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Continued Uncertainty as to the Constitutionality of Remedial Racial Classifications: Identifying the Pieces of the Puzzle†

Jesse H. Choper*

The extent to which the equal protection clause of the fourteenth amendment (and its counterpart in the due process clause of the fifth amendment) permits government to use racial classifications to remedy prior racial discrimination is one of the most significant and controversial constitutional issues of our time. It has been addressed by Justices of the Supreme Court in eight decisions, all during the Burger Court, the first arising during Chief Justice Burger's second term and the last during his seventeenth and final term. Although the Burger Court has told us much about this issue, there has been no authoritative opinion of the Court on most critical aspects of the matter. Thus, despite Justice O'Connor's recent optimistic declaration that "the diverse formulations and the number of separate writings put forth by various members of the Court in these difficult cases do not necessarily reflect an intractable fragmentation in opinion with respect to certain core principles," the claims of majority judicial support from partisans on both sides of the issue accurately indicate that an enormous degree of ambiguity and uncertainty persists.

The purpose of this paper is not to add to the great volume of intelligent and sophisticated analyses about how the constitutional ques-

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5. For the one exception, see Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); see also infra text accompanying notes 9-11.
7. See, e.g., Time, July 14, 1986, at 22.
tions should be resolved, for I have nothing new to contribute. Rather, after briefly summarizing the eight cases that have prompted at least one member of the Court to speak to the issue of constitutionality, and after describing the general approach of each incumbent Justice, I will explore the question of where the matter presently stands. This inquiry proceeds from two overlapping perspectives: first, identifying and discussing a number of factors and the differing responses they have generated from various members of the Court; and second, reviewing the position of each Justice as the Rehnquist Court begins.

I. THE RELEVANT DECISIONS

In Chief Justice Burger's second term, the Court decided *Swann v. Charlotte Mecklenburg Board of Education*, which involved the use of racial criteria to remedy *de jure* school segregation. The Court unanimously held that a federal judge may use race-based mathematical ratios as a starting point to remedy deliberate racial segregation in public schools. Indeed, in two companion cases to *Swann*, the Court ruled that race must often be used to remedy the problem. Since the Court has tended to view the school desegregation issue as *sui generis*, its approach in *Swann* and subsequent cases dealing with school desegregation probably has limited predictive value on the broader question of permissible remedial racial classifications.

The earliest "conventional" affirmative action case to be reviewed by the Court came three years later in *DeFunis v. Odegaard*, involving the University of Washington Law School's preferential admissions program for members of designated racial and ethnic minorities. Unlike *Swann*, the challenged government action in *DeFunis* had not been adopted to remedy prior deliberate discrimination by the state or its law school, but rather as an effort to increase the number of law students from minority groups. The Court held, by a five to four vote, that the case was *moot*. Only one of the dissenters, Justice Douglas, addressed the merits, finding that a law school's use of an explicit racial classification violated equal protection.

In 1977, although there was no opinion for the Court, Chief Justice Burger alone dissented from the ruling in *United Jewish Organizations v. Carey*, (UJO) upholding a New York districting plan that overtly used racial criteria in order to create a larger number of state legislative districts containing nonwhite majorities. As in *DeFunis*, and unlike *Swann*, there had never been a finding that the State of New York had engaged in

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10. Id. at 25.
13. Id. at 317.
14. Id. at 341-44 (Douglas, J., dissenting).
16. Id. at 168.
deliberate discrimination against racial minorities with respect to voting. There was, however, an important factor in *UJO* not present in *DeFunis*. New York had been required to undertake the challenged action because certain counties were subject to the Voting Rights Act of 1965. These counties had used a literacy test for voting during the 1968 presidential election, and less than half their eligible residents had gone to the polls. Under these circumstances, it may be said that the state legislation was based on a congressional presumption that the counties had engaged in deliberate racial discrimination. In any event, prior to *Regents of the University of California v. Bakke*, there had only been two dissenting votes against the constitutional permissibility of remedial racial classifications, and only one of these dissenters was on the Court when *Bakke* was decided.

*Bakke*, decided a year after *UJO*, involved an affirmative action program that had been adopted by the faculty of the Medical School of the University of California at Davis. The program reserved sixteen places in each entering class of one hundred for qualified minority applicants. It was undisputed that there had been no history of deliberate discrimination by the Davis Medical School. By a five to four vote, the Court held that the set-aside was invalid. Four members of that majority—Chief Justice Burger and Justices Stewart, Rehnquist, and Stevens—found that it was forbidden by Title VI of the Civil Rights Act of 1964 and thus there was no need to reach the constitutional issue. The remaining five members of the Court, however, did address the question of constitutionality. Justices Brennan, White, Marshall, and Blackmun—in a very unusual opinion because it was issued under all of their names—contended that, even though there had been no prior deliberate discrimination, the Davis plan did not violate equal protection. Justice Powell was the only member of the Court to find the program unconstitutional. But, in what was then, and probably continues to be, the most important part of the decision for affirmative action programs in higher education, Justice Powell reasoned that although the set-aside of sixteen places violated equal protection, race could nonetheless be used as a “plus” in the admissions process in order to achieve diversity in the student body.

In 1980, *Fullilove v. Klutznick* became the second major affirmative action decision. It involved the Public Works Employment Act of 1977, in which Congress appropriated $4 billion to state and local governments for construction projects. Specifically at issue was the “minority business enterprise” (MBE) provision which stipulated that ordinarily at least ten percent of the funds be expended for minority businesses (those businesses

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17. Alternatively, *UJO* may be predicated on a unique power of Congress to enact (or require) race-based remedies in order to alleviate the present effects of past racial discrimination. See infra note 77.
19. Id. at 272-77.
20. Id. at 320.
21. Id. at 417-18 (Stevens, J., concurring and dissenting in part).
22. Id. at 325-26 (Brennan, White, Marshall & Blackmun, JJ., concurring and dissenting in part).
23. Id. at 311-14.
There is a substantial ambiguity in Fullilove, however, as to whether the MBE provision was enacted to remedy prior deliberate discrimination by the government—that is, discrimination that is itself unconstitutional—or whether it was simply an effort to remedy “general societal discrimination” that had existed against minority group members. Six members of the Court, in two separate opinions—one by Chief Justice Burger, joined by Justices Powell and White, and the other by Justice Marshall, joined by Justices Brennan and Blackmun—upheld the MBE provision. Justices Rehnquist and Stevens found that the racial classification violated equal protection; Justice Stewart also voted against the classification’s constitutionality.

