The Affirmative Action Controversy

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THE AFFIRMATIVE ACTION CONTROVERSY

“Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. . . . The law regards man as man, and takes no account of his surroundings or of his color . . . .”

Justice John Marshall Harlan, 1896.1

“You guys have practicing discrimination for years. Now it is our turn.”

Justice Thurgood Marshall, 1971.2

I. INTRODUCTION

The controversy over affirmative action3 continues4 to spark in-


Affirmative action programs occur in many different forms. The most stringent require an employer to hire, promote, or train a pre-determined percentage of people based upon their race. These types of programs frequently establish quotas under which two separate training, promotion, or hiring decisions are made, one for minorities and women and one for white males. Other affirmative action programs establish goals and timetables with respect to the number of minority members who will be hired, promoted, or trained. Some programs do no more than consider minority status as a positive factor in the decision-making process, and others consist only of extensive recruitment or training of minorities. UNITED STATES COMMISSION ON CIVIL RIGHTS, AFFIRMATIVE ACTION IN THE 1980'S: DISMANTLING THE PROCESS OF DISCRIMINATION, 37 (Jan. 1981). See also Kilgore, Goals, Quotas, Preferences and Set Asides: An Appropriate Affirmative Action Response to Discrimination?, 19 VAL. U.L. REV. 829 (1985).

Each affirmative action program establishes a system of preference based upon race. However, there is no established definition of “minority.” Kilgore, supra at 835. For example, the affirmative action program challenged in United Steelworkers v. Weber, 443 U.S. 193 (1979), applied only to Blacks, Id. at 197, while the affirmative action program challenged in Fullilove v. Klutznick, 448 U.S. 448 (1980), applied to Blacks, Spanish-speaking individuals, Orientals, Indians, Eskimos and Aleuts. Id. at 454.

Although racial affirmative action programs are the most controversial, they are not the only form of preferential treatment. The most common use of affirmative action has been preferential opportunities for veterans. Nickel, Preferential Policies in Hiring and Admissions: A Jurisprudential Approach, 75 COLUM. L. REV. 534 (1975).

4. The United States Supreme Court has recently agreed to decide three new affirmative action cases. See supra notes 158-79 and accompanying text.
tense national debates. A federal judge recently described this controversy as "one of the most difficult and troubling issues facing the judiciary today." The debate over affirmative action has generated two opposing viewpoints, the "equal treatment" position and the "equal achievement" position.

Proponents of the equal treatment or color-blindness position believe that any consideration of race is unlawful. They believe in absolute race neutrality and argue that it is impossible to distinguish between benign and invidious racial classifications. Advocates of the equal treatment position view affirmative action as a form of "reverse discrimination" against the majority race.

Proponents of the equal achievement position focus upon the actual distribution of employment among racial groups. Chief Judge J. Skelly Wright of the District of Columbia Court of Appeals explained in a law review article that this is necessary because


6. Vulcan Pioneers v. New Jersey Dept. of Civil Service, 588 F. Supp. 716, 717, vacated, 588 F. Supp. 732 (D.N.J. 1984). In Vulcan, the court ruled that the City of Newark could lay off white firefighters who had seniority before minority firefighters. Since many white fire fighters would have otherwise been entitled to keep their positions, the court also ruled that this modification, from an otherwise bona fide last hired, first fired lay off policy, constituted a "taking" under the United States Constitution. Id. at 718. Accordingly, the judge ordered that the white fire fighters be paid "just compensation." Id.


9. Professor Alexander Bickel explained:
The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution.


10. Vuyanich, 505 F. Supp. at 262. See also B. SCHLEI & P. GROSSMAN, supra n. 7.
"[r]acial discrimination must not only be detected, but it must also
be remedied. In practice, this requires that the courts and other in-
stitutions engaged in remedying past discrimination begin to prefer
minority groups to the majority."11

This Note will examine the evolution and purposes of affirma-
tive action as well as analyze the Supreme Court’s major decisions
involving both the constitutionality and statutory legality of affirma-
tive action.

II. THE EVOLUTION OF AFFIRMATIVE ACTION

Throughout the history of this nation, racial discrimination has
stained the cloth of American law. The Declaration of Independence
proclaimed that "all men are created equal,"12 yet it omitted any
denunciation of slavery. Even the Constitution openly discriminated
against blacks, by counting them as a fraction of a person for the
purpose of apportioning congressional districts and taxes.13 The Su-
preme Court of the United States also tolerated discrimination. In
1857, the Court stated that blacks were "beings of an inferior order,
and altogether unfit to associate with the white race . . . and so far
inferior that they had no rights which the white man was bound to
respect."14

After the Civil War, Congress added the thirteenth, fourteenth
and fifteenth amendments to the Constitution. These amendments
outlawed slavery,15 guaranteed due process and equal protection
under the law,16 and insulated the right to vote from racial
discrimination.17

The Supreme Court, however, failed to declare illegal many
acts of discrimination. In Plessy v. Ferguson,18 the Court, by an
eight to one decision, upheld a Louisiana statute which required sep-
rate railway carriages for blacks and for whites because "[t]he ob-
ject of the [fourteenth] amendment was undoubtedly to enforce the
absolute equality of the two races before the law, but in the nature of
things it could not have been intended to abolish distinctions

213, 225 (1980).
12. The Declaration of Independence para. 2 (U.S. 1776).
17. U.S. Const. amend. XV, § 1.
based upon color."\(^{19}\)

Only Justice Harlan dissented. He concluded that the Civil War amendments had "removed the race line from our governmental systems"\(^{20}\) and declared that "[o]ur Constitution is color-blind and neither knows nor tolerates classes among citizens. . . . The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved."\(^{21}\) This "separate but equal" doctrine continued to be good law for the next fifty-eight years, until it was overruled by Brown v. Board of Education.\(^{22}\) It rationalized the legality of segregation in schools, state institutions, and privately owned businesses.\(^{23}\)

The principle of government-sanctioned discrimination was not limited to Blacks. As late as 1944, the Supreme Court upheld President Roosevelt's executive order which authorized the federal government to exclude Japanese people from certain areas in California.\(^{24}\) Despite a significant history of discrimination, no decision of the United States Supreme Court has ever adopted Justice Harlan's proposition that the Constitution is color-blind.\(^{25}\)

The theory of affirmative action is not new or peculiar to civil rights. In the labor law field, the 1935 Wagner Act used the identical phrase "affirmative action" to describe the National Labor Relations Board's remedial authority.\(^{26}\) The Supreme Court interpreted this to mean that the National Labor Relations Board has authority to put the injured party in the position in which he would have been, had there been no unfair labor practice.\(^{27}\)

When first applied in a racial context, affirmative action was considered to be an "outreach" program. These programs were designed to recruit minority applicants. Actual selection was made without regard to an individual's race, color, creed or nationality.\(^{28}\)

\(^{19}\) Id. at 544.

\(^{20}\) Id. at 555 (Harlan, J., dissenting).

