

AFFIRMATIVE ACTION IN EMPLOYMENT: CONSIDERING GROUP INTERESTS WHILE PROTECTING INDIVIDUAL RIGHTS*

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A good deal of the literature of affirmative action is devoted to the supposed conflict between individual rights and group interests.¹ This author's experience with affirmative action in employment, however, is that a good affirmative action officer not only balances both objectives, but uses each goal to help achieve the other. On the one hand, a failure to meet reasonable goals for employment of women and minorities may be indicative of hidden sources of bias within the organization. On the other hand, evidence of unfairness to an individual may indicate that the organization is pursuing its goals too inflexibly or even that the goals themselves are unrealistic.

The truth of these conclusions is difficult to demonstrate statistically.² This author's conclusion, based not only on case law³

* This Article combines my academic research with the experience I gained preparing an affirmative action study for the City of Baltimore. That study, entitled *An Affirmative Action Plan for the 90s, Employment in the City of Baltimore* was published in 1991. I consulted with a wide range of individuals during the study including Neal Janney, Esquire, City Solicitor; Alfred Kramer, Esquire, Assistant City Solicitor; Lola Smith, Chief of Equal Opportunity Compliance; Jesse Hoskins, Personnel Director; Joanne Evans Anderson, Assistant City Solicitor; Debra Shinsky, Assistant Director of Personnel for the National Aquarium in Baltimore; Dawn Hyde, Human Resources Consultant, Berkshire Associates; Ernest Miller, Consultant to the Civil Service Commission; and Laurice D. Royal, Assistant City Solicitor. I should like to thank all these individuals for their support and assistance.

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1. See, e.g., Lino A. Graglia, *Race Norming in Law School Admissions*, 42 J. LEGAL EDUC. 97 (1992); Donald P. Judges, *Light Beams and Particle Dreams: Rethinking the Individual v. Group Rights Paradigm in Affirmative Action*, 44 ARK. L. REV. 1007 (1991); Michael A. Olivas, *Legal Norms in Law School Admissions: An Essay on Parallel Universes* 42 J. LEGAL EDUC. 103 (1992); William B. Reynolds, *Panel I: Entitlements, Empowerment and Victimization: Introduction* 77 CORNELL L. REV. 964 (1992).

2. See generally James E. Jones, Jr., *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal and Political Realities*, 70 IOWA L. REV. 901, 932-39 (1985); George Rutherglen, *After Affirmative Action: Conditions and Consequences of Ending Preferences in Employment*, 1992 U. ILL. L. REV. 339, 346-55.

3. See generally *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Many advocates of affirmative action have wondered what might have happened had the City of

but also on direct experience,⁴ is that organizations can use affirmative action as a tool either for eliminating employment discrimination or for creating it, depending upon how effectively they apply it. Affirmative action that is well planned and flexibly applied can be a valuable management tool as well as an instrument for insuring fair treatment for minorities and women.

Understanding the values of affirmative action requires understanding the interaction of the law with the practical problems of employers. Employers initially opposed affirmative action, but today most employers would be opposed to its elimination.⁵

THE CASE LAW BASIS OF AFFIRMATIVE ACTION IN EMPLOYMENT

Historians trace affirmative action to the aftermath of the United States Civil War.⁶ The concept was revived during World War II by Executive Order.⁷ A series of United States Supreme Court cases beginning with *Steelworkers v. Weber*⁸ are the recent

Richmond honored one of Croson's apparently reasonable requests, such as the company be allowed to modify its bid to reflect the additional cost of using a minority contractor. *Id.* at 483.

An employment case where similar rigidity resulted in obvious injustice to a non-minority employee was *Harmon v. San Diego County*, 477 F. Supp. 1084 (S.D. Cal. 1979). In *Harmon* a majority employee who was considered the best qualified for the job was passed over twice for the same appointment. On the second occasion, the supervisor had to ask for a new list of potential candidates in order to be able to secure a minority candidate, although Harmon, the best qualified candidate, was still available from the original list. 477 F. Supp. at 1086-87.

4. As a practical matter, most specialists with whom the author has consulted usually agree off the record that successfully challenged affirmative action plans almost always involve a program that was not properly thought out to begin with, was not administered with sufficient flexibility, or both.

5. An examination of the *amicus* briefs in major affirmative action cases before the U.S. Supreme Court finds that most major employer associations, both public and private, support affirmative action. See discussion *infra* at notes 55-56 and accompanying text. Despite the increasingly conservative membership of the U.S. Supreme Court, employers, under pressure from the U.S. Department of Labor, are moving in the direction of utilizing affirmative action for the higher executive positions where women and minorities have made less of an impact thus far. See George Johnston & Peter Saucier, *The Glass-Ceiling Initiative*, LEGAL MGMT., Jan.-Feb. 1992, at 10; U.S. DEP'T OF LABOR, A REPORT ON THE GLASS CEILING INITIATIVE (1991).

6. For a good historical perspective on how the chance to create a truly equal society was lost in the nineteenth century, see ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 (1988).

7. See Jones, *supra* note 2, at 903-10.

8. 443 U.S. 193 (1979). The Court consolidated *Steelworkers v. Weber* with *Kaiser*

bases of affirmative action. To understand *Weber*, the Court's decision in *Griggs v. Duke Power Co.*⁹ is a vital piece of background information. The principle behind *Griggs* is that an employer may be responsible for the discriminatory impact of selection devices even if there is no intent to discriminate.¹⁰ Where the device excludes women or a minority group, the burden falls on the employer to demonstrate the usefulness of the measure in selecting better employees.¹¹

Aluminum & Chem. Corp. v. Weber and United States v. Weber.

9. 401 U.S. 424 (1971). See generally Herbert N. Bernhardt, *Griggs v. Duke Power Co.: The Implications for Private and Public Employers*, 50 TEX. L. REV. 901 (1972). Judge Wisdom noted the strong connection between the need to avoid liability for discriminatory impact and the use of affirmative action in the court of appeals decision in *Weber v. Kaiser Aluminum & Chem. Corp.*, 563 F.2d 216 (5th Cir. 1977). Justice Blackmun later affirmed this connection in his opinion in that case. *Steelworkers v. Weber*, 443 U.S. 193, 209 (1979).

Professor Alfred Blumrosen takes the position that the only practical way of meeting the standards of *Griggs* is to engage in affirmative action. See Alfred W. Blumrosen, *The Group Interest Concept, Employment Discrimination, and Legislative Intent: The Fallacy of Connecticut v. Teal*, 20 HARV. J. ON LEGIS. 99, 101 (1983). Professor Mack Player has suggested that the decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), undermines the rationale for affirmative action. See Mack Player, *Is Griggs Dead? Reflecting (Fearfully) on Wards Cove Co. v. Atonio*, 17 FLA. ST. U. L. REV. 1, 44 n.167 (1989). The 1991 Civil Rights Act has obviated this possibility. 42 U.S.C. § 2000e-2(k) (Supp. 1992). See generally Robert Belton, *The Civil Rights Act of 1991 and the Future of Affirmative Action: A Preliminary Assessment*, 41 DEPAUL L. REV. 1085, 1102-06 (1992).

10. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The employer in *Griggs* instituted new tests and other selection devices at the same time it eliminated an overt policy of discrimination as required by Title VII. The district court nevertheless found that there was no intent to discriminate, and the court of appeals affirmed this holding. *Id.* at 428-29. Both courts further found that without an intent to discriminate there could be no finding of discrimination. *Id.* at 429.

