AFFIRMATIVE ACTION: UNRESOLVED QUESTIONS AMIDST A CHANGING JUDICIARY

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INTRODUCTION

Affirmative action has proven to be one of the most controversial areas of civil rights law, spawning a large number of plurality and closely divided opinions by a highly fragmented Supreme Court.[1] In many respects, the Court's difficulty in providing bright line rules to govern this area is a reflection of the divisions in society surrounding the issue and the highly politicized context in which it arises.

This Article refers to affirmative action as a mechanism for providing preferences to certain applicants for specific benefits because those applicants possess traits which have been used in the past as a basis for discriminating against members of the group to which they belong. The most frequent and controversial use of affirmative action under this definition has occurred where private parties or public authorities have accorded preferential treatment to members of racial or ethnic groups or to women. Affirmative action has also been provided, however, to veterans,[2] persons with disabilities or handicaps,[3] and, in some cases, to persons of a particular sexual orientation.[4]

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1. *See, e.g.*, Johnson v. Santa Clara Transp. Agency, 480 U.S. 616 (1987)(4-2-3); Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986)(5-4).

2. *See* Personnel Adm'r of Massachusetts v. Feeny, 442 U.S. 256 (1979).

3. *See* 29 U.S.C. § 791(b) (1988).

4. For example, the National Lawyers Guild provides hiring preferences for those of gay or lesbian sexual orientation. Interview with Sandra Lowe, Staff Attorney at Lambda Legal Defense and Education Fund (Aug. 14, 1990). Preferences are also conceded to "those possessed of athletic skills, to the children of alumni, to the affluent who may bestow their largess on the institutions, and to those having connections with celebrities, the famous and the powerful." Regents of the Univ. of California v. Bakke, 438 U.S. 265, 404 (1978) (Blackmun, J., concurring in part and dissenting in part).

Of course, the preferential treatment accorded to alumni, institutional benefactors, and other persons occupying positions of power differs considerably from the preferential treatment accorded to members of racial minority groups, women, or gay men and lesbians. The former groups represent privileged members of society who have not suffered the consequences of social, economic, and political discrimination, and whose interests need no affirmative governmental protection because such protection is already guaranteed by the social order they have erected in the "private" sector.

By contrast, the latter groups represent those persons whose ability to achieve their fullest potential as members of society has been historically curtailed by various forms of social, economic, and political discrimination. While such treatment has been prohibited by law, the government's involvement in eliminating discrimination carries with it an important disadvantage in that the ultimate determination of what forms of discrimination are to be prohibited is subject to a political process in which members of these latter groups have limited power.

Assuming that the number of cases decided by the Supreme Court is an accurate indication of the most disputed areas of affirmative action, the issue of racial preferences is at the top of the list. The Court has decided at least twelve cases involving challenges by whites to the legality of such preferences.[5] These decisions, however, still leave many important issues unresolved, and the future of affirmative action uncertain. This Article seeks to identify some of these issues and to provide some insight as to how they will be resolved in future litigation.

THE CASES

Most challenges to affirmative action plans have been based on assertions that race or gender preferences are barred by law, in particular, by the fourteenth amendment[6] and by Title VII of the Civil Rights Act of 1964.[7] The great irony of these legal challenges is that both of these provisions of law were specifically designed to eradicate the long-standing legacy of racial discrimination endured by people of color throughout this nation's history.[8] Reliance upon these provisions as bases for challenging affirmative action plans that are race-based uproots these historic provisions from their social, legal, and political contexts.

Although the Supreme Court traditionally has been sensitive to the history behind these provisions, the changing composition of the Court over the past decade has resulted in the Court's adoption of an ahistorical, sometimes perverse, reading of the anti-discrimination laws. The current Court has become obsessed with questions such as: a) whether the affirmative action plan has been adopted by the employer voluntarily as opposed to being ordered by a court;[9] b) whether beneficiaries of the affirmative action plan are identifiable

5. Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1989); City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989); United States v. Paradise, 480 U.S. 149 (1987); Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986); Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986); Johnson v. Santa Clara Transp. Agency, 480 U.S. 616 (1987); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984); Fullilove v. Klutznick, 448 U.S. 448 (1980); United Steelworkers of America v. Weber, 443 U.S. 193 (1979); Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978); DeFunis v. Odegaard, 416 U.S. 312 (1974).

