CHAPTER THREE

Employment Discrimination, the Courts, and the Reagan Justice Department

The courts have repudiated the administration's policy of backing off on civil rights enforcement.

—Peter Sherwood, quoted in Fred Barbash, "The Administration Is Batting Zero on Civil Rights in the Supreme Court"

The statement above was made by an ebullient civil rights lawyer following a 1984 decision by the U.S. Supreme Court not to review the case of Bratton v. Detroit, in which white officers of the Detroit Police Department, joined by the Civil Rights Division of the Department of Justice, had challenged a voluntarily adopted city policy that established a 50 percent quota for promotion of blacks. The lawyer's reaction was by then both familiar and predictable, reflecting the prevailing view of civil rights activists that any attempt to enforce the civil rights of nonminorities by attacking racial quotas favoring minorities is, ipso facto, a "policy of backing off on civil rights enforcement." The Bratton case marked the culmination of three years of effort by the Reagan Justice Department to invalidate racial quotas and preference schemes, during which time it had not won a single victory before the Supreme Court.

In this, the first of two chapters in which we will present case studies of the Reagan administration's attempts to reformulate various aspects of civil rights policy, we will analyze six representative employment discrimination cases in which the Justice Department's Civil Rights Division participated as intervenor or amicus curiae. No claim is made to portray the totality of the Justice
Department's experience with employment discrimination policy formation and enforcement; the discussion will be limited to selected cases that seem representative of the general effort to reformulate race-conscious civil rights policies, specifically regarding the use of employment quotas and preference schemes based on race.

Reorientation of the Justice Department's Civil Rights Division

Before Reagan's election in 1980, the Civil Rights Division, like the OFCCP and the EEOC, had been a powerful engine in the drive toward a race- and gender-conscious interpretation of the federal civil rights statutes and the Constitution. Although the division, as merely the litigative arm of the federal civil rights enforcement bureaucracy, does not have authority to issue interpretive guidelines and regulations pursuant to statutory law, it nonetheless played an active role in the formulation of civil rights policy throughout the 1970s by consistently urging courts to establish legal precedents that collectively helped to facilitate the transition to a race- and gender-conscious regime of civil rights. As already noted, the division has been described by one prominent civil rights interest group as "the Civil Rights backbone of the federal government, and its activities and policies set the pace not only for other federal departments, but also for state, local, and private agencies."¹

The salience of the Civil Rights Division was also acknowledged by the Heritage Foundation in its widely circulated 1980 report, Mandate for Leadership. The report argued for a "color-blind" approach to civil rights policy and labeled the division a "radicalized" agency. It advised that the new head of the division would have to be willing "to take the heat" for policy changes and to face staff rebellions.² Sure enough, by 1982 it was clear that William Bradford Reynolds' outspoken support for the principle of race- and gender-neutrality had earned him the enmity of a large segment of the division's staff. In that year the National Journal reported that the Division "is experiencing a barely concealed revolt by many of its 390 employees."³ Said one division lawyer: "What we see is a conservative administration being activist in the opposite direction. It's this blind ideology—an airtight, rightist
view of the world. They're reactionary. It's that simple."⁴ "There's a very bad adversary atmosphere of them versus us," said another. "It's really weird. When we—that is, the division—lose in court, all the attorneys go up and down the hall cheering because we feel we really won."⁵ Within a year of Reynolds' appointment to head the division, seventy-five attorneys—more than half its complement—had signed a petition opposing Reynolds' policies.⁶

Opposition to the division's efforts under Reynolds was even more intense among members of the organized civil rights lobby. In May 1983, NAACP general counsel Thomas I. Atkins suggested at a hearing of the House Judiciary Subcommittee on Civil and Constitutional Rights that the division be dismantled and its functions assigned to other federal agencies. "Worse than not working, when the Division does work it does so in a harmful manner," he told an interviewer later. "I'm trying to reduce its ability to do harm."⁷ Subcommittee chairman Don Edwards (D-Cal.) evidently sympathized with the lobby's frustration. "They don't want to have anything to do with [division attorneys]," he said. "The only reason we have the civil rights laws is for these people, and they're saying that they don't want that kind of protection."⁸ To develop an understanding of the specific division actions that led to this remarkable consternation, let us consider the first of our cases.

Connecticut v. Teal: Expanding the Disparate Impact Theory

Connecticut v. Teal was a Title VII case decided by the Supreme Court in June 1982.⁹ In light of the circumstances that led to the suit, one may be surprised to learn that it was not a reverse discrimination case on the order of Bakke or Weber. The state of Connecticut had administered a written examination to employees of its Department of Income Maintenance as the first step in a selection process to determine which employees would be declared eligible for promotion. The mean score on the exam was 70.4 percent. Ordinarily this would have been automatically designated the minimum passing score, but the cutoff point was lowered to 65 to lessen the disparate impact upon black candidates, whose mean score was 6.7 percentage points below that of white candidates.¹⁰ Despite this adjustment, however, only 54.2 percent of the black candidates received passing scores (above 65), compared to
a pass rate of 79.5 percent among the white candidates. To compensate further for the still-low pass rate among the blacks, the state employed what the Court of Appeals for the Second Circuit characterized as an affirmative action program “in order to ensure a significant number of minority supervisors.” Although 26 blacks and 206 whites received passing scores, of the 46 persons ultimately promoted to supervisory positions, 11 were black and 35 were white, numbers not at all commensurate with the respective pass rates for the two groups.

A plausible argument might have been advanced that the state intentionally discriminated against white candidates on the basis of their race, but this was not the issue raised in Connecticut v. Teal. Rather, the suit was brought by four black employees who had scored below 65 on the written exam and were thereby excluded from further consideration in the promotion process. The plaintiffs charged that Connecticut had violated Title VII of the Civil Rights Act (which by this time had been amended by Congress to apply to governmental, as well as private, employers) by requiring, as an absolute condition for consideration for promotion, that applicants pass a test that excluded blacks in disproportionate numbers and that was not job-related. The same provision that the plaintiff in the Weber case claimed had been violated by the racial preference plan that had led to his exclusion from his employer’s apprenticeship program—Section 703(a) of Title VII—was what was said to have been violated:

It shall be an unlawful employment practice for an employer . . . 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 opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

As a matter of statutory construction, the Teal plaintiffs would seem to have had a very poor case. How could they possibly show that in flunking a generally administered, standardized test they had been “deprived” of an employment opportunity “because of [their] race, color,” and so forth? But given the substantial body of case law based on the disparate-impact theory of employment discrimination developed by the courts in the aftermath of the
Supreme Court's 1971 decision in *Griggs v. Duke Power*, that question was by now irrelevant so far as the plaintiffs in *Teal* were concerned. Or was it? In every previous disparate-impact case, the courts had preoccupied themselves with bottom-line results. The issue was always whether, after a particular hiring or promotion procedure had run its course and the final results were known, women or minority group members had suffered a disparate impact in contravention of the norm of statistical group parity. In *Teal*, however, there was no disparate racial impact at the bottom line. Indeed, with the disparate-impact doctrine firmly established in Title VII case law, officials in Connecticut’s Department of Income Maintenance undoubtedly realized that the disparate results of the examination they administered constituted a *prima facie* case of racial discrimination, and that the state might thus be called upon to prove its job-relatedness in court. Rather than undertake such a costly and possibly futile project, they sought to “correct” the test’s disparate impact by giving preferential consideration to those blacks who did pass, thereby ensuring that the bottom-line result—the ratio of blacks to whites among those finally awarded promotions—would not be statistically adverse to blacks.

When the state was sued anyway despite these measures, Connecticut’s defense was that the bottom-line results of its overall promotion process obviated the disparate impact caused by the examination, and that therefore the state should not be made to prove that its test was job-related. The district court agreed, but the Court of Appeals for the Second Circuit reversed, ruling that where “an identifiable pass-fail barrier denies an employment opportunity to a disproportionately large number of minorities and prevents them from proceeding to the next step in the selection process,” that barrier must be shown to be job-related.  

When the Supreme Court agreed to review the case, the Civil Rights Division submitted an *amicus curiae* brief in support of Connecticut, thereby reversing the position it had taken in the lower courts during the Carter administration. In its brief, the division called the Court’s attention to Section 703(h) of Title VII, which specifically authorizes the use of “professionally developed ability tests” so long as they are not “designed, intended or used to discriminate because of race, color,” and the rest. No doubt recognizing that in the *Griggs* case the Court gave short shrift to this provision by asserting that Congress had intended “only to make
clear that tests that were *job-related* would be permissible despite their disparate impact," the division contended that Connecticut’s test was not “used to discriminate” because it did not actually deprive disproportionate numbers of blacks of promotions. In effect, the Justice Department was saying that since the Court had required proof of job-relatedness only with respect to those employment practices that yield disparate results, and since in the final accounting there were no disparate results in this instance (except as they may have *favored* blacks), the Court should not require Connecticut to prove that the examination component of its promotion process was job-related.

It is important to note that in so arguing, the Justice Department stopped far short of challenging the validity of Connecticut’s second-stage preference under Title VII. Nor did it ask the Court to reverse its Griggs ruling. Instead, it asked only that the Court acknowledge that its disparate-impact theory of discrimination is based perforce on statistical comparisons of racial groups (as opposed to particular individuals), and that Connecticut had overcome the disparate impact produced by its test by adopting compensatory procedures to ensure that the overall promotion process would not have a disparate racial impact. A minority of four justices (Powell, Burger, O’Connor, and Rehnquist) agreed with this position, but the majority (Brennan, White, Marshall, Blackmun, and Stevens) ruled that since Section 703(a) “speaks, not in terms of jobs or promotions, but in terms of *limitations* and *classifications* that would tend to deprive any individual of employment opportunities,” Connecticut’s test must meet the job-relatedness requirement because it served as a “limitation” that denied the plaintiffs, as individuals, the “opportunity” to compete equally for promotions. “The suggestion that disparate impact should be measured only at the bottom line ignores the fact that Title VII guarantees these individual respondents the *opportunity* to compete equally with white workers on the basis of job-related criteria,” Justice Brennan declared in his opinion for the Court. (Notice how the norm of statistical group parity operates here: Brennan suggests that if an employment criterion, such as Connecticut’s test, produces a disparate racial impact that is adverse to blacks as a group, then it follows that those blacks—but only those blacks—who performed poorly on the test were denied “the opportunity to compete equally” for promotions. In contrast,
the numerous whites who failed the same test presumably were
not denied an opportunity to compete equally for promotions,
because whites as a group fared relatively well.)

