. Justice O'Connor, more ambivalently but nevertheless defini-
tively, announced her adherence to Weber based on stare decisis. In dissent, Chief Justice Rehnquist and Justices White and Scalia announced that they favored overruling Weber. The result is that Weber is firmly established as governing precedent.

Prior to its decision in Johnson, the Court had not spoken to the question whether Weber's construction of Title VII applies to public sector employers, which are subject to the constraints of the fourteenth amendment. Johnson settled this question authoritatively and correctly: Weber does apply to public sector employers.

ii. Manifest imbalance

Another important question settled by Johnson concerns the meaning of Weber's requirement that an affirmative action plan be "designed to eliminate conspicuous racial imbalance in traditionally segregated job categories." Justice White had stated that he had understood the phrase "traditionally segregated job categories" to imply that prior discrimination by the company adopting the plan is a necessary predicate for racially preferential affirmative action, which must be justified as a remedy for such discrimination. The Brennan-Powell majority in Johnson firmly rejected that interpretation, pointing out that under such a rule the plan in Weber itself would not have been upheld.

For similar reasons, the Brennan-Powell majority rejected Justice O'Connor's position that Weber should be narrowed by interpreting "manifest imbalance" to mean an imbalance that would support a prima facie case that the employer had been guilty of discrimination. The Brennan-Powell majority's position on this issue is supported by the fact that in Weber itself the Court chose not to adopt the "arguable violation" theory discussed by Justice Blackmun in his concurring opinion, since that theory is similar to Justice O'Connor's prima facie case approach. In Johnson, the Court explained:

255. Id. at 1460-61 (O'Connor, J., concurring in the judgment).
256. Id. at 1465 (White, J., dissenting); id. at 1472-74 (Scalia, J., dissenting).
259. Firefighters, 106 S. Ct. at 3081 (White, J., dissenting); Johnson, 107 S. Ct. at 1465 (White, J., dissenting).
261. Id. at 1452-53 n.10.
262. Compare id. at 1452-53 (rejecting Justice O'Connor's position) with id. at 1461-63 (O'Connor, J., concurring in the judgment).
263. Id. at 1451. See Weber, 443 U.S. at 211-13 (Blackmun, J., concurring).
Weber held that an employer seeking to justify the adoption of a plan need not point to its own prior discriminatory practices, nor even to evidence of an "arguable violation" on its part. . . . Rather, it need point only to a "conspicuous . . . imbalance in traditionally segregated job categories." Our decision was grounded in the recognition that voluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace, and that Title VII should not be read to thwart such efforts. . . . A manifest imbalance need not be such that it would support a prima facie case against the employer, as suggested in Justice O'CONNOR's concurrence, since we do not regard as identical the constraints of Title VII and the federal constitution on voluntarily adopted affirmative action plans. Application of the "prima facie" standard in Title VII cases would be inconsistent with Weber's focus on statistical imbalance, and could inappropriately create a significant disincentive for employers to adopt an affirmative action plan.264

Therefore, Johnson has established a standard which defines the necessary factual predicate of manifest imbalance in terms that Justice O'Connor correctly characterized as "expansive."265 The most important consequence of this standard is that it permits an employer to justify affirmative action on the basis of imbalances attributable to "the effects of discrimination in the workplace."266 In other words, "societal discrimination" can be a sufficient justification for voluntary affirmative action so far as Title VII is concerned, even though it probably would not be a sufficient justification under the fourteenth amendment.267 This distinction is of substantial practical significance because private employers, unlike public employers, are not limited by the constitutional standard.

Johnson's reaffirmation of a broad interpretation of manifest imbalance would seem to validate the approach of the Executive Order program which requires federal contractors to take affirmative action to remedy "underutilization" of minorities in their work forces.268 The program upheld in Johnson was based on the same concept of "underrepresentation,"269 and the Court explicitly approved the use of the concept there.270 At the same time, the Court noted that the plan in Johnson "expressly directed that

265. Id. at 1461 (O'Connor, J., concurring in the judgment). See also Weber, 443 U.S. at 213-15 (Blackmun, J., concurring).
266. Johnson, 107 S. Ct. at 1451.
267. See infra text accompanying notes 291-98; Johnson, 107 S. Ct. at 1462-63 (O'Connor, J., concurring in the judgment).
270. Id. at 1453-55.
numerous factors be taken into account in making hiring decisions, including specifically the qualifications of female applicants for particular jobs.\textsuperscript{271} This is important because it is necessary to analyze a "specialized labor pool" in order to determine "underrepresentation in some positions. If a plan failed to take distinctions in qualifications into account in providing guidance for actual employment decisions, it would [improperly] dictate mere blind hiring by the numbers . . . regardless of . . . economic conditions or the number of qualified minority applicants . . . ."\textsuperscript{272} The Court also noted that the plan in Johnson, like the one approved in Weber,\textsuperscript{273} was temporary in the sense that it "was intended to attain a balanced work force, not to maintain one."\textsuperscript{274}

iii. Burdens on nonminorities

In considering whether the plan in Johnson unnecessarily trammeled the interests of male employees, the Court noted that the plan was less drastic than the one approved in Weber because it did not set aside any positions for women.\textsuperscript{275} In addition, the "denial of the promotion [to the complaining male employee] unsettled no legitimate firmly rooted expectation on the part of the petitioner. . . . [H]e retained his employment with the Agency, at the same salary and with the same seniority, and remained eligible for other promotions."\textsuperscript{276}

On the other hand, it should not go unnoticed that in two significant respects the action approved in Johnson was arguably more severe in its impact on nonminorities than the action at issue in Weber. First, in Johnson the complaining male employee was undeniably deprived of a particular promotion which he might well have obtained were it not for the affirmative action program.\textsuperscript{277} By contrast, in Weber the training opportunity denied to the complaining white employee would not even have existed in the absence of the affirmative action plan. Under the Weber plan, the prior practice of hiring trained outsiders was replaced with a program that created new opportunities for training and advancement for white as well as black employees, and simply reserved 50\% of those new opportunities for blacks.\textsuperscript{278}

Second, the white employee's complaint in Weber was not that he was more qualified than black employees who obtained the training opportunities in question, but that he had more seniority. Yet the plan which created the

\textsuperscript{271} Id. at 1455.
\textsuperscript{272} Id. at 1454 (citation omitted).
\textsuperscript{273} Weber, 443 U.S. at 208. See also supra text accompanying note 245.
\textsuperscript{274} Johnson, 107 S. Ct. at 1456.
\textsuperscript{275} Id. at 1455.
\textsuperscript{276} Id. at 1455-56 (footnote omitted).
\textsuperscript{277} Id. at 1468-69 (Scalia, J., dissenting).
\textsuperscript{278} Weber, 443 U.S. at 197-99.
opportunities in question and provided that they not be filled entirely on the basis of seniority was contained in a collective-bargaining agreement between the company and the union. In Johnson, by contrast, the trial court found not only that the female employee's sex was the determining factor in her obtaining the promotion in question, but also that the male employee was "more qualified." These findings were not overturned by the court of appeals. Although the Court adverted to very real reasons for being skeptical of these findings, it also did not overturn them. Therefore, Johnson must be read to approve the granting of a preference on the basis of sex to a female employee who was less qualified (albeit only marginally so) than the male employee over whom she was promoted.

2. Constitutional Issues

Most significant statutory issues regarding affirmative action in employment have been settled by the Court's recent decisions in the contexts of court orders, consent decrees, and voluntary action. Important constitutional questions in the court order context have also been settled. In the consent decree and voluntary action contexts, constitutional issues arise only in the public sector. This remaining area of discussion—constitutional constraints on voluntary affirmative action by public employers—is one in which certain issues have not yet been settled by any majority of the Court.

