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Essays

Affirmative Action After Reagan

Neal Devins*

Ronald Reagan assumed office at the apparent height of the affirmative action controversy. During the Carter years, the Supreme Court wrote for the first time about the legality of both public- and private-sector affirmative action. Although these opinions generally approved of affirmative action, they sent confusing messages: Congress can remedy proven societal discrimination through a modest set aside;¹ a public university cannot remedy societal discrimination through admissions, although race can be a factor in admissions decisions;² Title VII nondiscrimination requirements do not apply to certain types of private-sector affirmative action.³ These rulings were more than ambiguous; they revealed a fractured court. The Justices filed multiple opinions and bitter dissents in each case. Rather than quieting the affirmative action debate, these rulings exacerbated the controversy.⁴ Consequently, despite three landmark opinions, the fate of affirmative action remained unsettled.

The Carter Administration was a strong advocate in these cases, arguing that affirmative action was as laudable as it was necessary.⁵ In addition, this Administration pressed affirmative action by enacting regulations governing civil service hiring and federal contracting and by establishing Equal Employment Opportunity Commission (EEOC) and Internal Revenue Service (IRS) guidelines.⁶

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1. See *Fullilove v. Klutznick*, 448 U.S. 448, 492 (1980) (upholding a congressional spending program requiring ten percent of federal funds granted for local public works projects to be used to procure services or supplies from minority-owned businesses).

2. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978).

3. See *United Steelworkers v. Weber*, 443 U.S. 193, 207 (1979).

4. When the Court wants to quiet the controversy about a divisive issue, it takes steps to speak in a unanimous voice. In *Brown v. Board of Education*, 347 U.S. 433 (1954), for example, the Justices made numerous compromises to ensure that the Court's opinion would be unanimous. See Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 1 (1979); Ulmer, *Earl Warren and the Brown Decision*, 33 J. POL. 689, 690 (1971).

5. See Brief for Secretary of Commerce at 14, *Fullilove* (No. 78-1007); Brief for United States at 16, *Weber* (No. 78-432); Brief for United States at 6, *Bakke* (No. 76-811).

6. See, e.g., Clark, *Affirmative Action May Fall Victim to Reagan's Regulatory Reform Drive*,

In 1980, presidential candidate Reagan challenged the Carter affirmative action initiatives. Whereas the 1980 Democratic platform asserted that "[a]n effective affirmative action program is an essential component of our commitment to expanding civil rights protections,"⁷ the Republican platform argued that "equal opportunity should not be jeopardized by bureaucratic regulations and decisions which rely on quotas, ratios, and numerical requirements to exclude some individuals in favor of others, thereby rendering such regulations and decisions inherently discriminatory."⁸

Once in office, however, the Reagan Administration's pursuit of its equal opportunity platform proved far from clear. The Administration opposed the Civil Rights Restoration Act,⁹ proposals for changes in voting rights,¹⁰ and amendments to fair-housing legislation¹¹—positions that evidenced its lack of support for stronger civil rights enforcement.¹²

13 NAT'L J. 1248, 1249-52 (1981) (noting that during the Carter Administration, regulations were passed barring employers from terminating workers on disability leaves for pregnancy as well as requiring extra minority recruitment efforts to be expended by agencies with few minorities or women); Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456, 488-97 (noting that during the Carter Administration the IRS proposed a change in the tax laws to deny tax-exempt status to private schools with "insignificant" numbers of minority students); Finn, "Affirmative Action" Under Reagan, COMMENTARY, Apr. 1982, at 17, 18-20 (reporting that the Carter Administration imposed on the federal government a strict quota system for hiring minorities).

7. 1980 Democratic Platform, reprinted in D. JOHNSON, NATIONAL PARTY PLATFORMS, 1840-1976, at 60 (Supp. 1980).

8. 1980 Republican Platform, reprinted in D. JOHNSON, *supra* note 7, at 182.

9. Pub. L. No. 100-259, 102 Stat. 28 (1988) (to be codified at 20 U.S.C. §§ 1681-1687). This legislation was designed to nullify the Supreme Court's determination that federal civil rights legislation extends only to the direct recipient of federal funds and not to the entire institution of which that recipient is a part. See *Grove City College v. Bell*, 465 U.S. 555, 571 (1984). President Reagan vetoed this legislation, claiming that it would "vastly and unjustifiably expand the power of the Federal government over the decisions and affairs of private organizations." Message to the Senate on Civil Rights Legislation, 24 WEEKLY COMP. PRES. DOC. 353, 353 (Mar. 16, 1988). Congress overrode this veto. See 134 CONG. REC. H1072, S2765 (daily ed. March 22, 1988).

10. See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended in scattered sections of 42 U.S.C.). To ease plaintiffs' burden, Congress amended the 1965 Voting Rights Act to make disparate racial impact probative of discriminatory motivation. The Administration initially opposed the bill, claiming that it would "likely lead to the widespread restructuring by Federal courts of electoral procedures and systems." SUBCOMM. ON THE CONSTITUTION, 97TH CONG., 2D SESS., REPORT ON VOTING RIGHTS ACT 39 (Comm. Print 1982) (quoting testimony of William Bradford Reynolds, Assistant Attorney General for Civil Rights); see also Pear, *Reagan Backs Voting Rights Act but Wants to Ease Requirements*, N.Y. Times, Nov. 7, 1981, at A1, col. 3 (noting Reagan's opposition to a simple effects test to prove discrimination). After substantial pressure from the Republican leadership of Congress, Reagan endorsed voting rights amendments that made some use of evidence of bad effects. See Remarks on Signing the Voting Rights Act Amendments of 1982, PUB. PAPERS 822-23 (June 29, 1982).

11. See Fair Housing Act Amendments of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988) (to be codified at 42 U.S.C. §§ 3601-3617). Indeed, during the signing ceremony, President Reagan expressed dissatisfaction with effects-based tests of fair housing violations and emphasized that fair housing laws speak "only to intentional discrimination." Remarks on Signing the Fair Housing Amendments Act of 1988, 24 WEEKLY COMP. PRES. DOC. 1140, 1141 (Sept. 13, 1988).

12. The Administration's initiative to restore the tax-exempt status of racially discriminatory

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At the same time, however, the Administration left in place several of its predecessor's most controversial programs and policies. For example, the "Reagan Revolution" did not bring with it changes in Executive Order 11,246, which requires affirmative action by government contractors.¹³ The Administration, moreover, did not alter either Small Business Administration and other Executive-initiated set-aside programs¹⁴ or EEOC guidelines providing for an inference of adverse impact whenever the "utilization" of women and minorities is less than eighty percent of their "availability."¹⁵

In sharp contrast to this regulatory inaction,¹⁶ the Reagan Justice Department quickly took steps to limit race-conscious affirmative action. As Civil Rights Division head William Bradford Reynolds testified in 1981:

We no longer will insist upon or in any respect support the use of quotas or any other numerical or statistical formula designed to provide to nonvictims of discrimination preferential treatment . . .

....

. . . Separate treatment of people in the field of employment, based on nothing more than personal characteristics of race or gender, is as offensive to standards of human decency today as it was

private schools also raised doubts about its commitment to antidiscrimination principles. See Devins, *supra* note 6, at 494-95. For a comprehensive, critical review of Reagan-era civil rights policy, see N. AMAKER, *CIVIL RIGHTS AND THE REAGAN ADMINISTRATION* 32-163 (1988).

13. See Exec. Order No. 11246, 3 C.F.R. 339 (1964-1965), reprinted as amended in 42 U.S.C. § 2000e app. at 28 (1982). The Reagan Administration did consider eliminating this contract compliance program. After the Supreme Court ruled in 1986 that affirmative action could serve as appropriate compensation for past discrimination, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986), however, the Administration decided not to change contract compliance requirements. See Boyd, *Goals for Hiring to Stay in Place*, N.Y. Times, Aug. 25, 1986, at A1, col. 5.

14. See generally Levinson, *A Study of Preferential Treatment: The Evolution of Minority Business Enterprise Assistance Programs*, 49 GEO. WASH. L. REV. 61, 64-98 (1980) (discussing the history and effectiveness of various Minority Business Enterprise set-aside programs). The Reagan Administration, surprisingly, was a vocal supporter of federal minority set-aside programs. See Pear, *Administration Challenges Plan by Rights Panel*, N.Y. Times, Apr. 11, 1986, at A1, col. 2.

15. Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4D (1988).

16. I use *inaction* rather than *acquiescence* because the Administration seriously considered changing several of these programs. See *supra* notes 9-13 and accompanying text. Conservatives severely criticized the Administration for its failure to develop a comprehensive approach to affirmative action. As Chester E. Finn, Jr. remarked:

Whither civil rights under Ronald Reagan? As with foreign affairs, it seems to depend more than it should on what day it is, who is in charge of a particular decision, what constituency is raising the loudest ruckus, and which agency is responsible for formulating the alternatives and executing the decision. The most ideological administration in recent history seems not to have its ideas sorted out . . .

Finn, *supra* note 6, at 28. The civil rights community saw things much differently. See, e.g., N. AMAKER, *supra* note 12, at 157 (remarking that the Bork nomination was opposed by civil rights advocates who had witnessed an "assault on affirmative action remedies" during the Reagan Administration). CITIZENS' COMM'N ON CIVIL RIGHTS, *AFFIRMATIVE ACTION TO OPEN THE DOORS OF JOB OPPORTUNITY* 90-120 (1984) (assailing the weakening of affirmative action enforcement by various executive departments and agencies).

some 84 years ago when countenanced under *Plessy v. Ferguson*
¹⁷

With the close of the 1988 Supreme Court Term, it is now possible to assess the Reagan Administration's success in advancing its absolutist goals of "color blindness" through the courts.

The assessment is a mixed story. Of greatest significance, Reagan Administration efforts to entirely discredit race and sex preferences have clearly failed. Over the past few years, the Court has validated a range of hiring and promotion schemes that benefit nonvictims.¹⁸ At the same time, however, the Court has barred nonremedial set asides and layoffs of senior nonminority employees.¹⁹

Because of the contentiousness and symbolic importance of affirmative action, the Court's jurisprudence on this issue does not lend itself to blanket generalizations. Indeed, as Justice Jackson commented in *Youngstown Sheet & Tube Co. v. Sawyer*,²⁰ "court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way."²¹ Judicial patchwork then is the norm, and affirmative action is no exception.