Brennan’s opinion for the Court is particularly noteworthy for
its uncharacteristic solicitude for the civil rights of individuals.1
His emphasis on Title VII’s concern for individuals, however,
seems misplaced within the context of the disparate-impact the-
ory of discrimination (to which Brennan wholeheartedly sub-
scribes). Indeed, this was the gravamen of Justice Powell’s dissent,
in which he was joined by three of his colleagues. Powell accused
the majority of having “confuse[d] the individualistic aim of Title
VII with the methods of proof by which Title VII rights may be
vindicated.”16 He continued:

The respondents, as individuals, are entitled to full personal
protection of Title VII. But having undertaken to prove a viola-
tion of their rights by reference to group figures, respondents
cannot deny petitioners the opportunity to rebut their evidence
by introducing figures of the same kind. Having pleaded a dis-
parate impact case, the plaintiff cannot deny the defendant the
opportunity to show that there was no disparate impact.17

These words, which speak not to the legality or desirability of
race-conscious rules of adjudication but rather to the need for a
consistent application of doctrinal principles, absolutely failed to
impress the Court’s majority.

For the Civil Rights Division, the Teal decision was a total loss.
Although the Court’s affirming of an apparently victim-specific
remedy may seem on a superficial level to comport with Assistant
Attorney General Reynolds’ stated objective of reorienting civil
rights policies toward the individual and away from the group, the
decision actually blends those features of each approach that are
most advantageous to plaintiffs in cases such as Teal. The decision

1See Opinion of Justice Brennan. “Title VII does not permit the victim of a facially
discriminatory policy to be told that he has not been wronged because other
persons of his or her race or sex were hired. That answer is no more satisfactory
when it is given to victims of a policy that is facially neutral but practically
discriminatory. Every individual employee is protected against both discrimina-
tory treatment and ‘practices that are fair in form but discriminatory in opera-
thus stands as a model of result-oriented jurisprudence. Its effect would seem to be to expand the scope of the disparate-impact theory well beyond the boundaries originally established in Griggs. Under Teal, disparate results in any particular component of an employment practice establishes a prima facie case of discrimination. Employers would no longer be able to adjust for the racially disparate outcomes produced in one stage of an employment procedure by affording preferential treatment to members of adversely affected minority groups in subsequent stages. In light of this further judicial enlargement of the meaning of “discrimination,” it seemed certain that employers would have an even greater incentive than before to eliminate standardized testing, once regarded as the cornerstone of merit employment procedures.

Interestingly, the Washington Council of Lawyers, a self-proclaimed “public interest bar association,” cited the “unequivocal rejection by the Supreme Court of the [Civil Rights] Division’s position” in the Teal case as “further evidence that the division has abandoned vigorous enforcement of Title VII.”¹⁸ In reality, the Division lost precisely because it did seek to enforce Title VII as interpreted in Griggs and its progeny. Evidently, in the opinion of some civil rights activists, attempts merely to enforce the requirements of existing case law are not sufficient to constitute “vigorous enforcement of Title VII”; rather, the division’s proper function must be to assist the organized civil rights lobby in its continuing drive to extend the boundaries of current race-conscious civil rights doctrine.

**Williams v. New Orleans:**
Enacting Racial Preferences via the Consent Decree

*Williams v. New Orleans,*¹⁹ decided by the Court of Appeals for the Fifth Circuit in April 1984, concerned a consent decree negotiated between the New Orleans Police Department (NOPD) and a class of black plaintiffs, some of whom had applied for positions with the department and some of whom were members of the force. The plaintiffs earlier had complained of discriminatory policies in the selection, training, and promotion of city police officers. Rather than go to trial, however, the parties agreed, in October 1981, to submit a proposed consent decree to the district court for its approval.
According to the district court, the thirty-three-page proposed decree governed “virtually every phase of an officer’s employment by the New Orleans Police Department.” Some of its more noteworthy provisions included the assignment of “buddies” to guide black applicants through the application process; new entry level procedures to ensure that the proportion of blacks who graduated from the police academy was no lower than the proportion of blacks who passed the entry level examination; the elimination of all general intelligence tests; the creation of forty-four new supervisory positions immediately and the appointment of black officers to all forty-four positions; the subsequent promotion of one black officer for every white officer promoted until blacks constituted 50 percent of all ranks within the NOPD; a requirement that any black officer who failed to complete the probationary period following promotion would be replaced by another black officer; and the automatic invalidation of any test item having a “statistically significant adverse impact against blacks.”

Such is the stuff of the modern employment discrimination consent decree. The officials of the New Orleans Police Department were only too happy to agree to these terms, but the department’s rank and file were not. Objections to the decree were filed with the district court by roughly three-fourths of the officers, including associations of Hispanic and female officers. The district court judge, Morey L. Sear, responded to these objections by withholding approval of the decree, indicating, however, that the decree was satisfactory in every respect save one: the provision requiring black and white officers to be promoted on a one-to-one basis until blacks constituted 50 percent of all ranks within the NOPD. That provision, said Judge Sear, exceeded the court’s remedial objectives and seriously jeopardized the career interests of nonblack officers. The parties were encouraged to modify the decree accordingly and resubmit it for the court’s approval. The plaintiffs, however, appealed this decision on grounds that the district court had abused its discretion in conditioning its approval of the decree on the deletion of the promotion quota, and a panel of the Fifth Circuit agreed. The case was remanded to the district court with instructions for Judge Sear to sign the decree.

At this point the Justice Department formally intervened with a request for a rehearing by the full appellate court; the Civil Rights Division would use the occasion to argue its belief that
wholesale relief to members of an entire racial class—without regard to whether each individual member of the class was an actual victim of discrimination—is never justified under Title VII. The division based its contention on the last sentence of Section 706(g) of Title VII, which reads as follows:

No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin.

Like every other provision in Title VII, this one speaks in terms of individuals, and it specifically enjoins courts from ordering the hiring or promotion of any individual unless his original failure to be hired or promoted was due to discrimination. Does this mean that a court could not authorize a consent decree requiring the promotion of a class of individuals, through the mechanism of a racial quota, in the absence of probative evidence that the employer in question had practiced discrimination against each member of the plaintiff class? The Civil Rights Division contended that it does.

The Fifth Circuit’s response was to brush this pivotal question aside, curtly observing that “[t]his court has long upheld the use of affirmative action in consent decrees under Title VII and has not required that relief be limited to actual victims of discrimination.”\(^{24}\) Moreover, “the use of quotas or goals under Title VII without regard to specific victims as one means to remedy past discrimination has been upheld regularly throughout the federal courts of appeal.”\(^{25}\) This, of course, could hardly have come as a revelation to the lawyers in the Civil Rights Division or to students of Title VII jurisprudence. What had been asked for was a reexamination of the issue in light of the circumstances presented by Williams. The court’s majority would have none of this, declaring summarily that “[t]he question of whether affirmative action provisions are permissible as a general remedy under Title VII is not an issue in this case.”\(^{26}\) The majority then proceeded to the narrower question of whether the district court had abused its discretion. The district
court’s ruling was upheld (resulting in the deletion of the one-to-one promotion quota) on the grounds that the district court showed proper concern for the fate of “the numerous intervening parties whose interests would have been affected by the decree.”27 The court thus recognized the unfairness of the decree, but not according to some principled rationale; by casting its approval of the district court ruling in terms of judicial discretion and the need to “balance” competing interests, the court seemed in effect to say that discrimination against whites to help blacks is appropriate under Title VII, provided there isn’t too much of it! In any event, it is clear that the Civil Rights Division had failed in its attempt to overturn judicial recourse to broad remedial racial quotas.

Only four (Higginbotham, Garwood, Jolly, and Gee) of the Fifth Circuit’s thirteen members found merit in the division’s stand against affirmative action quotas. Writing for three members of this dissident minority, Judge Patrick Higginbotham recalled the legislative history of Title VII, especially Senator Humphrey’s remark that

there is nothing in [Title VII] that will give any power to any court to require hiring, firing, or promotion of employees in order to meet a certain racial “quota” or to achieve a certain racial balance—That bugaboo has been brought up a dozen times but it is nonexistent.28

Although acknowledging that the Supreme Court had upheld the use of racial preference in promotion in its Weber decision, Higginbotham distinguished Williams from Weber by noting that “the Weber Court decided only that Congress did not intend to limit traditional business freedom to such a degree as to prohibit all voluntary, race-conscious affirmative action.”29 Williams posed a rather different question—whether requiring a public agency to afford preferential treatment to members of one race until a racial quota is achieved is a permissible judicially imposed remedy under Title VII. According to Higginbotham, “The legislative history of Title VII answers this question in clear terms. Such a practice cannot be required.” He then struck at the heart of the issue:

A quota which injures persons not participating in accused segregation patterns to the benefit of persons who were not its victims
is responsive to a wrong defined in terms of a failed social order—a judicially envisioned distribution of jobs among races, ethnic groups, and sexes. Such social ordering is a peculiar use of judicial power because judicial power to resolve disputes has traditionally and constitutionally been confined in the main to disputes whose dimensions are drawn by adverse parties.\(^{31}\)

