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Wygant v. Jackson Board of Education - A Question of Layoffs

Richard J. Cairns

Wygant v. Jackson Board of Education — A Question of Layoffs

I. Introduction

In *Wygant v. Jackson Board of Education*,[1] the Supreme Court decided the legitimacy of the means used to effectuate a racially-based affirmative-action plan of a public employer.[2] At issue in this case was a section of a collective bargaining agreement which provided that in the event of a layoff, senior nonminority employees would be laid off while junior minority employees would remain employed.[3] The Court held that such a plan discriminated against nonminority employees in violation of the equal protection clause of the fourteenth amendment.[4]

Part II of this Note identifies and discusses *United Steelworkers v. Weber*[5] and *Firefighters Local Union No. 1784 v. Stotts*,[6] the leading affirmative-action cases. Part II also highlights the similarities and distinctions between and among *Weber, Stotts*, and *Wygant*. Parts III and IV set forth the lower court decisions, the posture of the case when the Supreme Court granted certiorari, and the treatment of the case by the Court. Part V analyzes the Court's decision and comments on the effect

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1. 106 S. Ct. 1842 (1986).

2. The public employer in this case was the Jackson Board of Education. The plan involved a layoff policy affecting teachers in the Jackson Public Schools.

3. The provision in question is contained in article XII of the collective bargaining agreement:

> 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 eliminated. Each teacher so affected will be called back in reverse order for positions for which he is certificated maintaining the above minority balance.

106 S. Ct. at 1845.

4. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws . . . ." U.S. CONST. amend. XIV, § 1.

5. 443 U.S. 193 (1979).

6. 467 U.S. 561 (1984).

that the Court's lack of a majority consensus may have upon employers in this highly sensitive area. Part VI concludes that given the Court's ambivalence in its treatment of racially-based layoffs, it remains unclear whether such layoffs are ever permissible.

II. Background

Racially-based affirmative-action plans have been adopted for a variety of reasons. They have often been adopted as a court ordered (involuntary) remedy for actual victims of racial discrimination in employment.[7] They have also been adopted to eliminate traditional patterns of racial segregation in specific job titles[8] or — where no actual victims of discrimination have been identified — to make the ratio of the racial composition of the work force mirror that of employers of a similar kind within the surrounding area.[9] The adoption of such plans has been challenged by employees who considered themselves adversely affected by the remedy provided. In certain instances, labor unions have been involved because of their role in the adoption of the plans through the collective bargaining process.[10] The case law in this area addresses when, and under what circumstances, employers may, or must, adopt racially-based affirmative-action plans.

A. *Voluntary Affirmative-Action Plans — Private Employers*

1. *The Title VII Prohibition*

Title VII of the Civil Rights Act of 1964[11] makes it an unlawful employment practice for an employer to engage in the following conduct:

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7. Franks v. Bowman Transp. Co., 424 U.S. 747 (1976) (in class action suit alleging discriminatory hiring practices, plaintiffs were awarded priority consideration for employment).

8. United Steelworkers v. Weber, 443 U.S. 193 (1979). *See infra* notes 11-22 and accompanying text.

9. Hazelwood School Dist. v. United States, 433 U.S. 299 (1977) (proper statistical comparison was between defendant school district's teaching staff and public school teacher population in the relevant labor market).

10. 443 U.S. at 193.

11. 42 U.S.C. § 2000e-2(a), (d) (1982).

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment 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 individual's race, color, religion, sex, or national origin.[12]

It is also unlawful for:

any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.[13]

2. *Permissible Exceptions*

The issue of whether an employer may voluntarily adopt racially-based affirmative-action plans was raised and considered by the Court in *United Steelworkers v. Weber*.[14] The case concerned a challenge to an affirmative-action plan which had been negotiated between an employer and a steelworkers' union.[15] The challenge was brought by Weber, a white member of the bargaining unit who had been rejected for admission into a craft-training program. The most senior black trainee accepted into the program had less seniority than Weber.

The purpose of the negotiated affirmative-action plan was

12. *Id.* § 2000e-2(a).

13. *Id.* § 2000e-2(d).

14. 443 U.S. 193 (1979).

15. The employer, Kaiser Aluminum & Chemical Corp., and the union, United Steelworkers of America, entered into a collective bargaining agreement which included "an affirmative action plan designed to eliminate conspicuous racial imbalances in Kaiser's then almost exclusively white craftwork forces by reserving for black employees 50% of the openings in in-plant craft-training programs until the percentage of black craftworkers in a plant is commensurate with the percentage of blacks in the local labor force." *Id.*

"to eliminate traditional patterns of racial segregation"[16] at several of the employer's plants. Because the affirmative-action plan was designed to remedy the effects of prior discrimination, and because the plan was one negotiated between a private employer and a union which represented employees for collective bargaining purposes, the *Weber* Court was "not concerned with what Title VII *requires* or with what a court might order to remedy a past proved violation of the Act."[17] The issue framed by the Court in *Weber* was "whether Title VII *forbids* private employers and unions from voluntarily agreeing upon bona fide affirmative-action plans that accord racial preferences in the manner and for the purpose provided in the [employer-union] plan."[18] In holding that the plan was permissible, the Court determined that "Title VII's prohibition . . . against racial discrimination does not condemn all private, voluntary, race-conscious affirmative-action plans."[19]

3. *The* Weber *Test*

The *Weber* Court did not find it necessary to detail the line of demarcation between permissible and impermissible affirmative-action plans.[20] However, it did articulate the following elements to consider in testing the effect of such a plan on nonminorities:

(1) "[T]he plan does not unnecessarily trammel the interests of the white employees."[21]

(2) "The plan does not require the discharge of white workers and their replacements with new black hirees."[22]

(3) "[T]he plan [does not] create an absolute bar to the advancement of white employees . . . ."[23]

(4) "[T]he plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest ra-

16. *Id.* at 201.
17. *Id.* at 200 (emphasis added).
18. *Id.* (emphasis in original).
19. *Id.* at 208.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*

cial imbalance."[24]

4. *Voluntary Remedies Occasioned by Statistical Disparities Are Permissible*

Weber concluded that title VII leaves to private employers an "area of discretion . . . to . . . voluntarily . . . adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories."[25] In his concurring opinion, Justice Blackmun noted that the Court had expanded the bounds of title VII by failing to restrict racially-based remedies to actual victims of prior discrimination.[26]

Although Justice Blackmun would have adopted the "arguable violation" requisite which Judge Wisdom had espoused in his dissent to the court of appeals decision in *Weber v. Kaiser Aluminum & Chemical Corp.*,[27] he found this broader standard acceptable.[28] The significance of this construction is that statistical disparities alone would permit a private employer's adoption of a racially-based affirmative-action plan. An employer need not admit that it violated title VII in order to justify such a plan.[29]

B. *Involuntary Affirmative-Action Plans — Public Employers*

In *Firefighters Local Union No. 1784 v. Stotts*,[30] the Court again considered a challenge by nonminorities to a racially-based affirmative-action plan. Originally, minority employees had filed

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24. *Id.*

25. *Id.* at 209.

26. *Id.* at 213.

27. 563 F.2d 216, 230-31 (5th Cir. 1977) (Wisdom, C.J., dissenting). Judge Wisdom would have held that an "arguable violation" of title VII occurs when a statistical analysis of the workforce composition indicates past discrimination, even though no evidence of actual discrimination exists. *Id.*

28. 443 U.S. at 211 (Blackmun, J., concurring). Justice Blackmun acknowledged the difficulty of using an actual past discrimination prerequisite in the case. Kaiser, fearing claims for damages from prior victims would have been reluctant to demonstrate actual prior instances of discrimination. *Weber*'s alleged title VII violation could have been mooted, therefore, if no one had any incentive to prove that Kaiser had violated the Act. *See id.* at 213-14.

29. *Id.* at 213-14.