Nonetheless, headlines like "Court Affirmative Action Decision Says Little" or "Court Both Clarifies and Confuses Its Position on Affirmative Action" make poor copy.²² Not surprisingly, the popular and academic press generally view each affirmative action opinion to be of great historical moment. A comparison of the media's treatment of the

17. *Oversight Hearings on Equal Employment Opportunity and Affirmative Action, 1981: Hearings Before the Subcomm. on Employment Opportunities of the Comm. on Education and Labor*, 97th Cong., 1st Sess., Pt. 1, at 134, 137 (1981) (statement of William Bradford Reynolds, Assistant Attorney General for Civil Rights); see also Reynolds, *Individualism vs. Group Rights: The Legacy of Brown*, 93 YALE L.J. 995, 998-1001 (1984) (advocating race neutrality over racial preferences as a more effective means of protecting individual rights).

18. See, e.g., *Johnson v. Transportation Agency*, 480 U.S. 616, 641-42 (1987) (approving preference for minority and women employees seeking promotion); *United States v. Paradise*, 480 U.S. 149, 166-67 (1987) (holding that the Constitution does not absolutely prohibit court-ordered race-conscious relief); *Local No. 93, Int'l Assoc. of Firefighters v. City of Cleveland*, 478 U.S. 501, 530 (1986) (approving entry of consent decree providing temporary race-conscious hiring and promotion); *Local 28 of the Sheet Metal Workers' Int'l Assoc. v. EEOC*, 478 U.S. 421, 453 (1986) (holding that Title VII does not absolutely prohibit court-ordered, race-conscious relief).

19. See, e.g., *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 729 (1989) (plurality opinion) (holding that race-conscious set asides must be based on particularized discrimination and must be narrowly tailored); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (holding that remedying societal discrimination cannot justify granting preferences under the Constitution); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 575 (1984) (holding that nonvictim relief cannot disrupt seniority rights under Title VII).

20. 343 U.S. 579 (1952).

21. *Id.* at 635 (Jackson, J., concurring).

22. Cf. Greenhouse, *Bias Remedy vs. Seniority*, N.Y. Times, June 14, 1984, at A17, col. 1 ("In case after case over the last decade, the Supreme Court has walked gingerly through the minefield of affirmative action, always emerging with some questions answered and many more left for another day.").

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final two Reagan-era decisions, *Johnson v. Transportation Agency*²³ and *City of Richmond v. J.A. Croson Co.*,²⁴ illuminate this phenomenon.

The Supreme Court held in *Johnson* that a county agency could promote a female over a marginally better qualified male to help alleviate sex imbalance in a job category. Most observers believed that the case had largely settled the thorny question of the permissibility of affirmative action programs. Press reaction was quick and unanimous. Although media accounts took varying editorial positions on the wisdom of the decision, the accounts invariably portrayed the decision as extremely important and far reaching. United Press International, the *Los Angeles Times*, and Reuters, for example, all described the decision as either "landmark" or "historic."²⁵ Two major newspapers went even further in their characterizations: the *Washington Post* called the decision the Court's "broadest endorsement yet of affirmative action programs,"²⁶ and the *New York Times* called it the "most sweeping endorsement ever of special preferences."²⁷

Such ringing pronouncements were not confined to lay commentators. The *National Law Journal*, echoing a theme of most media accounts, called the decision a "near-deathblow"²⁸ to the Reagan Administration's view of affirmative action programs. The *Washington Post* quoted a representative of the Lawyers' Committee for Civil Rights Under Law: "All the broad questions have now been answered."²⁹ Professor Herman Schwartz agreed,³⁰ asserting that "[at least for now] the affirmative action wars are over,"³¹ with most of the conflict's issues "answered in a way favorable to the supporters of race- and gender-con-

23. 480 U.S. 616 (1987).

24. 109 S. Ct. 706 (1989). After *Croson*, the Supreme Court ruled in *Martin v. Wilks*—a case argued during the Reagan era—that nonintervening white firefighters could challenge race-conscious consent decree provisions. 109 S. Ct. 2180, 2184 (1989). Ostensibly, *Martin* involves non-party rights, not the legality of affirmative action. For a discussion of *Martin*'s impact on affirmative action, see *infra* notes 60, 82.

25. Reske, UPI, Mar. 25, 1987, AM Cycle, Washington News; Savage, *High Court Backs Women in Historic Ruling on Jobs*, L.A. Times, Mar. 25, 1987, at A1, col. 5; Vicini, *Major High Court Ruling Upholds Affirmative Action for Women*, Reuters, Mar. 25, 1987, AM Cycle.

26. Kamen, *Supreme Court Upholds Affirmative Action Hiring*, Wash. Post, Mar. 26, 1987, at A1, col. 4.

27. Taylor, *Court's Change of Course: New Affirmative Action Ruling Culminates Broad Rejection of Administration's Stance*, N.Y. Times, Mar. 27, 1987, at A1, col. 4.

28. Coyle, *Administration Loses Major Round on Reverse Bias*, Nat'l L.J., Apr. 6, 1987, at 5, col. 1.

29. Marcus, *Many Remedies Now Sanctioned: Decision Completes a Cycle of Job Discrimination Cases*, Wash. Post, Mar. 26, 1987, at A1, col. 5 (quoting Richard T. Seymour).

30. See Schwartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over but the Shouting*, 86 MICH. L. REV. 524, 524-25 (1987).

31. *Id.* at 524.

scious action."³² In fact, Schwartz announced that only "inevitable loose ends" and "peripheral issues remain[ed]."³³

The 1989 *Croson* decision indicates that *Johnson*-spurred reports of the death of the Reagan Justice Department position were premature. In *Croson* the Supreme Court held that a municipal set-aside plan is unconstitutional unless it benefits only members of racial groups arguably discriminated against by the city itself.³⁴ Although the earlier commentators correctly concluded that "the effort to *kill* affirmative action programs has failed,"³⁵ *Croson* reveals that this failure does not mean that affirmative action has prevailed.

Having miscalculated *Johnson*'s importance, commentators might have been more circumspect in their assessment of *Croson*. Instead, they again issued sweeping pronouncements about the opinion's importance.³⁶ Editorials and columns in the *Washington Post*, *New York Times*, and *Wall Street Journal* discussed the "dangers" of *Croson*,³⁷ characterized the decision as "a severe, perhaps fatal blow to local minority set-aside[s]"³⁸ and "the hardest blow yet against government racial preference,"³⁹ concluded that "exacting standards" have now been set for affirmative action's "passing constitutional muster,"⁴⁰ and condemned the Court for "drawing a narrower and narrower circle—a noose—around any government action that is race-conscious."⁴¹ Even Professor Schwartz joined this ominous chorus, characterizing *Croson* as "just the beginning."⁴²

The commentators' descriptions of *Johnson* and *Croson* suggest that the Supreme Court's affirmative action rulings resemble a swinging pendulum, one day approving of broad affirmative action regardless of past discrimination, the next day demanding victim-specific relief. The votes

32. *Id.* at 525.

33. *Id.*

34. *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 727 (1989) (plurality opinion).

35. Schwartz, *supra* note 30, at 576 (emphasis added).

36. Cf. Greenhouse, *Signal on Job Rights*, N.Y. Times, Jan. 25, 1989, at A1, cols. 4-5 ("In declaring unconstitutional the effort by Richmond to increase opportunities for blacks in the construction industry, the Supreme Court did not declare an end to government-sponsored affirmative action programs.").

37. Raspberry, *The "Set-Aside" Reversal: Theory over Practice*, Wash. Post, Jan. 30, 1989, at A9, col. 1.

38. Koch, *Equal Opportunity—Without Minority Set-Asides*, N.Y. Times, Feb. 20, 1989, at A19, col. 2.

39. Gigot, *Supreme Court: An Emerging Case of Poetic Justice*, Wall St. J., Jan. 27, 1989, at A14, col. 3.

40. *Setback for Set-Asides*, Wash. Post, Jan. 24, 1989, at A22, col. 1.

41. Krauthammer, *Exit Affirmative Action*, Wash. Post, Feb. 3, 1989, at A25, col. 5.

42. Coyle, *Reagan Legacy Is Alive and Well at High Court*, Nat'l L.J., Feb. 6, 1989, at 5, col. 1 (quoting Professor Herman Schwartz).

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of individual Justices provide additional support for this conclusion. Six Justices joined in both *Johnson* and *Croson*; therefore, Justice Kennedy's replacement of Justice Powell cannot explain the swing between the two cases.

The pendulum analogy, however, is also inaccurate. Supreme Court decision making is incremental rather than schizophrenic. Consequently, as Justice Jackson cautioned, overgeneralizations make little sense.⁴³ *Johnson* and other so-called broad affirmative action pronouncements are much narrower than the commentators' interpretations of them. By the same token, the applicability of *Croson* is much narrower than critics predict.

This Essay argues that the Supreme Court's recent work in affirmative action is neither far reaching nor clear cut. The argument is divided into two parts. Part I considers the Court's 1986 decision in *Local No. 93, International Association of Firefighters v. City of Cleveland*.⁴⁴ Part II, in turn, considers the Court's 1987 decision in *Johnson*. Parts I and II together argue that *Local 93* and *Johnson* are examples of issue avoidance rather than examples of sweeping and definitive pronouncements. The configuration of these cases ultimately casts doubt upon the sweep of other affirmative action rulings.

Part III demonstrates that narrow decisions cut both ways. Although *Local 93* and *Johnson* are less sweeping than they were portrayed by the commentators, *Croson* does not spell defeat for affirmative action programs. The *Croson* Court's primary objection to the Richmond set aside is its arbitrariness.⁴⁵ Indeed, *Croson* suggests that a more carefully crafted set-aside plan may pass constitutional muster.

The questions left undecided by the affirmative action cases, as well as the unusual grounds for decision in some of them, suggest that the complex issue of affirmative action is far from settled. In fact, the vagaries of these rulings now seem especially important. President Bush's commitment to appoint judges "who view judging as a matter of interpreting the law, . . . not making it"⁴⁶ suggests that federal judges may narrowly construe Reagan-era affirmative action rulings. This Essay ex-

43. See *Terminiello v. Chicago*, 337 U.S. 1, 13 (1949) (Jackson, J., dissenting) (cautioning against reliance on "generalized approbations of freedom of speech with which, in the abstract, no one will disagree"); *Maggio v. Zeitz*, 333 U.S. 56, 65 (1948) (Jackson, J.) ("such generalizations, useful enough, perhaps, in solving some problem of a particular case, are not rules of law to be applied to all cases, with or without reason").

