Chapter Three

O'Connor and the Employment Cases

Justice O'Connor's debut in the affirmative action field was modest. In the 1984 case of *Firefighters Local Union No. 1784 v. Stotts*,[1] the Court reversed a district court order invalidating the operation of a seniority system, negotiated between the firefighters union and the city of Memphis, that would have protected many white veteran firefighters against more recently hired blacks during a period of budget-induced layoffs. In an earlier consent decree reached with blacks claiming discrimination in hiring and promotion, the fire department, though not conceding discrimination, had committed itself to nondiscriminatory future practices. Firefighters Local No. 1784 had not been privy to those negotiations, and the agreement itself had made no specific mention of the seniority system or any other action that would have been injurious to existing employees. Thus, the district court's modification of the consent decree was supported neither by a robust record of discrimination

1. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984).

nor by inclusion of the organization representing parties likely to be injured by the decree.

The Court held that Section 703(h) of Title VII of the Civil Rights Act insulates bona fide seniority systems save for the actual victims of past discrimination. Writing for the majority, Justice White suggested, "If individual members of a plaintiff class demonstrate that they have been actual victims of the discriminatory practice, they may be awarded competitive seniority and given their rightful place on the seniority roster."[2] The remaining members of the plaintiff class were entitled to no special protection. The Court recalled Senator Humphrey's words during floor debate on the legislation: "No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title."[3]

Justice O'Connor wrote a short gratuitous concurrence, like a recruit already part of the formation announcing her presence after the roll has been called. However, in 1986, *Wygant v. Jackson*[4] provided the Court and Justice O'Connor with the opportunity to define their respective approaches toward affirmative action in ways that would be reflected in many later decisions.

Just as tough cases are said to make bad law, *Stotts* showed that easy cases may sometimes make incomplete law. The glaring question left unanswered by *Stotts* was whether, given a pervasive or egregious pattern of documented discrimination by a union or an employer, the courts could order

2. *Id.* at 578–579.
3. *Id.* at 580.
4. *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

forms of relief unavailable to redress innocent racial or ethnic imbalances. Such relief could extend preferential treatment to minority group members who had not themselves suffered discrimination, or it could involve hiring quotas. The Court would begin to put some meat on the skeletal *Stotts* case two years later in the important *Wygant* case.

During a period of racial tensions in the early 1970s, the Jackson, Michigan, Board of Education reached agreement with the local teachers union that, should it become necessary to lay off teachers, seniority rights would be observed except that at no time would there be a greater percentage of minority teachers laid off than the percentage of minority teachers employed at the time of the layoffs. When layoffs did occur, the board implemented the accord, laying off several nonminority teachers while retaining minority teachers with less seniority. Laid-off white teachers then filed suit, claiming the action of the board violated the equal protection clause of the Fourteenth Amendment as well as Title VII of the Civil Rights Act. In the lower federal courts, the board said the purpose of the agreement was to keep the percentage of minority teachers about the same as minority students to provide role models for the latter, an action made necessary by the long history of societal discrimination against black people. Although no history of racial discrimination was ever found on the part of the Jackson school system, both lower courts held the policy of redressing societal discrimination through the provision of role models permissible, and the means employed, reasonable.[5] The Supreme Court reversed the decision.[6]

Although he could not succeed in attracting five justices

5. 546 F. Supp. 1195 (E.D. Mich. 1982); 746 F.2d 1152 (6th Cir. 1984).
6. *Wygant*, 476 U.S. at 273.

to his plurality decision, Justice Powell authored an opinion rich in axioms that would become the lore of the land in affirmative action jurisprudence. Justice O'Connor, in her concurrence, provided a good look at her early approach to the issue plus what seems, in retrospect, a rather optimistic belief that consensus on the Court could be found on this divisive national question.

