

UTAH STATE BAR – LABOR & EMPLOYMENT SECTION
2008 ANNUAL SEMINAR
AFFIRMATIVE ACTION PRESENTATION
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Case Study

- HighHopes.Com has decided it needs to “downsize.” The reduction has been approved by its Board of Directors and each department has been told how many employees it must lay off. The Strategic Thoughts and Images Department has been instructed to select one employee for layoff.
- HighHopes has a written layoff policy which requires that layoffs be made strictly by seniority. To minimize the time spent interviewing job applicants, HighHopes hired only on Friday. Thus, the last two employees hired in the S.T. and I. Department were hired on the same day. HighHopes did not bother with performance evaluations; thus cannot objectively compare the employees’ performance. One of the employees is a white female, the other is a black female. The black female employee is the only black employee in the department. HighHopes has government contracts and an affirmative action plan copied from one written by another company which states: (1) in all employment decisions, the most qualified candidate will be selected; and (2) when candidates appear to be of equal qualifications, individuals identified as minorities for statistical purposes will be selected.
- No race discrimination charges had been filed against HighHopes before it adopted its affirmative action program. HighHopes’ EEO-1 reports show underutilization of blacks in comparison with the percentage of blacks in the local census.
- HighHopes considered having the two employees draw lots to determine who would be laid off, but rejected that option. Instead, HighHopes’ H.R. Director insisted the company use its affirmative action policy to break the tie. The H.R. Director drafted a letter to the white, female employee explaining that the company had decided to rely on its commitment to affirmative action as its means of breaking the seniority tie and stating that, as a result, she is being terminated.
- Before the letter was signed, someone in the company leaked this decision to the white female employee who went to HighHopes’ president and said she has an attorney and will sue HighHopes for reverse discrimination if she is terminated. The company president just called you for advice. What are your actions and recommendations?

**UTAH STATE BAR
LABOR AND EMPLOYMENT LAW SECTION**

AFFIRMATIVE ACTION

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INTRODUCTION

Q. *What is affirmative action?*

A. Preferential treatment for members of designated groups (i.e., African-Americans, women, and certain ethnic groups).

Q. *Where does affirmative action come from?*

A. Originally, from the executive branch. Executive orders direct administrative agencies to include affirmative action provisions in their procurement programs. The Code of Federal Regulations thus includes affirmative action provisions in almost every chapter. State and local government entities have adopted affirmative action provisions which have tended to parallel those implemented by the federal executive branch (example, Richmond, Virginia's minority set-aside provisions which we will discuss in connection of the City of Richmond v. J.A. Croson Co. case). Federal administrative agencies have established affirmative action schemes (example, the Federal Communications Commission's preferences for minority owned or managed broadcasters which we will discuss in connection with the Metro Broadcasting case). In some cases it has come directly from Congress (example, the minority business enterprise provisions of the Public Works Employment Act which this paper will discuss in connection with the Fullilove case). On their own initiative, universities have adopted preferential minority admissions programs (example, those litigated in University of California Regents v. Bakke). Injunctions and consent decrees in some employment cases involved remedial measures which could fairly be called affirmative action.

Q. *How does affirmative action work?*

A. In its predominant form, private companies bid on government contracts with contract specifications requiring the company to agree, as a term of the government contract, to have and to carry out an affirmative action plan. Government contract affirmative action specifications typically require the company to assess how women and minorities are distributed by job category across the company's workforce, to compare those numbers with local area labor force statistics, and to set goals for remedying statistically indicated

under utilization of women and minorities. These companies submit periodic EEO-1 reports updating these statistics.

Q. *If affirmative action is important, why hasn't a smart lawyer like me already heard about it?*

A. Affirmative action has been litigated in contexts where few of us practice: university admissions, Federal Communications Commission licensing regulations, federal state and municipal procurement regulations, and school district admissions and employment policies. It has seldom been litigated in the private employment context. It became early settled law that there is no private right of action for violation of an affirmative action plan. Affirmative action enforcement power lies predominantly with the executive branch--most commonly the U.S. Department of Labor's Office of Federal Contract Compliance. OFCCP has the power to terminate the government contract through an administrative procedure subject to limited judicial review. The result has been a history in which affirmative action enforcement has been conducted virtually entirely through a process which could appropriately be seen as alternative dispute resolution with very motivated participants from the private business side.

Q. *What does affirmative action have to do with antidiscrimination laws like Title VII and The Age Discrimination in Employment Act?*

A. In the vast majority of instances, very little. Affirmative action is, at its core, voluntary. There is no statute requiring private businesses to engage in affirmative action. Private businesses take on affirmative action obligations contractually. The antidiscrimination statutes are legislative enactments prohibiting employment decisions on the basis of race, national origin, sex, etc. Affirmative action involves preferential treatment for members of governmentally (or privately) designated groups.

I. THE CONSTITUTIONAL CHALLENGES RACIAL AND ETHNIC CLASSIFICATIONS

University of California Regents v. Bakke, 438 U.S. 265, 57 L. Ed.2d 750, 98 S. Ct. 2733 (1978) is the seminal, and perhaps best known, affirmative action case. In 1968, California's public university system opened a medical school at its University of California at Davis Campus. The medical school's first class contained three Asians but no Blacks, no Mexican-Americans, and no American Indians. In response, the medical school faculty devised a special admissions program to increase the representation of "disadvantaged" students in each medical school class. The program consisted of a separate admissions system which operated in addition to the regular admissions process. The special admissions program operated with a separate committee, a majority of whom were members of minority groups. In 1973, medical school applicants were asked whether they wished to apply as "disadvantaged." Starting in 1974, applicants were asked whether they wished to be considered as members of a "minority group" which the medical school faculty defined as "Blacks," "Chicanos," "Asians," and "American Indians." If the applicant answered yes, the application was handled by the special admissions committee. The committee chairman conducted an informal screening to see whether the application reflected economic or educational deprivation. The special admissions committee

rank ordered those applicants referred to it but did not rate or compare them against the medical school's general applicants. A yearly faculty vote established the number of special applicants to be admitted to the medical school. In 1973 and 1974, sixteen of the 100 members of the entering medical school class were selected through the special admissions program. Although disadvantaged whites applied to the special program in large numbers, none received admission. By 1974, the special admissions committee explicitly decided to consider only disadvantaged special applicants who were members of one of the four designated minority groups. Mr. Bakke was a white male who unsuccessfully applied to the Davis Medical School under the general admissions program in both 1973 and 1974. In both years, applicants were admitted under the special admissions program with grade point averages, medical college admissions test scores and interview scores significantly lower than his.

After his second rejection, Mr. Bakke sued in California state court, alleging the medical school's special admissions program operated to exclude him on the basis of his race, in violation of his rights under the Fourteenth Amendment's equal protection clause, the California Constitution, and Title VI of the Civil Rights Act of 1964. Mr. Bakke sought injunctive and declaratory relief compelling his admission to the medical school. The University cross-complained for a declaration that its special admissions program was lawful. The California trial court found that the special program operated as a racial quota because minority applicants in the special program were rated only against one another with a specified number of admissions reserved for them. The trial court held that the special admissions program violated both the federal and state constitutions and Title VI and enjoined the University from any consideration of race in its admissions process, but refused to order Mr. Bakke's admission holding that he had failed to carry his burden of proving he would have been admitted but for the existence of the special program.

Both parties appealed. The California Supreme Court took the case on direct appeal. Because the special admissions program involved a racial classification, the California Supreme Court applied strict scrutiny. The court held that while the University's stated goals of integrating the medical profession and increasing the number of physicians willing to serve members of minority groups were compelling state interests, the special admissions program was not the least intrusive means of achieving those goals. Without ruling on the state constitutional or Title VI statutory grounds relied on by the trial court, the California Supreme Court held that the equal protection clause required that "no applicant may be rejected because of his race, in favor of another who is less qualified, as measured by standards applied without regard to race." 553 P.2d at 1166, and enjoined the University from considering race in its admissions process.

The California Supreme Court also ruled that since Mr. Bakke had established that the University had discriminated against him on the basis of his race, the burden of proof shifted to the University to demonstrate that he would not have been admitted even in the absence of the special admissions program. The Court directed the trial court to enter judgment ordering Mr. Bakke's admission to the medical school.

The U.S. Supreme Court affirmed in part and reversed in part. The nine justices wrote almost 100 pages of separate opinions without reaching any opinion of the Court. Five justices agreed that the California Supreme Court's judgment would be affirmed in that it held that the medical school's special admissions program was unlawful and insofar as it ordered the medical

school to admit Mr. Bakke. Five justices agreed that the California Supreme Court's judgment must be reversed to the extent that it prohibited the University from giving any consideration to race in its future admissions process.