44. 478 U.S. 501 (1986). The Court held in *Local 93* that Title VII consent decrees may provide relief for minorities who have not been victims of discrimination. *Id.* at 530.

45. See *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 725-26 (1989) (plurality opinion).

46. Kamen & Marcus, *A Chance to Deepen Stamp on Courts*, Wash. Post, Jan. 29, 1989, at A1, col. 4 (quoting White House Counsel Boyden Gray).

amines how these cases form a mosaic in which the whole is considerably less than the sum of its parts.

I. *Local 93*: What About Title VII?

A. *The Supreme Court Opinion*

In *Local 93* the Court held that a public or private employer may develop an affirmative action hiring and promotion plan in settling employment discrimination lawsuits governed by Title VII.⁴⁷ Specifically, *Local 93* validates a court-approved settlement agreement between the city of Cleveland and an association of black and Hispanic firefighters.⁴⁸ The decree provides that the city must promote minority and nonminority candidates on an alternating basis to fill sixty-six lieutenant positions. The decree also specifies that after filling these positions, the city, using out-of-turn promotions if necessary, must ensure that twenty-five percent of its new lieutenants are members of minority groups.

The predominantly white firefighters' union⁴⁹ and the United States challenged the decree as inconsistent with section 706(g) of Title VII. That section provides that no court order shall extend relief to an individual "if such individual was refused admission, suspended, or expelled, . . . for any reason other than discrimination on account of race, color, religion, sex or national origin."⁵⁰ The union, characterizing a consent decree entered and approved by a court as the functional equivalent of a court order, claimed that Title VII remedial provisions bar consent decrees that benefit nondiscriminatees.⁵¹

The Court, however, did not actually decide whether the settlement agreement was outside the bounds of permissible court-ordered Title VII relief. Instead, it ruled that for Title VII purposes, the consent decree was identical to a private out-of-court settlement.⁵² Although the Court recognized that consent decrees possess "the legal force and character of judgment[s]"⁵³ and bear the "earmarks of judgments,"⁵⁴ it found disposi-

47. See *Local 93*, 478 U.S. at 515. Title VII of the Civil Rights Act of 1964 is codified at 42 U.S.C. §§ 2000e to 2000e-17 (1982).

48. See *Local 93*, 478 U.S. at 515. For the procedural history of the case, see *id.* at 504-15.

49. The union was allowed to voice its objections to the district court before entry of the decree. See *id.* at 529.

50. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 259 (codified as amended at 42 U.S.C. § 2000e-5(g) (1982)).

51. *Local 93*, 478 U.S. at 514.

52. *Id.* at 517-18.

53. *Id.* at 518.

54. *Id.* at 519. Specifically, (1) a consent decree is entered as a judgment based on a judicial finding of its propriety, (2) a court maintains continuing jurisdiction over a consent decree and may modify its terms over signatory objections, and (3) noncompliance with a consent decree is enforceable by a contempt citation. See *id.* at 523. See generally Anderson, *The Approval and Interpretation*

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tive portions of Title VII's legislative history that emphasize the avoidance of undue federal intervention and the preservation of management prerogatives.⁵⁵ The Court thus concluded that *Local 93* was indistinguishable from its 1979 decision in *United Steelworkers v. Weber*,⁵⁶ which allowed a private employer to voluntarily adopt a race-conscious plan to increase minority employment.

By holding that "the parties' consent animates the legal force of the consent decree,"⁵⁷ the Court further ruled that a decree itself need not be in conformity with the underlying statute. Indeed, the Court emphasized that a federal court should not refrain from entering a consent decree "merely because the decree provides broader relief than the court could have awarded after a trial."⁵⁸

By treating a consent decree as a contract between the signatories, the Court left affected third parties, including intervenors by right, with virtually no power to challenge the appropriateness of decree provisions. The Court asserted that nonconsenting intervenors may raise valid claims in a separate action.⁵⁹ The Court specified, however, that the possibility that decree provisions may violate intervenor or nonparty rights should not bar a court from entering a settlement agreement.⁶⁰ *Local 93*

of Consent Decrees in Civil Rights Class Action Litigation, 1983 U. ILL. L. REV. 579, 584-89 (explaining the characteristics and purposes of consent decrees); Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 929-30 (advocating a systematic procedure to provide fair hearings before entering consent decrees).

55. See *Local 93*, 478 U.S. at 501-24.

56. 443 U.S. 193 (1979). For further discussion of *Weber*, see *infra* notes 101-05 and accompanying text.

57. *Local 93*, 478 U.S. at 525.

58. *Id.* *Local 93* conceded, however, that a "federal court is more than a 'recorder of contracts.'" *Id.* (quoting *Pacific R.R. v. Ketchum*, 101 U.S. 289, 297 (1880)). Specifically, the Court acknowledged that a court could enter and enforce such an agreement only "to the extent that the consent decree is not otherwise shown to be unlawful." *Id.* at 526. This limitation is important with respect to contracts with federal executive agencies. See generally Rabkin & Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 STAN. L. REV. 203, 209-19 (1987) (discussing the constitutional limitations on contracts with federal executive agencies).

59. See *Local 93*, 478 U.S. at 530.

60. See *id.* This feature of the decision is quite controversial. First, as George Rutherglen and Daniel Ortiz point out, the union's failure to raise a specific objection to the decree in the district court might foreclose its opportunity to bring such an action. See Rutherglen & Ortiz, *Affirmative Action Under the Constitution and Title VII: From Confusion to Convergence*, 35 UCLA L. REV. 467, 477 (1988). Second, as Douglas Laycock observes: "[A] decree in which A and B agree to transfer the arguable rights of C is not a consent decree unless C also consents." Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 U. CHI. LEGAL F. 103, 104. For Laycock, "neither violation nor remedy may be adjudicated without notice and hearing for the parties to be bound." *Id.* For a contrasting view, see Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 335-38 (1988) (proposing a method for including third-party claims in consent decree proceedings).

Concerns that *Local 93* would foreclose adversely affected nonparty claims have been assuaged

therefore speaks *only* to the authority of a court to enter a consent decree without violating Title VII remedial provisions. Although the Court acknowledged that the decree might ultimately be inconsistent either with Title VII,⁶¹ or with the fourteenth amendment, the Court considered these prospects irrelevant to the disposition of the case.⁶²

B. *The Opinion in Context*

Local 93 says very little about the line separating permissible from impermissible affirmative action. By reserving the question of third-party rights and with it the ultimate legality of the decree, "the Court narrowed its holding almost to the vanishing point."⁶³ Indeed, Professor Schwartz characterizes *Local 93* as "the least controversial [affirmative action] decision, for it was the most limited."⁶⁴

A comparison of *Local 93* to other affirmative action decisions, however, makes Schwartz's conclusion less convincing. On the same day the Court decided *Local 93*, it ruled in *Local 28 of the Sheet Metal Workers' International Association v. EEOC*⁶⁵ that court-ordered Title VII relief may extend to nondiscriminatees.⁶⁶ *Sheet Metal Workers'* therefore suggests that the Court could have held that the *Local 93* consent decree was within the court's permissible range of remedial authority under Title VII. Instead, by basing its holding on the contractual nature of consent decrees, the *Local 93* Court took great pains to "emphasize that . . . nothing we say here is intended to express a view as to the extent of a court's [Title VII] remedy power."⁶⁷

Local 93's assiduous avoidance of the remedial authority issue is troublesome. First, the Court transformed a rather simple case into a fairly complex one. The Court needed only point to the remedial author-

by *Martin v. Wilks*, 109 S. Ct. 2180 (1989). In holding that an affirmative action settlement entered by consent decree is open to challenge by employee groups not parties to the original settlement, the Court concluded that any public policy in favor of voluntary affirmative action must give way to "our 'deep-rooted historic tradition that everyone should have his own day in court.'" *Id.* at 2184 (quoting 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4449, at 417 (1981)). Moreover, the Court adopted the view of Justice Stevens and defined "adversely affected" to include individuals deprived of vested legal rights as well as individuals denied an opportunity to compete equally for available job opportunities. *See id.* at 2188-89 (Stevens, J., dissenting). Thus, affirmative action plans that guarantee minorities some share of job and promotion opportunities cannot be insulated from nonparty challenge.

61. Title VII prohibits "discriminat[ion] . . . because of . . . race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) (1982).

62. *See Local 93*, 478 U.S. at 530. The Court also noted that the consent decree might also be challenged as a breach of contract. *See id.*

63. Rutherglen & Ortiz, *supra* note 60, at 476.

64. Schwartz, *supra* note 30, at 532.

65. 478 U.S. 421 (1986).

66. *Id.* at 482.

67. *Local 93*, 478 U.S. at 515 (emphasis added).

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ity holding of *Sheet Metal Workers'* to establish the validity of the *Local 93* consent decree. If Title VII remedies may benefit nondiscriminatees, it simply does not matter whether a consent decree must conform to the underlying statute or whether it is a private contract not subject to Title VII strictures.

Second, *Local 93's* conclusions that the underlying statute is irrelevant and that consent decrees are private contracts conflict with prior Court rulings. The 1984 decision *Firefighters Local Union No. 1784 v. Stotts*⁶⁸ indicates that "[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."⁶⁹ In *Stotts*, the Court concluded that a consent decree must conform to the underlying statute, which "necessarily act[s] as a limit" on court authority.⁷⁰ Consequently, in rejecting the lower court's modification of a consent decree that abridged bona fide seniority rights to further the decree's affirmative action objectives, the Court noted that neither "the terms of the decree [nor] notions of equity" can displace the underlying statute.⁷¹

Stotts' equating of consent decrees with judicial orders is emblematic of Supreme Court jurisprudence governing the modification of consent decrees.⁷² *Local 93* does not dispute this interpretation; instead, *Local 93* limits *Stotts*—and with it the underlying statute—to instances where the parties disagree.⁷³ This distinction, however, ignores language in *Stotts* and other Court rulings indicating that judicial authority "to adopt a consent decree comes only from the statute."⁷⁴

Local 93's conclusion that judicial entry of a consent decree is strictly ministerial is, at the least, subject to debate. Why does the Court

68. 467 U.S. 561 (1984).

