CONSTITUTIONAL LAW—EQUAL PROTECTION CLAUSE—LAYOFF PROVISION IN COLLECTIVE BARGAINING AGREEMENT PROTECTING EMPLOYEES BECAUSE OF THEIR RACE IS VIOLATIVE OF THE FOURTEENTH AMENDMENT—*Wygant v. Jackson Board of Education*, 106 S. Ct. 1842 (1986).

The equal protection clause of the fourteenth amendment to the United States Constitution provides that "[n]o [s]tate shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."[1] Nevertheless, the United States Supreme Court has interpreted this clause to allow preferential treatment of minority groups in certain circumstances.[2] The Court has consistently balanced the rights of innocent individuals against programs designed to remedy prior racial discrimination.[3] In *Wygant v. Jackson Board of Education*,[4] the Court sought to define the constitutional limitations of these programs under the fourteenth amendment.[5] The *Wygant* Court held that preferential protection against layoffs of minority teachers abrogated the fourteenth amendment rights of nonminority teachers.[6]

In 1972, the Jackson Board of Education (Board) and the Jackson Education Association (Union) added Article XII[7] to

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1 U.S. CONST. amend. XIV, § 1.

2 *See* Fullilove v. Klutznick, 448 U.S. 448, 492 (1980) (federal statute providing 10% of federal funding for minority businesses of public works projects held constitutional); University of California Regents v. Bakke, 438 U.S. 265, 318 (1978) (race may be used as a factor in university's admissions policy). *See also infra* notes 51-72 & 82-90 and accompanying text (discussing these cases).

3 *See Fullilove*, 448 U.S. at 484 (upholding constitutionality of federal statute providing preferential treatment to minority businesses upheld where effects on nonminorities were insignificant); *Bakke*, 438 U.S. at 299 (racial classifications must be based upon compelling objectives and narrowly tailored). *See also infra* notes 51-72 & 82-90 and accompanying text (discussing these cases).

4 106 S. Ct. 1842 (1986).

5 *See id.* at 1846 (Powell, J., plurality opinion).

6 *Id.* at 1852 (Powell, J., plurality opinion).

7 Article XII states:

> 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.

Wygant, 106 S. Ct. at 1845 (Powell, J., plurality opinion) (citation omitted).

their collective bargaining agreement in response to racial tension.[8] Article XII provided that, in the event of a layoff, teachers with the most seniority would be retained.[9] Minority teachers, however, could not be laid off at a rate greater than the percentage of minority teachers currently employed.[10] In 1974, layoffs were necessary.[11] The Board refused to follow Article XII on the basis that it violated the Michigan Teacher Tenure Act.[12]

Subsequently, the Union and two minority teachers who lost their jobs brought suit in federal court.[13] They alleged, among other claims, that the Board had violated the equal protection clause of the fourteenth amendment and Title VII of the Civil

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[8] *Id.* at 1844 (Powell, J., plurality opinion). *See infra* note 147 and accompanying text (discussing history prior to Article XII).

[9] *Wygant*, 106 S. Ct. at 1845 (Powell, J., plurality opinion). For text of Article XII see *supra* note 7 and accompanying text.

[10] *Wygant*, 106 S. Ct. at 1845 (Powell, J., plurality opinion).

[11] *Id.* The Board, in April of 1974, announced the layoff of 75 teachers. *See* Brief for Respondents at 14, Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842 (1986) (No. 84-1340). Included in the 75 were 19 minority teachers. *Id.* The teaching staff consisted of 11.1% minority teachers. *Id.* Thus, according to Article XII no more than 11.1% minority teachers should have been laid off. *See id.* The Board ignored these ratio figures as well as Article XII and retained all tenured teachers. *Id.*

[12] *Wygant*, 106 S. Ct. at 1845 (Powell, J., plurality opinion). The Board contended that compliance with Article XII would violate various sections of the Michigan Teachers Tenure Act. *See* Jackson Educ. Ass'n, Inc. v. Board of Educ. of the Jackson Public Schools, No. 77-011484CZ, slip op. at 4 (Jackson County Cir. Ct., Aug. 31, 1979) (citing MICH. COMP. LAWS §§ 38.101, .105, .172 (1979)). These sections provide in pertinent part:

> 38.101. Discharge, demotion or retirement of teachers
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> Discharge or demotion of a teacher on continuing tenure may be made only for reasonable and just cause, and only after such charges, notice, hearing, and determination thereof, as are hereafter provided . . . .
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> . . . .
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> 38.105. Necessary reduction in personnel, first vacancy
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> Any teacher on permanent tenure whose services are terminated because of a necessary reduction in personnel shall be pointed to the first vacancy in the school district for which he is certified and qualified.
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> . . . .
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> 38.172. Waiver of rights by teachers
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> No teacher may waive any rights and privileges under this act in any contract or agreement made with the controlling board. In the event that any section or sections of a contract or agreement entered into between a teacher and the controlling board make continuance of employment of such teacher continued upon certain conditions which may be interpreted as contrary to the reasonable and just cause of dismissals, provided by this Act, such section or sections of a contract or agreement shall be invalid and of no effect in relation to the termination of employment of such teacher.

MICH. COMP. LAWS §§ 38.101, .105, .172 (1979).

[13] *Wygant*, 106 S. Ct. at 1845 (Powell, J., plurality opinion).

Rights Act of 1964.[14] The United States District Court for the Eastern District of Michigan dismissed the federal claims on the ground that, inter alia, the plaintiff's evidence was insufficient to support a claim that the Board engaged in discriminatory practices before 1972.[15] The Union and the laid off minority teachers thereupon brought suit in Michigan state court.[16] The state court held that the Board breached its contract with the Union and that Article XII did not violate the Michigan Teachers Tenure Act.[17] The court further asserted that Article XII was permissible, despite its harsh effects on nonminority teachers, in order to remedy the results of societal discrimination.[18]

After the state court's decision, the Board was compelled to comply with Article XII.[19] Between 1976 and 1982, the Board laid off nonminority teachers while retaining minority teachers with lesser seniority.[20] The laid off, nonminority teachers brought suit in the United States District Court for the Eastern District of Michigan.[21] They alleged that the Board's action violated the equal protection clause of the United States Constitution and various statutes.[22]

The district court held that a judicial finding of prior dis-

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14 *Id.* The minority teachers and the Union claimed that the Board had breached the employment contract and that the Board's actions constituted discriminatory hiring practices. *Id.* *See generally* 42 U.S.C. §§ 2000e to e-17 (1982) (federal statute prohibiting employers from discriminating against individuals because of race).

15 *Wygant*, 106 S. Ct. at 1845 (Powell, J., plurality opinion).

16 *Id.* The minority teachers and the Union alleged the same claims raised in the federal district court. *Id.* *See also* Jackson Educ. Ass'n., Inc. v. Board of Educ. of the Jackson Public Schools, No. 77-011484CZ slip op. at 1 (Jackson County Cir. Ct.).

17 *Wygant*, 106 S. Ct. at 1845 (Powell, J., plurality opinion).