As explained above, although there is no general formulation of the constitutional standard of review that has been subscribed to by a majority of the Court, as a practical matter one should assume that the Powell standard must be satisfied in order for the Court to uphold race-conscious affirmative action imposed upon any employer—private or public—or voluntarily undertaken by a public employer. The Powell standard requires that the affirmative action in question be justified by a compelling governmental interest, and that it be narrowly tailored to achieve that interest. In the court order context, it is settled that the tailoring requirement should be flexibly interpreted. It is also settled that, in both the court order and

279. Id.
280. Johnson, 107 S. Ct. at 1449; id. at 1469 (Scalia, J., dissenting).
281. Id. at 1457 n.17; id. at 1464-65 (O'Connor, J., concurring in the judgment); id. at 1468-69 (Scalia, J., dissenting).
283. See supra text accompanying notes 124-62.
284. See supra text accompanying notes 213-15.
285. See supra text accompanying notes 124-35. As previously noted, the Court has not discussed the constitutional standard in the context of gender-conscious affirmative action in employment. See supra note 135.
286. See supra text accompanying note 125.
287. See supra text accompanying notes 149-61.
the voluntary context, remedying past discrimination by the governmental entity involved is a compelling interest justifying race-conscious affirmative action.\textsuperscript{288} The beneficiaries of such action need not be limited to identified victims of past discrimination.\textsuperscript{289}

With this much settled, four general questions remain open. First, apart from remedying past discrimination by the governmental entity involved, what other interests, if any, are sufficiently compelling to justify race-conscious affirmative action? Second, where past discrimination is the asserted justification, what constitutes a sufficient showing to support that justification? Third, is the tailoring requirement to be interpreted flexibly in the voluntary action context? Fourth, in evaluating burdens on innocent third parties from a constitutional perspective, how does one separate the permissible from the impermissible?

a. Compelling Interests

In the \textit{Wygant} case, the Court considered the constitutional validity of a collectively-bargained layoff system that gave preferential treatment to minority school teachers to the extent necessary to maintain the percentage of minority employment that had been reached prior to the layoffs.\textsuperscript{290} As the case came to the Court, the lower courts had justified the layoff policy by relying on “the [School] Board’s interest in providing minority role models for its minority students, as an attempt to alleviate the effects of societal discrimination.”\textsuperscript{291} Four members of the Court—Chief Justice Burger and Justices Powell, Rehnquist, and O’Connor—held that societal discrimination alone, without any showing of prior discrimination by the governmental unit involved, “is too amorphous a basis for imposing a racially classified remedy.”\textsuperscript{292} They also held that the role model theory is similarly unacceptable and “has no logical stopping point.”\textsuperscript{293} This holding did not muster a majority, however, because Justice White concurred in the judgment simply on the basis that “[n]one of the interests asserted by the board”—which in the Supreme Court included not only the role model and societal discrimination theories but also the interest in remedying the board’s own past discrimination\textsuperscript{294}—justified “this racially discriminatory layoff policy.”\textsuperscript{295}

\begin{itemize}
\item \textsuperscript{288} See supra text accompanying note 138.
\item \textsuperscript{289} See supra text accompanying note 139.
\item \textsuperscript{290} 106 S. Ct. at 1844-45 (opinion of Powell, J.).
\item \textsuperscript{291} Id. at 1847 (opinion of Powell, J.).
\item \textsuperscript{292} Id. at 1848 (opinion of Powell, J.). See also id. at 1854 (O’Connor, J., concurring in part and concurring in the judgment).
\item \textsuperscript{293} Id. at 1847 (opinion of Powell, J.). See also id. at 1854 (O’Connor, J., concurring in part and concurring in the judgment).
\item \textsuperscript{294} Id. at 1848-49 (opinion of Powell, J.).
\item \textsuperscript{295} Id. at 1857 (White, J., concurring in the judgment).
\end{itemize}
In view of Justice White's negative responses to affirmative action in all the recent cases, his failure to subscribe to Justice Powell's plurality opinion in *Wygant* may only theoretically withhold majority status from the rejection of the role model and societal discrimination justifications. On the other hand, Justice Stevens argued in dissent in *Wygant* that past discrimination by the school board was not a constitutionally necessary predicate for the affirmative action in question, which he believed was justified by the "sound educational purpose" of maintaining "'multi-ethnic representation on the teaching faculty.'"296 Justices Brennan, Marshall, and Blackmun argued that the plan "'was a legitimate and necessary response both to racial discrimination and to educational imperatives.'"297

*Wygant*, therefore, does not resolve definitively the question whether societal discrimination alone can be a sufficiently compelling governmental interest to justify an affirmative action program under the constitutional standard. Although societal discrimination is a sufficient justification under the Title VII standard,298 there is considerably less significance to the dispute over the constitutional standard than meets the eye. If a difference exists between the constitutional and the statutory standards, the constitutional standard is in any event applicable only to public employers. More importantly, if past discrimination by a public employer were the relevant constitutional test, it would not be difficult to meet in most instances where affirmative action might be thought appropriate, given the pervasive history of past discrimination in this country. Indeed, that standard was probably met in *Wygant* itself. In view of the state of the record, however, it is perfectly understandable that the plurality was unwilling to decide the case on the assumption that past discrimination by the school board existed.299

At the other pole from the theoretically unsettled question whether "'societal discrimination alone'"300 is constitutionally sufficient to justify race-conscious affirmative action, it is by no means established that past discrimination by the governmental entity involved is the only justification that

296. *Id.* at 1868 (Stevens, J., dissenting).
297. *Id.* at 1866 (Marshall, J., dissenting). See also *Bakke*, 438 U.S. at 362 (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part). The four justices stated:

Davis' articulated purpose of remedying the effects of past societal discrimination is . . . sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the Medical School.

*Id.*
298. See supra text accompanying notes 258-67.
299. Compare *Wygant*, 106 S. Ct. at 1858-60, 1862-63 (Marshall, J., dissenting) (discussing the facts) with *id.* at 1848-49 & n.5 (opinion of Powell, J.) (discussing the evidence) and *id.* at 1856-57 (O'Connor, J., concurring in part and concurring in the judgment) (discussing the evidence).
will withstand constitutional scrutiny. Justice Powell’s plurality opinion in Wygant stated that “the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination.”301 However, Justice O’Connor pointed out that “a state interest in the promotion of racial diversity [in a student body] has been found sufficiently ‘compelling,’ at least in the context of higher education, to support the use of racial considerations in furthering that interest.”302 She correctly cited Justice Powell’s opinion in Regents of University of California v. Bakke303 in support of that observation. She went on to state that “nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests . . . to be sufficiently ‘important’ or ‘compelling’ to sustain the use of affirmative action policies.”304

Justice Stevens, who in Wygant declared his view that “it is not necessary to find that the Board of Education has been guilty of racial discrimination in the past to support the conclusion that it has a legitimate interest in employing more black teachers in the future,”305 elaborated on this theme in the Johnson case. Although his comments in Johnson were made in the statutory context, they were sufficiently broad to apply in the constitutional context as well. Noting that in many cases employers might properly look to the future rather than to the past “to consider other legitimate reasons to give preferences to members of under-represented groups,” Justice Stevens quoted with approval from a law review article hypothesizing many such “forward-looking” justifications for affirmative action.306

In light of the views expressed by Justices O’Connor and Stevens, as well as the reliance by Justices Brennan, Marshall, and Blackmun on “educational imperatives” in Wygant,307 it may well be that, in an appropriate case, a majority of the Court would find a sufficient constitutional predicate for race-conscious affirmative action in considerations other than past discrimination by the governmental entity involved.

301. Id.
302. Id. at 1853 (O’Connor, J., concurring in part and concurring in the judgment).
304. Wygant, 106 S. Ct. at 1853 (O’Connor, J., concurring in part and concurring in the judgment).
305. Id. at 1867 (Stevens, J., dissenting).
306. Johnson, 107 S. Ct. at 1460 (Stevens, J., concurring) (citing Sullivan, The Supreme Court, 1985 Term—Sins of Discrimination: Last Term’s Affirmative Action Cases, 100 Harv. L. Rev. 78, 96 (1986) (giving as examples of other justifications improving the quality of education, improving services to black constituencies, averting racial tension, and increasing the diversity of a work force)).
307. 106 S. Ct. at 1866 (Marshall, J., dissenting); id. at 1863, 1866-67 (Marshall, J., dissenting).
b. Evidence of Past Discrimination

In *Wygant*, the Court also addressed the question of what showing is necessary when the asserted justification for affirmative action is past discrimination by the government employer. Unlike in the private sector, where manifest imbalance in a traditionally segregated job category is all that need be shown, the constitution may impose a higher evidentiary threshold. This question has little practical significance, except for the impact it has on a public employer's ability to compensate for societal discrimination rather than its own. Be that as it may, the Court did not produce a majority opinion on the question.