Justice Powell declared that race-conscious policies must be invoked only to redress specific past discrimination: "Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."[7] The effort to find role models cannot be used to support discriminatory layoffs because it bears no necessary relationship to past hiring practices. In fact, were there only a small number of minority children in the schools but a high percentage of black teachers in the labor pool, pegging the number of black teachers to the percentage of minority students could actually create discrimination in hiring. Further, a finding of past discrimination would provide an anchor for what otherwise might be wildly adrift remedies: "In the absence of particularized findings, a court could uphold remedies that are ageless in the reach into the past, and timeless in their ability to affect the future."[8]

Justice Powell did not find the remedy narrowly tailored, even had the policy objective been lawful.[9] In addition, while the Court looks closely at all race-conscious actions, it casts an especially skeptical eye on those that rely upon dismissals or abrogated seniority arrangements to achieve their ends. A worker applying for a job (or a student applying for college)

7. *Id.* at 276.
8. *Id.*
9. *Id.* at 283.

may have a hope but no reasonable expectation of acceptance, but a worker with accumulated seniority owns something of value potentially more precious than the title to a home. "While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives."[10]

In her concurrence, Justice O'Connor first searched for common ground regarding the test to which racial classifications are subjected. The standard is "strict scrutiny"—not "strict in theory and fatal in fact," but "strict and searching."[11] She saw Justice Powell translating this into requirements that "(1) the racial classification be justified by a 'compelling governmental interest,' and (2) the means chosen by the state to effectuate its purpose be 'narrowly tailored.'"[12] She found transient comments from the pro-affirmative action justices suggesting that they too favored strict scrutiny; but then she recalled their argument in *Bakke* that "remedial use of race is permissible if it serves 'important governmental objectives' and is 'substantially related to achievement of those objectives.'"[13] This was a far more tolerant standard, but one that had already set one Court faction apart from the other and would do so for years to come. However, O'Connor suggested than in many situations the difference in framing the issue "may be a negligible one."[14] Having blithely sought unity where disunity reigned, Justice O'Connor announced her own position: "I subscribe to Justice Powell's formulation

10. *Id.* at 283.
11. *Id.* at 285.
12. *Id.* at 287.
13. *Id.*
14. *Id.*

because it mirrors the standard we have consistently applied in examining racial classifications in other contexts."[15]

Still, she invited conciliation. Redressing specific past discrimination is one path toward race-conscious solutions, but there are others as well: "[A]lthough its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial classifications in furthering that interest. And nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies."[16]

So we see here what appears to be at least a passive endorsement of *Bakke*, a position Justice O'Connor would never expressly disavow, though her opinions in other cases would lead opponents of race preferences to conclude she had cast aside the rationale for Justice Powell's opinion. At the time of *Wygant*, however, Justice O'Connor was still trying to find common ground with Justices Marshall, Brennan, and Blackmun. Although a state cannot get into the business of race consciousness without the trigger of its own past discrimination, "it is agreed that a plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently 'narrowly tailored' or 'substantially related' to the correction of prior discrimination by the state actor."[17] This is not something Powell dealt with in his opinion, and it reflects a recurrent tendency in

15. *Id.* at 285.
16. *Id.*
17. *Id.* at 287.

Justice O'Connor's work of limiting and narrowing a Court decision even while purporting to concur with it.

Justice O'Connor next embraced Powell's conclusion that societal discrimination "cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny" and that the "role model" rationale must fail.[18] In an important qualification, however, barely noticed at the time, she volunteered the sort of evidence that state defenders of race-conscious programs might offer to justify their remedy: "[D]emonstrable evidence of a disparity between the percentage of qualified blacks on a school's teaching staff and the percentage of qualified minorities in the relevant labor pool sufficient to support a prima facie Title VII pattern or practice claim by minority teachers would lend a compelling basis for a competent authority such as the School Board to conclude that implementation of a voluntary affirmative action plan is appropriate to remedy apparent employment discrimination."[19]

The notion of disparity studies to document discrimination was borrowed from the controversial world of the Equal Employment Opportunity Commission (EEOC) and related agencies investigating companies' compliance with federal nondiscrimination law. Often, in the absence of documented discriminatory practices, testing, or other requirements having a "disparate impact" on minorities, the regulators would fall back on statistics showing a disparity between the percentage of minority workers at a given establishment versus the percentage of minority members of the relevant labor force. Should it appear that minorities were "underrepresented" at the establishment in question, the