18 *Id.* In *Wygant*, Justice Powell "seemed to define 'societal discrimination' as any discrimination not practiced by the same public body which has adopted the remedial plan." Comment, *Principles of Competence: The Ability of Public Institutions to Adopt Remedial Affirmative Action Plans*, 53 U. CHI. L. REV. 581, 604 n.103 (1986). *See also Wygant*, 106 S. Ct. at 1847 (Powell, J., plurality opinion). Justice O'Connor defined societal discrimination as "discrimination, not traceable to [the governmental agency's] own action." *Id.* at 1854 (O'Connor, J., concurring).

19 *See Wygant*, 106 S. Ct. at 1845 (Powell, J., plurality opinion).

20 *Id.* at 1845-46 (Powell, J., plurality opinion).

21 *Id.* at 1846 (Powell, J., plurality opinion). *See also* Wygant v. Jackson Bd. of Educ., 546 F. Supp. 1195, 1197 (E.D. Mich. 1982), *aff'd*, 746 F.2d 1152 (6th Cir. 1984), *rev'd*, 106 S. Ct. 1842 (1986).

22 *Wygant*, 546 F. Supp. at 1199. The nonminority teachers challenged their layoff on the following grounds, among others: the equal protection clause of the fourteenth amendment, U.S. CONST. amend. XIV, § 1; Title VII, § 701 of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-17 (1982); the Civil Rights Acts, 42 U.S.C. §§ 1981, 1983, 1985 (1982); the Michigan State Constitution, MICH. CONST. art. I, § 2 (equal protection); the Elliott-Larsen Civil Rights Act, 1976 MICH. PUB.

crimination was not a prerequisite for the Board's adoption of Article XII.[23] The court observed that minority teachers were important role models for minority students.[24] The court further noted an underrepresentation of minority teachers as compared to the percentage of minority students enrolled.[25] The court, therefore, reasoned that the Board's attempt to eliminate inadequate minority teacher representation was an important objective.[26] The court concluded that Article XII was substantially related to this objective and was therefore constitutional.[27] The Court of Appeals for the Sixth Circuit affirmed the district court's findings.[28]

The nonminority teachers appealed to the United States Supreme Court and certiorari was granted.[29] The Supreme Court reversed the judgment of the court of appeals.[30] A plurality of the Court ruled that a voluntary affirmative action policy of racially based layoffs was overintrusive and thus invalid.[31]

ACTS 1701 (codified as amended at MICH. COMP. LAWS §§ 37.2101-2804 (1979)); the Teachers' Tenure Act, MICH. COMP. LAWS §§ 38.71-191 (1979).

[23] *Id.* at 1200.

[24] *Id.* at 1201. The importance of role models was noted in Oliver v. Kalamazoo Bd. of Educ., 498 F. Supp. 732, 747-48 (W.D. Mich. 1980), *vacated*, 706 F.2d 757 (6th Cir. 1983). The *Oliver* court stated that "role models [are] important because they encourage minority students to higher aspirations and at the same time work to dispel myths and stereotypes about their race." *Id.* The role model theory links the percentage of minority students in the school to the percentage of minority teachers. *See Wygant*, 546 F. Supp. at 1201. The district court in *Wygant* stated that the role model theory is a permissible indicator of discrimination because:

> Teachers are role-models for their students. More specifically, minority teachers are role-models for minority students. This is vitally important because societal discrimination has often deprived minority children of other role-models.
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> Because of this one vitally important aspect of the teaching profession, the court . . . may compare the percentage of minority faculty with the percentage of minorities in the student body, rather than with the percentage of minorities in the relevant labor pool.

Id. at 1201 (citations omitted).

[25] *Wygant*, 546 F. Supp. at 1201.

[26] *See id.*

[27] *See id.* at 1202. The court stated: "The objective of this affirmative action plan to remedy past 'substantial' and 'chronic' underrepresentation of minority teachers on the Jackson School District faculty is plainly constitutional." *Id.* at 1201 (citation omitted).

[28] Wygant v. Jackson Bd. of Educ., 746 F.2d 1152, 1159 (6th Cir. 1984), *rev'd*, 106 S. Ct. 1842 (1986).

[29] Wygant v. Jackson Bd. of Educ., 471 U.S. 1014 (1985).

[30] Wygant v. Jackson Bd. of Educ., 106 S. Ct. at 1852 (Powell, J., plurality opinion).

[31] *Id.* at 1851-52 (Powell, J., plurality opinion). Voluntary affirmative action plans are voluntary race conscious programs adopted to correct minority imbalance

The United States Supreme Court has regarded racially based classifications repugnant to this nation's doctrine of equality.[32] The Court has required that such classifications be subjected to the most exacting scrutiny.[33] The Court has applied this standard of scrutiny to classifications disfavoring blacks as well as classifications prejudicing other racial groups.[34] The Warren Court demonstrated a strong disfavor of racial classifications in the landmark case of *Brown v. Board of Education*.[35]

The genesis of the racial classifications in the *Brown* case was due to local segregation laws which denied black children admission to schools established solely for white children.[36] Legal representatives for the black children brought suit under the equal protection clause of the fourteenth amendment.[37] Initially, the Court recognized that providing education was a primary role of state and local governments.[38] Secondly, the Court reasoned that once the state has undertaken this responsibility, it must provide education on an equal basis.[39] The *Brown* Court further considered the adverse psychological effects of segregation on black children.[40] The Court held that as a result of these harsh effects, separate educational facilities were inherently unequal.[41] Consequently, the Court concluded that such a segregation policy vio-

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in traditionally segregated job categories. *See* United Steelworkers v. Weber, 443 U.S. 193, 201 (1979). *Cf.* BLACK'S LAW DICTIONARY 55 (5th ed. 1979) (programs designed to remedy past discrimination in hiring minorities).

32 *See* Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

33 *See* Korematsu v. United States, 323 U.S. 214, 216 (1944).

34 *See* Hernandez v. Texas, 347 U.S. 475, 478 (1954) ("fourteenth amendment is not directed solely against discrimination" based upon "white" and "black"); Korematsu v. United States, 323 U.S. 214, 216 (1944) (fourteenth amendment applied to Japanese Americans); Truax v. Raich, 239 U.S. 33, 39 (1915) (fourteenth amendment includes aliens); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (fourteenth amendment is universal in its application without regard to race).

35 347 U.S. 483 (1954).

36 *Id.* at 487-88.

37 *Id.*

38 *Id.* at 493. The Court observed that education "is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Id.*

39 *Id.*

40 *Id.* at 494. The Court reasoned that children separated "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Id.* A similar analysis as to the harsh effects of Article XII on nonminorities was conducted in *Wygant*. *See infra* notes 119-25 and accompanying text.

41 *Brown*, 347 U.S. at 495.

lated the equal protection clause.[42]

Thereafter, in *Swann v. Charlotte-Mecklenburg Board of Education*,[43] the Court provided guidance to school boards in achieving integrated school systems as mandated by *Brown*.[44] Approximately sixty percent of all black students within the school district attended twenty-one schools comprised of ninety-nine percent or more of blacks.[45] Swann brought suit under the fourteenth amendment to desegregate the school district.[46] The Court observed that school boards were vested with broad discretionary powers to formulate and implement educational policy.[47] The Court noted that eliminating racial imbalances within the school district was consistent with those powers.[48] According to the Court, however, if a school board fails to remedy segregation through an acceptable plan, judicial authority may be invoked.[49] The Court held that the school board was required to adopt a desegregation plan modified by a court appointed expert.[50]

In *University of California Regents v. Bakke*,[51] the *Swann* Court's reference to a school board's discretion to eliminate discrimination was questioned.[52] The University of California Medical School at Davis (University) adopted a voluntary affirmative action program designed to benefit economically disadvantaged or

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42 *Id.*

43 402 U.S. 1 (1971).