Minnick v. California Department of Corrections, decided in 1981, raised several important issues that remain unresolved today. Minnick involved an affirmative action program voluntarily undertaken in the California prison system. The program, which was not a response to any prior history of deliberate discrimination, set hiring goals for prison employees of thirty-eight percent women and thirty-six percent minorities. The Court granted certiorari but, as in some other affirmative action cases, managed to avoid reaching the merits, holding that there was no final judgment. Justice Rehnquist agreed with Justice Stewart’s separately stated view that California’s hiring goals violated equal protection.

This was the background to the two major cases decided in 1986 in which the Court again discussed the constitutionality of remedial racial classifications. Wygant v. Jackson Board of Education involved a provision of the collective bargaining agreement between the Jackson, Michigan Board of Education and the union that represented the board’s teachers. It embodied the usual seniority procedure for layoffs—last hired, first fired—but provided further that no layoffs could result in a smaller percentage of minority teachers than were employed at the time of the separations. Were

25. Id. at 454.
26. See infra text accompanying note 76.
27. See Fullilove, 448 U.S. at 492.
28. See id. at 517 (Marshall, J., concurring).
29. Id. at 527, 552-53 (Stevens, J., dissenting).
30. Id. at 522-32 (Stewart, J., dissenting).
32. These percentage goals sought to produce a prison work force that more closely reflected (1) the minority composition of the inmate population, and (2) the gender distribution of the state’s labor market. Id. at 109. For a discussion of the Court’s treatment of the size of goals, see infra note 122.
33. See Minnick, 452 U.S. at 127 (Rehnquist, J., concurring).
34. 106 S. Ct. 1842 (1986).
it not for this provision, a much larger proportion of minority teachers would have been dismissed when cutbacks occurred, since most of the minority teachers had been hired quite recently pursuant to an affirmative action plan whose validity was not before the Court. Consequently, although there had been no finding of prior deliberate discrimination in hiring by the school district, nonminority teachers with greater seniority were laid off. The Court, by a five to four vote—again, there was no majority opinion—held that this violated equal protection. The five members of the Court who found it unconstitutional were Justice Powell (no surprise given his position in Bakke), Chief Justice Burger, Justice Rehnquist (fully expected after his stance in Fullilove and Minnick), Justice O'Connor (the first time she had an opportunity to express her view on the constitutionality of affirmative action), and Justice White (the first time he had ever voted to hold an affirmative action program unconstitutional). Upholding the provision, Justices Brennan, Marshall, and Blackmun were quite predictable because they had been very consistent on this issue. Justice Stevens' position was more significant since this was the first time he had approved an affirmative action program.

The second major constitutional decision in 1986 was Sheet Metal Workers' International Association v. Equal Employment Opportunity Commission. Sheet Metal Workers' involved a union with a longstanding record of deliberate discrimination against nonwhite workers in recruitment, training, and admission to the union in violation of Title VII of the Civil Rights Act of 1964, and a history of egregious noncompliance with a series of lower court orders attempting to remedy this illegality. In 1983, a federal district judge, after several unsuccessful attempts to cure this situation, set a goal for the union of 29.23% nonwhite members by 1987, based on the racial proportions of the relevant labor pool. One of the central issues when the case came to the Supreme Court was whether a race-based remedy could benefit persons other than the direct victims of the discrimination. The district court's goal did not simply seek to make the victims whole. Rather, it aimed to achieve proper racial and ethnic representation in the union of the groups that had been discriminated against.

By a five to four vote, again with no majority opinion, the Court upheld the district judge's order. The four dissenters in Wygant—Justices Brennan, Marshall, Blackmun, and Stevens—upheld the order as constitutional. The swing vote, as is often true, was cast by Justice Powell. Chief Justice Burger and Justices Rehnquist and O'Connor did not reach the constitutional issue, finding that the order was a racial quota in violation of the Civil Rights Act. Justice White was the fourth dissenter, again voting against the validity of a remedial racial classification; although, in contrast

35. Id. at 1843.
36. Id. at 1844.
37. Id.
38. 106 S. Ct. 3019 (1986).
39. Id. at 3026-31.
40. Id. at 3050-52.
41. Id. at 3063 (Rehnquist, J., dissenting); id. at 3057-62 (O'Connor, J., concurring in part and dissenting in part).
to Wygant, it is not clear that he based his conclusion on constitutional grounds.\textsuperscript{42}

A significant aspect of the Sheet Metal Workers' case was its specific rejection of the Solicitor General's position that, under both the Civil Rights Act of 196\textsuperscript{c}: and the equal protection precept of the fifth and fourteenth amendments, only actual victims of discrimination may benefit from a race-based remedy. The fact that a majority of the Court refused to accept the Reagan Administration's argument was wholly predictable, because if the Court had embraced the argument it would have abandoned a stand taken several times in the past. In Bakke, five members of the Court ruled that the benefits of race-conscious action need not be limited to the actual victims of discrimination, even when there had been no prior deliberate discrimination.\textsuperscript{43} In Fullilove, six Justices approved a plan under which the minority business enterprises that benefited from the set-aside did not have to be victims of prior discrimination.\textsuperscript{44} If they had been, it would have been purely coincidental. And, albeit in a nonconstitutional context, United Steelworkers v. Weber\textsuperscript{45} validated a collective bargaining agreement between a private company and a union that established an affirmative action program which did not benefit the actual victims of prior discrimination.\textsuperscript{46}

\section*{II. The General Standard of Review}

Unlike most areas of constitutional adjudication, the Court has yet to agree on the standard for measuring the validity of remedial racial classifications. Ostensibly, the "test" employed, at a minimum, reflects the Justices' substantially different attitudes in their approach to the constitutional issue. For example, Justice Powell's approach divided him from Justices Brennan, Blackmun, Marshall, and White regarding the preferential admissions plan in Bakke and split the Court on the issue of permissible layoffs in Wygant. Thus, identifying the several articulated tests may be helpful in understanding the Justices' positions with respect to the range of factors at play.

Justices Brennan, Marshall, and Blackmun have quite consistently adhered to a standard of "near strict scrutiny." Propounded originally in Bakke and reaffirmed in Fullilove, their basic principle for upholding a remedial racial classification is that it must be \textit{substantially} related to an \textit{important} state interest.\textsuperscript{47} Beyond this, they have added several refinements: the state interest must be articulated by the government agency adopting the program,\textsuperscript{48} and the plan may not stigmatize anyone on the basis of race.

\begin{itemize}
\item \textsuperscript{42} Id. at 3062 (White, J., dissenting).
\item \textsuperscript{43} Justice Powell's position in Bakke, however, did not speak directly to the use of racial criteria to remedy prior societal discrimination. See Bakke, 438 U.S. at 289-320; see also infra page 273.
\item \textsuperscript{44} Fullilove, 448 U.S. at 490-92.
\item \textsuperscript{45} 443 U.S. 193 (1979).
\item \textsuperscript{46} Id. at 208.
\item \textsuperscript{47} Bakke, 438 U.S. at 359-78 (Brennan, White, Marshall & Blackmun, JJ., concurring and dissenting in part); Fullilove, 448 U.S. at 519-21 (Marshall, Brennan & Blackmun, JJ., concurring).
\item \textsuperscript{48} Bakke, 438 U.S. at 361.
\end{itemize}
or ethnicity, or designate the politically impotent to carry the burdens imposed.  