The Salt Lake Tribune reported the Bakke decision under the headline: "Court Rules for Bakke; Action Fogs race Issue." The Tribune ran four stories on the Bakke decision including an Associated Press story which reported:

The Supreme Court was praised for "judicial statesmanship" and condemned for an "absolutely absurd" decision Wednesday in the wake of its ruling that a California medical school illegally discriminated against a white applicant because of his race.

Most of the legal experts, civil rights leaders and academic authorities contacted by the Associated Press said they were encouraged by the fact that the court said race can be taken into account in future college admission programs.

...

The majority opinion handed down Wednesday said strict racial quotas or goals are illegal, but said other affirmative action programs to overcome past discrimination are permissible.

The Bakke ruling has remained in the conventional wisdom of politics and business as the Tribune reported it. Careful legal analysis shows Bakke was an insecure foundation upon which to build a body of law. Contrary to the Associated Press report, there was no majority opinion. Justice Powell announced the judgment of the court, but his opinion which is still the foundation of most affirmative action law is his opinion -- and his only. No other justice joined in Justice Powell's explanation of the basis for his decision. Justice Powell is the decisive swing voice in Bakke. He joined Justices Burger, Rehnquist, Stevens and Stewart in affirming those portions of the lower court's judgment which held the special admissions program unlawful and which ordered Mr. Bakke's admission to medical school. He sided with Justices Brennan, Marshall, Black and Blackmun in reversing that portion of the lower court's judgment which enjoined any consideration whatsoever of race in any future admissions program.

Although the other justices join Justice Powell's announcement of those portions of the split judgment they agree with, none joins any significant part of his opinion. The other eight justices write four separate opinions. We will see the Justices repeatedly fail to agree on any opinion of the Court in the affirmative action cases after Bakke.

Let's start our review of Justice Powell's Bakke opinion with the less publicized part. Here he explains why he joined with the "conservative" block to find the special admissions program unconstitutional. Justice Powell first reviews the parties' contrasting positions. The University conceded that admissions decisions based on race or ethnic origin are reviewable under the Fourteenth Amendment. Mr. Bakke conceded that not all racial or ethnic classifications are per se invalid. The parties disagreed on the standard of review; and disagreed over whether the special admissions program should be characterized as having established a

racial quota, or as merely having established a “goal.” In Justice Powell’s view the “quota”/“goal” semantic distinction was immaterial. He started his analysis viewing the special admissions program as “undeniably a classification based on race and ethnic background.” He observed that reserving 16 seats for minimally qualified minority applicants resulted in a situation where white applicants could compete for only 84 seats in an entering class while minority applicants could compete for 100. To Justice Powell it made no difference whether this limitation was described as a “goal” or a “quota.” It was a line drawn on the basis of race and ethnic status.

He then worked through an analysis of the Fourteenth Amendment as he considered the appropriate standard of review, starting with the proposition that the rights guaranteed by that Amendment are personal rights guaranteed to the individual and then noting that equal protection cannot mean one thing when applied to one individual, but something else when applied to an individual of a different color.

In rejecting to the University’s argument that strict scrutiny should not be the standard of review for the special admissions program because white males are not a “discreet and insular minority” requiring extraordinary constitutional protection from the majoritarian political process, Justice Powell reviewed the history of the Supreme Court’s interpretation of the Fourteenth Amendment. He noted the court’s “initial view” that the one pervading purpose of the Fourteenth Amendment was “the freedom of the slave race and protection of the newly made free man and citizen from the oppressions of those who had formerly exercised dominion over him,” citing the Slaughterhouse cases of 1873. Justice Powell then reviewed his understanding of a period of judicial interpretation which he called “the dormancy of the Equal Protection Clause”, which he viewed as having ended in the 1930s. Justice Powell then reasoned that by the 1930s it was no longer possible to peg the guarantees of the Fourteenth Amendment to the struggle for equality of one racial minority. In his view, during the “dormancy” of the Equal Protection Clause, the United States had become a nation of minorities. Each had to struggle, and to some extent still struggled, to overcome the prejudices not of a monolithic majority, but of a “majority” composed of various minority groups. Justice Powell observed that the language of the Fourteenth Amendment reads in universal terms without reference to any race or ethnic origin and concluded it was far too late for the University to argue that the guarantee of equal protection to all persons permits recognition of special wards entitled to a degree of equal protection greater than that accorded others. He then concludes that when the Fourteenth Amendment is read according to its terms, it is unacceptable to vary the level of judicial review depending upon some perceived “preferred” status of a particular racial or ethnic minority. He notes that the concepts of “majority” and “minority” necessarily reflect temporary arrangements and political judgments and notes again that the white “majority” itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the state and private individuals.

Justice Powell concludes that strict scrutiny is appropriate for racial and ethnic classifications. He then rejects the University’s proffered justifications for the special admissions program: (1) reducing the historic deficit of traditionally disfavored minorities in medical schools and the medical profession; (2) countering the effects of societal discrimination; (3) increasing the number of physicians who will practice in currently underserved communities; and (4) obtaining educational benefits from an ethnically diverse student body. Of these four

goals, only the last seemed constitutionally significant to Justice Powell. He concluded, nevertheless, that the University's means for pursuing that goal was not constitutionally permissible, because the racial classification embodied in the special admissions program was not necessary to promote the University's legitimate interest in the diverse student body. To Justice Powell, the University's argument misconstrued the nature of the state interest in diversity. To Justice Powell that interest could not merely be one in simple ethnic diversity in which a specified percentage of the student body was effectively guaranteed to be members of selected ethnic groups with the remaining percentage an undifferentiated aggregation of students. In Justice Powell's analysis, the only legitimate interest in diversity requires what he calls "genuine diversity" of which racial or ethnic origin is but a single element. To Justice Powell, the special admissions program hindered rather than furthered attainment of genuine diversity by focusing only on ethnic diversity.

In concluding that the special admissions program was unconstitutional, Justice Powell was strongly influenced by the fact that the initial program's minority applicants were insulated from competition with all other applicants. By contrast, Justice Powell observed that Harvard had adopted an admissions procedure which compared applicant's characteristics on a much broader basis which did not exclude blacks or other "minority" applicants from comparison to and competition with all other applicants. It is in this context that Justice Powell expressed approval of some consideration of race in the University's admissions process.

In a single paragraph, Justice Powell said the California Supreme Court had failed to recognize the University's legitimate interest which might be served by a properly devised admissions program involving competitive consideration of race and ethnic origin. Justice Powell, joined by the block of four "liberal" Justices, therefore reversed that portion of the lower court's judgment which enjoined any future consideration of the race of any applicant. This two-sentence paragraph (doubtless bolstered by Justice Powell's favorable comments about the Harvard admissions program) came to be the most widely publicized feature of Bakke.

Justices Burger, Rhenquist, Stevens and Stewart concurred in the judgment that the special admissions program was invalid but would have based that ruling only on Section 601 of Title VI of the 1964 Civil Rights Act (which prohibits exclusion on the basis of race of any individual from a federally funded program). These justices thought it not necessary to consider whether the program violated the Equal Protection Clause, and though it not appropriate to consider whether race could ever be used as a factor in a state University's admissions program. Justice Brennan wrote an opinion joined by Justices White, Marshall and Blackmun (each of whom also wrote a separate opinion) which begins by declaring that the court had affirmed the constitutional power of federal and state governments to act affirmatively to achieve equal opportunity. The Brennan opinion characterizes the central meaning of the court's multiple opinions as a declaration that government may take race into account when it acts not to demean or insult any racial group but to remedy disadvantages cast on minorities by past racial prejudice. It doesn't seem unfair to say the Brennan opinion declared a cup one third full to be a win.

The court's next important affirmative action case was Fullilove v. Klitznick, decided in 1980. As in Bakke, the Justices were unable to arrive at an opinion of the Court. The affirmative action provision at issue in Fullilove was enacted by Congress. The Public Works Employment Act of 1977 appropriated \$4 Billion in federal grants to state and local entities for

use in local public works prospects. The act required grant applicants to give satisfactory assurances that at least 10 per cent of each grant would be spent for minority business enterprises (MBE). Congress defined an MBE as a business at least 50 per cent owned by minority group members, defined as U.S. citizens who were Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts. The act allowed some discretion to waive the set aside and had provisions intended to direct the grants to areas of high unemployment. The MBE set aside provisions were unsuccessfully challenged in several federal courts and in the Second, Third, and Sixth Circuits. The Supreme Court accepted an appeal from the Second Circuit.