44 *See id.* at 5; *see also* Green v. County School Bd., 391 U.S. 430, 437-38 (1968) (school board charged with duty to eradicate discrimination and create a unitary system).

45 *Swann*, 402 U.S. at 7. This situation was the result of the district court's approval of the school board's desegregation plan in 1965. *Id.* The desegregation plan was "based upon geographic zoning with free transfer provision" for students. *Id.* The plan failed to achieve the required unitary school system. *Id.*

46 *See id.*

47 *Id.* at 16.

48 *See id.* In regard to the school board's authority the Court specifically stated:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.

Id.

49 *Id.*

50 *See id.* at 32.

51 438 U.S. 265 (1978).

52 *See id.* at 272-73 (Powell, J., plurality opinion).

minority students.[53] This program reserved sixteen out of one hundred seats in the entering class for minority students.[54] Allan Bakke, a nonminority student, was denied admission to medical school, while lesser qualified minority students were admitted.[55] Bakke brought suit alleging that the University's race-conscious program violated the equal protection clause of the fourteenth amendment.[56]

Justice Powell, writing for the plurality, applied a strict standard of judicial review[57] to the University's admissions program under the equal protection clause.[58] The Justice maintained that

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[53] *Id.* at 272-76 (Powell, J., plurality opinion). The special program admitted 63 minority students of black, Mexican and Asian descent. *Id.* at 275-76 (Powell, J., plurality opinion). During the same time period, however, disadvantaged whites applying to the special program were not accepted. *Id.* at 276 (Powell, J., plurality opinion).

[54] *Id.* at 275 (Powell, J., plurality opinion).

[55] *Id.* at 276-77 (Powell, J., plurality opinion). Student qualifications were assessed on their personal interviews, "overall grade point average, grade point average in science courses, scores on the Medical College Admissions Test (MCAT), letters of recommendation, extracurricular activities, and other biographical data." *Id.* at 274 (Powell, J., plurality opinion).

[56] *Id.* at 277-78 (Powell, J., plurality opinion). Bakke also brought suit under the California State Constitution, CAL. CONST. art. I, § 21 as well as Title VI, § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976).

[57] The strict standard of judicial review can be summarized as:

> Classifications based on race or natural origin have been held to be "suspect," that is, the Justices will use "strict scrutiny" to determine whether the law is invidious. The use of these classifications will be invalid unless they are necessary to promote a "compelling" or "overriding" interest of government. Burdening someone because of his national origin or status as a member of a racial minority runs counter to the most fundamental concept of equal protection. To legitimate such a classification the end of the governmental action would have to outweigh the basic values of the [a]mendment. For this reason no such classification has been upheld since 1945 when there was any likelihood that it would burden racial minorities.

J.E. NOWAK, R.D. ROTUNDA & J.N. YOUNG, CONSTITUTIONAL LAW 535 (1978).

This standard was articulated by the Court as early as 1944. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944). The *Korematsu* Court noted that:

> [A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

Id.

[58] *Bakke*, 438 U.S. at 291 (Powell, J., plurality opinion). The *Bakke* plurality rejected the University's contention that the strict scrutiny level of analysis should not be applied to white applicants who are not a "discrete and insular minority." *Id.* at 290 (Powell, J., plurality opinion) (citation omitted). The plurality stated that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." *Id.* at

the University must show that its objectives were compelling and the racial classifications used were necessary to accomplish these objectives.[59] He opined that the University had a compelling interest in maintaining a diverse student body.[60] Justice Powell asserted, however, that the means of establishing such a student body through an absolute quota system was seriously flawed.[61] The Justice advanced that there were other means of establishing an ethnically diverse student body which were not offensive to individuals' equal protection rights.[62] The Justice emphasized that an admissions program which simply considered race as a factor would have achieved the same objective without the adverse effects of an absolute quota system.[63] Accordingly, the University's use of an absolute quota in its admission program was declared unconstitutional by the plurality.[64]

In a separate opinion, Justices Brennan, White, Marshall and Blackmun[65] rejected the strict scrutiny standard embraced by the

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289-90 (Powell, J., plurality opinion). The plurality further noted that classifications based on race have always been subjected "to the most rigid scrutiny." *Id.* at 291 (Powell, J., plurality opinion) (citing Korematsu v. United States, 323 U.S. 214, 216 (1944)).

59 *Id.* at 305. *See also In re* Griffiths, 413 U.S. 717, 721-22 (1973) (objectives must be substantial and classifications must be necessary to accomplish state objectives); Loving v. Virginia, 388 U.S. 1, 11 (1966) (racial classifications are essential to achieve some permissible state objective); McLaughlin v. Florida, 379 U.S. 184, 196 (1964) (racial classifications are necessary to accomplish permissible state objective).

60 *Bakke*, 438 U.S. at 314 (Powell, J., plurality opinion). In reference to the University's compelling objective, Justice Powell stated that:

> [P]hysicians serve a heterogeneous population. An otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.
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> Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body. Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded.

Id. (footnote omitted).

61 *Id.* at 315 (Powell, J., plurality opinion).

62 *See id.* at 316 (Powell, J., plurality opinion). The Justice cited Harvard College's admission policy as an example. *Id.*

63 *See id.* at 316-20 (Powell, J., plurality opinion).

64 *Id.* at 320 (Powell, J., plurality opinion).

65 *Id.* at 324 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part).

plurality.[66] Instead, the Justices concluded that an intermediate level of scrutiny[67] was more appropriate when examining race-conscious affirmative action programs.[68] According to the Justices, such programs must serve an "important" rather than a "compelling" purpose.[69] The Justices recognized that the University's admission program, designed to remedy past discrimination, was a sufficiently important objective to justify racial classifications.[70] They also observed that the University's use of an absolute quota for admission was a reasonable method to ac-

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66 *Id.* at 357 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part). The Justices rejected the strict scrutiny standard, stating:

> Unquestionably we have held that a government practice or statute which restricts "fundamental rights" or which contains "suspect classifications" is to be subjected to "strict scrutiny" and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available. But no fundamental right is involved here. Nor do whites as a class have any of the "traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."

Id. (citations omitted).

67 The intermediate level of scrutiny was articulated in Craig v. Boren, 429 U.S. 190 (1976). In *Craig*, the Supreme Court held an Oklahoma statute which prohibited the sale of beer with a 3.2% alcohol content to males under the age of 21 and females under the age of 18 "invidiously discriminates against males." Craig v. Boren, 429 U.S. 190, 204 (1976). In so holding, the Court stated that "[t]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 197. This standard of review "eliminates the strong presumption of constitutionality that exists under the rational basis standard of review but it allows the government to employ a gender-based classification so long as it is a reasonable means of achieving substantial government ends and not merely the arbitrary classifying of people by sexual stereotypes." NOWAK, R.D. ROTUNDA & J.N. YOUNG, *supra* note 57, at 532.