Justice Powell's plurality opinion for four justices in *Wygant* stated that "a public employer like the Board must ensure that, before it embarks on an affirmative action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination." If the employer's action is challenged by nonminority employees, "the trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary." Justice O'Connor, a member of Justice Powell's plurality, elaborated on this standard in a separate opinion. She emphasized that the employer's "remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required." She explained that such a firm basis for the Board's belief in "apparent prior employment discrimination" could be provided, for example, by "demonstrable evidence of a disparity between the percentage of qualified blacks on a school's teaching staff and the percentage of qualified minorities in the relevant labor pool sufficient to support a prima facie Title VII pattern or practice claim by minority teachers." Of course, a prima facie case under Title VII may be established either by a showing of disparate treatment (purposeful discrimination) or by a showing of disparate impact (discriminatory effect). Moreover, a prima facie case is by definition subject to

308. See *supra* text accompanying notes 258-65.
309. See *supra* text accompanying notes 266-67.
311. *Id.*
312. *Id.* at 1853 (O'Connor, J., concurring in part and concurring in the judgment).
313. *Id.* at 1856 (O'Connor, J., concurring in part and concurring in the judgment) (emphasis added). Justice O'Connor reiterated and further elaborated upon her proposed standard in *Johnson*, where she argued unsuccessfully that it, rather than the Brennan-Powell majority's interpretation of manifest imbalance, should also be the statutory standard. 107 S. Ct. at 1461-63 (O'Connor, J., concurring in the judgment). See also *supra* text accompanying notes 262-65.
314. See, e.g., *Teamsters*, 431 U.S. at 335-36 n.15.
rebuttal, and Justice O'Connor's articulation of the standard emphasized the governmental actor's belief in an apparent violation, rather than conclusive proof of an actual violation. In addition, the ultimate burden of persuasion in a reverse discrimination case rests with the person challenging the validity of the affirmative action program.315

Neither Justice Powell's nor Justice O'Connor's description in Wygant of the required quantum of proof was subscribed to by a majority, and the question cannot therefore be viewed as definitively settled. It seems fair to assume, however, that Justices Brennan, Marshall, Blackmun, and Stevens would subscribe to a formulation at least as permissive as Justice O'Connor's. Justice O'Connor also concluded that a contemporaneous finding by the governmental unit adopting the affirmative action program is unnecessary.316 This proposition should be regarded as definitively settled because Justice Powell's plurality opinion assumed sub silentio,317 and Justice Marshall's dissenting opinion stated explicitly,318 that a contemporaneous finding is not required.319

c. Tailoring

On the question of the degree of flexibility with which the "narrowly tailored" requirement is to be applied, Wygant also did not produce a

315. Wygant, 106 S. Ct. at 1848 (opinion of Powell, J.); id. at 1856 (O'Connor, J., concurring in part and concurring in the judgment); Johnson, 107 S. Ct. at 1449.
316. Wygant, 106 S. Ct. at 1853 (O'Connor, J., concurring in part and concurring in the judgment).
317. See id. at 1848-49 (opinion of Powell, J.). This reading of Justice Powell's opinion suggests a retreat by Justice Powell from his previously expressed insistence that "the legitimate interest in creating a race-conscious remedy is not compelling unless an appropriate governmental authority has found that [a constitutional or statutory] violation has occurred." Fulilove, 448 U.S. at 498 (Powell, J., concurring). Justice Powell's opinion in Wygant does not cite his opinion in Fulilove.

Of course, in Fulilove itself, Justice Powell applied his then asserted standard rather permissively, see id. at 502-06, noting that "[a]lthough the discriminatory activities were not identified with the exactitude expected in judicial or administrative adjudication, it must be remembered that 'Congress may paint with a much broader brush than may this Court.' " Id. at 506 (citation omitted). See also id. at 527 (Stewart, J., dissenting) ("The Court's attempt to characterize the law as a proper remedial measure to counteract the effects of past or present racial discrimination is remarkably unconvincing."); id. at 546 (Stevens, J., dissenting). Justice Stevens stated:

Just why a wealthy Negro or Spanish-speaking investor should have a preferred status in bidding on a construction contract in Alaska—or a citizen of Eskimo ancestry should have a preference in Miami or Detroit—is difficult to understand in light of either the asserted remedial character of the set-aside or the more basic purposes of the public works legislation.

Id.

319. Both Justice O'Connor and Justice Marshall advanced persuasive reasons for this conclusion. See id. at 1855-56 (O'Connor, J., concurring in part and concurring in the judgment); id. at 1862-63 (Marshall, J., dissenting).
majority approach. The question was addressed only in Justice Powell’s plurality opinion and in Justice O’Connor’s concurrence.

Justice Powell’s discussion merged the question of tailoring with the question of the burden on innocent third parties. He held that the tailoring of the layoff plan was not sufficiently narrow because the burden was too intrusive and “less intrusive means of accomplishing similar purposes—such as the adoption of hiring goals—were available.”

It is not clear what legal conclusion about tailoring should be drawn from this analysis, because the actual availability of less intrusive alternatives in _Wygant_ seems highly questionable. Justice Marshall argued in dissent that “[a]s a matter of logic as well as fact, a hiring policy achieves no purpose at all if it is eviscerated by layoffs.” Strictly speaking, this may be an exaggeration. However, Justice Marshall went on to point out that “neither petitioners nor any Justice of this Court has suggested an alternative to [the collectively-bargained layoff policy] that would have attained the stated goal [of preserving minority employment gains] in any narrower or more equitable a fashion. Nor can I conceive of one.” Justice Marshall’s point may be disputable as a matter of theory, because the goal of overcoming past discrimination need not necessarily include the goal of preserving a particular level of minority employment in the face of layoffs. Nevertheless, his criticisms of Justice Powell’s reasoning are sufficiently cogent to suggest that what really troubled Justice Powell in _Wygant_ was simply the burden of layoffs and not any problem of tailoring. If so, Justice Powell’s opinion does not provide much guidance on the broader question of the flexibility with which the tailoring criterion should be applied.

Justice O’Connor’s discussion of tailoring in _Wygant_ focused on the fact that the layoff provision was designed to safeguard a hiring goal which she believed was defective because the goal was keyed to the percentage of minorities in the student body rather than in the relevant labor force. If one assumes (contrary to Justice Marshall’s dissent) that Justice O’Connor’s criticism of the hiring goal was accurate and related to an issue properly before the Court, then the basis for her finding of a lack of proper tailoring was quite limited and fact-bound and provided little guidance on how she might apply the tailoring criterion in other contexts.