Justice Burger announced the judgment of the court holding that the 10% set aside did not violate the Equal Protection Clause. Justices White and Powell joined his opinion. These Justices reviewed and relied on the legislative history, primarily the statements of the act's sponsors and supporters arguing that prior experience had shown that minority enterprises had historically participated in an inordinately small percentage of government contracting. The Burger opinion reviewed and quoted a 1975 committee report from the House Subcommittee on Small Business Administration Oversight and Minority Enterprise showing that while minority persons comprised about 16 per cent of the population, they owned only 3.0 per cent of the country's businesses; and those businesses in only .65 per cent of gross national business receipts. The committee report characterized the disparity as a present effect of past discrimination. The report also expressed disappointment with the limited effectiveness of past government minority business programs. The Burger opinion starts by reviewing a body of cases upholding congressional power to use its spending power to further policy objectives by conditioning receipt of federal moneys upon compliance with federal statutory and administrative directives. Justice Burger put the MBE program within a familiar legislative pattern in which Congress induces government entities and private parties to cooperate with federal policy by attaching conditions to receipt of federal funds. Justice Burger found the objectives of the MBE program valid given the broad scope of Congress' power over commerce and spending. He also found the means employed constitutionally valid, distinguishing the scope of Congressional legislative authority from the more limited power of a court to order remedial relief. From this premise, he concluded that the program was not unconstitutional because it might disappoint the expectations of non minority firms, thus implicitly rejecting any argument that non minority firms which had never discriminated were denied equal protection.

Justice Burger characterizes the MBE program as a limited remedial effort within the Congress' power given its "heavy burden of dealing with a host of intractable economic and social problems." He ends his opinion by saying he has not adopted, expressly or implicitly, any of Bakke's analysis although he believes the MBE program would survive review under any test articulated in the several Bakke opinions.

Justice Powell wrote a separate opinion applying his Bakke analysis to the 10% set aside provisions. He began by noting that he would place greater emphasis than the other justices on the need to articulate judicial standards of review in the affirmative action area. Justice Powell reviewed the legislative history and was strongly influenced by what he characterized as the overwhelming evidence of private employment discrimination identified in the congressional hearings. Justice Powell found the 10% set aside provisions justified as an appropriate remedy serving a compelling interest in eliminating the continuing effects of past discrimination. He

also relied on broad constitutional power granted the Congress to enforce the provisions of the Thirteenth, Fourteenth and Fifteenth Amendments.

Justices Marshall, Brennan and Blackmun concurred in the judgment and thought the 10% set aside did not violate equal protection because it was substantially related to the important congressionally articulated goal of remedying present effects of past discrimination in public contracting. These Justices also thought it constitutionally appropriate to use racial classifications which provide benefits to minorities to remedy present effects of past racial discrimination.

Justices Stewart and Rhenquist joined in the dissenting opinion arguing that the set aside provision on its face denied equal protection by barring one class of business owners from the opportunity to participate in the government benefit on the basis of their race and ethnicity. Justice Stevens wrote a separate dissenting opinion arguing that Congress failed to discharge its Fifth Amendment duty to govern impartially when it did not adequately demonstrate that the 10% set aside was justified by a shared characteristic of numbers of the preferred class.

Firefighters Union 1784 v. Stotts, 467 U.S. 561 (1984) involved a court approved consent decree which had been entered into to settle a pattern or practice racial discrimination class action against the city of Memphis, Tennessee in its hiring and promotion of firefighters. A consent decree established a 50% minority hiring goal and a 20% minority promotion goal for vacancies in the fire department. In 1981, budget deficits required a substantial reduction in force. The city had in place a memorandum of understanding with the firefighters union providing that layoffs were to be determined on the basis of seniority and allowing senior employees whose positions were abolished to bump down to a lower position. Firefighters who had been hired under the consent decree and who lacked sufficient seniority to retain their jobs sought and obtained a preliminary injunction against the implementation of the layoff plan. The Sixth Circuit upheld the district court's injunction.

Justice White, speaking for the court, held the injunction improper. Justice White concluded that the district court's power to unilaterally modify a consent decree was limited by Section 706(g) of Title VII of the 1964 Civil Rights Act which allows an award of fictional seniority only to proven victims of illegal discrimination. Finding that none of the beneficiaries of the modified consent decree met this qualification, the court held that the injunction was improper.

An affirmative action program was held unconstitutional in Wygant v. Jackson Board of Education 476 U.S. 267 (1986). Wygant involved a board of education's hiring goal which tried to match the percentage of minority teachers in the school district to the percentage of minority students in the district. The board's contract with its teacher's union provided for layoffs in reverse order of seniority as long as the percentage of minority teachers did not drop. The school board implemented a layoff in which it laid off non-minority teachers with greater seniority than minority teachers who were retained to protect the district's percentage of minority teachers. The non-minority teachers sued, claiming an equal protection violation.

The court found the layoff provision unconstitutional, but the Justices again were unable to reach any majority opinion. In a pattern typical of the affirmative action cases, nine Justices

wrote five opinions. Justice Powell wrote the plurality opinion, joined by Justices Burger and Rehnquist, and joined in part by Justice O'Connor who also wrote a separate opinion. Justice White who provided the fifth vote in support of the judgment also wrote a separate opinion. Justice Marshall wrote a dissenting opinion joined by Justices Brennan and Blackmun. Justice Stevens wrote a separate dissenting opinion. Justice Powell's opinion began by emphasizing his belief in strict scrutiny as the appropriate standard of review for all racial classifications, whether favoring racial minorities or not. He then analyzed whether the proffered governmental interests were compelling and whether the means chosen to pursue those interests were narrowly tailored. The school board had advanced two interests: curing the effects of societal discrimination and providing role models for minority students. Justice Powell found both less than compelling.

He also thought the means used by the board failed under strict scrutiny. Although conceding that an affirmative action plan could sometimes impose burdens on innocent parties, he would not allow the school board to lay off more senior white employees to preserve a higher ratio of minority teachers. He found racially determined layoff priorities too intrusive because they put the entire burden of achieving racial equality on a few innocent individuals.

The board also raised, apparently for the first time before the Supreme Court, an interest in curing its own prior discrimination. Justice Powell viewed this as a legitimate and compelling interest but concluded the record lacked any factual determination to support the conclusion that remedial action was necessary to address this interest.

In dissent, Justice Marshall disagreed with Justice Powell's use of the strict scrutiny test, arguing that remedial racial discrimination should be allowed if it serves important government interests and is substantially related to the achievement of those objectives.

In 1989 a majority of the court adopted strict scrutiny as the appropriate standard of review, and struck down a MBE set aside program expressly patterned after the one the Court had approved nine years earlier in Fullilove. The case was City of Richmond v. JA Croson Co., 488 U.S. 469. In 1983 the Richmond, Virginia city council adopted a minority business utilization plan which required prime contractors awarded city construction contracts to subcontract at least 30 per cent of the dollar amount of the contract to one or more minority business enterprises. Richmond's plan defined an MBE as a business at least 51 per cent of which is owned by minority group members, and defined minority group members as U.S. citizens who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos or Aleuts. Thus Richmond used exactly the same definitions as those Congress used in the minority set aside which the court found constitutional in its 1980 Fullilove decision. Fullilove notwithstanding, the court found Richmond's set aside plan unconstitutional.

Justice O'Connor announced the judgment of the court and wrote an opinion enough parts of which were joined by enough Justice's to constitute the opinion of the court. She began her opinion by stating:

In this case, we confront once again the tension between the Fourteenth Amendment's guarantee of equal treatment to all citizens, and the use of race based measures to ameliorate the

effects of past discrimination on the opportunities enjoyed by members of minority groups in our society.

She then went on to note that the lower Federal courts were split on the standard of review to be applied in evaluating the constitutionality of state and local programs which allocated a portion of public contracting opportunities exclusively to minority owned businesses. Some courts had applied Fullilove's deferential standard of review, while other courts had applied Wygant's stricter standard of review. Croson's procedural history nicely illustrates the confused and fragmented state of affirmative action during this period. By 1989 Croson had already been before the Supreme Court once and had been ruled on twice by the Fourth Circuit. In the Fourth Circuit's first Croson opinion, it affirmed a district court decision upholding the constitutionality of Richmond's minority set aside in all respects. In its first Croson opinion, the Fourth Circuit applied a standard of review based on its best attempt to synthesize the various Supreme Court opinions in Fullilove and Bakke. As applied, this "synthesized Fullilove" test was highly deferential to the Richmond city council's stated justifications for the 30 per cent set aside. Croson sought Certiorari which was granted. The Supreme Court vacated the first Fourth Circuit Croson opinion and remanded the case for further consideration in light of the intervening decision in Wygant. On remand, a divided panel of the Fourth Circuit struck down the Richmond set aside program because it violated both prongs of strict scrutiny equal protection analysis. The majority of the Fourth Circuit in Croson II interpreted Wygant to say that a municipality which enacts a racial preference cannot rest on broad brush assumptions of historical discrimination. The Fourth Circuit also read Wygant to hold that findings of societal discrimination will not suffice to support racial preferences; the findings must concern that government's own prior discrimination. In Croson's second hearing before the Supreme Court, the parties continued to argue over whether Wygant or Fullilove controlled. Justice O'Connor found neither case controlled.