30. 467 U.S. 561 (1984).

a class action against the City of Memphis, Tennessee, and its fire department, alleging racial discrimination in hiring and promotion practices.[31] The case was settled, and a consent decree was approved and entered by the district court.[32] When the City subsequently announced its intent to lay off firefighters on the basis of seniority (last hired, first fired), the district court enjoined the City from laying off any black employee, and modified the consent decree.[33] In order to comply with the court's order, a modified layoff plan, designed to protect black employees, was presented and approved. Layoffs were carried out pursuant to this plan.[34] The ensuing layoffs, made in accordance with the plan, resulted in nonminority employees — with more seniority than minority employees — being laid off or demoted in rank.[35]

1. *Layoffs — A Significant Difference*

The most significant difference between *Weber* and *Stotts* is that unlike *Weber*, the racially-based plan in *Stotts* involved layoffs. By requiring that no black employee be laid off, the court order adversely affected an existing seniority system which both the court of appeals and the Supreme Court held to be bona fide.[36] Furthermore, the plan in *Stotts* had been imposed by the district court's injunction. "Neither the Union nor the nonminority employees were parties to the suit when the [consent] decree was entered. Hence the entry of that decree cannot be said to indicate any agreement by them to any of its terms."[37]

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31. *Id.* at 565.
32. *Id.*
33. *Id.* at 566-67.
34. *Id.* at 567.
35. *Id.*
36. *Id.* at 574-77.

> Section 703(h) of Title VII provides that it is not an unlawful employment practice to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority system, provided that such differences are not the result of an intention to discriminate because of race. . . . Section 703(h) . . . permits the routine application of a seniority system absent proof of an intention to discriminate.

Id. at 577 (citing Teamsters v. United States, 431 U.S. 324, 352 (1977)).

37. *Id.* at 575. The district court had justified its right to take action based on its retention of jurisdiction of the case as set forth in the original consent decree, "for such further orders as may be necessary or appropriate to effectuate the purposes of this de-

In this respect, the racially-based plan was involuntary. Unlike the plan in *Weber*, it had not been negotiated between the employer and the union.

2. *Involuntary Remedies — Only for Actual Victims of Discrimination*

The *Stotts* Court's holding, that the layoff plan at issue was impermissible, was based on the effect of the plan on the nonminority employees. The Court determined that the "displacement of white employees with seniority over blacks" was a result that had not been included in the original agreed-upon remedy of the consent decree.[38] Arguably, the remedy would be impermissible under a *Weber* analysis because of such displacement.[39] However, the *Stotts* Court did not adopt the *Weber* analysis. The Court held that the remedy, which awarded competitive seniority to minority employees who were not actual victims of prior discrimination, was not an available remedy under title VII and applied the rationale of an earlier case, *Teamsters v. United States*.[40] The *Teamsters* Court had determined that under § 706(g) of title VII, "make-whole relief [was available] only to those who have been actual victims of illegal discrimination."[41] The *Stotts* Court confirmed that "mere membership in the disadvantaged class is insufficient to warrant a seniority award; each individual must prove that the discriminatory practice had an impact on him."[42] Such "make-whole" relief may contain an award of competitive seniority, and the victims would be given their "rightful place on the seniority roster."[43]

In *Stotts*, the beneficiaries of the remedial plan were not

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cree." *Id.* at 565-66 (quoting Stotts v. Memphis Fire Dep't, 679 F.2d 541, 578 (6th Cir. 1982)).

38. *Id.* at 575.

39. 443 U.S. at 208. While not a perfect fit, the displacement found by the *Stotts* Court would seem to violate the second element of the *Weber* analysis. *See supra* text accompanying note 24.

40. 431 U.S. 324 (1977). "Our ruling in *Teamsters* that a court can award competitive seniority only when the beneficiary of the award has actually been a victim of illegal discrimination is consistent with the policy behind §706(g) of Title VII, which affects the remedies available in Title VII litigation." 467 U.S. at 579-80.

41. 467 U.S. at 579-80.

42. *Id.* at 579 (citing 431 U.S. at 367-71).

43. *Id.* at 578-79.

identified as having been actual victims of prior discrimination.[44] Therefore, the Court held that under title VII, the action taken by the lower courts exceeded the remedy that a court could have given had the case been tried and had plaintiffs' allegation of a pattern or practice of discrimination been proven.[45]

Another significant distinction between *Weber* and *Stotts*, in addition to the voluntary/involuntary adoption of the racially-based plan, is that unlike *Weber*, *Stotts* involved an employer in the public sector. The Court concluded that it need not decide whether "the City, *a public employer*, could have taken this course voluntarily without violating the law."[46]

III. *Wygant*: Facts and Lower Court Decisions

A. *The Facts*

In 1969, the NAACP complained to the Michigan Civil Rights Commission that the Jackson Board of Education "had engaged in various discriminatory practices, including racial discrimination in the hiring of teachers."[47] The Michigan Civil Rights Commission determined that the allegations in the complaint were justified, and negotiated an adjustment order whereby the Board agreed to "[t]ake affirmative steps to recruit, hire and promote minority group teachers and counselors as positions [became] available . . . ."[48]

In the years 1970-1971, a study was made of the representation of minorities on the faculty of the Jackson public schools. A comparison was made of the percentage of minority teachers to the percentage of minority students in the district. Nearly 16% of the student body was made up of minorities, whereas minorities represented only 8.3-8.5% of the faculty. The collective bargaining agreement in effect at that time, November 1971, mandated that straight seniority would govern (last hired, first fired)

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44. *Id.* at 579.

45. *Id.*

46. *Id.* at 583 (emphasis added).

47. Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842, 1859 (1986) (Marshall, J., dissenting).

48. *Id.* These facts, relied upon by Justice Marshall in his dissent, were "lodged" by the Board as part of its brief, and were not part of the record in the lower court proceedings. *See Wygant*, 106 S. Ct. at 1849 n.5 (Marshall, J., dissenting).

in the event of layoffs.[49]

In the spring of 1972, contract negotiations began. The climate for negotiation was influenced by the Michigan Civil Rights Commission adjustment order and by a January 1972 survey of all teachers concerning the district's layoff policy. Ninety-six percent "expressed a preference for the straight seniority system and opposed a system that would freeze minority layoffs."[50] There also had been a boiling over of racial tension, with resultant violence at the Jackson High School, in February of that year.[51] The negotiations resulted in a tentative agreement which included protective provisions against minority layoffs. Following a short strike in the fall of 1972, the contract was ratified for the 1972-1973 school year. Article XII, the challenged provision, was included in that agreement.[52]

The express goal of the remedial plan, expressed in article XII(D)(1), was "to have at least the same percentage of minority racial representation on each individual staff as [was] represented by the student population of the Jackson Public Schools."[53] Article XII(B)(1) sought to preserve that goal by providing protection against layoffs to minorities. "[A]t 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."[54] The contract language was followed when layoffs were required in the spring of 1973. When the same situation prevailed in 1974, however, the Board of Education ignored the contract language, retained tenured teachers, and failed to maintain the required percentage of minority faculty.[55] An action was brought in district court by the union and two minority teachers claiming breach of contract and "that the Board's failure to adhere to the layoff provision violated the Equal Protection Clause of the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964."[56] The Board denied any

49. Wygant v. Jackson Bd. of Educ., 546 F. Supp. 1195, 1197 (E.D. Mich. 1982).
50. *Id.* at 1197.
51. *Id.* at 1198.
52. *Id.*
53. *Id.* (emphasis omitted).
54. *Id.* (emphasis omitted).
55. *Id.*
56. 106 S. Ct. at 1845 (citing Jackson Educ. Ass'n v. Board of Educ., No. 4-72340

prior employment discrimination in its answer to the complaint.[57] Following dismissal of the action on procedural grounds, the union and minority teachers brought an action in Jackson County Circuit Court alleging the same claims.[58] Entering a judgment on behalf of these plaintiffs, that court rejected the Board's opposing argument that the layoff provision violated the Civil Rights Act of 1964. The court also determined that nothing had established that the Board's hiring practices had discriminated against minorities. The court attributed the minority representation on the faculty to societal racial discrimination and, even though article XII had a discriminatory effect on nonminority teachers, the court held that it was a permissible attempt to remedy the effects of societal discrimination.[59]

B. *Procedural History*

1. *District Court*

The suit in the instant case was brought by nonminority teachers when the Board "adhered to the letter of the contract when layoffs were next required."[60] The case heard by the district court was based upon plaintiffs' challenge of the layoff provisions on grounds that they violated the equal protection clause of the fourteenth amendment.[61] The district court held that a prior judicial finding of past discrimination was not required as a prerequisite to adoption of an affirmative-action plan, citing *Weber* as authority for this determination.[62]

a. Detroit Police Officers' Association v. Young

Recognizing that *Weber* applied to a private sector employer, and to title VII violations, the district court held that the Sixth Circuit Court of Appeals' decision in a prior case, *Detroit*

(E.D. Mich. 1976)).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Wygant*, 546 F. Supp. at 1198.