In any event, no opinion in _Wygant_ commanded a majority, and the ambiguity concerning the tailoring issue may well have been removed last

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320. _Id._ at 1852 (opinion of Powell, J.).
321. _Id._ at 1864 (Marshall, J., dissenting).
322. _Id._ at 1865 (Marshall, J., dissenting).
323. _Id._ at 1857 (O'Connor, J., concurring in part and concurring in the judgment).
324. _Id._ at 1860-61 n.3 (Marshall, J., dissenting).
325. In the court order context, Justice O'Connor subsequently applied the tailoring criterion in a manner which was rejected as unduly strict by the Brennan-Powell majority. _See supra_ text accompanying notes 159-61, 187-89, 193-94.
term. The flexible approach to the tailoring criterion adopted in *Paradise* by the Brennan-Powell majority does not on its face appear to be limited to the court order context. However, the *Paradise* opinion did rely in part on the concept of the chancellor's equitable remedial discretion. Since there are obvious differences between governmental units voluntarily adopting affirmative action programs and federal judges issuing orders upon a finding of discrimination, it is conceivable that the tailoring standard might be applied more strictly in the voluntary action context.

d. Burdens on Nonminorities

The constitutional limits on the burdens that may be imposed on innocent third parties were illuminated, although not definitively resolved, by *Wygant* and the subsequent cases. In *Wygant*, four justices (the Powell plurality minus Justice O'Connor, and Justice White) held that the racially preferential layoff policy imposed an unacceptable burden on white teachers, and that this burden rendered the policy unconstitutional. Justice Powell's opinion emphasized the distinction between race-based layoffs and racial hiring goals. The burden that hiring goals impose on innocent individuals "is diffused to a considerable extent among society generally," while "layoffs impose the entire burden of achieving racial equality on particular individuals . . . ." In addition, the injury imposed by layoffs—loss of an existing job, disruption of important settled expectations, and "serious disruption of . . . lives"—is more severe than mere denial of a future employment opportunity. The burden of layoffs "is too intrusive." In subsequent cases, the Brennan-Powell majority reiterated this distinction, upholding not only hiring goals but also promotion goals partly on the basis that the burdens there were both less severe and more diffuse.

326. See supra text accompanying notes 156-61.
327. *Wygant*, 106 S. Ct. at 1851-52 (opinion of Powell, J.); *id.* at 1857-58 (White, J., concurring in the judgment).
328. *Id.* at 1851 (opinion of Powell, J.).
329. *Id.* at 1851-52 (opinion of Powell, J.).
330. *Id.* at 1852 (opinion of Powell, J.).
331. *Sheet Metal Workers*, 106 S. Ct. at 3052-53 (opinion of Brennan, J.) (hiring goals); *id.* at 3056-57 (Powell, J., concurring in part and concurring in the judgment); *Paradise*, 107 S. Ct. at 1073 (opinion of Brennan, J.) ("Because the one-for-one requirement is . . . limited in scope and duration, it only postpones the promotions of qualified whites. Consequently, like a hiring goal, it 'impose[s] a diffuse burden, . . . foreclosing only one of several opportunities.' ") (citation omitted); *id.* at 1076 (Powell, J., concurring). Justice Powell stated:

Although the burden of a . . . promotion goal . . . is not diffused among society generally, the burden is shared by the nonminority employees over a period of time. . . . Although some white troopers will have their promotions delayed, it is uncertain whether any individual trooper, white or black, would have achieved a different rank, or would have achieved it at a different time, but for the
Of course, awards of competitive seniority to identified victims of discrimination are proper even though they have an adverse impact on non-minority employees when layoffs are based on seniority. Moreover, Justice O'Connor, a member of the five-justice majority that struck down the layoff plan in *Wygant*, explicitly reserved the question whether even non-victim-specific race-based layoffs might be constitutionally acceptable in some circumstances: "Nor is it necessary, in my view, to resolve the troubling questions of whether any layoff provision could survive strict scrutiny or whether this particular layoff provision could, when considered without reference to the hiring goal it was intended to further, pass the onerous 'narrowly tailored' requirement." Nevertheless, it seems unlikely that non-victim-specific racial preferences will be upheld under any circumstances in the layoff context.

The supposed distinctions that result in layoffs being placed in a class by themselves, apart from hiring and promotion preferences, are subject to serious question. Justice Marshall made a rather convincing case in *Wygant* that the layoff provision there was a reasonable collectively-bargained compromise in which the interests of all concerned were fairly and appropriately taken into account. In addition, Justice Stevens' criticism of the distinction between layoffs and other actions came close to being unanswerable, at least from a theoretical perspective:

> The fact that the issue arises in a layoff context, rather than a hiring context, has no bearing on the equal protection question. For if the Board's interest in employing more minority teachers is sufficient to justify providing them with an extra incentive to accept jobs in Jackson, Michigan, it is also sufficient to justify their retention when the number of available jobs is reduced. Justice POWELL's suggestion . . . that there is a distinction of constitutional significance under the Equal Protection Clause between a racial preference at the time of hiring and an

promotion requirement.

*Id. See also Johnson, 107 S. Ct. at 1455-56 (O'Connor, J., concurring in part and dissenting in part) ("[D]enial of the promotion unsettled no legitimate firmly rooted expectation on the part of petitioner. . . . [W]hile . . . [he] was denied a promotion, he retained his employment with the Agency, at the same salary and with the same seniority, and remained eligible for other promotions." (footnote omitted) (applying statutory standard, not constitutional standard)). Compare also *Wygant*, 106 S. Ct. at 1850-51 (opinion of Powell, J.) ("[In Fullilove, the challenged statute required at least 10 percent of federal public works funds to be used in contracts with minority-owned business enterprises. This requirement was found to be within the remedial powers of Congress in part because the 'actual burden shouldered by nonminority firms is relatively light.' (citation omitted) with Bakke, 438 U.S. at 319-20 (opinion of Powell, J.) ("[The Davis special admissions program] tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. . . . At the same time, the preferred applicants have the opportunity to compete for every seat in the class.").")  

333. *Id.* at 1857 (O'Connor, J., concurring in part and concurring in the judgment).  
334. *Id.* at 1858-60, 1863-66 (Marshall, J., dissenting).
identical preference at the time of discharge is thus wholly unpersuasive. He seems to assume that a teacher who has been working for a few years suffers a greater harm when he is laid off than the harm suffered by an unemployed teacher who is refused a job for which he is qualified. In either event, the adverse decision forecloses "only one of several opportunities" that may be available . . . to the disappointed teacher.33

Nevertheless, however pristine the logic of Justice Stevens' argument, this is a situation where practical considerations may overwhelm the theoretical perspective. Putting questions of legal theory aside, there are respects in which, at a fundamental level of lay perception and experience, and as a fundamental matter of personnel relations, race-based layoffs are more objectionable than race-based hiring. The consequences of being laid off—the burdens perceived and experienced—are considerably more severe than the consequences of not being hired in the first place. Both because of its immediate impact on the worker's present economic circumstances, and because of its impact on the worker's most basic expectations (whether or not those expectations are legally protected as a theoretical matter), a race-based layoff is perceived and experienced as the most threatening and offensive form of preferential affirmative action. It cannot be entirely inappropriate for the law to take into account these common sense realities of psychology, economics, and employee relations. By the same token, there is also some reason to be more concerned, and correspondingly more careful, about the impact of minority promotion quotas on other incumbent employees than about the impact of hiring quotas on rejected applicants. Incumbent employees must maintain cooperative relationships in the workplace, and employees disadvantaged by promotion quotas have expectations concerning opportunities for advancement based on their years of service to their employer. On the other hand, applicants for employment have no pre-existing relationship either with their prospective employer or with their prospective co-workers.

One may fairly question whether these kinds of distinctions are of constitutional dimension. It may be sufficient to rely on employers and unions to give appropriate weight to these considerations in the voluntary action context, and to rely on the informed discretion of judges in the court order context (where these and other questions of burden-weighing also may arise). However, the distinction Justice Powell has drawn between layoffs on the one hand, and hiring and promotion on the other, does bear the imprint of a certain practical wisdom. In this respect, the distinction between layoffs and other employment decisions may be similar to the distinction Justice Powell drew in Bakke between admissions programs which set aside a number of positions for minorities and programs which merely take race into account

335. Id. at 1870 n.14 (Stevens, J., dissenting) (citations omitted).
as one among many factors to be considered.\textsuperscript{336} What such distinctions lack in theoretical validity—and they can be attacked from both sides of the underlying philosophical argument\textsuperscript{337}—they may make up for in solomonic justice.

\section{II. Summary and Evaluation}

The Supreme Court has expended much effort, and has been closely divided, in its examination of the issues raised by affirmative action in employment. However, the most important issues in this area have now been settled, as explained in the preceding analysis. In summarizing and evaluating the Court's overall performance, it is convenient to discuss the statutory issues and the constitutional issues separately. It then seems appropriate to comment on certain overriding policy issues.

