THE SECOND GENERATION OF AMERICAN AFFIRMATIVE-ACTION DECISIONS

*WOJCIECH SADURSKI**

In 1986 and 1987 the Supreme Court of the United States handed down five decisions on affirmative action.[1] This was a remarkable coincidence, considering that in its entire history, before the 1986-87 crop, the Court had made only four decisions on the merits of challenged "positive discrimination" programs.[2] Three of the prior judgments were made in 1978-1980 and established the main conceptual structure for locating affirmative action within the American equal-protection doctrine; hence, the recent five decisions may properly be seen as a second generation of affirmative-action cases, which both build upon, and develop in new directions, the legacy of *Bakke, Weber* and *Fullilove.*

There are a number of reasons for considering these last five cases an important innovation to, rather than a simple continuation of, the received doctrine of the Court. First, the composition of the Court has undergone a number of changes since the 1978-80 decisions, with Justice

---

* Senior Lecturer in the Department of Jurisprudence, the University of Sydney. I am grateful to Grant Lamond for his valuable research assistance, and to him and Sarah McNaughton for their useful comments on an earlier draft. My work was supported by a research grant from the University of Sydney.

[1] *Wygant* v. *Jackson Board of Education*, 54 LW 4479 (1986) [henceforth referred to as *Wygant*]; *Local 28, Sheet Metal Workers' International Association* v. *Equal Employment Opportunity Commission*, 54 LW 4984 ((1986) [*Sheet Metal Workers*]; *Local Number 93, International Association of Firefighters* v. *City of Cleveland*, 54 LW 5005 (1986) [*Firefighters*]; *United States* v. *Paradise*, 55 LW 4211 (1987) [*Paradise*]; *Johnson* v. *Transportation Agency, Santa Clara County*, 55 LW 4379 (1987) [*Johnson*].

[2] *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978) [*Bakke*] (invalidating the University's special admissions program for minority groups but holding that the goal of achieving a diverse student body may justify consideration of race in admissions under some circumstances); *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979) [*Weber*] (upholding an affirmative action plan for blacks in admissions to a craft training program; see *infra* note 101); *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980) [*Fullilove*] (upholding a provision which required that special funds be set aside for minority business enterprises); *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561 (1984) [*Stotts*] (invalidating the award of competitive seniority to blacks who had not been found to be victims of past discrimination). In the only other reverse-discrimination case to reach the Supreme Court, *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974), the Court dismissed the appeal on the ground of mootness (petitioner had been admitted to the law school where initially he had been denied a place due to special preferences for minority applicants).

O'Connor (who was already sitting on the Court at the time of *Stotts*)[3] and Justice Scalia (who joined the Court in 1987, and participated in two of the five cases discussed here)[4] making very significant contributions to the decisions. Second, the Court had to deal for the first time with a sex-conscious affirmative action case,[5] whereas all the earlier cases had involved racial preferences. Third, within the area of employment relations, the Court had to consider, again for the first time, the issue of preferences in layoffs, not merely in recruitment—a distinction which some judges found crucial.[6] Fourth, as will be shown in the course of this article, a number of the judges have modified their earlier standpoints, in particular in respect to the standard of scrutiny to be applied to affirmative-action classifications. Fifth, the last of the five decisions to be discussed here saw three judges categorically urging the overruling of the most important precedent in the area of employment preferences for blacks, namely, *Weber*.[7] Sixth, the decisions contain an attempt by one of the judges, Justice Stevens, to develop a totally new approach to affirmative action (and indeed, to the general analysis of equal protection under the 14th Amendment of the Constitution and the anti-discrimination provisions of the Civil Rights Act of 1964), transcending the type of approach that has characterized the Court since *Bakke*.[8] All in all, the five decisions on affirmative action handed down in 1986-87 constitute an important contribution to American judicial thinking about equality and discrimination, and warrant closer critical attention.

To review these decisions in the light of their relations to the received doctrines and to the future directions of equal-protection jurisprudence is the main aim of this article. In Part I, I will briefly describe the facts and decisions in all five cases, in order to help the reader put the subsequent discussion in context. In Part II, I will identify the main theoretical problems raised by these decisions and survey the different approaches by particular judges (or groups of judges) to these issues. I will be proceeding on a problem-by-problem, rather than on a judge-by-judge, or case-by-case basis, because I believe it is more helpful in illuminating the actual level of agreement and disagreement between the Supreme Court justices with regard to what they consider to be the main legal and theoretical challenges raised by affirmative action. I will, however, make an exception to this structure and isolate Stevens J.'s views which, for reasons which will become clear, are better discussed on their own, so that the overall coherence of his (emerging) doctrine of equal protection may become more evident. This will be discussed in Part III.

---

[3] 467 U.S. 561 (1984).

[4] *Paradise* and *Johnson*.

[5] *Johnson*.

[6] See *Wygant* at 4483-84 (Powell J., announcing the judgment).

[7] *Johnson* at 4390-91 (White J., dissenting), 4391-96 (Scalia J. and Rehnquist C.J., dissenting).

[8] *Wygant* at 4492-94 (Stevens J., dissenting); *Johnson* at 4386-88 (Stevens J., concurring). It should be noted that Stevens J. had already been developing his new approach to equal protection (regarding non-affirmative-action issues) in a number of earlier decisions, see notes 183, 204 and 205 *infra*.

I. Judgments

The Court invalidated an affirmative action program in one of the decisions[9] and upheld challenged programs in four other cases. Four judges always voted in favour of a challenged classification: Marshall, Brennan, Blackmun and Stevens JJ., though the last usually did so on grounds different to those of the other three Justices who acted always in a block.[10] For the sake of convenience, and in accordance with American terminology, I will sometimes refer to them as the "liberal" judges. On the other side of the spectrum, three judges always voted against affirmative action: Burger C.J. (and after Chief Justice Burger's departure, Scalia J.), Rehnquist C.J. and White J., though White J. usually on narrower grounds than the other "conservative" judges,[11] as I will be calling them in this article. Two judges were "in between": Powell J., who voted once against affirmative action[12] and four times in favour, and O'Connor J., who voted twice in favour of affirmative action[13] and three times against. Overall, the Court was divided 4:3 in favour of affirmative action, with two swinging justices. The replacement of Powell J. by Justice Kennedy will most probably see the Court evenly divided into two alliances of four, with O'Connor J. holding the casting vote.

(a) Wygant

Wygant involved a layoff provision in a collective bargaining agreement between the Jackson Board of Education and the Jackson Education Association (the Union). The agreement provided, among other things, that where layoffs became necessary, they would not result in a greater percentage of minority employees being laid off than the existing percentage of minority teachers employed. The effect of this provision was to qualify a system based purely on seniority: a more senior white teacher might have to be laid off instead of a less senior minority teacher in order to preserve the overall percentage of minority teachers in the system.

Two years after signing the agreement, the Board refused to honour this provision. The Union sued in a state court and succeeded in a breach of contract claim.[14] After the layoff provision was upheld in the court the Board adhered to it, but two non-minority teachers who had been laid off sued in the District Court, alleging violations *inter alia* of the

---

[9] *Wygant.*

[10] In *Wygant* Stevens J. filed a separate dissenting opinion, in *Paradise* and *Johnson* he filed separate concurring opinions; and in *Sheet Metal Workers* and *Firefighters* he joined the opinions of the majority (though in *Sheet Metal Workers* only in part) without filing a separate opinion.

[11] In all five cases White J. filed his own, separate opinion: concurring in *Wygant*, and dissenting in the other four cases.

[12] In *Wygant.*

[13] In *Firefighters* and *Johnson.*

[14] Earlier the union sued in a federal court claiming a violation of the Constitution and the Civil Rights Act, but the federal court concluded it lacked jurisdiction and declined to exercise pendant jurisdiction over the state law contract claims.

14th Amendment's Equal Protection Clause. The District Court upheld the constitutionality of the layoff provision, holding that racial preferences were permissible under the Equal Protection Clause as an attempt to remedy the effects of societal discrimination by providing "role models" for minority schoolchildren.

The Supreme Court overturned this decision. In a 5 to 4 judgment the Court held that the layoff provision violated Title VII of the Civil Rights Act. The basis of the majority view, announced by Powell J., was that general societal discrimination did not justify the granting of racial preferences, since there must be at least some evidence of actual discrimination by the employer. Powell J., joined by Burger C.J. and Rehnquist J., reiterated his view that all racial distinctions are inherently suspect and call for strict scrutiny regardless of whether a group disadvantaged by the classification has, or has not, historically been subject to governmental discrimination.[15] In a separate concurring opinion, White J. invoked the analogy of a provision which required that non-minority members of a workforce be discharged while minority members were hired until the latter comprised a suitable percentage of a workforce.[16] Four of the above-mentioned judges did not regard the plan as narrowly tailored, a point O'Connor J. (who concurred in the judgment) left open.[17] In two separate dissents, Marshall J. (joined by Brennan and Blackmun JJ.) defended the plan as narrowly tailored to preserve minority representation and achieve meaningful integration,[18] while Stevens J. claimed that the layoff provision advanced the public interest in providing education by an integrated, multiracial faculty.[19]

(b) Sheet Metal Workers

In *Sheet Metal Workers* the Court considered the case of a union which had been found guilty of discrimination under Title VII of the Civil Rights Act of 1964. Among other things, the District Court ordered a non-white membership goal of 29% by July 1981. This was affirmed by the Court of Appeal, and on remand a revised program was adopted with a time extension. In 1982 and 1983 the union was found guilty of civil contempt for disobeying the court's orders, and an amended goal was set for August 1987. The Union challenged the judgment (subsequently upheld by the Court of Appeal) and the Supreme Court upheld the affirmative-action plan by 5 to 4. Brennan J., joined by Marshall, Blackmun and Stevens JJ., and supported in a separate opinion by Powell J., agreed that a district court may, in appropriate circumstances, order preferential

---

[15] *Wygant* at 4481.
[16] *Id.* at 4487.
[17] *Id.* at 4486-87.
[18] *Id.* at 4487-92.
[19] *Id.* at 4492-94.

relief benefiting individuals who are not the actual victims of discrimination.[20] O'Connor J. concurred in part (on matters which are irrelevant to the discussion here)[21] and dissented in part, claiming that the "goal" operated as a racial quota. White J. dissented on similar grounds, although he admitted that Title VII did not bar relief to non-victims of discrimination in all circumstances.[22] More unambiguously, Rehnquist J. (whom Burger C.J. joined) dissented on the grounds that Title VII forbade racial preferences by an employer which displace non-minorities, except to minority individuals who have been the actual victims of that employer's past racial discrimination.[23]

(c) Firefighters

In the *Firefighters* case, the Court upheld by a vote of 6-3 a consent decree entered into by the City of Cleveland to settle a race discrimination lawsuit brought by an organization of black and Hispanic firefighters who had charged the City with discrimination on the basis of race and national origin in hiring, assigning and promoting firefighters. The firefighters' union objected to the decree which provided for the use of race-conscious relief and other affirmative-action measures in promoting firefighters. Brennan J. (joined by Marshall, Blackmun, Powell, Stevens and O'Connor JJ.) declared that the law did not preclude consent decrees that may benefit individuals who were not the actual victims of a defendant's discriminatory practices. He based this conclusion on the analogy of *Weber*'s support for voluntary action by employers and unions,[24] and also on a discussion of the remedial authority of a federal court and the union's rights in the litigation.[25] O'Connor J. concurred, emphasizing the narrow character of the Court's holding, and the importance of "prior discriminatory conduct" as a predicate for a "temporary remedy favoring black employees".[26] White J. dissented on the basis of the unfair burden imposed upon senior and better qualified white firefighters who missed out on the promotion process,[27] while Rehnquist J. (with whom Burger C.J. joined) based his dissent on the analogy with *Stotts*,[28] claiming that only actual victims of discriminatory practices may be given preferential promotions.[29]

---

[20] *Sheet Metal Workers* at 4991-5000.