\(^{21}\) Id. at 559.

\(^{22}\) 347 U.S. 483 (1954).

\(^{23}\) J. NOWAK, R. ROTUNDA and J. YOUNG, CONSTITUTIONAL LAW 629 (2d ed. 1983) [hereinafter cited as CONSTITUTIONAL LAW].

\(^{24}\) Korematsu v. United States, 323 U.S. 214 (1944). The Korematsu case was decided during World War II. However, the decision has never been overruled.


Later, the concept of affirmative action shifted from equality of opportunity toward statistical parity of results.  

III. ARGUMENTS IN FAVOR OF AFFIRMATIVE ACTION

Proponents of affirmative action cite accomplishment of the following goals as justification for the plan:

1. **Compensatory and Distributive Justice.** Preferential policies compensate for unjust past discrimination. The goal of such programs is to raise the status of minorities in American society.

2. **Utilitarian Justice.** The public welfare will be enhanced by reducing racial inequality, and the learning experiences of all Americans increased by associating with more diverse school and professional populations.

3. **Extinguishes Inherited Guilt.** Awarding preference to minorities is a way in which the majority can ease the guilt caused by their past wrongs and those of their ancestors.

4. **Operational Needs.** In the law enforcement context, some courts have upheld affirmative action programs because infusion of minority employees was believed to be necessary to promote a safe and efficient police force.

IV. ARGUMENTS IN OPPOSITION TO AFFIRMATION ACTION

Opponents of affirmative action cite the following potential problems:

1. **Reverse Discrimination.** The most emotionally charged objection to affirmative action is that it discriminates against white people. Rather than helping eradicate discrimination, affirmative ac-

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30. Nickel, supra note 3, at 537. See also Duncan, The Future of Affirmative Action: A Jurisprudential/Legal Critique, 17 HARV. C.R.-C.L. L. REV. 503, 510 (1982). Professors Nickel and Duncan distinguish between compensatory justice and distributive justice. The theory behind compensatory justice is that a person should be made whole for the discrimination he has suffered. The theory behind compensatory justice is that the victim of discrimination should be given the position in society which he deserves.

In the context of affirmative action, this Aristotelian distinction is not clear or useful. Therefore, both theories will be treated together in this Note. See Greenawalt, Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions, 75 COLUM. L. REV. 559, 580 (1975).
31. Nickel, supra note 3, at 541. See also Duncan, supra note 30, at 524.
33. B. SCHLEI and P. GROSSMAN, supra note 7, at 862.
34. Duncan, supra note 30, at 533. See generally B. SCHLEI and P. GROSSMAN, supra note 7, at 775-76.
tion perpetuates it.

2. Stigmatization. Affirmative action stigmatizes minorities as inferior and reinforces racial stereotypes.

3. Unclear Definitions and Limited Scope. Affirmative action does not include every minority group. It discriminates against minority groups which may not have had the strength or "political clout" to negotiate a "piece of the action" for its members. This may lead to the unfortunate consequence of having different minority groups fighting with each other to determine who should receive preference. Related to this issue is the problem of defining who is and who is not a member of a minority group. What constitutes a "Black" or an "Aleut"? Exactly how brown or black do they have to be? Does the fact that a person has a black grandfather entitle him to receive preferential treatment, even if he is white and comes from a wealthy family? Still another problem with affirmative action, is that it is without limit. A black child can receive preference when he applies to college and to graduate school. This same individual, may also receive a preference each time he changes jobs.

4. Competence. Proponents of the equal treatment position often argue that affirmative action produces less competent employees which in turn will decrease the efficiency and quality of services provided.

V. THE CONSTITUTIONALITY OF AFFIRMATIVE ACTION

The Supreme Court has developed three different standards under which it will examine the constitutionality of a particular racial classification. They are commonly referred to as strict scrutiny, intermediate scrutiny, and the rational basis standard.

35. Duncan, supra note 30, at 543.
36. Id. at 545-47.
37. In Fullilove, Justice Stevens criticized affirmative action because preferences may occur "for almost any other ethnic, religious, or racial group with the political strength to negotiate a 'piece of the action' for its members." Fullilove, 448 U.S. 448, 539 (1980) (Stevens, J., dissenting).
38. In Fullilove, Justice Stewart criticized the Court's upholding of a racial quota because "our statute books will once again have to contain laws that reflect the odious practice of delineating the qualities that make one person a Negro and make another white." Fullilove v. Klutznick, 448 U.S. 448, 531 (Stewart, J., dissenting). See also Kilgore, supra note 3, at 834-35.
39. Duncan, supra note 30, at 529.
40. Traditionally the equal protection clause was subject to a deferential standard of review. This "rational basis" standard only required that the challenged racial classification reasonably relate to its legislative purpose. See G. Gunther, Constitutional Law 587 (11th ed. 1985). Under this standard of scrutiny, judges usually allowed legislators great "flexibility to act on the basis of broadly accurate generalizations." Id.
The constitutionality of affirmative action came before the Supreme Court for the first time in *DeFunis v. Odegaard*. However, the *DeFunis* Court never resolved the issue of the constitutionality of affirmative action because the case was dismissed as moot. Since *DeFunis*, the Supreme Court has issued four complicated opinions.

Dissatisfaction with this minimal level of review led to the development of a new Equal Protection standard by the Warren Court. See *Note, Fullilove v. Klutznick: An Initial Victory for Congressional Affirmative Action*, 8 OHIO N.U.L. REV. 377 (1981). This intensive standard of review became known as strict scrutiny. Under this standard of review, a racial classification will be “upheld only if justified by a compelling state interest, and then only if no less intrusive means for accomplishing the legislative objective are available.” *Id.* Strict scrutiny only applies to “suspect classifications” (e.g., race, nationality or alienage) or to laws which affect “fundamental rights” (e.g., right to interstate travel). *Id.*

Recently, the Supreme Court has developed a third standard of scrutiny which is considered to be an intermediate level of review. For a classification to be upheld under the intermediate level of review, the classification “must serve important governmental objectives and must be substantially related to the achievement of those objectives.” See G. GUNther, supra, at 591. This intermediate level of scrutiny has been applied to sex discrimination cases. *Id.* In addition, a majority of the Court adopted this standard as the appropriate level of scrutiny in cases involving affirmative action and reverse discrimination. See *supra* text accompanying notes 87-96.


42. The affirmative action program under attack in *DeFunis* concerned a law school admission program. The University of Washington Law School had two separate admission programs, one for applicants who indicated that they were Black, Chicano, American Indian or Filipino, and another for Whites. *DeFunis*, 416 U.S. 312, 320 (1974) (Douglas, J., dissenting). The law school denied admission to Marco DeFunis Jr., a white male, despite the fact that they admitted a considerable number of less qualified minority applicants. *Id.* at 324.