18. *Id.* at 288.
19. *Id.* at 291.

agency would put its enforcement mechanisms into play, ranging from simple findings of noncompliance to suspension of government contractors to the requirement that the employer promptly devise and implement an affirmative action plan. In *Wygant*, Justice O'Connor suggested applying this doctrine to potential race-conscious programs by the state. She raised the issue again when she wrote the opinion of the Court in the *Croson* case, which at first reading seemed to ban race set-asides in state contracts but which led to the introduction of hundreds of state "disparity studies" justifying continued set-asides. When it came to escaping from the central thrust of her own decrees, Justice O'Connor had few peers on her bench, or on any other.

Stretching the Civil Rights Act

On July 2, 1986, the Court decided two cases that pushed affirmative action in employment well into the gray areas of the Civil Rights Act of 1964, if not beyond. As was by then her custom, Justice O'Connor placed her individual views into the record in each case, concurring in one, dissenting in substantial part in the other.

Firefighters Local 93 v. Cleveland[20] began as a lawsuit by Vanguard—an association of black and Hispanic Cleveland firefighters claiming discrimination in hiring, assigning, and promoting minorities, including the use of culturally biased standardized tests. The city, which had resisted and lost two recent discrimination suits involving both the police and fire departments, was in no mood to again be adjudged harshly. Therefore, it negotiated with Vanguard a consent decree call-

20. *International Association of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986).

ing for specific numbers of minority candidates to be lieutenant, captain, battalion chief, and assistant chief. Under the agreement, "appropriate minority hiring goals" were to be established for future promotions, with the city refraining from using seniority points in promotions. The plan, which was to remain in effect for nine years, could be extended for an additional six years by agreement. Firefighters Local 93 had been excluded from the talks, and when it objected to the deal, the district court judge proposed boosting the number of planned promotions so that whites would actually wind up with more promotions than without affirmative action. Still the union membership voted overwhelmingly against the plan. A revised consent decree, not too dissimilar to the one rejected by Local 93, was eventually approved by the district court, which found from earlier municipal hearing records abundant evidence of past discrimination—much of it admitted by the department—and affirmed on appeal.[21]

The issue before the Court was whether the lower court could enter a consent decree that provided remedies beyond ones the court could have ordered under the Civil Rights Act following an adversary proceeding. Without question, Section 706(g) of the act prohibited courts from ordering reinstatement of a union member or the "hiring, reinstatement or promotion of an individual as an employee, or the payment to him of any back pay" if that person had been "refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin."[22] In other words, unless one had been the victim of direct racial, ethnic,

21. *Id.* at 501–511.

22. 42 U.S.C. 2000d et seq. (1964) (amended by Civil Rights Act of 1991, 42 U.S.C. 2000e et seq. (1991)).

nationality, or gender discrimination, he or she could not benefit from mere membership in a group that had suffered discrimination.

In this case, the Court majority stretched a bit. Recalling the "voluntary" contract—albeit under EEOC pressure—that Kaiser had reached with the Steelworkers Union in the *Weber* case, the Court concluded that consent decrees were, for purposes of affirmative action, more like the contract in *Weber* than the traditional judicial order subject to Civil Rights Act limitation. After all, Congress preferred voluntary rather than coerced employer action. Thus, wrote Justice Brennan for a six-justice majority, the act "does not restrict the ability of employers or unions to enter into voluntary agreements providing for race-conscious remedial action."[23]

In her concurring opinion, Justice O'Connor sought to narrow the holding's applicability—a familiar propensity. Yes, the parties can negotiate a consent decree beyond what a court could impose after a contested case. However, injured nonparties could still challenge the accord under other sections of the act or even under the Fourteenth Amendment.[24] Moreover, if previous holdings suggest that an employer's prior discriminatory conduct "is the necessary predicate for a 'temporary remedy favoring black employees,'" the Court's opinion would leave that requirement "wholly undisturbed."[25]