61. *Id.* at 1199. The plaintiffs sued on a variety of federal and state law claims which were dismissed by the district court. These claims are not discussed here because the subject matter is outside the scope of this Note.

62. *Id.*

Police Officers' Association v. Young,[63] "extended this particular holding of *Weber* to public sector employers and to alleged Constitutional violations."[64]

In *Young*, the Detroit Police Department, subsequent to its own determination that blacks were underrepresented in the department, voluntarily adopted an affirmative-action plan. This plan contemplated the promotion of black patrolmen to sergeant ahead of white patrolmen who were higher on the eligibility list. The plan was challenged by white officers on the grounds that it violated title VII and equal protection of the laws. The circuit court, relying on *Weber*, held that even though there had been no prior judicial determination of race discrimination, the department's own determination of racial disparities justified the voluntary plan.[65]

b. *Application of the* Young *Standard*

The district court adopted the *Young* court's rationale for extending *Weber* to the public sector — that a requirement of a "judicial determination of past discrimination for a state to undertake a race-conscious remedy . . . would be 'self-defeating' and would 'severely undermine' voluntary remedial efforts."[66]

The *Young* standard of "substantial and chronic underrepresentation" had been adopted directly from the four member plurality in *Regents of the University of California v. Bakke*.[67] Applying the *Young* standard, the district court determined that the affirmative-action plan served a legitimate purpose[68] and affirmed the constitutionality of article XII(B)(1).[69] To determine whether there was such "substantial and chronic underrepresentation," the court deemed it appropriate to com-

63. 608 F.2d 671 (6th Cir.), *cert. denied*, 452 U.S. 938 (1979).

64. 546 F. Supp. at 1199 (emphasis omitted).

65. *Id.* at 1199-1200.

66. *Id.* at 1200 (reiterating *Young*'s citation to Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 362 (1978)).

67. 438 U.S. 265 (1978). The *Bakke* Court standard involved a consideration of whether "there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities . . . . " *Id.* at 362.

68. 546 F. Supp. at 1200-01.

69. *Id.* at 1202-03.

pare the percentage of minority teachers to the percentage of minorities in the student body on the theory that "minority teachers are role-models for minority students. This is vitally important because societal discrimination has often deprived minority children of other role-models."[70]

Having determined that there was "substantial and chronic underrepresentation" based upon the minority faculty/minority student comparison, the court determined that the ends used were "substantially related" to the objective of remedying such underrepresentation which the court had already found to be a legitimate purpose.[71] The "substantially related" criterion was adopted from the "reasonableness" test applied in *Young*.[72]

The court found the layoff provision to be substantially related for several reasons. First, it was designed to retain or at least prevent a reduction in the minority to majority ratio.[73] Second, it was a temporary measure.[74] Third, it did not require the retention of unqualified teachers.[75] Finally, it did "not require the layoff of all white teachers or otherwise unnecessarily or invidiously trammel their interests."[76] As to this last element, the court gave great weight to the fact that the provision had been voluntarily adopted by the predominantly white membership of the union.[77]

2. *Court of Appeals*

The Sixth Circuit Court of Appeals affirmed the holding of the district court. It adopted both the standard of substantial

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70. *Id.* at 1201.

71. *Id.* at 1202.

72. *Id.* at 1201-02 (citing Valentine v. Smith, 654 F.2d 503, 510 (8th Cir.), *cert. denied*, 454 U.S. 1124 (1981); United States v. Miami, 614 F.2d 1322, 1338-40 (5th Cir. 1980); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 359 (1978); and Fullilove v. Klutznick, 448 U.S. 448, 482-92 (1980)).

73. *Id.* at 1202.

74. "In fact, the layoff provisions are part of a collectively-bargained contract of limited duration. . . . subject to change whenever the contract is renegotiated." *Id.*

75. *Id.*

76. *Id.*

77. *Id.* "[I]t is undeniable that the contract, and thus the challenged layoff provision, was collectively bargained. It is difficult for the court to conceive how a plan which has been voluntarily adopted by the membership of the [union] can invidiously trammel the interests of white teachers, a majority of the [union]." *Id.*

and chronic underrepresentation and the reasonableness test ("substantially related") applied by the district court, and quoted extensively from Judge Joiner's opinion.[78] The appellate court also accorded considerable weight to the voluntary nature of the layoff provision.[79] In this respect, it distinguished *Firefighters Local Union No. 1784 v. Stotts*,[80] which had been recently decided, and also *Oliver v. Kalamazoo Board of Education*.[81] Both cases had been decided after the district court issued its decision.

Stotts involved a judicially imposed modification of a consent decree.[82] *Kalamazoo* also involved an involuntary scheme imposed by a district court.[83] The Sixth Circuit concluded that "[t]he principle involved in both cases seems to be that voluntary affirmative action plans contracted between the parties are easier to defend in the courts than those mandated ab initio by federal trial courts."[84] Not only did the court consider the voluntariness of the plan to be determinative, but it also placed emphasis on the collective bargaining process as a safeguard of the rights of nonminority employees, including the plaintiffs.[85]

IV. Supreme Court Decision

A. *Plurality Opinion*

Justice Powell wrote the opinion of the Court and was joined in all respects by Chief Justice Burger and Justice Rehnquist. Justice White concurred in the judgment only, while Justice O'Connor concurred in all parts of the opinion except part IV which examined layoffs as a means to accomplish the race-conscious purposes of the affirmative-action plans.[86]

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78. Wygant v. Jackson Bd. of Educ., 746 F.2d 1152 (6th Cir. 1984).

79. *Id.* at 1157-58.

80. 467 U.S. 561 (1984). *See supra* notes 30-46 and accompanying text.

81. 706 F.2d 757 (6th Cir. 1983).

82. *See supra* notes 32, 37, and accompanying text.

83. The *Wygant* court noted that in *Kalamazoo*, it was held that "the District that Court did not have the constitutional authority to design and order the remedy of a 20% hiring quota for black teachers disregarding the contractual and legal seniority and tenure rights of white teachers who would be displaced." 746 F.2d at 1159.

84. *Id.*

85. *Id.* at 1158. *See supra* note 77.

86. Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842, 1844, 1857 (1986).

The Court began its analysis by articulating the appropriate standard of review for classifications based upon race. "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees."[87] The test adopted by the Court consisted of two prongs: "First, any racial classification 'must be justified by a compelling governmental interest.' "[88] The second requirement was that "the means chosen by the State to effectuate its purpose must be 'narrowly tailored to the achievement of that goal.' "[89] Thus, the plurality made clear at the outset the limits within which racially-based affirmative-action plans by public employers must fit in order to pass constitutional muster.

Part III of the plurality's opinion rejected the lower courts' rationale that the racially-based layoff provision was justified in effectuating "the Board's interest in providing minority role models for its minority students, as an attempt to alleviate the effects of societal discrimination . . . . "[90] The Court reaffirmed its insistence on "some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination."[91] The rationale behind this requirement was that the measure to be adopted to cure the prior discrimination will be *temporary*. At some point, the remedy will have been achieved and the racially-based plan will no longer be necessary.[92]

The Court stated that when statistical disparities are used to demonstrate the need for a racially-based remedy, "the

87. *Id.* at 1846 (quoting Fullilove v. Klutznick, 448 U.S. 448, 491 (1980)).