Higginbotham was correct in noting the peculiarity of judicially imposed “social ordering” within the broad historical context of Anglo-American jurisprudence. Yet, as noted in Chapter 2, the invention of group-based equity by late twentieth century jurists had seriously vitiates the traditional injunction that the “judicial power to resolve disputes” be “confined in the main to disputes whose dimensions are drawn by adverse parties.” The sweeping, group-oriented equitable relief that the Fifth Circuit proposed to uphold in Williams made sense only if one defined the “adverse parties” as entire racial groups. This was both understood and deplored by Higginbotham:

The principal failing of the proposed quota is that it regards all members of the black race as a single class, rather than recognizing that the group is composed of individuals, some of whom have suffered the invidious effects of past discrimination and some of whom have not. I have no objection, of course, to grouping those individuals who have suffered some wrong and now prosecute [sic] their case on a group basis. . . . What I cannot accept is the notion that “the black race” is an independent legal entity and that relief for past discrimination against black persons should take the form of special advantages granted in the future to “the black race.” Races, per se, are not proper parties to a court action.\(^{31}\)

This, as we have noted, was the essence of the Justice Department’s position as well. A quite different view was expressed in a separate opinion written by Judge John Minor Wisdom and joined by five of his colleagues (Brown, Politz, Randall, Tate, and Johnson). While concurring in the court’s rejection of the Civil Rights Division’s per se attack on promotion quotas, Wisdom dissented from its holding that the district court had acted properly in disallowing the particular promotion quota at issue in Williams. His opinion is of particular interest because, although none of the other opinions written in regard to the case addressed constitutional
issues, Wisdom's does. It is not surprising, then, that his long opinion is liberally sprinkled with citations to articles written by leading professors of constitutional law, including the redoubtable Owen Fiss. These sources are used mostly to support a group rights "interpretation" of the Fourteenth Amendment's equal protection clause, consonant with the position espoused by Fiss which we considered in Chapter 2.

Wisdom does not, however, go so far as to explicitly adopt Fiss's "group-disadvantaging principle" to the exclusion of the more orthodox "antidiscrimination principle." Yet because he apparently sees adherence to the antidiscrimination principle as leading necessarily to injustice, at least at the present time, the effect is much the same as if Wisdom had adopted the group-disadvantaging principle. He wrote, for example, that

the Constitution calls for equal treatment under the law, and in light of the pervasive past discriminatory practices and the present effects of these practices, in many cases this goal can be achieved only by taking active, affirmative steps to remove the effects of prior inequality. 32

By this reasoning, legal rules and principles are understood not as immediate injunctions to be obeyed and enforced in the here and now, but rather as prospective "goals" that can realistically be met only after an indeterminate period during which judges must authorize various race-conscious measures designed to ensure that the goal of nondiscrimination may someday be realized. Or, to use Judge Higginbotham's terms, the goal of equal treatment under the law must not conflict with "a judicially envisioned distribution of jobs among races, ethnic groups, and sexes." So long as it does, the goal of equal treatment must be deferred. This view, summed up in Justice Blackmun's dictum that "to get beyond racism, we must first take account of race . . . [a]nd in order to treat some persons equally, we must treat them differently," had by 1980 become quite common throughout the federal judiciary, and although it appears on the surface not to be as radical a doctrine as Fiss's overt repudiation of the antidiscrimination principle, it does tend in practice to produce the same kind of results.

Judge Wisdom was not content to rely solely on the equal protection clause to advance his argument that "[t]he Constitution
is race-conscious." His signal contribution in support of that conclusion was to aver that the Thirteenth Amendment (which abolished slavery) offers a constitutional justification for race-conscious affirmative action. His contention is based on the first Justice Harlan’s *dissenting* opinion in the *Civil Rights Cases*, proclaiming that “the Thirteenth Amendment may be exerted—for the eradication, not simply of the institution [of slavery], but of its badges and incidents. . . .” Thus, concludes Wisdom, the “underrepresentation of blacks on the [New Orleans police] force since 1898, or perhaps since 1847-77, is a badge of slavery: it is a sign readily visible in the community that attaches a stigma upon the black race.”

Here is what the Thirteenth Amendment says in full:

*Section 1.* Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

*Section 2.* Congress shall have power to enforce this article by appropriate legislation.

The Wisdom opinion would thus seem to transcend even the mode of constitutional adjudication conventionally denoted by the term “judicial activism.” With the obvious exception of the U.S. Supreme Court and the possible exception of the Court of Appeals for the District of Columbia Circuit, the Fifth Circuit is probably the most influential court in the country with respect to civil rights issues, encompassing as it does much of the deep South. That six of thirteen judges on that court could subscribe to such an extraordinary (even by contemporary standards) reading of the Constitution was a telling indication of the extent to which some judges were prepared to go to promote race-conscious civil rights policies. Indeed, from the Civil Rights Division’s point of view, the Wisdom opinion—even though it failed by one vote to carry the day—might have seemed even more portentous than the majority’s rejection of its attack on racial quotas. How, after all, could a fundamental reformulation of civil rights doctrine be achieved through the courts when a substantial portion of the most influential appellate court judges were apparently committed
to expanding race-conscious civil rights doctrine well beyond existing boundaries?

_Firefighters v. Stotts: A Tentative Victory for Race Neutrality_

Although before 1980 the Supreme Court had upheld the voluntary use by private employers of racial preferences in job hiring and promotions, it had yet to rule on the question of whether racial criteria could be used to determine job layoffs during periods of economic distress. Here again, Congress had anticipated the emergence of this issue during the debates that preceded the enactment of the 1964 Civil Rights Act, and the results of its deliberations were stated in the form of Sections 706(g) and 703(h). We have already had occasion to quote from the relevant provisions of the former section, the effect of which was to prohibit courts from ordering, _inter alia_, “the hiring, reinstatement, or promotion of an individual as an employee . . . if such individual was refused admission . . . for any reason other than discrimination on account of race, color,” and the rest. Section 703(h) provides:

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

During the early 1980s, as the national economy went into recession, many unionized workers across the country were laid off by their employers on the basis of seniority, generally in accordance with seniority-based layoff procedures that had been written into collective bargaining agreements between unions and employers. The use of seniority as a criterion for determining layoffs reflected the widely held belief that employers as well as fellow workers should be especially sensitive to the plight of older workers, inasmuch as they typically have greater financial commitments and less job mobility than their less senior counterparts. Moreover, seniority effectively displaced personal favoritism,
nepotism, and ethnic or racial prejudice as grounds for determining layoffs. In the early 1980s, however, many employers, particularly in the public sector, were operating under Title VII consent decrees that required them to exercise racial preference for minorities in hiring and promotion, and it soon became clear that if widespread seniority-based layoffs went into effect, the "gains of affirmative action" would rapidly be eroded as recently hired members of the preferred groups succumbed to the rule of "last hired, first fired."

In a number of such instances the original plaintiffs went back to court, urging that existing employment discrimination consent decrees be amended to apply race-conscious principles to layoffs as well as to hiring and promotion. Despite the plain language of Section 706(g), and especially 703(h), many courts promptly obliged. When, for example, the City of Boston found itself confronted with fiscal problems of so serious a magnitude that 1,300 Boston schoolteachers had to be laid off, a federal judicial order was issued forbidding any reduction in the minority share of school employment. 36 The result was that tenured white teachers with up to fifteen years of service were laid off, while the school board continued to hire new black teachers. Three years later there were still over 400 white teachers laid off in Boston; for all intents and purposes they had lost their jobs in the cause of racial equality. 37

Such decisions represented significant departures from the letter and spirit of Section 703(h), but in the absence of a definitive Supreme Court ruling upholding racially determined layoffs it would have been premature to conclude that the conventional principles governing job layoffs had been permanently supplanted by the tenets of race-conscious civil rights doctrine. In 1983, however, the Court agreed to review Firefighters Local No. 1784 v. Stotts, 38 a case that presented essentially the same basic question that was at issue in the Boston schoolteachers case, but under far less prepossessing circumstances for a momentous legal engagement. (Inexplicably, the Supreme Court had twice refused to review the Boston case. 39) The case involved a clash between black firefighters, hired by the City of Memphis under a consent decree, and white firefighters with seniority rights under their labor agreement. The consent decree had established racial hiring and promotion quotas within the fire department pursuant to two separate lawsuits brought against the city. The first, which challenged the city's over-
all employment practices, was brought by the federal government and ended with a 1974 consent decree (with no admission of liability) that established the long-term goal of a racially proportionate workforce in the fire department, to be pursued through an interim quota requiring that 50 percent of new hires be black. The second suit was a class action brought by the respondent Carl Stotts attacking the hiring and promotion practices of the fire department alone. This case was settled in 1980 by yet another consent decree, which reiterated the long-term employment goal and the 50 percent hiring quota for blacks, but added a 20 percent promotion quota as well. It also contained a directive that eighteen named black firefighters be given immediate promotion.40

The present case, which could be called “Stotts II,” arose in the spring of 1981, when fiscal difficulties caused the city to begin a program of layoffs. The city’s established personnel policy, detailed in a memorandum of understanding with the firefighters’ union, announced that layoffs would occur according to a last-hired, first-fired schedule.41 Had the city proceeded on this basis (as it had proposed to do), the result would have been a layoff of twenty-five whites (out of 497) and fifteen blacks (out of eighty-five), with all the latter to be drawn from the eighteen new hires employed under the 1980 decree, as well as the demotion of fourteen of the eighteen named blacks who had been promoted under that decree. The upshot would have been a reduction in black employment in the fire department from an 11 percent to a 10 percent share.42 When the class represented by Stotts sought an injunction against the discharge of the fifteen blacks, the district judge, relying on the consent decree, forbade the city to apply its seniority policy in a way that would reduce the proportional representation of blacks in the fire department. The city responded by ordering the fire department to execute its layoffs by dismissing senior white firefighters.43 On appeal, the Court of Appeals for the Sixth Circuit affirmed, concluding that the district court’s modification of the original consent decree was permissible under general contract principles because the city had “contracted” to provide “a substantial increase in the number of minorities in supervisory positions” and the layoffs would breach that contract.44

Although Stotts clearly presented fundamental issues under Title VII every bit as profound as those presented by the Boston
schoolteachers and similar cases, by the time the case reached the
Supreme Court (arguments were heard on December 6, 1983), it
had begun to take on the appearance of a tempest in a teapot.
For one thing, because of changes in the city’s layoff schedule (the
fiscal crisis in Memphis evidently proved to be not as grave as had
initially been forecast), only three additional whites were laid off
by the fire department, and these were recalled less than a month
later (although each lost roughly $1,200 in back pay, less unem-
ployment insurance benefits). Moreover, it so happened that all
six of the firefighters actually affected by the judicial order—the
three “senior” whites who were laid off and the three “junior”
blacks who were retained—were all hired on the same day, less
than two years earlier. The reason the blacks ranked below the
whites on the seniority list was that the first letter in their last
names came later in the alphabet, and the Memphis seniority sys-
tem used alphabetical priority as its tie-breaking device. Fur-
thermore, the modified consent decree was cast as a temporary
restraining order, addressed specifically to the layoffs scheduled
for June 1981, rather than as a permanent injunction, so it was by
no means certain that the order would apply to future layoffs.