Justice Warren Burger, writing for a unanimous Court, described its grant of certiorari in this case in the following language:

We granted the writ in this case to resolve the question whether an employer is prohibited by the Civil Rights Act of 1964, Title VII, from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites.

Id. at 425-26.

The Court concluded that Congress wanted more than merely to eliminate intentional discrimination. According to the Court, any barrier not related to job performance should be eliminated if it impacted discriminatorily on minorities. *Id.* at 430-36. See also Bernhardt, *supra* note 9, at 907-09.

11. *Griggs*, 401 U.S. at 432. See also Bernhardt, *supra* note 9, at 907-16.

FIG LEAF ANALYSIS

From a legal point of view, *Griggs* made the employer's position more difficult; but in another and perhaps more important sense, the decision made the elimination of discrimination easier. Employers could now work on eliminating discrimination without accusing anyone, including themselves, of discriminatory practices. Discrimination in the *Griggs* case was the result of the black person's inferior education and not of any intent to discriminate.¹² This inferior education caused blacks to fail the tests in greater numbers than whites. Because the tests therefore posed a barrier to job entry, the employer was put to the task of showing that they were job related.

Courts could therefore examine the need to change tests or any selection devices, including interviews or references, in a less personal sense. Employers needed to change the selection device not because they were deliberately using it to discriminate but because of discriminatory factors built into the structure of society. These factors, called "institutional racism,"¹³ are not directly the fault of the individual administering the test or conducting the interview. Employers discover the impact of the factors only through the use of statistics. Accordingly, while the employer is put to the task of changing its selection methods, it avoids the stigma of intent to discriminate.

In reality, of course, intent is not as clearly delineated as this analysis would indicate. Why were the tests in the *Griggs* case required for the first time on the very day when, as a result of the passage of Title VII, the company revised a policy of not hiring blacks for skilled positions?¹⁴ One could argue that this coincidence of events indicated that someone thought blacks were inferior to whites. By providing a more objective rationale, the *Griggs* case eliminated the need to delve so deeply into intent.

Therefore, *Griggs* arguably provided a "fig leaf" by which an employer could eliminate discrimination without taking moral responsibility for having acted improperly. In fact, however, this argument is inverted. An employer discriminating under the *Griggs* standard

12. *Griggs*, 401 U.S. at 430. See also Bernhardt, *supra* note 9, at 902.

13. See Bernhardt, *supra* note 9, at 902 and sources cited therein.

14. *Griggs*, 401 U.S. at 427. See also *supra* note 10.

may be doing so despite substantial efforts to eliminate the effects of discrimination.¹⁵ To brand such conduct as morally reprehensible would only impede the effort to eliminate discrimination.¹⁶

AFFIRMATIVE ACTION AFTER GRIGGS

The *Griggs* decision held that an employer discriminated if it used a selection device that had discriminatory impact but had no demonstrable relationship to job performance.¹⁷ This left employers with essentially two choices. They could either validate their selection devices or they could avoid discriminatory impact. No method of avoiding this choice exists, because any seemingly neutral selection device can be found violative if it has discriminatory impact.¹⁸

Validation is a complex process which many employers have tended to shun as too difficult or too expensive.¹⁹ Indeed, in many cases where employers attempt to validate, they find that the employees they accept are no more qualified than those they reject.²⁰ Accordingly, for the employer to statistically demonstrate that the employees it is selecting are superior to those it is rejecting is not only difficult or expensive but also impossible.²¹ The alternative to validation is to avoid discriminatory impact by ensuring that the percentage of minorities selected corresponds to the percentage in the qualified applicant pool. This is another name for affirmative action.

To summarize the situation after *Griggs*, the Court faced an anomaly. Congress passed a statute which forbade discrimination and made no explicit exception for affirmative action.²² Without

15. *Griggs*, 401 U.S. at 432.

16. See discussion *infra* at notes 17-23.

17. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

18. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 989-91 (1988).

19. See articles by Bernhardt, Blumrosen and Player, *supra* note 9.

20. See Bernhardt, *supra* note 9, at nn.37, 38. See also *Johnson v. Santa Clara*, 480 U.S. 616, 641 n.17 (1987).

21. The reader may have difficulty accepting this position despite the conclusions of industrial psychologists cited in note 9. In fact, however, employers are concerned only with the qualifications of the employees they hire, not with the qualifications of those they reject. When forced to accept applicants they would normally reject, employers are sometimes pleasantly surprised. See also R. Roosevelt Thomas, Jr., *From Affirmative Action to Affirming Diversity*, HARV. BUS. REV., Mar.-Apr. 1990, at 107; Lena Williams, *Companies Capitalizing on Worker Diversity*, N.Y. TIMES, Dec. 15, 1992, at A1.

22. Title VII provides:

Sec. 703. (a) It shall be an unlawful employment practice for an em-

affirmative action, however, employers could not effectively eliminate discrimination. Moreover, the Court in *Griggs* had created a rationale to find violations that, as a practical matter, could be avoided only by affirmative action; yet affirmative action violated the explicit terms of Title VII. In this context, Judge Wisdom of the Fifth Circuit Court of Appeals, in his dissent to *Weber v. Kaiser Aluminum & Chemical Corp.*, complained that if affirmative action were disallowed “[t]he employer and the union [would be] made to walk a high tightrope without a net beneath them.”²³ The *Weber* case posed the anomaly waiting since the issuance of the *Griggs* decision.

STEELWORKERS v. WEBER

In the *Weber* case, the Supreme Court reversed the Fifth Circuit and upheld affirmative action.²⁴ Of the nine Justices of the Court, however, only Justice Blackmun, in his concurring opinion, acknowledged the dilemma that the *Griggs* case had posed for employers and unions.²⁵

The fact that Justice Burger, who authored the *Griggs* decision, could cite *Griggs* against the result reached by the majority in *Weber* indicates the degree to which the conservative wing of the Court was out of touch with the realities of eliminating employment discrimination. The requirement of skilled training had a discriminatory impact in the *Weber* case, as it did in most of the South at that time.²⁶ The *Weber* decision required Kaiser to either validate its practices or alleviate the discriminatory impact.²⁷ Burger, however, would have made illegal any direct effort to alleviate the discriminatory impact.

Justice Brennan, writing the majority opinion, held that “[t]he purposes of the plan mirror those of the statute. Both were designed

ployer—

. . . .

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individuals' race, color, religion, sex, or national origin.

78 Stat. 255, 42 U.S.C. § 2000e-2 (Supp. III 1992).

23. *Weber*, 563 F.2d 216, 230 (5th Cir. 1977) (Wisdom, J., dissenting).

24. *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979).

25. *Weber*, 443 U.S. at 209-16 (Blackmun, J., concurring).

26. *See infra* notes 40-49 and accompanying text.