DeFunis sued in a Washington trial court, contending that the law school discriminated against him on the basis of race in violation of the equal protection clause of the fourteenth amendment. He asked the trial court to issue an injunction directing the school to admit him. The trial court ruled in favor of Mr. DeFunis and issued the injunction. *Id.* at 314-15.

While he was attending law school, the university appealed the lower court’s decision. The Washington Supreme Court reversed the judgment of the trial court and held that the law school’s admission policy did not offend the Constitution. By the time the Washington Supreme Court issued this decision, Mr. DeFunis was in his second year of law school. *Id.* at 315. On appeal to the U.S. Supreme Court, Justice Douglas stayed the judgment of the Washington Supreme Court until the United States Supreme Court had time to decide the case. DeFunis was in his first term of his third year when the United States Supreme Court considered his certiorari petition. *Id.*

In a five to four opinion the Supreme Court dismissed the *DeFunis* case as moot. The Court concluded that this case no longer presented a “case or controversy” because the law school conceded that it would allow DeFunis to finish his legal education regardless of how the Court ruled. *Id.* at 316-17.

Only Justice Douglas discussed the merits of the case. He concluded that the strict scrutiny standard of review was applicable in cases in which a racial classification was utilized. *Id.* at 333 (Douglas, J., dissenting). Justice Douglas expressly rejected the argument that the law school’s affirmative action program constituted a compelling state interest, which would justify the use of a racial classification. *Id.* at 341-42.

43. Marco DeFunis eventually graduated from law school. CONSTITUTIONAL LAW, supra note 23, at 666 n.35.
A. Bakke: A Divided Court Finally Speaks

In 1977, three and one half years after DeFunis, the Court decided Regents of the University of California v. Bakke. By that time, a substantial body of law had developed which permitted race-conscious affirmative action for past and present discrimination against minorities.

The University of California, Davis Medical School had two separate admissions programs: regular and special admissions. Under the regular admissions program, all students could compete for entrance into the first year class. Under the special admissions program, however, a quota existed which mandated that sixteen percent of the class be selected from among those applicants with "disadvantaged" backgrounds. Although many disadvantaged white candidates applied under the special admissions program, the medical school never admitted any of them. The Davis Medical School rejected Allen Bakke, a white male, in 1973 and in 1974. In both years, the school admitted applicants through the special admissions program who had significantly lower grade point averages and Medical School Admission Test scores than Bakke's.

The Supreme Court decision, consisting of six separate opinions and two five-to-four holdings, held that the special admission program constituted racial discrimination in violation of Title VI of the Civil Rights Act of 1964, and that although race may be considered as one factor in an admission decision a rigid quota was unlawful.

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48. Id. at 274-275. The medical school did not have a formal definition of "disadvantaged," but the 1974 application asked the candidates whether they wished to be considered as members of a minority group. The medical school considered Blacks, Chicanos, Asians and American Indians as minority group members. Id. The 1973 application asked candidates whether they wished to be considered as "economically and/or educationally disadvantaged." If this question were answered affirmatively, then the applicant was considered under the special admissions program. Id.

49. Id. at 276.

50. For a complete breakdown of Bakke's credentials, in comparison to those of other candidates, see the table located in footnote 7 of the Court's opinion. Id. at 277-78 n.7.

51. Justice Powell wrote the Judgment of the Court. Justice Stevens concurred with his first holding (the special admissions program violated Title VI), and was joined by Chief Jus-
In language described by at least one law review commentator as "reminiscent of the Douglas dissent in DeFunis," 52 Justice Powell rejected the argument that the strict scrutiny standard only applies to "discrete and insular minorities." 53 Rather, Powell concluded that strict scrutiny was the appropriate level of review because race is a suspect classification. 54

Davis Medical School asserted four justifications for its quota system: (1) the need to reduce the historic shortage of minority doctors; (2) the need to cure the results of past societal discrimination; (3) the need to increase the number of doctors who will practice in underserved communities; and (4) the need to obtain an ethically diverse student body. 55 Justice Powell rejected the first three arguments. However, he did conclude that the attainment of a diverse student body was a "constitutionally permissible goal," because academic freedom is a special concern of the first amendment. 56

Even though diversity was a permissible objective, Powell concluded that the special admissions program violated the equal protection clause. In Powell's view, the flaw in the medical school's program was that it focused only on ethnic diversity. He explained that for diversity to qualify as a compelling state interest, it must encompass "a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." 57 Powell then cited the Harvard University Admissions Program (where race is considered as a positive factor, but does not insulate an individual's comparison with others) as an acceptable affirmative action program. 58

The Brennan group rejected Justice Powell's conclusion that...
strict scrutiny was the appropriate standard of review on the
grounds that whites do not constitute a suspect class and that no
fundamental right was involved. They concluded that the interme-
diate scrutiny standard was the appropriate level of review. Brennan
concluded that the special admissions program survived this in-
termediate level of review. He reasoned that the medical school’s
purpose of remedying the effects of past societal discrimination was
an objective sufficiently important to justify the use of a race con-
scious admissions policy. Both Brennan and Powell accepted the
equal achievement position. Powell approved of an affirmative action
plan which serves a utilitarian purpose (academic diversity) and
Brennan viewed the goal of compensatory and distributory justice
(remedying the effects of past discrimination) to be of sufficient
importance to justify the use of explicit racial quotas. Four other
Justices took no position on the appropriate constitutional standard
of review because they concluded that the special admission program
was invalid under Title VI. Therefore, there was no majority deci-
sion on the appropriate constitutional standard of review in affirm-
ative action cases.

B. Fullilove: The Justices Remain Divided

**Fullilove v. Klutznick** was the third case the Supreme Court
decided concerning the legality of affirmative action. The affirmative
action program under attack in **Fullilove** concerned a racial “set-
aside” program. The Public Works Employment Act of 1977

59. *Id.* at 356-57. (Brennan, J., concurring in part and dissenting in part).
60. *Id.* at 357.
61. Justice Brennan stated "racial classifications designed to further remedial purposes
must serve important governmental objectives and must be substantially related to achieve-
ment of those objectives." *Id.* at 359 (quoting Califano v. Webster, 430 U.S. 313, 317 (1977)
and Craig v. Boren, 429 U.S. 190, 197 (1976)).
63. *Id.* at 311-12.
64. *Id.* at 362 (Brennan, J., concurring in part and dissenting in part).
65. *Id.* at 411-12 (Stevens, J., concurring in part and dissenting in part).
67. United Steelworkers v. Weber, 443 U.S. 193 (1979) was the second major case in
which a majority of the Court discussed the legality of affirmative action. Because *Weber*
concerned the legality of an affirmative action plan under Title VII, it will be discussed in Part
VI of this Note. See supra text accompanying notes 103-121.
68. The set-aside quota challenged in *Fullilove* received public attention again in 1984,
when former Labor Secretary Raymond J. Donovan was indicted for evading this law. See
generally Oreskes, *Corruption and Quotas in the Construction Industry. The Set-Aside Scam.*
1984).
contained a provision which required that at least ten percent of federal funds granted for local public works projects be used to procure services or supplies from eligible minority group members. This provision was known as the Minority Business Enterprise provision (MBE).\textsuperscript{70} 