Justice White united with them in Bakke but not in Fullilove. Instead he subscribed to Chief Justice Burger's stricter standard. Most recently, in the Wygant and Sheet Metal Workers' cases, each producing many pages of opinions, Justice White—providing his rationale each time in one short paragraph—failed to state a standard of review. It seems fair to infer that, in the eight years since Bakke, Justice White has stiffened his criteria for upholding remedial racial classifications.

In contrast, Justice Powell has been consistent from Bakke, through Fullilove, Wygant, and Sheet Metal Workers'. In Bakke, he argued that all racial classifications—whether "invidious" or "benign"—should be subject to "strict scrutiny." That is, the racial classification must be necessary to a compelling government interest. Most recently, in Wygant, Justice Powell phrased the test a bit differently, and perhaps more meaningfully, stating that a race-based remedy must be "narrowly tailored" to achieve a compelling interest. In Fullilove, Chief Justice Burger essentially subscribed to Justice Powell's "strict scrutiny" position, and he also joined Justice Powell's opinion in Wygant. Justice O'Connor joined Justice Powell in Wygant and, in a separate concurring opinion, specifically reaffirmed her approval of his "strict scrutiny" standard.

Justice Rehnquist also joined Justice Powell's opinion in Wygant. But in both Fullilove and Minnick, Justice Rehnquist agreed with Justice Stewart's view that all racial discriminations are invalid, with the limited exception that a court of equity may impose burdens on a racial basis in order to remedy the actual effects of a prior legal violation against a racial or ethnic group. That is essentially the Reagan Administration's position that was rejected by the Court in Wygant and Sheet Metal Workers'. Even Justice Rehnquist voted to reject this argument in Wygant, although it is doubtful that Justice Rehnquist subscribes to all the language in Justice Powell's Wygant opinion. It is more likely that he joined the opinion because he agreed with the result. Whether he joined it to avoid writing separately, and whether this represents the beginning of a trend, are nice questions (particularly now that he has become Chief Justice).

As is often true, Justice Stevens' approach differs from that of his colleagues. The test that he has adopted is simpler in some ways, yet more complicated in others. In Wygant, he took a straight balancing approach as an initial matter, employing neither "strict scrutiny" nor "near strict scrutiny." He asked, first, whether the Jackson Board of Education's

49. Id.
50. On the extent to which Chief Justice Burger actually employed this standard, see Choper, The Constitutionality of Affirmative Action: Views from the Supreme Court, 70 Ky. L.J. 1, 8-21 (1981-82).
52. Wygant, 106 S. Ct. at 1846.
53. See Choper, supra note 50, at 8.
54. Wygant, 106 S. Ct. at 1853 (O'Connor, J., concurring).
55. See Choper, supra note 50, at 6.
purpose in having "multi-ethnic representation on the teaching faculty" served a "rational," or "valid," or "legitimate" public interest—terms that invoke the most deferential standard of equal protection review—that "justifies any adverse effects on the disadvantaged group" or "transcends the harm to the white teachers who are disadvantaged by the special preference the Board has given to its most recently hired minority teachers." He then added several other criteria that must be satisfied, the most important being "an assessment of the procedures that were used to adopt and implement the race-conscious action." In *Fullilove*, Justice Stevens found the set-aside unconstitutional principally on the ground that the congressional decisionmaking process was totally inadequate. He was on strong ground factually because the MBE provision was a floor amendment that was never considered by any congressional committee. On the other hand, in *Wygant*, Justice Stevens declared that the procedures "were scrupulously fair" and emphasized that the provision of the collective bargaining agreement had been approved by a majority of the union membership on many occasions. This, however, sounds better than the reality. It is true that, from the perspective of the quality of deliberation accorded the issue, the policy in *Wygant* "was adopted with full participation of the disadvantaged individuals . . .," whereas in *Fullilove*, only "perfunctory consideration" was given to the MBE provision during the "brief discussion on the floor of the House as well as in the Senate on two different days. . ." But, viewed from a different—and politically more realistic—vantage point, as Justice Powell pointed out, the votes by the union membership in *Wygant* did not accurately represent the interests adversely affected. The teachers who actually bore the risk of not being able to maintain their jobs in *Wygant* were the nonminority instructors at the bottom of the seniority ladder. These teachers were certainly not a majority of the union members voting to approve the provision. Those

57. Id. (Stevens, J., dissenting).
58. Id. at 1869 (Stevens, J., dissenting).
59. Id. at 1868 (Stevens, J., dissenting).
60. Id. at 1867 (Stevens, J., dissenting).
61. Id. at 1869 (Stevens, J., dissenting).
62. Id. (Stevens, J., dissenting).
63. See *Fullilove*, 448 U.S. at 549-50 (Stevens, J., dissenting).
64. *Wygant*, 106 S. Ct. at 1869 (Stevens, J., dissenting).
65. In *Fullilove*, Justice Stevens clearly implies that there is a nexus between "the kind of deliberation that a fundamental constitutional issue of this kind obviously merits," 448 U.S. at 552 (Stevens, J., dissenting), and a "narrowly tailored" remedy, id. at 541 (Stevens, J., dissenting), to achieve a "legitimate" purpose, id. at 543 (Stevens, J., dissenting). Thus, in *Wygant*, Justice Stevens stressed that, "in striking contrast to the . . . unjustified breadth of the race-based classification in *Fullilove*," 106 S. Ct. at 1870 (Stevens, J., dissenting), the Jackson School Board's plan was "specially designed to achieve its objective—retaining the minority teachers that have been specifically recruited to give the Jackson schools . . . an integrated faculty." Id. (Stevens, J., dissenting).

Justice Stevens' final criterion—"an evaluation of the nature of the harm itself"—is discussed infra text accompanying notes 111-15.

67. *Fullilove*, 448 U.S. at 550 (Stevens, J., dissenting).
68. Id. (Stevens, J., dissenting).
nonminority instructors with long tenure may be more generous with the seniority rights of others that are junior to them than they would be if they were directly threatened.