She first distinguished Fullilove because its standard embodied traditional judicial deference appropriately due Congress. She also distinguished Fullilove because the waiver provisions attached to its 10 per cent set aside made that set aside more flexible than Richmond's set aside. Borrowing from Justice Powell's separate opinion in Fullilove, she further distinguished the cases on the grounds that Congress, unlike any state or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. By contrast, she saw the Fourteenth Amendment as an explicit constraint on state power. Finally, she distinguished the comparative sufficiency of the factual support offered to establish the need for remedial race based measures.

In Croson, proponents of the set aside provision relied on a study which indicated that while the general population of Richmond was 50 per cent black, only 0.67 per cent of the city's prime construction contracts had been awarded to minority businesses in the five year period from 1978 to 1983. Proponents also showed that a variety of contractors associations whose representatives appeared in opposition to the ordinance establishing this set aside had virtually no minority businesses within their membership. The city also relied on the following statement of council person Marsh, a proponent of the ordinance:

There is some information, however, that I want to make sure that we put in the record. I have been practicing law in this community

since 1961, and I am familiar with the practices in the construction industry in this area, in the state, and around the nation. And I can say without equivocation, that the general conduct of the construction industry in this area, and the state, and around the nation, is one in which race discrimination and exclusion on the basis of race is widespread.

Much of the justices' disagreement in Croson centered on whether this kind of anecdotal declaration from the proponents and supporters of the minority set aside was entitled to the same deference the court had afforded the Congressional legislative history committee reports and findings in Fullilove. Justice O'Connor and the Croson majority held that the sort of conclusory declaration of remedial purpose quoted above was insufficient to meet strict scrutiny--at least where a local government entity was involved. Justice O'Connor's majority opinion holds that the district court erred by what she characterized as "blind judicial deference to legislative or executive pronouncements of necessity." She also rejected reliance on the disparity between the minority population of the City of Richmond and the number of prime contracts awarded to minority firms, noting the absence in the record of proof that white prime contractors simply would not hire minority firms. Indeed, Justice O'Connor's opinion notes evidence in the record that overall minority participation in city contracts in Richmond, Virginia had been running at 7 to 8 percent with minority contractor participation in community block development grant construction projects running at 17 to 22 percent. Justice O'Connor thought it sheer speculation to try to determine how many minority firms would be in business in Richmond, Virginia absent societal discrimination and, while reserving the possibility that a municipal government might on some set of facts be appropriately characterized as having been a passive participant in private racial discrimination which would justify remedial affirmative action, held the Richmond plan unconstitutional. Justice O'Connor and the majority also noted that in addition to the insufficiency of the actual showing of a need for remedial measures on the basis of discrimination against blacks, there was a total absence of any evidence to indicate that the City of Richmond had discriminated against the other beneficiaries of the 30 percent set aside. For example, she noted there was no evidence in the record of a history of discrimination against Eskimos in Richmond, Virginia. While not a major premise of their reasoning, the majority in Croson did note that the record in the case showed that a majority of the Richmond City Council which had passed the set aside ordinance were black. Croson goes so far as to suggest that the set aside provisions could be construed as the result of racially motivated politics rather than as an appropriately narrow remedial measure.

Paralleling Justice Powell's analysis in Bakke, Justice O'Connor views the rights created by the equal protection clause of the Fourteenth Amendment as individual rights, citing Shelley v. Kraemer, 334 U.S. 1 (1948), in which the Supreme Court invalidated racially restrictive covenants in property deeds. Justice O'Connor then reasons that searching judicial inquiry into the justification for race-based measures is required to determine what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. She characterizes the purpose of strict scrutiny as smoking out illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of racial classifications--constitutionally a highly suspect tool.

Justice O'Connor also characterizes racial classifications as carrying a danger of stigmatic harm and a danger of promoting notions of racial inferiority and leading to a politics of racial hostility. She rejects Justice Marshall's dissenting argument, insisting that adherence to strict scrutiny as the appropriate standard of review does not imply that the court views racial discrimination as largely a phenomenon of the past. She rejects the relaxed standard of judicial scrutiny advocated by Justice Marshall's dissent as one which would effectively assure that race would always be relevant in American life and one which would deny the ultimate goal of eliminating such irrelevant factors as race entirely from governmental decision making.

The 1988-89 term in which Croson was decided was an unusually active year for civil rights and discrimination cases. Important cases that year included: Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Lorance v. AT&T Techs., U.S. 900 (1989); Martin v. Wilks, 490 U.S. 755 (1989); and Independent Federation of Flight Attendants v. Zipes, 491 U.S. 754 (1989), Under Title VII, as well as Public Employees Retirement Sys. of Ohio v. Betts, 492 U.S. 158 (1989), under the Age Discrimination in Employment Act (ADEA), and Patterson v. McLean Credit Union, 491 U.S. 164 (1989); and Jett v. Dallas Indep. School Dist., 491 U.S. 701 (1989), under 42 U.S.C. § 1981. Media headlines that year declared that the Reagan court had turned on civil rights. Croson was sometimes characterized as signaling the end of affirmative action. Any sense that Croson had ended affirmative action ended in 1990 with Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990). That case involved two policies of the Federal Communications Commission designed to stimulate minority ownership of FCC broadcast licenses. Notwithstanding Croson's recent endorsement of strict scrutiny for racial classifications, the court applied only intermediate scrutiny to the FCC's racial preferences. The court based the lower standard of review on the proposition that the FCC's preferences were "benign" racial classifications.

Only five years later, the Supreme Court reversed Metro Broadcasting in Adarand Constructors, Inc. v. Peña, 515 U.S. 200. Justice O'Connor wrote the lead opinion, as she had done in Croson. Her opinion was joined by Justices Rehnquist, Kennedy and Thomas and was joined in part by Justice Scalia. Justice O'Connor reviews the history of the Supreme Court's fragmented affirmative action jurisprudence, noting the problems generated by the Court's failure to produce any majority opinion in Bakke, Fullilove and Wygant, characterizing Croson as a partial resolution of the affirmative action issue and characterizing Metro Broadcasting as "a surprising turn." Justice O'Connor purports to find three consistent propositions in the Court's cases through Croson: (1) skepticism: any preference based on racial or ethnic criteria must necessarily receive a most searching examination; (2) consistency: the standard of review under the equal protection clause does not depend on the race of those burdened or benefited by a particular classification; and (3) congruence equal protection analysis is the same under both the Fifth and Fourteenth Amendments. Justice O'Connor's opinion characterizes Metro Broadcasting as inconsistent with those propositions.

She then announces the Court's holding: "We hold today that all racial classifications, imposed by whatever federal, state, or local government act, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. To the extent that Metro Broadcasting is inconsistent with that holding, it is overruled."

Justice Scalia joined Justice O'Connor's opinion, but made it clear that his scrutiny of racial classifications would be strict indeed; stating: "Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus upon the individual . . . To pursue the concept of racial entitlement--even for the most admirable and benign of purposes--is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American." Justice Thomas also wrote a separate opinion concurring in the Court's judgment and in Justice O'Connor's opinion but emphasizing his view that the racial paternalism inherent in affirmative action programs is the moral and constitutional equivalent of laws designed to subjugate particular races--and is "at war with the principle of inherent equality that underlines and infuses our Constitution." Justice Thomas concludes his opinion by stating: "In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple."

Adarand was decided in 1995. Federal court cases after Adarand consistently struck down affirmative action measures. In Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), the Fifth Circuit held that the University of Texas Law School violated the constitutional rights of white and non-preferred minority applicants by granting racial preferences in admissions to Blacks and Mexican-Americans. In Lesage v. Texas, 158 F.3d (5th Cir. 1998), the Fifth Circuit ruled that preferred status granted to Black and Hispanic applicants for admission to the University of Texas' graduate programs was also unconstitutional. In Lutheran Church-Missouri Synod v. Federal Communications Commission, 141 F.3d 344 (D.C. Cir. 1998), the U.S. Court of Appeals for the District of Columbia Circuit held that the Federal Communications Commission unconstitutionally deprived the Lutheran Church of equal protection by purporting to impose its affirmative action regulations on a radio station owned and operated by the Lutheran Church. In Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998), the First Circuit held that the city of Boston violated the Constitution's equal protection provisions by granting admissions preferences to African-American children who applied to attend its three highly competitive examination schools.