69. *Id.* at 576 n.9 (quoting *Railway Employees v. Wright*, 364 U.S. 642, 651 (1961)); see also *id.* at 588 n.2 (O'Connor, J., concurring) (finding "persuasive" the Court's reliance on the statutory source of the district court's authority as justification for using Title VII in its analysis).

70. *Id.* at 576 n.9.

71. *Id.*

72. See, e.g., *Local No. 93, Int'l Assoc. of Firefighters v. City of Cleveland*, 478 U.S. 501, 523 (1986) (conceding that consent decrees, like judicial orders, may be subject to later modification by the court); *Columbia Artists Management Inc. v. United States*, 381 U.S. 348, 352 (1965) (noting that the Court had allowed modifications of consent decrees in the past upon "a showing of changed circumstances"). *Stotts* was extremely controversial for its suggestion that the policy underlying Title VII "is to provide make-whole relief only to those who have been actual victims of illegal discrimination." *Stotts*, 467 U.S. at 580 (emphasis added). *Sheet Metal Workers'* limited this suggestion to the facts of *Stotts*—nonvictim relief that disrupts a bona fide seniority plan. See *Local 28 of the Sheet Metal Workers' Int'l Assoc. v. EEOC*, 478 U.S. 421, 473-74 (1986).

73. See *Local 93*, 478 U.S. at 527-28.

74. *Stotts*, 467 U.S. at 576 n.9 (emphasis added); see *Railway Employees v. Wright*, 364 U.S. 642, 651 (1961); see also *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932) (holding that "a court does not abdicate its power to revoke or modify its mandate" regardless of "whether the decree has been entered after litigation or by consent").

not simply rely on *Sheet Metal Workers'* to demonstrate that Title VII relief may extend to nondiscriminatees?

The answer lies in *Sheet Metal Workers'*. That case involved "long continued and egregious racial discrimination" and "foot-dragging resistance"⁷⁵ to judicial efforts to enjoin blatant intentional discrimination against minorities. After twenty years of union nonacquiescence to state and federal court orders, which culminated federal contempt citations,⁷⁶ the federal court in 1983 established a 29.23 percent minority membership goal.⁷⁷ Although this membership goal extended benefits to nondiscriminatees, a majority of the Justices concluded that "such relief may be appropriate where an employer or labor union has engaged in persistent or egregious discrimination."⁷⁸ In so ruling, the Court explicitly rejected Department of Justice efforts to transform *Stotts* into an absolute prohibition of nonvictim relief.⁷⁹

Sheet Metal Workers', however, does not define "persistent or egregious discrimination." If restricted to situations as abominable as *Sheet Metal Workers'*, the exception to Title VII's policy of favoring victim-specific relief would be very limited indeed. In *Local 93*, the Court declined the opportunity to extend *Sheet Metal Workers'* beyond its facts. By emphasizing the nonjudicial character of consent judgments, the Court simply concludes that it "need not decide whether this is one of those cases" where nonvictim relief is appropriate.⁸⁰

In the end, although it rejects Reagan Administration efforts to

75. *Sheet Metal Workers'*, 478 U.S. at 477.

76. *See id.* at 427-36.

77. *Id.* at 437. For the procedural history of the case, see *id.* at 427-40.

78. *Id.* at 445. *Sheet Metal Workers'* was a 4-1-4 plurality opinion. Justice Powell cast the decisive vote. He agreed with only this feature of the plurality's reasoning. *See id.* at 483 (Powell, J., concurring).

Because judicial action is state action, judicial imposition of race-conscious relief may need to satisfy the demands of strict scrutiny under the equal protection clause. In addition to this Title VII ruling, *Sheet Metal Workers'* concludes that the union's hiring order satisfied strict scrutiny review. The plurality found the remedial order "narrowly tailored to further the Government's compelling interest in remedying past discrimination." *Id.* at 480. The Court employed the identical analysis in *United States v. Paradise* to uphold a lower court order requiring the Alabama State Troopers to employ a one-black-for-one-white promotion scheme to remedy "pervasive, systematic, and obstinate discriminatory conduct." 480 U.S. 149, 167 (1987).

Before a court may order such "affirmative" relief, however, it must find persistent, ongoing discrimination. *See Bazemore v. Friday*, 478 U.S. 385, 408 (1986). In *Bazemore*, five Justices concluded that present racial imbalance in the face of prior intentional discrimination is an inadequate basis to support "affirmative" relief. *See id.* at 407-09 (White, J., concurring). Consequently, the Court did not require North Carolina, which had discontinued its segregated club policy in favor of a freedom-of-choice plan twenty years earlier, to remedy racial imbalance in state-supported 4-H and homemakers clubs. *See id.* at 407-08.

79. *See Brief for the United States at 7-11, Local No. 93, Int'l Assoc. of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986) (No. 84-1999).

80. *Sheet Metal Workers'*, 478 U.S. at 515.

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limit consent decree relief to victims of discrimination,⁸¹ *Local 93* reveals precious little about the scope of permissible affirmative action remedies. The Court's responses to third-party challenges based either on Title VII or the fourteenth amendment will ultimately define that scope. Because the Supreme Court earlier ruled in *Weber* that employers may voluntarily adopt race-conscious hiring plans that favor nondiscriminatees, *Local 93* does not substantially enhance employer discretion to give preferences to nonvictims.⁸² Since the opinion rests on a debatable assessment of the legal status of consent judgments, however, *Local 93* suggests that the broad remedial relief countenanced in *Sheet Metal Workers'* may be limited to pervasive, egregious discrimination.

II. *Johnson*: What About the Constitution?

A. *The Supreme Court Opinion*

In *Johnson v. Transportation Agency*,⁸³ the Supreme Court ruled that Title VII does not prohibit public employers from voluntarily adopting affirmative action plans. Specifically, the Court upheld a plan that authorized consideration of the sex and race of qualified applicants for openings in traditionally segregated job categories.⁸⁴ The *Johnson* Court thus approved Santa Clara County's decision to promote Diane Joyce, a well-qualified female applicant, to the position of road dispatcher over Paul Johnson, an arguably better qualified male applicant.⁸⁵

The Court found *Weber* to be controlling, despite the fact that, un-

81. See Brief for the United States at 12-20, *Local 93* (No. 84-1999).

82. *Local 93*'s consent decree should not be equated with *Weber*'s voluntary contract. Consent decrees, by sharing many of the attributes of judicial orders, enable the entering court to ensure the satisfaction of decree objectives. *Local 93* recognizes these virtues. See *Local 93*, 478 U.S. at 523-24. In response to third-party challenges, the Supreme Court may limit consent decrees to what a court could order had the case gone to trial. Otherwise, employers will subject themselves both to consent decree obligations and to third-party liability.

This lesson is apparent in *Martin v. Wilks*, 109 S. Ct. 2180 (1989). By enabling a broad class of nonminorities to challenge consent decree provisions as inconsistent with Title VII or with equal protection, *Martin* forecloses *Local 93*'s prospect of nonreviewability. See *supra* note 60. *Weber*'s approval of voluntary preferences established outside of litigation, therefore, may serve as the outer limit of employer discretion. For a discussion of *Weber*'s impact on voluntary preferences in the public sector, see *infra* Part II.

83. This Essay's analysis of *Johnson* differs substantially from an analysis I prepared for the United States Commission on Civil Rights, where I served as Assistant General Counsel from 1984-1987. See Williams, *Rights Panel Rejects a Statement Assailing High Court Jobs Ruling*, N.Y. Times, May 16, 1987, at A1, col. 5; Pear, *Rights Panel Assails High Court for Sanctioning Job Preferences*, N.Y. Times, May 14, 1987, at A1, col. 1. The statement that allegedly, among other things, criticized *Johnson* as an unjustifiable extension of *Weber* represented the views of the agency's Office of General Counsel. See Williams, *supra*; Pear, *supra*. As this Essay's analysis reveals, I believe that *Johnson* is little more than a reaffirmation of *Weber*. See *infra* text accompanying notes 106-27.

84. See *Johnson*, 480 U.S. at 630, 640-42.

85. See *id.* at 623-24, 662-64.

like *Weber, Johnson* involved a public employer that was subject to constitutional strictures.⁸⁶ The Court concluded that since the constitutional issue was not previously "raised or addressed," it would consider only "the prohibitory scope of Title VII."⁸⁷ By viewing as distinct the constitutional and statutory issues, the Court recognized that Title VII might countenance conduct otherwise prohibited by the Constitution.⁸⁸ The Court, therefore, did not consider analytically relevant its 1986 decision in *Wygant v. Jackson Board of Education*,⁸⁹ which set forth criteria for constitutional evaluation of affirmative action plans undertaken by public employers.⁹⁰

Santa Clara County adopted its affirmative action plan because the "mere prohibition of discriminatory practices" was inadequate to correct underrepresentation of women and minorities caused by societal discrimination.⁹¹ The plan's long-term objective was to make the County Transportation Agency's workforce match the composition by sex and race of the county's workforce.⁹² The plan therefore represented the county's voluntary commitment to equal employment opportunity rather than its attempt to remedy the effects of its own discriminatory practices. The district court concluded that sex was the "determining factor" in Joyce's promotion.⁹³ The Supreme Court majority, however, in concluding that the promotion did not violate Title VII, characterized the county's affirmative action efforts as "modest."⁹⁴ Noting that "[a]ny differences in

86. See *id.* at 651. Four Justices, however, disagreed with this feature of the majority's ruling. See *id.* at 648-49 (O'Connor, J., concurring); *id.* at 664-65 (Scalia, J., dissenting) (joined by Justices Rehnquist and White).

87. *Id.* at 620 n.2

88. For the Court, "[t]he fact that a public employer must also satisfy the Constitution does not negate the fact that the statutory prohibition with which that employer must contend was not intended to extend as far as that of the Constitution." *Id.* at 628 n.6. This statement is counterintuitive. As Rutherglen and Ortiz argue:

[G]overnment preferences for the benefit of minorities should not be closely scrutinized because there is no need for the judiciary to protect the majority from itself. . . . By contrast, private employers are more likely to use preferences to avoid liability to individual victims of discrimination . . . [and therefore] may not give much weight to the interests of the employees . . . who bear the cost of the preference. . . . If this is true, voluntary preferences under Title VII should be subject to a higher, not a lower, standard of justification than voluntary preferences under the Constitution.