27. *See supra* notes 17-23 and accompanying text.

to break down old patterns of racial segregation and hierarchy. Both were structured to open employment opportunities for negroes in occupations which have been traditionally closed to them."²⁸ Brennan explicitly denied that "the freedom of an employer to undertake race-conscious affirmative action efforts depends on whether or not his effort is motivated by fear of liability under Title VII."²⁹

Chief Justice Burger in dissent wrote the following:

The Court reaches a result I would be inclined to vote for were I a Member of Congress considering a proposed amendment of Title VII. I cannot join the Court's judgment, however, because it is contrary to the explicit language of the statute and arrived at by means wholly incompatible with long-established principles of separation of powers. Under the guise of statutory "construction," the Court effectively rewrites Title VII to achieve what it regards as a desirable result. It "amends" the statute to do precisely what both its sponsors and its opponents agreed the statute was not intended to do.³⁰

Although Burger was himself the author of the *Griggs* opinion, he made no mention in his dissent to *Weber* of the dilemma the rule against discriminatory impact posed for employers and unions. His only mention of *Griggs* was to assert that the majority opinion in *Weber* was in conflict with his unanimous opinion in *Griggs*.³¹

Justice Rehnquist's dissent attacked the majority in even stronger terms.³² He likened the majority opinion in *Weber* to pronouncements in a mythical future society in George Orwell's novel *1984* in which words have lost their meaning.³³ Rehnquist concluded:

Today, however, the Court behaves much like the Orwellian speaker earlier described, as if it had been handed a note indicating that Title VII would lead to a result unacceptable to the Court if interpreted here as it was in our prior decisions. Accordingly, without even a break in syntax, the Court rejects "a literal construction of § 703(a)" in favor of newly discovered "legislative history," which leads it to a conclusion directly contrary to that compelled by the

28. *Id.* at 208 (citations omitted).

29. *Id.* at 208 n.8.

30. *Weber*, 443 U.S. at 216 (Burger, C.J., dissenting).

31. *Id.* at 218.

32. *Weber*, 443 U.S. at 219 (Rehnquist, J., dissenting).

33. *Id.* at 219-20.

“uncontradicted legislative history” unearthed in *McDonald* and our other prior decisions. Now we are told that the legislative history of Title VII shows that employers are free to discriminate on the basis of race: an employer may, in the Court's words, “trammel the interests of the white employees” in favor of black employees in order to eliminate “racial imbalance.” *Ante*, at 208. Our earlier interpretations of Title VII, like the banners and posters decorating the square in Oceania, were all wrong.³⁴

In contrast to Justice Brennan on one side, and Chief Justice Burger and Justice Rehnquist on the other, Justice Blackmun struck a middle ground.³⁵ In his concurring opinion, Blackmun acknowledged that “the Congress that passed Title VII probably thought it was adopting a principle of non-discrimination that would apply to blacks and whites alike.”³⁶ Blackmun concluded, however, “that additional considerations, practical and equitable, only partially perceived, if perceived at all, by the 88th Congress, support the conclusion reached by the Court today”³⁷

Blackmun would have opted for an “arguable violation” theory, which would have allowed an employer to engage in affirmative action only for the purpose of avoiding an arguable violation of the law. He stated his reasoning as follows:

The “arguable violation” theory has a number of advantages. It responds to a practical problem in the administration of Title VII not anticipated by Congress. It draws predictability from the outline of present law and closely effectuates the purpose of the Act. Both Kaiser and the United States urge its adoption here. Because I agree that it is the soundest way to approach this case, my preference would be to resolve this litigation by applying it and holding that Kaiser's craft training program meets the requirement that voluntary affirmative action be a reasonable response to an “arguable violation” of Title VII.³⁸

He joined the majority, however, after concluding that his “arguable violation” theory would have allowed affirmative action in all cases where it would be allowed by the majority opinion. Blackmun stated his reasoning as follows:

34. *Id.* at 220.

35. *Weber*, 443 U.S. at 209 (Blackmun, J., concurring).

36. *Id.* at 213.

37. *Id.* at 209.

38. *Id.* at 211.

To make the “arguable violation” standard work, it would have to be set low enough to permit the employer to prove it without obligating himself to pay a damages award. The inevitable tendency would be to avoid hairsplitting litigation by simply concluding that a mere disparity between the racial composition of the employer's work force and the composition of the qualified local labor force would be an “arguable violation,” even though actual liability could not be established on that basis alone.³⁹

Kaiser Aluminum, the employer in the *Weber* case, faced enormous difficulties in attempting to comply with the law as it was then understood.⁴⁰ It had recently integrated its non-skilled labor force, which had been ninety percent white, by a program of hiring whites and blacks alternately as openings occurred.⁴¹ It could not, however, find any substantial number of black skilled laborers who met its requirement of five years prior industrial experience.⁴² This requirement, as Justice Blackmun pointed out, was subject to being challenged in the Court as being not sufficiently job related.⁴³

One solution to this problem might have been to recruit and use black skilled laborers who had credentials different from those typically held by the whites.⁴⁴ Another solution might have been to recruit trainees for skilled labor from the general population on a non-discriminatory basis.⁴⁵ Kaiser instead developed a training program for skilled workers chosen from its non-skilled employees.⁴⁶ Clearly this was the most popular option with Kaiser's non-skilled employees, whether black or white, as well as with the union that repre-

39. *Id.* at 214 (citation omitted).

40. See discussion *supra* notes 17-23; see also Herbert N. Bernhardt, *Voluntary Affirmative Action: Narrow Decision O.K.'s It*, 65 A.B.A. J. 1321 (1979).

41. *Weber v. Kaiser Aluminum & Chem. Corp.*, 563 F.2d 216, 228 (5th Cir. 1977) (Wisdom, J., dissenting).

42. *Steelworkers v. Weber*, 443 U.S. 193, 210 (1979) (Blackmun, J., concurring).

43. *Id.* (citing *Parson v. Kaiser Aluminum & Chem. Corp.*, 575 F.2d 1374, 1389 (5th Cir. 1978), *cert. denied sub nom. Steelworkers v. Parson*, 441 U.S. 968 (1979)).

44. See discussion of this issue in U.S. COMMISSION ON CIVIL RIGHTS, *AFFIRMATIVE ACTION OF 1980S: DISMANTLING THE PROCESS OF DISCRIMINATION* (1981).

45. One of the ironies of the case is that if Kaiser had chosen either of these first two options, *Weber* and others like him would not have had any chance to be chosen and yet would have had no standing to sue.

46. *Steelworkers v. Weber*, 443 U.S. 193, 210 (1979) (Blackmun, J., concurring). Justice Blackmun characterized this program as being modeled “along the lines of a Title VII consent decree later entered for the steel industry.” *Id.* (citing *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826 (5th Cir. 1975)).

sented them.⁴⁷ At that point blacks constituted only fifteen percent of Kaiser's work force,⁴⁸ by far the least senior part.⁴⁹ If Kaiser had strictly followed seniority, as Brian Weber wished, virtually no blacks would have been trained. The program chosen by Kaiser and the union was therefore the best option for achieving two goals. One goal was improving the upward mobility of non-skilled employees and the other was achieving a skilled work force whose percentage of minorities more closely matched those in the qualified population.

The *Weber* case set the ground rules for a debate. It included a liberal position, a conservative position, and a moderate position. Blackmun represented the moderate position, which was that affirmative action was necessary to comply with the law, but that it also carried dangers. Neither Blackmun nor other moderates in society, however, had formulated or articulated the rules that would enable affirmative action to achieve its goals while avoiding the dangers.