In these cases, diversity was uniformly asserted as the compelling governmental interest. Diversity was uniformly found inadequate to justify affirmative action.

The post-Adarand federal cases have either reasoned that Justice Powell's favorable comments about the interest in diversity are simply not part of the law (for example, the 5th Circuit's decisions in Hopwood and Lesage); or have reasoned that even if Justice Powell's comments are still part of the law, they don't justify the affirmative action measures in the case before the court (for example, the 1st Circuit's ruling in Wessman).

The post-Adarand cases recognize diversity only as a property of individuals. These cases uniformly reject the assumption that membership in a racial or ethnic group may be legally assumed to involve what Justice Powell called "genuine diversity." These cases also show that affirmative action will clearly be allowed only to remedy instances of past intentional discrimination.

II. THE GENDER QUESTION (EQUAL PROTECTION ANALYSIS)

The Supreme Court has never decided a case involving an equal protection challenge to gender-based affirmative action. We might have assumed that Adarand could be read to resolve this issue but the Court's 1996 decision in United States v. Virginia, 518 U.S. 515, may indicate otherwise.

The Court's recent equal protection cases involving gender classifications start with a case with an unusual twist. In Mississippi University for Women v. Hogan, 458 U.S. 718 (1982), Mississippi had a state statute excluding males from enrolling in the School of Nursing at the all-female Mississippi University for Women. Justice Sandra Day O'Connor wrote her first opinion for the Court in the Mississippi University for Women case. She wrote the majority opinion in a five to four decision stating that while gender-based classifications favoring one's sex could be justified in limited circumstances, the University's exclusion of male applicants violated the equal protection clause. Justice O'Connor based her reasoning on two primary points: (1) the absence of any discriminatory barriers against the entrance of women into the nursing profession, and (2) the failure of the exclusionary policy to benefit female nurses. Justice O'Connor concluded the discriminatory admissions policy actually constituted a wrong, not only against men, but also against women because it tended to perpetuate a stereotype view of nursing as an exclusively woman's job. The stereotype or stigma rationale resurfaced in Justice O'Connor's opinions in Croson and in her dissent in FCC v. Metro Broadcasting.

In Mississippi University for Women, the five to four majority applied a standard which required that gender classifications were to be tested as to whether they were supported by "an exceedingly persuasive justification."

In 1994 in J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994). The Supreme Court held that intentional gender discrimination through the use of preemptory challenges in jury selection was unconstitutional. Previous cases regarding preemptory jury challenges had concerned racial discrimination and had applied the strict scrutiny standard. Georgia v. McCollum, 505 U.S. 42 (1992); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991); Powers v. Ohio, 499 U.S. 400 (1991); Batson v. Kentucky, 476 U.S. 79 (1986). Although Justice Blackman made several references to the similarity between exclusion from jury service on the basis of race and on the basis of gender in his majority opinion, the Court applied a standard of review again requiring "an exceedingly persuasive justification."

Two years after the J.E.B. decision, and one year after Adarand, the Supreme Court ruled on Shannon Faulkner's highly publicized challenge to VMI's exclusively male admissions policy. Justice Ginsburg wrote the majority opinion joined by five other justices holding that the male-only admissions policy violated the equal protection clause. Her opinion began by noting that J.E.B. and Hogan had required "exceedingly persuasive justification" to defend gender-based government action. She then noted that the Supreme Court "has thus far reserved most stringent judicial scrutiny for classifications based on race or national origin." Justice Ginsburg then goes on to use the phrase "exceedingly persuasive" nine times in the course of her majority opinion to describe the standard the Court is applying.

Justice Ginsburg reviews an extended history of official action denying rights or opportunities to women and tracks the Court's increasingly skeptical scrutiny of those actions, noting cases like Stanton v. Stanton, 421 U.S. 7 (1975), in which the U.S. Supreme Court held unconstitutional Utah's requirement that parents support boys until age 21 and girls only until age 18. Justice Ginsburg's opinion notes that the Court's heightened scrutiny of gender classifications has not made sex a proscribed classification per se. She reads the Court's jurisprudence to leave no room for any consideration of supposed "inherent differences" in matters of race or national origin classification; but puts gender classifications on a different footing because "physical differences between men and women, however, are enduring," citing Ballard v. United States, 329 U.S. 187 (1946). She says sex classifications may be used to compensate women for particular economic disabilities they have suffered, citing Califano v. Webster, 430 U.S. 313 (1977); to promote equal employment opportunity citing California Federal Savings & Loan Assn. v. Guerra, 479 U.S. 272 (1987), but may not be used, as they once were, to create or perpetuate the illegal social and economic inferiority of women.

The ultimate consequences of Justice Ginsburg's reference to a different standard of review for gender-based classifications is not clear. Perhaps Justice Ginsburg is simply being meticulous in her review of the history of the Court's prior cases and the standard of review; perhaps she is laying the foundation for the notion that there can continue to be a "benign" classification for the benefit of women, even though "benign" classifications for race and national origin are defunct.

When Justice Ginsburg's opinion talks about the facts, it's clear she says the evidentiary record shows some women could meet every VMI requirement. Thus, she finds Ms. Faulkner needed no preference. Her repeated reference to a different standard of review for gender classifications is dicta, but suggests that she may argue that Adarand did not decide the standard of review for gender classifications.

III. THE EMPLOYMENT CASES (AFFIRMATIVE ACTION AND TITLE VII)

In the early years of Title VII, the federal courts uniformly applied what came to be known as "protected group analysis." Under this analysis, the first question under Title VII was: "Is the plaintiff a member of a 'protected group' under Title VII?" For Caucasian males, this answer was no, and the early federal court cases effectively ruled out the possibility of any Title VII claim by Caucasian males. The United States Supreme Court ended protected group analysis in a 1976 case called McDonald v. Santa Fe Trail Transportation Co.

In that case, a trucking company determined that three of its employees had stolen some antifreeze while unloading one of its trucks. Two of the employees were white; one was black. The employer fired the two white employees but did not fire the black employee. The two white employees sued, alleging race discrimination against them. The Federal District Court dismissed their cases, holding that white employees could not sue under Title VII. The Court of Appeals for the Fifth Circuit affirmed. The Supreme Court reversed both lower courts, holding that white employees could sue under Title VII.

In a unanimous opinion written by Justice Thurgood Marshall, the Supreme Court, citing its famous 1971 decision in Griggs v. Duke Power Co., said it was basing its decision on Section 703(a) of Title VII which states:

(a) *Employer Practices.* It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin. (emphasis added.)

The Court read this language to apply to all individuals and not to only members of some particular race. The Court interpreted Section 703 to prohibit “discriminatory preference for any racial group, minority or majority.” The Court also based its ruling on what it characterized as the uncontradicted Congressional legislative history showing that Title VII was “intended to cover white men and white women and all Americans.”

In 1976, in Santa Fe Trail Transportation, the Supreme Court required only one page plus an additional paragraph to announce and explain its unanimous decision. As we have seen, affirmative action law soon became much more contentious and complicated.

The Supreme Court did not decide its first private employment affirmative action case under Title VII until 1979. That case was Steelworkers v. Weber. The facts before the Court in Steelworkers v. Weber were these:

1. The case arose from defendant's plant in Gramercy, Louisiana. Historically, the employer hired as craft workers for that plant only persons who had prior craft experience.
2. Before the Weber case, nearly a dozen federal court cases had determined that blacks in the South had long been excluded from craft unions. Therefore, few blacks were able to present prior craft experience credentials.
3. As a consequence, as of 1974 only five of the 273 skilled craft workers at the employer's Gramercy, Louisiana plant (1.83%) were black, even though the workforce in the area was approximately 39% black.
4. The employer's business included government contracts and the employer had agreed to follow an affirmative action plan which required a utilization study to assess minority representation in the workforce and hiring and promotion goals to overcome any under utilization found to exist.
5. By 1974 there was good reason to believe the Federal Office of Contract Compliance might terminate the employer's government contracts for failing to comply with its affirmative action plans.
6. In 1974, the employer and the Steelworkers Union entered into a collective bargaining agreement in which they agreed that a training program would be established to train non-skilled production workers to fill craft openings. Their agreement reserved 50% of the

openings in the craft training program for black employees until the percentage of black craft workers in the plant because commensurate with the total percentage of blacks in the local labor force.