88. 106 S. Ct. at 1846 (quoting Palmore v. Sidoti, 466 U.S. 429, 432 (1984) (citations omitted)).

89. 106 S. Ct. at 1846 (quoting *Fullilove*, 448 U.S. at 480).

90. 106 S. Ct. at 1847. *See also supra* text accompanying note 70.

91. *Id. See* Hazelwood School Dist. v. United States, 433 U.S. 299 (1977) (concluding that a showing of prior discrimination must be determined, and asserting the relevant comparison for making such a determination).

92. "[T]he role model theory employed by the District Court has no logical stopping point. The role model theory allows the Board to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose." 106 S. Ct. at 1847. The plan in *Weber* is an example of a temporary plan. "Preferential selection of craft trainees at the Gramercy plant will end as soon as the percentage of black skilled craftworkers in the Gramercy plant approximate the percentage of blacks in the local labor force." United Steelworkers v. Weber, 443 U.S. 193, 208-09 (1979).

proper comparison for determining the existence of actual discrimination [is] 'between the racial composition of [the school's] teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market.' "[93] Thus, the Court rejected the role-model theory as a cure for societal discrimination for two reasons: 1) such comparisons are irrelevant for addressing employment discrimination,[94] and 2) the remedy is vague and indefinite.[95] The record before the Court for review contained no evidence of any prior discrimination in hiring by the Board that would indicate that such remedial action was necessary.[96] Nonetheless, the Court did not decide this issue because it found the layoff provision to be an impermissible means of "achieving even a compelling purpose."[97]

The Court rejected the "reasonableness" test which had been applied by the court of appeals[98] and held that under the strict scrutiny standard applicable to racially-based state action, the means chosen must be sufficiently narrowly tailored to accomplish legitimate purposes.[99] The Court determined that layoffs impose too great a burden on innocent individuals,[100] as opposed to hiring goals where such burdens are "diffused to a considerable extent among society generally."[101]

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93. 106 S. Ct. at 1847 (quoting *Hazelwood*, 433 U.S. at 308).

94. *Id.* at 1848. *See also id.* at 1857 (O'Connor, J., concurring), and Wygant v. Jackson Bd. of Educ., 746 F.2d 1152, 1159-60 (6th Cir. 1984) (Wellford, J., concurring) (quoting Oliver v. Kalamazoo Bd. of Educ., 706 F.2d 757, 762 (6th Cir. 1983): "[T]he students . . . do not have a constitutional right to attend a school with a teaching staff of any particular racial composition.").

95. "[S]ocietal discrimination is insufficient and over expansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." 106 S. Ct. at 1848.

96. *Id.* at 1848-49.

97. *Id.* at 1849. The Board had contended that if permitted to do so, it could establish the existence of prior discrimination. The Court noted that this precise issue had been litigated in two prior suits. "Both courts concluded that any statistical disparities were the result of general societal discrimination, not of prior discrimination by the Board." *Id.*

98. *Wygant*, 746 F.2d at 1157. *See also supra* text accompanying note 78.

99. 106 S. Ct. at 1852.

100. *Id.* at 1851-52.

101. *Id.* at 1851. The Court pointed to an expectation interest on the part of employees that stems from the "stability and security" of seniority. *See* Fallon & Weiler, *Conflicting Models of Racial Justice*, SUP. CT. REV. 1, 58 (1984). Citing this article, the

B. *Concurring Opinions*

1. *Justice White's Concurrence*

Justice White concurred only in the judgment of the plurality.[102] In a terse one page separate opinion, Justice White applied a combination of the *Weber*[103] and *Stotts*[104] analyses in determining that the layoff plan in this case was violative of the equal protection clause. At the outset he identified the purpose of the layoff plan as being "to maintain a certain proportion of minority teachers."[105] Such a plan was contrary to the fourth element in the *Weber* test which required that the plan be temporary and not intended to maintain racial balance.[106] Because the layoff plan contemplated the retention of "teachers solely because they [were] black, even though some of them [w]ere in probationary status,"[107] Justice White also implied that it violated elements one and two of the *Weber* test[108] which required that the plan neither unnecessarily trammel the interests of white employees[109] nor contemplate the discharge of white workers and their replacement with new black hirees.[110] Added to Justice White's *Weber* analysis was the implication of the *Stotts* requirement that the beneficiaries of the plan must be actual victims of prior discrimination.[111] His opinion noted that the plan contemplated "the discharge of white teachers to make room for blacks, none of whom ha[d] been shown to be a victim of any racial discrimination."[112] Although Justice White did not

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Court determined that "[l]ayoffs disrupt these settled expectations in a way that general hiring goals do not." 106 S. Ct. at 1851.

102. 106 S. Ct. at 1858 (White, J., concurring).

103. *Weber*, 443 U.S. 193. *See supra* notes 14-29 and accompanying text.

104. Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984). *See supra* notes 30-46 and accompanying text.

105. 106 S. Ct. at 1857 (White, J., concurring).

106. *See supra* note 24 and accompanying text.

107. 106 S. Ct. at 1857.

108. *Id.*

109. *See supra* note 24 and accompanying text.

110. 106 S. Ct. at 1857.

111. 467 U.S. at 578-83 and *supra* note 40. In this aspect of his analysis, Justice White appeared to extend this requirement of *Stotts*, which had been decided on title VII grounds, to equal protection cases as well. The plaintiffs' title VII action had been dismissed and was not before the Court for review. *See supra* note 61.

112. 106 S. Ct. at 1857.

expressly refer to either *Weber* or *Stotts*, it seems unmistakable, based on his language, that elements of those decisions underlie his reasoning in the separate opinion. He clearly believed that affirmative-action plans designed to "[lay off] whites who would otherwise be retained in order to keep blacks on the job" violated the equal protection clause.[113]

2. *Justice O'Connor's Concurrence*

Justice O'Connor concurred in all parts of the plurality opinion with the exception of part IV.[114] Although it is apparent that she agreed, as stated in part IV of the plurality opinion, that the racially-based remedial measures adopted were not sufficiently narrowly tailored,[115] she arrived at that conclusion differently than the plurality. Justice O'Connor did not believe that a racially-based layoff provision per se could not be sufficiently narrowly tailored to pass constitutional muster,[116] but rather stated that "[b]ecause the layoff provision here acts to maintain levels of minority hiring that have no relation to remedying employment discrimination, it cannot be adjudged 'narrowly tailored' to effectuate its asserted remedial purposes."[117]

Justice O'Connor arrived at her conclusion by first adopting the plurality position that the appropriate standard of review is one of strict scrutiny, which requires that the racially-based remedy serve a compelling governmental purpose[118] and that the means used be sufficiently narrowly tailored to achieve such a purpose.[119] Justice O'Connor de-emphasized this formulation by asserting that the Court was in accord that the means "cannot impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals directly and ad-

113. *Id.* at 1858.

114. *Id.* at 1844 (O'Connor, J., concurring).

115. *Id.* at 1857.

116. *See id.* The plurality finds such layoffs to be too intrusive a burden on "innocent individuals." *Id.* at 1851-52.

117. *Id.* at 1857.