68 *See Bakke*, 438 U.S. at 356-62 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part). The Justices stated that "a number of considerations—developed in gender-discrimination cases but which carry even more force when applied to racial classifications—lead us to conclude that racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to achievement of those objectives.' " *Id.* at 359 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part) (citations omitted).

69 *Id.* at 361 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part).

70 *Id.* at 369 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part). The Justices specifically stated that "the University's goal of admitting minority students disadvantaged by the effects of past discrimination is sufficiently important to justify use of race-conscious admissions criteria." *Id.*

complish the University's objectives.[71] The Justices further asserted that there was no difference between the quota system adopted by the University and the scheme advocated by the plurality.[72]

One year later, the Court established its position on voluntary affirmative action programs involving a private employer under Title VII.[73] In *United Steelworkers v. Weber*,[74] a private employer established a temporary plan to set aside fifty percent of the positions in the company's craft training programs for blacks.[75] This plan was negotiated and incorporated into the collective bargaining agreement with the employees' union.[76] A white production worker, who was denied admission to the training program, brought suit under Title VII.[77] The Court initially emphasized that its decision was not a determination of the legality of the plan under the equal protection clause.[78] The *Weber* majority noted that the negotiated plan was consistent with the legislative intent of Title VII.[79] The Court further observed that the plan was temporary and did not completely bar white employees from the training program.[80] Accordingly, the Court reasoned that the plan was valid under Title VII.[81]

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71 *Id.* at 376-78 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part).

72 *Id.* at 378 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part).

73 *See* United Steelworkers v. Weber, 443 U.S. 193, 209 (1979) (adoption of voluntary affirmative action program by private employer permissible under Title VII).

74 443 U.S. 193 (1979).

75 *Id.* at 198. This plan was to be terminated upon achieving a proportional percentage of black skilled craftworkers equal to the percentage of blacks in the local work force. *Id.* at 199.

76 *Id.* at 197-98.

77 *Id.* at 199. The black workers selected into the training program under the affirmative action plan had less seniority than the production worker denied admission. *Id.*

78 *Id.* at 200.

79 *Id.* at 203-04. The Court quoted from a House Report that Title VII would, "create an atmosphere conducive to voluntary or local resolution of other forms of discrimination." *Id.* at 204 (quoting H.R. REP. No. 914, 88th Cong., 1st Sess., pt. 1, at 18 (1963)).

80 *Id.* at 208.

81 *Id.* at 209. In 1984, the Court examined whether the use of layoffs as a means to remedy prior discrimination violated Title VII. *See Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984). In *Stotts*, the district court entered an injunction pursuant to a consent decree which required the layoff of senior white employees before black employees with lesser seniority. *See id.* at 565-67. The Supreme Court vacated this injunction by holding that Title VII protects bona fide seniority plans. *Id.* at 575. The Court concluded that it would, therefore, be inappropriate to deny innocent employees benefits which inured through seniority. *Id.*

Within four years of *Bakke*, the Court rendered another plurality decision in *Fullilove v. Klutznick*.[82] The *Fullilove* Court carved an exception to the prohibition against affirmative quotas by upholding the constitutionality of a federal statute providing preferential treatment to minority businesses.[83] The statute required that ten percent of federal funding for construction projects be used to purchase goods from minority businesses.[84] Construction contractors alleging economic loss due to enforcement of the statute brought suit, inter alia, under the "equal protection component of the Due Process Clause of the Fifth Amendment."[85] Chief Justice Burger, writing for the plurality, upheld as constitutional the statute's objective to remedy the racial bias hindering minority business participation in federal contracts.[86] He emphasized that it was not impermissible to require innocent parties to share the burdens in remedying prior discrimination.[87] According to the plurality, the economic loss to the nonminority contractors was relatively small in comparison to the overall contracting opportunities.[88] Additionally, the Chief Justice noted that the ten percent requirement could be waived in certain circumstances.[89] Therefore, the plurality ruled that the

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82 448 U.S. 448 (1980).

83 *See id.* at 492 (Burger, C.J., plurality opinion). Petitioners brought suit under the Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2) (1982). *See id.* at 455 (Burger, C.J., plurality opinion). This statute provided federal grants for public works projects. *Id.* at 453 (Burger, C.J., plurality opinion). However, the approval for federal grants was conditioned upon allocating 10% of each grant to minority business enterprises. *Id.* at 454 (Burger, C.J., plurality opinion).

84 *Id.* at 453-54 (Burger, C.J., plurality opinion).

85 *Id.* at 455 (Burger, C.J., plurality opinion). The contractors also brought suit under the equal protection clause of the fourteenth amendment, U.S. CONST. amend. XIV, § 1; the Civil Rights Acts, 42 U.S.C. §§ 1981, 1983, 1985 (1976); Title VI, § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976); and Title VII, § 701 of the Civil Rights Act of 1964, ch. 21, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e to e-17 (1982)).

86 *See id.* at 473-76 (Burger, C.J., plurality opinion). The Chief Justice held that the congressional objectives of the statute were valid as within the spending power of the commerce clause. *Id.* at 476-78 (Burger, C.J., plurality opinion).

87 *Id.* at 484 (Burger, C.J., plurality opinion). Chief Justice Burger specified that "[w]hen effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such 'a sharing of the burden' by innocent parties is not impermissible." *Id.* (citations omitted). *See also* Franks v. Bowman Transp. Co., 424 U.S. 747, 777-78 (1976) (awarding retroactive seniority to victims of employment discrimination).

88 *Fullilove*, 448 U.S. at 484 (Burger, C.J., plurality opinion). The loss to the contractors would have been "only 0.25% of the annual expenditure for construction work in the United States." *Id.* at 484-85 n.72 (Burger, C.J., plurality opinion) (citation omitted).

89 *Id.* at 487 (Burger, C.J., plurality opinion). Chief Justice Burger stressed that

statute was constitutional.[90]

It was against this vacillation of the Court's position with regard to voluntary affirmative action programs that the Supreme Court heard *Wygant v. Jackson Board of Education*.[91] The Justices failed, however, to agree on a majority pronouncement and issued a total of five separate opinions.[92] Justice Powell announced the judgment of the Court and authored an opinion in which Chief Justice Burger and Justice Rehnquist joined.[93] Justice O'Connor joined in part with the plurality and wrote a separate concurring opinion.[94] Justice White also concurred and wrote a separate opinion.[95] Justice Marshall dissented, joined by Justices Brennan and Blackmun.[96] Similarly, Justice Stevens filed a separate dissenting opinion.[97]

Writing for the plurality, Justice Powell observed that the Court has never ruled that societal discrimination alone was sufficient to justify racially based classifications.[98] According to the Justice, the Court has required evidence of actual discrimination before approving limited use of such classifications.[99] Justice Powell posited that the correct method for determining whether actual discrimination existed was to compare the percentage of minorities on the faculty with the percentage of qualified minor-

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the racial classifications used in the statute were rebuttable through an administrative process. *Id.* The Chief Justice observed that there were two fundamental assumptions of the program which could be rebutted by the affected party:

> (1) that the present effects of past discrimination have impaired the competitive position of businesses owned and controlled by members of minority groups; and (2) that affirmative efforts to eliminate barriers to minority-firm access, and to evaluate bids with adjustment for the present effects of past discrimination, would assure that at least 10% of the federal funds granted under the Public Works Employment Act of 1977 would be accounted for by contracts with available, qualified, bona fide minority business enterprises.