The Supreme Court concluded that this statute was constitutional. As in \textit{Bakke}, the Court failed to achieve a majority opinion regarding the correct level of scrutiny applicable in affirmative action cases.\textsuperscript{71} Chief Justice Warren Burger, joined by Justices White and Powell, wrote the judgment of the court. Since Burger did not address the constitutionality of affirmative action in \textit{Bakke}, his opinion is important in determining the appropriate constitutional standard of review. The Chief Justice stated that the MBE provision would be upheld under either the intermediate or strict scrutiny standards which the Court applied in \textit{Bakke}.\textsuperscript{72} Unfortunately, he failed to expressly adopt either standard but instead established the following test:\textsuperscript{73} "Any preference based upon racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees."\textsuperscript{74} The Burger test is a type of intermediate level of scrutiny as indicated by the fact that Justice White, who adopted an intermediate stand in \textit{Bakke},\textsuperscript{75} joined the Burger opinion in \textit{Fullilove}, while Justice Powell wrote a separate opinion applying the strict scrutiny standard as he had in \textit{Bakke}.\textsuperscript{76} If Powell had considered the opinion of the Chief

\textsuperscript{70} The MBE provision provides:

Except to the extent that the Secretary determines otherwise, no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term "minority business enterprise" means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.


\textsuperscript{71} See supra text accompanying notes 45-74.

\textsuperscript{72} \textit{Fullilove}, 448 U.S. at 492.

\textsuperscript{73} Id.

\textsuperscript{74} Id. at 491.

\textsuperscript{75} Justice White joined in Justice Brennan's opinion in \textit{Bakke}. See supra text accompanying notes 59-62.

\textsuperscript{76} In \textit{Fullilove}, Powell stated that a racial classification is unconstitutional "unless it is a necessary means of advancing a compelling governmental interest." 448 U.S. 448, 496 (Powell, J., concurring).

Powell reasoned that "[r]acial classifications must be assessed under the most stringent
Justice a form of strict scrutiny, he may not have written a separate opinion. Furthermore, the words Burger used, “a most searching examination,” imply a heightened level of review, but they do not require the strictest level of review.

Chief Justice Burger accepted the equal achievement position espoused by Justices Powell and Brennan in Bakke. He recognized that affirmative action accomplishes the goal of compensatory and distributive justice, and stressed the deference which is to be accorded to an act of Congress. It is clear that the intent of Congress was to increase minority participation with respect to public works projects.

Justice Marshall wrote an opinion, joined by Justices Brennan and Blackmun, in which he concurred in the judgment of the Court. He advocated the use of the same intermediate level of scrutiny which Justice Brennan had advocated in Bakke. Judged under the intermediate standard, Marshall concluded that the MBE provision was plainly constitutional and that this question was not even a close one. In Marshall’s view, remedying the effects of prior discrimination is a sufficiently important government objective to justify the use of racial classifications.

Justice Stewart joined by Justice Rehnquist wrote a dissenting opinion. Unlike the other Justices, Stewart did not see a distinction between affirmative action and invidious discrimination. Justice Stewart advocated a color-blind constitutional standard of review, indicating a willingness to approve of racial classification only as a level of review because immutable characteristics, which bear no relation to individual merit or need, are irrelevant to almost every governmental decision.” Id. However, Powell did not assert that the Constitution prohibits all racial classifications. Rather, he concluded that “any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid . . . . But, in narrowly defined circumstances, that presumption may be rebutted.” Id. at 497 n.1. In Powell’s view, the MBE provision constituted such a circumstance because it served the “compelling governmental interest in eradicating the continuing effects of past discrimination identified by Congress.” Id. at 496.

77. Fullilove, 448 U.S. at 491.
78. The Chief Justice stated that “[a] program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to the Congress, a co-equal branch.” Fullilove, 448 U.S. at 472.
79. Id. at 496 (Powell, J., concurring).
80. Justice Marshall stated, “the proper inquiry is whether racial classifications designed to further remedial purposes serve important governmental objectives and are substantially related to achievement to those objectives.” Fullilove, 448 U.S. at 519 (Marshall, J., concurring).
81. Id.
82. Id. at 520.
83. Fullilove, 448 U.S. at 526 (Stewart, J., dissenting).
specific remedy for a proven violation of law. Justice Stevens also dissented, stating that “[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.” Although Stevens did not explicitly adopt any of the traditional forms of scrutiny, his opinion has been described by at least one law review commentator as a form of strict scrutiny.

After Fullilove, a majority of the Supreme Court is on record as favoring some form of intermediate level of scrutiny. Chief Justice Burger and Justice White adopted a form of intermediate scrutiny in Fullilove and Justices Marshall, Brennan and Blackmun advocated the intermediate standard in both Bakke and Fullilove. In contrast, Justice Rehnquist would require a color-blind standard. Justice Stewart retired from the Court after having advocated color-blindness and Justice O’Connor has never had the opportunity

84. Id. at 528.
85. Fullilove, 448 U.S. at 537 (Stevens, J., dissenting).

Justice Stevens objected to the MBE provision on both substantive and procedural grounds. Choper, supra note 3, at 7.

Substantively, Stevens referred to this law as a “slapdash statute” because it contained a random distribution to a favored few. Fullilove v. Klutznick, 448 U.S. 448, 539 (1980) (Stevens, J., dissenting). Stevens also objected to this law because there was no reason advanced in the Act or in the legislative history which explained how Congress came up with a definition of “minorities.” Id. at 535. Stevens also referred to this statute as a “perverse form of reparation for the members of the injured classes [f]or those who are the most disadvantaged within each class are the least likely to receive any benefit from the special privilege . . . .” Id. at 538.

This is because the MBE provision only benefits minorities with enough capital to be in the construction business.

Justice Stevens’ principle substantive objection to the statute was that it may not merely be interpreted to be a remedial statute. Rather, it may become a “permanent source of justification for grants of special privileges.” Id. at 539. He asserts that if no objective standards are used, legislative preferences will occur “for almost any ethnic, religious, or racial group with the political strength to negotiate ‘a piece of the action’ for its members.” Id. Stevens also objected to this statute because the automatic preference can work to the advantage of minorities who have not suffered from any discrimination. Id. at 540-41.

On procedural grounds, Stevens objected to Congress’ decision-making process in selecting ten percent as the amount to be set-aside. Id. at 535-36. Stevens also found fault with the statute because there was no articulated purpose for the racial quota in the Act or in the legislative history. Id. at 549-50. Stevens also labeled the consideration of this Act as “perfunctory” because “only a handful of legislators spoke and there was virtually no debate.” Id. at 550.