\subsection{A. Statutory Issues}

The language, legislative history, and purposes of Title VII have been well served by the Court's ventures in statutory interpretation.

\begin{itemize}
\item [336.] \textit{Bakke}, 438 U.S. at 315-20 (opinion of Powell, J).
\item [337.] \textit{E.g.}, \textit{compare} id. at 378-79 (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part) \textit{with} Bork, \textit{The Unpersuasive Bakke Decision}, Wall St. J., July 21, 1978, at 8, col. 4. In \textit{Bakke}, Justices Brennan, White, Marshall, and Blackmun stated:
\begin{quote}
Davis' special admissions program cannot be said to violate the Constitution simply because it has set aside a predetermined number of places for qualified minority applicants rather than using minority status as a positive factor to be considered . . . . For purposes of constitutional adjudication, there is no difference between the two approaches. In any admissions program which accords special consideration to . . . racial minorities, a determination of the degree of preference to be given is unavoidable, and any given preference that results in the exclusion of a white candidate is no more or less constitutionally acceptable than a program such as that at Davis. . . .
\end{quote}
\begin{quote}
. . . . That the Harvard approach does not also make public the extent of the preference and the precise workings of the system while the Davis program employs a specific, openly stated number, does not condemn the latter plan for purposes of Fourteenth Amendment adjudication. It may be that the Harvard plan is more acceptable to the public than the Davis "quota." . . . But there is no basis for preferring [as a matter of constitutional law] a particular preference program simply because . . . it proceeds in a manner that is not immediately apparent to the public.
\end{quote}

438 U.S. at 378-79. By comparison, Professor Bork has stated:
\begin{quote}
Justice Powell's middle position—universities may not use raw racial quotas but may consider race, among other factors, in the interest of diversity among the student body—has been praised as a statesmanlike solution to an agonizing problem. It may be. Unfortunately, in constitutional terms, his argument is not ultimately persuasive.
\end{quote}
\begin{quote}
. . . . (Justice Powell's rule may not prove remarkably different in action from Justice Brennan's, for it does not allow for the hypocrisy of many universities in this area. Race will be taken into account, and educators' candor may suffer more than quotas.).
\end{quote}

Bork, \textit{supra}, at 8, col. 4.
1. Litigated Court Orders

The Court interpreted section 703(h) in Stotts and Sheet Metal Workers as barring court-ordered interference with bona fide seniority systems except when necessary to provide make-whole relief to identified victims of discrimination.\textsuperscript{338} This interpretation is now established because it has been subscribed to by a majority of justices, and it is correct. If it is considered unfortunate that the beneficiaries of affirmative action in hiring may suffer some disadvantage as a result of lack of seniority, and that the effects of affirmative hiring efforts may be diluted to some extent as a result, it must be remembered that these consequences flow from clearly expressed congressional intent. As a matter of individual fairness and equity, the minority person who was not a victim of the employer's discrimination has scant basis to complain of being placed on the same footing as contemporaneously hired nonminorities for purposes of layoffs and other benefits governed by competitive seniority. As a matter of social engineering, Congress is free to amend Title VII in the unlikely event that it cares to ameliorate this result.

Sheet Metal Workers also correctly interpreted section 703(j) as having no effect on the availability of court-ordered remedial quotas, and this interpretation also is finnly established.\textsuperscript{339} There is an obvious difference between the concepts of liability and remedy, and between quotas to overcome imbalance and quotas to overcome proven discrimination. The Court properly read section 703(j) as incorporating these distinctions.

The Court's interpretation of section 706(g), as clarified in Sheet Metal Workers, is also correct.\textsuperscript{340} It is now established that section 706(g) does not preclude granting preferential relief to nonvictims. Make-whole relief is limited to victims of discrimination, but class-based affirmative relief is not. Any other rule would improperly tie the hands of a court of equity and also reward those defendants whose exclusionary policies have been most successful in deterring minority applicants. The Court's interpretation is consistent with the language, legislative history, and purpose of section 706(g).

Under the proper view of section 706(g), numerical relief is available in a variety of circumstances, and such relief is not restricted to the most egregious cases. The reasons why this should be regarded as established by the Brennan-Powell majority have been explained above.\textsuperscript{341} It is less clear whether it is settled that an award (or a denial) of numerical relief is to be reviewed under an abuse of discretion standard. The reasons for believing that this is the standard applied by the Brennan-Powell majority have been

\textsuperscript{338} See supra text accompanying notes 34-56.
\textsuperscript{339} See supra text accompanying notes 57-66.
\textsuperscript{340} See supra text accompanying notes 57-123.
\textsuperscript{341} See supra text accompanying notes 86-92, 111-23.
discussed above. In any event, the factors to be considered in reviewing such decisions are clearly established: the justifications for the relief; the connection between the relief and the violation; the propriety of the relief's formulation from the standpoints of flexibility, duration, and appropriate calculation of numbers and percentages; and the impact of the relief on nonminorities. These factors, and the manner in which the Brennan-Powell majority has applied them, are entirely consistent with an abuse of discretion standard.

2. Consent Decrees

_Firefighters_ establishes that consent decrees and any uncontested orders modifying or enforcing such decrees are to be treated exactly like voluntary action taken outside the litigation context insofar as Title VII's limitations on preferential affirmative action are concerned. Initially it may seem anomalous to ignore the fact that voluntary action agreed to in a consent decree is incorporated into a court order which, if violated, triggers the remedies for contempt. On balance, however, the Court has persuasively explained its treatment of consent decrees as voluntary action.

The practical consequences of this treatment are of limited significance. Contested orders issued under consent decrees are subject to the same standards as other litigated orders, and consent decrees do not by their mere existence resolve the claims of nonparties. It seems perfectly appropriate that the parties to a collective-bargaining agreement may modify its seniority provisions by consent decree if they could modify them by agreement outside of litigation, regardless of whether a court could achieve the same result within the constraints of section 703(h). Since section 703(j) does not limit court-ordered numerical remedies or voluntary affirmative action, there is no reason why it should affect consent decrees differently. Finally, although sections 703(a)-(d), rather than section 706(g), supply the operative limitations on affirmative action by consent decree, this has practical significance only to the extent that it allows a consent decree to provide relief for societal discrimination as well as for the defendant's discrimination. If that may be done by voluntary agreement—and it can under _Weber_ and _Johnson_—then the fact that the agreement is preceded by a lawsuit and incorporated in a court order should not and does not change the result.
3. Voluntary Action

The conclusion that sections 703(h), 703(j), and 706(g) of Title VII do not apply to voluntary affirmative action is obviously correct. The Court's interpretation of sections 703(a)-(d) to permit a broad range of freedom for voluntary affirmative action involving preferential treatment for minorities is subject to reasonable dispute as a matter of theory, but the dispute has been definitively resolved by Weber and Johnson. Although the Court's interpretation may be difficult to reconcile with the language of Title VII, the Court has convincingly explained why the legislative history and the purposes of Title VII are well served by its result. In addition, the Court's conclusion that Title VII's statutory standard applies to the public sector in the same way that it applies to the private sector is plainly correct.

The Court has adopted a "manifest imbalance" standard, rather than an "arguable violation" or a "prima facie case" standard, for judging the sufficiency of the factual predicate for affirmative action under Title VII. Manifest imbalance is a notably permissive standard. The potential for overbroad action due to sloppiness, market pressure, or political pressure does exist in the voluntary action context. By contrast, in the court order context, a finding of discrimination is the necessary predicate, and the affirmative action in question is carefully formulated by an independent federal district judge. To the extent that the standard of review in the voluntary action context is more permissive than in the court order context, an anomaly exists. However, although preferences for minorities are permissible in the voluntary action context, the burden of such preferences on nonminorities must be considered in the same way in that context as in the court order context. To that extent, the effect of the anomaly is reduced, though not eliminated. In any event, the Court's application of a "managerial discretion" rationale to give wide scope to voluntary affirmative action is probably consistent with the congressional intent in the private sector. Constitutional limitations further circumscribe voluntary action in the public sector.