Id. He concluded that this process provided reasonable assurance that the statute would be limited to the objectives stated by Congress. *Id.* at 489 (Burger, C.J., plurality opinion).

90 *Id.* at 492 (Burger, C.J., plurality opinion).

91 106 S. Ct. 1842 (1986).

92 *Id.* at 1844-52 (Powell, J., plurality opinion); *id.* at 1852-57 (O'Connor, J., concurring); *id.* at 1857-58 (White, J., concurring); *id.* at 1858-67 (Marshall, J., dissenting); *id.* at 1867-71 (Stevens, J., dissenting).

93 *Id.* at 1844 (Powell, J., plurality opinion).

94 *Id.* at 1852 (O'Connor, J., concurring).

95 *Id.* at 1857 (White, J., concurring).

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

97 *Id.* at 1867 (Stevens, J., dissenting).

98 *Wygant*, 106 S. Ct. at 1847 (Powell, J., plurality opinion).

99 *Id.*

ity teachers in the local labor market.[100]

Justice Powell rejected the district court's role model theory,[101] and the comparison of the percentage of minority teachers to minority students as an indicator of discrimination.[102] He maintained that there could be a number of non-discriminatory reasons for a deviation between the two percentages.[103] Moreover, the Justice articulated that the role model theory would have required the Board to engage in the unnecessary, yearly adjustment of its teaching staff.[104] Further, the Justice noted that the role model theory and its basic underlying premise that "black students are better off with black teachers" was contrary to the Court's decision in *Brown*.[105] Consequently, the Justice concluded that the purpose of remedying mere societal discrimination as a basis for an affirmative action program based on social classifications was too indefinite and overly broad.[106]

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100 *Id.* The Court noted the appropriate analysis to determine prior discrimination by the school board was enunciated in Hazelwood School Dist. v. United States, 433 U.S. 299 (1977). *Id.* In *Hazelwood* the Court identified the correct method of determining past discrimination as a comparison, "between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market." *Hazelwood*, 433 U.S. at 308. The Supreme Court later clarified the appropriate tests to determine past discrimination for skilled and non-skilled workers in Johnson v. Transportation Agency, Santa Clara County. *See* 107 S. Ct. 1442, 1452-53 (1987). Where a job requires "no special expertise," the Court will compare the percentage of minorities or women hired by an employer to the percentage of minorities or women in the local labor market. *Id.* at 1452.

101 *See supra* note 24 and accompanying text (discussing the role model theory).

102 *See Wygant*, 106 S. Ct. at 1847-48 (Powell, J., plurality opinion).

103 *Id.* at 1848 (Powell, J., plurality opinion). The petitioners alleged that one of the main reasons that the minority student percentage was greater than the percentage of minority teachers was that white student enrollment was declining. Petitioners' Brief at 18-19, Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842 (1986) (No. 84-1340) [hereinafter Petitioners' Brief]. Accordingly, this factor had the overall effect of causing the relative percentage of minority students to increase. *Id.*

104 *Wygant*, 106 S. Ct. at 1847 (Powell, J., plurality opinion) (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31-32 (1971)). Justice Powell explained:

> 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. Indeed, by tying the required percentage of minority teachers to the percentage of minority students, it requires just the sort of year-to-year calibration the Court stated was unnecessary in *Swann*.

Id.

105 *Id.* at 1848 (Powell, J., plurality opinion) (citation omitted). *See supra* notes 35-42 and accompanying text (discussing *Brown*).

106 *See Wygant*, 106 S. Ct. at 1848 (Powell, J., plurality opinion). Justice Powell asserted that societal discrimination was insufficient and too broad a basis to support "legal" racial classifications which injure innocent individuals. *Id.*

The plurality opinion indicated that minorities had competing constitutional rights with nonminorities.[107] Accordingly, Justice Powell stressed that public employers must demonstrate through convincing evidence that a race-conscious affirmative action policy was warranted.[108] Justice Powell pointed out that in both the district court[109] and state court decisions[110] there was no finding of actual discrimination but of mere societal discrimination.[111] Despite these earlier decisions, the Justice conceded that in the instant action, the Board maintained that it had actually discriminated against minorities in the past.[112] Justice Powell expressed, however, that it was unnecessary to determine whether the Board engaged in such prior discrimination, since Article XII was unconstitutional even if it was based on a compelling purpose.[113]

Justice Powell rejected the court of appeals application of the "reasonableness" test[114] for constitutional review of Article

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107 *See id.* Justice Powell explained how the two competing constitutional rights impacted public employers in that:

> [P]ublic employers, operate under two interrelated constitutional duties. They are under a clear command from this Court, starting with *Brown v. Board of Education*, to eliminate every vestige of racial segregation and discrimination in the schools. Pursuant to that goal, race-conscious remedial action may be necessary. On the other hand, public employers . . . also must act in accordance with a "core purpose of the [f]ourteenth [a]mendment" which is to do away with all governmentally imposed distinctions based on race.

Id. (citations omitted).

108 *Id.* Justice Powell noted that a public employer must have sufficient evidence to support a conclusion of past discrimination. *See id.* The Justice emphasized that this proof was necessary in order to justify a race-conscious affirmative action program. *Id.* This evidence is critical in that if an affirmative action program is challenged by nonminorities, "the trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary." *Id.* Without this determination by the trial court, the appellate court may not then review the validity of a race-conscious plan. *Id.* at 1848-49 (Powell, J., plurality opinion).

109 Jackson Educ. Ass'n. Inc. v. Board of Educ. of Jackson Public Schools, No. 4-72340 (E.D. Mich. Dec. 15, 1976). *See supra* text accompanying notes 13-15.

110 Jackson Educ. Ass'n., Inc. v. Board of Educ. of the Jackson Public Schools, No. 77-011484CZ (Jackson County Cir. Court, Aug. 31, 1979). *See supra* text accompanying notes 16-18.

111 *See Wygant*, 106 S. Ct. at 1849 (Powell, J., plurality opinion).

112 *See id.*

113 *See id.*

114 The reasonableness test as defined by the court of appeals "asks whether the affirmative action plan is 'substantially related' to the objectives of remedying past discrimination and correcting 'substantial' and 'chronic' under-representation." Wygant v. Jackson Bd. of Educ., 746 F.2d 1152, 1157 (6th Cir. 1984), *rev'd*, 106 S. Ct. 1842 (1986). *Cf. supra* note 67 and accompanying text.