The brevity of the layoffs and demotions, the small amount of
money involved, and especially the apparent evanescence of the
judicial order under review combined to make for a plausible ar-
gument that the Stotts case was “moot,” and therefore unfit for the
exercise of judicial power. The mootness issue provided a conve-
nient pretext for those members of the Court who, on the basis of
their votes in previous cases involving challenges to race-
conscious civil rights doctrine, would have been most inclined to
defend the modified consent decree at issue in Stotts. Rather than
issue a judgment on the merits of the case, which would have
required some effort to reconcile Section 703(h) with the terms of
the modified consent decree, Justices Brennan, Marshall, and
Blackmun could argue that the decision of the Court of Appeals
should be permitted to stand on grounds of mootness.

For their part, the remaining six justices had little difficulty
rebutting the mootness argument, and although their analysis
“was by no means free of difficulty,” according to a pair of legal
scholars who studied the case, “the majority did not stray indefen-
sibly beyond the bounds of mootness doctrine in finding Stotts fit
for decision.” Indeed, the rationale for finding the case justiciable
that was propounded by Justice White in his opinion for the Court does seem persuasive, if not compelling:

Undoubtedly, not much money and seniority are involved, but the money and seniority at stake does not determine mootness. As long as the parties have a concrete interest in the outcome of the litigation, the case is not moot notwithstanding the size of the dispute. [Citation omitted.] Moreover, a month’s pay is not a negligible item for those affected by the injunction, and the loss of a month’s competitive seniority may later determine who gets a promotion, who is entitled to bid for transfers or who is first laid off if there is another reduction in force. These are matters of substance, it seems to us, and enough so to foreclose any claims of mootness.49

Turning to the merits of the case, the Court averred that “the issue at the heart of this case is whether the District Court exceeded its powers in entering an injunction requiring white employees to be laid off, when the otherwise applicable seniority system would have called for the layoff of black employees with less seniority.”50 The Court then proceeded to explain its reasons for finding that the district court’s injunction was improper. First, as one might have expected, the Court assigned much importance to the language of Section 703(h) protecting bona fide seniority systems, declaring that “it is inappropriate to deny an innocent employee the benefits of his seniority in order to provide a remedy in a pattern or practice suit such as this.”51 (A “pattern or practice” suit, we should note, is one in which statistical evidence is adduced to demonstrate a continuous adverse effect on the employment or promotion prospects of a particular minority group. Title VII suits predicated upon the disparate impact theory of employment discrimination are thus a major subspecies of the “pattern or practice” suit. In Title VII case law, pattern or practice suits are distinguished from suits alleging specific harm to identifiable victims.) It also took up the vexing issue, inherent in the very nature of consent decrees, of the extent to which the rights or legitimate interests of unrepresented third parties may have been abrogated by the terms of the decree. Thus, the Court held that

it must be remembered that neither the Union nor the non-minority employees were parties to the suit when the 1980 decree
was entered. Hence the entry of that decree cannot be said to indicate any agreement by them to any of its terms. Absent the presence of the Union or the non-minority employees and an opportunity for them to agree or disagree with any provisions of the decree that might encroach on their rights, it seems unlikely that the City would purport to bargain away non-minority rights under the then-existing seniority system. We therefore conclude that the injunction does not merely enforce the agreement of the parties as reflected in the consent decree. If the injunction is to stand, it must be justified on some other basis.32

The conclusion expressed by the final two sentences of this passage stated a holding that was important in its own right. Its apparent effect was to announce that the purpose of a consent decree should be conceived narrowly and precisely, so as to preclude the possibility that as circumstances change following the negotiation of a decree, one of its parties could simply appeal to a sympathetic judge to modify or amend the original decree in whatever way is deemed necessary to effect the decree's "larger" purpose. The prevalence of this kind of open-ended consent decree during the 1970s had in some instances served to confer upon judges de facto authority for administering large and complex social institutions, including prisons, state mental hospitals, and public school districts. The majority's categorical rejection of the open-ended consent decree may thus in itself have been regarded as a minor victory for advocates of a race-neutral regime of civil rights, given the prominent role of activist judges in helping to establish and expand race-conscious civil rights doctrine.

This, combined with the Supreme Court's refusal to abide the incompatibility of the district court's injunction with the layoff provisions contained in Section 703(h), signaled the Civil Rights Division's first victory before the Supreme Court. In the context of job layoffs, the Court unequivocally endorsed Assistant Attorney General Reynolds' expressed belief that "make-whole" relief is only appropriate to individual victims of proven discrimination:

If individual members of a plaintiff class demonstrate that they have been actual victims of the discriminatory practice, they may be awarded competitive seniority and given their rightful place on the seniority roster. [However, it is also] clear that mere membership in the disadvantaged class is insufficient to warrant a
seniority award; each individual must prove that the discriminatory practice has had an impact on him. Even when an individual shows that the discriminatory practice has had an impact on him, he is not automatically entitled to have a non-minority employee laid off to make room for him.\textsuperscript{53}

The Court went on to note that in \textit{Stotts} there had been "no finding that any of the blacks protected from layoff had been a victim of discrimination and no award of competitive seniority to any of them."\textsuperscript{54}

The Court might well have ceased its inquiry at this point, and in light of its dismal experience before the federal appellate courts generally, the Civil Rights Division (or at least its leadership) would no doubt have been pleased at having scored its first Supreme Court victory. Justice White's majority opinion continued, however. Invoking Section 706(g), it went on at some length to cast doubt on the validity, not merely of classwide racial preference schemes in the context of layoffs, but with regard to hiring and promotion as well. Elaborating on "the policy behind Section 706(g) of Title VII, which affects the remedies available in Title VII litigation," White acknowledged that

\begin{quote}
\textit{[t]hat policy, which is to provide make-whole relief only to those who have been actual victims of illegal discrimination, was repeatedly expressed by the sponsors of the Act during the congressional debates.}\textsuperscript{55}
\end{quote}

White followed this statement with a recitation of illustrative oral testimony and interpretive memoranda that were put forward by Senators Humphrey, Clark, and Case (see Chapter 2), all disclaiming any intent to authorize courts or administrative agencies to grant any form of preferential treatment to "anyone who was not discriminated against in violation of [Title VII]."\textsuperscript{56} The Court's opinion concluded with an observation that "[t]he Court of Appeals holding that the District Court's order was permissible as a valid Title VII remedial order ignores not only our ruling in \textit{Teamsters} [a case decided in 1977, which also involved a Title VII challenge to a bona fide seniority system] \textit{but the policy behind Section 706(g) as well.}\textsuperscript{57}

Was the Court serving notice of a shift to a more "interpretivist" mode of adjudicating Title VII claims, according to which
broad, race-conscious remedies in "pattern or practice" cases would be disallowed owing to the prohibitory language of the title itself and its principal congressional sponsors? It must be noted that although the Court had invalidated the modified consent decree by a vote of 6 to 3, only five of the six justices who voted with the majority joined in White's opinion for the Court. Justice Stevens filed a separate opinion that concurred in the judgment, but which labeled the Court's discussion of Title VII "wholly advisory." Still, a narrow majority had apparently expressed its agreement with the stated position of Assistant Attorney General Reynolds and the Civil Rights Division. Because the Court's actual decision pertained only to the parties in Stotts, however, one could not say with any degree of certainty what, if any, implications the Court's opinion might have for race-conscious affirmative action in general.

Nevertheless, appearing to adopt what Martin Shapiro once called "the typical lawyers' strategy of telling judges they have been doing something in the hope that this will embolden them to actually do it," Reynolds, obviously elated by the decision, described it as an "unequivocal" statement that court-ordered or court-enforced racial quotas of any kind were illegal under Title VII. "I said some time ago that civil rights was at a crossroads; that we would either take the path of race-conscious remedies... or the high road of race neutrality," he said. "The Court has moved us off the crossroads and propelled us down the path we have been urging. It is an exhilarating decision." Within four months following the decision of the case on June 12, 1984, the Civil Rights Division had employed it in the service of new challenges to no fewer than fifty-one existing consent decrees that had settled previous employment discrimination cases in a variety of cities, counties, school districts, and state agencies. Most of those decrees involved racial quotas for hiring and promotion rather than layoffs. Some differed from the decree at issue in Stotts in that there had been a prior judicial finding of discrimination on the part of the employer. They all resembled the Stotts decree in the critical respect that they afforded preferential treatment to persons who had not themselves suffered any discrimination at the hands of

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*In addition to White, the others were Burger, Powell, Rehnquist, and O'Connor."
the employer, and all had the ineluctable effect of systematically disfavoring innocent members of nonminority groups.