The combination of *Weber* and *Firefighters* pushed the possibilities of affirmative action in a direction sponsors of the act had assured colleagues it would not go—toward an employer's "voluntary" agreement to implement hiring or

23. *Firefighters*, 478 U.S. at 511.
24. *Id.* at 530.
25. *Id.* at 531.

promotional "goals" to benefit blacks or Hispanics who had not themselves been victims of discrimination by the employer in question, even though that employer may have been utterly racist in its hiring or promotional practices. Of course, the employer's conduct may have been considerably more benign and the consent decree simply a practical way to avoid years of costly and damaging litigation.

Local 28 of the Sheet Metal Workers International Association v. Equal Employment Opportunity Commission,[26] decided the same day as *Firefighters v. Cleveland*, took another giant step in the direction of a body of substantive discrimination law developed by judicial decision rather than by legislative process. The case began with a suit by the U.S. Department of Justice, succeeded by the EEOC, to enjoin the New York–based craft union and its apprenticeship program from engaging in a pattern and practice of discrimination against nonwhites. The district court found pervasive violations of the Civil Rights Act in the recruitment, selection, training, and admission to the union and, following continued union resistance to change its ways, established a 29 percent "goal" for nonwhite union membership. This figure was a reflection of the percentage of blacks in the relevant labor pool. The district court also ordered a union affirmative action program recommended by a court-appointed administrator. Following an appeal, lost by the union, the district court twice held the union in contempt for deliberately failing to implement the required changes, slightly increasing the target percentage for nonwhite workers and directing that fines for contempt levied against the union be placed in a

26. *Local 28 of the Sheet Metal Workers International Association v. Equal Employment Opportunity Commission*, 478 U.S. 421 (1986).

fund devoted to increasing nonwhite union membership.[27] The court further relaxed the initial timetable in response to union complaints that it was the sluggish economy of the early 1980s, rather than its own malevolence, keeping minority numbers low. Affirmed on appeal, the case came to the Supreme Court and raised the question of whether, even in response to egregious discrimination, the wording and history of the Civil Rights Act permitted a court to order a functional quota as a vehicle for relief and whether a court could implement a race-conscious plan of direct benefit to many who had not been victims of discrimination.

Writing for the majority, Justice Brennan first held that the Civil Rights Act "does not prevent a court from ordering, in appropriate circumstances, affirmative race-conscious relief as a remedy for past discrimination . . . where an employer or a labor union has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination."[28] In addition, Section 706(g)—which denies compensatory relief to individuals not subject to racial or ethnic discrimination—does not stop a court "from ordering affirmative race-conscious relief which might incidentally benefit individuals who were not the actual victims of discrimination."[29] Rather the intent of the section, according to Brennan, was to deny relief to someone a union could prove would not have gotten the job anyway, even with no discrimination. In cases of long-standing or egregious discrimination, however, Brennan averred it may be that only a firm goal that requires the hiring of minorities in rough proportion to their place in the relevant

27. *Id.* at 430–436.
28. *Id.* at 445.
29. *Id.*

work force would break the pattern of endless evasion and litigation. Such an order would reinforce the principal congressional objective—"to open employment opportunities to Negroes in occupations which have been traditionally closed to them."[30] Simply stopping discrimination may not be enough to attract minority job applicants when the employer's long-standing reputation is of one with doors closed to minorities. Affirmative action erases the "outward and visible signs of yesterday's racial distinctions" in a way necessary to attract potential black employees.[31] Numerical goals may also be an important judicial tool for reducing the effects of past discrimination. In short, as the lower federal courts had unanimously held, "[R]acial preferences may be used, in appropriate cases, to remedy past discrimination under Title VII."[32] The union and the EEOC (during the Reagan years, the EEOC took some conservative positions before the Supreme Court) were wrong to conclude that the act prevented nonvictims from participating in the mediation of past discrimination. Congress only sought to demand that "an employer would not violate the statute merely by having a racially imbalanced work force, and consequently, that a court could not order an employer to adopt racial preferences merely to correct such an imbalance."[33]