[21] Namely on the issue of the use of statistical evidence in evaluating the Union's membership practices, on the contempt fines *qua* remedies for civil contempt, and on appointment of an administrator with broad powers to supervise the Union's compliance with the court's orders, *id.* at 5002-05.

[22] *Id.* at 5005.

[23] *Id.* at 5005.

[24] *Firefighters* at 5009-11.

[25] *Id.* at 5011-13.

[26] *Id.* at 5013.

[27] *Id.* at 5013-14.

[28] 467 U.S. 561 (1984).

[29] *Firefighters* at 5014-15.

(d) Paradise

The *Paradise* case arose out of protracted litigation with the Alabama Department of Public Safety. In 1972 the District Court held that the Department had systematically excluded blacks from employment in violation of the 14th Amendment, and ordered the hiring of one black trooper for every white trooper until blacks constituted 25% by the force. The District Court later clarified the order by indicating that it applied to 25% of the force as a whole and not just 25% of the entry level positions. A consent decree was entered in 1979 and another in 1981 regarding the implementation of a promotion system within the Department. In 1984 the Department needed to promote 15 troopers to corporal, and proposed that 4 of them be black, pending the implementation of a satisfactory scheme. Instead, the District Court ordered that 50% of all promotions should go to blacks if qualified applicants were available. In 1984 such a plan was introduced for corporals, and later the same year, for sergeants.

The United States challenged the relief on the basis that it violated the 14th Amendment. The majority, whose opinion was announced by Brennan J. (with Marshall, Blackmun and Powell JJ. joining, and with Stevens J. filing a separate concurring opinion), left open the issue of the level of scrutiny required, stating that the plan challenged would survive even strict scrutiny since it was narrowly tailored to the compelling state interest of remedying past and present discrimination by a state actor (the Department) which had been involved in "egregious discriminatory conduct".[30] There was no other effective remedy to the Department's past, pervasive discrimination;[31] the flexibility of the plan was assured by the condition that only qualified blacks be promoted, and by the plan's temporary nature.[32] In a concurring opinion Powell J. reiterated his *Fullilove*[33] standard of a narrowly drawn affirmative action remedy[34] while Stevens J., who concurred in the judgment, analogized the case with the school desegregration decision *Swann* v. *Charlotte-Mecklenburg Bd. of Education*[35] which announced the principle (relevant, according to Stevens J., to *Paradise*) that race-conscious remedies are obviously required to remedy racially discriminatory actions by the State. In her dissent, joined by Rehnquist C.J. and Scalia J., O'Connor J. accepted that there was a compelling government interest in remedying past and present discrimination by the Department[36] but denied that the relief was narrowly tailored, and that the rights of non-minority workers had been properly

---

[30] *Paradise* at 4216.

[31] *Id.* at 4217-8.

[32] *Id.* at 4218-9.

[33] 448 U.S. 448 (1980).

[34] *Paradise* at 4221.

[35] 402 US 1 (1971).

[36] *Paradise* at 4223.

protected.[37] White J., agreeing generally with Justice O'Connor, based his dissent on the "evident" fact that the District Court had exceeded its equitable powers in devising a remedy.[38]

(e) Johnson

Finally, the *Johnson* case saw the Supreme Court reviewing its earlier affirmative action cases and summarizing their overall effect. This case involved a plan by the Transportation Agency of Santa Clara County which provided that when making promotions to positions within a traditionally segregated job classification in which women and minorities had been significantly underrepresented, the Agency was permitted to take sex and ethnicity into account as one factor for appointing a qualified applicant. Such a position in the Agency fell vacant and seven people were deemed qualified to be appointed. A female applicant, Diane Joyce, who had scored 73 on the first interview, was appointed after representations by the Affirmative Action Office Coordinator, although a male applicant, Paul Johnson, who had scored 75 on the first interview, had been recommended after the second interview. The Agency Director who made the appointment was authorized to appoint any of the seven qualified applicants irrespective of the recommendation. Johnson challenged the plan on the basis of discrimination under Title VII of the Civil Rights Act of 1964. The federal District Court found the Agency's plan invalid under the criterion announced in *Weber* that the plan be temporary, but the Court of Appeals reversed the decision.

The Supreme Court upheld the Agency's plan on the strength of *Weber* by 6 to 3. Brennan J. (with Marshall, Blackmun, Powell and Stevens JJ. joining) found that the plan fully met the *Weber* test,[39] and that in justifying the plan it was not necessary for an employer to point to its own discriminatory practices but that it need only point to a conspicuous imbalance in traditionally segregated job categories.[40] Stevens J. wrote a separate concurring opinion in which he restated his views about voluntary affirmative-action programs.[41] O'Connor J. concurred in the judgment, primarily on the basis that the preference involved in the Agency's plan did not amount to a strict quota,[42] but she expressed her disagreement with Stevens J. that there might be any justifications for affirmative action other than to eliminate actual discrimination.[43] In an emphatic and eloquent dissent, which marked his debut in the fight against the constitutionality of affirmative action,[44] Scalia J. (joined by Rehnquist

---

[37] *Id.* at 4224.

[38] *Id.* at 4225.

[39] See *infra* note 101.

[40] *Johnson* at 4382-86.

[41] *Id.* at 4386-88.

[42] *Id.* at 4390.

[43] *Id.* at 4388.

[44] Earlier Scalia J. joined the dissenters in *Paradise*, without however filing an opinion of his own.

C.J.) urged the overruling of *Weber*. The effect of the decision in practice, Scalia J. warned, would be that a minimally qualified minority member would be selected to meet a "goal" regardless of the comparative merits of the applicants.[45]

II. Issues and Doctrines

(a) Past Discrimination

One important area of disagreement among the judges is the issue of how strict and precise the evidence of past discriminatory practices must be in order to validate remedial affirmative action. The "liberals", not surprisingly, take the most relaxed approach to the need to establish past discrimination. The general position of Brennan, Marshall and Blackmun JJ. is that to justify an affirmative action plan an employer need not point to its own prior discriminatory practices or even evidence of an arguable violation: it is enough that there is a "conspicuous imbalance in traditionally segregated job categories".[46] This proposition, one needs to emphasize, was made in *Johnson* by the three liberal judges with reference to a *voluntary* employer agreement, and was justified by Title VII's purpose of eliminating the effects of discrimination in the workplace. In *Sheet Metal Workers*, which presented a different issue because the Union had been found guilty of past discrimination, the three judges (joined by Stevens J.) rejected the claim that affirmative action may benefit only "the identified victims of past discrimination".[47] The judges see the bottom line in the guarantee that a "mere" racial imbalance between a workforce and its relevant labour market cannot warrant the court ordering an employer to adopt racial preferences to correct such an imbalance.[48] However, when an employer (or a union) has engaged in longstanding or egregious discrimination, it may not be good enough to require it to cease such discriminatory practices and award relief to particular individuals victimized by such practices.[49] It may be necessary to require the employer to take "affirmative steps to end discrimination effectively to enforce Title VII"[50] and since its general purpose is to dismantle prior patterns of employment discrimination, such relief has to be "provided to the class as a whole rather than to individual members".[51] It follows that beneficiaries of affirmative action need not show that they were themselves victims of discrimination.[52]

---

[45] *Johnson* at 4395.

[46] *Id.* at 4383, quoting *Weber* at 209 (Blackmun J., concurring). On the ambiguity of the phrase "traditionally segregated job category", see *Johnson* at 4393-94 (Scalia J., dissenting).

[47] *Sheet Metal Workers* at 4992.

[48] *Id.* at 4992.

[49] *Id.* at 4991.

[50] *Id.* at 4991.

[51] *Id.* at 4998.

[52] *Id.* at 4998.

O'Connor J. came close to this position, though she appeared more strict in defining the basis for "determining that affirmative action is warranted".[53] As a general principle she rejected the view that, in the cases of a voluntary action undertaken by a public employer, a specific finding of past discrimination is necessary. In a lengthy argument, she claimed that such a requirement would be a powerful counter-incentive for public employers to "meet voluntarily their civil rights obligations".[54] At the same time, she rejected the tendency to justify affirmative action by an appeal to "societal" discrimination. Hence, the line O'Connor J. drew was between "societal" discrimination (which is not a proper basis for affirmative action) and "apparent prior employment discrimination".[55] While an employer need not establish specific instances of the latter, it must nevertheless have a "firm basis" for believing that remedial action is required.[56] Such a "firm basis" (described also as a "compelling basis" and "reliable benchmarks"),[57] may consist in a statistical disparity (for instance, between the percentage of qualified blacks in a given institution and the percentage of qualified blacks in the relevant labour pool)[58] which must be strong enough to support a prima facie claim of discrimination under Title VII.[59]

Powell J., in a similar vein, insists on "some showing of prior discrimination by the governmental unit involved"[60] in order to justify a remedial racial classification. While he allows proof from statistical disparity, it must not be a disparity *per se* but only as evidence of prior governmental discrimination: "societal discrimination" is definitely insufficient.[61] In his rejection of societal discrimination or mere statistical disparity as sufficient grounds in themselves for remedial racial classifications, he goes as far as to mention the need for "particularized findings"[62]—but he fails to draw unambiguous conclusions as to the nature of such findings.

This is evident in the opinions of the Court's "conservatives", and their position is best exemplified by Scalia J.'s opinion in *Johnson* (joined by Rehnquist C.J. and White J.). He began his opinion by saying that the Agency was neither found guilty of prior discrimination, nor could its affirmative action be construed as aimed "to replicate what a lack of discrimination would produce".[63] He restated emphatically *Wygant*'s

---

[53] *Wygant* at 4486.

[54] *Id.* at 4486.

[55] *Id.* at 4486.

[56] *Id.* at 4486; *Johnson* at 4388.

[57] *Wygant* at 4486.

[58] *Id.* at 4486.

[59] *Id.* at 4486; *Johnson* at 4388.

[60] *Wygant* at 4481.

[61] *Id.* at 4481-2.

[62] *Id.* at 4482. Very significantly, this is the only judgment (from among the five decisions under discussion) in which Burger C.J. and Rehnquist J. (as well as O'Connor J.) joined Powell J.'s opinion.

[63] *Johnson* at 4391.

conclusion (without mentioning that *Wygant* involved layoffs rather than promotion—a difference he obviously deemed irrelevant) that affirmative action could not be justified by "societal discrimination", much less by "societal attitudes that have limited the entry of certain races, or of a particular sex, into certain jobs."[64] A consistent position adopted by the Court's conservatives is that courts may order racial preferences which displace non-minorities only in favour of those minority individuals who have been actual victims of a particular employer's racial discrimination.[65] It is significant that Scalia J. used *Sheet Metal Workers* to argue that the majority of six set very strict limitations upon relief for persons who were not identifiable victims of discrimination (such as "persistent or egregious discrimination" and "particularly egregious conduct").[66] In his dissent in *Johnson* Scalia J. claimed that the majority in the case departed from these narrow and strict conditions: this implies that he would impose the same limitations upon affirmative action with regard to voluntary programs as with regard to court-ordered plans.[67]

There are four comments which can be made about the requirement for finding identifiable cases of discrimination against particular victims in order to justify preferences. For one thing, this requirement would undermine the possibility of achieving those future-oriented goals of affirmative action which are not strictly related to compensation for past discrimination, but which aim at achieving more balance and integration in employment, education etc. Difficulties, endemic to trying to provide actual proof of past acts of discrimination, would make these goals unachievable in the near future. Hence, to read the 14th Amendment and the Civil Rights Act in a race- and sex-blind manner, and to restrict the preferences to remedies awarded to identifiable victims of particular illegal acts of discrimination, would be to defeat the purpose of Title VII which, arguably, was to promote and improve employment opportunities for disadvantaged minorities.