87. See supra text accompanying notes 75-77.
88. See supra text accompanying notes 59-62 and 80-82.
89. See supra text accompanying notes 83-84.
90. See supra notes 83-84 and accompanying text. Justice Stewart retired from the Court in 1981. CONSTITUTIONAL LAW, supra note 23, at 1101.
to address the constitutionality of affirmative action.91

It is unclear whether Justice Powell supports a strict or an inter-
mediate level of scrutiny. In Fullilove, Powell endorsed Burger’s92
intermediate standard, yet wrote a separate concurring opinion93 in
which he applied strict scrutiny, as he did in Bakke.94 It is also un-
clear which level of scrutiny Justice Stevens would adopt. He did not
address the Constitution in Bakke95 and he did not clearly articulate
which position he endorsed in Fullilove.96

VI. AFFIRMATIVE ACTION AND THE CIVIL RIGHTS ACT OF 1964

Affirmative action programs also have been challenged on statu-
tory grounds under the Civil Rights Act of 1964.97

91. Justice Sandra O’Connor was appointed by President Reagan in 1981. CONSTITU-
TIONAL LAW, supra note 23, at 1100.

92. See supra notes 72-77 and accompanying text.

93. See supra note 76.

94. See supra notes 52-58 and accompanying text.

95. See supra note 65 and accompanying text.

96. See supra notes 85-86 and accompanying text.

97. Affirmative action programs have been challenged under the following section of
Title VI:
“No person in the United States shall, on the ground of race, color, or national origin, be
excluded from participation in, be denied the benefits of, or be subjected to discrimination
Affirmative action programs have been challenged under the following sections of Title VII:
(1) Section 703 (a) of Title VII provides the following:
It shall be an unlawful employment practice for an employer -
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discrimi-
nate against any individual with respect to his compensation, terms, conditions, or
privileges of employment, because of such individual’s race, color, religion, sex, or
national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any
way which would deprive or tend to deprive any individual of employment opportu-
nities or otherwise adversely affect his status as an employee, because of such indi-
vidual’s race, color, religion, sex, or national origin.

(2) Section 703 (d) of Title VII provides the following:
It shall be an unlawful employment practice for any employer, labor organization,
or joint labor-management committee controlling apprenticeship or other training or
retraining, including on-the-job training programs to discriminate against any indi-
vidual because of his race, color, religion, sex, or national origin in admission to, or
employment in, any program established to provide apprenticeship or other training.

(3) Section 706(g) of Title VII provides the following:
If the court finds that the respondent has intentionally engaged in or is intentionally
engaging in an unlawful employment practice charged in the complaint, 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 (pay-
A. Bakke and Title VI

In *Bakke*, Justice Powell concluded that Title VI proscribes those classifications which violate the Constitution. Because he found that the special admissions policy violates the equal protection clause, he held it to be unlawful under Title VI. Justice Stevens expressly avoided addressing the constitutionality of affirmative action, but concluded that Title VI had been violated. He was joined by Chief Justice Burger, and Justices Stewart and Rehnquist. Together with Powell, they constituted a majority of the Court on the issue of Title VI. Stevens reasoned that Congress intended a color-blind standard and concluded that "Title VI stands for the general principal that no person . . . be excluded from participation . . . on the ground of race, color or national origin under any program or activity receiving Federal financial assistance."
B. Weber and Title VII

United Steelworkers v. Weber\textsuperscript{103} was the second major case the Supreme Court decided regarding the legality of an affirmative action plan and the first dealing with the plan in the area of employment discrimination. By a five to two majority, the Supreme Court upheld a provision in a collective bargaining agreement which reserved fifty percent of the openings in a craft training program for black employees.\textsuperscript{104} This quota was to remain in existence until the percentage of black craft workers in the Kaiser plant approximated the percentage of black workers in the local labor force.\textsuperscript{105}

Prior to the institution of the affirmative action plan, Kaiser's force of craft workers was almost exclusively white. Under pressure from the Office of Federal Contract Compliance to increase its percentage of minority craft workers,\textsuperscript{106} Kaiser instituted the plan to remedy the imbalance. Brian Weber, a white male, was denied entry into this training program even though less qualified black applicants were admitted. Weber sued, claiming that the company had discriminated against him on account of his race, in violation of Title VII of the Civil Rights Act of 1964.\textsuperscript{107}

Writing for the majority, Justice Brennan again advocated the "equal achievement" position. Although he conceded that the argument to interpret Title VII literally was not "without force,"\textsuperscript{108} he stated that it should be interpreted "against the background of the legislative history . . . and the historical context from which the Act arose,"\textsuperscript{109} and concluded that the legislative purpose of the Act was to undo the effects of past discrimination.\textsuperscript{110}

While Justice Brennan refrained from declaring that all affirm-
ative action plans\textsuperscript{111} are perforce lawful, he expressly declined to "define in detail the line of demarcation between permissible and impermissible affirmative action plans."\textsuperscript{112} He did, however, articulate those factors which led to his decision that this particular plan was lawful\textsuperscript{113} because it did not "unnecessarily trample the interests of the white employees."\textsuperscript{114}

In a dissenting opinion, Chief Justice Burger stated that the majority opinion is "contrary to the explicit language of the statute."\textsuperscript{115} Burger maintained that the majority opinion amends "the statute to do precisely what both its sponsors and its opponents agreed that the statute was \textit{not} intended to do."\textsuperscript{116} Burger concluded that all employment discrimination is unlawful under this Act.

In another forceful dissent, Justice Rehnquist, joined by Chief Justice Burger, described the majority's opinion as something out of the book 1984 and not reminiscent "of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini."\textsuperscript{117} In his view, "the Court eludes clear statutory language, uncontradicted legislative history and uniform precedent in concluding that employers are, after all, permitted to consider race in making employment decisions."\textsuperscript{118}

Rehnquist's dissent is consistent with his view that the Constitution is color-blind.\textsuperscript{119} It is surprising, however, that Chief Justice Burger joined in the dissent in \textit{Weber}. In his discussion of the Constitution in \textit{Fullilove}, the Chief Justice stated, "As a threshold matter, we reject the contention that in the remedial context the

\textsuperscript{111} \textit{Id.} at 208.
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} The plan was declared lawful, based on the following considerations:
1. The plan does not require the discharge of white workers and their replacement with new black hires . . . (citations omitted).
2. Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white.
3. Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance. Preferential selection of craft trainees at the Gramercy Plant will end as soon as the percentage of black skilled craft workers in the Gramercy Plant approximates the percentage of blacks in the local labor force.
\textit{Id.}
\textsuperscript{114} \textit{Id.}
\textsuperscript{115} \textit{Weber}, 443 U.S. at 216 (Burger, C.J., dissenting).
\textsuperscript{116} \textit{Id.} (emphasis supplied).
\textsuperscript{117} \textit{Weber}, 443 U.S. at 222 (Rehnquist, J., dissenting).
\textsuperscript{118} \textit{Id.}
\textsuperscript{119} See supra notes 83-84 and accompanying text.
Congress must act in a wholly ‘color-blind’ fashion.” On the other hand, Burger joined Justice Stevens’ opinion in Bakke, in which Stevens concluded that Title VI mandates color-blindness and said “the meaning of Title VI . . . is crystal clear: Race cannot be the basis of excluding anyone from participation in a federally funded program.” Apparently, the Chief Justice accepts a color-blind statute, but not a color-blind Constitution.