III. **The Pieces of the Puzzle: A Series of Intersecting Factors**

**A. Prior Illegality vs. Societal Discrimination**

In judging the validity of remedial racial classifications, different members of the Court have placed varying emphasis on a series of factors. Generally, the most important factor has been whether the challenged action was taken in response to a prior illegality (a violation of either the Constitution or an antidiscrimination law), or whether it seeks simply to remedy what has been labelled the “effects of societal discrimination” (a situation in which minorities are underrepresented not because the government unit involved has deliberately discriminated against them, but rather when a racially neutral policy—say, in hiring or college admissions—produces a racially disproportionate impact that is probably attributable, at least in part, to society’s long history of discrimination against minorities).

All Justices agree that a race-based remedy may be used to make the actual victims of prior illegal discrimination whole. For example, when it has been demonstrated that a member of a racial minority has been denied employment, promotion, or seniority in violation of Title VII of the Civil Rights Act of 1964, several Supreme Court decisions have approved a federal district judge’s order that persons who have been discriminated against be hired or awarded retroactive seniority.70 In fact, since this does no more than specifically rectify the misconduct, it is really not “race-based” relief at all.

Moving a step further, in *Swann*, the Court unanimously affirmed a federal district judge’s use of a race-based pupil assignment plan to remedy deliberate school segregation, even though there was not a tight fit between the prior illegality and a remedy to make the victims whole.71 Moreover, in *Wygant*, Justice Powell—joined by Chief Justice Burger and Justices Rehnquist and O’Connor—cited *Swann* in seeming support of the proposition that remedial racial classifications for “prior discrimination by the governmental unit involved”72 were constitutional, even though the programs went beyond making the identified victims whole. Indeed, Justice Powell’s opinion made clear that it would have been permissible for the Jackson Board of Education to voluntarily undertake its race-based plan if there had been a determination that the board had engaged in prior discrimination against the minority groups benefiting from the plan.73

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73. It should be noted again, however, that Justice Rehnquist’s position—as articulated by Justice Stewart’s dissenting opinion in *Fullilove*,—would appear to be that (1) only “make whole” relief is allowed, and (2) the only branch of government that may grant “a race-conscious remedy” is “a court of equity,” *Fullilove*, 448 U.S. at 527 (Stewart, J., dissenting),
B. Numerical Goals to Remedy the Effects of Societal Discrimination

The question of whether a government agency may, on its own initiative, implement numerical goals to remedy the effects of past societal discrimination falls at the opposite end of the spectrum. Assessing the constitutionality of the numerical goals must begin with the principle stated in Swann that, even in the absence of past discrimination, a school board may conclude, as a matter of educational policy, “that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole.” First, it should be emphasized that this was dicta. The issue before the Court was the validity of a judicial order to remedy a conceded violation of the fourteenth amendment. Second, I would suggest that, unless busing to desegregate is perceived as imposing little (or no) harm, or unless remedies for deliberate school segregation are sui generis, the Swann dicta is of doubtful validity today because a majority of the Justices dislike any fixed ratios, irrespective of the context.

Justices Brennan, White, Marshall, and Blackmun, in their Bakke opinion, provide the strongest authoritative support for numerical goals to remedy the effects of societal discrimination. On the other hand, writing for himself in Bakke, Justice Powell argued that a goal, quota, or set-aside was an invalid response to societal discrimination and could only be used to remedy a prior constitutional or statutory violation identified as such by a properly authorized government agency. Based on this principle, Justice Powell, in a separate opinion, upheld the MBE set-aside in Fullilove. The support in the record for this conclusion, however, was scanty at best, particularly with respect to purposeful discrimination by any federal agency in the distribution of public works funds. Such unlawful discrimination, it must be remembered, was necessary to justify the racial classification as a remedy for “prior discrimination by the governmental unit involved.”

Thus, disqualifying the actions of legislative, executive and administrative agencies. It remains to be seen whether Justice Rehnquist, by joining Justice Powell’s opinion in Wygant, has broadened his range of permissibility. See supra text following note 54.

74. Swann, 402 U.S. at 16.
75. See infra text accompanying notes 116-20.
76. Justice Powell’s fragmented discussion of this issue may be found at 448 U.S. 503-07. Although he states that “the legislative history of . . . [the MBE provision] demonstrates that Congress reasonably concluded that private and governmental discrimination had contributed to the negligible percentage of public contracts awarded minority contractors,” id. at 503, he points to no specific evidence (either before Congress or otherwise) of deliberate discrimination by the federal government. Justice Powell finally concedes that “[a]lthough the discriminatory activities were not identified with the exactitude expected in judicial or administrative adjudication, it must be remembered that ‘Congress may paint with a much broader brush than may this Court . . . .’” Id. at 506 (citations and footnote omitted).
77. See infra text accompanying notes 86-92.

There are several other possible, but by no means wholly unproblematic, explanations for Justice Powell’s action in Fullilove. First, it may rest on the fact that the MBE provision was contained in a federal statute and that Congress has a unique power to enact remedial racial classifications. This possibly important piece of the puzzle is discussed in Choper, supra note 50, at 9-14. For similar reasoning by Justice Powell with respect to a separate issue, see infra note 101. Second, as argued at length in Chief Justice Burger’s opinion (which Justice Powell...
However Justice Powell's stance in *Fullilove* may be explained, his opinion in *Wygant*—joined by Chief Justice Burger and Justices Rehnquist and O'Connor—stated flatly that remedying societal discrimination will not justify a racial classification. Thus, as of the end of 1986, there were four unambiguous votes against using racial classifications to remedy societal discrimination.

Justice Stevens' position still remains unaccounted for. As indicated above, his vote to uphold the collective bargaining provision in *Wygant* is plainly premised on the view that, as long as adequate procedures are followed, a numerical racial goal may be valid, even though it is not used to remedy a prior illegality. At present, this would seem to produce a five to four division on this issue (albeit a significantly qualified majority because of Justice Stevens' "decisionmaking process" criterion), but Justice White's apparent movement since *Bakke* leaves the matter unresolved.\(^7\)

C. Determining and Defining Prior Illegality

Given the uncertainty about the validity of racial classifications to remedy the effects of societal discrimination, determining that a race-based program was implemented to remedy a prior illegality assumes great significance. *Wygant* addressed this question for the first time. The discussion probably represents the most important aspect of the case, although, as will be seen, its contours are highly ambiguous.

Justice Powell wrote the key opinion on this issue, joined by Chief Justice Burger and Justices Rehnquist and O'Connor. (Justice O'Connor filed a separate opinion that discussed the matter even more extensively.) Justice Powell made two basic points. First, a government employer (and presumably a state university as well) that voluntarily undertakes a race-based affirmative action program need not make a contemporary finding that it was doing so to remedy its own prior illegality. (Justice O'Connor's separate opinion reiterated this point and then supported it on policy grounds by reasoning that an opposite rule "would severely undermine public employers' incentive to meet voluntarily their civil rights obligations.")\(^7\)\(^8\) Second, if a nonminority employee challenges the plan's constitutionality in court, the government agency cannot successfully defend its program simply by conceding that the agency illegally discriminated against minority employees; rather, "the trial court must make a factual determination that remedial action was necessary."\(^8\)\(^0\) In other words, the trial court must find that the government agency was attempting to remedy its prior

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\(^7\) See infra text accompanying note 118.