350. See supra text accompanying note 233.
351. See supra text accompanying notes 239-57.
352. See supra text accompanying note 257.
353. See supra text accompanying notes 258-67.
355. See supra text accompanying notes 244, 275-81.
357. See supra text accompanying notes 282-337.
B. Constitutional Issues

The Court’s constitutional jurisprudence on affirmative action is less clearly settled than its statutory jurisprudence. However, if the standards that have been articulated are properly interpreted, the results will continue to be generally acceptable.

1. Litigated Court Orders

It is settled that court-imposed quota remedies are subject to some form of heightened constitutional scrutiny under the equal protection component of the due process clause of the fifth amendment. This is true notwithstanding Justice Stevens’ persuasive argument that it should not be the case.\(^{358}\) However, the Court has not agreed on a formula for heightened scrutiny either in the court order or in the voluntary action context. Neither the Brennan test nor the Powell test has been established as the appropriate formulation of the heightened scrutiny standard.\(^{359}\) The Brennan test would make the constitutional standard most closely parallel to the statutory standard both in the court order and in the voluntary action context. Nevertheless, in the court order context the Powell test, as interpreted and applied in \textit{Paradise} by the Brennan-Powell majority, is quite similar to the statutory standard.\(^{360}\)

It is established that a finding of past discrimination provides the necessary compelling interest to support preferential relief.\(^{361}\) The Brennan-Powell majority’s flexible interpretation of the tailoring standard abjures the limitations of a least restrictive alternative concept and affords to the district courts substantial room for the exercise of sound discretion.\(^{362}\) The factors to be considered in exercising this discretion are the same factors that are relevant under the statutory standard.\(^{363}\) The constitutionality of preferential relief to persons other than identified victims of discrimination is settled, and there is no reason to believe that such relief is permissible only in particularly egregious cases.\(^{364}\)

The foregoing theoretical parameters, coupled with the Court’s sensible and sensitive applications of the constitutional standard in \textit{Sheet Metal Workers}, in \textit{Paradise}, and (perhaps more debatably) in \textit{Wygant}, provide substantial reassurance that the results in the court order context will usually be acceptable even to an advocate of Justice Stevens’ position on court-
ordered relief. To the extent that a distinction has been drawn between layoffs on the one hand and hiring and promotion on the other, the result is one that commends itself in practice even if it is difficult to justify as a matter of theory.365

2. Consent Decrees

The same reasoning that frees consent decrees from the statutory restraints of section 706(g) of Title VII also necessarily frees them from constitutional restraints when the defendants are in the private sector.366 If one accepts the Firefighters reasoning in the statutory context, one must accept it in the constitutional context as well. To the extent that it seems anomalous to apply different standards in the private and public sectors, the anomaly applies to all forms of voluntary action, whether or not contained in consent decrees.

3. Voluntary Action

It is in the area of the constitutional limitations on voluntary affirmative action by a governmental entity that the greatest uncertainty remains in the wake of the Court's recent decisions. However, the questions that remain open are less important than those that have been settled or that seem close to having been settled.367

It is settled by Wygant that past discrimination by the governmental entity involved is a sufficiently compelling justification for preferential affirmative action, and that a contemporaneous finding of discrimination is not necessary to establish such a factual predicate.368 It may also be assumed that Justice O'Connor's articulation of the evidentiary standard for concluding that there has been apparent past discrimination—the prima facie case criterion—will be the controlling constitutional standard.369 Nothing indicates that the tailoring concept is to be applied differently in the voluntary action context than in the court order context.370 These results are satisfactory. The Court's method of assessing the burdens imposed on innocent third parties seems similar in the court order and voluntary action contexts and under the statutory and constitutional standards. However, it could be argued in future cases that greater burdens are tolerable when the justification is remedying past discrimination as opposed to some other asserted interest.371

365. See supra text accompanying notes 327-37.
367. See supra text accompanying notes 282-337.
368. See supra text accompanying notes 288, 316-19.
369. See supra text accompanying notes 310-16.
370. See supra text accompanying notes 320-26.
371. See supra text accompanying notes 327-37.
The Court has not determined what other interests may constitute sufficient justifications for racial classifications. Societal discrimination alone was declared insufficient by a four-justice plurality in *Wygant*, and this would probably be the view of a five-justice majority. A different five-justice majority might well find other justifications to be sufficient. It is appropriate that the Court is maintaining an open mind on this question.

The differences between the constitutional and the statutory limitations on voluntary action do create an anomaly to the extent that the constitutional limitations on public sector actors are more stringent than the statutory limitations on private sector actors. The differences in question revolve around two distinctions. The first distinction is between the prima facie case standard under the fourteenth amendment and the less stringent manifest imbalance standard under Title VII. The second distinction is between justifying affirmative action by reference to the employer's own past discrimination and justifying it by reference to the more expansive concept of societal discrimination. The anomaly arises because the fundamental objectives of the fourteenth amendment and of Title VII would appear to be the same: to eliminate discrimination and to overcome the continuing effects of prior discrimination.

If the legislative history and purposes of Title VII support providing wide latitude for voluntary affirmative action, it is not at all clear why the same is not true of the fourteenth amendment. From this point of view, symmetry should be achieved by equating the constitutional standard with the permissive statutory standard. From the opposite point of view, it has been argued that the statutory standard should be defined to incorporate the restrictive constitutional standard. It has also been argued that the constitutional and statutory standards should be symmetrical even though in one respect this may loosen the constitutional standard, and in another respect it may tighten the statutory standard.

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372. See supra text accompanying notes 290-99.
373. See supra text accompanying notes 300-07.
374. See supra text accompanying notes 258-70, 290-99, 308-19.
376. See Johnson, 107 S. Ct. at 1469-70, 1471-72 (Scalia, J., dissenting) (arguing that Weber should be overruled).
377. See *Wygant* v. Jackson Bd. of Educ., 106 S. Ct. 1842, 1855 (1986) (O'Connor, J., concurring in part and concurring in the judgment) ("Imposing a contemporaneous findings requirement would produce the anomalous result that what private employers may voluntarily do to correct apparent violations of Title VII, . . . Weber . . . , public employers are constitutionally forbidden to do to correct their statutory and constitutional transgressions."); *Johnson*, 107 S. Ct. at 1461 (O'Connor, J., concurring in the judgment) ("In my view, the
As the precedents now stand, symmetry on the issues in question may be achieved only by incorporating the more permissive statutory standard into the constitutional standard, because the statutory standard is firmly established. It is unlikely that this particular form of symmetry will soon be achieved. The asymmetry that remains is probably no more disconcerting than other peculiarities that have been noted: the possibility of finding some difference between the constitutional standard applicable to court orders and the standard of section 706(g) of Title VII; the oddity of applying heightened scrutiny to a court order remedying discrimination; and the anomaly of applying a more permissive standard to voluntary affirmative action than to court orders. These wrinkles in the law are not of overriding importance; the future of affirmative action does not hang in the balance.

So far as the present issues are concerned, it may simply be impossible to achieve perfect symmetry between the public sector and the private sector when two different sources of law are applicable. To consider another example, Title VII's proscription of discrimination is broader than the fourteenth amendment's since the former includes unjustified discriminatory effects while the latter includes only purposeful discrimination. If different constitutional and statutory definitions of prohibited discrimination may coexist, then it is perhaps no more anomalous for different constitutional and statutory definitions of the permissible scope of voluntary affirmative action to coexist. Of course, the former asymmetry of legal standards does not produce asymmetrical results because Title VII's more stringent statutory definition of prohibited discrimination has been extended to the public sector; thus public and private employers alike are subject to the more demanding standard of conduct. By contrast, in the present setting the results are in fact asymmetrical: because the constitutional standard for voluntary affirmative action is the more restrictive one, the public employer's freedom of action is more limited than the private employer's.

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378. Johnson, 107 S. Ct. at 1450 n.6 ("The fact that a public employer must also satisfy the Constitution does not negate the fact that the statutory prohibition with which that employer must contend was not intended to extend as far as that of the Constitution." (emphasis in original)).