The Court noted the refusal of Congress, when considering the Equal Employment Opportunity Act of 1972, to pass two amendments that would have explicitly limited relief to proven victims of discrimination. The Court also expressed confidence that the 29 percent goal established by the lower

30. *Id.* at 448.
31. *Id.* at 450.
32. *Id.* at 451.
33. *Id.* at 453.

court would prove flexible in practice and that both it and the fund established with contempt fines would dissolve once the system had been purged of past discrimination.[34]

Justice O'Connor dissented sharply from the acceptance by the majority of the combination 29 percent goal and fund order, claiming that the goal thereby becomes "a rigid racial quota" barred by the 1964 act.[35] Congress sought to preclude quotas because of the harm they would impose on innocent nonminority workers and "the restriction on employer freedom that would follow from an across-the-board requirement of racial balance in every workplace."[36] She was not shutting the door on "racial preferences short of quotas," but even these preferences should be used when clearly necessary only if they would benefit nonvictims at the expense of victims.

Justice O'Connor was by that time—not uncharacteristically—walking an extremely fine line. References to the percentages of minority workers in a given labor pool were useful, but only as benchmarks "to estimate how an employer's work force would be composed absent past discrimination."[37] One cannot assume, however, that people of the various races "will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination." Therefore, there must be "a substantial statistical disparity between the composition of an employer's work force and the relevant labor pool, or the general population, before an intent to discriminate may be inferred from such a disparity."[38]

34. *Id.* at 482.
35. *Id.* at 489.
36. *Id.* at 493.
37. *Id.* at 494.
38. *Id.*

To be consistent with the act, a racial hiring or membership goal "must be intended to serve merely as a benchmark for measuring compliance with Title VII and eliminating the lingering effects of past discrimination, rather than as a rigid numerical requirement that must unconditionally be met on pain of sanctions," according to Justice O'Connor. A permissible goal "should require only a good-faith effort on the employer's or union's part to come within a range demarcated by the goal itself."[39]

This was all well and good in the abstract, but the Court was dealing with a union with a history of racial exclusion that violated New York state law even before passage of the Civil Rights Act of 1964, a union that showed a pervasive, persistent, and egregious refusal to comply with the law. No labor force benchmarks were needed in this instance because the number of black craftsmen taken into the union was close to zero. When confronted with judicial orders to end such practices, the union's lack of good faith was such that it was twice held in civil contempt. So, for all its insistent language, the O'Connor dissent never grappled with the question of what to do with a union or employer that acts in bad faith, contrary to law and court order, and that does so repeatedly. Is this actor to be treated with soft "goals" and benchmarks to measure its "good faith," or does it need a hard standard, subject to judicial amelioration, should circumstances change—as happened when the economy went south in the early 1980s and the federal district court extended the compliance deadline? Justice O'Connor was still finding her own way on affirmative action cases, still grasping for a rule of reason as crisp and logical as Justice Powell's notion of com-

39. *Id.* at 495.

pelling interest and narrow tailoring. In the *Sheet Metal Workers* case, she had still not found it.

United States v. Paradise,[40] decided in February 1987, also involved a court-ordered remedy for wanton racial discrimination, this time practiced by an agency of the state, and another dissent by Justice O'Connor that, like the *Sheet Metal Workers* case, seemed to be applying the right standard to the wrong set of facts.