Second, the nature of past discrimination (in cases of race- or sex-stratified societies) has been such that it has often operated effectively *before* a member of a disadvantaged group has had an opportunity to apply for an admission or promotion. In *Teamsters*[68] the Supreme Court announced, *inter alia*, that "nonapplicants" can be shown to be victims of unlawful discrimination, if they were deterred from applying for jobs by an employer's discriminatory practices.[69] Explaining this principle, which is at variance with the requirement of "identifiable victims of

---

[64] *Id.* at 4392.

[65] *Sheet Metal Workers* at 5005 (Rehnquist J., dissenting).

[66] *Johnson* at 4393.

[67] "There is no sensible basis for construing Title VII to permit employers to engage in race- or sex-conscious employment practices that courts would be forbidden from ordering them to engage in following a judicial finding of discrimination", *id.* at 4393 (Scalia J., dissenting).

[68] *International Bro. of Teamsters* v. *United States*, 431 U.S. 324 (1977).

[69] *Id.* at 366-72.

identifiable violations", Stewart J. (delivering the opinion of the Court, in which no "conservative" dissents were filed)[70] said:

> The denial of Title VII relief on the ground that the claimant had not formally applied for the job could exclude from the Act's coverage the victims of the most entrenched forms of discrimination. Victims of gross and pervasive discrimination could be denied relief precisely because the unlawful practices had been so successful as totally to deter job applications from members of minority groups. A *per se* prohibition of relief to nonapplicants could thus put beyond the reach of equity the most invidious effects of employment discrimination—those that extend to the very hope of self-realization.[71]

Third, to deny "societal" discrimination a role in the scrutiny of unfair disadvantage amounts to ignoring the most effective and pervasive way women and minorities have been excluded from the system of distribution of social benefits. Past racial segregation which confined black children to lower-quality schools; hostility of white-dominated unions towards black employees; protective labor legislation which denied women employment and union membership in a wide range of positions—these are examples of the ways in which *present* disadvantages are directly related to past societal discrimination.

Fourth, while it is true that statistical disparities between the number of members of a given group in particular positions in society and the proportion of this group in a community are not sufficient proof of discriminatory practices, they help, when combined with our empirical knowledge about the history of discrimination, to establish that drastic imbalance is most likely the product of discrimination. This is only a *prima facie* indication, and Scalia J. is right in rejecting a presupposition that particular groups will gravitate towards all social positions in the exact proportion of their numerical percentage in a society.[72] On the other hand, common sense suggests that significant imbalances in *desired* social positions (that is, positions to which the groups in question undoubtedly aspire) can be traced (in the absence of better explanation) to their unfavourable position in a society, over which they have no control. This is certainly a rebuttable presumption, and it may well be that in particular cases an explanation can be found for why particular groups are over- or under-represented in various professions, schools and social positions, but—in the light of a documented history of discrimination in a given nation—it seems to be the minimum requirement that the burden of proof be on those who would defend drastic imbalances as unrelated to discrimination.

---

[70] Marshall J. dissented in part, Brennan J. joined him. The grounds of their dissent do not detract from the principle relevant here; *id.* at 378-95.

[71] *Id.* at 368.

[72] *Johnson* at 4391.

(b) Standard of Review

None of the judges in the decisions discussed endorsed any of the two possible extreme positions: that racial classifications are *per se* invalid regardless of the purpose of regulation, or that racial classifications in the remedial context warrant only a minimum, "rational basis" standard of judicial scrutiny (that is, requiring merely that a classification be rationally related to a legitimate governmental purpose). So the consensus opinion of the Court may be formulated as being that racial classifications may *sometimes* be valid, but the criteria for testing its validity are more stringent than in the case of any "non-suspect" classification. Here the consensus ends. The controversy about the proper level of scrutiny is of central importance, because the answer to this preliminary question is in practice decisive for the outcome of the case: the adoption of the highest level of scrutiny has almost always resulted in the invalidation of a classification[73] and so it has earned the description of being " 'strict' in theory and fatal in fact",[74] while the application of a less stringent test (though still stricter than the rational-basis test) leads, more often than not, to the upholding of a classification.

Disagreement centres around three questions. First: should there be a uniform test for all racial (or sex-conscious) classifications, regardless of the "benign" purpose of a regulation or, alternatively, should a "benign" program (aimed at helping, rather than disadvantaging, an otherwise disadvantaged minority) be subject to a less strict scrutiny than the programs which have adverse affects upon such groups? Second, how important must the purpose of a classification be in order to justify the use of "suspect" (or "quasi-suspect", as in the case of sex) classifications in the remedial context? Third, what is the required relationship between a classification and the purpose of regulation; in other words, how closely "tailored" to its purpose must the classification be in order to be upheld? While in the recent tradition of equal-protection decisions the labels given by the judges to describe their preferred level of scrutiny varied and included "a most searching examination",[75] "the most exact connection between justification and classification",[76] "the most exacting judicial examination"[77] and "strict . . . review",[78] what really matters is the degree

---

[73] Until now the only instance of racial classification that survived strict scrutiny was in the first case where strict scrutiny based on "suspect classification" was announced, *Korematsu* v. *United States*, 323 U.S. 214 (1944). No classification aimed at benefiting a racial minority passed the strict scrutiny test before the *Sheet Metal Workers* case, where a majority suggested that the classification *would* survive even the strictest scrutiny, at 5000.

[74] *Wygant* at 4489 (Marshall J., joined by Brennan and Blackmun, JJ. dissenting), *Bakke* at 362 (Brennan J., joined by White, Marshall and Blackmun JJ., dissenting in part and concurring in part), quoting Gunther, "The Supreme Court, 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection", *Harv. L.Rev.* 86 (1972) 1, 8.

[75] *Fullilove* at 492 (opinion of Burger, C.J., joined by White and Powell JJ.).

[76] *Id.* at 537 (Stevens J., dissenting).

[77] *Bakke* at 291 (opinion of Powell J.).

[78] *Id.* at 361 (Brennan J., joined by White, Marshall and Blackmun JJ.,dissenting in part and concurring in part).

of "fit" between a classification used and the remedial purposes to be achieved.[79]

The liberal judges would apply an intermediate level of scrutiny to the classifications aimed at eliminating the effects of past discrimination. Brennan, Marshall and Blackmun JJ. consistently apply their standards and argument developed back in *Bakke* (where White J. had joined them) that while racial distinctions are irrelevant to "nearly all" legitimate state objectives, they are highly relevant to the objectives of remedying the effects of past discrimination. In these cases, something less than the strictest (though higher than merely a "rational basis") scrutiny should be applied.[80] The argument for lowering the standard of scrutiny is that non-beneficiaries of the classification in question (e.g. whites) do not have the characteristics of a "suspect class", so they do not need any extra protection from governmental action in the form of judicial scrutiny.[81] While in the decisions under discussion the "liberal" group did not elaborate on this, in *Bakke* it was explained that whites are not saddled, as a group, with any special disabilities, nor have they been subjected to a history of unequal treatment, nor reduced to such a position of political powerlessness as to require any special protection from the democratic, majoritarian process.[82] On the other hand, the argument for applying a higher than merely minimum scrutiny is that "any racial classification is subject to misuse".[83] Again, this has been elaborated in *Bakke* in an argument that race classifications may reinforce racial stereotypes and stigma, and are based on immutable characteristics, contrary to the widely held beliefs about the role of individual merit and achievement.[84] A resulting judicial test is whether the aims served by a classification are "*important* governmental objectives" and, second, whether the classification is "*substantially* related to achievement of those objectives".[85]

In *Wygant* the application of this "intermediate" level of scrutiny was somewhat obscured by the assertion by Marshall J. that the affirmative plan "would pass constitutional muster, no matter which standard the Court should adopt".[86] Hence, while he focused his attention on the second tier of scrutiny, showing that the plan was "narrowly tailored" and that it was the "least burdensome of all conceivable options",[87] he said

---

[79] This is emphasized by O'Connor J. in *Wygant* at 4485.

[80] As a matter of fact, in *Bakke* Brennan J. used the adjective "strict" to describe his level of scrutiny, but qualified it immediately: "[O]ur review under the Fourteenth Amendment should be strict—not ' "strict" in theory and fatal in fact,' because it is stigma that causes fatality—but strict and searching nonetheless", *Bakke* at 361-62 (Brennan J., joined by White, Marshall and Blackmun JJ., dissenting in part and concurring in part).

[81] *Wygant* at 4489.

[82] *Bakke* at 357.

[83] *Wygant* at 4489.

[84] *Bakke* at 360-61.

[85] *Wygant* at 4489, emphases added.

[86] *Id.* at 4489.

[87] *Id.* at 4491.

somewhat cryptically that the aim of promoting diversity and integration of the school teaching staff for the benefit of the students "satisf[ies] the demands of the Constitution".[88]

In those passages where they attempt to define and characterize the aims of affirmative action, the liberal judges translate *Weber*'s purpose of "break[ing] down old patterns of racial segregation and hierarchy"[89] into the more workable aims of "remedying underrepresentation"[90] and "eliminat[ing] . . . work force imbalances in traditionally segregated job categories".[91] The saving grace of an affirmative-action promotion plan is, for them, in accordance with one of the *Weber* tests, that it is intended to *attain* a work force which reflects the balance in the relevant labour pool, and not to *maintain* one.[92] They see the aim of preferential policy in layoffs as "to preserve the levels of faculty integration achieved through the affirmative hiring policy adopted in the early 1970's";[93] since the policy of employing minority teachers was of a "very recent vintage", the application of a straight seniority system would lead to the reversal of this degree of racial integration on the school faculties which had already been achieved.[94] They also justified the need for school integration by pointing to the fact of racially motivated violence, which had erupted at the schools, "interfering with all educational objectives".[95] This last argument suggests that Marshall, Brennan and Blackmun JJ. do not preclude the use of utilitarian, future-oriented goals in justifying affirmative action, though no doubt compensatory arguments, related to the elimination of the present effects of past discrimination prevail in their opinions.[96] This is evident when they describe, in the context of the aim of fostering equal employment opportunities, a tradition of "longstanding or egregious discrimination".[97]

The liberal judges' main focus is, however, on the second prong of scrutiny, i.e. on the means-ends relationship. In *Sheet Metal Workers* they described the court-imposed union membership goal as "necessary to combat the lingering effects of past discrimination"[98] and asserted that it was "narrowly tailored to further the Government's compelling interest in remedying past discrimination".[99] In *Sheet Metal Workers*,

---

[88] *Id.* at 4490. The formulation is imprecise because any "legitimate governmental purpose" also satisfies the demands of the Constitution (all purposes not forbidden by the Constitution are "legitimate"), and yet not any such purpose meets the conditions of an "intermediate" scrutiny.

[89] *Weber* at 208, quoted in *Johnson* at 4383.

[90] *Johnson* at 4384.

[91] *Id.* at 4385.

[92] *Id.* at 4385; see *Weber* at 209.

[93] *Wygant* at 4489.