In retrospect, the Rehnquist dissent in *Weber* can be seen as the beginning of a counterreaction to the social revolution of the 1960s and 1970s aimed at incorporating minorities into the mainstream. This counterreaction grew in strength on the Court as conservative Justices were appointed and as Justice Byron White switched sides.⁵⁰ Ultimately, however, affirmative action was upheld, although limited.⁵¹ The Court's decision in *Wards Cove*, which would have virtually overruled *Griggs*, was itself overruled by the Civil Rights Act of 1991.⁵² A Democratic President probably will appoint moderates or liberals to the Court. Accordingly, the issue is no longer whether affirmative action in employment is legal but rather how it must be managed to comply with the law. Before reaching that conclusion, however, the attacks on affirmative action and how they were limited should be considered.

47. See Bernhardt, *supra* note 40, at 1322.

48. *Weber*, 443 U.S. at 210 (1979).

49. Because most of Kaiser's general black work force had been hired recently under a separate affirmative action program, they had less seniority than did the whites. *Id.* at 198-99.

50. Although White had fully participated in the *Weber* case and supported the majority opinion, he stated in his dissent to *Johnson v. Santa Clara* that he was ready to overrule *Weber*. 480 U.S. 616, 657 (1987).

51. See discussion *infra* at notes 63-162.

52. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), overruled by 42 U.S.C. § 2000e-2 (Supp. III 1992). See Belton and Player *supra* note 9.

THE PRACTICAL TREND

The Solicitor General was on the side of affirmative action in the *Weber* case.⁵³ With the advent of a Republican administration in the 1980s this changed markedly. Not only was the Solicitor General against affirmative action in all major cases of the 1980s, but the Assistant Attorney General in charge of the Civil Rights Division actively sought to overturn settlements involving affirmative action, even where no other party sought to do so.⁵⁴

In this effort, the administration went against the trend. Increasingly, it found itself pitted against not only civil rights groups, but also against municipalities and municipal associations, employers and employer associations, and labor unions.⁵⁵ The Attorney General's office was turning against affirmative action at the same time as many others in society were accepting it.

Employers are increasingly finding that affirmative action is good business.⁵⁶ Affirmative action continues to be urged as a means of avoiding litigation.⁵⁷ This is true in part because of the continuing action of the Office of Federal Contract Compliance Programs (OFCCP),⁵⁸ which pushed for affirmative action even during the

53. *Weber*, 443 U.S. 193, 196 (1979).

54. See *infra* notes 63-71 and accompanying text.

55. The reader should peruse the impressive list of *amici* in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 475-76 (1989); in *Johnson v. Santa Clara*, 480 U.S. 616, 616-19 (1987); in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 269-70 (1986); *Steelworkers v. Weber*, 443 U.S. 193, 197 (1979).

56. See discussion *supra* at notes 2-5. See also Alan Farnham, *Holding Firm on Affirmative Action*, FORTUNE, Mar. 13, 1989, at 87; Leo J. Shapiro, *On Affirmative Action, Bush, Thomas in Minority*, CRAIN'S CHICAGO BUS., Aug. 19, 1991, at 13.

57. See discussion *supra* notes 17-23 and accompanying text. See also Karen Torry, *Why, How to Say "Yes" to Affirmative Action*, CRAIN'S CHICAGO BUS., July 18, 1988, at 15; Lena Williams, *Companies Capitalizing on Worker Diversity*, N.Y. TIMES, Dec. 15, 1992, at A1.

58. Justice Rehnquist, in a footnote to his *Weber* dissent, described the manner of operation of the OFCCP:

The Office of Federal Contract Compliance (OFCC), subsequently renamed the Office of Federal Contract Compliance Programs (OFCCP), is an arm of the Department of Labor responsible for ensuring compliance by Government contractors with the equal employment opportunity requirements established by Exec. Order No. 11246, 3 CFR 339 (1964-1965 Comp.), as amended by Exec. Order No. 11375, 3 CFR 684 (1966-1970 Comp.), and by Exec. Order No. 12086, 3 CFR 230 (1979).

Executive Order 11246, as amended, requires all applicants for federal contracts to refrain from employment discrimination and to "take affirmative action

Reagan administration.⁵⁹ Also, population trends indicate that groups regarded as minorities will constitute a majority of the work force in the near future.⁶⁰ Personnel specialists, consultants, and law firms have become increasingly adept at designing and administering affirmative action programs to meet the needs of employers and to minimize objections from non-minorities.⁶¹ Finally, a pool of qualified minorities is increasingly available to fulfill the goals of affirmative action.⁶²

The sum of all these developments was that plans which set goals for minority representation were becoming an integral part of management techniques regardless of the theoretical debate. Management was trying to avoid litigation with both majority and minority groups, as well as attempting to comply with a national policy of eliminating the vestiges of discrimination.

to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin.” § 202 (1), 3 CFR 685 (1966-1970 Comp.), note following 42 U.S.C. § 2000. The Executive Order empowers the Secretary of Labor to issue rules and regulations necessary and appropriate to achieve its purpose. He, in turn, has delegated most enforcement duties to the OFCC. See 41 CFR § 60-20.1 *et seq.*, § 60-2.24 (1978).

The affirmative action program mandated by 41 CFR § 60-2 (Revised Order No. 4) for nonconstruction contractors requires a “utilization” study to determine minority representation in the work force. Goals for hiring and promotion must be set to overcome any “underutilization” found to exist.

The OFCC employs the “power of the purse” to coerce acceptance of its affirmative action plans. Indeed, in this action “the district court found that the 1974 collective bargaining agreement reflected less of a desire on Kaiser’s part to train black craft workers than a self-interest in satisfying the OFCC in order to retain lucrative government contracts.” 563 F.2d 216, 226 (5th Cir. 1977).

Steelworkers v. Weber, 443 U.S. 193, 223 n.2 (1979) (Rehnquist, J., dissenting).

59. One commentator criticized Reagan and Bush for their inconsistency. Daniel Seligman, *The President’s Daily Decision, How Gotti Got to the Top, Homicidal Honchos and Other Matters*, FORTUNE, July 15, 1991, at 126. Another attributed continued support by the OFCCP for affirmative action to congressional oversight. See Torry, *supra* note 57.

60. See R. Roosevelt Thomas, Jr., *supra* note 21; George White, *Creating a Bias-Free Corporate Structure; Human Resources: Experts Say Employers Should Consider Overall Strategy When Choosing a Diversity Consultant*, L.A. TIMES, June 1, 1993, at D3. See also Williams, *supra* note 57.

61. See Johnston & Saucier, *supra* note 5. See also *Steelworkers v. Weber*, 443 U.S. 193 (1979) (White, J., dissenting); Williams, *supra* note 57.

62. See Alfred W. Blumrosen, *Expanding the Concept of Affirmative Action to Address Contemporary Conditions*, 13 N.Y.U. REV. L. & SOC. CHANGE 297 (1985); Alfred W. Blumrosen, *The Law Transmission System and the Southern Jurisprudence of Employment Discrimination*, 6 INDUS. REL. L.J. 313, 333-51 (1984).