Rutherglen & Ortiz, *supra* note 60, at 507-08; see also Schwartz, *supra* note 30, at 540-42 (arguing that Title VII requirements must be at least as high as constitutional requirements).

89. 476 U.S. 267 (1986).

90. See *id.* at 273-84. *Johnson*, however, did indicate that the *Wygant* criteria would govern a constitutional assessment of the plan. See *Johnson*, 480 U.S. at 620 n.2.

91. *Johnson*, 480 U.S. at 620.

92. See *id.* at 621.

93. *Id.* at 625 (quoting the district court).

94. *Id.* at 636. In stark contrast, the dissent viewed the plan as draconian. For the dissent, the plan "imposed racial and sexual tailoring that would . . . give each protected racial and sexual group a governmentally determined 'proper' proportion of each job category." *Id.* at 660 (Scalia, J., dis-

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qualifications between Johnson and Joyce were minimal, to say the least,"⁹⁵ the majority concluded that the sex of Joyce was "but one of numerous factors"⁹⁶ in the promotion decision. Indeed, the majority suggested that the Santa Clara plan was analogous to the sort of race-conscious behavior allowable under *Regents of the University of California v. Bakke*,⁹⁷ which allows group status to be considered along with other criteria.⁹⁸ Furthermore, the Court noted that the plan applies only when the "[a]gency has identified a conspicuous imbalance in job categories traditionally segregated by race and sex"⁹⁹ and "it anticipated only gradual increases in the representation of minorities and women."¹⁰⁰

The majority therefore found the plan well within the bounds of *Weber's* acceptable affirmative action. The Court explained that the county's plan, like the collective bargaining agreement in *Weber*, was a "voluntary affirmative action plan designed to 'eliminate manifest racial imbalances in traditionally segregated job categories.'" ¹⁰¹ The *Weber* Court found this plan unobtrusive in its response to imbalance and therefore consistent with Title VII's objective of encouraging voluntary efforts to "break down old patterns of . . . segregation."¹⁰² By *Weber's* standards, *Johnson* is an easy case.¹⁰³ The *Weber* agreement called for a rigid

senting); see also *id.* at 658-64 (Scalia, J., dissenting) (discussing the structure of the plan and the findings at trial).

95. *Id.* at 641 n.17.

96. *Id.* at 638.

97. 438 U.S. 265, 316-19 (1978).

98. See *Johnson*, 480 U.S. at 638. In drawing this comparison, the majority did not suggest that *Bakke* should govern the constitutionality of the plan. See *id.*

99. *Id.* at 640.

100. *Id.* at 639. Indeed, prior to the Joyce hire, "none of the 238 [skilled craft] positions was occupied by a woman." *Id.* at 636.

101. *Id.* at 628 (quoting *United Steelworkers v. Weber*, 443 U.S. 193, 197 (1979)). Commentators have criticized the *Weber* opinion for misrepresenting the facts surrounding the collective bargaining agreement. See, e.g., Morris, *New Light on Racial Affirmative Action*, 20 U. CAL. DAVIS L. REV. 219, 228 (1986) (noting that the employer had engaged in prior discrimination and might have forfeited lucrative government contracts without an affirmative action plan); Schatzki, *United Steelworkers of America v. Weber: An Exercise in Understandable Indecision*, 56 WASH. L. REV. 51, 73 n.56 (1980) (criticizing the Court's failure to mention that if Kaiser had never instituted the affirmative action apprenticeship plan, Weber would "never have been employed as a skilled craftsman"). First, the plan was the direct outgrowth of Kaiser Aluminum's failure to meet affirmative action obligations of government contractors. Indeed, the *Weber* district court found that the desire to "retain lucrative government contracts" was the impetus behind the *Weber* plan. *Weber v. Kaiser Aluminum & Chem. Corp.*, 563 F.2d 216, 226 (5th Cir. 1977), *rev'd sub nom. United Steelworkers v. Weber*, 443 U.S. 193 (1979). Second, rather than responding to imbalances caused by societal discrimination, the plan responded to the union's purposeful discrimination. In fact, the Supreme Court noted that "[j]udicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice." *Weber*, 443 U.S. at 198 n.1. Pointing to these factors, the Reagan Administration argued that *Weber* approved only the remedial use of affirmative action. Brief for United States as Amicus Curiae Supporting Petitioner at 13-17, *Johnson* (No. 85-1129).

102. *Weber*, 443 U.S. at 208.

103. *Johnson's* insistence that a manifest imbalance be more than a simple comparison of the

one-for-one promotion scheme,¹⁰⁴ whereas the Santa Clara plan (as described by the *Johnson* majority) envisions "only gradual increases" in minority representation by considering group status as "but one of numerous factors."¹⁰⁵

B. *The Opinion in Context*

Johnson, although described as "the most sweeping and definitive of the Court's affirmative action opinions,"¹⁰⁶ is little more than a reaffirmation of *Weber*. In light of Reagan Administration efforts to discredit *Weber* or recast the *Weber* plan as remedial,¹⁰⁷ that reaffirmation is significant. Yet, by ducking the critical constitutional issue, the Court in *Johnson* did little to extend the existing scope of permissible voluntary affirmative action. Indeed, as Professor Schwartz admits, "[i]f the constitutional standards for voluntary plans are significantly more stringent than the statutory requirements, affirmative action hiring and promotion plans by many public agencies remain under a constitutional cloud."¹⁰⁸

At first blush, the Court's refusal to extend constitutional norms to public-sector Title VII actions is surprising. The majority is surely correct in recognizing that Title VII is grounded in the commerce clause and not in the fourteenth amendment;¹⁰⁹ however, as Justice Scalia asserts in dissent, "it is most unlikely that Title VII was intended to place a lesser restraint on discrimination by public actors than is established by the Constitution."¹¹⁰

employer's skilled craft workers with the general labor force, see *Johnson*, 480 U.S. at 638, is more exacting than *Weber*. See Rutherglen & Ortiz, *supra* note 60, at 480. Moreover, *Johnson*'s analysis of the *Weber* requirements that white employee interests not be unnecessarily trammelled and that the plan be temporary is more thorough than *Weber* itself. Compare *Johnson*, 480 U.S. at 638 (explaining that non-minority rights were not trammelled where an affirmative action plan used sex as a consideration, but adding that a specific timetable might be necessary where such a plan employs rigid quotas) with *Weber*, 443 U.S. at 208-09 (holding that the interests of white workers were not trammelled where the affirmative action plan was temporary and did not mandate the discharge or bar the advancement of non-minority workers).

104. See *Weber*, 443 U.S. at 223.

105. *Johnson*, 480 U.S. at 638-39.

106. Schwartz, *supra* note 30, at 526. The Administration argued that "*Weber* was seeking not to leave open the door to mere 'societal discrimination' as a justifying ground. Rather, it was seeking to solve an altogether different problem: the hardships faced by an employer who wishes to remedy his own prior discrimination." Brief for United States as Amicus Curiae Supporting Petitioner at 8, *Johnson* (No. 85-1129).

107. See Brief for United States as Amicus Curiae Supporting Petitioner at 9, 12-17, *Johnson* (No. 85-1129).

108. Schwartz, *supra* note 30, at 539-40.

109. See *Johnson*, 480 U.S. at 627 n.6.

110. *Id.* at 664 (Scalia, J., dissenting). Furthermore, a basic principle of constitutional interpretation is that courts should interpret statutes in such a manner as to avoid invalidating the statute on constitutional grounds. See, e.g., *NLRB v. Catholic Bishop*, 440 U.S. 490, 500 (1979) (citing cases in which the Court has construed the National Labor Relations Act and related statutes not to permit

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The legislative history of the 1972 amendment, which extended Title VII to state and local governments, also suggests the applicability of constitutional standards. As amendment sponsor Senator Jacob Javits remarked:

[I]t is very important, as we are about to vote on this amendment, . . . that we recognize that of all the provisions in this bill, this has the most solemn congressional sanction, because it is based not on the commerce clause, . . . but is based on the 14th amendment. This is a paramount right which is created for all Americans.¹¹¹

Indeed, Congress extended Title VII to public actors in response to the difficulties state and local employees faced in attempting to vindicate in federal court their constitutional right to equal treatment.¹¹² In other words, Congress did not seek to subvert constitutional norms in public-sector Title VII actions; instead, it intended to protect public-sector employees' right to equal treatment by providing them with an effective administrative forum as well as an administrative champion.¹¹³

Granted, the amendment's legislative history demonstrates only that Congress intended to provide equal employment opportunity for public-sector employees. It does not foreclose the possibility that Congress sought to accomplish this objective solely by extending distinct private-sector Title VII protections. Such an interpretation, however, is inconsistent with the Court's analysis in *Weber*.¹¹⁴ In addition, it is unlikely

practices that would raise serious constitutional questions); *Crowell v. Benson*, 285 U.S. 22, 62 (1932) (noting that "it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided"). For this reason, *Dothard v. Rawlinson*, 433 U.S. 321 (1977), is inapposite. See *Johnson*, 480 U.S. at 628 n.6. Although *Dothard* recognized congressional intent that "Title VII principles be applied to governmental and private employers alike," *Dothard*, 433 U.S. at 332 n.14, in that case constitutional standards were less intrusive than Title VII standards. See *id.* at 334 n.20. *Dothard* does not contradict the proposition that the Constitution serves as a floor in public-sector cases; instead, *Dothard* establishes only that Title VII may serve as a ceiling higher than the Constitution. See *id.*

111. SUBCOMMITTEE ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 1173 (Comm. Print 1972).

112. See H.R. REP. NO. 238, 92d Cong., 1st Sess. 18 (1971), reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2153 ("Although the aggrieved individual may enforce his rights directly in the Federal district courts, this remedy . . . is frequently an empty promise due to the expense and time involved in pursuing a Federal court suit.").

113. See S. REP. NO. 415, 92d Cong., 1st Sess. 419-20 (1971) ("[I]t is an injustice to provide employees in the private sector with the assistance of an agency of the Federal Government in redressing their grievances while at the same time denying similar assistance to State and local government employees.").