[94] *Id.* at 4488.

[95] *Id.* at 4490.

[96] See, e.g., *Paradise* at 4216.

[97] *Sheet Metal Workers* at 4991, see also *Paradise* at 4216.

[98] *Sheet Metal Workers* at 4999.

[99] *Id.* at 5000.

Wygant, as well as in *Paradise*, their strategy has been to concede that there is no consensus in the Court about the level of scrutiny to be applied to racial classifications made for remedial purposes, but that the classifications before them would in any case survive even the strictest scrutiny.[100] In *Johnson* they used the standards of *Weber*[101] and throughout the opinion analogized between racial and sex-conscious affirmative action without ever suggesting that these two types of classifications may warrant different standards of review.[102]

Powell J. provides the most important and influential alternative to the liberal judges' intermediate test theory. Consistently with his *Bakke* opinion, he has reiterated in the decisions under discussion his theory that the standard of judicial scrutiny is uniform in the racial-classification cases, regardless of the purpose of classification, and of whether the regulation is "benign" in the sense of aiming at benefitting a disadvantaged class. All distinctions based on race are inherently suspect and must be subject to "the most exacting judicial examination".[103] This involves two limbs: firstly a racial classification must be justified by a compelling governmental interest, and secondly the means chosen to effectuate this purpose must be "narrowly tailored" to the achievement of that goal.[104] It is noticeable that, since *Fullilove*, Powell J. has considerably lowered the level of the second tier of his test, no longer relying on a traditional formula that the means chosen must be "necessary" to the achievement of the compelling end,[105] but rather that they must be narrowly tailored (or, in another formulation, that they must be "specifically and narrowly framed").[106] Admittedly, this test is much easier to meet. One may say that Powell J. has in fact opted for an intermediate test *sans le dire*; the only (and very significant) difference between him and the liberal judges seems to be that he refuses to apply a "different" level of scrutiny to "invidious" and "benign" discriminations.

This, however, is not certain, as there is some degree of ambiguity about Powell J.'s understanding of "narrow tailoring". In two of the cases discussed he reiterated his own *Fullilove* test for a narrowly drawn affirmative-action remedy:

> (i) the efficacy of alternative remedies; (ii) the planned duration of the remedy; (iii) the relationship between the percentage of

---

[100] *Sheet Metal Workers* at 4999-4950, *Wygant* at 4489, *Paradise* at 4215-16.

[101] In *Weber* an affirmative action plan was upheld on the grounds that: (1) its purposes mirrored those of Title VII of the Civil Rights Act of 1964 (to break down old patterns of racial segregation and hierarchy); (2) the plan did not unnecessarily trammel the interests of non-beneficiaries; and (3) the plan was a temporary measure, not intended to maintain a racial balance but simply to eliminate a manifest racial imbalance, *Weber* at 209-10.

[102] *Johnson* at 4382-6.

[103] *Bakke* at 291, *Wygant* at 4481, *Sheet Metal Workers* at 5001; see also *Paradise* at 4221-22 ("court-ordered or government-adopted affirmative action plans must be most carefully scrutinized").

[104] *Fullilove* at 480, *Wygant* at 4481, *Sheet Metal Workers* at 5001.

[105] *Bakke* at 305.

[106] *Wygant* at 4483.

> minority workers to be employed and the percentage of the minority group members in the relevant population or work force; (iv) the availability of waiver provisions if the hiring plan could not be met; and (v) the effect of the remedy upon innocent third parties.[107]

The application of one and the same test led Powell J. to accept an affirmative-action plan in *Sheet Metal Workers* and to reject another in *Wygant.* He appears to be arguing in *Sheet Metal Workers* that no other effective remedy was available to the Court, other than to impose the membership goal upon the union,[108] while in *Wygant* he claimed that "less intrusive means of accomplishing similar purposes [i.e. of remedying prior discrimination] . . . are available".[109] On a closer reading, however, his distinction turns out to be unconvincing: neither in *Sheet Metal Workers* did he discharge the burden of showing that no other effective remedy was possible, nor in *Wygant* did he demonstrate the lack of other, "less intrusive means". His own example of such alternative means: "the adoption of hiring goals",[110] is clearly unconvincing because the whole problem of the case was that it became necessary to *lay off* teachers. It is puzzling to see how the adoption of hiring goals may improve the percentage of minority members in the school faculties when schools are forced to reduce their staff.[111] The only explanation of this inconsistency in Powell J.'s reasoning seems to be that he applied two different tests in *Sheet Metal Workers* and in *Wygant,* and that the application of these different tests resulted from the fact that *Sheet Metal Workers* was about union membership (an issue related to hiring) while *Wygant* was about the firing of employees. "Narrow tailoring" in *Sheet Metal Workers* was interpreted in a loose and lenient way (i.e. without any serious investigation of alternative remedies), thus bringing it close to an intermediate level of scrutiny, while in *Wygant* it was interpreted in a very rigorous way, having the effect of elevating the test to the level of the strictest scrutiny. The upshot of this argument is that Powell J. has not been faithful to his own basic principle that the level of scrutiny must remain constant in all racial classifications, although the differentiating factor resides not, as in the case of liberal judges, in the benign/invidious distinction, but rather, in the nature of the burden imposed upon the non-beneficiaries. If that is the case, then Powell J.'s reasoning strikes me as unprincipled: I fail to see any genuine significance in the difference between the effects of preferential hiring and preferential lay-offs. In a situation of shrinking job markets and large unemployment, the effects seem to be equally devastating to those who are displaced by an affirmative action program

---

[107] *Fullilove* at 510-11; see also *Sheet Metal Workers* at 5001, *Paradise* at 4221

[108] *Sheet Metal Workers* at 5001.

[109] *Wygant* at 4484.

[110] *Id.* at 4484.

[111] This is pointed out by Marshall J. who, in a direct polemic with Powell J. says: "As a matter of logic as well as fact, a hiring policy achieves no purpose at all if it is eviscerated by layoffs", *id.* at 4490. See also critique of Powell J.'s distinction by Stevens J., *id.* at 4494 n. 14.

in question. While the liberal judges can support their distinction between the two different levels of scrutiny in "benign" and "invidious" cases of classification by appeal to the arguments of compensatory justice and democratic principles of protecting "discrete and insular minorities", Powell J.'s distinction relies on contingent and unsubstantiated judgments about the alleged differences in the costs imposed by lay-off and hiring processes.

In his opinions, Powell J. firmly reiterates that the sole aim of affirmative action programs is remedying past or present discrimination,[112] but is adamant in rejecting remedying "societal" discrimination as a proper aim of such programs.[113] Attaining a particular balance in the work force is also disqualified.[114] He explicitly rejects "the role model theory", as applied to affirmative-action layoffs in public schools. One of the arguments of the Court of Appeals' judgment reversed in *Wygant* was "a need for more minority faculty role models"[115]—a need evidenced by the disparity between the percentage of minority teachers and the percentage of minority students. Powell J. asserted that "there is no apparent connection between the two groups".[116] His main objection to the "role model theory" was that it has "no logical stopping point", that it may justify more extensive discriminatory hiring and layoff practices than those warranted by remedial purposes, and that it bears no relationship to "the harm caused by prior discriminatory hiring practices".[117] It also presupposes an idea that "black students are better off with black teachers" which logically leads to the ideal of segregation.[118]

The aspect of Powell J.'s doctrine which holds that the level of scrutiny does not depend upon whether the non-beneficiaries have been discriminated against in the past or not, is presently shared by three other judges on the Court: Rehnquist C.J., O'Connor and Scalia JJ.[119] (and before his retirement, also by Burger C.J.).[120] O'Connor J. expresses her rejection of the benign/invidious discrimination distinction (or, rather, of its relevance to the standard of review) by saying that "the analysis and level of scrutiny applied to determine the validity of [a racial] classification do not vary simply because the objective appears acceptable to individual Members of the Court".[121] The words "simply because" disguise, in my view, the monumental difference between classifications which stigmatize a racial group as inferior and those which impose a burden upon a racial

---

[112] *Id.* at 4482.

[113] *Id.* at 4481.

[114] *Sheet Metal Workers* at 5001.

[115] *Wygant* at 4481.

[116] *Id.* at 4482.

[117] *Id.* at 4482.

[118] *Id.* at 4482.

[119] *Paradise* at 4223 (O'Connor J., joined by Rehnquist C.J. and Scalia J., dissenting).

[120] See *Wygant* 4480-84 (Powell J., joined by Burger C.J. and Rehnquist J.).

[121] *Id.* at 4484, quoting *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 724, n. 9 (1982).

group in order to right the historical wrongs against another group. Still, O'Connor J.'s statement has an attractive air of judicial deference and restraint. Further, O'Connor J. suggests (convincingly, I believe) that the difference between the "intermediate" test of the liberal judges and the "strict" test of Powell J. may be illusory, and that the distinction between a "compelling" aim (Powell J.'s first tier of the test) and an "important" purpose (the liberals' first tier) may be "a negligible one".[122] This seems to confirm what I have suggested above, namely, that in some contexts at least, Powell J.'s test is less stringent than he would have us believe. Rather than choosing between the adjectives "important" and "compelling" (an arguably fruitless enterprise), O'Connor J. simply asserts that the state interest must be "sufficiently weighty" to warrant remedial affirmative action.[123] It is interesting to note, however, that in *Wygant* O'Connor J. leaves open the possibility that there may be some unspecified compelling government interests justifying affirmative action other than to remedy prior discrimination.[124] She concentrates her attention on the second limb, correctly stating that the real controversy concerns the degree of "fit" between the classification and its aim. In *Wygant*, she concluded that the layoff provisions were not "narrowly tailored" to the aim of "remedying employment discrimination"[125] because the provision under challenge acted to maintain levels of minority employment without any regard to the percentage of qualified minority teachers within the relevant labour pool. Surprisingly, in the context of this argument O'Connor J. referred at one point to the absence of the "necessity of the layoff provision"[126] which would suggest that, after all, her interpretation of "narrow tailoring" resembles the most onerous requirement of "necessity" in the tradition of the strict-scrutiny doctrine of the Court. Elsewhere, she has protested against "a standardless view of 'narrowly tailored' far less stringent than that required by strict scrutiny".[127] In *Paradise* she complained that the District Court used a quota without considering any alternatives, which made it impossible to suggest that it was "necessary".[128] For this single reason, she concluded that the quota could not survive strict scrutiny, which she sometimes interprets in terms of "necessity"[129] and sometimes, somewhat more leniently, in terms of "narrow tailoring".[130]

Justice O'Connor's rather confused and ambiguous view of "strict scrutiny" is compounded by her assertion that "to survive strict scrutiny,

---

[122] *Wygant* at 4485.

[123] *Id.* at 4485-6.

[124] *Id.* at 4485.

[125] *Id.* at 4487.

[126] "[I]t is impossible to evaluate the necessity of the layoff provision as a remedy for the apparent prior discrimination absent reference to that goal", *id.* at 4487.

[127] *Paradise* at 4223.

[128] *Id.* at 4224.

[129] *Id.* at 4224; see also *Sheet Metal Workers* at 5004 (stating that race-conscious remedies may be allowed only when "truly necessary").