THE LEGAL TREND

The Reagan administration's attempt to reverse the trend toward increased use of affirmative action at first centered on the *Stotts* case.⁶³ The attempt was an unusual focus because *Stotts* did not involve a challenge to the basic affirmative action plan between the parties.⁶⁴ Instead, the focus in *Stotts* was on the power of the district court to enjoin the layoff of black employees who had been hired pursuant to a consent decree.⁶⁵ Both the employer and the union opposed the district court's preliminary injunction.⁶⁶

Nevertheless, despite the very special facts of this case, the Civil Rights Division of the United States Department of Justice took the occasion to send a letter to plaintiffs and defendants in fifty-two cases where the parties had incorporated affirmative action into consent decrees.⁶⁷ Without evidence that any party in any of these cases wished to modify its consent agreement, the Division urged the parties to modify their agreements.⁶⁸ The goal envisioned by the Civil Rights Division was to eliminate any preferences, unless the preferences were narrowly tailored to assist actual victims of discrimination.⁶⁹

The Civil Rights Division gave *Stotts* the broadest possible reading, one which effectively eliminated affirmative action.⁷⁰ A subsequent opinion by Justice Rehnquist, who wrote the strong dissent in *Weber*, indicated that he also saw *Stotts* as burying affirmative action.⁷¹ Subsequent decisions, however, demonstrated that affirma-

63. *Firefighters v. Stotts*, 467 U.S. 561 (1984).

64. See generally Herbert N. Bernhardt, *A Conflict Between Affirmative Action and Seniority: The Court May Avoid This One*, 1983-84 Term, PREVIEW OF UNITED STATES SUPREME COURT CASES 229. The dissent in *Stotts* would have declared the case moot. *Stotts*, 467 U.S. at 593 (Blackmun, J., dissenting). A similar case in Boston had been remanded for mootness just a year earlier. *Firefighters v. Boston Chapter, NAACP*, 461 U.S. 477 (1983).

65. *Stotts*, 467 U.S. at 564.

66. *Id.* at 566-67 & 583.

67. Form letter from William Bradford Reynolds, Assistant Attorney General of the United States of America sent during December 1984, January and February 1985 to representatives of municipalities, police and fire departments, school districts, public utilities and sheriff departments. (Letter and list of recipients on file with author).

68. *Id.*

69. *Id.*

70. Merely aiding specific victims of past discrimination could not be called affirmative action. *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976).

71. *Firefighters v. Cleveland*, 478 U.S. 501, 535 (1986).

tive action was still very much alive, both legally and practically.

WYGANT v. JACKSON

In *Wygant v. Jackson Board of Education*, the Supreme Court, while rejecting some portions of the parties' affirmative action plan, made quite clear its view that affirmative action was legitimate for both private and public employers.⁷² The case involved a school district in Michigan and was brought pursuant to the Equal Protection Clause of the Fourteenth Amendment.⁷³ The Court split in a number of directions on this case; but in hindsight, Justice O'Connor's views appear to be most significant.⁷⁴

Wygant was unusual because the purpose of the affirmative action program for black teachers was to provide role models for black students.⁷⁵ Accordingly, the goals for hiring were based not on the numbers of black teachers available but on the percentage of minorities in the student population.⁷⁶ The program also included a collective bargaining provision, Article XII, which provided that in the event of layoff, minorities would be laid off in proportion to their percentage of the teachers in the system.⁷⁷ The lawsuit began when the Board of Education failed to comply with Article XII and instead laid off employees in order of seniority.⁷⁸ The teachers' union and two minority employees sued to enforce this provision.⁷⁹

Four dissenting Justices wished to uphold the Jackson Board of Education's affirmative action plan in its entirety, including the role

72. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

73. *Id.* at 271.

74. *Wygant*, 476 U.S. at 284 (O'Connor, J., concurring).

75. *Wygant*, 476 U.S. at 275.

76. *Id.* at 294.

77. *Id.* at 270-71. Article XII of the parties' Collective Bargaining Agreement reads as follows:

In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff. In no event will the number given notice of possible layoff be greater than the number of positions to be to be eliminated. Each teacher so affected will be called back in reverse order for positions for which he is certificated maintaining the above minority balance.

Id.

78. *Id.* at 271.

79. *Id.*

model theory and Article XII.⁸⁰ Justice Powell wrote the majority opinion, finding that the state had not demonstrated the compelling interest necessary for a racial classification and that the layoff provision was not sufficiently narrowly tailored.⁸¹ Justice O'Connor joined Justice Powell on the first finding but found it unnecessary to decide if the layoff provision might have been justified under other circumstances.⁸²

The *Wygant* case demonstrated that the process of applying the Equal Protection Clause or Title VII is similar.⁸³ Both doctrines use a balancing process. Indeed, Justice O'Connor might well have used the tightrope analogy from *Weber*⁸⁴ when she spoke of public employers as "trapped between the competing hazards of liability to minorities if affirmative action *is not* taken to remedy apparent employment discrimination and liability to minorities if affirmative action *is* taken."⁸⁵

As Justice O'Connor viewed the problem, the role model theory for hiring minority teachers had no demonstrable relationship to the number of qualified minority teachers in the community.⁸⁶ Therefore, the theory was not probative of employment discrimination.⁸⁷ Clearly, Justice O'Connor was correct on this point.⁸⁸ If the affirmative action in the *Wygant* case was justified at all, it would be by educational goals, not employment goals.⁸⁹

The *Wygant* decision was issued on May 19, 1986.⁹⁰ On July 2, 1986, the Supreme Court issued two decisions, *Sheet Metal Workers v. EEOC*⁹¹ and *Firefighters v. Cleveland*.⁹² The *Firefighters* case upheld the right of the city to agree on an affirmative action plan with representatives of minorities and to incorporate that plan in a con-

80. *Wygant*, 476 U.S. at 295-320 (Marshall, J., dissenting, joined by Brennan, J. and Blackmun, J.; Stevens, J., dissenting).

81. *Wygant*, 476 U.S. at 269.

82. *Wygant*, 476 U.S. at 284 (O'Connor, J., concurring).

83. This similarity was later confirmed by Justice O'Connor in *Johnson v. Santa Clara*, 480 U.S. 616, 649 (1987).

84. *See supra* note 23 and accompanying text.

85. *Wygant*, 476 U.S. at 291.

86. *Id.* at 294.

87. *Id.*

88. Qualified Michigan teachers were not being denied employment opportunities. To find qualified teachers the school board had to import them from out of state. *Id.* at 307.

89. *See Wygant*, 476 U.S. at 313 (Stevens, J., dissenting).

90. *Wygant*, 476 U.S. at 267.

91. 478 U.S. 421 (1986).

92. 478 U.S. 501 (1986).

sent decree.⁹³ Such affirmative action would not have to be limited to actual victims of discrimination.⁹⁴ The *Sheet Metal Workers* case upheld the right of United States District Courts to order affirmative action in cases of egregious violations of the laws against discrimination.⁹⁵ Again, such affirmative action would not be limited to actual victims of discrimination.⁹⁶

Wygant, *Sheet Metal Workers*, and *Firefighters* signalled the end of the ideological crusade to eliminate affirmative action. Yet at the same time, they, and the cases that followed, indicated that affirmative action would be limited. As the cases unfolded, both extremes, that of unlimited affirmative action and that of no affirmative action, seemed patently unreasonable. Limiting affirmative action to the actual victims of discrimination would end all efforts to voluntarily correct discrimination, and it would allow assistance to minorities only in cases where specific acts of discrimination could be proved. On the other hand, an affirmative action plan which was not tied to the available pool of qualified applicants would have an unfair impact on applicants not preferred by the plan. Such discriminatory impact, without rational justification, would violate Title VII and the Equal Protection Clause. It was increasingly clear that employers would have to work hard at the affirmative action process if discrimination against minorities was to be corrected and discrimination against majorities avoided.