\(^8\) The question is again before the Court in Johnson v. Transportation Agency, 748 F.2d 1308, amended by 770 F.2d 752 (9th Cir. 1985), cert. granted, 106 S. Ct. 3331 (1986); see also supra note 32.

\(^9\) *Wygant*, 106 S. Ct. at 1855 (O'Connor, J., concurring).

\(^0\) *Id.* at 1848. Justice O'Connor uses the phrase "firm basis" in her separate concurrence. *Id.* at 1855 (O'Connor, J., concurring).
unlawful conduct.\textsuperscript{81} (In a subsequent part of his opinion, Justice Powell plainly implies that the government employer must also have a strong basis for believing that it has engaged in prior illegal discrimination against members of each minority group that is being benefited by the affirmative action plan.)\textsuperscript{82}

A series of crucial and unanswered questions remains. May a challenger prevail by proving that despite the government agency's strong belief that remedial action was necessary, it had never \textit{in fact} engaged in any illegal discrimination? (Justice Powell's opinion—and Justice O'Connor's concurrence\textsuperscript{83}—clearly indicate that "the ultimate burden remains with the [challenger] to demonstrate the unconstitutionality of an affirmative action program.")\textsuperscript{84} Or must a challenger go further and show that not only had there been no prior illegality, but also that the government agency had no strong basis for believing that there had been? Although Justice Powell's opinion does not speak to this second question, Justice O'Connor answers the question affirmatively.\textsuperscript{85} Thus, in her view, prior unlawful conduct \textit{in fact} is not necessary to justify a remedial racial classification.

Assuming that the government unit need only have a "strong" (or "firm") basis for believing that remedial action was necessary, what exactly does this mean? Must the government unit have a strong basis to conclude that it committed a constitutional violation, or does a statutory violation suffice? There is a vast difference between these violations. Under the rule of \textit{Washington v. Davis},\textsuperscript{86} there cannot be a constitutional violation without an \textit{intent} to discriminate. But under Title VII of the Civil Rights Act of 1964, there can be a statutory violation even though there is no intent to discriminate;\textsuperscript{87} a plaintiff need only show that an employment practice has produced a statistical disparity between the employer's work force and the relevant labor pool that cannot be explained by job-related hiring criteria.\textsuperscript{88}

Justice Powell's opinion does not carefully distinguish between constitutional and statutory violations; rather, the generic phrase "prior discrimination by the governmental unit involved" is used.\textsuperscript{89} But there is at least a suggestion in his opinion that if the public employer can show a statistical disparity between the racial composition of its work force and the relevant labor market (which, as noted above, constitutes a prima facie case under Title VII),\textsuperscript{90} then that disparity in itself will provide a strong basis for the employer's belief that remedial action is necessary.\textsuperscript{91} On the other hand, at

\textsuperscript{81} Whether the prior discrimination must be a constitutional violation or only a breach of an antidiscrimination statute is discussed \textit{infra} text accompanying notes 86-96.

\textsuperscript{82} \textit{Wygant}, 106 S. Ct. at 1852 n.13.

\textsuperscript{83} \textit{Id.} at 1856 (O'Connor, J., concurring).

\textsuperscript{84} \textit{Id.} at 1848.

\textsuperscript{85} \textit{Id.} at 1856 (O'Connor, J., concurring).

\textsuperscript{86} 426 U.S. 229 (1976).


\textsuperscript{88} See \textit{Albemarle Paper Co. v. Moody}, 422 U.S. 405, 425 (1975).

\textsuperscript{89} \textit{Wygant}, 106 S. Ct. at 1847.

\textsuperscript{90} For different views on the precise nature of the statistical disparity, compare \textit{Pouncy v. Prudential Ins. Co.}, 668 F.2d 795 (5th Cir. 1982) with \textit{Segar v. Smith}, 738 F.2d 1249 (D.C. Cir. 1984).

\textsuperscript{91} \textit{Wygant}, 106 S. Ct. at 1847-48.
the very end of his opinion, Justice Powell faults the Jackson Board of Education for having "never suggested—much less formally found—that they have engaged in prior, [purposeful] discrimination against members of each of these minority groups."92 Justice O'Connor's discussion is considerably less ambiguous. She regularly describes the justification for race-based remedial action as being prior "statutory and constitutional transgressions"93 and prior "unlawful"94 or "illegal"95 discrimination. Finally, her detailed example of the process for determining the government unit's "firm basis" strongly implies that a violation of Title VII constitutes a "firm basis."96

Assuming that a statutory violation is adequate, the question again arises whether a challenger can prevail by showing that even though the government employer had a strong basis for concluding that it violated the Civil Rights Act, there was in fact no statutory violation—that is, although there was a statistical disparity, the agency's hiring criteria were job-related. Or can the challenger win only by proving that there was no statistical disparity, and therefore, the government employer did not even have a prima facie case? If it is the latter, challenges will almost never succeed because there are statistical disparities in virtually all situations in which remedial programs are undertaken, whether in the context of employment or admissions to public schools, colleges, or professional schools. Although Justice Powell's opinion provides no meaningful indication as to how these questions should be resolved, there are passages in Justice O'Connor's concurrence that point to the latter conclusion.97

The foregoing discussion of the method for determining prior illegality (constitutional or statutory) has focused only on the views of Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor.98 As for the other five members of the Court, it is fair to conclude that Justices Brennan, Marshall, and Blackmun will subscribe to the most lenient requirements since they do not require a prior constitutional or statutory violation. After Wygant, the same may be said for Justice Stevens (although his additional criteria must also be fulfilled). If Justice White were to adhere to his Bakke opinion, where there had been no prior illegality, the views expressed in Justice Powell's plurality opinion in Wygant would be far less important for the future since there would be a majority of five favoring affirmative action plans, regardless of antecedent unlawfulness. But, as observed above, Justice White's approach has become uncertain. Thus, the consequences of Justices Powell's and O'Connor's intimations (particularly the

92. Id. at 1852 n.13.
93. Id. at 1855 (O'Connor, J., concurring).
94. Id. (O'Connor, J., concurring).
95. Id. (O'Connor, J., concurring).
96. Id. at 1856 (O'Connor, J., concurring).
97. Id. (O'Connor, J., concurring).
98. That there is serious doubt that Justice Rehnquist will adhere to most of this reasoning bears repeating. His position has been that race-based remedies are valid only when decreed by a court of equity "following litigation in which a violation of law has been determined. . . ." Fullilove, 448 U.S. at 525 n.4. Whether his new chair on the bench will result in a modification of his stance remains to be seen.
that voluntary affirmative action programs are to be encouraged, may go a long way toward having a majority of the Court uphold remedial racial classifications.