[130] *Paradise* at 4225.

the District Court order must fit with greater precision than any alternative remedy".[131] This allegedly "strict scrutiny" test is significantly lower than the traditional test of "necessity". It is one thing to say that a classification must be "necessary" to achieve a compelling aim, and it is another thing to say that it must fit the attainment of this aim "better" than any alternative remedy. The former test allows for the trumping of racial classifications even by "less precise" alternatives, whenever the costs of this diminished "precision" are outweighed by the benefits of not using a racial classification, with all its usual drawbacks. The latter test does not allow for such a calculus: a racial classification will survive strict scrutiny if all the alternatives fit the aim "less precisely". Such a prediction is relatively easy to make, if, for instance, "less precisely" means postponement in time, or higher side-effects in terms of under- and over-inclusiveness. Hence, the test of "greater precision", described by O'Connor J. herself as "strict scrutiny", is in fact substantially different (and much more lenient) than her own test of necessity. Furthermore, it is significant that the sentence about the "greater precision" test of strict scrutiny is immediately followed, in O'Connor J.'s judgment, by the approving reference to J. H. Ely—perhaps the most influential proponent of applying a lower than strict level of scrutiny to race-conscious affirmative action.[132]

While in none of the cases under discussion, do the other "conservative" judges, in their own opinions, conduct the discussion in terms of the levels of scrutiny,[133] in *Wygant* Burger C.J. and Rehnquist J. joined Powell J. who expounded his strict-scrutiny theory,[134] and Rehnquist C.J. and Scalia J. joined in O'Connor J.'s opinion in *Paradise*, described above.[135] The conservatives on the Court clearly confine the aim of racial or sex preferences to the granting of relief to "the actual victims of a particular employer's racial [or sex-based] discrimination".[136] Reduced to remedying particular victims of particular acts of illegal, *intentional*, discrimination,[137] affirmative action is virtually rejected. No wonder that Scalia J. talks about "affirmative-action discrimination"[138] and employers' alleged freedom "to discriminate through affirmative action".[139] As for White J., in none of the cases discussed here was his

---

[131] *Id.* at 4224.

[132] J. H. Ely, "The Constitutionality of Reverse Racial Discrimination", *U. Chi. L. Rev.* 41 (1974) 723, cited by O'Connor J. in *Paradise* at 4224.

[133] With the exception of one single mention in Scalia J.'s opinion who reminds the Court that race-conscious relief for non-victims of actual discrimination had to be "under narrowly confined circumstances", *Johnson* at 4393.

[134] *Wygant* at 4480-4.

[135] *Paradise* at 4223-5.

[136] *Sheet Metal Workers* at 5005 (Rehnquist J., joined by Burger C.J., dissenting); *Firefighters* at 5014-17 (Rehnquist J., joined by Burger C.J., dissenting); *Johnson* at 4391 (Scalia J., joined by Rehnquist C.J. and White J., dissenting).

[137] For a reference to "intentional" discrimination, which alone may generate a national consensus, see Scalia J. in *Johnson* at 4394.

[138] *Id.* at 4395.

[139] *Id.* at 4396.

opposition to affirmative action based on any explicit choice of a standard of review.

(c) Effect upon the non-beneficiaries

One persistent dilemma for affirmative-action programs, which makes them such a serious moral issue, is that they necessarily frustrate the expectations of those who would be hired, recruited, promoted, admitted etc., save for the program of preferences for a disadvantaged minority. It is endemic to any legal classification that a conferral of benefits upon one group is necessarily correlated with a denial of these benefits to all non-members of the group. But when is this denial of benefits so unfair that it creates a class of "victims" of the preferential-treatment program, and consequently that the classification should be condemned as discriminatory?

I have argued elsewhere that non-beneficiaries have a good case for complaining of being "victims" of a classification when it can be shown that their dignity, as citizens entitled to equal protection of laws, is impaired by an act or a programme.[140] While measuring the dignity infringed by a regulation is a very tall order, there are three tests which help assess the likelihood of such an impairment of dignity. They are contained in the following questions. First: does a challenged regulation stigmatize the non-beneficiaries as morally or intellectually inferior? This is because, historically, unfair discriminations have usually been the product of stereotypes and prejudice against a given group; their result was not merely to impose disadvantages upon a minority, but also to foster its sense of inferiority vis-a-vis the rest of society. Second: does a challenged classification add to the burdens of an already disadvantaged minority? The idea here is that legal discrimination tends to perpetrate, freeze and strengthen existing patterns of disadvantage. Third: is the group disadvantaged by a challenged classification alienated from the political and legislative process through which the rule in question was made? This relies upon the fact that, historically, invidious discrimination has usually been the product of ignorance or resentment against a politically powerless group, and that the burdens imposed upon dominant groups by themselves raise far less suspicion that they result from an unfair exploitation of their privileged access to the decision-making process. While the politically dominant, generally advantaged and non-stigmatized groups can still argue about the unfairness of a classification when the means used by a regulation are irrelevant to the achievement of a valid public purpose, the very fact of being denied advantages of a particular distribution of rights is insufficient to sustain the argument of being "victimized" by a classification.

---

[140] W. Sadurski, "*Gerhardy v. Brown* v. the Concept of Discrimination", *Sydney L. Rev.* 11 (1986) 5, 33-40.

The "liberal" judges in *Johnson* relied upon one of the tests of *Weber*, i.e. that the affirmative-action plan must not "unnecessarily trammel the interests of the [non-minority group] employees": in *Weber* the "non-trammelling" nature of the program was evidenced by the fact that the plan did not require "the discharge of white workers and their replacement with new black hirees", nor did it create "an absolute bar to the advancement of white employees".[141] In *Johnson*, the liberal judges extrapolated this test, coined as it was in respect of race-conscious preferences, to a plan aimed at eliminating the underrepresentation of one sex in a workforce in comparison to its proportion of the relevant labour market. They concluded that the Agency plan did not establish any rigid goal or quota: it merely allowed sex to be taken into account as one of numerous considerations, very much as race was taken into account in a Harvard Plan of student recruitment, commended by Powell J. in *Bakke*.[142] Hence, since women had to compete with all other qualified candidates and no positions were set aside for them, the *Weber* requirement of "not trammelling" the rights of non-preferred employees had been met: "*No* persons are automatically excluded from consideration; *all* are able to have their qualifications weighed against those of other applicants".[143]

In *Paradise* the liberals attached much weight to the fact that the affirmative-action plan was temporary, not so much as a relevant characteristic in its own right, but rather as one of the indicia of not imposing an unacceptable burden upon third parties.[144] Further, they supported the statement that "the temporary and extremely limited nature of the requirement substantially limits any potential burden on white applicants for promotion" by pointing out that, even when the quota was operating, a substantial number of whites were being promoted.[145] In effect, the plan resulted merely in a postponement of promotion for whites, not in its absolute denial.[146] They skillfully pointed to the contrast between promotion preferences and layoffs preferences (thus earning the support of Powell J. for their judgment and opinion), describing the burden resulting from the former as "diffuse"[147] and "not . . . intrusive".[148]

This avenue was not available to them in *Wygant*, however. This case represented the most dramatic dilemma from the point of view of harm imposed upon third parties: the hardship of losing a job is arguably

---

[141] *Weber* at 209.

[142] *Bakke* at 316-19, discussed in *Johnson* at 4385. That the plan challenged under *Johnson* considered sex only as *a* plus factor, is also emphasized by O'Connor J. in *Johnson* at 4390.

[143] *Johnson* at 4385, emphases in original.

[144] *Paradise* at 4220. Note, however, that in two other cases those same judges emphasize the indicium of temporariness as important in its own right, see *Sheet Metal Workers* at 4999 and *Johnson* at 4386.

[145] *Paradise* at 4220.

[146] *Id.* at 4220.

[147] *Id.* at 4220, quoting opinion of White J. in *Wygant*.

[148] *Paradise* at 4220, quoting opinion of Powell J. in Wygant.

higher than one of not being promoted. The strategy of Marshall J. here is very much like a classic argument of Ronald Dworkin made with respect to preferential university admissions: Dworkin argued that since there is no absolute *right* for anyone to be admitted in the first place, the "merit" represents the qualifications deemed most useful from the point of view of the general social purposes that the process of admissions is taken to serve.[149] If these purposes encompass promoting more racial integration and balance, then the race of an applicant automatically becomes an element of his or her "merit". Describing the layoffs provision in *Wygant*, Marshall J. said that "someone will lose a job under any layoff plan and, whoever it is, that person will not deserve it".[150] Since the principle of seniority is not so fundamental as to be immune to any modifications (a point supported in Marshall J.'s opinion by the precedent of other departures from strict seniority systems),[151] a racial preference which involved a departure from the seniority principle may be warranted when it serves an important purpose. The implication of this argument is that, while whites laid off as a result of the plan did not "deserve" it, neither would have blacks under the operation of the seniority system. The burdens imposed by the plan upon the whites, undisputable though they were, were not unfair.[152] (This is strengthened by the fact that the burdens resulting from the necessary layoffs were allocated to both minority and non-minority employees, proportionately to their portions of the faculty.[153] The departure from the straight seniority system was aimed at maintaining the achieved racial integrity, not at increasing the proportion of blacks; hence no "absolute burden or benefit [was placed] on one race").[154]

Incidentally, a somewhat similar argument was made with regard to a promotion system by Brennan J. in *Johnson*, where he said that Paul Johnson, an applicant who ranked highest after interviews, "had no absolute entitlement to the road dispatcher position",[155] since any of the seven applicants who were classified as qualified and eligible could have been

---

[149] R. Dworkin, *Taking Rights Seriously* (London: Duckworth 1978, 2nd ed) 227-29; *A Matter of Principle* (Harvard U.P., 1985) 298-99.

[150] *Wygant* at 4490.

[151] *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 775 (1976) (granting retroactive seniority to victims of employment discrimination); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 339-40 (1953) (bestowing enhanced seniority on those who had served in the military before employment); *Aeronautical Industrial District Lodge 727* v. *Campbell*, 337 U.S. 521, 529 (1949) (giving preferred seniority status to union chairmen); cited in *Wygant* at 4490-91.

[152] It may appear at first blush inconsistent that Marshall, Brennan, Blackmun and Stevens JJ. in one decision relied upon the layoffs/hiring distinction, see *Paradise* at 4220, and elsewhere *those same judges* denied, *contra* Powell J., any significance of this distinction, see *Wygant* at 4490-91 (Marshall J. joined by Brennan and Blackmun JJ., dissenting), 4494 n. 14 (Stevens J., dissenting). The difference between the attitude of these four judges to the layoffs/hiring distinction in *Wygant* and in *Paradise* can of course be explained by tactical considerations: knowing Powell J.'s position announced in *Wygant*, they could easily enlist his support for their position in *Paradise*, where the layoffs issue did not arise, and thus Powell would be prepared to distinguish the case from *Wygant* precisely on this basis.

[153] *Wygant* at 4488.

[154] *Id.* at 4491.