379. See supra note 104.

380. See supra text accompanying notes 146-48.

381. See supra text accompanying notes 353-57.


However, the practical implications of this lack of symmetry are not particularly troubling. The governmental unit wishing to engage in affirmative action must be a bit more precise and meticulous than the private employer in articulating the justification for its actions. The governmental unit must also be more ready to acknowledge its own history of prior discrimination. If this leaves less room for hypocrisy or face-saving on the part of the governmental employer, the gain in public understanding and acceptance may outweigh the reduction, if any, in the allowable sweep of affirmative action.

C. Policy Issues

Broadly speaking, the results of the Court's recent decisions are threefold. First, the decisions recognize the values, as well as the costs, of affirmative action and require that attention be paid to both. Second, they afford ample room for the exercise of responsible discretion both by courts seeking to remedy proven discrimination and by employers wishing to engage in voluntary affirmative action. Finally, the decisions avoid incorporating absolutist or inflexible standards into the fabric of constitutional law.

Whether one applauds or deplores these results depends in significant part on one's attitude toward the desirability of affirmative action. If one regards a quota remedy even for a proven history of egregious, purposeful discrimination as "evil," one will naturally disapprove of the Court's recent decisions. The same will be true if one is prepared to label all voluntary affirmative action as politically motivated catering to "particular constituencies," or as resigned acceptance under federal government pressure of "the cost of hiring less qualified workers." My favorable evaluation of the Court's recent decisions should be sufficient to suggest that I do not share these negative views of affirmative action.386

384. *Firefighters*, 106 S. Ct. at 3085 (Rehnquist, J., dissenting). *See also Weber*, 443 U.S. at 254-55 (Rehnquist, J., dissenting) ("There is perhaps no device more destructive to the notion of equality than ... the quota. ... [It is] a creator of castes, a two-edged sword that must demean one in order to prefer another.").
385. *Johnson*, 107 S. Ct. at 1475-76 (Scalia, J., dissenting). *See also Scalia, The Disease as Cure: "In order to get beyond racism, we must first take account of race.",* 1979 Wash. U.L.Q. 147, 157 ("From racist principles flow racist results.").

Whatever may be wrong with today's affirmative action programs and quota systems, it should be clear that the evil, if any, is not the same [as the evil of programs that discriminated against blacks and women]. Racial and sexual minorities do not constitute the dominant social group. Nor is the conception of who is a fully developed member of the moral and social community one of an individual who is either female or black. Quotas which prefer women or blacks...
I will not attempt here to add to the extensive literature on the jurisprudential and philosophical theories for and against affirmative action. However, I will discuss the practicalities of the subject. My theoretical perspective corresponds to what Professor Gewirtz has called the "corrective" conception of antidiscrimination law. Under this conception, "[r]emedial strategies and transformative actions are appropriate to remove the effects of past discrimination."\(^{387}\) I also share Professor Gewirtz’s view that:

> Law mediates between the ideal and the real. . . . To be of the law, as opposed to philosophy and economic theory, . . . one must take reality as the primary realm of activity. . . . In law, reality is not a footnote to theory or an appendix to the ideal. . . . [L]aw is nothing without reality, . . . law can and does pursue the ideal, and . . . the distinctive drama of legal life is that it requires living well with both.\(^{388}\)

Of course, there is more than one conception of reality. Mine has been shaped by many experiences representing the government and private plaintiffs in Title VII litigation. Many of the cases in which I was involved resulted in the utilization of quota remedies. An early case will illustrate my conception of the relevant reality.

After a full trial on the merits against a sheet metal union and joint apprenticeship committee in Newark, New Jersey, the government moved for a preliminary injunction to deal with two limited problems pending entry of a final order in the case. The union had followed a practice of dispatching young men to work as "temporary apprentices" or "seasonal help" before the joint apprenticeship committee acted upon their applications. The men referred out in this manner, all of whom were white and many of whom had friends or relatives in the union, frequently worked as "temporary apprentices" for many months before their formal applications were acted upon. To preserve the court’s ability to provide effective relief for minority applicants in its final order, the government requested that no new appren-

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Ibid. Compare also sources cited supra note 385 with Wasserstrom, supra, at 619. Professor Wasserstrom states:

> Someone might argue that what is wrong with these programs is that they deprive persons who are more qualified by bestowing benefits on those who are less qualified in virtue of their being either black or female.

> . . . Part of what is wrong with even talking about qualifications and merit is that the argument derives some of its force from the erroneous notion that we would have a meritocracy were it not for affirmative action.

Ibid. (footnote omitted).


AFFIRMATIVE ACTION IN EMPLOYMENT

The government also requested that, in the interim, any further referrals of seasonal help be on the basis of one black or hispanic applicant referred for each one white applicant referred. The court entered the one-for-one preliminary injunction requested by the government. This order was included among those cited by the Supreme Court in its recent *Sheet Metal Workers* case.389

The following is an excerpt from the hearing on the government's motion for preliminary injunction. The case was heard by the late Judge Robert Shaw, who, in chambers conferences with the attorneys for the parties, had expressed his skepticism about quotas and pointedly informed us that if the government was not satisfied with any order he entered in the case, there was always the United States Court of Appeals for the Third Circuit.

MR. SELIG [For the government]: ... [T]here are not very many jobs available at the moment for temporary apprentices. ... I think that in and of itself shows what the defendants have done, because the reason there are no jobs available is that all the jobs have been taken by the seventy or so whites who were put to work, half of them since the spring of 1970, and one of the reasons for our motion is that the pipeline which leads to apprenticeship has gotten clogged with a large group of whites, and unless this injunction is entered it's going to be very difficult for non-whites to get into this. ... [T]he defendants say that there were only two jobs available since the conclusion of the trial. They have both been filled by blacks, but I don't think that this obviates the necessity for a preliminary injunction which is concerned (a) with preventing them from indenturing a group of seventy white apprentices and then making it impossible for any blacks to be indentured for the next year or perhaps two years, and (b) with just arriving at an equitable procedure for referring persons who seek work as temporary apprentices.

MR. PYKON [For the union and the joint apprenticeship committee]: ... [W]ithout prejudice, of course, ... we will certainly consent to the first paragraph of counsel's proposed injunction which is that we will be enjoined and restrained from engaging in any act or practice the purpose or effect of which is to discriminate on account of race or national origin against Negroes or Spanish-surnamed Americans. I would, like to even amend that to say any person, which has been the union's position at all times from the start of this trial, and I might add from the start of the inception of this case it has been the union's position.

THE COURT: Well, let's stay with the practical aspects of the matter. We don't have any problem with discrimination against whites, so you can eliminate your theoretical argument on that.

MR. PYKON: ... [I]n any event, to show what the union has been doing,

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since we were in court there were only two jobs and only Negroes were considered. We thought we might show the good faith of the union. . . .

Mr. Pykon: I don't know what your Honor means or has in mind.

The Court: Since over the years all the jobs have been given to white people, it would seem in order to correct that imbalance let the black people have some of them.

Mr. Pykon: You mean racial discrimination in reverse?

The Court: I told you before, counsel, that is an impractical approach. Don't try to tell me that in employment there is discrimination against white people. You know it is not so, and I know it is not so. Let's stick with the problem that we have. Discrimination against black people, that is what we want to correct.

Mr. Pykon: That is right, your Honor, but—Well, I am saying the first paragraph of counsel's order—his proposed order, is that we will not take any act or practice which will have the purpose or effect to discriminate on account of race or national origin.

The Court: I can see if I let that stand alone without more specific requirements every time a matter comes up I will have you arguing that the action taken didn't affect them. I have had these situations where generalities are present in orders. They actually settle nothing.

Mr. Pykon: I don't believe that the people should be referred on a one-for-one basis, white against black. If that was the case, your Honor, then since the time of the last hearing one less Negro would have been working at this time because one white would have been submitted.

The Court: Your only objection to Paragraph No. 3 is that you feel No. 3 deprives black people of jobs?

Mr. Pykon: I say this: If that test would have been in force at the time of the last hearing that would be the practical effect. That is not my entire argument, to phrase it in that manner. My argument is that they should be referred out on some other criterion than just race. . . . That is my objection.

The Court: I think the only condition would be qualification for the job.

Mr. Pykon: I would agree.