The case grew out of a lawsuit originally filed in 1972 in which the NAACP charged the Alabama Department of Public Safety with illegally refusing to hire blacks. The case, tried before legendary District Court Judge Frank M. Johnson, was open and shut; in the 37-year history of the department, not a single black had ever been hired as a state trooper or for any but the most menial of jobs. Endeavoring to end not only the discrimination itself but also its present effects, Judge Johnson ordered the department to hire one black trooper for each white until 25 percent of the force—roughly equivalent to the percentage of blacks in the relevant labor force—was black and to develop recruitment, examination, training, promotion, and other personnel policies that neither in purpose nor effect discriminated against blacks.[41]

Evidence that developed during the litigation proved that, at least in the early years, the department sought to evade its responsibility. At first, the department perceived a vastly scaled-back need for new troopers, thus minimizing the number of blacks brought onto the force. Some blacks were eventually hired, but personnel policies were administered unevenly and little effort was made to develop fair promotion

40. *United States v. Paradise*, 480 U.S. 149 (1987).
41. 317 F. Supp. 1079 (M.D. Ala. 1970).

procedures. By 1978, out of 232 state troopers at the rank of corporal or above, none was black.[42]

Faced with a court order to develop a promotion test that did not adversely impact blacks, the department administered a test to 262 applicants, 60 of whom were black. Of these, only five blacks finished in the top half of the test-takers, and the highest rank achieved by a black candidate was 80. Under federal guidelines, tests are presumed to adversely impact blacks if they do not do at least four-fifths as well as whites.[43] In other words, as explained by the Court, "[I]f 60% of the whites who take a promotion test pass it, then 48 percent of the black troops to whom the test is administered must pass." Otherwise, the test is regarded as having an adverse impact on black job aspirants.[44] Under the unanimous 1971 Supreme Court holding in the *Duke Power Company* case,[45] an employer can justify administering a test with an adverse impact only on the basis of a compelling business need, a standard that opened a generation worth of litigation over the validity of tests administered by both public and private employers. Strangely, given the critical importance of a police force that appreciates priorities and procedures, knows and respects the law, and understands the importance of fastidious record keeping, the issue of a compelling state need to hire troopers who scored high on exams was not raised as an issue by either the majority or the dissenting *Paradise* justices.

By late 1983, there were only four black corporals but no sergeants, lieutenants, or captains. The district court ordered

42. *Paradise*, 480 U.S. at 159.
43. *Id.* at 160.
44. *Id.*
45. *Griggs v. Duke Power Company*, 401 U.S. 424 (1971).

that at least 50 percent of promotions to all ranks go to blacks, assuming they are qualified and the rank was less than 25 percent black. This plan would terminate when the 25 percent figure was reached or when the department came up with a promotion plan that had no adverse impact on blacks. As applied, the order appeared flexible, for example, in permitting all-white promotions when no qualified blacks were available. In fact, one upper-ranks promotion exam did produce a class with just over 23 percent blacks, a bit below the 25 percent goal.

A four-judge plurality, led by Justice Brennan, had little difficulty affirming "a temporary remedy that seeks to spend itself as promptly as it can by creating a climate in which objective, neutral employment criteria can successfully operate to select public employees solely on the basis of job-related merit."[46] As to any whites passed over by the remedial procedures, "[I]t cannot be gainsaid that white troopers promoted *since 1972* were the specific beneficiaries of *an official policy which systematically excluded all blacks*" (emphasis in opinion).[47] Concurring, Justice Stevens sensibly likened the case to the South's desegregation era, when busing and other race-conscious remedies were sometimes imposed in an effort to completely eliminate the legacy of forced separation of the races.[48]

Justices O'Connor and Powell both invoked the standard test for race-conscious official action—strict scrutiny to determine whether a compelling interest was being served by a narrowly tailored remedy. However, though Powell saw

46. *Paradise*, 480 U.S. at 156 (citing *NAACP v. Allen*, 493 F.2d 614, 621 (5th Cir. 1974)).

47. *Id.* at 170–171 (citing *Paradise v. Prescott*, 767 F.2d 1514, 1533 (11th Cir. 1985)).