D. "Burdens" on "Innocent" Persons

All members of the Court accept the principle that a government unit may use some form of race-based relief to remedy actual prior unlawful discrimination. Moreover, virtually every Justice has acknowledged that the remedy may extend to persons beyond the actual victims of the discrimination and may disadvantage innocent persons. But there is substantial disagreement about how great a "burden" "innocent persons may be called upon to bear"—nonminorities who do not get jobs or who are fired because of a racially preferential hiring system or a reverse seniority plan, or who are refused university admission because of an affirmative action program.

In Wygant, Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, made it clear that, apart from make-whole relief for victims, layoffs are too harsh a burden to impose on innocent people, even to remedy a prior constitutional violation. On the other hand, these three Justices declared that although hiring goals "may burden some innocent individuals," they are distinguishable from layoffs because "the burden to be borne by innocent individuals is diffused to a considerable extent among society generally." Similarly, they observed that school admission is akin to hiring, pointing to the fact that even though Marco DeFunis was not admitted to the University of Washington Law School, he was accepted by several other law schools in the geographic area. Thus, the "level of harm suffered" was not great.

Justice White made the question of layoffs the exclusive basis for his rationale in Wygant, disapproving the plan on equal protection grounds. He was careful, however, to say that Wygant was not a case in which those benefiting from the affirmative action plan were victims of racial discrimination, thus intimating a willingness to accept layoffs for make-whole relief. It is uncertain whether Justice White would also uphold layoffs of innocent persons as a remedy for prior illegality when the beneficiaries

99. See supra text accompanying note 79.
100. See Wygant, 106 S. Ct. at 1850.
101. Justice Powell's opinion stated that, although the purpose of the remedy "may be legitimate, the Board's layoff plan is not sufficiently narrowly tailored. Other, less intrusive means of accomplishing similar purposes—such as the adoption of hiring goals—are available." Id. at 1852. By contrast, in Fullilove, after having found that "the set-aside is designed to serve the compelling governmental interest in redressing racial discrimination," 448 U.S. at 508, Justice Powell reasoned that "this Court has not required remedial plans to be limited to the least restrictive means of implementation," id., believing that "Congress' choice of a remedy should be upheld . . . if the means selected are equitable and reasonably necessary to the redress of identified discrimination." Id. at 510; see supra note 77.
102. Wygant, 106 S. Ct. at 1851.
103. Id.
104. Id. at 1851 n.11.
were not themselves victims of the discrimination, although there is a strong suggestion in his Sheet Metal Workers' dissent that he would not.\textsuperscript{105}

Justice O'Connor declined to join that part of Justice Powell's opinion in \textit{Wygant} that rejected layoffs of innocent persons as a remedy for prior unlawful discrimination. Since \textit{Wygant} involved only an attempt to remedy the effects of societal discrimination, Justice O'Connor found it unnecessary to resolve the former issue.\textsuperscript{106}

Justices Brennan, Marshall, and Blackmun voted to uphold the system of layoffs in \textit{Wygant} even though the Jackson Board of Education had never been found guilty of prior illegal discrimination.\textsuperscript{107} Nonetheless, they did not say that layoffs of innocent persons were valid to remedy the effects of societal discrimination. Rather, Justice Marshall's dissenting opinion urged that the case be remanded for a finding that the Jackson Board of Education had engaged in prior discrimination for which the layoff remedy was justified (and absolutely necessary to achieve the school district's goal of faculty integration as well).\textsuperscript{108} Moreover, in all of the cases involving remedial racial classifications, Justices Brennan, Marshall, and Blackmun have continually emphasized the modest nature of the burden imposed on innocent people. For example, in \textit{Weber}, Justice Brennan's opinion for the Court stressed the fact that the collective bargaining plan did "not unnecessarily trammel the interests of the white employees," because it did "not require the discharge of white workers."\textsuperscript{109} Similarly, in \textit{Sheet Metal Workers'}, Justice Brennan's plurality opinion emphasized that the judicially ordered relief "did not [disadvantage] existing union members."\textsuperscript{110}

On the one hand, it can be inferred that Justices Brennan, Marshall, and Blackmun are as much concerned with the degree of the burden imposed on innocent persons as are the other members of the Court. On the other hand, it may be that they have written narrowly in order to hold a majority (as in \textit{Weber}) or to entice Justice Powell to join their opinion in \textit{Sheet Metal Workers'} or at least to keep his vote in a separate concurring opinion in that case.

Justice Stevens has been the most forthright in dealing with the scope of the burden of remedial racial classifications. In \textit{Wygant}, he argued that the difference between layoffs and hiring "has no bearing on the equal protection question,"\textsuperscript{111} reasoning that both involve "only one of several [employment] opportunities"\textsuperscript{112} available to an individual. Even Justice Powell, after distinguishing \textit{Wygant} from \textit{Sheet Metal Workers'} on the ground that the latter did not involve layoffs, conceded that "it is too simplistic"\textsuperscript{113}

\textsuperscript{105} 106 S. Ct. 3019, 3062-63 (1986) (White, J., dissenting).
\textsuperscript{106} 106 S. Ct. 1842, 1852 (1986) (O'Connor, J., concurring in part and concurring in the judgment).
\textsuperscript{107} Id. at 1858 (Marshall, J., dissenting).
\textsuperscript{108} Id. at 1867 (Marshall J., dissenting).
\textsuperscript{109} 443 U.S. 193, 208 (1979).
\textsuperscript{110} 106 S. Ct. 3019, 3052 (1986).
\textsuperscript{111} \textit{Wygant}, 106 S. Ct. at 1870 n.14 (Stevens, J., dissenting).
\textsuperscript{112} Id. (Stevens, J., dissenting).
\textsuperscript{113} \textit{Sheet Metal Workers'}, 106 S. Ct. at 3057 n.3 (Powell, J., concurring in part and concurring in the judgment).
to conclude that layoffs are always invalid and hiring preferences are always permissible. It is "the diffuseness of the burden" that he finds to be critical.\footnote{Id. (Powell, J., concurring in part and concurring in the judgment).}

To summarize: after the \textit{Wygant} case, there are five votes on the Supreme Court disapproving layoffs as a remedy for the effects of societal discrimination. Less clear, however, is the question of whether innocent persons may be laid off in order to remedy a prior violation of the Constitution or an antidiscrimination statute. Four Justices—Brennan, Blackmun, Marshall, and Stevens—would approve; three Justices—Powell, Rehnquist, and Burger—would disapprove. Justice White also appears to disapprove because of his emphasis in both \textit{Wygant} and \textit{Sheet Metal Workers'} on the importance of make-whole relief rather than simply remediying a prior illegality. Thus, Justice O'Connor holds the key to resolving the problem.