118. *Id.* at 1853. Justice O'Connor contended that "as regards certain state interests commonly relied upon in formulating affirmative action programs, the distinction between a 'compelling' and an 'important' governmental purpose may be a negligible one." *Id.*

119. *Id.* at 1857.

versely affected by a plan's racial preference."[120] In like manner, she found the Court "in accord in believing that a public employer, consistent with the Constitution, may undertake an affirmative-action program which is designed to further a legitimate remedial purpose . . . ."[121] Justice O'Connor found additional unanimity by the Court in that "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."[122]

In her analysis, Justice O'Connor leaned more toward the *Weber* statistical analysis of patterns or practices of prior discrimination[123] than toward the *Stotts/Teamsters* actual victim test[124] as justification for a public employer's having a "firm basis"[125] for initiating a racially-based remedial affirmative-action plan. According to Justice O'Connor, as long as the public employer can demonstrate some prior discrimination, the plan is warranted, and it is not necessary that specific victims of such discrimination be identified by a contemporaneous finding of prior discrimination by a court or other competent body.[126] Public employers are able to make such determinations by comparing statistical data in the "relevant labor pool sufficient to support a prima facie Title VII pattern or practice claim by minority teachers . . . ."[127] Such evidence "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 prior employment discrimination."[128]

Justice O'Connor characterized as improper, the lower courts' reliance on the "societal discrimination" and "role-model" theories[129] for determining an important governmental

120. *Id.* at 1853-54.
121. *Id.* at 1853.
122. *Id.*
123. *See supra* notes 25-29 and accompanying text.
124. *See supra* notes 38-46 and accompanying text.
125. 106 S. Ct. at 1856.
126. *Id.* at 1853-56.
127. *Id.* at 1856. *See supra* note 91.
128. 106 S. Ct. at 1856.
129. *See supra* text accompanying notes 67-70 for lower court's analysis.

interest.[130] The basis of these theories had no foundation in prior *employment* discrimination.[131] "[I]t is only when it is established that the availability of minorities in the relevant labor pool substantially exceeded those hired that one may draw an inference of deliberate discrimination in employment."[132] For Justice O'Connor, the layoffs were not sufficiently narrowly tailored because they were instituted to achieve a purpose unrelated to employment discrimination.[133] Whether layoffs could survive a strict scrutiny analysis, apparently decided negatively by the plurality, is a question that Justice O'Connor found unnecessary to resolve.[134]

C. *Dissenting Opinions*

1. *Justice Marshall's Dissent*

Justice Marshall, joined by Justices Brennan and Blackmun, proposed that the plurality and concurring opinions were too quick to decide a constitutional issue based on an informal and incomplete record.[135] Justice Marshall argued that the district court's failure to develop the record sufficiently "prevented the full exploration of the facts that are now critical to resolution of the important issue before us."[136] It is primarily for this reason that Marshall would have remanded for further proceedings.[137] Nonetheless, because the constitutional issue had been

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130. 106 S. Ct. at 1857.

131. "The disparity between the percentage of minorities on the teaching staff and the percentage of minorities in the student body is not probative of employment discrimination . . . . " *Id.*

132. *Id.* Justice O'Connor pointed out that the Michigan Civil Rights Commission "determined that the evidence before it supported the allegations of discrimination on the part of the Jackson School Board, though that determination was never reduced to formal findings because the School Board, with the agreement of the Jackson Education Association (Union), voluntarily chose to remedy the perceived violation," and that absent a finding of prior discrimination the lower courts falsely assumed that "any discrimination addressed by an affirmative action plan could only be termed 'societal.' " *Id.* at 1854.

133. *Id.* at 1857.

134. *Id.*

135. *Id.* at 1858 (Marshall, J., dissenting).

136. *Id.* Respondents sought to provide the Court with ample extra-record material purporting to support the proposition that there had been evidence of prior discrimination in the proceedings before the Michigan Civil Rights Commission. *Id.*

137. *Id.* at 1866-67.

decided, Justice Marshall expressed his disagreement with the conclusions reached.[138]

Using the proceeding before the Michigan Civil Rights Commission as a starting point, Justice Marshall considered that the parties' negotiation of article XII was a proper settlement in lieu of inevitable title VII litigation.[139] This provision, a product of collective bargaining by the Board and the Union, had been ratified by a majority vote "[e]ach of the six times that the contract ha[d] been renegotiated" since 1972.[140] The dissent distinguished *Wygant* from *Stotts* by pointing to the role the affected nonminority employees had played through the collective bargaining process in the adoption of the *Wygant* racially-based plan.[141]

Justice Marshall's constitutional analysis[142] recognized that the Court has been unable to agree upon the appropriate standard of review for affirmative-action plans which are attacked under the equal protection clause.[143] Whether applying a strict scrutiny standard requiring a compelling state interest, or the less rigid standard, requiring substantially related means for achieving important governmental objectives, Justice Marshall was of the opinion that article XII is constitutionally valid.[144] He

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138. *Id.* at 1858.

139. *Id.* at 1862. As a result of negotiations, article XII represented a consensus between the Board, which had sought a freeze on minority layoffs, and the union, which had sought to preserve the straight seniority system of last hired, first fired. *Id.* at 1859-60.

140. *Id.* at 1860. At least 80% of the members of the union were white. *Id.*

141. *Id.*

142. Justice Marshall framed the issue as: "whether the Constitution prohibits a union and a local school board from developing a collective-bargaining agreement that apportions layoffs between two racially determined groups as a means of preserving the effects of an affirmative hiring policy, the constitutionality of which is unchallenged." *Id.* at 1860. Justice Marshall took issue with Justice O'Connor's conclusion which was based on the propriety of the hiring plan. He argued that the petitioners did not carry their burden of demonstrating that "at the time they were laid off, the proportion of minority teachers had equaled or exceeded the appropriate percentage of the minority labor force, and that continued adherence to affirmative-action goals, therefore, unjustifiably caused their injuries." *Id.* at 1860-61 n.3.

143. *Id.* at 1861.

144. *Id.* at 1862. Justice Marshall did not believe that strict scrutiny was the correct standard. "[B]ecause no fundamental right was involved and because whites have none of the immutable characteristics of a suspect class, the so-called 'strict scrutiny' applied to cases involving either fundamental rights or suspect classifications was not applicable." *Id.* at 1861 (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 357 (1978)).

arrived at this conclusion by defining the "principal state purpose supporting Article XII" as "the need to preserve the levels of faculty integration achieved through the affirmative hiring policy adopted in the early 1970's."[145] Integration of the schools and of the faculty is the affirmative duty of the local school board[146] which should not "have delayed . . . [by] disputing its obligations and [thereby] forcing the aggrieved parties to seek judicial relief."[147] Justice Marshall, therefore, agreed with the Court's recognition "that formal findings of past discrimination are not a necessary predicate to the adoption of affirmative-action policies, and that the scope of such policies need not be limited to remedying specific instances of identifiable discrimination."[148]

Justice Marshall found article XII to be narrowly tailored because it "allocates the impact of an unavoidable burden proportionately between two racial groups."[149] Race was not the sole determinative factor; seniority was also considered in selecting the individual to be laid off.[150] It was a temporary measure which, when no longer necessary, would be subject to further negotiations.[151] "Article XII metes out the hardship of layoffs in a manner that achieves its purpose with the smallest possible deviation from established norms."[152] It was Justice Marshall's contention that the "best evidence that Article XII is a narrow means to serve important interests is that representatives of all

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145. 106 S. Ct. at 1862.

146. *Id.* at 1863 (citing Green v. County School Bd., 391 U.S. 430, 437-38 (1968) and Brown v. Board of Educ., 349 U.S. 294, 299 (1955)).

147. 106 S. Ct. at 1863.

148. *Id.* (citing the plurality opinion at 1844 and O'Connor, J., concurring at 1852).

149. 106 S. Ct. at 1865 (Marshall, J., dissenting). *See supra* note 3.

150. 106 S. Ct. at 1865. Justice Marshall pointed out that "[t]he general practice of basing employment decisions on relative seniority may be upset for the sake of other public policies." *Id.* at 1864. *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 774-75 (1976) (innocent workers displaced by the Court's grant of seniority to victims of employment discrimination); Ford Motor Co. v. Huffman, 345 U.S. 330, 339-40 (1953) (collective-bargaining agreements may go further than statutes in enhancing the seniority of certain employees for the purpose of fostering legitimate interests); Aeronautical Indus. Dist. Lodge 727 v. Campbell, 337 U.S. 521, 528-29 (1949) (preferred seniority status given to union chairman, to the detriment of veterans); United Steelworkers v. Weber, 443 U.S. 193, 208 (1979).