7. The District Court found the employer and the union entered into this agreement primarily because of their self-interest in satisfying the Office of Federal Contract Compliance and not primarily out of voluntary desire to train black craft workers.
8. During 1974, the first year of operation of the affirmative action plan, 13 craft trainees were selected from the employer's unskilled production workforce. Of these, seven were black and six were white. The most senior black employee selected into the program had less seniority than several white production workers whose bids for admission were rejected.
9. One of the rejected white production workers, plaintiff Brian Weber, sued the employer in Federal Court. Mr. Weber's complaint alleged that the employer and the Union had violated Section 703(a) and Section 703(d) of Title VII by selecting junior black employees for skilled craft training in preference to more senior white employees.

The Federal District Court in Louisiana held the plan violated Title VII, entered judgment in favor of Mr. Weber and other white employees and issued a permanent injunction prohibiting the employer and the Union from operating under the affirmative action provisions of their collective bargaining agreement. The Fifth Circuit affirmed, holding that all employment preferences based upon race including those preferences incidental to a bona fide affirmative action plan violated Title VII's prohibition against racial discrimination. The U.S. Supreme Court exercised its discretion to hear the case, approved the affirmative action plan, and reversed the holdings of both the District Court and the Fifth Circuit. Unlike Santa Fe Trail Transportation, the Weber opinion is neither short nor unanimous. Seven justices wrote four different opinions which are summarized below.

**STEELWORKERS V. WEBER (1979)
(ONLY 7 JUSTICES PARTICIPATE)**

Majority

Brennan/Stewart
White/Marshall

- I. Title VII does not condemn all private, voluntary, race conscious affirmative action plans.
 - 1. Literal interpretation of sections 703(a) and (d) would give result at variance with purpose of statute.
 - 2. Section 703(j) says Title VII shall not “require” preferential treatment of minorities and does not say Title VII shall not “Permit or require” preferential treatment.

- II. Affirmative action plan in case didn’t violate Title VII because it:
 - 1. Was designed to eliminate traditional patterns of conspicuous racial segregation.
 - 2. Was a temporary measure not intended to maintain racial balance but simply to eliminate a manifest racial imbalance.
 - 3. Plan did not require discharge of white workers to replace with black workers, and did not create absolute bar to advancement of white workers.

Concurring

Blackmun

- I. Majority’s expansive interpretation of Title VII disturbs me because (as Rehnquist dissent points out) it seems at odds with the political bargain Congress struck and with the nondiscrimination principle it probably thought it was passing - one applicable to blacks and whites alike.

- II. Justice Blackmun would have preferred an “arguable violation” theory-only companies and unions which had committed “arguable violation” of Title VII would be to use affirmative action without liability to whites for reverse discrimination.

- III. But, Justice Blackmun went along

Dissents

Burger

- I. The majority reaches a result I would vote for if I were a member of Congress considering a proposed amendment to title VII, but that result is contrary to the explicit language of Title VII and I must dissent. The majority’s opinion effectively rewrites Title VII to do precisely what Title VII’s sponsors and opponents agreed that statute was not intended to do.

- II. After long study and searching debate, Congress wrote a statute which unambiguously states in § 703(d): “It shall be an unlawful employment practice for any employer to discriminate against any individual because of his race, color, religion, sex, or national origin

- III. Hard cases tempt judges to exceed their authority and make

Rehnquist

- I. “In a very real sense the Court’s opinion is ahead of its time: it could more appropriately have been handed down five years from now in 1984, a year coinciding with the title of a book from which the Court’s opinion borrower, perhaps subconsciously, at least one idea.” [A dramatic and unexplained reversal of the Court’s prior interpretations of Title VII in Griggs v. Duke Power Co. (1971); McDonald v. Santa Fe Trail Transportation Co. (1976); and Furnco Construction Corp. v. Waters (1978).]

- II. To reach the result it desires, the majority:
 - 1. Ignores or distorts the language of Sections 703(a), 703(d) and 703(j). Rather than applying the words of the statute, the majority calls upon what it divines as the “spirit” of the act. The fact that Title VII was passed to prevent employment discrimination against Negroes does not mean Congress intended to allow employers to discriminate against white persons.

- III. The legislative history proves Congress meant what it said--Title

Majority
Brennan/Stewart
White/Marshall

Concurring

Blackmun

with majority's ruling because:

1. The preferential apprenticeship program in Weber operated as a temporary tool for remedying past discrimination, ends when the company's skilled workforce matches racial composition of local workforce.

2. The plan did not attempt to maintain a previously achieved racial balance.

3. He believed he saw practical and equitable considerations Congress didn't see or didn't understand:

(a) Literal interpretation of nondiscrimination principle in § 703 puts employers and unions on a "high tightrope without a net": liable to blacks for past discrimination, but liable to whites if they act to remedy past discrimination.

Burger

bad law as the Court does in this case by totally rewriting a crucial part of Title VII to reach a "desirable" result. If private affirmative action programs are to be permitted, it is for Congress, not the Court, to change the law to permit them.

Dissents

Rehnquist

VII permits no racial discrimination in employment--not even preferential treatment of minorities to correct racial imbalance.

1. As Title VII was debated in Congress, its opponents argued that it would force employers to hire by race to racially balance all job classifications. The bill's opponents argued that the EEOC would have power to prevent a business from employing and promoting the people it wished, and that federal bureaucrats would have power to order hiring and promotion only of employees of certain races or religious groups.

2. Title VII's supporters in both the House and Senate gave repeated assurances, including an analytical memorandum from the Justice Department, that:

(a) Title VII prohibits all quotas, special seniority rights, and preferential treatment in favor of minorities and

(b) Preserves all established seniority rights of existing employees.

(c) The bill's supporters also represented that Title VII would tolerate no voluntary racial preferences, whether in favor of blacks or whites.

(d) § 703(d) was added to the

Majority

Brennan/Stewart
White/Marshall

Concurring

Blackmun

Dissents

Burger

Rehnquist

bill to write these assurances into law. § 703(j) is specifically addressed to Federal courts and agencies charged with interpreting the law. It directs them not to try to require affirmative preferences.

It took eight years after Weber before the Court next considered whether Title VII allowed affirmative action. This time the case involved preferential treatment for a female employee. These were the facts:

1. The employer had a promotion to make. Twelve employees applied for the promotion. Nine of the twelve were deemed qualified for the job and were interviewed by a two-person selection committee.
2. The committee scored each applicant. Seven applicants scored above 70 in the interview process, which meant that all seven were certified as eligible for the promotion. A male employee received a score of 75 from the selection committee, while a female employee received a score of 73. The employer decided to have a second selection committee do a final selection interview with these two applicants.
3. The female employee contacted the employer's affirmative action coordinator because she had had disagreements in the past with some of the members of the interview panel and was afraid her application for promotion might not receive disinterested review.
4. The employer had an affirmative action plan. It had reviewed the composition of its workforce at the time it adopted its affirmative action plan. The employer's review showed that, while women constituted 36.4% of the area labor area market, they composed only 22.4% of its workforce. Female employees were concentrated largely in EEOC job categories traditionally held by women: women made up 76% of office and clerical workers; but only 7.1% of Employer No. 2's officials and administrators; only 8.6% of its professionals; 9.7% of its technicians; and 22% of its service and maintenance workers.
5. The promotion in question involved a skilled craft worker position. The employer had 238 skilled craft worker positions, none of which had ever been held by a woman.
6. The affirmative action plan said this underrepresentation of women in part reflected the fact that women had not traditionally been employed in these positions and had not been strongly motivated to seek training or employment in them because of the limited opportunities that had existed in the past for women to work in such classifications.
7. The plan stated that it was intended to achieve a statistically measurable yearly improvement in hiring, training, and promotion of minorities and women and stated, as a benchmark by which to evaluate progress, that the long-term goal was to attain a workforce whose composition represented the proportion of minorities and women in the area labor force. The plan stated a long-term aspiration that about 36% of skilled craft positions would be occupied by women.
8. The employer selected the female applicant for promotion. The unsuccessful male applicant sued, alleging reverse discrimination.

This case is Johnson v. Transportation Agency. This case generated five different opinions which are summarized and compared below:

**JOHNSON V. TRANSPORTATION AGENCY
(DECIDED 1987)**

Plurality

Brennan/Marshall
Blackmun/Powel

Concurring

Stevens
In Judgment and Opinion,
Creating Majority

Dissents

White

Scalia
Rehnquist

- I. This case is governed by our decision in Weber v. Steelworkers. It raises two issues:

Issue No. 1 Whether consideration of the sex of applicants for skilled craft jobs was justified by the existence of a manifest imbalance reflecting underrepresentation of women in traditionally segregated job categories.

(a) The manifest imbalance need not be such that it would establish a *prima facie* case against the employer--under Weber the appropriate focus is on statistical imbalance.