48. *Id.* at 190–195.

nothing in Judge Johnson's handling of the matter to prevent his concurring with the plurality, Justice O'Connor was brief, but sharp, in her dissent, accusing her brethren of adopting "a standardless view of 'narrowly tailored' far less stringent than that required by strict scrutiny."[49] (More than a decade later, critics would make this same accusation regarding O'Connor's opinion in the Michigan cases.) The 25 percent requirement in *Paradise* was too rigid, she maintained. Instead, remedies such as stiff fines might have achieved the desired reforms "without trammeling on the rights of nonminority troopers," or a trustee might have been appointed to develop fair promotion procedures.[50]

One can, on the one hand, appreciate Justice O'Connor's desire to put some ground between her own developing affirmative action jurisprudence and the kind of result-oriented activism of such justices as Blackmun, Brennan, and Marshall. Her attempt, however, along with that of Justice Powell, to reduce each case to a pat formula—strict scrutiny, compelling need, narrow tailoring—is less convincing. There were, as we have seen, three distinct categories of affirmative action cases coming to the Court during this period: private contracts or consent decrees providing for racial preferences, state or federal initiatives designed to lift black people into the economic mainstream by awarding special benefits in areas like public contracting, and court-ordered remedies for specific acts of illegal discrimination. In the first category of cases, including *Weber*, the Court, instead of running roughshod over specific Civil Rights Act language, might instead have elected to "pierce the veil" of the transaction to determine whether it was in fact a remedy for past illegal discrim-

49. *Id.* at 197.
50. *Id.* at 200.

ination. If so, the parties, whether by agreement or consent decree, could well have been given some leeway to reach a just settlement. If not, the deal was itself barred by the Civil Rights Act of 1974 and should have been rejected.

The second category, including such cases as *Bakke* and *Fullilove* and involving no past official discrimination, presents the perfect situation for the "compelling need" standard. Strict scrutiny is appropriate; narrow tailoring, essential. The need for judicial skepticism is great because of the brutal and terrible history, both in this country and elsewhere, of the de jure use of race or ethnicity to define individual rights.

The third category, exemplified in such cases as *Sheet Metal Workers* and *Paradise* and involving judicial remedies for past illegal discrimination by public or private actors, calls for the application of a far different standard. Rather than strict scrutiny, judicial discretion should be the order of the day. Rather than narrow tailoring, the courts should be encouraged to think creatively for remedies that will purge the involved institution of the vestiges of its lawless conduct. Beneficiaries of the mitigating policies ought not to be limited to those suffering direct injury from the discrimination. In George Wallace's Alabama, for example, the operative policy for every institution controlled or influenced by the state—including the state troopers—could be summarized in three simple words: Blacks not welcome. Needed in this category is the complete dismantling of the system and its effects. To require blacks to go through the futile gesture of challenging the system in order to benefit from that dismantlement would compound the indignity.

In short, Justice O'Connor's "one size fits all" affirmative action analysis in those early years lacked subtlety and judicial imagination. However, her opinion in *Paradise* was

joined by the new Chief Justice Rehnquist and the recently appointed Justice Scalia. Soon Justices Kennedy and Thomas would join the Court, and O'Connor's need to dissent in affirmative action cases would disappear.

Perhaps the most curious decision of the string that began with *Weber* involved not race but gender. In *Johnson v. Transportation Agency*,[51] a male county worker in Santa Clara County, California, had applied for the job of road dispatcher but lost the position to a woman judged slightly less qualified. The male worker alleged that his rights under Title VII of the Civil Rights Act had been breached. The Transportation Agency had recently adopted an affirmative action plan with the goal of making the ratio of male and female workers, as well as minorities in each department, reflect their proportion in the county labor force—36.4 percent female, for example. At the time, women constituted only 22.4 percent of agency employees and held none of the 238 skilled craft worker positions. Yet in trying Johnson's case, the district court found there had been no past or present discrimination practiced by the agency. Rather, as the agency itself reported, most women failed to undergo the training needed to compete for the jobs in question, many of the positions required heavy labor, and societal attitudes had tended to discourage women entrants.[52]

Ignoring the fact that as recently as *Wygant* it had held that societal discrimination is too amorphous a concept to justify race (or gender) conscious relief, a Court majority, again led by Justice Brennan, invoked the holding in the 1978 *Weber* case that employer action of giving hiring preference

51. *Johnson v. Transportation Agency*, 480 U.S. 616 (1987).
52. *Id.* at 625–627.

to minorities is justified to eliminate a "manifest imbalance in traditionally segregated job categories."[53]

Weber was profoundly different in one material respect—the employer in that case, Kaiser Aluminum, along with its craft unions, had been deeply involved in excluding minorities from the unions and apprenticeship programs that would have made those minorities eligible for skilled positions. Rather than engage in a costly and protracted legal battle, Kaiser chose to start a new chapter in its employment policies. By contrast, Santa Clara County had practiced no such discrimination.