6. U.S. CONST. amend. XIV.

7. 42 U.S.C. § 2000e (1982).

8. As Justice Brennan stated in his opinion for the Court in United Steelworkers v. Weber:

> It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long," constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

443 U.S. 193, 204 (1979) (quoting 110 CONG. REC. 6552 (1964) (remarks of Sen. Humphrey)).

9. *See* Johnson v. Santa Clara Transp. Agency, 480 U.S. 616 (1987) (voluntary affirmative action plan); Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) (Court-ordered affirmative action plan); Local 28 of the Sheetmetal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986)(Court-ordered affirmative action plan).

victims of discrimination;[10] and c) whether such plans must be scrutinized as strictly as programs which discriminate against racial minorities.[11] Although some of these inquiries are arguably justified by the legal provisions at issue, the Court has also injected its own ideas of "sin" into its legal calculus.[12]

A. Voluntary Affirmative Action

The Court has been sharply divided over the circumstances which justify an employer's voluntary implementation of an affirmative action plan, or, in other words, the predicate which allows an employer to provide racial or gender preferences to individuals or groups of workers.[13] The Supreme Court first addressed this issue in *United Steelworkers of America v. Weber*,[14] in which a steelworker challenged his employer's decision to institute an affirmative action plan designed to increase the number of black skilled craftworkers. In order to achieve this goal, the employer started a training program which utilized a racial quota for admission purposes.[15] The operation of the quota resulted in some blacks with less seniority than whites gaining admission to the program. Weber, a white person who had been excluded from the program, brought suit under Title VII of the Civil Rights Act.[16] The Court upheld the affirmative action plan, concluding that the legislative history of Title VII indicated that "Congress did not intend wholly to prohibit private voluntary affirmative action efforts."[17] Concluding that section 703(j) of Title VII was meant to assure that "management prerogatives and union freedoms . . .

10. *See* Local 28 of the Sheetmetal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986) (a bare majority held that Title VII did not require a court to find actual victims of discrimination before ordering remedies).

11. *See* City of Richmond v. J.A. Croson, 109 S. Ct. 706 (1989) (holding that strict scrutiny applies to racial classifications that advantage minorities but disadvantage whites).

12. *See, e.g.*, Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 80 (1986) (arguing that "the Court has approved affirmative action only as precise penance for the specific sins of racism a government, union, or employer has committed in the past" and providing a critique of this approach).

13. Although the following discussion deals primarily with affirmative action in the context of employment, state educational institutions have also implemented affirmative action plans. In cases involving these plans, the Court focuses on the justification for affirmative action in admissions policies. The Court has narrowed the inquiry to a determination of whether the affirmative action plan can be justified by governmental interests substantial enough to pass fourteenth amendment scrutiny. *See* Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978). This issue is more fully addressed in the following text.

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

15. The plan reserved 50% of the openings in the training program for black employees until the percentage of black craftworkers in the plant was commensurate with the percentage of blacks in the local labor force. During the pendency of the litigation, blacks constituted 39% of the Gramercy, Louisiana, labor force, but only 1.83% of the skilled craftworkers at the plant. *Id.* at 198-99.

16. Section 703 of the Act makes it an unlawful practice for an employer 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." Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a) (1982).