XII and instead applied a strict scrutiny standard.[115] He emphasized that strict scrutiny was the proper standard to be used where racial classifications were involved.[116] The Justice observed that the strict scrutiny standard required that the means used to accomplish a compelling state purpose must be narrowly framed to achieve such a goal.[117] The Justice stated that if the means were specifically circumscribed, then it would be lawful for nonminorities to share the adverse effects to achieve the state's objective.[118]

Justice Powell next distinguished between the adverse effects of layoffs and affirmative hiring upon nonminorities.[119] According to the Justice, layoffs produce harsh psychological effects and cause severe disruption to a person's life.[120] Unlike affirmative action layoffs, affirmative hiring programs merely foreclose one of many employment opportunities to an individual.[121] Moreover, the Justice explained that affirmative hiring programs impact on society as a whole, while layoffs impact only a few individuals.[122] Accordingly, Justice Powell reasoned that Article XII, because of its adverse effects, was too intrusive upon nonmi-

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115 *See Wygant*, 106 S. Ct. at 1849-50 (Powell, J., plurality opinion). Justice Powell stated that the reasonableness "standard has no support in the decisions of this court . . . . Our decisions always have employed a more stringent standard—however articulated—to test the validity of the means chosen by a state to accomplish its race-conscious purposes." *Id.* at 1849 (Powell, J., plurality opinion). *See also supra* note 57 (discussing strict scrutiny standard).

116 *See Wygant*, 106 S. Ct. at 1850 (Powell, J., plurality opinion). The plurality's sensitivity to the implementation of racial classifications as a remedy for past discrimination was expressed in that "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Id.* (quoting Fullilove v. Klutznick, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting)).

117 *Id.* (citing *Fullilove*, 448 U.S. at 480 (Burger, C.J., plurality opinion)).

118 *Id.* Justice Powell indicated that, "[a]s part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy." *Id.* The Court has upheld the validity of such burdens when the plan was "limited and properly tailored" to cure past discrimination. *Id. See also* Franks v. Bowman Transp. Co., 424 U.S. 747, 777-78 (1976). *See supra* note 87.

119 *See Wygant*, 106 S. Ct. at 1851 (Powell, J., plurality opinion).

120 *Id.*

121 *Id.* The Court expressed that:

> Denial of a future employment opportunity is not as intrusive as loss of an existing job . . . A worker may invest many productive years in one job and one city with the expectation of earning the stability and security of seniority . . . . Layoffs disrupt these settled expectations in a way that general hiring goals do not.

Id.

122 *Id.* at 1851-52 (Powell, J., plurality opinion).

nority teachers as a means for curing prior discrimination.[123] Justice Powell acknowledged that other methods, such as affirmative hiring programs, were available to accomplish the Board's goal.[124] The Justice therefore held that Article XII's layoff plan was over-intrusive and violated the equal protection clause.[125]

In a concurring opinion, Justice O'Connor agreed with the plurality that the strict scrutiny level of judicial review should be applied in this case.[126] The Justice observed that the "strict" level standard has been used consistently in the past to evaluate racial classification.[127] Justice O'Connor emphasized that this standard should not be altered to a lesser standard of analysis simply because the classifications under scrutiny are part of an affirmative action plan.[128]

Justice O'Connor observed that the Court "forged a degree of unanimity" in that an affirmative action plan does not have to be limited to the remedy of specific incidents of discrimination to be "narrowly tailored" or "substantially related" to the plan's objectives.[129] As with the plurality, the Justice noted that societal discrimination was not a sufficiently compelling purpose to warrant the use of racial classifications in an affirmative action program.[130] She also concurred with Justice Powell's conclusion that the lower courts erred in using the role model theory to justify the purpose of Article XII.[131]

Justice O'Connor reasoned that requiring a public employer to establish a pattern of illegal discrimination before implementing an affirmative action program "would severely undermine public employer incentive to meet voluntarily their civil rights obligations."[132] The Justice noted, however, that public employers do have a responsibility to nonminority employers as well.[133]

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123 *Id.* at 1852 (Powell, J., plurality opinion).

124 *Id.*

125 *Id.* The Justice stated that "as a means of accomplishing purposes that otherwise may be legitimate, the Board's layoff plan [was] not sufficiently narrowly tailored." *Id.* (footnote omitted). He further asserted that even if the Board's purposes were compelling, Article XII would not have been sufficiently limited to the goal of remedying past discriminatory practices. *See id.*

126 *Id.* at 1853 (O'Connor, J., concurring).

127 *Id.*

128 *See id.* (O'Connor, J., concurring) (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 n.9 (1982)).

129 *Id.*

130 *See id.* at 1854 (O'Connor, J., concurring).

131 *Id.*

132 *Id.* at 1855 (O'Connor, J., concurring).

133 *See id.* at 1855-56 (O'Connor, J., concurring).

She asserted that in order to avoid infringing on the constitutional rights of these nonminority employees, a public employer must establish "a firm basis for determining that affirmative action is warranted."[134] The Justice observed that one such benchmark for establishing the need for affirmative action is the difference between the percentage of minority teachers on the board's staff and the percentage of qualified minority teachers in the relevant labor pool.[135]

The Justice concluded that Article XII was not "narrowly tailored" to achieve the Board's objective.[136] In reaching this conclusion, Justice O'Connor maintained that Article XII was adopted to protect the minorities previously hired through the Board's affirmative hiring program.[137] The Justice noted that the hiring program used the role model theory which linked the percentage of minority students to the percentage of minority teachers as an indicator of employment discrimination.[138] The Justice asserted, however, that by making the comparison to minority students instead of other teachers, the difference in percentages was not indicative of employment discrimination.[139] Therefore, the Justice concluded that the Board's affirmative action program could not remedy employment discrimination.[140]

Justice White, who also concurred with the plurality, asserted that none of the purposes articulated by the Board for maintaining a racially discriminatory layoff policy was justifiable under the equal protection clause.[141] The Justice reasoned that Article XII had the same effect as requiring the Board to fire nonminority teachers and hire minority teachers to remedy prior racial discrimination.[142] Therefore, Justice White determined that Article XII contravened the equal protection clause.[143]

In his dissenting opinion, Justice Marshall remarked that the record was incomplete because it failed to accurately depict the

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134 *Id.* at 1856 (O'Connor, J., concurring).

135 *Id.*

136 *See id.* at 1857 (O'Connor, J., concurring).

137 *Id.*

138 *Id. See supra* note 24 (discussing Role Model Theory).

139 *Wygant*, 106 S. Ct. at 1857 (O'Connor, J., concurring). The Justice explained that an inference of deliberate employment discrimination can be made "only when it is established that the availability of minorities in the relevant labor pool substantially exceeded those hired." *Id.*

140 *Id.*

141 *Id.* (White, J., concurring).

142 *See id.* at 1857-58 (White, J., concurring).