JOHNSON v. SANTA CLARA

Johnson v. Santa Clara also reaffirmed the use of voluntary affirmative action, this time in a case involving a public employer.⁹⁷ The case was tried under Title VII. The district court found that the employer had violated Title VII because the affirmative action plan had no definite duration.⁹⁸ The Ninth Circuit Court of Appeals reversed, and the Supreme Court affirmed the court of appeals, find-

93. *Id.* at 530.

94. *Id.* The reader should refer to the assertions by Assistant Attorney General Reynolds in letters to settling parties, *supra* note 67, and Justice Rehnquist's dissent in *Weber*, *supra* notes 32-34 and accompanying text. Both Reynolds and Rehnquist took the positions that *Stotts* had forbidden the use of affirmative action to aid anyone other than actual victims of discrimination. *See supra* notes 63-71 and accompanying text.

95. *Sheet Metal Workers*, 478 U.S. 421, 442 (1986).

96. *Id.*

97. 480 U.S. 616 (1987).

98. *Id.* at 620.

ing that the employer had not violated Title VII.⁹⁹

Johnson, the plaintiff, complained because but for affirmative action he believed he would have been chosen for the job.¹⁰⁰ Joyce, the woman who was chosen instead of Johnson, had virtually the same qualifications as Johnson but was chosen only after she contacted the agency affirmative action coordinator and received his recommendation.¹⁰¹ Joyce was the first woman chosen by the agency for a skilled craft position.¹⁰² While the agency planned eventually to have women in skilled crafts positions approximate the percentage of women in the labor market, at that time thirty-six percent, no immediate goal had been chosen.¹⁰³

The agency plan authorized gender to be taken into account as one factor in making promotions to positions within a traditionally segregated job classification.¹⁰⁴ The plan intended to achieve “a statistically measurable yearly improvement in hiring, training and promotion of minorities and women”¹⁰⁵ In setting short term goals, the plan called for equal employment opportunity officers to take into account the percentages of qualified individuals available in the local area.¹⁰⁶

In some ways the case met the author's “fig leaf” analysis.¹⁰⁷ It involved a situation in which gender bias might have influenced the fact that Joyce was not selected as the most qualified.¹⁰⁸ Joyce her-

99. *Id.*

100. *Id.* at 625.

101. *Johnson*, 480 U.S. at 624-25.

102. *Id.* at 621.

103. *Id.* at 621-22.

104. *Id.* at 620.

105. *Johnson*, 480 U.S. at 621 (citation omitted).

106. *Id.* at 622.

107. *See supra* text accompanying notes 12-16.

108. *Johnson*, 480 U.S. 616, 624 n.5 (1987). Footnote five illustrates circumstances where it is difficult to prove discrimination but where the disinterested observer may nevertheless be suspicious:

Joyce testified that she had had disagreements with two of the three members of the second interview panel [which rated her qualifications as slightly inferior to those of Johnson]. One had been her first supervisor when she began work as a road maintenance worker. In performing arduous work in this job, she had not been issued coveralls, although her male co-workers had received them. After ruining her pants, she complained to her supervisor, to no avail. After three other similar incidents, ruining clothes on each occasion, she filed a grievance, and was issued four pairs of coveralls the next day. Joyce had dealt with a second member of the panel for a year and a half in her capacity as chair of the Roads Operations Safety Committee, where she and he “had several

self had contacted the affirmation action officer because of fear that she “might not receive disinterested review.”¹⁰⁹

Citing the *Weber* decision, Justice Brennan, in the majority opinion for the Court, wrote:

[A]n employer seeking to justify the adoption of a plan need not point to its own prior discriminatory practices, nor even to an “arguable violation” on its part. Rather it need point only to a “conspicuous . . . imbalance in traditionally segregated job categories.” Our decision was grounded in the recognition that voluntary employer action can play a crucial role in furthering Title VII’s purpose of eliminating the effects of discrimination in the workplace, and that Title VII should not be read to thwart such efforts.¹¹⁰

Brennan further noted that:

[A] comparison of the percentage of minorities or women in the employer’s work force with the percentage in the area labor market or general population is appropriate in analyzing jobs that require no special expertise Where a job requires special training, however, the comparison should be with those in the labor force who possess the relevant qualifications.¹¹¹

However, Brennan stated that in his view the manifest imbalance need not be such as to support a *prima facie* case against the employer.¹¹² In examining the plan in *Johnson*, Brennan found that the short term goals made the plan acceptable.¹¹³ The short term goals involved modest increases in the percentages of women and minorities hired and took into account the numbers locally available

differences of opinion on how safety should be implemented.” In addition, Joyce testified that she had informed the person responsible for arranging her second interview that she had a disaster preparedness class on a certain day the following week. By this time about 10 days had passed since she had notified this person of her availability, and no date had yet been set for the interview. Within a day or two after this conversation, however, she received a notice setting her interview at a time directly in the middle of her disaster preparedness class. This same panel member had earlier described Joyce as a “rebel-rousing, skirt-wearing person.”

Id. (citations omitted).

109. *Id.*

110. *Johnson*, 480 U.S. at 630 (citations omitted).

111. *Id.* at 631-32.

112. *Id.* at 632.

113. *Id.* at 636.

within the appropriate qualifications.¹¹⁴ This contrasted with the overall goals based on percentages in the work force which would have mandated “blind hiring by the numbers.”¹¹⁵ Brennan further found that the plan did not unnecessarily trammel the rights of majority employees.¹¹⁶ Johnson had no definite entitlement to the job, being only one of several from whom the supervisor would choose.¹¹⁷ Moreover, Johnson remained eligible for future promotions and in fact was selected for the next one.¹¹⁸

Finally, Brennan noted that the plan was “intended to *attain* a balanced work force, not to maintain one.”¹¹⁹ Accordingly Brennan concluded “that the Agency does not seek to use its plan to maintain permanent racial and sexual balance.”¹²⁰

Justice Stevens and Justice O'Connor wrote concurring opinions.¹²¹ In his opinion, Stevens emphasized the point made in his *Wygant* opinion that a state may use its power to engage in affirmative action for other than employment goals.¹²² In her opinion, O'Connor criticized Brennan for taking an “expansive and ill defined approach.”¹²³ In fact, however, her differences with Brennan in the *Johnson* case parallel those of Blackmun in the *Weber* case.¹²⁴ Like Blackmun, O'Connor's theory of “arguable violation” puts the emphasis on “arguable” rather than on “violation.”¹²⁵

Justice White, as previously noted, used the *Johnson* case as a vehicle to announce that he no longer supported the decision he had voted for in *Weber*.¹²⁶ Justice Scalia harked back to Rehnquist's dissent in *Weber*¹²⁷ by arguing that Title VII forbade all discrimination,

114. *Johnson*, 480 U.S. at 636-37.

115. *Id.*

116. *Id.* at 638.

117. *Johnson*, 480 U.S. at 638.

118. *Id.* at 638. Contrast the situation in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), with *Harmon v. San Diego County*, 477 F. Supp. 1084 (S.D. Cal. 1979).

119. *Johnson*, 480 U.S. at 639 (emphasis added).

120. *Id.* at 640.

121. *Id.* at 642, 647 (O'Connor, J., concurring, Stevens, J., concurring).

122. *Johnson*, 480 U.S. at 647 (Stevens, J., concurring).