17. 443 U.S. at 203.

be left undisturbed to the greatest extent possible,"[18] the Court applied a "manifest imbalance" standard of scrutiny. The statistical imbalance which existed between the percentage of blacks in the surrounding community work force (39%) and the number of skilled black workers at the plant (1.83%) constituted, according to the Court, a "conspicuous racial imbalance in [a] traditionally segregated job categor[y]."[19] The Court did not provide an open-ended approval of such plans, implying that in order to pass judicial scrutiny such plans had to be temporary in nature and could not unnecessarily trammel the rights of white employees.[20]

In 1987, the Court revisited the question of the constitutionality of a voluntarily adopted affirmative action plan in *Johnson v. Santa Clara Transportation Agency*.[21] At issue was an affirmative action plan which provided a preference to women seeking skilled jobs.[22] The plaintiff, a white man, sought the job of road dispatcher, which ultimately was offered to a woman even though he had scored two points higher than she during the interview phase of the application process. The Court upheld the affirmative action plan, basing its decision on the authority of *Weber*.[23]

The change in composition of the Court in the intervening ten years since *Weber* was, however, reflected in the spread of votes in the *Johnson* decision. *Weber* was decided by a 5-2 vote with Justices Powell and Stevens not participating.[24] By the time *Johnson* reached the Court, Justices O'Connor and Scalia had taken the seats of Justices Stewart and Burger. Justice Scalia wrote a dissenting opinion in *Johnson*, joined by Justices Rehnquist and White, calling for the overruling of *Weber*.[25] Although Justice Stevens concurred with the majority, he acknowledged that *Weber* was "at odds with my understanding of the actual intent of the authors of the legislation."[26] Justice O'Connor also joined with the majority, but only on the grounds that the statistical disparity between the percentage of qualified women in the skilled labor force and the percentage of skilled women workers employed by the agency was sufficient to make out a "prima facie Title VII case brought by unsuccessful women job applicants."[27]

Four members of the Court are thus clearly dissatisfied with the *Weber* ruling that a predicate for a voluntary affirmative action plan exists when sta-

18. 443 U.S. at 206 (quoting H.R. REP. NO. 914, 88th Cong., 1st Sess., pt. 2, at 29 (1963), *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2355, 2391).

19. *Id.* at 209.

20. *Id.* at 208-09.

21. 480 U.S. 616 (1987).

22. The plan authorized the employer to consider sex as one factor in making promotions within a traditionally segregated job classification. *Id.* at 620-21.

23. 443 U.S. 193 (1979).

24. Justice Brennan wrote the majority opinion, joined by Justices Stewart, White, Marshall, and Blackmun. Chief Justice Burger and Justice Rehnquist dissented. 443 U.S. at 195.

25. 480 U.S. at 669-70 (Scalia, J., dissenting).

26. *Id.* at 644 (Stevens, J., concurring).

27. *Id.* at 656 (O'Connor, J., concurring).

tistics demonstrate a "conspicuous racial imbalance in traditionally segregated job categories," but fails to establish a *prima facie* violation of Title VII.[28] Three Justices have called for outright reversal of *Weber*, a fourth has suggested changing the predicate before the affirmative action plan can be implemented, and a fifth has acknowledged that *Weber* was probably wrongly decided. When Justices Kennedy and Souter have the opportunity to address these issues, they will have three possible options: they can side with the liberal wing of the Court and reaffirm *Weber*; they can add their voices to the chorus of Justices calling for *Weber*'s reversal; or they can join Justice O'Connor and thereby require that unless there is a sufficient statistical disparity between the number of skilled workers on the job and the number of qualified workers in the relevant labor pool that would make out a prima facie case of discrimination under Title VII, the necessary predicate for establishing a voluntary affirmative action plan will not be deemed to have been established.

There is already some indication of how Justice Kennedy will vote when the Court revisits the issue. In *City of Richmond v. J.A. Croson*,[29] the Court, in an opinion by Justice O'Connor, struck down a Richmond, Virginia, affirmative action plan which required prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more minority business enterprises.[30] The Court held that the plan violated the fourteenth amendment and that "there is nothing approaching a *prima facie* case of a constitutional or statutory violation by *anyone* in the Richmond construction industry."[31] Justice Kennedy's willingness to join the majority in *Croson* indicates that the votes may exist to overrule *Weber* or require a more substantial predicate before a voluntary affirmative action plan will pass judicial scrutiny.