By February 1985, district and appellate court decisions had been handed down in six important cases, each of which involved challenges to the use of race-conscious employment criteria, though not necessarily as mandated by judicial orders. In each case plaintiffs had urged judges to adopt a broad reading of the Supreme Court’s Stotts opinion, consistent with that of the Civil Rights Division. In each case the division’s position was rejected. The Court of Appeals for the Third Circuit upheld the use of quotas to promote “racial balance” in the assignment of schoolteachers in Philadelphia, contending that the Stotts decision was “inapplicable” because there was “no requirement of race-conscious layoffs.” A federal district judge in South Bend, Indiana, upheld a section of a teachers’ contract providing that no blacks would be laid off after concluding that the Stotts decision applied to “court-imposed affirmative action programs,” but not to the South Bend plan, because the latter had been voluntarily adopted. The Court of Appeals for the Sixth Circuit rejected a suit brought by thirty-eight white men challenging a racial quota system for hiring firefighters in Detroit, on the grounds that the fire department had a history of racial discrimination, that the plan was adopted voluntarily, and that no employees were deprived of seniority rights.

A district judge in Detroit upheld a voluntary promotion quota designed to ensure that white and black police officers would be promoted in equal numbers. The judge wrote that the Stotts ruling had not “substantially changed the legal standards under which this case must be decided.” The Court of Appeals for the Ninth Circuit upheld an affirmative action plan adopted by the transportation agency of Santa Clara County, California, even though it resulted in the promotion of a woman who had a lower examination score than a male employee seeking the same job. The court declared that the “plan was a lawful attempt to break down entrenched patterns of discrimination.” Finally, the Court of Appeals for the Sixth Circuit upheld a contract provision limiting the number of black teachers who would be laid off in Jackson, Michigan. The court decided that it was permissible because blacks had been “chronically underrepresented” on the teaching staff. Moreover, the court found Stotts irrelevant because
the layoff provision stemmed not from a court order but from "voluntary decisions in the collective bargaining process."65

The Supreme Court's discussion of the policy behind Section 706(g) may indeed have been "wholly advisory," as Justice Stevens suggested, but, if so, that "advice" had been resoundingly and uniformly rejected by the lower courts.

Wygant v. Jackson Board of Education:
A Retreat from the Implications of Stotts?

Of the lower court decisions mentioned above, the Supreme Court had by the end of its 1986 term agreed to review only one—the decision upholding race-based layoffs of schoolteachers in Jackson, Michigan. As noted, the case differed from Stotts in that the challenged layoff procedure was provided for in a collective bargaining agreement rather than imposed by judicial order. On the other hand, it was similar to Stotts in that no prior judicial finding of discrimination against minorities by the employer had ever been made. Indeed, unlike Stotts, a court had inquired fully into the question of prior discrimination and concluded categorically that "there is no history of overt past discrimination by the parties to this [labor] contract."66 There thus was a definitive judicial finding of non-discrimination on the part of the Jackson School Board. This explains why the Sixth Circuit, in upholding the race-based layoff provision, predicated its decision on the notion that blacks had been "chronically underrepresented" on the teaching staff, rather than subject to any form of actual discrimination. There was one more respect in which Wygant differed from Stotts, and for that matter from all previous court rulings and administrative regulations designed to correct minority group underrepresentation: The extent to which minority group members were said to be adequately represented on the Jackson teaching staff was determined not by comparing the percentage of currently employed minority teachers with the percentage of qualified minorities in the relevant labor pool (however geographically delimited), but rather by comparing the percentage of currently employed minority teachers with the percentage of minority students currently enrolled in the Jackson public schools.

This last point is of critical importance, because if the conventional means of determining minority group underrepresentation
had prevailed in the Jackson School District, blacks might conceivably have been considered overrepresented. Consider that in 1980–81, when the white plaintiff Wendy Wygant was being laid off for the seventh time to protect the jobs of less-senior minority teachers, minorities constituted 13.5 percent of the teachers in the Jackson schools while constituting only 9.7 percent of the population of Michigan. Nevertheless, the collective bargaining agreement between the board and the Jackson Education Association provided that in the event of layoffs “teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff.” Because black students in the district exceeded 13.5 percent and their numbers were likely to grow steadily into the foreseeable future, the effect of this rule was to create a contractual ratchet, whereby the percentage of minority teachers would be gradually increased (through the use of hiring quotas, which were not an issue in the case), but could never be reduced.

When suit was brought, the school board contended, and the lower courts agreed, that it was appropriate for the school board to devise measures that would ensure that the percentage of minority teachers would be commensurate with the percentage of minority students, because the minority teachers’ utility as “role models” for minority students would help combat the effects of societal discrimination. In the words of the district court:

"In the setting of this case, it is appropriate to compare the percentage of minority teachers to the percentage of minority students in the student body, rather than with the percentage of minorities in the relevant labor market. It is appropriate because teaching is more than just a job. Teachers are role models for their students. This is vitally important because societal discrimination has often deprived minority children of other role models."

*Although established precedents furnish little guidance as to the appropriate population group for purposes of comparison, an argument could be made that since “qualified” teachers must by definition be certified by a state licensing authority, the state of Michigan, rather than the City of Jackson or the United States as a whole, is the relevant population group with which to compare the percentage of minority teachers employed in the Jackson schools.
The Court of Appeals for the Sixth Circuit, in affirming the judgment of the district court, adopted essentially this same reasoning and language. Both courts, however, had resorted to making peremptory assertions regarding social science controversies about which there is considerable disagreement among scholars. The utility of "same-race role models" has been much discussed in the scholarly literature, yet no consensus as to their relative effectiveness has thus far emerged.*

Even assuming, however, that same-race role models are helpful in alleviating the effects of "societal discrimination," the Supreme Court would have to decide whether the burden imposed on senior white teachers by race-based layoffs could be justified under the Fourteenth Amendment's equal protection clause. (Unlike the plaintiffs in Stotts, who challenged a judicial order made pursuant to a Title VII lawsuit, the plaintiffs in Wygant invoked the equal protection clause as the basis for their attack on a voluntary action undertaken by a public employer.) Since announcing its decision in the 1944 case of Korematsu v. United States,73 the Court has applied a standard of "rigid" or "strict" scrutiny when reviewing state laws and policies that establish racial categories. Although in the Bakke case four justices argued for the use of a more lenient standard of review in cases involving challenges to race-conscious affirmative action policies (where the discrimination that occurs is said to be "benign"), a majority has consistently held that whenever government policies classify people according to race and thereby treat them differently, such classifications are "inherently suspect." Once the existence of a suspect classification has been established, it is afforded strict scrutiny, which means, first, that the government must show that the law or policy under review serves a compelling state purpose; and, second, that the suspect instrument used to accomplish the compelling purpose is narrowly tailored, meaning that there exists no alternative instrument that is less burdensome or intrusive.

The Sixth Circuit had refused to apply the "strict scrutiny" standard of review, applying instead the far less stringent "re-
sonableness” test that the Supreme Court has used in reviewing legislative acts said to discriminate on grounds other than race, religion, or sex. As noted, however, the Supreme Court had never departed from its practice of applying strict scrutiny to policies containing racial classifications, and so seldom in the Court’s recent history had a racial classification survived strict scrutiny that it had become axiomatic among constitutional lawyers that as employed by the Court, this standard of review was generally “strict in theory but fatal in fact.” Hence, by a 5 to 4 vote, the Court in

Wygant did reverse the Court of Appeals on the grounds that maintaining same-race role models for the benefit of minority students did not constitute a compelling state interest, and that, moreover, the means used to achieve the school board’s objective was “not sufficiently narrowly tailored.” Writing for a plurality of the Court, Justice Powell observed that

[0]ther less intrusive means of accomplishing similar purposes—such as the adoption of hiring goals—are available. For these reasons, the board’s selection of layoffs as the means to accomplish even a valid purpose cannot satisfy the demands of the equal protection clause.74

The Civil Rights Division had sided with the plaintiffs in the case, urging the Supreme Court to adopt the same victim-specific approach to race-conscious remedies for proven civil rights violations under the Constitution that Reynolds claimed the Court had endorsed with respect to statutory violations in Stotts. The plurality (Powell, Rehnquist, and Burger, with O’Connor and White concurring separately) did affirm that race-conscious measures

*A notable exception to this rule occurred in Bakke. There, Justice Powell, whose lone opinion spoke for an otherwise divided Court, suggested that if a medical school were to use race “as one factor” in its admissions process in order to promote diversity within its student body, such use of racial criteria would be upheld as serving a compelling state interest. Moreover, four justices endorsed Justice Brennan’s position that an “intermediate” level of scrutiny was appropriate in deciding challenges to affirmative action racial preference schemes. Furthermore, something less than strict scrutiny seems to have been used in Fullilove v. Klutznick, 448 U.S. 448 (1980), in which the Court upheld the use of racial preference in awarding government-funded construction contracts.
could not be justified in the absence of proof of discrimination by the entity to which the measures pertained. Hence, wrote Powell,

[This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination.]

What of the victim-specific approach to remedial action that the Civil Rights Division had advocated and that the Court seemingly adopted in the Stotts case in its discussion of “the policy behind Section 706(g)”?

The answer to this question was adumbrated by Powell’s reference to “hiring goals” as an apparently acceptable means of redressing past discrimination, and was finally confirmed (albeit obliquely) by the Court’s treatment of a related issue raised by the Civil Rights Division. The division argued that before remedies for civil rights violations could be enacted, an independent administrative agency, legislative body, or court must initially have determined that the public employer proposing to effect such remedies had itself been guilty of previous discrimination. The plurality clearly held that race-conscious remedies were not permissible in the absence of previous discrimination by the public employer affected by such remedies, but it just as clearly rejected the division’s contention that the enactment of race-conscious remedies must be preceded by a “contemporaneous” independent finding of prior discrimination. In other words, “voluntary” race-conscious affirmative action was allowable under the equal protection clause so long as it purported to remedy some concrete act(s) of discrimination for which the employer was directly responsible. Direct evidence of such discrimination, however, would be required only in the event that the affirmative action policies were challenged by nonminority employees in court. In Powell’s words,

a public employer like the Board must ensure that, before it embarks on an affirmative action program, it has convincing evidence that remedial action is warranted. That is, it must have
sufficient evidence to justify the conclusion that there has been prior discrimination.