C. The Statutory Challenge in Fullilove

The Fullilove case also was challenged on statutory grounds. Chief Justice Burger, joined by two other Justices, concluded that the Minority Business Enterprise (MBE) provision was legal under Title VI, but did not explain his reasons for this holding. Justice Powell, who joined the opinion of the Chief Justice and also wrote a separate concurring opinion, also concluded that the set-aside provision did not violate Title VI because the set-aside program was constitutional. Justice Marshall, joined by two other Justices, also concluded that the MBE provision did not offend Title VI because the prohibitions against discrimination in Title VI are coexistent with those in the Constitution. Since the Constitution was not violated, Marshall found no statutory violation. Justices Stewart, Rehnquist, and Stevens, who dissented in Fullilove, did not address the statutory issue. Thus a majority of six concluded that the MBE provision was lawful under Title VI. An interesting aspect of the statutory challenge in Fullilove is the fact that each of the Justices who discussed it only addressed it in a footnote, with little or no analysis.

D. Stotts: The Supreme Court’s First Step Towards Color-Blindness

In Firefighters Local Union No. 1784 v. Stotts, the Supreme Court, in a six to three decision, held that the layoff of more senior white employees before less senior black employees violated Title VII of the Civil Rights Act of 1964. Carl Stotts, a black captain

120. Fullilove v. Klutznick, 448 U.S. 448, 482 (1980).
122. 448 U.S. 448 (1980).
123. Id. at 492 n.77.
124. Id. at 517 n.15 (Powell, J., concurring).
125. Id. at 517 n.1 (Marshall, J., concurring).
127. Stotts, 104 S. Ct. at 2590.
in the Memphis Fire Department, filed a class action suit in 1977 alleging racial employment discrimination in violation of Title VII.\textsuperscript{128} A settlement was reached before trial. The city entered into a consent decree and agreed to promote and provide back pay to a number of individuals. Under the consent decree, the city also adopted the "long term goal of increasing the proportion of minority representation in each job classification in the Fire Department to approximately the proportion of blacks in the [local] labor force,"\textsuperscript{129} and established a goal of filling fifty percent of the job vacancies with black candidates. The city did not admit that it had violated any law and no provisions were made for layoffs.\textsuperscript{130}

Due to budget deficits in 1981, the city laid off some fire fighters. Layoffs were based upon the "last hired, first fired" concept. As many blacks had been recently hired, they were more likely to be laid off in disproportionate numbers.\textsuperscript{131} At the request of Stotts, the district court issued an injunction forbidding the city from applying the seniority layoff policy because it would reduce the percentage of blacks employed. Pursuant to this Order, the city adopted a modified layoff plan. As a result, some non-minority employees were laid off or demoted in rank,\textsuperscript{132} while minority employees with less seniority remained in their jobs.

After concluding that this case was justiciable, Justice White, writing for the Court overturned the lower court's decision. Justice White reached this result by interpreting Section 703(h) and Section 706(g) of Title VII.\textsuperscript{133} He concluded that Section 703(h) "protects bona fide seniority systems, and it is inappropriate to deny an innocent employee the benefits of his seniority."\textsuperscript{134} White also emphasized that only actual victims of discrimination may disrupt an otherwise bona fide seniority system.\textsuperscript{135} Justice White interpreted section 706(g) which addresses the remedies available under Title VII, to provide make whole relief "only to those who have been actual victims of illegal discrimination."\textsuperscript{136} He reached this result by

\begin{itemize}
\item \textsuperscript{128} Id. at 2581.
\item \textsuperscript{129} Id.
\item \textsuperscript{130} Id.
\item \textsuperscript{131} Id. at 2581-82.
\item \textsuperscript{132} Id. at 2582. The city ultimately laid off twenty-four fire fighters, three of whom were black. If the seniority system had been followed, six blacks would have been laid off. Id. at 2582 n.2.
\item \textsuperscript{133} See supra note 97.
\item \textsuperscript{134} Stotts, 104 S. Ct. at 2586-87.
\item \textsuperscript{135} Id. at 2588.
\item \textsuperscript{136} Id. at 2589.
\end{itemize}
examining the intent of Congress.\textsuperscript{137}

Justice O'Connor wrote a concurring opinion which primarily dealt with the "unusual procedural posture of [this] case."\textsuperscript{138} Substantively, O'Connor said very little. She merely expressed her belief that "Title VII affirmatively protects bona fide seniority systems, including those with discriminatory effects on minorities."\textsuperscript{139} She agreed with the Court's holding because it held the "respondents to the bargain they struck during the consent decree negotiations in 1980."\textsuperscript{140}

O'Connor did not address the constitutionality of affirmative action. Nevertheless, her concurrence is an extremely important opinion. It represents the views of President Reagan's lone appointee.\textsuperscript{141} Given the fact that five justices are over age seventy-seven,\textsuperscript{142} a distinct possibility exists that President Reagan will have the opportunity to appoint several new Justices to the Court. If this occurs, the Court may finally outlaw affirmative action.\textsuperscript{143}

Justice Blackmun,\textsuperscript{144} in a dissenting opinion, joined by Justices

\textsuperscript{137}. For example, Senator Humphrey stated the following:
No court order can require hiring, reinstatement, admission to membership or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act or discrimination forbidden by this title. This is stated expressly in the last sentence of Section 707(e) [enacted without relevant change as § 706(g)] . . . . Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require . . . firing . . . of employees in order to meet a racial 'quota' or to achieve a certain racial balance. That bugaboo has been brought up a dozen times; but is nonexistent.

Stotts, 104 S. Ct. at 2589 (quoting 110 CONG. REC. 6549 (remarks of Sen. Humphrey)).

\textsuperscript{138}. Id. at 2590-91 (O'Connor, J., concurring).

\textsuperscript{139}. Id. at 2592.

\textsuperscript{140}. Id. at 2594.

\textsuperscript{141}. See supra note 91.


The Reagan administration has aggressively attacked affirmative action. William Bradford Reynolds, the head of the civil rights division of the United States Department of Justice has stated that affirmative action has done more harm than good and that "[i]t's demeaning because it says people are going to get ahead not because of what they can do, but because of their race." Assault on Affirmative Action, TIME, February 25, 1985, at 19. The chairpersons of the U.S. Equal Employment Opportunity Commission and the United States Commission on Civil Rights have also indicated their opposition to affirmative action. Cox, Some Thoughts on the Future of Remedial Race and Gender Preferences Under Title VII, 19 VAL. U. L. REV. 801-02 (1985).