143 *Id.* at 1858 (White, J., concurring).

factual history behind the Board's implementation of Article XII.[144] Noting that the Court should not allow the parties to relitigate this case, Justice Marshall criticized the plurality for ignoring the "compelling factual setting."[145] Disagreeing with the plurality's legal reasoning, Justice Marshall continued his analysis based upon the merits of the case.[146] Using the available records and additional information, Justice Marshall traced what he perceived to be the history of discrimination in the Jackson School System.[147]

The Justice proceeded to examine the Board's purpose for adopting Article XII.[148] Unlike the plurality opinion, Justice Marshall acknowledged that actual discrimination had existed.[149] The Justice indicated that the Board alleged urgent reasons, such as racially motivated violence, to justify integrating the faculty.[150] Furthermore, the Justice stressed that the Board implemented an affirmative hiring program to avoid suit for discriminatory employment practices.[151] Accordingly, the Justice maintained that if the record before the court was complete, he would have upheld the constitutionality of the Board's purpose.[152]

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144 *Id.* (Marshall, J., dissenting). Justice Marshall disapproved of the district court's grant of summary judgment to the respondents which prevented the development of the full factual record. *Id.*

145 *Id.*

146 *Id.*

147 *See id.* at 1858-59 (Marshall, J., dissenting). In 1969 a complaint of racially discriminatory hiring practice was lodged against the Board by the National Association for the Advancement of Colored People (NAACP) with the Michigan Civil Rights Commission. *Id.* at 1859 (Marshall, J., dissenting). In settling this complaint, the Board agreed to establish an affirmative action plan to recruit, hire and promote minority teachers. *Id.* By 1971, the Board was forced to lay off teachers. *Id.* These layoffs eliminated the gains of the Board's affirmative hiring plan which had increased the percentage of minority teachers to 8.8%. *Id.* In an effort to protect any subsequent gains made through the affirmative hiring, the Board and the Union entered into a collective bargaining agreement. *Id.* While the teachers favored a straight seniority system for layoffs, the Board favored a freeze on the layoffs of minorities. *Id.* Article XII was negotiated into the collective bargaining agreement as a compromise. *Id.*

148 *See id.* at 1862 (Marshall, J., dissenting).

149 *Id.* at 1863 (Marshall, J., dissenting). Because the Board chose to settle the complaint raised by the NAACP, there was no actual court finding of past racial discrimination. *Id.* However, Justice Marshall noted that the Board's admission of culpability would have unwisely jeopardized its position in future litigation. *See id.* at 1862-63 (Marshall, J., dissenting).

150 *Id.* at 1863 (Marshall, J., dissenting).

151 *Id.* Justice Marshall considered these reasons as adequate evidentiary support for the district court to warrant the remedial action taken by the Board. *Id.*

152 *Id.* The Justice concluded that had the record been complete he would have held "that the state purpose of preserving the integrity of a valid hiring policy—

Secondly, Justice Marshall enumerated several reasons why Article XII was narrowly tailored to achieve the Board's objective.[153] The Justice first observed that Article XII divided the burden of layoffs proportionately between the nonminority and minority teachers.[154] He next recognized that an individual's race was not the sole criteria in determining the loss of a job.[155] The Justice further asserted that Article XII was not adopted for the purpose of increasing minority representation.[156] Additionally, the Justice underscored the fact that since Article XII was the result of collective negotiations, it could be eliminated at any time.[157] The Justice enunciated that "the conclusion is inescapable that Article XII meets, and indeed surpasses any standard" for justifying remedial race-conscious programs.[158]

In a separate opinion, Justice Stevens set forth his reasons for dissenting.[159] He argued that it was unnecessary to determine whether the Board had engaged in past discrimination in order to justify a race-conscious affirmative action program.[160] The Justice asserted that the essential question was "whether the Board's [objective] advance[d] the public interest in educating children for the future."[161] Depending upon the burden placed on nonminorities, Justice Stevens maintained that such classifications may be justified.[162]

Justice Stevens stated that the equal protection clause prohibits racial classifications in governmental contexts.[163] The Jus-

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which in turn sought to achieve diversity and stability for the benefit of all students—was sufficient . . . to satisfy the demands of the Constitution." *Id.*

153 *See id.* at 1863-65 (Marshall, J., dissenting). Justice Marshall observed that Article XII "would pass constitutional muster, no matter which standard the Court should adopt." *Id.* at 1862 (Marshall, J., dissenting).

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

155 *Id.* The Justice noted that "[r]ace [was] a factor, along with seniority, in determining which individuals the school system will lose; it [was] not alone dispositive of any individual's fate." *Id. Cf.* University of California Regents v. Bakke, 438 U.S. 265, 318 (1978) (race as factor may be used in university admission program). *See supra* notes 51-72 and accompanying text (discussing *Bakke*).

156 *Wygant*, 106 S. Ct. at 1865 (Marshall, J., dissenting).

157 *Id.* The Justice noted that when Article XII was no longer necessary, the parties to the collective bargaining agreement could negotiate for its removal. *See id.*

158 *Id.* at 1866 (Marshall, J., dissenting).

159 *Id.* at 1867 (Stevens, J., dissenting).

160 *Id.*

161 *Id.*

162 *See id.*

163 *Id.* Justice Stevens noted numerous decisions holding that the equal protection clause prohibits race based discrimination. *Id.* at 1867 nn.2-5 (Stevens, J., dissenting). Specifically, Justice Stevens cited: Baston v. Kentucky, 106 S. Ct. 1712, 1719 (1986) (jury challenges based on race was violative of the equal protection

tice conceded, however, that classifications based on race were sometimes permissible.[164] In his opinion, the Justice recognized that education was one such situation.[165] Justice Stevens perceived that the purpose of the collective bargaining agreement was to establish a multi-ethnic teaching staff.[166] He concluded therefore that the purpose for Article XII was valid.[167]

Once a race-conscious affirmative action plan is deemed valid, Justice Stevens explained that the court should additionally examine whether the legitimate purpose of the plan exceeded the harm caused to nonminorities.[168] In so doing, Justice Stevens articulated that this harm may be evaluated by examining both the procedures for the adoption of such a plan and by determining the extent of harm caused to nonminorities.[169] Justice Stevens pointed out that the harm caused to nonminorities was not due to their race, but from a combination of fiscal restraint which necessitated the layoffs and special contractual protections in the faculty's bargaining agreement.[170] The Justice explained that the procedure for adopting Article XII was fair because it was overwhelmingly approved of and supported by the Union.[171] Although the nonminorities are harmed by the Board's plan, the Justice reasoned that it was justified by the compelling purpose it served.[172] Therefore, the Justice expressed that he would affirm

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clause); Vasquez v. Hillery, 106 S. Ct. 617, 623 (1986) (discrimination in selecting grand jurors was unconstitutional); Rose v. Mitchell, 443 U.S. 545, 556 (1979) (exclusion of grand jurors based on race denied the defendant equal protection); Strauder v. West Virginia, 100 U.S. 303, 310 (1879) (statutory denial of jury participation based on race was violative of defendant's equal protection); Turner v. City of Memphis, 369 U.S. 350, 353-54 (1962) (segregated restaurant at municipal airport was violative of fourteenth amendment); Burton v. Wilmington Parking Auth., 365 U.S. 715, 716-17 (1961) (segregated restaurant in a state agency building was violative of the equal protection clause); Loving v. Virginia, 388 U.S. 1, 12 (1966) (statute banning interracial marriages was violative of the equal protection and due process clauses); Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (the denial of child custody to a natural parent based on a subsequent interracial marriage was violative of the fourteenth amendment). *Id.*

164 *See id.* at 1867-68 (Stevens, J., dissenting).

165 *Id.* at 1868 (Stevens, J., dissenting).

166 *Id.* The Justice rationalized that a multi-ethnic teaching staff could provide greater benefits to an ethnically diverse student body than an entirely white faculty. *Id.*

167 *Id.*

168 *See id.* at 1869 (Stevens, J., dissenting).

169 *Id.*

170 *Id.* at 1870 (Stevens, J., dissenting).

171 *Id.* at 1869-70 (Stevens, J., dissenting). *See also id.* at 1859-60 (Marshall, J., dissenting).