\textbf{E. "Strict" Quotas vs. "Flexible" Goals}

Apart from the nature of the burden placed on innocent persons, the other most influential factor in determining the validity of a race-based remedy for a prior constitutional or statutory violation is whether the remedy imposes a strict quota or merely sets a flexible goal. In \textit{Sheet Metal Workers'}, Justice Brennan's plurality opinion—joined by Justices Marshall, Blackmun, and Stevens—strained to find that the goal of 29.23% union membership, to be reached by 1987, was not an "inflexible [racial] quota."\footnote{Id. at 3051-52 n.49.} Justice Brennan reasoned that the district judge had previously changed numerical goals of this sort "to accommodate legitimate reasons"\footnote{Id. at 3051-52 n.49.} asserted by the union. Notwithstanding the tenuous finding that the district judge's order did not impose an inflexible goal, it should be remembered that Justices Brennan, Marshall, and Blackmun (along with Justice White) approved the set-aside in \textit{Bakke}.

Justice Powell, who cast the fifth vote necessary to sustain the 29.23% goal in \textit{Sheet Metal Workers'}, echoed the plurality's treatment, finding that the percentage was not as rigid as it looked.\footnote{It should be added that Chief Justice Burger's opinion in \textit{Fullilove}, which was joined by Justices Powell and White, stretched the record to its limits, if not beyond, in order to find that the 10% set-aside was not as inflexible as it appeared. \textit{See} Choper, \textit{supra} note 50, at 18-21. At this point, we have seen that at least five members of the Court—Justices Brennan, Marshall, Blackmun, Powell, and Stevens, who are most ready to uphold affirmative

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} (Powell, J., concurring in part and concurring in the judgment).
\item A case scheduled for decision in 1987, United States v. Paradise, 767 F.2d 1514 (11th Cir. 1985), \textit{cert. granted}, 106 S. Ct. 3331 (1986), involving a long and egregious history of discrimination by the Alabama State Highway Patrol, poses the question of the validity of a burden that falls someplace between hiring and firing. After more than a decade of noncompliance with remedial efforts, the federal district court ordered a one-to-one ratio for promotion to corporal until either 25% of the rank is filled by black officers or the department itself develops an acceptable promotion plan. \textit{See also} Johnson v. Transportation Agency, 748 F.2d 1308, amended by 770 F.2d 752 (9th Cir. 1985), \textit{cert. granted}, 106 S. Ct. 3331 (1986) (involving promotions).
\item \textit{Sheet Metal Workers'} , 106 S. Ct. at 3051 n.49.
\item \textit{Id.} at 3051-52 n.49.
\item \textit{It should be added that Chief Justice Burger's opinion in \textit{Fullilove}, which was joined by Justices Powell and White, stretched the record to its limits, if not beyond, in order to find that the 10% set-aside was not as inflexible as it appeared. \textit{See} Choper, \textit{supra} note 50, at 18-21.}
\end{enumerate}
\end{footnotesize}
action programs—appear hesitant to approve inflexible quotas. Chief Justice Burger's approach in *Fullilove* plainly reflects a similar disposition.

Justice White, dissenting in *Sheet Metal Workers*, interpreted the 29.23% goal to be a "strict racial quota" and flatly declared in his one-paragraph opinion that he would not uphold "this kind of racially discriminatory hiring practice . . . " Justice White, however, is somewhat ambiguous about the basis for his disapproval—that is, whether he believes that such an inflexible goal is a violation of equal protection or contrary to the Civil Rights Act or simply exceeds the equitable discretion of a federal district judge in fashioning remedies. Again, a perplexing question about Justice White is why he approved the set-aside of sixteen places in the class in *Bakke*. Perhaps the fact that the sixteen places had to be filled by "qualified" applicants caused him to view the set-aside as somewhat flexible. More likely, Justice White may have been influenced by the nature of the burden in *Bakke*, exclusion from the Davis Medical School—one of many, rather than the greater disadvantage of being excluded from the sheet metal worker trade. Even more likely, in my judgment, Justice White no longer holds the view that he expressed in *Bakke*.

Justice O'Connor interpreted the 29.23% goal in *Sheet Metal Workers* to be a strict quota and thus in violation of the Civil Rights Act. It is fair to conclude that her judgment on the constitutionality of the quota is unknown. But, although Justice Rehnquist's position in *Sheet Metal Workers* was similar to Justice O'Connor's, there appears to be little doubt about his opposition to quotas of any kind beyond those that may be necessary to achieve make-whole relief for the actual victims of discrimination.

IV. WHERE DOES EACH JUSTICE STAND?

Having examined the question of the constitutionality of remedial racial classifications through the lens of several influential, if not decisive, factors, predictability may be assisted by turning to the basic stance of each Justice as the Rehnquist Court begins.

At least since *Bakke*, Justices Brennan, Marshall, and Blackmun have stood together in upholding all remedial programs, notwithstanding their highlighting of certain qualifications of the plans they have voted to sustain. In addition to emphasizing the relatively modest nature of the burdens imposed on innocent persons, they have stressed the limited duration of

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119. 106 S. Ct. at 3062 (White, J., dissenting).
120. *Id.* (White, J., dissenting).
121. In United Steel Workers v. Weber, 443 U.S. 193 (1979), Justice Brennan's opinion for the Court pointed out that the affirmative action plan was only "a temporary measure." *Id.* at 208. In *Sheet Metal Workers*, Justice Brennan's plurality opinion observed that the lower court had devised a "temporary membership goal," 106 S. Ct. at 3053, to be achieved rather than maintained. *Id.* at 3052.