[155] *Johnson* at 4385.

legitimately promoted. Consequently, the denial of promotion "unsettled no legitimate firmly rooted expectation" on the part of Johnson:[156] a tacit implication is that perhaps the choice between these seven candidates should be guided by a legitimate public *purpose* of the plan, rather than by a desert, entitlement, or expectation of those concerned.[157]

O'Connor J. relies upon the *Weber* requirement of not trammelling unnecessarily the rights of non-minorities,[158] which she elsewhere describes cautiously as "provid[ing] some measure of protection to the interests of the employer's nonminority employees"[159] or "not impos[ing] disproportionate harm on the interests . . . of innocent individuals directly and adversely affected by a plan's racial preference".[160] She does not elaborate on this notion along the lines of the liberal judges, but rather seems to reduce the third-parties interests question to the matter of a "narrow tailoring" of, and a "firm basis" for, affirmative remedies.[161] She also defends a distinction between impermissible quotas and permissible goals on the basis of the harm that the former impose on innocent non-minority workers.[162]

As for Powell J., the degree and nature of harm imposed upon third parties is given much more attention than in O'Connor J.'s opinions, and this is the main reason why he distinguishes between *Wygant* on one hand and *Paradise* and *Sheet Metal Workers* on the other. He realistically observes that the very fact of imposing "some of the burden of the remedy" upon innocent persons is not, in itself, illegal;[163] however, in *Wygant* this burden was fully concentrated upon a few individuals (the non-minority teachers due to be laid off) with the effect that there was a "serious disruption of their lives".[164] In contrast, hiring goals, according to Powell J., impose a burden upon some innocent individuals which is more "diffuse" and less "intrusive".[165] This, as I have noted above, seems to be an unrealistic and unprincipled judgment.[166] Powell J. says, *inter alia*, that the burden imposed by hiring goals "often foreclos[es] only one of several opportunities", in contrast to layoffs which "often result[] in serious disruption of [the employees'] lives".[167] The contrast seems to be one of degree at the very best, and even then, it is hard to assert it seriously

---

[156] *Id.* at 4385.

[157] As I will show later, only Stevens J. makes express and open references to the future-oriented goals as warranting programs of affirmative action, see Part III of this Article.

[158] *Paradise* at 4224.

[159] *Johnson* at 4388.

[160] *Wygant* at 4485.

[161] See, e.g., *Wygant* at 4485-87, *Paradise* at 4322-25, *Johnson* at 4388-90.

[162] *Sheet Metal Workers* at 5003.

[163] *Wygant* at 4483.

[164] *Id.* at 4484.

[165] *Id.* at 4484, *Sheet Metal Workers* at 5002, *Paradise* at 4221.

[166] See text accompanying note 111 *supra.*

[167] *Wygant* at 4484, footnote omitted.

in this time of high unemployment. To rest such a fundamental legal and moral distinction (resulting, as was the case, in the difference between upholding and invalidating a plan) upon such a debatable difference is open to serious doubts.

Incidentally, it is interesting to note that both O'Connor and Powell JJ. consistently talk about *innocent* individuals that have to bear the burden of remedies to minorities.[168] This suggests that they would basically confine the discourse of affirmative action to reparations due to the victims by the *perpetrators* of discrimination. As one commentator noted, this is a doctrine of "sin", and it imposes significant limits upon our argument about preferential treatment.[169] I have elsewhere argued that, even within the perspective of "past-oriented" arguments about preferential treatment, the judgments of "innocence" and "guilt" are unnecessary to justify the moral duty of reparation.[170] The morality of compensation implies that the costs are to be borne by the perpetrators *and/or beneficiaries* of past discrimination. In societies where various groups suffer reduced opportunities of access to education or employment, the argument can be made out that the rest of society enjoys unearned advantages in their access. For instance, it could be shown perhaps that in the absence of past discrimination there would be a larger pool of qualified minority candidates::[171] affirmative action can be seen, then, as the removal of an unfair advantage to which a person is not morally entitled.[172] A trace of such an argument is discernible in the majority opinion in *Firefighters*, who quoted Judge Lambros of the District Court (who had approved the consent decree under challenge) as saying: "It is neither unreasonable nor unfair to require non-minority firefighters who, although they committed no wrong, *benefited from the effects of the discrimination* to bear some of the burden of the remedy".[173]

In his defence of the non-beneficiaries of affirmative action in the case under discussion, White J. twice used the "parade of horribles" argument with a very similar structure. In *Sheet Metal Workers*, he claimed that the requirement of attainment of a racial quota by a union is equivalent to judicial insistence on the displacement of white workers by the minority workers.[174] In *Wygant* he suggested that the preferential layoff provisions were equivalent to a hypothetical policy under which "it would be

---

[168] So is Rehnquist J., see *Sheet Metal Workers* at 5005.

[169] K. M. Sullivan, "Sins of Discrimination: Last Term's Affirmative Action Cases", *Harv. L. Rev.* 100 (1986) 78.

[170] W. Sadurski, "The Morality of Preferential Treatment", *Melb. Univ. L. Rev.* 14 (1984) 572, 599.

[171] For a similar argument, see *Bakke* 365-66 (Brennan J., joined by White, Marshall and Blackmun JJ., dissenting in part and concurring in part).

[172] See similarly B. R. Boxhill, "The Morality of Preferential Hiring", *Philosophy & Public Affairs* 7 (1978) 246, 261-68); D. Phillips, *Equality, Justice and Rectification* (London: Academic Press, 1979) 304-8.

[173] Quoted in *Firefighters* at 5008, emphasis added.

[174] *Sheet Metal Workers* at 5005.

permissible to discharge whites and hire blacks until the latter comprised a suitable percentage of the work force".[175] But this analogy, which was met with a rebuttal by Marshall J.,[176] is a rhetorical pin, exploiting the moral monstrosity of the hypothesis under which white (innocent) employees would be supplanted by blacks. Surely it is one thing to decide, on public policy grounds, about the discharge of a white teacher rather than a black one, once it is known that one of them has to be discharged anyway because of the reduction of jobs, but it is quite a different thing to lay off a white teacher *in order to* hire a black one.

Scalia J., in his dissent in *Johnson*, argued that Paul Johnson had been discriminated against through the operation of the affirmative action plan.[177] The plan involved a target, and those responsible for filling the positions were required to explain their failure to reach those targets. Hence, the easiest way out for any hirer within the Agency was to meet the target and not to have to explain the failure. In practice, therefore, the target would result in the Agency discriminating against male candidates by implementing a quota. Further, Scalia J. rejected the majority's claim, quoted above, that in the sex-conscious affirmative action plan under consideration no-one was automatically excluded from consideration and all were able to have their qualifications weighed against those of other candidates.[178] With a little help from Shakespeare, Scalia J. sarcastically notes that even if Johnson was entitled to have his qualifications weighed against those of other candidates, he was "virtually assured that, after the weighing, if there was any minimally qualified applicant from one of the favored groups, he would be rejected".[179]

This assertion seems unsupported. Firstly, as O'Connor J. showed, gender operated as one of the numerous considerations in the Agency's plan,[180] and not as a trump over all other criteria, as Scalia J. would have us believe. Secondly, the difference in the scores awarded to Johnson and Joyce is, in everyone's language, truly marginal: 75 and 73 respectively.[181] Scalia J.'s assertion that Johnson would be displaced by "any minimally qualified" candidate from a preferred group therefore cannot be verified, and certainly does not fit the facts of the case. Thirdly, the preference for Joyce may be seen as the removal of an unfair benefit Johnson enjoyed by virtue of the fact that Joyce's scores had been adversely affected by irrelevant considerations and stereotypes. As the majority reported, one of the interviewing panel members was on record as having

---

[175] *Wygant* at 4487.
[176] *Id.* at 4491 n. 5.
[177] *Johnson* at 4392.
[178] *Id.* at 4385.
[179] *Id.* at 4395.
[180] *Id.* at 4390.
[181] See *id.* at 4381.

described Joyce as a "rebel-rousing, skirt-wearing person".[182] It is therefore unrealistic to believe that the difference of scores between Joyce and Johnson objectively reflected their unequal qualifications.

III. Alternative approach: Justice Stevens

Justice Stevens is the only member of the Court to have abandoned the Court's traditional type of analysis of the equal-protection provisions of the 14th Amendment and of the Civil Rights Act. While all the remaining judges base their approach on a preliminary choice of a standard of scrutiny (and the disagreements among them, with regard to affirmative action, attaches to the choice between an intermediate and a strict test), Stevens J. has consistently developed an alternative approach in which the issue of the level of scrutiny is no longer determinative of the outcome in equal-protection cases. His approach is governed by the search for the relevance of a classification in a given, specific context. He proceeds by asking three questions:

> What class is harmed by the legislation, and has it been subjected to a 'tradition of disfavor' by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment?[183]

Stevens J.'s approach to affirmative action, developed in *Wygant*, has a number of important consequences and distinctive characteristics, which render it markedly different from the conventional approach.[184] First, it is fundamentally future-oriented in its justification of affirmative action. All other judges, whether proponents or opponents of the principle of affirmative action, generally look *back*, into the history of discrimination, and argue about the validity of affirmative measures on *remedial* grounds. For the liberal judges, improving racial balance, although it may sound future-oriented, is basically a means of redressing imbalance which is an indication of past pervasive discrimination. For the more conservative judges, preferences for the members of disadvantaged minorities can be warranted only by identifiable acts of discrimination against the particular victims. Stevens J. transcends this perspective and looks to future goals: his examples of justified purposes of affirmative action include: developing a better relationship of the police and the community through an integrated police force,[185] promoting educational benefits through integrated faculties in the public schools,[186] increasing the diversity of the work force and

---

[182] *Johnson* at 4381 n. 5.

[183] *Id.* at 4492 n. 1. This test was proposed for the first time in *Cleburne* v. *Cleburne Living Center*, 105 S.Ct. 3249, 3261-62 (1985) (Stevens, J., dissenting).

[184] For a positive assessment of his doctrine, see also Note, "Justice Stevens' Equal Protection Jurisprudence", *Harv. L. Rev.* 100 (1987) 1146; for an example of harsh criticism of Stevens, see A. A. Morris, "New Light on Racial Affirmative Action", *U. C. Davis L. Rev.* 20 (1987) 219, 238-243.

[185] *Wygant* at 4492.

[186] *Id.* at 4492-93.

averting racial tension over the allocation of jobs.[187] In *Johnson* he explicitly advised employers to "focus on the future" instead of "retroactively scrutinizing his own or society's possible exclusions of minorities in the past".[188] In the argument about educational advantages resulting from integrated school faculties, he goes much further than simply restating a "role model theory" (which, forward-looking though it is, is based on a concern for the disadvantaged students, hence indirectly has remedial purposes) but focuses instead on the importance for white children of experiencing regular learning contracts with black teachers. Overall, it is a major step toward abandoning the paradigm of "sin" in the affirmative-action discourse.[189]

Second, Stevens J.'s approach shows a way out of the increasingly complex and untidy pattern of reasoning about the "standard of review". At first glance the general scheme of three tiers seems convincing and simple: minimum scrutiny applied to non-problematic, ordinary economic and social classifications;[190] intermediate level, reserved for "quasi-suspect" classifications, such as gender[191] or illegitimacy,[192] and (according to the liberal judges) to benign racial classifications;[193] and strict scrutiny, applied when suspect classifications or fundamental rights are involved.[194] In fact, however, the apparently transparent architecture of the system has long been eroded. On the one hand, the Court has been increasingly eager to "heighten" the scrutiny in the cases which would normally trigger only a "rational basis" scrutiny. This has been effected through a number of devices, unusual in the framework of "minimum" scrutiny: the Court has become increasingly rigorous in scrutinizing (and rejecting) the purpose of classifications, thus limiting the traditional scope of a "legitimate state purpose";[195] and it has also become less tolerant of under- and over-inclusiveness of non-suspect (and even non-quasi-suspect) classifications, thus approaching something close to "narrow tailoring" (usually required

---

[187] *Johnson* at 4388, quoting with approval K. Sullivan, *supra* note 169.

[188] *Johnson* at 4388.

[189] That this is a deliberate move from one "paradigm" to another is evidenced by the distinction Stevens J. draws in the very first paragraph of his opinion in *Wygant*: "Rather than analyzing a case of this kind by asking whether minority teachers have some sort of special entitlement to jobs as a remedy for sins that were committed in the past, I believe that we should first ask whether the Board's action advances the public interest in educating children for the future", *Wygant* at 4492.