123. *Johnson*, 480 U.S. at 648 (O'Connor, J., concurring). See also *One Justice Sets a Tack of Her Own*, N.Y. TIMES, Mar. 27, 1987, at A17.

124. See *supra* notes 35-39 and accompanying text.

125. See *supra* notes 38-39 and accompanying text.

126. See *supra* note 50.

127. See *supra* text accompanying notes 32-34.

including affirmative action.¹²⁸ In doing so, he, like Rehnquist, conveniently ignored the fact that without affirmative action the goals of Title VII could not be achieved.¹²⁹

Justice Scalia's criticism of the plan in the *Johnson* case used strong language. He stated that “[q]uite obviously, the plan did not seek to replicate what a lack of discrimination would produce, but rather imposed racial and sexual tailoring that would, in defiance of normal expectations and laws of probability, give each protected racial and sexual group a governmentally determined ‘proper’ proportion of each category.”¹³⁰ Scalia went on to conclude:

This Court's prior interpretations of Title VII, especially the decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), subject employers to a potential Title VII suit whenever there is a noticeable imbalance in the representation of minorities or women in the employer's work force Thus, after today's decision the failure to engage in reverse discrimination is economic folly A statute designed to establish a color-blind and gender-blind workplace has thus been converted into a powerful engine of racism and sexism, not merely permitting intentional race-and sex-based discrimination, but often making it, through operation of the legal system, practically compelled.¹³¹

Justice Scalia thus persists in concluding, as Rehnquist before him,¹³² that affirmative action, which in many cases is the only practicable way of avoiding race and gender discrimination,¹³³ is itself “a powerful engine of sexism and racism.”¹³⁴ In the author's view, Scalia and Rehnquist twist the facts to reach their own conclusions, much like the speaker in George Orwell's *1984*.¹³⁵ Both Justices project a color blind goal of a nation where discrimination is eliminated and reject the practical measures necessary to overcome discrimination in a world where people are imperfect.

The *Johnson* case can be seen as the triumph of the moderate approach to affirmative action in the Supreme Court. *Johnson* reaf-

128. *Johnson*, 480 U.S. 616, 657-58 (1987) (Scalia, J., dissenting).

129. See *supra* notes 12-23 and accompanying text.

130. *Johnson*, 480 U.S. at 660 (Scalia, J., dissenting).

131. *Id.* at 676-77.

132. See *supra* text accompanying notes 32-34.

133. See *supra* text accompanying notes 9-23.

134. *Johnson*, 480 U.S. at 677 (Scalia, J., dissenting).

135. See *supra* text accompanying notes 33-34.

firmed the right of both private and public employers to engage in affirmative action. At the same time, however, the Justices stressed that affirmative action should be rationally limited. There could be no "blind hiring by the numbers."¹³⁶ The goals set for female and minority employment had to be closely tied to the number of qualified individuals available. This allowed the agency to give a preference to Joyce under circumstances where the failure to do so could result in continuation of discriminatory impact against qualified females. Arguably, giving her the preference in this case was the only way to avoid giving Joyce grounds for a lawsuit. By allowing affirmative action, the Court allowed discrimination to be voluntarily eliminated without waiting for proof of specific violations of law. This was a limited kind of affirmative action, consistent with the Blackmun opinion in the *Weber* case.

Even the liberal and moderate Justices, however, have failed to come to terms with just how ubiquitous and necessary affirmative action has become as a management tool. Paradoxically, therefore, there is language in the opinions that would give employers too much leeway and at the same time, subject them to excessive attack. Thus, Brennan in the *Johnson* case indicated that the plan was temporary and not intended to maintain a permanent racial balance. A good affirmative action plan is not intended to maintain a racial balance at all, whether temporary or permanent. On the other hand, the use to which affirmative action is put is not temporary.

When properly used, affirmative action goals are guidelines for discovering the discriminatory impact of selection techniques. To turn the guidelines into rigid quotas ignoring fairness and merit would violate Title VII. In that sense, racial balancing, even on a temporary basis, is not allowed.

On the other hand, the need met by affirmative action goals is not short term. Subtle, unintended discrimination such as that behind the *Griggs* decision may be expected to continue for the indefinite future. New problems may arise as new groups enter the work force and as selection techniques change. Accordingly, employers are likely to face a continuing need to monitor the impact of their selection devices against realistic goals based on qualified applicant pools. Therefore, to say that an affirmative action plan must be temporary is inaccurate in any realistic sense. What we may look forward to is long term use of affirmative action plans carefully crafted

136. *Johnson*, 480 U.S. at 636.

to be limited to qualified applicants. Such plans will be judged not only on how well employers design them but also on how flexibly and fairly employers apply them.

CROSON, WARDS COVE, AND THE
CIVIL RIGHTS ACT OF 1991

Johnson was the last Supreme Court case involving affirmative action in employment. The *City of Richmond v. J.A. Croson Co.* case,¹³⁷ however, once again stirred up the hornet's nest of those ready to declare that affirmative action was on its way out.¹³⁸ In fact, *Croson* stood not for that but for the proposition that the Court would not blindly endorse an affirmative action plan simply because a municipality announced that it was remedial.¹³⁹ Justice O'Connor, speaking for the Court, invoked another well settled principle: when special qualifications are necessary, comparisons to the general population are not enough.¹⁴⁰ The City of Richmond clearly got into trouble because of the inflexible way in which it administered its affirmative action plan.¹⁴¹

The issues concerning affirmative action in construction contracts are not the same as those in employment contracts. To evaluate just how a city can justify a preference for minorities among construction contractors is beyond the scope of this Article.¹⁴² For purposes of affirmative action in employment, however, the employer must demonstrate that his or her work force does not reflect the percentage of qualified minorities in the relevant general work force. This principle runs through all the cases this Article has analyzed. Nothing in the *Croson* decision changes this proposition.

The *Wards Cove* case was a different matter.¹⁴³ *Wards Cove* undermined the incentive for affirmative action by limiting the *Griggs* case. *Wards Cove* did this by placing the burden on the plaintiff to establish the particular employment practice that had

137. 488 U.S. 469 (1989).

138. See, e.g., *Court Has Affirmative Action Reeling*, PHOENIX GAZETTE, Feb. 6, 1989, at A11.

139. *Croson*, 488 U.S. at 500.

140. *Id.* at 501. Justice Brennan as well as Justice O'Connor stated this principle in the *Johnson* case. See *supra* text accompanying notes 110-112.

141. *Croson*, 488 U.S. at 483. See *supra* note 3.

142. But see Millemann & Chibundu, REPORT OF THE TASK FORCE TO STUDY THE CONSTITUTIONALITY OF THE BALTIMORE CITY MBE AND WBE PROGRAM (1990).

143. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). See also *supra* note 9.

disparate impact¹⁴⁴ and by leaving the burden of persuasion on the plaintiff even after the plaintiff demonstrated disparate impact.¹⁴⁵

On October 27, 1991, President Bush signed the Civil Rights Act of 1991.¹⁴⁶ This statute reinstated the prevailing rule under *Griggs* by amending section 701 of Title VII to provide that the employer has both the burden of production and persuasion after the plaintiff has demonstrated disparate impact, and by adding a new section, 703(k).¹⁴⁷

Wards Cove could have done more to cripple the incentive for affirmative action than any of the cases where affirmative action was directly challenged. The repeal of that decision had bipartisan support. President Bush's characterization of the Civil Rights Act of 1991 as a quota bill involved an acceptance of the Rehnquist-Scalia position that any preference was discriminatory. However, those who favor this position fail to acknowledge that numerical guidelines are often necessary to monitor the elimination of discrimina-

144. *Wards Cove*, 490 U.S. at 656-57.