The Court has emphasized the difference between the "prima facie" standard adopted in *Croson* and the "manifest imbalance" standard approved by the Court in *Weber*. As Justice Brennan noted in *Johnson*:

> [I]n cases such as *Weber*, where the employment decision at issue involves the selection of unskilled persons for a training program, the "manifest imbalance" standard permits comparison with the general labor force. By contrast, the "prima facie" standard would require comparison with the percentage of minorities or women qualified for the job for which the trainees are being trained, a standard that would have invalidated the plan in *Weber* itself.[32]

The adoption of the "prima facie" standard will seriously curtail the ex-

28. 443 U.S. 193, 209.

29. 109 S. Ct. 706 (1989).

30. A minority business enterprise was defined as a business at least 51% of which is owned and controlled by minority group members, who are defined as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." *Id.* at 713 (quoting Ordinance No. 83-69-59, codified in RICHMOND, VA., CITY CODE § 12-156(a) (1985)).

31. *Id.* at 724 (emphasis in original).

32. 480 U.S. at 633 n.10.

tent to which employers will implement voluntary affirmative action plans. If an employer can be held liable to white workers for adopting an affirmative action plan where there is not a *prima facie* violation of Title VII or the fourteenth amendment, most employers will prefer to wait until they are sued by minorities or women before they begin making the changes necessary to end discrimination. Under the "manifest imbalance" test, employers had much more room to address racial and gender imbalances, because they were not open to suits by disgruntled whites. The "prima facie" test, if adopted, will encourage the employer to do nothing until the employee balance becomes so skewed as to provide an inference of discriminatory conduct.

Given the dissension on the Court concerning *Weber*, particularly that surrounding the issues of the legislative intent behind Title VII and the predicate necessary to establish a violation thereof, the *Weber* opinion rests upon a very shaky foundation, and has doubtful continuing validity.

B. The Issue of Identifiable Victims

Another issue not fully resolved by the Court in the affirmative action area is whether and to what extent a court-ordered affirmative action plan can provide relief to persons who are not identifiable victims of discrimination. The Supreme Court first addressed this issue in 1984 in *Firefighters Local Union No. 1784 v. Stotts*.[33] In that case, black firefighters and the United States Department of Justice began litigation against the City of Memphis and its fire department, alleging that the defendants had engaged in discriminatory hiring and promotion practices in violation of Title VII, 42 U.S.C. §§ 1981 and 1983. The parties negotiated a consent decree which provided specific affirmative relief to the plaintiffs, including hiring and promotional preferences.[34]

After implementation of the decree, the City claimed that a budgetary shortfall would require it to lay off workers according to the City's traditional seniority system, which would result in the termination of many blacks who had been hired pursuant to the consent decree. Plaintiffs went to court and successfully obtained a preliminary injunction which ordered that the City of Memphis "not apply the seniority policy proposed insofar as it will decrease the percentage of black lieutenants, drivers, inspectors and privates that are presently employed."[35] The injunction was upheld by the Court of Appeals

33. 467 U.S. 561 (1984).

34. The City agreed to promote 13 named individuals and provide backpay to 81 employees of the fire department. It also agreed to increase, over time, minority representation in the fire department until it approximated the percentage of blacks in the labor force in Shelby County, Tennessee. In a previous decree settling litigation conducted against the City of Memphis by the Department of Justice in 1974, the City had agreed to establish an interim hiring goal of filling 50% of the job vacancies in the department with qualified black applicants. This provision was included in the 1980 decree with an additional goal of assuring that 20% of promotions in each job classification was to go to blacks. *Id.* at 565.