Evidentiary support for the conclusion that remedial action is warranted becomes crucial when the remedial program is challenged in court by nonminority employees. 76

Justice O’Connor made the same point somewhat more emphatically:

The imposition of a requirement that public employers make [formal] findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers’ incentive to meet voluntarily their civil rights obligations. . . . This conclusion is consistent with our previous decisions recognizing the States’ ability to take voluntary race-conscious action to achieve compliance with the law even in the absence of a specific finding of past discrimination. 77

The difficulty with O’Connor’s reasoning is that she treats “public employers” as if they were static entities, capable of recognizing and admitting “their” past mistakes and of taking steps to rectify them. Notwithstanding civil service reforms designed to make public employers less responsive to partisan political pressures, however, public employers are in fact often affected by the political or ideological agendas of elected politicians. A new administration, be it at the state, county, municipal, or board level, could easily claim that the previous administration had discriminated against certain discrete groups as a way of justifying preferential treatment for those groups under the new administration. If the groups in question happen to be the same groups that were instrumental in electing the new administration to office, the new administration will have discovered a particularly convenient (and apparently legal) method of rewarding its supporters by means of what amounts to an innovative form of patronage. This, of course, is a worst-case scenario, and yet is surely not so fanciful that it ought not be considered in juxtaposition with O’Connor’s “best-case” assumptions.

Expanding upon O’Connor’s theme, Justice Marshall, in a dissent that was joined by Justices Brennan and Blackmun, wrote that

[t]he real irony of the argument urging mandatory, formal findings of discrimination lies in its complete disregard for a longstanding goal of civil rights reform, that of integrating schools
without taking every school system to court. . . . It would defy equity to penalize those who achieve harmony from discord, as it would deny wisdom to impose on society the needless cost of superfluous litigation."8

It scarcely needs saying that from the standpoint of innocent third parties whose seniority rights have been abrogated by those who strive to "achieve harmony from discord," litigation to determine whether race-conscious remedies were truly warranted would hardly seem "superfluous." Under the rule apparently subscribed to by at least seven members of the Court (Justices White and Stevens did not address the issue), a doctrinaire or politically motivated public employer could unilaterally decide to adopt race-conscious employment policies, and initially, at least, it need satisfy no one but its own decision makers that the plan could be justified as remedial. Only if suit is brought (a suit, incidentally, that will certainly entail no small amount of time or monetary expense) will the public employer be required to divulge its reasons for believing that race-conscious measures are justified. Even here, the burden of plaintiffs, according to Justice O'Connor, ought to be substantial:

[A]s the Court suggests, the institution of such a challenge does not automatically impose upon the public employer the burden of convincing the court of its liability for prior unlawful discrimination; nor does it mean that the court must make an actual finding of prior discrimination based on the employer's proof before the employer's affirmative action plan will be upheld. In "reverse discrimination" suits, as in any other suit, it is the plaintiffs who must bear the burden of demonstrating that their rights have been violated [sic*]. . . . For instance, in the example posed above, the nonminority teachers could easily demonstrate that the purpose and effect of the plan is to impose a race-based classification. But when the Board introduces its statistical proof as evidence of its remedial purpose, thereby supplying the court with the means for determining that the Board had a firm basis

*As discussed in Chapter 2, the disparate-impact theory of employment discrimination holds that once a showing of a discriminatory effect is made, it is the defendant who automatically assumes the burden of rebutting the inference of unlawful discrimination.
for concluding that remedial action was appropriate, it is incumbent upon the nonminority teachers to prove their case; they continue to bear the ultimate burden of persuading the Court that the Board’s evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently “narrowly tailored.” Only by meeting this burden could the plaintiffs establish a violation of their constitutional rights, and thereby defeat the presumption that the Board’s assertedly remedial action based on the statistical evidence was justified.79

A striking feature of this detailed pronouncement is the remarkable degree to which it departs from the historic application of “strict scrutiny” to government policies making use of racial classification. In O’Connor’s formulation, a racial classification that purports to serve a “remedial purpose” is automatically presumed to be constitutionally permissible unless that presumption is effectively rebutted by those alleging an equal protection violation.

As for the Civil Rights Division’s victim-specific approach to remedying civil rights violations, it follows that if public employers can justify, when challenged in court, their race-conscious employment policies by reference to “statistical evidence” (explicitly approved by O’Connor and, it seems reasonable to infer from their endorsement of numerical hiring goals, by Powell, Burger, and Rehnquist as well), then even the plurality that struck down the Jackson layoff plan would permit nonvictims to be among the principal beneficiaries of racial preferences. As if to emphasize this point, O’Connor declared that

the Court has forged a degree of unanimity; it is agreed that a plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently “narrowly tailored,” or “substantially related,” to the correction of prior discrimination by the state actor.80

Recognizing that a corollary of racial preference for non-victims is “reverse” discrimination against innocent persons, Justice Powell asserted that “[a]s part of this Nation’s dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy.”81 Parenthetically, we may note that it is this sort of sweeping moral catechism that,
when substituted for the application of explicit, readily intelligible legal rules (in this case, the antidiscrimination mandate implicit in the equal protection clause), is the hallmark of modern judicial activism. Powell offers no formula for determining the proper allocation of the burden among particular innocent individuals; no method for predicting which of them “may be called upon,” and under what circumstances. Because the plurality did not need to rely upon this particular pronouncement in its disposition of the case, Powell’s words are mere dicta. They served to indicate forcefully, however, that the Court’s decision in Stotts had in no way signaled the decisive shift in the Court’s thinking that Assistant Attorney General Reynolds had imputed to it.

The Wygant Dissent:
Toward a Racially Proportionate Distribution of Hardship

Our discussion of Wygant has thus far focused mostly on the plurality and concurring opinions. If these did little to vindicate the Civil Rights Division’s interpretation of Stotts, the two dissenting opinions were especially revealing of the increasing extent to which the group rights approach to equal protection jurisprudence had become entrenched among the Court’s three most liberal members. These justices—Brennan, Marshall, and Blackmun—joined in an opinion written by Justice Marshall that was remarkable not so much for the decision it recommended (upholding the school board’s race-based layoff scheme) as for the way in which it framed the issues of the case. To Marshall, the plaintiffs were not autonomous individuals who had lost their jobs solely because of their color; rather, they were those members of the white race who had the least seniority, and therefore properly bore the brunt of their race’s fair share of the hardship imposed by unavoidable layoffs. The race-based layoff provision in the teachers’ contract, wrote Marshall,

avoided placing the entire burden of layoffs on either the white teachers as a group or the minority teachers as a group. Instead, each group would shoulder a portion of that burden equal to its portion of the faculty. Thus, the overall percentage of minorities on the faculty would remain constant.82
In Marshall’s analysis the plaintiffs became veritable representatives of the white race, or rather, of “the white teachers as a group,” responsible for fulfilling the group’s putative obligations. “To petitioners, at the bottom of the seniority scale among white teachers,” he observed, “fell the lot of bearing the white group’s proportionate share of layoffs that became necessary in 1982.” 83 The idea that each racial group should bear a “proportionate share” of layoffs is wholly consistent with the norm of statistical group parity. If the range of social goods and benefits (such as a lucrative job or admission to a prestigious professional school) are to be distributed in equal proportions from one group to the next, then so too should the range of life’s burdens and hardships. Thus Marshall is led to conclude that the layoff provision in the Jackson teachers’ contract is by no means “not sufficiently tailored.” Rather, it is “a narrow provision because it allocates the impact of unavoidable burden proportionately between two racial groups.” 84 Furthermore, “it places no absolute burden or benefit on one race, and, within the confines of constant minority proportions, it preserves the hierarchy of seniority in the selection of individuals for layoff.” 85 That is to say, the provision preserves the hierarchy of seniority, but along racially segregated lines; each group is conceived as having its own exclusive hierarchy of seniority.

Marshall had clearly broken new ground here. His innovation lies in his extension of the concept of group rights to group responsibility. Responsibility for bearing the hardships and suffering that regularly befall “society”—such as, in the present example, the social and economic dislocations that result from fiscal insolvency—should in fairness be distributed proportionately among racial groups. Notwithstanding the equal protection clause’s requirement of equal treatment for individual persons, Marshall teaches that it is constitutionally permissible for governments to hold an individual responsible for his race’s proportionate share of society’s burdens. When reflecting on the overt race-consciousness that evidently informs Marshall’s jurisprudence, it is important to bear in mind that Marshall is not attempting here to fashion a remedy for some real or imagined violation of statutory or constitutional law. Rather, he is recommending it as a quite normal structural arrangement for allocating hardship under any circumstances.

From a comparative perspective it is easy to discern the profoundly traditionalistic—perhaps even feudal—character of the
system here constructed, for although it evokes an ethos quite foreign to the modern, individualistic legal-rational culture of the West, it is common in traditional societies for social obligations and responsibilities to be allocated among individuals on the basis of their membership in the relevant clan, tribe, race, or caste.

The Sheet Metal Workers Association Case: Repudiation of Stotts and "the Policy behind Section 706(g)"

That the Court in Wygant seemed to be retreating from the broad attack on racial quotas and preference schemes which it had apparently launched in Stotts was amply confirmed on July 2, 1986, when the Court handed down decisions in two more cases in which the Justice Department challenged the legality of race-conscious affirmative action doctrine. In the first case, Local 28 of the Sheet Metal Workers’ International Association v. Equal Employment Opportunity Commission, six members of the Court (Brennan, Marshall, Blackmun, Stevens, Powell, and White) held that "a district court may, in appropriate circumstances, order preferential relief benefiting individuals who are not the actual victims of discrimination as a remedy for violations of Title VII." Five of these justices (all but White) agreed that the present case established "appropriate circumstances" for awarding racial classwide relief in the form of preferential treatment for blacks.