\textsuperscript{144}. Justice Blackmun believed that this case was moot, and therefore not justiciable. Stotts, 104 S. Ct. at 2596 (Blackmun, J., dissenting).
Brennan and Marshall, drew a distinction between individual and race-conscious relief. He concurred with the majority opinion regarding individual relief, and concluded that an individual is entitled to an award of relief “only if he can establish that he was the victim of discrimination.” In Title VII suits, however, Blackmun asserted that race-conscious relief can be appropriate. In support of this position, he cited cases from every circuit which had approved of race-conscious relief. Justice Blackmun also cited to the legislative history of an amendment to Title VII as demonstrating that “Congress endorsed the remedial use of race under Title VII.” Thus Justice Blackmun indicates his support of the “equal achievement” school of thought. In Stotts, unlike the other cases discussed, the Justices who advocated this position dissented from the majority opinion.

The Court’s decision in Stotts is not surprising because the layoff plan fails the first prong of the Weber test and hence it “unnecessarily trammel[s] the interests of the white employees,” by laying off white workers rather than less senior black workers. It is surprising, however, that Weber was not even mentioned by the majority.

The exact impact of Stotts is an issue of considerable controversy. The United States Department of Justice contends that Stotts sub silentio overruled Weber. However, all of the lower courts

145. Id. at 2605. (Blackmun, J., dissenting).
146. Justice Blackmun rationalized his position by stating the following: The purpose of such relief is not to make whole any particular individual, but rather to remedy the present class-wide effects of past discrimination or to prevent similar discrimination in the future. Because the discrimination sought to be alleviated by race-conscious relief is the classwide effects of past discrimination rather than discrimination against identified members of the class, such relief is provided to the class as a whole rather than to its individual members . . . . The distinguishing feature of race-conscious relief is that no individual member of the disadvantaged class has a claim to it, and individual beneficiaries of the relief need not show that they were themselves victims of the discrimination for which the relief was granted. Id. at 2606 (Blackmun, J., dissenting).
147. Id.
148. Id. at 2609.
149. To satisfy the first prong of the Weber test, it must be proved that “[t]he Plan does not require the discharge of white workers and their replacement with black hires.” United Steelworkers v. Weber, 443 U.S. 193, 208 (1977). Although the Stotts plan does not require replacing discharged white workers with black ones, it has the same result. White workers lose their jobs while the black workers remain.
150. In testimony before the Labor Subcommittee on Employment Opportunities and the House Judiciary Subcommittee on Civil and Constitutional Rights, Assistant Attorney General William Bradford Reynolds stated the following: As we read the Stotts opinion, it appears to us to say that the federal courts may neither require nor permit race-conscious or gender-conscious hiring, promotion or layoff procedures as an element of Title VII relief (whether incorporated in a court
have stated that *Weber* was not overruled by *Stotts.*\(^{151}\)

Although in form *Weber* still remains good law, it appears that *Stotts* has overruled it in substance. Upon close analysis, it is apparent that the holding in *Stotts* is at complete odds with the holding in *Weber.* In *Weber* the Supreme Court allowed an affirmative action quota system to interfere with a promotion system based upon seniority.\(^{152}\) However, in *Stotts* the Supreme Court did not allow an affirmative action plan to interfere with layoffs.\(^{153}\) It is difficult to see how the innocent white person who lost his promotion to a less senior black worker in *Weber* is in a different position than the innocent white employee in *Stotts* who would be required to give up his job order or a consent decree) in an employment discrimination case.


The Department of Justice has asked fifty-one state and local governments to eliminate promotion and hiring goals. *Justice Department Challenges Indianapolis Affirmative Action Plan*, 85 DAILY LAB. REP. (BNA) A-6 (May 2, 1985). However, in the first case which was challenged by the Department of Justice, *United States v. City of Buffalo*, Nos. 73-414C and 74-195C, slip. op. (W. Dist. N.Y. June 10, 1985), a district court judge concluded that the *Stotts* case was limited to layoffs. *See also Federal Court Rejects Justice Department Effort to Modify Buffalo Consent Decree*, 115 DAILY LAB. REP. (BNA) A-1 (June 14, 1985).


In *Deveraux*, the court stated the following:

The expansive reading of *Stotts* urged by plaintiffs would require us to find that *Stotts* overruled *Weber sub silentio.* In view of the importance of any such action, it seems likely that the Court would have directly addressed *Weber* if it had intended to overrule that decision. All the circuits considering the issue have concluded, in the absence of any express pronouncement to the contrary, that *Weber* remains good law.


The Supreme Court has agreed to hear three new affirmative action cases. Wygant v. Jackson Bd. of Educ., 746 F.2d 1152 (6th Cir. 1984), *cert. granted*, 105 S. Ct. 2015 (1985); Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479 (6th Cir.), *cert. granted*, 106 S. Ct. 59 (1985); E.E.O.C. v. Local 638 . . . Local 28 of Sheet Metal Workers Int'l Ass'n, 753 F.2d 1172 (2d Cir.), *cert. granted*, 106 S. Ct. 58 (1985). The Court now has the opportunity to clarify *Stotts* as well as prior cases.

152. *See supra* notes 98-118 and accompanying text.

153. *See supra* notes 126-148 and accompanying text.
because of affirmative action.\textsuperscript{154}

Perhaps the contradiction can be explained by the following proposition: the interest given up by a white employee who loses his job to a less senior black employee, is greater than the interest he gives up when he fails to receive a promotion. If so, the legality of affirmative action, under Title VII, turns on the degree of harm which the innocent victim suffers. Another distinction between the cases lies in the fact that Weber was concerned with the legality of an affirmative action program which was collectively bargained for, while Stotts dealt with a conflict between a collective bargaining agreement and a consent decree.

Although Stotts only dealt with layoffs, a majority of the Court finally adopted a color-blind standard of review. Historically, color-blindness has been the goal of the Civil Rights movement.\textsuperscript{165} In fact, Justice Thurgood Marshall, the only black ever to sit on the Supreme Court, advocated color-blindness when he argued Brown v. Board of Education\textsuperscript{156} before the Supreme Court in 1954.\textsuperscript{167}

\section*{VII. THE 1985-86 TERM PRESENTS THE SUPREME COURT WITH THE OPPORTUNITY TO CLARIFY AND REEXAMINE THE LEGAL STATUS OF AFFIRMATIVE ACTION}

As this Note goes to press, the United States Supreme Court has granted certiorari in three cases involving affirmative action issues.\textsuperscript{158} The Supreme Court only decided a total of four affirmative action cases between 1978 and 1984.\textsuperscript{166} Therefore, the legal status of affirmative action might be significantly changed. In addition, the Supreme Court now has the opportunity to clarify and reexamine

\begin{itemize}
\item \textsuperscript{154} See generally Kinsley, The Merit Above All Canard, Los Angeles Times, July 2, 1984, § 2 (Metro), at 5, col. 3.
\item \textsuperscript{156} 347 U.S. 483 (1954).
\end{itemize}
some of the Court's earlier divided and inconsistent opinions.\textsuperscript{160}  