Justice Powell was even more explicit in *Sheet Metal Workers*, finding that "the goal was not imposed as a permanent requirement, but is of limited duration." *Id.* at 3056 (Powell, J., concurring in part and concurring in the judgment). This mirrored his characterization (and that by Chief Justice Burger) of the MBE provision in *Fullilove*. See Choper, *supra* note 50, at 15.
the challenged remedies and the flexibility and reasonableness of the numerical goals. Further, they have embroidered their "near strict scrutiny" test postulated in Bakke with several additional requisites. In Wygant, they declined to rely on their broad view in Bakke that race-based remedies may be used constitutionally to counter the effects of societal discrimination, urging, instead, that the school district be permitted to show that it committed unconstitutional discrimination in the past. In Sheet Metal Workers', they concluded that the district court's order passed "even the most rigorous test [since] it [was] narrowly tailored to further the Government's compelling interest in remediying past discrimination."\(^{122}\)

Nonetheless, my judgment is that these three Justices can generally be counted on to approve any affirmative action program that realistically may come before the Court. Why then have their opinions continued to talk about the limited nature and scope of the plans? Is it possible that Justice Blackmun, who expressed the hope in Bakke that the need for affirmative action would be short-lived, is not as solidly in place as Justices Brennan and Marshall? Does Justice Stevens, who strongly dissented in Fullilove, require a more fine-tuned approach than Justices Brennan and Marshall (and Blackmun?) would be willing to use? More likely, is there a continuing effort to obtain Justice Powell's signature on their opinions, or at least to retain his concurrence?

After Wygant and Sheet Metal Workers', I think that Justice Stevens can also be counted on generally to approve judicially imposed race-based remedies as well as those voluntarily undertaken (at least if proper decisionmaking procedures are followed). Although Justice Stevens dissented in Bakke on the ground that the program contravened the Civil Rights Act, I believe that if he were now to reach the constitutional question, he would uphold the set-aside of sixteen places in the class. Even though a strong argument can be made that the decisionmaking body in Bakke—the Davis Medical School faculty—was not representative of those who bore the burden of the affirmative action program, the same is true of the union vote in Wygant.

Moving to the opposite end of the spectrum, I think that Justice Rehnquist is inclined to approve race-based remedies in only one situation: a judicial finding of deliberate discrimination and relief fashioned to make the victims whole. Even though he joined Justice Powell's opinion in

122. In Bakke, the opinion of Justices Brennan, White, Marshall, and Blackmun observed that the 16% set-aside constituted "a percentage less than that of the minority population in California." 438 U.S. at 374 n.58 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part). In Sheet Metal Workers', Justice Brennan's plurality opinion mentioned that the 29.23% goal "was based on the labor pool in the area covered by the newly expanded union." 106 S. Ct. at 3030. Again, Justice Powell strongly emphasized that "the goal is directly related to the percentage of nonwhites in the relevant workforce." Id. at 3056 (Powell, J., concurring in part and concurring in the judgment). For a discussion of the weight given by Justice Powell (and Chief Justice Burger) to this quantitative factor in Fullilove, see Choper, supra note 50, at 15-16.

123. Sheet Metal Workers', 106 S. Ct. at 3053.

Wygant, the reasoning (but not the result) of which goes further, all indications suggest that Justice Rehnquist would subsequently disclaim that broad language unless he changes his posture as one who frequently speaks independently and by himself.

Chief Justice Burger, who will no longer be a participant, has been closest to Justice Rehnquist. The difference between them in Fullilove (the only decision, apart from Swann, in which the retired Chief Justice chose to uphold a race-based remedy) may be explained by Chief Justice Burger's great emphasis on Congress's special powers to enact remedial racial classifications. As for Chief Justice Burger's authorship of the Court's opinion in Swann, apart from the fact that the school desegregation issue may well be treated as distinct, a recent study of the draft opinions in Swann reveals that Chief Justice Burger was not enthusiastic about the Court's final negotiated product, as confirmed by his subsequent positions on the subject.

Although it is possibly foolhardy to predict the position of Justice Scalia—whose vote will replace Chief Justice Burger's—his prior academic writing on the topic suggests that he would have voted against the MBE provisions in Fullilove. More importantly, however, is the fact that, even if my speculation is correct, it would not have affected the outcome. Fullilove was a six to three decision; even if Justice Scalia had disagreed with Chief Justice Burger, the result would still have been five to four in favor of the affirmative action program. My judgment is that, although the Court is closely divided on the issue, Justice Scalia's vote (which promises to be at least as unreceptive to race-based remedies as the retired Chief Justice's) will make no significant difference in respect to the validity of remedial racial classifications.

Three members of the Court whose views are somewhat more complicated, and thus less predictable, remain to be considered. Justice Powell finds a compelling interest for a race-based classification when it is used to remedy a prior illegality. Whether there is prior discrimination, therefore, becomes critical. As for other racial classifications, Justice Powell is sometimes willing to uphold an affirmative action plan when he finds that the government interest is compelling. In Bakke, he indicated that race could be taken into account in order to achieve diversity in college and professional school admissions. But this does not mean that he will readily do so; he rejected a relatively strong reason in Wygant: the school board's desire to have a racial and ethnic distribution among its faculty to serve as...
role models for its students. Probably more important, Justice Powell employs a balancing process even when remedying a prior violation. How heavy is the burden imposed on innocent individuals? How long does the remedy last? How large is the goal? How flexible is it? All of these elements go to that part of his test which requires that the remedy must be "carefully tailored."

Justice O'Connor appears to be very close to Justice Powell. It is true that she dissented in Sheet Metal Workers', but only because she found the 29.23% quota to be a violation of the Civil Rights Act. She strongly suggested approval of Justice Powell's position in Bakke that diversity in college and graduate admissions may sustain a racial classification, and she opined that there may be other compelling justifications as well. Moreover, much like Justice Powell's balancing test, she stated that the means may "not impose disproportionate harm on ... [the] innocent individuals." But there is at least one important potential difference between them. Whereas Justice Powell foreclosed the use of layoffs to remedy even a constitutional violation (except for make-whole relief), she left that question open.

We come finally to the source of greatest uncertainty. When Justice White, in Bakke, approved an inflexible goal even though there was no prior deliberate discrimination by the Davis Medical School faculty, advocates of affirmative action justifiably felt that they had a solid vote. But, less than a decade later, in Sheet Metal Workers'—a case involving a response to egregious and persistent deliberate discrimination—Justice White found the remedy invalid. It is unclear whether his objection was based on his conclusion that the relief involved a "strict racial quota," or on his judgment that the context of the remedy would require "the displacement of nonminority workers." His strong aversion to layoffs, in the absence of make-whole relief for the actual victims of discrimination, first manifested in Firefighters v. Stotts and again in Wygant, may mean that he has shifted his place on the spectrum beyond both Justices O'Connor and Powell.

V. CONCLUSION

The purpose of this paper has not been to reveal the Court's undisclosed answers to most of the important constitutional questions concerning remedial racial classifications. Those who presently claim that there is clarity in this area (and some do) are either deluded, or deluding. Rather, the effort has been to identify better the pieces of the puzzle. Only the Court has the authority ultimately to fit them together.

130. Sheet Metal Workers', 106 S. Ct. at 3062 (White, J., dissenting).
131. Id. at 3063 (White, J., dissenting).