Justice O'Connor, however, concurring with the judgment, chose to disregard the findings of the district court and to draw her own statistical conclusions from the evidence. The Court, she complained, "has chosen to follow an expansive and ill-defined approach to voluntary affirmative action by public employers despite the limitations imposed by the Constitution and the provisions of Title VII."[54] To introduce race-conscious hiring, an employer—public or private—must, in effect, acknowledge its own culpability for past discrimination. It must "point to a statistical disparity sufficient to support a prima facie claim under Title VII by the employee beneficiaries of the affirmative action plan of a pattern or practice claim of discrimination."[55] Once that is done, voluntary actions are encouraged as a remedy for past discrimination. In *Johnson*, in the total absence of female participation in certain job categories, Justice O'Connor found her prima facie case justifying a gender-conscious response. On the basis of the undisputed evidence—which

53. *Id.* at 633.
54. *Id.* at 648.
55. *Id.* at 649.

suggested no agency discrimination—Justice O'Connor appeared to be inventing facts to support her predetermined conclusion. There is simply no other basis on which to explain her decision.

Justice Scalia, in dissent, complained that the Court had transformed the Civil Rights Act, replacing "the goal of a discrimination-free society with the quite incompatible goal of proportionate representation by race and sex in the workplace."[56] This statement is true even if the action by employers "is intended to overcome the effect, not of the employer's own discrimination, but of societal attitudes that have limited the entry of certain races, or a particular sex, into certain jobs."[57]

Justice Scalia's analysis drew support from an unexpected source, Justice Stevens, who, in his concurrence, offered one of the more candid judicial statements one is likely to encounter—a flat admission that he (and the Brennan plurality group), in permitting race-conscious affirmative action, had baldly chosen to disregard the clear language of the Civil Rights Act. Without question, Justice Stevens acknowledged, the intention of Congress had been to preclude discrimination against or preferences for members of the majority or minority races. Years of observation, however, showed that "special programs to benefit members of minority groups" could speed the arrival of greater job equality, the true hope of those who supported the legislation. Neither the pre-*Weber* decisions of the Court, "nor the 'color blind' rhetoric used by the Senators and Congressmen who enacted the bill, is now controlling." So, for Justice Stevens: "[T]he only problem for me is whether to adhere to an authoritative con-

56. *Id.* at 658.
57. *Id.* at 666.

struction of the Act that is at odds with my understanding of the actual intent of the authors of the legislation. I conclude without hesitation that I must answer that question in the affirmative."[58] It would be hard to imagine a more bald statement of judicial activism than Justice Stevens' acknowledgment that his opinion was based on the silent aspirations of the legislators rather than the language of the bill or their publicly stated legislative intent.

The *Johnson* case brought to a close a period when employment cases were at the center of the Supreme Court affirmative action docket. The focus would next shift to government contracting, voting rights, and, of course, education. Pushed by such agencies as the EEOC and the Office of Federal Contract Compliance Review and sanctioned by the Court, industry was well into its affirmative action and diversity periods, seeking to employ minorities in numbers that at least reflected their participation in local labor forces. In the initial period, with the major exception of *Bakke*, most of the judicial focus was on the Civil Rights Act and little attention was paid to social questions raised by race preferences. The stigmatic effects of discrimination, for example, were so clear that few lawyers or justices stopped to wonder whether the promotion of less-qualified minorities or the admission of those with marginal academic credentials into the nation's elite universities would also raise questions of stigma. Beginning with the *Croson* case, however, it would fall to Justice O'Connor to address this and other questions for the Court majority.

58. *Id.* at 644.