As always, the Court was obliged to give at least the appearance that it was taking seriously the language of Section 706(g) and its pivotal admonition to judges:

No order of the court shall require the admission or reinstatement of an individual as a member of a union . . . if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin in violation of . . . this title.

In his plurality opinion, Justice Brennan, countering familiar arguments made by both the Sheet Metal Workers’ Association and the Solicitor General, declared that "[t]he sentence on its face
addresses only the situation where a plaintiff demonstrates that a union (or an employer) has engaged in unlawful discrimination, but the union can show that a particular individual would have been refused admission even in the absence of discrimination, for example because the individual was unqualified. In these circumstances, Section 706(g) confirms that a court could not order the union to admit the unqualified individual.  

The Supreme Court thus took the position that Congress intended to prohibit courts from granting relief to “unqualified” persons who have been subjected to racially discriminatory policies, but that Congress never addressed the question of whether courts could grant relief to persons who are qualified but who never suffered personally from the union’s or employer’s discriminatory policy—persons who, for all that is known, may not even have been part of the labor force at the time the alleged discrimination took place. The Supreme Court could therefore uphold a district court ruling that had ordered the New York City–based union local to meet a 29.23 percent nonwhite-membership quota by August 31, 1987. The Court also upheld the lower court’s creation of an “Employment, Training, Education, and Recruitment Fund” to “be used for the purpose of remedying discrimination.” The fund, which was to be paid for by the union’s membership, “paid for nonwhite union members to serve as liaisons to vocational and technical schools with sheet metal jobs for qualified nonwhite youths, and extended financial assistance to needy apprentices, giving them the benefits that had traditionally been available to white apprentices from family and friends.”

By treating the racial quota as a remedy for past discrimination, the Court was able to sidestep Title VII’s explicit disavowal of any interpretation that would regard it as an instrument for enforcing substantive group parity, although the Court’s attempt to explain away the relevance of the last sentence of Section 706(g) may strike some as less than convincing, especially in light of the Court’s discussion of it in Stotts. The particular circumstances of the case, however, make clear that, as we have already suggested, the Court’s refusal to accede to the proposition that remedies should only be available to actual victims derives from the justices’ awareness—never explicitly articulated—that to adopt such a rule would be to alter radically the legal meaning of the very wrong to which the remedy is addressed—“discrimination.”
We have argued that group-based relief makes sense only if the wrong which it purports to remedy is understood as the absence of group parity—that is, a state of affairs in which wealth-producing social goods, such as jobs and places in apprenticeship programs and professional schools, are distributed unevenly among the relevant groups. It is evident that the Court's opinion in the Sheet Metal Workers case follows this approach, not least because each of the justices who voted with the majority stressed that group-based relief was in order precisely because the union was supposed to have practiced "egregious" discrimination. Indeed, in announcing the rule of decision that governed the Court's judgment, Justice Brennan wrote that "[s]pecifically, we hold that such relief may be appropriate where an employer or labor union has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination."91 The district court, too, had characterized the union's discriminatory practices as "egregious," and had held the Stotts ruling inapposite because "this case, unlike Stotts, involved intentional discrimination."92

Remember that in the Weber case the Court ruled that a private employer could voluntarily engage in race-conscious affirmative action on the theory that Title VII's prohibition of racial discrimination was not intended by Congress to interfere with "traditional business freedom" if used to practice "benign" discrimination. Therefore, private employers need not justify their voluntarily adopted racial preference schemes as "remedies" for past discrimination against minorities. The Weber ruling, however, did not directly apply to private employers or unions who were compelled by court order to adopt race-conscious procedures for dealing with prospective employees or members. Local 28 of the Sheet Metal Workers Association, to its chagrin, had been placed under just such an arrangement, and hence the court-ordered affirmative action plan under which it was forced to operate could be sustained only if supported by evidence that the union had discriminated. The Court was thus at pains to emphasize the extraordinary character of the discrimination previously practiced by the union—it was "intentional" and "egregious." In such cases (but presumably not in others where the putative discrimination was less than "egregious") race-conscious affirmative action was found to be an appropriate remedy.
It is important to ask what constitutes intentional, egregious discrimination. Reflection on this question from a common-sense perspective might yield an answer such as the following: Intentional, egregious discrimination would, in the extreme case, be exemplified by an employer who publicly announced that he would refuse to accept applications for employment from persons who belong to particular groups, as when factories in northeastern industrial cities during the nineteenth century displayed signs bearing such messages as “Now Hiring: No Irish Need Apply.” A less extreme example, utilizing a more practicable method given the enactment of modern civil rights legislation, would be to accept applications for employment or union membership without regard to the applicant’s race, but to favor members of one group over members of another during the selection process, even where, on the basis of neutral hiring criteria, the disfavored individuals present credentials or qualifications superior to those of the favored individuals. It is difficult, from a common-sense perspective, to imagine another form of discrimination that would qualify as “egregious,” or even, perhaps, as “intentional.”

As it happens, Local 28 did use neutral criteria for determining admission to its apprenticeship program; applicants had to possess a high school diploma and score high, relative to other applicants, on a competitive entrance examination. Thus, for Local 28 to have been found guilty of practicing “egregious” discrimination against nonwhites, one might have expected that one or more nonwhite applicants for admission to the local, despite having both a high school diploma and a relatively high score on the examination, were nevertheless passed over in favor of white applicants who lacked one or both of these attributes. In fact, no such unsuccessful nonwhite applicant was produced during the course of the litigation. Instead, the doctrinal legacy of Griggs and its progeny displaced the common-sense understanding of what “egregious discrimination” might entail. Hence,

the [district] court found that petitioners had adopted discriminatory procedures and standards for admission into the apprenticeship program. The court examined some of the factors used to select apprentices, including the entrance examination
and high school diploma requirement, and determined that these criteria had an adverse discriminatory impact on nonwhites, and were not related to job performance. The court also observed that petitioners had used union funds to subsidize special training sessions for friends and relatives of union members taking the apprenticeship examination.\footnote{94}

It is not too much to say that the Supreme Court’s uncritical acceptance of the district court’s equation of disparate impact and “egregious discrimination” necessarily determined the outcome of the case. It would be impossible to redress a wrong defined in terms of adverse group impact by permitting relief only to actual victims of discrimination, because the wrong by its very nature was suffered by the group as a collective entity rather than by any of its particular members.

The logic of disparate impact is also evident in the Court’s agreement with the notion that the use of union funds to subsidize “special training sessions for friends and relatives of union members taking the apprenticeship examination” was discriminatory, and by its approval of the district court’s creation of a union-subsidized fund for the sole benefit of nonwhite applicants, “for the purpose of remedying discrimination.” To be sure, whenever a union whose membership is drawn predominantly from one group engages in nepotistic recruitment and training practices, there is bound to be an adverse impact on members of other groups. That, however, is only because nepotism has an adverse impact on all prospective applicants—white or otherwise—who are not fortunate enough to have a friend or relative among the union’s current membership. It is typical of group-based equity to regard nepotism, whose disfavored “victims” actually comprise all those who are not friends or relatives of incumbents, as disfavoring only the racial or ethnic group that is statistically underrepresented. Thus, one effect of the district court’s remedy was the creation of a second class of specially “advantaged” applicants against whom nonminority applicants unrelated by kith or kin to any of the union’s incumbents must compete for scarce positions. One could say of such applicants that they were now doubly disadvantaged in the competition for union apprenticeships, being disfavored on the one hand because of their lack of “connections” and on the other hand because of their race.
Local No. 93, International Association of Firefighters v. City of Cleveland

The other case decided by the Supreme Court on July 2, 1986 involved circumstances nearly identical to those of the Williams case considered above. The issue before the Court was similar to the issue decided in the Sheet Metal Workers case, but with a twist: The Court was asked to consider whether Section 706(g) of Title VII "precludes the entry of a consent decree which provides relief that may benefit individuals who were not the actual victims of the defendant's discriminatory practices." Here again, "discriminatory practices" were alleged to include such items as "the written examination used for making promotions..." Due to the nature of the consent decree settlement process, however, these allegations were never proved in court. As was suggested by the lawyer for the City of Cleveland in oral arguments before the Court, the city's previous experience had provided it with ample incentive to settle the lawsuit, brought by a group of black firefighters who called themselves the Vanguards, as quickly and painlessly as possible:

[W]hen this case was filed in 1980, the City of Cleveland had eight years at that point of litigating these types of cases, and eight years of having judges rule against the City of Cleveland.

You don't have to beat us on the head. We finally learned what we had to do and what we had to try to do to comply with the law, and it was the intent of the city to comply with the law fully.

Thus the city eagerly entered negotiations with the Vanguards to avoid another round of futile litigation.

In November 1981, the two parties submitted to the district court a proposed consent decree, the features of which were delineated by Justice Brennan in his opinion for the Court:

The first step required that a fixed number of already planned promotions be reserved for minorities: specifically, 16 of 40 planned promotions to Lieutenant, 3 of 20 planned promotions to Captain, 2 of 10 planned promotions to Battalion Chief, and 1 of 3 planned promotions to Assistant Chief were to be made to minority firefighters... The second step involved the establishment of "appropriate minority promotion goal[s],"... for the ranks of Lieutenant, Captain, and Battalion Chief. The
proposal also required the City to forgo using seniority points as a factor in making promotions. . . The plan was to remain in effect for 9 years, and could be extended upon mutual application of the parties for an additional 6-year period.98

The city, in fact, was so eager to reach an accommodation with the Vanguards that it negotiated without ever consulting the local firefighters’ union, whose members obviously stood to be strongly affected by the decree’s provisions. Upon learning of this, the district judge declared himself to be “appalled that these negotiations leading to this consent decree did not include the intervenors . . .,”99 and thus refused to consider it until the firefighters’ union was brought into the discussions.