145. *Id.* at 659.

146. 42 U.S.C. § 2000e (Supp. III 1992). Before signing the Act, Bush accused Congress of authoring a quota bill, primarily because of a Congressional effort to reinstate the *Griggs* rule. *The Death of an Ugly Slogan*, N.Y. TIMES, Oct. 27, 1991, at D14.

147. 42 U.S.C. § 2000e-2 (Supp. III 1992). Section 703 states:

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if —

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

Id.

tion. The center of our society, as well as the center of the Court, continues to support measured affirmative action so long as it is closely tied to the availability of qualified applicants.

THE DISPUTE OVER VALUES AND GOALS

Proponents of affirmative action see it as a way to overcome inequality caused by historic discrimination.¹⁴⁸ Inequality is seen not as the result of conscious bigotry but as something that will occur despite a good faith effort by all concerned to act in an unbiased manner concerning race and gender when employing people.¹⁴⁹ In this view, if it was ever possible to overcome the effects of discrimination merely by restoring equal rights to those who had been disenfranchised, the possibility was lost long ago when discrimination was built into the fabric of our society.¹⁵⁰

Opponents of affirmative action see it as an infringement on individual freedom. They see programs meant to assist groups that have been victims of discrimination as divisive and inconsistent with the ideal of individual freedom.¹⁵¹ They see any claim to group rights as necessarily decreasing individual rights.¹⁵² However, affirmative action does not oppose group interests and individual rights. In fact, this author's analysis indicates that individual rights are promoted when goals related to group interest are used to check against an employer's performance. These goals, applied flexibly, can become a means of eliminating discriminatory practices that otherwise would not be located.¹⁵³

148. See, e.g., DEREK BELL, *AND WE ARE NOT SAVED* (1987).

149. See Bernhardt, *supra* note 9, at 902.

150. See BERNARD SCHWARTZ, *BEHIND BAKKE: AFFIRMATIVE ACTION AND THE SUPREME COURT* (1974), quoting from Justice Marshall: "If the principle of color-blindness had been accepted by the majority in *Plessy [v. Ferguson]* . . . we would not be faced with this problem in 1978 For us now to say that color blindness [applies] is to make a mockery of 'equal justice under law.'" *Id.* at 128. For a good historical perspective on how the chance to create a truly equal society was lost in the nineteenth century, see ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877* (1988).

151. See Bernard D. Meltzer, *The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. CHI. L. REV. 423, 456 (1980).

152. See Brief for the United States as Amicus Curiae Supporting Petitioners at 21, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (No. 84-1340); NATHAN GLAZER, *ETHNIC DILEMMAS 1964-1982* 273 (1983).

153. See *supra* text accompanying notes 12-23, 107-09.

REALITY AS AN ANSWER TO THEORY

Whether or not a person favors affirmative action depends upon whether the person believes it promotes equality. Professor Michael Rosenfeld suggested, in a provocative article, that the outcome of a person's application of different statutory and constitutional tests to affirmative action depends upon what he or she believes constitutes substantive equality.¹⁵⁴ Similarly, this author concludes that in the area of employment law the validity of an affirmative action program cannot be established with any abstract formula.

A close examination of the facts of many cases where affirmative action is used indicates that it promotes equality.¹⁵⁵ For example, equality was served by the promotion of Joyce in the *Johnson* case.¹⁵⁶ Yet the realities of proof make it highly unlikely that she would have been able to prove discrimination in the absence of affirmative action.¹⁵⁷ In these circumstances, a hand on the scale apparently serves the reasonable purpose of promoting equality. This is not an unusual circumstance. Affirmative action in a variety of situations allows the elimination of hidden discrimination without the need for accusations of deliberate bias, which are both difficult to prove and disruptive.¹⁵⁸

Opponents who argue for total elimination of affirmative action, whether theorists or Justices, are simply ignoring the reality of hidden discrimination. Ignoring discrimination will not make it go away. They also overestimate the efficiency of normal employment selection. Companies who select work forces by traditional methods find that their employees are not necessarily more efficient than those selected with the use of affirmative action guidelines.¹⁵⁹ In fact, employers are frequently pleasantly surprised by their more

154. Michael Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 20 MICH. L. REV. 1729, 1734 (1989).

155. See *supra* text accompanying notes 12-23.

156. See *supra* text accompanying notes 107-09.

157. After a two day trial, the district court found as a matter of fact that Johnson was more qualified than Joyce. *Johnson v. Santa Clara*, 480 U.S. 616, 663-64 (1987).

158. See *supra* text accompanying notes 12-23.

159. If the employer demonstrates that the selection technique with discriminatory impact selects employees who perform better, and the plaintiff is unable to prove that a less discriminatory alternative would achieve the same result, the employer will not be liable for a violation under the *Griggs* decision or the new § 703(k) rule. See discussion *supra* notes 12-23 and accompanying text, and § 703(k) *supra* note 147.

diverse work forces.¹⁶⁰ All of this does not mean that courts should back away whenever an employee asserts a claim of affirmative action. Just as there are inequities built into usual ways of operating, affirmative action can also be a source of inequity if not properly applied. As Justice O'Connor pointed out in the *Wygant* case, an employer must strike a balance avoiding discrimination in either direction.¹⁶¹

Justice O'Connor assumes that the standards are the same whether applying Title VII or the Equal Protection Clause.¹⁶² Her assumption makes sense. When striking a balance, the formula reaching fairness to both sides is reached is likely to be the same, no matter what the source of legal obligation.

CONCLUSION

Affirmative action is a necessary aid in eliminating discrimination. Affirmative action does not require the employer to select unqualified employees. In fact, the employer is required to base affirmative action goals on the pool of qualified applicants in order to have a valid plan under either Title VII or the Equal Protection Clause. A wise employer uses statistics published on the availability of qualified employees.¹⁶³ The employer may also wish to hire a consultant.

Affirmative action is likely to be with us for the foreseeable future. Perhaps a better name for it would be "managing diversity," a phrase coined by a management consultant.¹⁶⁴ Ultimately a system for containing the effects of prejudice, by checking the impact of selection devices against a model, is evolving. Prejudice may impact non-minorities as well as minorities.

Good affirmative action does not result in a fixed percentage of minorities in every job as Justice Scalia suggested in his *Johnson* dissent.¹⁶⁵ If, however, an employer's work force does not reflect the percentage of *qualified* minorities in the applicant pool, something is

160. See Thomas, *supra* note 21; Williams, *supra* note 21. See also *supra* notes 56-62 and accompanying text.

161. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

162. *Johnson v. Santa Clara*, 480 U.S. 616, 649 (1987) (O'Connor, J., concurring). See *supra* notes 123-25 and accompanying text.

163. See, e.g., U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, JOB PATTERNS FOR MINORITIES AND WOMEN IN PRIVATE INDUSTRY 1990 (1991).

164. See Thomas, *supra* note 21.

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

probably wrong. A flexible case by case approach to correcting such inequities may be good business and may also avoid a suit for discriminatory impact. It may also help to bring about the kind of equality and fairness that the Equal Protection Clause and Title VII were designed to achieve.