114. In *Weber*, the Court on at least eleven different occasions maintained that its decision was limited to private affirmative action. See *Williams v. City of New Orleans*, 729 F.2d 1554, 1565 (5th Cir. 1984) (Gee, J., concurring). *Weber* thus did not merely indicate that public employers' actions are subject to separate constitutional attack; instead, by suggesting that its explication of Title VII extends only to private employers, *Weber* implicitly acknowledged that public employers are subject to more stringent Title VII review than private employers. See *United Steelworkers of America v.*

that legislation both based in and designed to further fourteenth amendment equal treatment objectives would nonetheless fail to incorporate fourteenth amendment standards.¹¹⁵ Thus, applying Title VII to public employers inevitably raises important constitutional issues that the *Johnson* Court specifically chose to ignore.

The reason that *Johnson* eschews the constitutional issue, however, is fairly obvious. As the majority noted, the relevant constitutional precedent is *Wygant v. Jackson Board of Education*,¹¹⁶ a case that does not bode well for the constitutionality of the Santa Clara plan.¹¹⁷ *Wygant* demands that voluntary affirmative action plans be both "narrowly tailored"¹¹⁸ and responsive to actual discrimination, rather than general societal discrimination.¹¹⁹ Consequently, although a statistical imbalance—even without a finding of intentional discrimination by a court or other competent body—is a sufficient basis for a voluntary group-conscious affirmative action plan,¹²⁰ *Wygant*'s recognition of the desirability of voluntary compliance is far from a carte blanche for public-sector affirmative action.

Johnson deviates from *Wygant*'s standards in one critical respect. The *Johnson* plan is based on a statistical imbalance caused by societal

Weber, 443 U.S. 193, 200, 206 n.6 (1979). For an opposing view, see Schwartz, *supra* note 30, at 541-42 (noting that neither the relevant provisions of Title VII nor the legislative history of the 1972 amendments draws any distinction between public and private employers).

115. Schwartz does not dispute this conclusion. See Schwartz, *supra* note 30, at 559. In Schwartz's view, however, societal discrimination is an adequate basis for constitutional affirmative action. See *id.* at 553-61. Consequently, Schwartz would ratchet down existing constitutional requirements so that private and public employers alike could respond to statistical imbalance caused by societal discrimination. See *id.* at 542.

116. See *Johnson v. Transportation Agency*, 480 U.S. 616, 620 n.2 (1987) (referring to *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986)).

117. The *Johnson* Court drew an analogy between the Santa Clara Plan and the Harvard Plan that Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 316-19 (1978), implicitly validated. See *Johnson*, 480 U.S. at 638. If applicable in the employment context, *Bakke* would allow group status to be a permissible factor in employment decision making. See *Bakke*, 438 U.S. at 317-18. *Bakke*, however, places great weight on an educational institution's special interest in academic diversity, and thus far courts have not extended it to other contexts. See *id.* at 315-17 & n.51. *Johnson*'s endorsement of the *Wygant* standard supports this limited reading of *Bakke*. But see *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) (suggesting that *Bakke* might be extended to noneducational settings).

118. *Wygant*, 476 U.S. at 279-80 & n.6.

119. See *id.* at 274; see also *id.* at 287 (O'Connor, J., concurring) (reviewing Court doctrine on the permissible scope of affirmative action beneficiaries); Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 80-81 (1986) (criticizing the rule that affirmative action is permissible "only as precise penance for the specific sins of racism," as discouraging "forward-looking justifications" such as "securing workplace peace" and "eliminating workplace caste").

120. See *Wygant*, 476 U.S. at 277 (indicating the necessity of "sufficient evidence to justify the conclusion that there has been prior discrimination"). In Justice O'Connor's view, an employer would have sufficient evidence "if it can point to a statistical disparity sufficient to support a prima facie claim under Title VII." *Johnson*, 480 U.S. at 649 (O'Connor, J., concurring).

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discrimination. The county offered no evidence to refute the district court's conclusion that the county had not discriminated against women or other minorities.¹²¹ In fact, the majority recognized that the underrepresentation of women was caused, in part, by factors unrelated to discrimination.¹²² Since the county considered factors unrelated to discrimination, a principal purpose of the plan apparently was to advance the county's notion of social good.

Interestingly, Justice O'Connor argued in her *Johnson* concurrence that the Joyce promotion should be viewed as a remedy for apparent past discrimination.¹²³ O'Connor's attempt to reconcile Title VII and constitutional norms suggests that the validity of the *Johnson* plan did not hinge on the separation of Title VII and constitutional standards. The failure of any other Justice to subscribe to this theory, however, suggests that the Supreme Court takes seriously the line it drew in *Wygant* separating permissible responses to perceived actual discrimination from impermissible efforts to correct statistical imbalances caused by societal discrimination.¹²⁴

Johnson's failure to address the constitutionality of the Santa Clara plan at least puts, in Professor Schwartz's view, a "cloud" over voluntary public-sector affirmative action.¹²⁵ Furthermore, the Court's characterization of the Santa Clara plan as more limited than the plan it approved in *Weber*¹²⁶ suggests that *Johnson* does not expand the scope of permissible voluntary affirmative action under Title VII.¹²⁷ Although the Court's reaffirmation of *Weber* is significant, *Johnson* does not break new ground.

121. See *Johnson*, 480 U.S. at 659 (Scalia, J., dissenting).

122. See *id.* at 622 (noting that among the nondiscriminatory factors were the facts that some jobs involved heavy labor and that the number of minorities and women who qualified for positions requiring specialized training and experience was limited).

123. See *id.* at 652-57 (O'Connor, J., concurring). Justice O'Connor's willingness to characterize the Santa Clara plan as remedial may become significant in future hiring cases, because O'Connor authored the Court's opinion in *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989) (plurality opinion).

124. Indeed, in a little noticed 1986 summary order, the Court reversed the Fourth Circuit's approval of Richmond's set-aside plan for public contracts. *City of Richmond v. J. A. Croson Co.*, 478 U.S. 1016, 1016 (1986), vacating 779 F.2d 181 (4th Cir. 1985); see also Devins, *Don't Write Off the Reagan Social Agenda*, A.B.A. J., Feb. 1, 1987, at 42, 44 (noting that the Court in *Wygant* emphasized "the desirability of voluntary compliance, [by] indicat[ing] that a statistical imbalance—even without a finding of intentional discrimination 'by a court or other competent body'—is a sufficient basis for a voluntary, race-conscious remedial plan"). For further discussion of *Croson*, see *infra* notes 128-76 and accompanying text.

125. Schwartz, *supra* note 30, at 540-41.

126. See *supra* notes 101-05 and accompanying text. As Justice Scalia argued in dissent, the majority could have cast the Santa Clara Plan as far-reaching affirmative action. See *Johnson*, 480 U.S. at 658-61 (Scalia, J., dissenting).

127. Indeed, in some respects, *Johnson* demands a more exacting scrutiny of voluntary affirmative action than *Weber*. See *supra* notes 106-08 and accompanying text.

III. *Richmond v. Croson: Wygant Redux*A. *The Supreme Court Opinion*

Croson illustrates the full force of *Wygant*'s demands that voluntary affirmative action plans be both narrowly tailored and responsive to actual discrimination. In *Croson*, the Supreme Court invalidated Richmond's plan to set aside thirty percent of city contracting dollars for black, Hispanic, Oriental, Indian, Eskimo, or Aleut contractors.¹²⁸ In its analysis, the Court found that the Richmond plan failed both prongs of the *Wygant* test.¹²⁹

Richmond created its plan in the wake of the Supreme Court's 1980 decision in *Fullilove v. Klutznick*.¹³⁰ In *Fullilove*, the Court upheld a congressional plan setting aside for minority groups ten percent of certain federal construction grants in response to a legislative finding of societal discrimination.¹³¹ After *Fullilove*, many state and local governments enacted set-aside plans to benefit minority contractors.¹³² These governments assumed that they were subject to the same standard that the *Fullilove* Court applied to the federal government.¹³³

In *Croson*, however, the Supreme Court concluded that the *Fullilove* model was inapplicable to state and local set asides.¹³⁴ First, *Fullilove* reflected "appropriate deference to the Congress, a co-equal branch,"¹³⁵ and, more fundamentally, the branch that is "expressly charged by the Constitution with competence and authority to enforce equal protection guarantees."¹³⁶ Second, the fourteenth amendment "stemmed from a distrust of state legislative enactments based on race,"¹³⁷ a factor inapplicable to federal enactments. The Court therefore held that state and local set asides were subject to the same constitutional standard as other state and local affirmative action—the *Wygant* standard.¹³⁸

The *Croson* Court had little difficulty concluding that the thirty percent set aside failed both prongs of the *Wygant* test. The Court found no

128. *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 730 (1989) (plurality opinion).

129. See *infra* notes 139-47 and accompanying text.

130. 448 U.S. 448 (1980).

131. *Id.* at 492.

132. See *Days, Fullilove*, 96 YALE L.J. 453, 454 (1987).

133. See *id.*

134. *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 719 (1989) (plurality opinion).

135. *Id.* at 717 (quoting *Fullilove*, 448 U.S. at 472).

136. *Id.* at 718 (quoting *Fullilove*, 448 U.S. at 483).

137. *Id.* at 720.

138. See *id.* at 723; see also *Johnson v. Transportation Agency*, 480 U.S. 616, 620 n.2 (1987) (noting that *Wygant* sets forth the appropriate standard of constitutional review in affirmative action cases).