[190] See, e.g., *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911); *San Antonio Indep. School Dist.* v. *Rodriguez*, 411 U.S. 959 (1973); *New Orleans* v. *Dukes*, 427 U.S. 297 (1976); *Vance* v. *Bradley*, 440 U.S. 93 (1979); *Schweiker* v. *Wilson*, 450 U.S. 221, 230 (1981).

[191] See, e.g., *Craig* v. *Boren*, 429 U.S. 190 (1976); *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718 (1982).

[192] See, e.g., *Levy* v. *Louisiana*, 391 U.S. 68 (1968); *Weber* v. *Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972); *Mills* v. *Habluetzel*, 456 U.S. 91 (1982).

[193] See, e.g., *Bakke* at 358-62 (opinion of Brennan J., joined by White, Marshall and Blackmun JJ.).

[194] See, e.g., *Korematsu* v. *United States*, 323 U.S. 214 (1944) (suspect classification); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) (fundamental rights).

[195] See e.g. *Hooper* v. *Bernalillo County Assessor*, 105 S. Ct. 2862 (1985) (rewarding citizens for past contributions not a legitimate state purpose); *City of Cleburne* v. *Cleburne Living Center*, 105 S. Ct. 3249 (1985) (invalidating a statutory requirement of a special-use permit for a group home for the mentally retarded).

in heightened-scrutiny cases) in the cases of only minimum scrutiny.[196] On the other hand, the decisions discussed in this article indicate that the "liberal" judges feel uneasy about applying merely an "intermediate" scrutiny to affirmative-action classifications: in *Wygant* as well as in *Sheet Metal Workers* and *Paradise* they claimed that the challenged classifications would pass even the strictest judicial test.[197] Such a strategy is puzzling and disorienting (especially when one remembers their eloquent rejection of any need for strict scrutiny of benign racial classifications in *Bakke*),[198] and may be explained only by their general (though unstated) mistrust of the force of the intermediate/strict scrutiny distinction. But if a given classification *would* pass the strict test anyway, what is the use of the intermediate test in this case or this class of cases? These two types of developments (heightening of the minimum scrutiny, and virtual abandonment of the intermediate scrutiny in affirmative-action cases) would suggest that the whole pattern is in very bad shape.

To this, Stevens J. proposes an alternative: abandonment of the three tier approach[199] and of an illusion that certain *types* of classifications may always warrant particular degrees of scrutiny, and instead, a case-by-case search for the relevance of classifications in the light of the particular circumstances of the case. In *Wygant* he concludes that "there was a rational and unquestionably legitimate basis" for the challenged lay-off provision.[200] While the language of a "rational" and "legitimate" basis might suggest the use of the minimum scrutiny, Stevens J. nowhere implies that he uses these words in their technical sense derived from the traditional equal-protection jurisprudence. In *Cleburne*[201] Stevens J. expressly indicated his reluctance to attach a particular level of scrutiny to a particular type of classification. Emphasizing the importance of a specific *context* of the use of "alienage, gender, or illegitimacy", he rejected the use of " 'an intermediate standard of review' in these cases" and explained that "the characteristics of these groups are sometimes relevant and sometimes irrelevant to a valid public purpose".[202] This, and not the choice of a standard of scrutiny, determines the outcome of the case. In *Cleburne* he would have invalidated a measure disadvantaging the mentally retarded not because "mental retardation" has its obvious place in the list of characteristics triggering a particular level of scrutiny, but

---

[196] See e.g. *Williams* v. *Vermont*, 105 S. Ct. 2465 (1985) (an underinclusive automobile use tax invalidated).

[197] See *supra* note 100.

[198] *Bakke* at 356-62 (opinion of Brennan J., joined by White, Marshall and Blackmun, JJ.).

[199] "There is only one Equal Protection Clause. . . . It does not direct the courts to apply one standard of review in some cases and a different standard in other cases." *Craig* v. *Boren*, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring). See also C. E. Baker, "Neutrality, Process, and Rationality: Flawed Interpretations of Equal Protection", *Texas L. Rev.* 58 (1980) 1029, 1038.

[200] *Wygant* at 4493; see also the finding of a "legitimate purpose" in *Johnson* at 4387.

[201] 105 S. Ct. 3249 (1985).

[202] *Id.* at 3362 (Stevens J., concurring).

rather because the classification in this case expressed "irrational fears"[203] while in some other cases the same type of classification would be "obviously relevant to certain legislative decisions".[204] In still other cases, Stevens J. would have invalidated or upheld gender classification, not on the force of application of a uniform level of scrutiny, but because he believed that in one case sex classification expressed stereotypical judgments about the sex roles,[205] while in another actual differences between men and women justified differential treatment.[206] In a word, Stevens J. would contextualize the equal-protection analysis to a much higher degree than in the Court's traditional jurisprudence, which preferred to categorize certain types of classification *in abstracto* as warranting pre-determined methods of scrutiny.

Third, Stevens J. provides a method for distinguishing between "benign" and "invidious" classifications without at the same time resorting to these open-ended and often hard to verify descriptions. He distinguishes between "exclusionary" and "inclusionary" classifications: the former are aimed at excluding members of a minority race because of their skins and are predicated on the prejudice against a particular race; the latter aim at including more members of the minority group in, e.g., school faculties and are based on the predicate that race distinctions are unimportant.[207] While at first blush one might criticize Stevens J. by saying that any decision about preferential inclusions has, as its logical correlate, an "exclusionary" consequence (a decision to "include" more blacks implies "excluding" those whites who would be admitted—or retained—in the absence of preference), this is not so. For one thing, what really matters is that we judge the inclusion/exclusion standard by the yardstick of the proportions of the groups concerned at the baseline. It would be absurd to claim, for instance, that in 1969, when the Jackson Public Schools were first charged by the NAACP with discrimination, and the minority representation on the faculties was only 3.9%,[208] to initiate preferential hirings of blacks meant "excluding" whites from the staff. For another thing, Stevens J. makes it clear that his inclusion/exclusion distinction is really activated by the type of thinking behind a decision, and not by its formal characteristics. Exclusion is, in fact, defined by Stevens J.

---

[203] *Id.* at 3262.

[204] *Id.* at 3262.

[205] *Michael M.* v. *Superior Court*, 450 U.S. 464, 501 (1981) (Stevens J., dissenting) (arguing that California's gender-specific rape law is based on a stereotypical assumption that the decision to engage in sex is typically a male decision, and therefore that in a typical case the male is actually the more guilty party).

[206] *Caban* v. *Mohammed*, 441 U.S. 380, 406-7 (1979) (Stevens J., dissenting) (arguing that a New York statute which permitted an unmarried mother to veto the adoption of her child by its natural father, but does not grant the same right to the father in the case of an attempted adoption by the child's mother is justified by the differences between men and women at the time and immediately after a child is born).

[207] *Wygant* at 4493.

[208] *Id.* at 4487-8.

via a reference to irrational stereotypes and illusions about the role of race and skin colour; inclusion—by it being based on the principle "that all men are created equal".[209] So Stevens J.'s distinction is not as objective and mechanical as it would appear at first glance, but rather appeals to substantive moral judgments. The point is that these judgments are taken to be largely consensual; by implication, Stevens refuses to attach any weight to racist stereotypes in deciding about the "exclusionary" or "inclusionary" nature of a classification.

In a more general way, the distinction between "benign" and "invidious" discrimination appears in the very first question of Stevens J.'s three-tiered test: "What class is harmed by the legislation, and has it been subjected to a 'tradition of disfavor' by our laws?".[210] The idea is that unfair discrimination is not merely a matter of disadvantaging *a* group by a given classification (this is endemic to all legal distinctions in any allocation of benefits and burdens), but rather that discrimination consists in an *extra* burden, added to an already existing pattern of disadvantage and deprivations. It is one thing to ask a group, not particularly disadvantaged overall, to carry a burden necessary to achieve an important public purpose, and it is another to impose additional burdens upon a traditionally and notoriously disadvantaged group. While the former situation still lends itself to a routine scrutiny of its relevance, the latter raises fundamental questions of exploitation of "permanent minorities". As I have suggested elsewhere, where the burden of a particular regulation falls unevenly on different groups, the burdens borne by a group which is generally well-off and traditionally dominant do not raise moral problems equal to those raised by the burdens suffered by groups traditionally and permanently disadvantaged.[211] Stevens J. interprets this principle somewhat more narrowly, confining the overall disadvantage to a tradition of disfavour exhibited *by law*; still, it has the merit of pointing our attention to the importance of the existing context of preferences and burdens, which are so crucial in the analysis of discrimination.[212] In line with this, he explained in *Johnson* that the aim of Title VII of Civil Rights Act was "to protect historically disadvantaged groups *against* discrimination and not to hamper managerial efforts to benefit members of disadvantaged groups that are consistent with that paramount purpose".[213]

Fourth, Stevens J.'s doctrine attacks the problem of harm to third parties in a novel and more realistic way. Rather than considering, in

---

[209] *Id.* at 4493.

[210] *Id.* at 4492 n. 1.

[211] Sadurski, *supra* note 140 at 38-39; see also R. Lempert, "The Force of Irony: on the Morality of Affirmative Action and *United Steelworkers v. Weber*", *Ethics* 95 (1984) 86, 89; R. A. Wasserstrom, "Preferential Treatment", in *Philosophy and Social Issues* (Univ. of Notre Dame Press, 1980) 64.

[212] Earlier, Stevens J. had applied the "tradition of disfavor" analysis to discrimination against aliens in public employment, arguing that alienage-based classification is a vestige of the traditional denial of jobs to nonvoting aliens, *Foley* v. *Connellie*, 435 U.S. 291, 308-9 (1978) (Stevens J., dissenting).

[213] *Johnson* at 4387, emphasis in the original.

an absolute way, any harm to the "innocent" parties as disqualifying the legality of affirmative action (as the conservative judges do), or believing that the non-stigmatizing character of affirmative action renders it almost non-problematic with regard to non-beneficiaries (as the liberal judges sometimes appear to imply),[214] Stevens J. openly and realistically suggests that the judgment about affirmative action must involve balancing the degree of harm to non-beneficiaries and the benefits to the public purpose served by affirmative action. In *Wygant* he suggested that "if there is a valid purpose to race consciousness, the question that remains is whether that public purpose transcends the harm to the white teachers who are disadvantaged by the special preference the Board has given to its most recently hired minority teachers".[215] While the act of balancing these values may appear to be hopelessly indeterminate, Stevens J. provides a number of ways by which to assess the harm. He says, for instance, that negative consequences for the white teachers are not based on any lack of respect for their race, nor on "blind habit and stereotype".[216] He also says that the harm results from the combination of two factors: the economic conditions which render it necessary to lay off *some* teachers, and the need to provide the integrated character of the faculty—the latter need dictated by an important and valid public purpose.[217] Harm to non-beneficiaries is therefore seen not as an absolute disqualifying attribute of affirmative action, but as a factor which enters into the weighing and balancing process on the side of costs which may, or may not (depending on the circumstances of the program), be outweighed by the benefits.