151. 106 S. Ct. at 1865.

152. *Id.*

affected persons, starting from diametrically opposed perspectives, have agreed to it — not once, but six times since 1972."[153]

Apart from his disagreement with the Court's determination of a complex issue on an arguably incomplete record, Justice Marshall grounded his dissent on the salutary goal served by article XII in preserving a legitimate and unchallenged affirmative-action *hiring* policy.[154] The interests of all employees, both minority and nonminority, are safeguarded through the representative nature of the collective bargaining process.[155]

2. *Justice Stevens' Dissent*

Justice Stevens dissented separately to argue that the educational goals involved in the preservation of minority teachers, hired pursuant to the Jackson Board of Education's affirmative-action hiring policy, served a valid public purpose.[156] As did Justice Marshall, Justice Stevens viewed the collective bargaining process as an adequate procedural safeguard that had been adopted "with full participation of the disadvantaged individuals and with a narrowly circumscribed berth for the policy's operation."[157] According to Justice Stevens, the harm to the petitioner was not based on

> any lack of respect for their race, or on blind habit and stereotype. Rather, petitioners had been laid off for a combination of two reasons: the economic conditions that have led Jackson to lay off some teachers, and the special contractual protections in-

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153. *Id.* at 1866. "The collective-bargaining process is a legitimate and powerful vehicle for the resolution of thorny problems, and we have favored 'minimal supervision by the courts and other governmental agencies over the substantive terms of collective bargaining agreements.' American Tobacco Co. v. Patterson, 456 U.S. 63, 76-77 (1982). We have also noted that '[s]ignificant freedom must be afforded employers and unions to create differing seniority systems,' California Brewers Ass'n v. Brygant, 444 U.S. 598, 608 (1980)." Justice Marshall pointed out that "[t]his deference is warranted only if the union represents the interests of the workers fairly; a union's breach of that duty in the form of racial discrimination gives rise to an action by the worker against the union." 106 S. Ct. at 1866 n.6 (citing Steele v. Louisville & Nashville R.R., 323 U.S. 192, 207 (1944)).

154. 106 S. Ct. at 1866.

155. *Id.*

156. *Id.* at 1867-69 (Stevens, J., dissenting).

157. *Id.* at 1870. The fairness of the procedures employed to adopt the provision was evidenced by the fact that "[t]he Union that represents the petitioners negotiated the provision and agreed to it; the agreement was put to a vote of the membership, and overwhelmingly approved." *Id.* at 1869-70.

tended to preserve the newly integrated character of the faculty in the Jackson schools.[158]

Justice Stevens saw no difference between a contractual provision which protects a percentage of minority faculty and one which may grant immediate tenure to a select group of teachers possessing special skills.[159] The harm would be similarly generated if the group protected were different.[160] The protection in this case was "justified by a valid and extremely strong public interest."[161] Contrary to the plurality view, Justice Stevens gave no significance to the distinction between a layoff and hiring plan in analyzing the equal protection issue.[162] The harm suffered is virtually the same and "the distinction is artificial, for the layoff provision at issue in this case was included as part of the terms of the *hiring* of minority and other teachers under the collective-bargaining agreement."[163]

V. Analysis

A. Wygant: *The Link Between* Weber *and* Stotts

The *Wygant*[164] case provided the Court with a factual setting which linked elements of *Weber*[165] with elements of *Stotts*.[166] In *Wygant*, the Court had the opportunity to consider the question it expressly did not decide in *Stotts*: whether a *public* employer may voluntarily adopt a racially-based affirmative-action plan applicable to layoffs.[167] Although the Court struck down the plan at issue in *Wygant*, the validity of racially-based layoffs has yet to be resolved by a majority of the Court.

The *Wygant* plurality held the layoff plan to be impermissi-

158. *Id.* at 1870 (footnote omitted).
159. *Id.*
160. *Id.*
161. *Id.* (footnote omitted).
162. *Id.* n.14.
163. *Id.* (emphasis in original).
164. Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842 (1986).
165. United Steelworkers v. Weber, 443 U.S. 193 (1979).
166. Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984).
167. *See* Botts, *Labor Law — Has the Supreme Court Put Out the Fire on Court Ordered Affirmative Action?*: Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984), 18 CREIGHTON L. REV. 737, 767-68 (1985).

ble on the facts of the case.[168] Justice White, concurring in the plurality's conclusion, suggested that racially-based layoff plans are impermissible in any context.[169] Justice O'Connor left open the validity of a voluntary racially-based layoff plan in the public sector.[170]

1. *Voluntary Plan by a Private Employer*

The common element among *Weber, Stotts,* and *Wygant,* is the adverse effect of a racially-based affirmative-action plan on nonminorities. *Weber* stands alone in two respects. The plan did not involve layoffs, but was tailored to promotion into a craft-training program.[171] Secondly, because the employer was in the private sector, there was no state action to implicate the equal protection clause of the fourteenth amendment.[172] *Wygant's* similarity to *Weber,* however, lies in the nature of the adoption of the racially-based plan. As in *Weber,* the plan in *Wygant* was a result of collective bargaining between the employer and the union.[173] Thus, the plan was voluntarily adopted. As such, its effect on nonminority employees should be analyzed according to the four part test enunciated in *Weber.*[174] Although the *Wygant* Court determined that the *Weber* test was not directly relevant to the *Wygant* plan,[175] it alluded to a portion of the *Weber* analysis in dicta relative to the Court's "concern over the burden that a preferential layoffs scheme imposes on innocent

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168. 106 S. Ct. 1842, 1852 (1986).

169. *See supra* notes 100-01 and accompanying text. Justice White's language implies the use of a *Weber* analysis for this viewpoint.

170. Her analysis seems to permit a plan "keyed to a hiring goal" relevant "to the remedying of employment discrimination." 106 S. Ct. at 1857.

171. *See supra* notes 14-16 and accompanying text.

172. *See supra* note 46 and accompanying text. *But see Wygant* at 1846 n.4 ("School district collective bargaining agreements constitute state action for purposes of the Fourteenth Amendment.")(citing Abood v. Detroit Bd. of Educ., 431 U.S. 209, 218, & n.12 (1977)).

173. 106 S. Ct. at 1844-45.

174. *See* 443 U.S. at 208 (setting forth the *Weber* text). *See also supra* text accompanying note 24 and notes 14-15 and accompanying text.

175. "Since *Weber* involved a private company, its reasoning concerning the validity of the hiring plan at issue there is not directly relevant to this case, which involves a state-imposed plan. No equal protection claim was presented in *Weber.*" 106 S. Ct. at 1851 n.9.

parties."[176]

2. *Involuntary Plan by a Public Employer*

The distinction of the *Stotts* case was the involuntary nature of the public employer's remedial plan. The *Stotts* Court noted that neither the union nor the nonminority employees had agreed to the racially-based remedial plan.[177] In both *Weber* and *Wygant*, the plans were voluntarily adopted by the employers and the unions, and had been incorporated into the respective collective bargaining agreements.[178] It is unclear how *Stotts* would have been decided had the plan been adopted voluntarily.

Wygant gave the Court the opportunity to consider a voluntary plan of a public employer. The underlying factual predicate of a pattern or practice of racial discrimination by the public employer was questionable.[179] Therefore, another variable was introduced to support the Court's analysis. Nonetheless, although the voluntariness issue appeared to be the material element of the unresolved question in *Stotts*,[180] the *Wygant* plurality seems to have discounted the significance of voluntariness because it viewed layoffs based on race as a legally inappropriate way to achieve even a compelling purpose.[181] Justice White was

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176. *Id.* at 1851. The implication is that, although not "directly relevant," the *Weber* reasoning is brought to bear in the context of public sector plans. The Court's reference is to the second element of the *Weber* test: "[t]he plan does not require the discharge of white workers and their replacement with new black hirees." *Weber*, 443 U.S. at 208.

177. *Stotts*, 467 U.S. at 575.