At issue in \textit{Wygant v. Jackson Board of Education},\textsuperscript{161} is a collective bargaining agreement provision which gives minority school teachers greater protection from layoffs than their white counterparts.\textsuperscript{162} Although this case is similar to \textit{Stotts}, it concerns the legality of a collectively bargained layoff provision, while \textit{Stotts} concerned the administration of a consent decree which was silent with respect to layoffs.\textsuperscript{163} The Sixth Circuit upheld the provision in \textit{Wygant} against constitutional and statutory attacks.\textsuperscript{164} The only issue before the Court is whether the Constitution tolerates racial preferences for teacher layoffs, in the absence of past discrimination, based solely on the statistical disparity between minority faculty and students.\textsuperscript{165}  

For reasons set forth above, the Court is likely to conclude that the intermediate level of scrutiny is the appropriate level of review.\textsuperscript{166} Nevertheless, the Court is likely to find a constitutional violation, based on the holding in \textit{Stotts} which does not allow a court to modify a consent decree to give greater protection to minorities in

\textsuperscript{160} The Supreme Court's inconsistency in deciding affirmative action cases is illustrated by the holdings in \textit{Bakke} and \textit{Weber}. \textit{Bakke} held that a school may not institute a racial quota, but that it may award preferential consideration to minority candidates. Regent of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). Yet \textit{Weber} permits an employer to institute a racial quota in order to determine who should be promoted. United Steelworkers v. Weber, 443 U.S. 193 (1979).

In only two of the four major affirmative action cases was the Court able to gather enough votes so that one Justice could write the opinion of the Court. One of them was decided by a five to two vote, United Steelworkers v. Weber, 443 U.S. 193 (1979). The other was decided by a six to three margin. Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984).

In both \textit{Bakke} and \textit{Fullilove} the Court was unable to achieve one majority opinion. \textit{Bakke} consisted of six separate opinions and two five to four holdings. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). \textit{Fullilove} consisted of five separate opinions in which not more than three Justices joined in with any one opinion. Fullilove v. Klutznick, 448 U.S. 448 (1980).

162. \textit{Id.} at 1154.
163. For an analysis of \textit{Stotts}, see supra notes 126-57 and accompanying text.
164. \textit{Wygant}, 746 F.2d at 1155-57. In upholding the affirmative action layoff provision, the Sixth Circuit concluded that a finding of racial discrimination is not a prerequisite to the adoption of a lawful affirmative action plan under Title VII or the Equal Protection clause. \textit{Id.} at 1155-56. However, the court stated that it would require some evidence of minority underrepresentation. In an interesting twist, the court allowed the school to compare the percentage of minority teachers to the percentage of minorities in the \textit{student} population, rather than in the relevant labor market. \textit{Id.} at 1156. The court reasoned that such a comparison was appropriate since the state has a "vitaly important" interest in providing role models for minority students. \textit{Id.}

166. See supra notes 87-96 and accompanying text.
the event of a layoff. While Wygant may be distinguished from Stotts which did not address the Constitution and involved the administration of a consent decree, it would be difficult for the Court to apply a different analysis. The employee who is forced to give up his position so that a less senior minority can retain one pursuant to a consent decree in Stotts, suffers the same amount of harm as the employee who loses his position under a collective bargaining agreement in Wygant.

Vanguards of Cleveland v. City of Cleveland \(^{167}\) concerns the legality of an affirmative action promotional preference plan entered into pursuant to a consent decree settling a Title VII employment discrimination suit. \(^{168}\) The Sixth Circuit upheld this plan against a challenge under Title VII. \(^{169}\) Among the issues before the Court is whether a municipal employer can adopt a racial preference plan, over the objection of a union, when the affirmative action scheme awards preference to minorities whether or not they were actual victims of discrimination. \(^{170}\)

Vanguards presents the Supreme Court with the opportunity to reexamine the Weber decision. Weber upheld, against a Title VII attack, a collectively bargained racial quota with regard to promotions. \(^{171}\) This author asserts that Weber is overruled in substance by Stotts. Vanguards of Cleveland presents the Court with the opportunity to overrule it in form and declare that an employer cannot lawfully institute a racial preference plan, unless it is limited to benefiting the actual victims of discrimination. \(^{172}\)

E.E.O.C. v. Local 638 . . . Local 28 of Sheet Metal Workers International Association \(^{173}\) results from a decision which found a union in contempt of court for violating the “racial goals” \(^{174}\) established in a district court order. \(^{176}\) The court order required that the union offer for work, and the employer hire a certain percentage of minorities. The district court issued the order because it found that

167. 753 F.2d 479 (6th Cir.), cert. granted, 106 S. Ct. 59 (1985).
168. Id. at 481-83.
169. Id. at 489.
171. For an analysis of Weber see supra notes 103-21 and accompanying text.
172. See supra notes 150-57 and accompanying text.
174. The dissent criticized the majority for “transform[ing] . . . a goal guiding the administrator's decisions into an inflexible racial quota.” Id. at 1189 (Winter, J., dissenting).
175. Id. at 1174. The district court order contained numerous affirmative action provisions. Id. at 1185. This Note only addresses the issue of court-ordered racial goals.
the union intentionally violated Title VII.\textsuperscript{176} The Second Circuit con-
cluded that \textit{Stotts} did not preclude the use of race-conscious affirma-
tive action.\textsuperscript{177} Among the issues presented to the Court is whether,
after a general finding of discrimination against \textit{unidentified} persons,
a court may order race-conscious affirmative action in the form of a
percentage goal.\textsuperscript{178}

The Supreme Court is likely to reverse the Second Circuit's de-
cision and invalidate the membership goal, based on the holding in
\textit{Stotts} which eliminates all race-conscious relief except that which
benefits actual victims of discrimination.\textsuperscript{179} In \textit{Sheet Metal Workers},
those who benefit from the affirmative action plan are not the actual
victims of discrimination.

\textbf{VIII. CONCLUSION}

The common objective of all affirmative action plans is integra-
tion. The controversy over affirmative action is not over the objective
or end, but rather over what means should be used to accomplish the
end. The Supreme Court has not definitively determined the appro-
priate level of constitutional scrutiny to apply in affirmative action
cases, nor has the Court established any clear guidelines concerning
to what degree, if any, affirmative action will be permitted under the
Civil Rights Act of 1964. As the Supreme Court considers the cases
currently before it, the controversy continues.

Mitchell H. Rubinstein

\textsuperscript{176} \textit{Id.} at 1176.
\textsuperscript{177} \textit{Id.} at 1185-86.
\textsuperscript{178} \textit{Local 638 v. E.E.O.C.}, 54 U.S.L.W. 3191 (Oct. 8, 1985) (No. 84-1656).
\textsuperscript{179} \textit{Stotts}, 104 S. Ct. at 2589.