35. *Id.* at 567.

for the Sixth Circuit.[36] Consequently, three white employees were laid off who would otherwise have been protected by the City's seniority system.[37]

The Supreme Court, in an opinion by Justice White, reversed both lower court orders, concluding that the terms of the consent decree did not address the issue of layoffs and that the lower court had abused its discretion by modifying the consent decree over the objection of the City.[38] The Court further held that the issuance of the injunction below contravened the policy of Title VII,[39] as expressed in section 706(g) of the statute, which provides, in the view of the Court in *Stotts*, "make-whole relief only to those who have been actual victims of illegal discrimination."[40] The Justice Department incorrectly read *Stotts* as holding that: 1) the only relief available under Title VII is make-whole relief; and 2) relief can be provided only to identifiable victims of discrimination. The proper reading of *Stotts* became clear, however, from subsequent cases, especially *Local 28 of the Sheetmetal Workers' International Association v. EEOC*,[41] in which Justice White, author of the *Stotts* opinion, stated in his dissent that "§ 706(g) does not bar relief for nonvictims in all circumstances."[42] Based on its misinterpretation of *Stotts*, the Department of Justice launched a campaign in over fifty different municipalities to overturn similar consent decrees that provided relief to individuals who had not been identifiable victims of discrimination.[43]

In most of these cases,[44] the arguments of the Department of Justice were rebuffed; however, the Supreme Court did not directly address the question of identifiable victims until its 1985 term when it agreed to hear two companion cases posing the issue. In one of the cases, *Local No. 93, International Association of Firefighters v. City of Cleveland*,[45] the Court had before it a consent decree entered into by the City of Cleveland and an organization of black firefighters who had sued the City for its discriminatory policies concerning minority firefighters. A solid majority of the Court, including three members of the *Stotts* majority,[46] held that "whether or not § 706(g) precludes a court from imposing certain forms of race-conscious relief after trial, that provision

36. Stotts v. Memphis Fire Dep't, 679 F.2d 541, 551 (6th Cir. 1982).

37. 467 U.S. at 567 n.2.

38. *Id.* at 574-76.

39. Although concurring in the judgment of the Court, Justice Stevens felt that the majority's discussion of Title VII was "wholly advisory." *Id.* at 590. The majority opinion of the Court, however, expressed the narrow view that "the Court of Appeals imposed on the parties as an adjunct of settlement something that could not have been ordered had the case gone to trial and the plaintiffs proved that a pattern or practice of discrimination existed." *Id.* at 579.

40. *Id.* at 580.

41. 478 U.S. 421 (1986).

42. *Id.* at 499.

43. *See* M. ROSSEIN, EMPLOYMENT DISCRIMINATION: LAW AND LITIGATION, 20-37 n.160 (1990).

44. See cases listed in Local 28 Sheet Metal Workers v. EEOC, 478 U.S. at 475 n.47.

45. 478 U.S. 501 (1986).

46. Members of the *Stotts* majority who were also voting in the *Cleveland* majority were Justices Powell, Stevens, and O'Connor.

does not apply to relief awarded in a consent decree."[47]

The companion case, *Local 28 of the Sheetmetal Workers' International Association v. EEOC*,[48] required the Court to review decisions of two lower federal courts[49] upholding an affirmative action plan which required that Local 28 increase minority membership to 29% and establish a training program and fund that was to "be used for the purpose of remedying discrimination."[50]

The Court held that the relief ordered by the lower courts was consistent with Title VII, based on its reading of the legislative history of the statute and especially section 706(g), which, according to the Court, was designed to "emphasize that an employer would not violate the statute merely by having an imbalanced work force, and consequently that a court could not order an employer to adopt racial preferences merely to correct such an imbalance."[51]

Despite the clarity of Justice Brennan's analysis of the legislative history, that part of the opinion carried only a plurality of the Court.[52] Three members of the Court expressed open disagreement with the plurality's reading of Title VII,[53] and a fourth "generally agree[d]" with the plurality's analysis of the legislative history but dissented on the ground that the remedy imposed against the union was "inequitable."[54] Justice Powell provided the fifth vote, upholding the plurality's view of the legislative history of Title VII and the imposition of liability on Local 28. Again, the positions of Justices Kennedy and Souter on this issue will determine whether a majority of the current court will authorize court-ordered affirmative action relief to non-identifiable victims of discrimination. Short of a case which like *Local 28* presents an extraordinary record of discrimination,[55] this seems unlikely.