172 *Id.* at 1870 (Stevens, J., dissenting).

the judgment of the court of appeals.[173]

As stated earlier, the Court's position with regard to voluntary affirmative action programs under the equal protection clause has fluctuated.[174] These vacillations have made attempts to predict the future direction of the Court with respect to voluntary affirmative action highly speculative. The *Wygant* decision, in this respect, clarifies the Court's approach to this issue. It also provides guidance to employers concerning such programs. *Wygant's* overall effect, however, will be to discourage public employers from establishing voluntary affirmative action programs in the future.[175]

The *Wygant* ruling found a clear majority for the strict scrutiny standard of review for voluntary affirmative action programs based on race. By embracing such a standard, the *Wygant* plurality and concurrences have definitively set forth the framework for lower courts to evaluate race-conscious affirmative action programs.[176] Because of its rigid analysis, however, the adoption of the strict scrutiny standard frustrates the creation and maintenance of affirmative action programs. The standard approved in *Wygant* will serve to invalidate those affirmative action programs based on purposes which are not compelling but nevertheless extremely important.[177] This standard will further limit employers' discretion and will be used to second-guess an employer's purpose for implementing an affirmative action program.

Moreover, the plurality required public employers to establish the existence of prior actual discrimination before implementing an affirmative action program.[178] Therefore, employers

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173 *Id.* at 1871 (Stevens, J., dissenting).

174 *See supra* notes 51-90 and accompanying text.

175 *See generally* Sullivan, *Sins of Discrimination: Last Terms's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986). The Court drew a distinction between the burden of proof for a manifest racial or gender imbalance and the standard of proof for a prima facie case for racial or gender discrimination. Johnson v. Transportation Agency, Santa Clara County, 107 S. Ct. 1442, 1452-53 & n.10 (1987). The Court further emphasized that "we do not regard as identical the constraints of Title VII and the federal constitution on voluntarily adopted affirmative action plans." *Id.* at 1452. Thus, public voluntary affirmative action programs, because of their coverage under the fourteenth amendment, would be subject to the burden of proof required for a prima facie case of discrimination as articulated in Hazelwood School Dist. v. United States, 433 U.S. 299 (1977). *See id.* at 1452 n.6.

176 *See* Fein, *Affirmative-Action Fans Who Applaud Wygant May Be Misguided*, Nat'l L. J., June 9, 1986, at 13.

177 *See supra* notes 67-69 and accompanying text (discussing intermediate level of scrutiny).

178 *See supra* note 108 and accompanying text.

who implement such programs are tacitly admitting to prior discrimination.[179] These admissions are clearly against the employers' interests.[180] Such admissions expose employers to potential lawsuits from nonminorities for racial discrimination.[181] Indeed, employers, faced with such considerations, will be reluctant to institute voluntary affirmative action programs.[182]

Although the prior discrimination requirement does not have to be established through a judicial finding,[183] this requirement nevertheless has the effect of encouraging litigation.[184] Litigation will arise over whether the employer actually engaged in prior discrimination and, if so, to what extent.[185] This litigation, as evident in the procedural history of *Wygant*, will in most instances be protracted.[186] Public employers confronted with the possibility of protracted litigation will undoubtedly be discouraged from implementing affirmative action programs.

The *Wygant* decision further frustrates the purposes of valid affirmative action hiring programs. Public employers who implement voluntary affirmative action hiring programs lack the protection necessary to effectively implement the purpose of such programs. Usually, the employees hired through the affirmative hiring program are the least senior and therefore are laid off first.[187] Public employers confronted with such consequences will hesitate to invest in affirmative action when the gains from such programs can be eliminated in one series of layoffs.

Moreover, Justice Powell, by ignoring the collective bargaining agreement, sanctioned judicial interference into the political process.[188] Such interference based on equal protection has been confined to correcting governmental oppression of minority groups.[189] *Wygant* has extended this protection to nonminority employees who disagree with a collective bargaining agreement which has been approved by the majority of union

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179 *See* Sullivan, *supra* note 175, at 92; *see also Wygant*, 106 S. Ct. at 1862 (Marshall, J., dissenting); *see supra* note 149.

180 *See* Sullivan, *supra* note 175, at 92.

181 *Id.*

182 *Id.*

183 *See Wygant*, 106 S. Ct. at 1854-55 (O'Connor, J., concurring).

184 *See* Sullivan, *supra* note 175, at 92.

185 *See id.*

186 *See id.*

187 *See Wygant*, 106 S. Ct. at 1859 (Marshall, J., dissenting).

188 *See* Sullivan, *supra* note 175, at 97.

189 *Id.*

members.[190] The *Wygant* decision also has undermined the contractual relationship between the union and its members. The principle that the union speaks for its members has been seriously impaired.[191] Furthermore, since layoffs will undoubtedly effect some members of the union, *Wygant* has placed union leaders in the untenable position of simultaneously protecting all members and maintaining the best interest of the union.[192]

In striking down Article XII, Justice Powell observed that an employee's rights and expectations concerning seniority are his most important asset.[193] The Justice further articulated that layoffs based on race "disrupt[ed] these settled expectations" and consequently were too intrusive and burdensome.[194] The Justice, however, failed to address whether such a provision would be permissible if made applicable solely to new hires. Such a modification would surely change the outcome of this case. In this manner, Article XII would not be considered disrupting an employee's expectation of seniority and thus would not be intrusive and burdensome.[195] New employees would be aware of such a provision and would not have the expectation of a pure seniority system layoff scheme. Thus, the burden imposed on individuals would be diminished since new employees would be given notice of the possibility of being laid off before less senior individuals of another race.

Ironically, the *Wygant* decision created separate standards of review for race and gender based affirmative action programs. Under the *Wygant* decision, the most exacting level of constitutional analysis is mandated for judicial review of voluntary affirmative action programs based on race.[196] On the other hand, the *Wygant* gender based programs would not be subject to this same level of analysis. Gender discrimination cases require the application of the intermediate level of review.[197] Consequently, gender based affirmative action programs would be subject to this lesser standard of review. As a result, gender-conscious volun-

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190 *Id.*

191 *See id.*

192 *Id.*

193 *Wygant*, 106 S. Ct. at 1851 (Powell, J., plurality opinion).

194 *Id.* at 1851-52 (Powell, J., plurality opinion).

195 *See generally* Petitioners' Brief, *supra* note 103, at 1-9.

196 *See Wygant*, 106 S. Ct. at 1846-50.

197 *See supra* note 74 (discussing intermediate level of review). *See also* Craig v. Boren, 429 U.S. 190, 197 (1976) (formulation of intermediate level of analysis).

tary affirmative action programs would pass constitutional muster more readily than race based programs.

Once again the Court has balanced the rights of individuals against a program designed to remedy prior racial discrimination. The plurality noted that Article XII, assuming that this provision was incorporated into the labor agreement to remedy prior racial discrimination, was too intrusive upon nonminority teachers.[198] More importantly, the *Wygant* decision, by striking down race-conscious layoffs and requiring employers to establish the existence of prior actual discrimination, will inhibit future public affirmative action programs.

Gerard M. Giordano

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198 *See Wygant*, 106 S. Ct. at 1852.