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actual discrimination because the city did not demonstrate either that its contracting dollars were going to discriminatory firms or that there was an underutilization of Richmond-area minority contractors and subcontractors.¹³⁹ The Court considered irrelevant the fact that, although minorities comprised half of Richmond's population, minority businesses received less than one percent of prime contracts.¹⁴⁰ It considered equally irrelevant the virtual nonexistence of minority contractors in state and local contractors' associations.¹⁴¹ In the Court's view, gross statistical disparities are of "little probative value" when special qualifications are required to fill particular jobs.¹⁴² The Court reasoned that the dearth of minority contractors could be a result of "career and entrepreneurial choices" as well as a result of complexities in bidding procedures and bonding requirements that limit access to the construction industry.¹⁴³ Prior congressional findings of discrimination in the construction industry and testimony before the city council that Richmond was not immune from this discrimination also failed to impress the Court.¹⁴⁴ Noting that "[t]he history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis,"¹⁴⁵ the Court concluded that the city council did not meet its obligation to come forward with evidence of actual discrimination in Richmond.¹⁴⁶

139. See *Croson*, 109 S. Ct. at 723-28 (plurality opinion). Despite its conclusion that there was insufficient evidence of actual discrimination, *Croson* arguably relaxes the *Wygant* standard. In *Wygant*, the plurality "insisted upon some showing of prior discrimination by the governmental unit involved." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986). The *Croson* decision, however, indicated that a literalist application of the *Wygant* criteria was unduly restrictive. See *Croson*, 109 S. Ct. at 720. *Croson* enables a municipality to redress discrimination committed by private recipients of public funds. See *id.* (plurality opinion). Otherwise, the Court noted, cities would be unable to respond to some publicly funded discrimination. See *id.*

140. See *Croson*, 109 S. Ct. at 724 (plurality opinion).

141. See *id.*

142. See *id.* at 725 (quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 n.13 (1977)).

143. *Id.* at 726.

144. See *id.* at 724-25.

145. *Id.* at 725. In support of this venerable proposition, the Court cites the Japanese internment case, *Korematsu v. United States*, 323 U.S. 214 (1944). This citation is doubly ironic. First, *Korematsu* was extraordinarily deferential to the government in its emplacement of a racial classification during wartime. See P. IRONS, *JUSTICE AT WAR* 332 (1983) (noting that in Justice Jackson's draft dissent, he suggested that with the adoption of the majority opinion, "we may as well say any military order will be constitutional" (emphasis added)). Second, scholars have revealed that pernicious discrimination underlay the Japanese internment. See *id.* at 8 ("The historical background of hostility directed at Orientals—first the Chinese and then the Japanese—rode on powerful currents of nativism and prejudice," leading to "the replacement of pleas for tolerance with demands for the evacuation and internment of this entire racial minority.").

146. See *Croson*, 109 S. Ct. at 723-24 (plurality opinion). As Michael Rosenfeld commented in an article otherwise quite critical of *Croson*: "[B]y borrowing a judicially approved federal formula without apparent regard for relevant differences in context, the Richmond City Council opened itself up to the charge that its preferential set-asides could not be deemed legitimately remedial even in the

Correlatively, the city failed to satisfy *Wygant*'s requirement that the means be narrowly tailored because it made no inquiry into whether participating minority firms could have suffered from discrimination by the city. Because the thirty percent set aside failed to set geographic criteria for minority participants and included minorities such as Eskimos and Aleuts, who were never victimized in Richmond, the Court found that the set aside was "not linked to identified discrimination in any way."¹⁴⁷ Indeed, the Court viewed the "random inclusion of racial groups" never victimized in Richmond as "suggest[ing]" that the city's purpose was "outright racial balancing."¹⁴⁸

B. *The Opinion in Context*

Many have characterized *Croson* as the death knell of affirmative action. In Charles Krauthammer's words, "the status of affirmative action has been clarified. Custer's status was similarly clarified at the Little Bighorn."¹⁴⁹ *Croson* doomsayers point to three features of the majority's opinion to support their prediction: (1) a majority of Justices, for the first time, explicitly endorsed strict scrutiny review in affirmative action cases,¹⁵⁰ (2) the Court limited to federal legislation *Fullilove*'s approval of societal discrimination as a basis for affirmative action,¹⁵¹ and (3) the Court extended *Wygant* through an overly rigid view of what constitutes particularized discrimination.¹⁵² Despite these protestations, *Croson* does little more than reaffirm *Wygant* and *Fullilove*.

Wygant presaged *Croson*'s endorsement of strict scrutiny. A plurality of Justices held in *Wygant* that "any racial classification 'must be justified by a compelling governmental interest' "¹⁵³ and that the means chosen must be "narrowly tailored."¹⁵⁴ Moreover, a majority of the *Johnson* Court referred to *Wygant* as the governing constitutional stan-

broadest sense of the term." Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1745 (1989).

147. *Croson*, 109 S. Ct. at 728 (plurality opinion). The Court also noted that Richmond failed to consider either race-neutral alternatives to the set aside or standards that would ensure that minority beneficiaries were victims of past discrimination. See *id.* at 728-29. These concerns, if emphasized in future cases, could limit race-conscious relief to actual victims. *Croson*'s reaffirmation of *Wygant*'s numerical model, however, and *Croson*'s endorsements of the set aside, speak against this interpretation. See *supra* note 139; *infra* note 166.

148. *Croson*, 109 S. Ct. at 728 (plurality opinion).

149. Krauthammer, *supra* note 41, at A25, col. 5.

150. See *Croson*, 109 S. Ct. at 721 (plurality opinion).

151. See *id.* at 719-20.

152. See *id.* at 723.

153. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (emphasis added) (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)).

154. *Id.* (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980)).

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dard and thereby implicitly endorsed this formulation.¹⁵⁵ Of equal significance, although the formal endorsement of strict scrutiny is of symbolic moment, strict review is not a talisman for the invalidation of affirmative action programs. The lead opinions in *Bakke*, *Fullilove*, and *Wygant*—the three constitutional affirmative action rulings before *Croson*—all used strict review¹⁵⁶ and all concluded that governmental actors can redress past discrimination through affirmative action.¹⁵⁷ *Croson* is much the same. Borrowing from *Wygant*, the *Croson* Court recognized that “[w]here there is a significant statistical disparity between the number of *qualified* minorit[ies] . . . and the number of such contractors actually engaged by the locality,” affirmative action is appropriate.¹⁵⁸

This formulation, by using eligible minorities in the relevant labor market as the appropriate reference, views affirmative action as properly responsive to local ills and not to the problems of a nation. This rejection of public employers’ attempts to remedy societal discrimination finds explicit support in Justice Powell’s *Bakke* opinion¹⁵⁹ and in the *Wygant* plurality opinion.¹⁶⁰ *Fullilove*, moreover, does not speak to the contrary. As *Croson* recognizes, *Fullilove* is very much couched in terms of appropriate deference to the exercise of congressional power under section five of the fourteenth amendment to the Constitution.¹⁶¹

Croson, finally, is unexceptional in its conclusion that the thirty percent set aside was invalid because it did not respond to particularized discrimination. *Wygant* refuses to recognize mere statistical disparities as an adequate basis for affirmative action.¹⁶² Instead, *Wygant* speaks of the need for “convincing evidence . . . of prior discrimination”¹⁶³ and cautions that numeric disparities are insufficient if “unrelated to discrim-

155. See *Johnson v. Transportation Agency*, 480 U.S. 616, 620 n.2 (1987).

156. See *Wygant*, 476 U.S. at 273-74; *Fullilove v. Klutznick*, 448 U.S. 448, 492 (1980); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978).

157. See *Wygant*, 476 U.S. at 274-76, 280; *Fullilove*, 448 U.S. at 482; *Bakke*, 438 U.S. at 307-10.

158. *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 729 (1989) (plurality opinion) (emphasis added).

159. See *Bakke*, 438 U.S. at 307-10.

160. See *Wygant*, 476 U.S. at 274.

161. See *Croson*, 109 S. Ct. at 717-18 (plurality opinion) (citing *Fullilove*, 448 U.S. at 472). It is noteworthy that, on the day the Court decided *Fullilove*, it also granted certiorari in a case that called into question state authority to remedy societal discrimination through affirmative action. See *Minnick v. California Dep’t of Corrections*, 448 U.S. 910 (1980), *cert. dismissed*, 452 U.S. 105 (1981) (dismissing the writ because the trial court had not finally determined the legal status of the challenged plan in light of the significant developments in the law). Moreover, the *Wygant* Court characterized *Fullilove* as a case about the “remedial powers of Congress.” *Wygant*, 476 U.S. at 272. For a prophetic discussion of *Fullilove*’s inapplicability to state and local set asides, see Choper, *The Constitutionality of Affirmative Action: Views from the Supreme Court*, 70 Ky. L.J. 1, 9 (1981).

162. See *Wygant*, 476 U.S. at 276.

163. *Id.* at 277.

ination."¹⁶⁴ Affirmative action therefore must be grounded in concrete evidence of prior discrimination.¹⁶⁵

In *Croson*, Richmond failed to produce such evidence. Instead, the city built its case around circumstantial evidence—statistical imbalances and conclusory statements about discrimination in the local construction industry.¹⁶⁶ The apparent paucity of the city's discrimination evidence was clear to the Supreme Court even at the time of its *Wygant* decision. Shortly after *Wygant*, the Court directed the Fourth Circuit to reconsider its earlier approval of the Richmond set aside.¹⁶⁷ Not surprisingly, the Fourth Circuit, in its remand opinion, characterized the city council's proceedings leading up to the thirty percent set aside as "betray[ing] the very casualness about the use of racial distinctions in public enactments that *Wygant* warned against."¹⁶⁸

Describing *Croson* as consistent with the Court's earlier pronouncement in *Wygant* may seem strange. After all, the press heralded *Wygant*'s innovation—enabling employers to correct imbalances in the

164. *Id.* at 276; see *infra* note 166.

165. See *Wygant*, 476 U.S. at 277.

166. See *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 723 (1989) (plurality opinion). The city, moreover, acknowledged that minority underrepresentation might also be caused by such nonracial factors as "deficiencies in working capital, inability to meet bonding requirements, unfamiliarity with bidding procedures, and disability caused by an inadequate track record." *Id.* at 724.

Initially, applying *Wygant* in the minority set-aside context is troubling. If the city council had relied on concrete evidence suggesting that private contractors in Richmond discriminated on the basis of race, *Wygant*'s emphasis on the relevant labor market would have constrained the city. Because *Wygant* compares "[minority firm] representation in the public contracting market with only the percentage of existing [minority firms] rather than with the representation of minorities in the given population," it does not provide a remedy for the possibility that identified discrimination has prevented minority firms "from competing with nonminority business and hence from establishing a competitive market share." Note, *The Nonperpetuation of Discrimination in Public Contracting: A Justification for State and Local Minority Business Set-Asides After Wygant*, 101 HARV. L. REV. 1797, 1809 (1988). Although it is harsh, this limitation is understandable. Otherwise, affirmative action plans—by utilizing minority population ratios—would not be demonstrably responsive to actual discrimination and hence would not satisfy the Supreme Court's remedial demands. A host of nonracial factors may influence the underrepresentation of minority contractors. See *supra*.