(b) Under Weber, where the employment at issue involves selection of unskilled persons for a training program, the manifest imbalance standard permits comparison with the general labor force rather than comparison with the percentage of minorities or women qualified for the job for which the trainees are being trained--as would be the case under the *prima facie* standard.

(c) The hiring at issue was

- I. Before 1978, the court construed the Civil Rights Act of 1964 as an absolute blanket prohibition against discrimination which neither required nor permitted discriminatory preferences for any group, minority or majority. As I stated in my separate opinion in Bakke and as the court forcefully stated in McDonald v. Santa Fe Trail Transportation Co.,

Congress intended "to eliminate all practices which operate to disadvantage the employment opportunities of any group protected by Title VII, including Caucasians."

(a) If the court had adhered to its pre-1978 construction of Title VII, the male employee would unquestionably win this case, but the court has not adhered to that interpretation of Title VII.

(b) In Bakke in 1978 and again in Steelworkers v. Weber in 1979, a majority of the court interpreted the antidiscriminatory strategy of Title VII in a fundamentally different way.

(c) The problem for me is whether to adhere to an authoritative construction by the court of Title VII that is at odds

- I. I would overrule Weber.

(a) (I believe affirmative action can only be justified under Title VII where it is used to remedy intentional and systematic exclusion of minorities by employers and unions from certain job categories. This is and was my understanding of what was decided in Weber.)

(b) In this case, the court now interprets Weber to require nothing more than a manifest imbalance between one identifiable group and another in the employer's labor force in order to justify affirmative action.

(c) As Justice Scalia so well demonstrates, that interpretation is a perversion of Title VII, I would overrule Weber.

- I. The majority's decision converts Title VII's clear language from a guarantee that race or sex will not be the basis for employment determinations to a guarantee that it often will.

This affirmative action plan did not serve to remedy prior sex discrimination by the employer--there was no prior sex discrimination to remedy. Instead, the goal of this plan was to mirror the racial and sexual composition of the local labor force, not merely in the workforce as whole, but in each and every individual job category. In a discrimination-free world, it would obviously be a statistical oddity for every job category to match the racial and sexual composition of the local workforce qualified for that job. This plan did not seek to replicate what a lack of discrimination would produce, but instead, imposed racial and sexual tailoring that would, in defiance of normal expectations and laws of probability, give each protected racial and sexual group a governmentally determined "proper" proportion of each job category.

The most important legal point

Plurality

Brennan/Marshall
Blackmun/Powel

made pursuant to a plan that directed that sex or race be taken into account for the purpose of remedying under-representation.

(d) It was appropriate for the employer to take affirmative action considerations into account in making its promotion decision because the plan emphasized that long-term goals were not to be taken as guides for actual hiring decisions and required consideration of a host of practical factors including specifically the qualifications of applicants for particular jobs.

Issue No. 2 Whether the affirmative action plan unnecessarily trammied the rights of male employees or created an absolute bar to their advancement.

(a) Unlike Weber, the plan sets aside no positions for women but merely authorizes that consideration be given to affirmative action concerns when evaluating qualified applicants.

Under the Bakke decision (1978), race or ethnic background may be deemed a plus under an affirmative action plan as long as the plan does not insulate the individual from comparison with all other candidates.

(b) The plan at issue does

Concurring

Stevens
In Judgment and Opinion,
Creating Majority

with my understanding of what Congress intended. I conclude without hesitation that I must answer that question in the affirmative. Bakke and Weber have been decided and are now an important part of the fabric of our law.

(d) The preference granted to the female employee in this case does not violate Title VII as construed in Weber and Bakke.

Concurring Only in Judgment.

O'Connor

I concur in the Court's judgment.

1. I write this separate opinion, however, because I disagree with both the majority and with Justice Scalia's dissent.

(a) I disagree with the majority's expansive and ill-defined approach to voluntary affirmative action because it disregards both the language of Title VII and the limitations imposed by the Constitution.

(b) In my view the proper standard for evaluating the legality of an affirmative action plan by a public employer under Title VII is no different from that required by the Constitution's Equal Protection Clause.

(c) In either case, the

White

Dissents

Scalia
Rehnquist

established by the majority's decision is that Title VII permits racial or sexual discrimination when it is intended to overcome the effect, not of the employer's own discrimination, but of societal attitudes that have limited the entry of certain races, or of a particular sex, into certain jobs.

The majority's decision is a demonstration not of stability and order but of the instability and unpredictable expansion which comes from substituting judicial improvisation for statutory text.

The court should overrule Weber which was a dramatic departure from the court's prior Title VII precedents. Instead, this case expands Weber to effectively require employers to engage in intentional discrimination on the basis of race or sex.

The majority's decision has converted a statute designed to establish a color blind and gender blind work place into a powerful engine of racism and sexism, not merely permitting intentional race and sex-based discrimination, but often making it, through operation of the legal system, practically compelled.

It is unlikely that today's result will be displeasing to politically elected officials, to whom it provides the means of quickly

Plurality

Brennan/Marshall
Blackmun/Powel

not automatically exclude any person from consideration for promotion--all are able to have their qualifications weighed against those of other applicants.

(c) The male employee had no absolute entitlement to the promotion at issue. Seven applicants were classified as qualified and eligible for promotion and the employer's director was authorized to promote any of the seven. Thus, denial of the promotion unsettled no legitimate firmly rooted expectation on the part of the employer.

(d) The male employee retained his employment at the same salary and the same seniority, and remained eligible for other positions.

(c) The plan was intended to attain a balanced workforce, not to maintain one.

Concurring

Stevens
In Judgment and Opinion,
Creating Majority

employer must have had a firm basis for believing that remedial action was required. This requires the employer to point to a statistical disparity sufficient to support a *prima facie* claim against it under Title VII by the employee beneficiaries of the affirmative action plan.

(d) Under Weber, affirmative action is permitted only if the employer can point a manifest imbalance in traditionally segregated job categories.

(e) The Weber standard for judging affirmative action under Title VII would be the same as the standard recently adopted in Wygant v. Jackson Board of Education (1986) for judging the affirmative action plans of public employers under the equal protection clause. Under that standard, the societal discrimination without more is too amorphous a basis for imposing a racially classified remedy.

2. I disagree with the Justice Scalia's dissenting Opinion because it rejects the court's prior decisions in Weber and Bakke and addresses the question of how Title VII should be interpreted as if the court were writing on a clean slate.
3. In this case, I am satisfied that the

White

Dissents

Scalia
Rehnquist

accommodating the demands of organized groups to achieve concrete numerical improvement in the economic status of particular constituencies. Nor will it displease the world of corporate and government employers for whom the cost of hiring less qualified workers is often substantially less--and infinitely more predictable--than the cost of litigating Title VII cases. In fact, the only losers in the process are the Mr. Johnson's of the country for whom Title VII has been not merely repealed but actually inverted. The irony is that these individuals--predominantly unknown, unaffluent, unorganized--suffer this injustice at the hands of a court fond of thinking itself the champion of the politically impotent. I dissent.

Plurality
Brennan/Marshall
Blackmun/Powel

Concurring
Stevens
In Judgment and Opinion,
Creating Majority

White

Dissents

Scalia
Rehnquist

employer had a firm basis for adopting an affirmative action program because the fact there were no women in its skilled craft positions despite the fact that women constituted approximately 5% of the local labor pool of skilled craft workers, presents a statistical disparity which would have been sufficient to establish a *prima facie* Title VII case against the employer.

One important Title VII affirmative action case did get to the Supreme Court in 1998. That case is Taxman v. Board of Education of Township of Piscataway--a case with a particularly interesting history. During the Reagan administration, the U.S. Justice Department filed the Taxman case on behalf of a white female teacher who was laid off pursuant to the school board's affirmative action policy which said all employment decisions were to be based on merit, but where employees were equally qualified, favorable consideration would be given to employees who fell within the government's definition of "minorities." The school district operated under rules which required layoffs in strict reverse seniority order. Ms. Taxman and a black female teacher had signed their contracts on the same day and had absolutely equal seniority. The school district had generated an express written record showing it favored the black teacher and laid off Ms. Taxman to bolster its EEOC minority statistics.

The facts of the case study problem come from Taxman. The Federal District Court found the Ms. Taxman's layoff was unlawful reverse racial discrimination under Title VII and entered judgment against the employer. The employer appealed. While the case was pending on appeal, the Clinton administration filed a motion in the Third Circuit Court of Appeals seeking permission to switch sides, and asking for leave to file a brief asking the Third Circuit to reverse the judgment the Justice Department had obtained in the District Court on Ms. Taxman's behalf. The Third Circuit denied the government's motion.