The Court: And I am sure among the black people you have qualified people, and I would be inclined to direct that there be a record of the reasons for finding disqualification.

Mr. Pykon: We have no objection to that.

The Court: I am also of the opinion that until some [im]balance is corrected the preference should be given to black people until we get something near a fair ratio.

Mr. Selig: . . . [Y]our Honor, for this seasonal help there are no qualifications that have been required in the past.

The Court: I know that. . . . What do you have to say about this one for one at the present time? It might take fifteen years before this situation is even partially corrected.

Mr. Selig: Yes, your Honor. We would have no objection to going farther than that. We just propose this as one way of doing it. If your
Honor wishes to order that until there are the same—
The Court: Until the final decree. I am inclined to order that priority be given minority groups until the final decree.
Mr. Selig: That would be fine with us.
The Court: I will take out the one for one that you object to.
Mr. Pykon: I don't know what your Honor means by "priority." Does this mean exclusively?
The Court: Yes.
Mr. Pykon: Exclusively.
The Court: Yes. You've only got three or four working out of seven hundred.

Mr. Selig: This order is drawn on a fifty-fifty assumption. If what you feel should be entered is one which is more stringent than that, I can draft that this afternoon . . . .
The Court: Do nothing further. I will look at what you have. If I feel that any changes should be made in it I will make the changes . . . . I may accept your one-for-one proposition because even though there is serious imbalance now the men likely to be employed, from what I have heard, are young men, and I see no reason why there should not be equal opportunity to all young men regardless of color. One for one is a realistic approach, [though] I hope in some manner or other to correct the present imbalance that exists. Maybe that can be done with a final decree, but I will give this consideration.390

Judge Shaw entered the one-for-one order shortly after this hearing. He, like many other judges before and after him, had heard the evidence and viewed the problem to be resolved in practical, nonideological terms. What he searched for was a solution to the problem that was fair, equitable, and even-handed, taking into account both the interests of the groups that had been discriminated against and the interests of innocent third parties. He approached his task with the benefit of a thorough, first-hand knowledge of the facts and the parties, and with a keen understanding of what was necessary to produce corrective results.

Judge Shaw, like scores of other federal district judges who have issued quota orders over the years, was in a far better position to weigh the equities and formulate a remedial decree than appellate judges with only a cold record to review. A constricting standard of appellate review was not necessary to assure that he would exercise his equitable remedial discretion in a responsible fashion. He, like other district judges, could be counted upon to approach his task with realism and with sensitivity. The objective and the result of the quota he ordered was to remedy exclusion and to mandate inclusion, not to exclude or to stigmatize any group or individual.

It is true that with a finite number of jobs to be allocated, every additional job for a minority applicant means one less job for a nonminority applicant. But this reality is no reason to abandon the corrective endeavor or to abjure meaningful remedies for proven wrongs. At the same time, any quota order should be responsive to the factual record in the case. A reasoned explanation should support the issuance of such an order and the extent and duration of the numerical requirements. The order should not require employers to hire unneeded or unqualified individuals, nor should it freeze nonminorities out of all participation in future employment opportunities. Any quota requirement must be subject to the availability of qualified minority applicants, and the ratio ordered in a case involving airline pilots might well differ from that in a case involving sheet metal workers. Federal district judges may be relied upon to be aware of these limitations and considerations, and they may be trusted to exercise their discretion sensibly in these cases. The Court's recent decisions both recognize and insure that this will be so.\(^{391}\)

When one moves from the court order to the voluntary action context, there is not quite the same basis for confidence that affirmative action will be carefully formulated.\(^ {392}\) That is why it is anomalous to apply a less restrictive standard to voluntary action than to court orders.\(^ {393}\) Nevertheless, the fears of abuse articulated by some who are troubled by affirmative action\(^ {394}\) seem greatly exaggerated. The image of employers blithely filling their workforces with incompetents because of the pressures to engage in affirmative action seems far removed from reality. It is equally unrealistic to assume that a scientific basis exists for choosing the "best qualified" applicant for every job. In a footnote in Johnson, the Court said plainly what everyone knows, but many opponents of affirmative action are loath to acknowledge:

The dissent predicts that today's decision will loose a flood of "less qualified" minorities and women upon the workforce . . . . A . . . fundamental . . . problem with the dissent's speculation is that it ignores the fact that "[i]t is a standard tenet of personnel administration that there is rarely a single, 'best qualified' person for a job. An effective personnel system will bring before the selecting official several fully-qualified candidates who each may possess different attributes which recommend them for selection. Especially where the job is an unexceptional, middle-level craft position, without the need for unique work experience or educational attainment and for which several well-qualified candidates are available, final determinations as to which candidate is 'best qualified' are at best subjective."\(^ {395}\)

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391. See supra text accompanying notes 86-123, 143-95.
392. See, e.g., Days, supra note 140, at 458-60, 463-65, 471-76.
393. See supra text accompanying notes 146-48, 353-57.
394. See, e.g., Johnson, 107 S. Ct. at 1474-76 (Scalia, J. dissenting); Scalia, supra note 385, at 148-57.
395. 107 S. Ct. at 1457 n.17 (citation omitted).
This observation may fairly be made with regard to the vast majority of jobs to which affirmative action will be applied. In those instances where it is not accurate, weighty reasons of self-interest provide ample motivation for the employer to select the best qualified applicant.

The idea that standardized tests or other credential requirements provide a scientific basis for a purely meritocratic system may be seductive to some, but it is belied by common sense and by the vast number of litigated cases in which the unfairness and limited utility of many widely used selection devices have been documented. In one such case the court made the following trenchant observation:

[It] is apparent that no applicant for public employment can base any claim of right . . . upon an eligibility ranking which results from unvalidated selection procedures that have been shown to disqualify blacks at a disproportionate rate. This is so because by definition such criteria have not been shown to be predictive of successful job performance. Hence, there is no reliable way to know that any accepted applicant is truly better qualified than others who have been rejected. Until the selection procedures used by the defendants here have been properly validated, it is illogical to argue that quota hiring produces unconstitutional "reverse" discrimination, or a lowering of employment standards, or the appointment of less or unqualified persons.

Common experience tells us that the situation this observation describes is the rule rather than the exception, both in the private and in the public sector.

This is not to suggest that qualifications are irrelevant or that, even though relevant, they should not be taken into account. But there is no question that mistakes will occur and that individual injustices will be perpetrated when employment decisions are made, whether or not affirmative action is a factor that enters into the equation. It would be unrealistic, ahistorical, and insensitive to the lingering effects of past discrimination to demand that the positive values of affirmative action be scrapped in favor of a meritocratic ideal which we lack the means to achieve. Recognizing this, the Court's recent decisions seek to provide a reasonable degree of flexibility for affirmative action that is responsive to social and historical realities.

At the same time, the Court has properly recognized that competing values and interests exist in this area and are entitled to weight. Hence, the Court has insisted that the burdens of affirmative action on nonminorities not be excessive; that preferential remedies not be employed "indiscriminate[ly];" that voluntary affirmative action not degenerate to "blind hiring by the
numbers;"\textsuperscript{399} and that the justification for an affirmative action plan not be so attenuated or amorphous as to lead to "remedies that are ageless in their reach into the past, and timeless in their ability to affect the future."\textsuperscript{400} The Court's approach to affirmative action has been careful and cognizant of the dangers of excess. But the Court has wisely avoided locking itself, the federal judiciary, or the nation's employers into a constitutional straight-jacket.

CONCLUSION

The Supreme Court's decisions on affirmative action in employment have settled the most important statutory and constitutional questions. Although the Court has been closely divided, respect for \textit{stare decisis} counsels adherence to the principles which have been established. The decisions the Court has reached reflect a laborious and conscientious effort over an extended period of time. Whatever his or her personal views might be, a new justice will not write on a clean slate. In this area of the law of affirmative action, a new justice could find ample reason to preserve the legacy of a Supreme Court majority.

\textsuperscript{399} Johnson, 107 S. Ct. at 1454.
\textsuperscript{400} Wygant, 106 S. Ct. at 1848 (opinion of Powell, J.).