178. In *Weber*, the employer and union had recognized and sought to remedy the effects of "conspicuous racial imbalance in traditionally segregated job categories." 443 U.S. at 209 (footnote omitted). Accordingly, they adopted, through collective bargaining, a plan designed to eliminate those effects. Similarly, the employer and union in *Wygant* sought to use the collective bargaining process to remedy the effects of societal discrimination, evidenced by the small percentage of minority teachers on the school faculty. 106 S. Ct. at 1846-47.

179. The *Wygant* plurality found it did not need to address the question of prior discrimination because the means used to effectuate what may have been a legitimate purpose were not sufficiently narrowly tailored. 106 S. Ct. at 1849.

180. The unresolved question in *Stotts* was whether a public employer could voluntarily adopt an affirmative action plan without violating the law. *See supra* text accompanying note 46.

181. 106 S. Ct. at 1849. Because the Court focused on the layoff as an improper means, the issue of voluntariness lost significance.

of the same view,[182] whereas Justice O'Connor hinted that a voluntary racially-based layoff plan by a public employer may be valid if it is "keyed to a hiring goal" relevant "to the remedying of employment discrimination," and is not employed solely to remedy general societal discrimination.[183]

3. *The Seniority Issue*

Another common element was the issue of seniority and the impact that the remedial racially-based plans have on what are otherwise considered to be bona fide seniority systems.[184] *Wygant* was a hybrid of *Weber* and *Stotts*. *Wygant* took from *Weber* the element of a voluntary seniority modification agreed to by the union and grafted it onto the public employer and layoff elements present in *Stotts*. The *Wygant* factual setting combined elements of *Weber* and *Stotts*: a public employer and a union voluntarily agreeing to a seniority modification with respect to layoffs, based upon race, for the purpose of effectuating an affirmative action plan.

The decision in *Wygant*, although an affirmative step in the evolution of indicia of permissibility in the adoption of racially-based remedial affirmative-action plans, casts a shadow of uncertainty over the constitutional limitations placed upon employers, both private and public, in treating employment discrimination and its remedies. Any consensus to be found in the separate opinions lies more in the results reached than in the underlying analyses upon which those results are based.

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182. *Id.* at 1857-58 (White, J., concurring).

183. *Id.* at 1857 (O'Connor, J., concurring).

184. "Section 703(h), however, permits the routine application of a seniority system absent proof of an intention to discriminate." 467 U.S. at 577 (citing Teamsters v. United States, 431 U.S. 324, 352 (1977)). Section 703(h) provides that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(h) (1982) (codifying Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(h), 78 Stat. 241, 255).

B. *Standard of Review Clarified*

Although there may be some lingering uncertainties from the *Wygant* decision, it has crystallized the standard of review to be applied to racially-based remedial affirmative-action plans involving layoffs by a public employer. Four members of the Court agreed that the applicable standard of review is one of strict scrutiny.[185] In view of Justice White's prohibitive stance against racially-based layoffs,[186] it seems fair to conclude that such a plan will be scrutinized strictly.

Whether the state interest need be a compelling one, as suggested by the plurality,[187] or merely an important one, as espoused in Justice Marshall's dissent,[188] appears to be of little distinction.[189] "The Court is in agreement that whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative-action program."[190]

Similarly, there is a degree of consensus on the second prong of the plurality's test: that the means used be sufficiently narrowly tailored.[191] But whether the means used must be sufficiently narrowly tailored or merely "substantially related" as espoused by the dissent, the Court was in accord 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."[192] Accordingly, the *Wygant* Court rejected the title VII analysis of *Teamsters v. United States*[193] that had been applied by the Court in *Stotts*.[194] After *Wygant*, no findings of prior discrimination are required to ef-

185. *See* 106 S. Ct. at 1846-47. *See also id.* at 1852-53 (O'Connor, J., concurring).
186. *See id.* at 1857-58 (White, J., concurring).
187. *Wygant*, 106 S. Ct. at 1846-47.
188. *Id.* at 1861 (Marshall, J., dissenting).
189. *Id.* at 1853 (O'Connor, J., concurring).
190. *Id.*
191. 106 S. Ct. at 1847. *See also id.* at 1853 (O'Connor, J., concurring).
192. *Id.* at 1853 (O'Connor, J., concurring).
193. 431 U.S. 324 (1977). *See supra* note 40-43 and accompanying text.
194. 467 U.S. 561 (1984). *See supra* text accompanying notes 40-46.

fectuate a racially-based remedy.[195] It is sufficient that the public employer recognize a disparity in the racial composition of its workforce, as compared with that of the relevant labor market, in order to undertake a voluntary racially-based remedial affirmative-action plan.[196]

C. *The Relevant Statistical Comparison*

Wygant also made clear the proper method of determining racial discrimination in employment. The court below had determined that the purpose of article XII of the collective bargaining agreement was to remedy the effects of general societal discrimination.[197] Such a focus is too broad to justify a racially-based *employment* remedy. The plurality rejected such a broad based purpose and Justice O'Connor, in her concurring opinion, determined the relevant statistical comparison to be "[t]he disparity between the percentage of minorities on the teaching staff" and that of the relevant labor pool.[198]

D. *A Premature Decision*

What is troubling about the plurality decision in *Wygant* is the Court's apparent disregard of certain significant factual elements that prevailed, such as the collective bargaining safeguards, the apparent prior discrimination determination by the Michigan Civil Rights Commission and its order of adjustment,[199] the hiring goals of the Jackson Board of Education which went unchallenged, and the historical reasons which led to the adoption of the article XII layoff provision.[200]

Justice Marshall's dissent detailed information supplied by both parties which had not been included in the record. Because

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195. *See* 106 S. Ct. at 1855 (O'Connor, J., concurring). *See also id.* at 1867 n.7 (Marshall, J., dissenting).

196. *See* 106 S. Ct. at 1847. *See also id.* at 1856 (O'Connor, J., concurring).

197. Wygant v. Jackson Bd. of Educ., 746 F.2d at 1156-57.

198. 106 S. Ct. at 1857 (O'Connor, J., concurring) (Justice O'Connor's assessment of the relevant statistical comparison to be used in establishing prior discrimination is consistent with the Court's decision in Hazelwood School Dist. v. United States, 433 U.S. 299 (1977), thus indicating that a majority of the Court would agree on this comparison.).

199. *Id.* at 1862 & n.4 (Marshall, J., dissenting).

200. *See id.* at 1858-60.

the district court did not develop an adequate record, the case should have been remanded for that purpose, rather than decided on constitutional grounds without adequate factual support.[201] Even though the school board had expressly denied employment discrimination in a prior action and subsequently was found by a state court not to have "discriminated against minorities in its hiring practices,"[202] the adjustment order of the Michigan Civil Rights Commission was the impetus behind the negotiation between the school board and the union which in turn resulted in the adoption of article XII.[203] The Court did not have the latter information before it as part of the record.[204] The fact that article XII was collectively bargained and the absence of such information from the record persuasively militates toward Justice Marshall's case for remand.[205]

Justice O'Connor's concurrence in this case hinged on the determination that a voluntary racially-based layoff plan, designed to remedy general societal discrimination is unconstitutional because the plan is irrelevant "to the remedying of *employment* discrimination."[206] Had the court remanded the case for further development of the relevant statistical data, the case might have been decided differently. Justice O'Connor's opinion seems to suggest that she would have favored such a layoff provision had the statistical analysis supported a finding of prior employment discrimination.[207]

What looms in the background of the plurality's and dissent's analyses in *Wygant* is the Court's apparent reliance on the test articulated in *Weber*.[208] In deciding that the layoff provision is too intrusive a burden on innocent parties,[209] the plu-

201. *Id.* at 1858.

202. *Id.* at 1849 n.5. *See supra* text accompanying notes 56-59.

203. *Id.* at 1862 (Marshall, J., dissenting).

204. *Id.* at 1848 & n.2.

205. "The haste with which the District Court granted summary judgment to respondents, without seeking to develop the factual allegations contained in respondents' brief, prevented the full exploration of the facts that are now critical to resolution of the important issue before us. Respondents' acquiescence in a premature victory in the District Court should not now be used as an instrument of their defeat." *Id.* at 1858.