A three-judge panel of the Third Circuit heard argument in the Taxman case in November 1995. Before the three-judge panel ruled, the Third Circuit had the case reargued before all of the circuit's 13 judges. One of those judges retired before the opinion was issued in August 1996. By an eight to four majority, the Third Circuit held that Ms. Taxman's layoff was reverse racial discrimination and violated Title VII.

The school board sought permission to appeal to the U.S. Supreme Court, and the Supreme Court agreed to hear the case. Extensive briefs, including several amicus briefs, were filed. The Supreme Court set the case on its 1998 calendar and heard full oral arguments. After the case was fully argued, while the parties were waiting for the Supreme Court's decision, the NAACP paid approximately \$400,000 to Ms. Taxman and mooted the case before the Supreme Court issued any opinion.

The eight judge Taxman majority reviews the same history of affirmative action law I have reviewed in this paper, noting that the words of Title VII and the Supreme Court's early Title VII decisions in Griggs v. Duke Power Co. and McDonald v. Santa Fe Trail Transportation prohibit discrimination in employment on a neutral basis, neither requiring nor permitting any preference for any group. The Taxman majority then carefully reviewed the Weber and Johnson cases.

In Taxman, the employer admitted that when it applied its affirmative action policy to select the white employee to be laid off and the black employee to keep her job, it was not acting to remedy the effects of its own past employment discrimination. The school district agreed it had applied its affirmative action policy to obtain an educational benefit which it believed would result from a racially diverse faculty. The eight-judge majority in Taxman ruled that when the employer applied its affirmative action policy for this purpose, it violated Title VII. The court explained its ruling in these words:

It is only because Title VII was written to eradicate not only discrimination per se but the consequences of prior discrimination as well, that racial preferences in the form of affirmative action can co-exist with the Act's antidiscrimination mandate. We are convinced that unless an affirmative action plan has a remedial purpose, it cannot be said to mirror the purposes of the statute, and, therefore, cannot satisfy the first prong of the *Weber* test.

We see this case as one involving straightforward statutory interpretation controlled by the text and legislative history of Title VII as interpreted in *Weber* and *Johnson*. The statute on its face provides that race cannot be a factor in employer decisions about hires, promotions and layoffs, and the legislative history demonstrates that barring considerations of race from the workplace was Congress' primary objective. If exceptions to this bar are to be made, they must be made on the basis of what Congress has said. The affirmative action plans at issue in *Weber* and *Johnson* were sustained only because the Supreme Court, examining those plans, in light of congressional intent, found a secondary congressional objective in Title VII that had to be accommodated--i.e., the elimination of the effects of past discrimination in the workplace. Here, there is no congressional recognition of diversity as a Title VII objective requiring accommodation.

Accordingly, it is beyond cavil that the Board, by invoking its affirmative action policy to layoff Sharon Taxman, violated the terms of Title VII.

I see some revisionist legal history being written here. It seems true to Weber's facts to say preferential selection to the apprenticeship program was strongly connected to eliminating continuing effects of past discrimination in that workplace. That employer had held a pool of its own unskilled black employees out of skilled craft jobs for years by requiring prior experience--which blacks couldn't get in Louisiana in the 1960s and 70s. By the time Weber was decided, Griggs v. Duke Power had established disparate impact as an avenue to prove Title VII discrimination. Under disparate impact, if a practice neutral on its face is shown to have a disparate racial impact, racial discrimination has been proven unless the employer can justify the practice. On Weber's facts, the employer was highly exposed to a disparate impact case, thus showing a strong connection between past (and continuing) discrimination in that workplace (and in that union and workforce) and the remedial affirmative measures.

Taxman is less true to Johnson's facts. I don't see any disparate impact exposure in Johnson, and the facts indicate the promotion at issue was given to the first qualified female who had ever applied for the dispatcher job. There was clearly a striking statistical underutilization of women in the skilled craft position at issue, but if that was a continuing effect of past discrimination, it wasn't discrimination by that employer. If the affirmative action in Johnson was remedying past discrimination, the discrimination can only have been a generalized societal

discrimination (and one compounded by many personal and economic choices made by female employees).

Taxman reads as if the Third Circuit justices got mixed up about how the majorities in Weber and Johnson read Title VII. The Weber majority didn't read Title VII to provide that race can't be a factor in employer decisions. The Weber majority twisted the language of § 703(j) to let it permit race conscious decisions. Taxman treats Weber's holding as if it were the same as Santa Fe Trail Transportation. It isn't, and one of Justice Rehnquist's most pointed criticisms of Weber's majority opinion involves Weber's failure to explain why it is so sharply inconsistent with Santa Fe Trail Transportation. Taxman's declaration that exceptions to Title VII's race neutral language must be made by Congress and not by the courts isn't true to Weber or Johnson. Again, that's what the dissenting justices said in those cases.

The Third Circuit majority didn't seem to want to explain that the law has changed since Weber and Johnson were decided, so they effectively rewrote Weber and Johnson instead. The law has changed, or maybe it would be more correct to say the Supreme Court has changed. The justices who formed the Weber and Johnson majorities are gone. Justice Rehnquist, in dissent in Johnson and Weber, has consistently argued Title VII doesn't allow affirmative action. Justices Scalia and Thomas share that view. In Adarand, a majority, including Justices Rehnquist, Scalia, and Thomas, formed around Justice O'Connor's reasons for subjecting all racial classification to strict scrutiny. The Metro Broadcasting notion of a less strict scrutiny for "benign" racial classifications was reversed in Adarand.

Employment Cases After Taxman.

McGarry v. Board of County Commissioners Pitkin County, (10th Cir. 1999). Unsuccessful white male applicant for County job alleged Title VII reverse discrimination by hiring Hispanic and African American applicants over him. Plaintiff testified County personnel director told him the successful Hispanic and African American applicants "were minorities, affirmative action hirings, two blacks and one Hispanic." District Court granted summary judgment for the employer. The Tenth Circuit reversed, holding that the personnel director's reference to affirmative action hirings constituted direct evidence of reverse discriminatory intent, raising disputed material fact issue.

Bass v. Orange County, (11th Cir. 2001), public employment reverse discrimination case, Title VII, § 1981 claims. Eleventh Circuit holds that the County's affirmative action plan, when coupled with evidence indicating the County was acting pursuant to that plan in selecting minority applicants over white plaintiff for promotion, constituted direct evidence of reverse racial discrimination unless the plan is valid.

Frank v. Xerox Corp., (5th Cir. 2003), Xerox balanced workforce program constituted direct evidence of racial discrimination. Ironically, in this case Xerox's affirmative action program generates direct evidence of racial discrimination against blacks. The Xerox program identified explicit racial goals for each job and grade level and measured whether blacks or whites were under represented in certain jobs in certain locations. Plaintiffs were black employees who worked in jobs and at a location where blacks had been identified by Xerox as being overrepresented. The District Court granted Xerox's motion for summary judgment. The

Fifth Circuit reversed, holding that the balanced workforce program constituted direct evidence of discriminatory intent against blacks seeking promotion to jobs where Xerox had determined that blacks were “overrepresented.”

Alexander v. City of Milwaukee, (7th Cir. 2007). Seventeen white police lieutenants alleged race discrimination under 42 U.S.C. § 1981, § 1983 and Title VII. At issue were 41 captain promotions during the period 1997 to 2003. The police chief nominated a single candidate for each promotion. A five-member board of commissioners approved the chief’s nomination. The chief followed no written procedure and kept no records of his basis for making promotion nominations.

The Board of Commissioners kept records of police force racial and gender diversity and evaluated the police chief on his ability to foster diversity. The Board wrote that fostering diversity was the part of his job the chief did best. A 1996 police commission report showed white men were underrepresented at the captain’s rank, while African Americans were overrepresented. All plaintiffs were qualified for promotion. The police captain was black.

Of 20 women in minorities promoted to captain during the period at issue, 17 had spent less than five years in lieutenant rank (four were promoted during their probationary first year as lieutenant). Of 21 white males promoted during the same period, only four had less than five years as lieutenant.

A jury found in plaintiff’s favor, awarding compensatory damages ranging from \$9,000 to \$50,000, plus \$289,000 in punitive damages against the police chief and the commissioners in their individual capacity.

On appeal, the Circuit affirmed the jury verdict. This is the first case I have seen where evaluating a decision maker’s performance on demonstrated ability to foster diversity was held to constitute direct evidence of illegal discriminatory intent. The Circuit also affirmed judgments against the commissioners in their individual capacities holding they were not entitled to qualified immunity because after Adarand and Croson, the law was clear. Thus, they should have realized the police chief’s promotion nominations constituted unlawful reverse discrimination.