Recent scholarship from unlikely sources bolsters the conclusion that the *Wygant* limitation is necessary. Drew Days, the Carter Administration official who managed the *Fullilove* litigation, expressed strong reservations about the inept crafting of many set-aside programs. See Days, *supra* note 132, at 458-59. Indeed, in language strikingly similar to that in *Croson*, Days argued that set asides involving explicit racial classifications should be used only after "lesser alternatives were systematically and thoroughly explored prior to being rejected" and that "[participation] levels should initially correspond to the percentage of minority contractors within the jurisdiction who are qualified and available to participate in government projects." *Id.* at 483-84. The so-called liberal press also attacked set-aside programs. Articles in both *The New York Times* and *New Republic* suggested that the set-aside programs were riddled with fraud. See Oreskes, *The Set-Aside Scam*, NEW REPUBLIC, Dec. 24, 1984, at 17, 17-18; Friendly, *Road Contractors Found to Be Evading Anti-Bias Law*, N.Y. TIMES, Nov. 30, 1984, at B4, col. 1. These doubts about existing set-aside programs may well have influenced the Court. The *Croson* majority made numerous references to the article by Days. See *Croson*, 109 S. Ct. at 719, 727, 728 (plurality opinion).

167. See *J.A. Croson Co. v. City of Richmond*, 478 U.S. 1016 (1986).

168. *J.A. Croson v. City of Richmond*, 822 F.2d 1355, 1358 (4th Cir. 1987).

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relevant labor market through affirmative action—as “a significant victory for civil rights groups.”¹⁶⁹ In sharp contrast, the press has characterized *Croson* as a civil rights debacle.¹⁷⁰ As the earlier case analyses suggest, the truth lies somewhere in the middle.

Wygant’s reformulation is a compromise between competing principles. If it responds to disparities related to discrimination, an affirmative action plan can go forward without a contemporaneous finding of discrimination.¹⁷¹ At the same time, because the relevant labor market is the point of comparison, there exists “a strong basis in evidence . . . that remedial action [is] necessary.”¹⁷²

Although *Croson* emphasizes this narrowing feature of *Wygant*, it explicitly endorses *Wygant*’s compromise. In fact, *Croson* cites with approval an Ohio set aside “relying on [the] percentage of minority businesses in the State compared to [the] percentage of state purchasing contracts awarded.”¹⁷³ In other words, the problem with Richmond’s plan may not be affirmative action in general or even set asides in particular, but the sloppiness and arbitrariness of the thirty percent set aside.¹⁷⁴ As Joshua Smith, a spokesperson for minority contractors, commented, “The ruling itself should have no major impact; the justices simply said that a local jurisdiction will have to do its homework.”¹⁷⁵

Croson therefore breaks little new ground. Its reaffirmation of *Wy-*

169. *High Court Ruling Signals Support for Affirmative Action*, Wash. Post, May 20, 1986, at A1, col. 6; see also *High Court Bars a Layoff Method Favoring Blacks*, N.Y. Times, May 20, 1986, at A1, col. 4 (asserting that “the Justices’ reasoning [in *Wygant*] broadly supported some uses of affirmative action by government employers”).

170. See Frost, *Strong Tool Lost in Fight Against Continual Patterns of Excluding Minorities*, L.A. Times, Feb. 1, 1989, § 2 (Metro), at 7, col. 1; *supra* notes 37-42, 149 and accompanying text.

171. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 289 (1986) (O’Connor, J., concurring); see also *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 728-29 (1989) (plurality opinion) (striking down the challenged quota system because it was maintained for administrative convenience rather than for remedying prior discrimination).

172. *Wygant*, 476 U.S. at 277; see also *Croson*, 109 S. Ct. at 725 (plurality opinion) (stating that “the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task”).

173. *Croson*, 109 S. Ct. at 725-26 (citing *Ohio Contractors Ass’n v. Keip*, 713 F.2d 167 (6th Cir. 1983)).

174. *Keip* is especially instructive. Like the Richmond Plan, the Ohio set aside was predicated upon a determination that state contracting dollars were going to discriminatory private firms. *Ohio Contractors Ass’n v. Keip*, 713 F.2d 167, 171 (6th Cir. 1983) (citing *Ethridge v. Rhodes*, 268 F. Supp. 83 (S.D. Ohio 1967)). Significantly, however, the Ohio set aside—although based on disparities between the percentage of eligible minority firms and the percentage of minority contracting dollars—was far from precise. The set aside allocated a greater percentage of state dollars than the percent of minority firms, see *id.* at 169, 171, but in determining the relevant market share of minority firms, the Ohio set aside considered only the gross number of minority businesses and paid no attention to firm size, see *id.* at 171. In short, under the Ohio set aside, states and municipalities retained fairly broad discretion over their contractor dollars.

175. Lawrence, *Firms Weigh Court Ruling on Set-Asides*, Wash. Post, Jan. 30, 1989, at F1, col. 4.

gant is important because it crystallizes the standard of review for affirmative action cases. Although this crystallization is of some practical and great symbolic importance, it should not be overstated. In fact, by recognizing that a city is empowered to use affirmative action to redress some forms of private discrimination within its jurisdiction, *Croson* loosens *Wygant's* demand that affirmative action respond only to discrimination "by the governmental unit involved."¹⁷⁶ Although affirmative action proponents may find this loosening a thin silver lining in an ominous grey cloud, the possible impact of *Croson* should not be overgeneralized.

IV. Conclusion: Affirmative Action After Reagan

The boundaries of permissible affirmative action remain uncertain. Commentators who argue that the 1986 and 1987 cases represent sweeping approval of race-conscious hiring and promotion schemes fail to consider how these cases relate to each other; viewed as a mosaic, the cases leave unanswered many questions about the scope of permissible affirmative action. In the same way, *Croson* pundits overstate their claims. *Croson* does not undermine *Wygant's* promise of expanding the sweep of affirmative action.

The indeterminacy of Reagan-era affirmative action rulings reveals some important lessons about Court rulings on highly charged political issues. First, as Justice Jackson suggested in the *Steel Seizure* case, the Court moves incrementally; hence, readers should exercise caution before attaching too much importance to any opinion.¹⁷⁷ Second, the perceived significance of Supreme Court rulings is defined, in part, by the political milieu in which they arise. Although many Presidents seek to further their own social policies through litigation,¹⁷⁸ the Reagan Justice Department encountered a firestorm of criticism because its views on affirmative action and other divisive issues were a substantial departure from those of its predecessors. Consequently, Supreme Court decisions

176. *Wygant*, 476 U.S. at 274; see *supra* note 119 and accompanying text. Compare *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 720 (1989) (plurality opinion) (declaring that in order to justify a racial classification, a showing must be made of past discrimination by the specific governmental entity making the classification) with *Wygant*, 476 U.S. at 274 (explaining that a state or local government has the authority to remedy past discrimination in the private sector within that government's jurisdiction).

177. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-35 (1952) (Jackson, J., concurring).

178. See J. CALIFANO, *A PRESIDENTIAL NATION* 168-69, 173-74 (1975); G. EDWARDS & S. WAYNE, *PRESIDENTIAL LEADERSHIP* 402-03 (1985); cf. E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1984*, at 144 (R. Bland, T. Hindson & J. Deltason 5th rev. ed. 1984) (noting the President's power to select among the laws to be "faithfully executed" and citing the Sherman Act as an example); P. SHANE & H. BRUFF, *THE LAW OF PRESIDENTIAL POWER: CASES AND MATERIALS* 429 (1988) (noting the Executive's prosecutorial discretion in enforcement of criminal laws).

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on affirmative action, an issue normally with high stakes, took on added symbolic and practical importance.

Whether the lower federal courts and the Supreme Court will read these decisions as narrowly as this Essay urges is another matter. Until the courts clarify which path they will take, however, opponents and proponents of affirmative action must prepare for future battles.

In many respects, future battles should be less intense. Although many questions remain unanswered, Reagan efforts to limit Title VII remedies and constitutional relief exclusively to victims of discrimination have surely suffered a stinging rebuke. *Johnson* reaffirmed *Weber*,¹⁷⁹ *Sheet Metal Workers* refused to extend *Stotts*,¹⁸⁰ and both *Croson* and *Wygant* recognize that affirmative action can be predicated on minority underrepresentation.¹⁸¹ Moreover, in several of the 1986 and 1987 cases, the Supreme Court ridiculed the Reagan Administration for departing from past governmental efforts in support of affirmative action.¹⁸² As a result, the Reagan Administration abandoned its initiatives to challenge affirmative action hiring and promotion plans in fifty-one municipalities.¹⁸³

Over the past few years, moreover, there has been burgeoning support for affirmative action from private industry and state and local government. Admittedly, this support may be economic. For example, some employers "voluntarily" adopt affirmative action plans to stave off threatened litigation. This support will nonetheless chill governmental efforts to limit nonvictim relief.

Those concerned with affirmative action, therefore, should attend closely to the Court's shifts and signals in its coming terms. The unsettled state of the doctrine indicates that significant developments may be heralded in ways far more subtle than shouting.

179. See *supra* notes 101-08 and accompanying text.

180. See *supra* notes 65-74 and accompanying text.

181. See *supra* notes 157-61 and accompanying text.

182. See, e.g., *Local No. 93, Int'l Assoc. of Firefighters v. City of Cleveland*, 478 U.S. 501, 518 n.9 (1986) (noting that the EEOC had not joined the brief for the United States); *Local 28 of the Sheet Metal Workers' Int'l Assoc. v. EEOC*, 478 U.S. 421, 444 n.24 (1986) (commenting on the "curious position" of the EEOC in challenging the numerical nonwhite membership goals that the district court established for the union, because in 1975 the EEOC had asked the court to order numerical goals and implement ratios).

183. Following the Supreme Court's opinion in *Stotts*, the Administration urged fifty-one jurisdictions to use *Stotts* as a mechanism for foregoing their affirmative action obligations. See *Affirmative Action Revisions Resisted*, Wash. Post, Apr. 3, 1985, at A1, col. 3.