There followed negotiations that resulted in first one modified version of the original proposed decree, and then another, but both were opposed by representatives of Local 93. The second modified decree, which was eventually approved by the district court judge, was rejected by the union’s membership by a vote of 660 to 89.100 That decree

required that the city immediately make 66 promotions to Lieutenant, 32 promotions to Captain, 16 promotions to Battalion Chief and 4 promotions to Assistant Chief. These promotions were to be based on a promotional examination that had been administered during the litigation. The 66 initial promotions to Lieutenant were to be evenly split between minority and non-minority firefighters. However, since only 10 minorities had qualified for the 52 upper-level positions, the proposed decree provided that all 10 should be promoted. The decree further required promotional examinations to be administered in June 1984 and December 1985. Promotions from the lists produced by these examinations were to be made in accordance with specified promotional “goals” that were expressed in terms of percentages and were different for each rank. The list from the 1985 examinations would remain in effect for two years, after which time the decree would expire.101

Did such an arrangement, which clearly benefited persons who were not themselves victims even of alleged, much less proven, discrimination, violate Title VII, specifically the final sentence of Section 706(g)?
In the *Sheet Metal Workers* case, the Court ruled that racial class-wide "relief" could be granted by courts in "appropriate cases," such as those involving "egregious" or "intentional" discrimination. The allegations of discriminations had never been litigated in the present case, and hence there was no record from which the Court could determine whether sufficiently egregious discrimination had occurred. Resolute in its desire to uphold race-conscious civil rights doctrine, however, the Court devised an ingenious, if legally questionable, solution to this problem: It held that "whether or not Section 706(g) precludes a court from imposing certain forms of race-conscious relief after trial, that provision does not apply to relief awarded in a consent decree."\(^\text{102}\)

In other words, the final sentence of Section 706(g), which begins with the words, "No order of the court shall require . . . ," has no bearing on consent decrees because such instruments are not "orders of courts."

From a legal standpoint, this was a bizarre holding for a number of reasons. Most importantly, the decision seemed to overrule *Stotts*, which just two terms earlier had decided that Section 706(g) was applicable to a judicial order that modified an existing consent decree. To reconcile the *Cleveland Fireighters* ruling with that issued in *Stotts*, one would have to find plausible the notion that a modified consent decree constitutes an "order of the court" within the meaning of Section 706(g), but that a consent decree in its original form does not. Moreover, the ruling was at odds with major precedents which had established unequivocally that consent decrees were indeed judicial orders, rather than "contracts," as Justice Brennan contended, because the authority of courts to enforce them is rooted in the nexus between the decree and the statute that it is ultimately intended to enforce. Thus the Court in *Stotts* found it useful to quote language from the Court's opinion in the 1961 case of *Railway Employers v. Wright*, to wit,

"[T]he District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce," not from the parties' consent to the decree.\(^\text{103}\)

Although Brennan cited a leading academic authority on federal practice as support for his position, he omitted, as Justice Rehnquist noted in dissent, a key sentence from the passage he quoted:
But the fact remains that judgment is not an *inter partes* contract; the Court is not properly a recorder of contracts, but is an organ of government constituted to make judicial decisions and when it has rendered a consent judgment it has made an adjudication.\(^{104}\)

It is thus their capacity as instruments of adjudication, whose legitimacy is derived from statutory law, that has caused consent decrees traditionally to be regarded as “orders of the court.”

Even if it were reasonable to insist that consent decrees are mere “contracts,” it must be acknowledged that no contract is legally enforceable unless all those affected by it have initially agreed to its terms. The Cleveland consent decree, however, was approved despite the objections of Local 93. Brennan’s solution here was simply to deny that the union was in any way affected by the decree:

> [T]he consent decree entered here does *not* bind Local 93 to do or not to do anything. It imposes no legal duties or obligations on the Union at all; only the parties to the decree can be held in contempt of court for failure to comply with its terms.\(^{105}\)

Justice Rehnquist observed in his dissent that this statement

verges on the pharisiacal; the decree does bind the City of Cleveland to give preferential promotions to minority firemen who have not been shown to be the victims of discrimination in such a way that nonminority union members who would otherwise have received these promotions are obviously injured.\(^{106}\)

However shaky the Court’s rationale may have been from a purely legal standpoint, there is no denying its utility as a political expedient. The Court’s opinion not only enabled it to reach the result that it desired in the particular case at hand, but it also served to stymie the Justice Department in the pursuit of its broader agenda. We noted earlier that following the *Stotts* ruling the Civil Rights Division had moved to overturn fifty-one existing affirmative action consent decrees around the country on the grounds that their terms were impermissible under Section 706(g). Most of these motions were still pending by the time the *Sheet Metal Workers* and *Cleveland Firefighters* cases were handed down.
Because it applied narrowly to judicially fashioned “remedies” for proven instances of “discrimination,” the Court’s decision in the former case would probably have had little effect on the effort to overturn the decrees. But by deciding in Cleveland Firefighters that Section 706(g) has absolutely no bearing on consent decrees, the Court succeeded in pulling the rug out from under the Justice Department—the very same rug, incidentally, that the Court itself had furnished in Stotts. It is difficult to imagine that this consideration was not a factor in the Court’s decision. It would appear that Supreme Court justices, far from “following the election returns,” sometimes seek actively to confound executive initiatives with which they disagree, even when the initiatives are grounded in the prior decisions of those very same justices.

As would be expected, the Civil Rights Division tried to put the best possible face on the July 2 decisions. Calling the rulings “disappointing” and “extremely unfortunate,” Assistant Attorney General Reynolds nonetheless emphasized language in the Court’s opinion suggesting that racial preferences are the “least preferred” remedy, to be used only under extraordinary circumstances. There were immediate signs, however, that employers and the press took these perfunctory caveats no more seriously than the Court did. For instance, two days after the rulings were handed down the New York Times ran a story in its “Business Day” section under the headline, “Minority Hiring Ruling Puts Concerns on Notice.” Given its title, one might have expected the article to explain the limitations that the Court had seemingly placed on the use of racial preference in hiring and promotion. Instead, readers were informed that the decisions “do send a warning to companies that have been lax, according to experts and executives. . . . [F]or the ‘substantial’ number of companies that have ‘downgraded the importance of their affirmative action programs’ during the Reagan Administration,” the article continued, “the decision is a ‘clear warning that they must take affirmative action seriously again,’ according to D. Quinn Mills of the Harvard Business School.” In reality, of course, the decisions in no way pertained to the voluntary “affirmative action programs” of private companies, and so hardly constituted a “warning” to the business community, clear or otherwise. Yet already the decision was being received as such, in part because of the mediating influence of partisan “experts.”
Conclusion

The politics of civil rights is dominated by magic words—some positive, such as "equal opportunity," and some negative, such as "discrimination." The cases examined here suggest that this is no less true of the most rarefied juridical discourse on the subject than it is of popular soapbox oratory. In either forum emotionally freighted words and phrases are invoked, with little or no attention to what they might actually mean, to give judicially enacted race-conscious social policy an aura of legitimacy.

The magic words that make up the rhetoric of civil rights are compelling in part because of their abstract connotations—justice and equity in the case of "equal opportunity," meanness and bigotry in the case of "discrimination"—but also because their use has been associated historically with the experience of oppressed groups. In the past, the measure of a group's oppression consisted in the mix of public laws and private practices intended deliberately to exclude, isolate, and subjugate that group. In the 1970s and 1980s the measure of a group's oppression was, at least in certain influential circles, transformed; a group was considered to be oppressed to the extent that it lacked parity with other groups. The Constitution and the civil rights statutes could be used effectively to combat the original form of oppression, but they were, if taken literally, wholly unresponsive to the revised version. Hence the need, for those who would use public law to correct substantive disparities among groups, to continue to define their mission as "remedying discrimination."

A judiciary in pursuit of a mission such as this one will thus quite naturally want to use its remedial authority to promote re-distribution along group lines. The tendency will nearly always be to take from the "advantaged" group and give to the "disadvantaged" group. Hence the most blatant and direct forms of intentional discrimination will be countenanced if practiced against members of the advantaged group for the purpose of "remedying" even the most tenuous claims of discrimination brought by members of the disadvantaged group. This stance explains the remarkable asymmetry in the courts' treatment of issues involving discrimination against minorities as against issues involving discrimination against nonminorities.

The generally euphoric response by the influential news media to the Sheet Metal Workers and Cleveland Firefighters decisions
illustrated well the emotive force behind the rhetoric of civil rights. "Contrary to the legal arguments of the Justice Department, the [Supreme] Court insists that victory over discrimination cannot yet be declared," announced the New York Times in a lead editorial. "Nor may government pretend that its remedial task is done." In its enthusiasm, the Times could not resist attributing to the Court a position it did not, and which perforce it could not, take: "[T]he high court has resoundingly rejected the Administration's arguments that race-conscious affirmative action to redress discrimination is itself discriminatory against whites." The Court, of course, suggested to the contrary that discrimination against whites was an acceptable by-product of race-conscious affirmative action. The Times' eagerness to pretend otherwise perhaps betrays a visceral aversion to discrimination even when practiced against nonminorities. The Justice Department might well have aided its cause by focusing debate on the meaning of "discrimination" instead of on the appropriate form of relief.

Understanding the nature of a wrong is critical to defining the nature and scope of its remedy. The cases examined here demonstrate just how vague and subjective is our current understanding of "discrimination" and its antonym, "equal opportunity." As used in contemporary discourse they are provocative catch-phrases that serve to legitimate the bureaucratic and judicial administration of group parity. Another such phrase, as we shall discover in Chapter 4, is "school desegregation."