It is *not*, one should hasten to add in defence of Stevens J. against a predictable objection, a situation of utilitarian goals triumphing over the concern for the rights of individuals disadvantaged by the program. *Any* decision would disadvantage some individuals: after all, the blacks had less seniority through no fault of their own, but rather because their shorter work experience was due to prior discrimination and segregation; therefore a race-neutral approach to lay-offs would harm them by virtue of facts of which they were "innocent". Hence there is no way of finding a harm-free solution to the problem of lay-offs in Jackson public schools. Stevens J.'s approach indicates the important truth that in the situation of "tragic choices" such as this one it is myopic to suggest that there is a morally easy solution to the problem merely by abstaining from interfering with the pattern of entitlements and privileges. Rather, we must choose between a greater and a lesser "harm" and "injustice": a morally better choice is one that is less evil than any alternative. By pointing at the future-oriented public purpose as a tie-breaker in the situation of two possible "harms", Stevens J. makes us aware of this tragic dimension

---

[214] See, e.g., *Bakke* at 374-76 (opinion of Brennan, J., joined by White, Marshall and Blackmun JJ.).

[215] *Wygant* at 4493.

[216] *Id.* at 4493, footnote omitted.

[217] *Id.* at 4493-4.

of our world in which to act morally often means to choose a lesser evil, and of the need to abandon an absolutist moral scrutiny of injustice v. utility calculus in favor of the more realistic weighing and balancing of the costs and benefits of a program.

One important argument in Stevens J.'s treatment of the "harm to third parties" issue concerns the role the non-beneficiaries themselves played in adopting the affirmative-action program. Stevens J. attaches much weight to the fact that the challenged provision had been agreed to by the union representing the petitioners, and that the procedures for adopting it were scrupulously fair.[218] It needs to be stressed that the point is made *in the context of the discussion of the harm to white teachers*: Stevens J. concludes that "the race-conscious layoff policy . . . was adopted with full participation of the disadvantaged individuals".[219]

While Stevens J. does not carry this argument any further, the importance of this point transcends by far a simplistic argument: "the whites had agreed to the provision, so they have no right to complain about it". Rather, it brings us to the very heart of the philosophy of discrimination. The point has been made forcefully in the American literature and jurisprudence of equal protection that the main function of court-controlled equal protection is to prevent harm imposed upon groups alienated from the process of legislative decision-making. While there is little risk that the majority will impose unfair burdens upon itself through the process of democratic decision-making, such a risk exists with regard to those who are not properly represented in a political and legislative system. Even if one cannot totally exclude the possibility of a well-represented majority imposing excessive burdens upon itself (though such a prospect is highly unrealistic), it is senseless to suggest that such unfairness may stem from prejudice, hostility and ignorance. Since these attitudes and stereotypes have usually been operative in shaping discriminatory laws (whether against a racial minority, or a religious group, or women), special protection has to be granted to those groups which can easily become victims of majoritarian hostility, prejudice and ignorance. Such special protection consists in a less deferential than usual judicial review of legislative acts and public programs. If, however, a group disadvantaged by the program has not been removed from the political process, one may rely on democratic procedures to result in an acceptable outcome, without appeal to any reinforced protection by the courts.

This is, in summary, a doctrine which may find its source in the famous Footnote Four in *United States* v. *Carolene Products*,[220] where

---

[218] *Id.* at 4493.

[219] *Id.* at 4493. But see, critically, J. H. Choper, "Continued Uncertainty as to the Constitutionality of Remedial Racial Classifications: Identifying the Pieces of the Puzzle", *Iowa L. Rev.* 72 (1987) 255, 262-263.

[220] 304 U.S. 144 (1938).

Justice Stone suggested that "prejudice against discrete and insular minorities" may call for a heightened judicial scrutiny because it "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities".[221] The concept has frequently been invoked by the liberals on the Court, both in equal-protection cases[222] and in the cases involving other articles of the Bill of Rights.[223] Following up this insight, Judge J. Skelly Wright postulated that "[w]hen the majority group acts to disadvantage itself for the benefit of the minority, there should be a strong presumption of legality" because it cannot be supposed that they are acting "out of prejudice, ignorance, or hostility".[224] John Hart Ely, perhaps the most influential proponent of this theory of judicial review in equal-protection cases, nicely concludes his argument about the fundamental difference between classifications disadvantaging a minority and disadvantaging a majority by saying: "Whether or not it is more blessed to give than to receive, it is surely less suspicious".[225] And, one may add, even if those who have "given" have after-thoughts and feel hurt by the preference to others, the fact that they had their say, that they were heard, and that the procedure for representing their claim has been scrupulously observed, should act as an important soothing factor to reduce their frustration and feeling of hurt. As John Plamenatz says: "It is a psychological fact . . . that men reconcile themselves more easily to obeying persons whose power to give orders is dependent upon their wishes that they should do so than to obeying those who they think could still compel them to obey even if they did not happen to be giving effect to their wishes."[226] White teachers in the Jackson schools may feel hurt (anybody would), but cannot feel unfairly treated, for they are made to carry an extra burden in a community in which they belong to a dominant group that had its say about the overall distribution of benefits and burdens. Stevens J.'s approach has the advantage of drawing our attention indirectly (for he himself does not develop the argument in *Wygant*) to this fact, and through this, to the crucial function of equal-protection judicial review in defending the politically powerless minorities.

IV. Conclusions

Notwithstanding the official position of the current United States administration and its Department of Justice, which has consistently made

---

[221] *Id.* at 152 n. 4 (1938).

[222] See, e.g., *Bakke* at 361-2 (opinion of Brennan, J., joined by White, Marshall and Blackmun JJ.).

[223] Recently, Brennan J. asserted that "[a] critical function of the Religion Clauses of the First Amendment is to protect the rights of members of minority religions against quiet erosion by majoritarian social institutes that dismiss minority beliefs and practices as unimportant because unfamiliar", *Goldman* v. *Weinberger*, 106 S. Ct. 1310, 1321-22 (1986) (Brennan, J., dissenting).

[224] J. S. Wright, "Color-Blind Theories and Color Conscious Remedies", *U. of Chi. L. Rev.* 47 (1980) 213, 234-35.

[225] *Democracy and Distrust* (Harvard U.P., 1980) 171, footnote omitted. See also, generally, Ely, *supra* note 132; P. Brest, "Affirmative Action and the Constitution: Three Theories", *Iowa L. Rev.* 72 (1987) 281, 283.

[226] J. Plamenatz, *Consent, Freedom and Political Obligation* (Oxford U.P., 1968, 2nd ed.), 148.

known its opposition to affirmative action, programs of preferential treatment for minorities in the workforce and education (and, with respect to the workforce, also preferences for women) are firmly entrenched in American life. While the programs, dating back to President Johnson's Executive Order 11246 have not revolutionized race relations in the United States, it would be a mistake to underestimate their actual effects upon improving employment (and educational) opportunities for these disadvantaged groups.[227] In this, the American example constitutes a powerful model for other countries to assess and, if deemed relevant to local conditions, to follow.

The unique position of the Supreme Court in the American political and legal system renders the recent crop of affirmative-action decisions particularly important for such an assessment. All its reservations and qualifications notwithstanding, the Court turned out to be willing to uphold the principle of affirmative action as a permanent feature of the equal-protection system: in four cases out of five, the programs of affirmative action were upheld. But, at the same time, one must note that the future legal stability of the programs has been somewhat reduced in comparison with the legal regime originating from *Bakke, Weber* and *Fullilove.* The most striking feature of the recent decisions is that they saw the polarization of the Court into two set camps. While in the "first generation" cases the justices more freely crossed the floor (a generally "conservative" Burger C.J. voted *for* affirmative action in *Fullilove*; a by-and-large "liberal" Stevens J. was *against* preferential admissions in *Bakke* and *Fullilove*, etc), in the Court of 1986-87 there have been two *permanent* blocks of the opponents (three) and the proponents (four) of affirmative action, and two "swinging" judges. With the imminent replacement of Powell J. by a more conservative judge, who will probably join the anti-affirmative-action camp, O'Connor J. will be placed in the unique position of holding a decisive vote.

A close analysis of her opinions in the five cases under review suggests that the line she draws between acceptable and invalid preferences is a function of how "narrowly drawn" the classification is to its remedial aim. While *in abstracto* this sounds convincing and clear, in practice it is a test which leaves a great margin of discretion and indeterminacy in evaluating the degree of "fit" of a classification to its aim. Certainly, it is a less "principled" and transparent test than the ones proposed by the liberal and conservative camps on the Court. In other words, while the very principle of preferences for minorities who suffer present effects of past discrimination seems to be safe and sound, the question of whether

---

[227] See, e.g., J. M. Culp & G. Loury, "The Impact of Affirmative Action on Equal Opportunity: A New Look", in *Bakke, Weber, and Affirmative Action* (The Rockefeller Foundation, 1979) 124-36; J. M. Malveaux, "Shifts in the Employment and Occupational Status of Black Americans in a Period of Affirmative Action", *id.* at 137-69; R. Kennedy, "Persuasion and Distrust: A Comment on the Affirmative Action Debate", *Harv. L. Rev.* 99 (1986) 1327, 1329; "Assault on Affirmative Action", *Time* 25 Feb. 1985 at 31-2.

a particular program will in future be upheld by the Court now depends *solely* on the judgment as to how tightly the preferential classification is drawn in order to benefit the victims of past discrimination (and, consequently, how insignificant the incidences of under- and over-inclusiveness are).

Three main areas of doctrinal disagreement, which shape the field of current judicial thinking about affirmative action are: the nature and relevance of the findings of past discrimination needed to warrant affirmative preferences; the level of judicial scrutiny that the affirmative-action programs trigger; and the degree of harm to third parties which would disqualify a program as unfair and discriminatory. The decisions discussed above saw the most important developments in respect to the second of these issues. The issue of a standard of scrutiny is, indeed, a crucial one in the equal-protection jurisprudence, for it brings disparate moral and legal issues (such as the evaluation and determination of the purpose of preferences, the judgments of the relevance of the classification to the purpose, the tolerance for under- and over-inclusiveness) under a single conceptual framework cut to suit judicial analysis in a system of judicial review of constitutionality. The single most important phenomenon, marked by the five decisions surveyed in this article, is a gradual erosion of the traditional scheme of judicial scrutiny under the 14th Amendment. This was marked by three parallel developments: the actual (though not always consistent) use of a lowered scrutiny under a guise of "strict" scrutiny by Powell J. and O'Connor J.; a departure from the consistent use of an intermediate scrutiny of affirmative action by the "liberal" judges (as displayed by their assurance that the challenged programs would pass even the strictest scrutiny); and the abandonment altogether of the traditional three-tiered analysis of judicial scrutiny by Stevens J.

This last development deserves particular attention: in the cases under discussion Stevens J. has extended his novel and innovative approach to the equal-protection jurisprudence to the affirmative-action analysis. This consists mainly in the abandonment of a rigid three-tiered framework of equal-protection analysis, where each type of classification occupies a stable place and always triggers the same test, and its replacement by a case-by-case, context-bound analysis of the relevance of classifications. This comes in a broader theoretical package, which includes: an emphasis on the future-oriented public purposes served by affirmative action, related as they are to the well-being of the community as a whole; a distinction between exclusionary classifications based on stereotypical thinking, and inclusionary classifications derived from the principle of equality; and the weighing and balancing of public benefits and private harms resulting from affirmative action. Stevens J.'s analysis gives proper weight to the idea that the true critical function of judicial review under the equal-protection principle is to protect disadvantaged and politically powerless groups from the possible abuse of political and

legislative power by the majority. His contextual jurisprudence corresponds to the insight that the analysis of "discrimination" must not ignore the characteristics of a group benefiting from a challenged classification: it makes a difference whether or not a group is a victim of a "tradition of disfavor". His doctrine brings judicial analysis closer to the real world in which sex and race distinctions do matter as the indicators of present effects of past discrimination. The message is, that in a judicial analysis of legal discrimination, just as in real life, what is good for the goose is not necessarily good for the gander.