206. *Id.* at 1857 (O'Connor, J., concurring) (emphasis added).

207. *See supra* notes 115-134 and accompanying text.

208. *See supra* text accompanying notes 14-29.

209. 106 S. Ct. at 1851-52.

rality implied that the plan unnecessarily trammels the interests of the white employees[210] affected by the racially-based protection of minority proportions of the faculty. The burden thus construed is analyzed for its effects upon *individuals*. When viewed in this perspective, the collective burden upon nonminorities as a *group* becomes fragmented, and the voluntary aspect of the racially-based plan is lost in the wake of litigation instituted by obviously dissatisfied plaintiffs.

E. *The Role of Collective Bargaining*

The collective bargaining process in this case cannot be ignored. Furthermore, the Court's rejection of the remedying of societal discrimination as a valid purpose should not suffice to negate the majority's ratification of the racially-based remedial function of article XII.[211] Indeed, it was a concurring opinion in *Stotts* that endorsed the negotiation process as a safeguard of the rights of innocent employees: " '[I]f innocent employees are to be made to make any sacrifices . . . , they must be represented and have had full participation rights in the negotiation process. . . .' "[212]

1. *The Reduced Expectation Interest*

Applying *Weber* to an analysis of a group burden,[213] the participation by ratification of nonminorities in the collective bargaining process demonstrates an adequate safeguard that the "white employees" as a group did not have their interests "unnecessarily trammeled" by article XII.[214] Additionally, the fact that article XII had been included in the collective bargaining agreement and had been ratified "six times since 1972"[215] belies the plurality's rationale that the employees affected by the layoff had the "expectation of earning the stability and security of seniority."[216] Race was not the only consideration in determining

210. *See id.*
211. *See id.* at 1866 (Marshall, J., dissenting).
212. *Id.* (quoting *Stotts*, 467 U.S. at 588 n.3 (O'Connor, J., concurring)).
213. *See id.* at 1859-60 (Marshall, J., dissenting).
214. *See id.* at 1865.
215. *Id.* at 1866.
216. *Id.* at 1851.

those to be laid off; seniority was also a factor.[217] Presumably, those hired during the period in which article XII was in effect were among the group most likely to be laid off based upon seniority, and the express terms of the collective bargaining agreement provided the group with notice that seniority was not the sole determinative factor. Notwithstanding the fact that affected nonminorities may have been hired before the adoption of article XII, the ratification of a contract containing such a significant provision is evidence of the reduced expectation of the stability and security which seniority normally provides.[218]

2. *The Matter of Voluntariness*

The plurality discounted the utility of the collective bargaining process as a safeguard with respect to racially-based layoffs, noting that the senior white employees who carried the ratification vote had nothing to lose by the adoption of article XII. The junior white employees who might be affected cannot be said to have waived their rights on the basis of the majority vote, which may have been contrary to their desires.[219] The plurality noted that

> [t]he fact that such a painless accomodation was approved by the more senior union members six times since 1972 is irrelevant. The Constitution does not allocate constitutional rights to be distributed like bloc grants within discrete racial groups; and until it does, petitioners' more senior union colleagues cannot vote away petitioners' rights.[220]

Although the Court largely relied on a *Weber* analysis, it is this constitutional issue, equal protection, that distinguished *Wygant* from *Weber*. Neither *Weber* nor *Stotts*, both title VII cases, was decided on equal protection grounds. Consequently, the voluntary nature of the affirmative action plan in *Weber* was significantly different from the *Wygant* plan, primarily because, unlike *Weber*, the *Wygant* employer was a public employer whose racially-based action implicated the fourteenth amend-

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217. *Id.* at 1865 (Marshall, J., dissenting).

218. "Article XII modifies contractual expectations that do not themselves carry any connotation of merit or achievement . . . . " *Id.*

219. *See* 106 S. Ct. at 1850 n.8.

220. *Id.*

ment. Thus, unless the provisions of the collective bargaining agreement are recognized as conditions of employment voluntarily agreed upon by individuals and the employer, the collective bargaining agreement between union and employer is of no redeeming consequence where the elements of the *Weber* test are not satisfied.

The plurality opinion of Justices Powell, Burger, and Rehnquist rejected the proposition that the collective bargaining process can substitute for an individual in securing a " 'waiver' of the right not to be dealt with by the government on the basis of one's race. . . . "[221] Because Justice O'Connor did not concur in that portion of the opinion which addressed the collective bargaining aspect,[222] it is unclear as to which side of this issue she would adopt.

F. *Will Racially-Based Layoffs Ever Be Permissible?*

As a model of judicial guidance in the area of affirmative-action, the *Wygant* decision fell short of the mark. Despite the fact that it resolved the issue of whether findings of prior discrimination are necessary, and that it addressed the relevant statistical comparisons used to determine prior discrimination, *Wygant* raised more questions than it answered. The nature of the opinion left open the question of whether racially-based layoffs in the public sector are ever permissible.[223] Whether such layoffs in the private sector may be permissible was another question raised by *Wygant*.[224]

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221. *Id.*

222. *See supra* text accompanying note 219.

223. Justice O'Connor left open the question of whether any layoff would survive the strict scrutiny test. 106 S. Ct. at 1857 (O'Connor, J., concurring). In her concurring opinion, Justice O'Connor emphasized that the layoff provision was "tied to the percentage of minority students in the school district, not to the percentage of qualified minority teachers within the relevant labor pool" and concluded that as such it had "no relation to remedying employment discrimination . . . ." *Id.* at 1857. She therefore found it unnecessary "to resolve the troubling questions of whether any layoff provision could survive strict scrutiny or whether this particular layoff provision could, when considered without reference to the hiring goal it was intended to further, pass the onerous 'narrowly tailored' requirement." *Id.* Apparently Justice O'Connor would not consider racially-based remedial measures which contemplate layoffs to be per se impermissible if they are adopted to effectuate affirmative-action plans to remedy employment discrimination. Resolution of that issue was reserved for another day.

224. Based on the reasoning of the plurality that layoffs impose too intrusive a bur-

VI. Conclusion

It is obvious that affirmative-action hiring policies are of little significance if they can be disemboweled by cyclical economic patterns that from time to time generate layoffs. The Court provides more than lip-service in support of the public policy of equal employment opportunities. But the plurality's solution of using hiring goals to accomplish racial balance begs the question as to how such goals, once met, may be preserved. The rationale underlying Justice O'Connor's concurrence indicates that a "layoff provision" to "maintain levels of minority hiring" which is related to "remedying employment discrimination" *may* "be adjudged 'narrowly tailored' to effectuate its asserted remedial purpose."[225] Hers is the swing vote between absolutely no racially-based layoffs,[226] and the preservation of affirmative-action hiring through some protection against minority layoffs.[227]

As it stands today, the Court is ambivalent in its treatment of racially-based layoff provisions. Should the Court be faced with the issue again, Justice O'Connor may swing the decision in favor of such layoffs, given the correct factual foundation. To do so, Justice O'Connor may have to grapple with the voluntariness issue as it relates to collective bargaining — an issue not addressed in her concurrence. Until that time, resolution of that issue, and of the validity of all racially-based layoffs, must wait.

Richard J. Cairns

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den, 106 S. Ct. at 1851-52, and of Justice White, that racially-based layoffs are never permissible, *see id.* at 1857 (White, J., concurring), it would appear that at least four members of the Court would find that racially-based layoffs in the private sector would be unconstitutional under the *Weber* analysis, which provides that the interests of nonminorities must not be unnecessarily trammeled.

225. Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842, 1857 (1986) (O'Connor, J., concurring). This is a construction of the converse of Justice O'Connor's rationale that such a provision having no relation to remedying employment discrimination cannot be narrowly tailored.

226. The plurality and Justice White. *See supra* notes 86-113 and accompanying text.

227. The dissenting opinions. *See supra* notes 135-163 and accompanying text.