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47. 478 U.S. at 515.

48. 478 U.S. 421 (1986).

49. The District Court issued two contempt orders for the purposes of enforcing compliance with the affirmative action plan, only one of which has been actually reported. *See* EEOC v. Local 638 and Local 28 of the Sheet Metal Workers' Int'l Ass'n, 30 Empl. Prac. Dec. (CCH) ¶ 33,198 (S.D.N.Y. 1982). Both the Supreme Court and Second Circuit opinions, however, provide a description of both orders. *See* Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 434-44 (1986); EEOC v. Local 638. . .Local 28 of Sheet Metal Workers' Int'l Ass'n, 753 F.2d 1172, 1176-78 (2d Cir. 1985).

50. 478 U.S. at 436.

51. *Id.* at 453.

52. The plurality consisted of Justices Brennan, Marshall, Blackmun and Stevens. Justice Powell concurred in part and concurred in the judgment.

53. 478 U.S. at 500 (Burger, C.J. & Rehnquist, J., dissenting); *id.* at 489 (O'Connor, J., concurring in part and dissenting in part).

54. *Id.* at 499 (White, J., dissenting).

55. The facts of *Local 28* were quite extraordinary. The union had been found guilty of discrimination in both state and federal proceedings. *See In re* State Comm'n for Human Rights v. Farrell, 52 Misc. 2d 936, 277 N.Y.S.2d 287 (N.Y. Sup. Ct. Special Term), *aff'd*, 27 A.D.2d 327, 278 N.Y.S.2d 982 (N.Y. App. Div.), *aff'd*, 19 N.Y.2d 974, 281 N.Y.S.2d 521, 228 N.E.2d 691 (1967); *In re* State Comm'n of Human Rights v. Farrell, 47 Misc. 2d 799, 263 N.Y.S.2d 250 (N.Y. Sup. Ct. Special Term 1965); *In re* State Comm'n for Human Rights v. Farrell, 47 Misc. 2d 244, 262 N.Y.S.2d 526 (N.Y. Sup. Ct. Special Term), *aff'd*, 24 A.D.2d 128, 264 N.Y.S.2d 489 (N.Y. App. Div. 1965); *In re* State Comm'n for Human Rights v. Farrell, 43 Misc. 2d 958, 252 N.Y.S.2d 649 (N.Y. Sup. Ct. Special Term 1964). *See also* EEOC v. Local

C. *The Level of Scrutiny*

This Article has focused thus far on the legality of affirmative action programs under Title VII of the Civil Rights Act. The equal protection clause of the fourteenth amendment also imposes strictures on the affirmative action programs of public employers.[56] When assessing equal protection claims involving race classifications, the Court applies a heightened level of scrutiny because it has traditionally considered such classifications "suspect." Once heightened scrutiny is triggered, the classification can be justified only upon a showing of a compelling state interest which must be satisfied by means narrowly tailored to serve that interest.

In its 1988 Term, the Supreme Court squarely addressed the question of the level of scrutiny to be applied when a racial classification gives advantages to minorities as opposed to placing burdens on them. In *City of Richmond v. J.A. Croson*,[57] the Court for the first time held that strict scrutiny applies to racial classifications which advantage minorities and disadvantage whites. Although this conclusion is quite far-reaching in terms of equal protection doctrine, the *Croson* majority implied that this result was in line with conventional equal protection analysis since the governing body which enacted the legislation at issue was mostly black, as was the population of the city. Justice O'Connor, writing for the majority, stated:

> In this case, blacks comprise approximately 50% of the population of the City of Richmond. Five of the nine seats on the City Council are held by blacks. The concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case.[58]

Racial classifications which disadvantage whites should not be subjected

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638, 401 F. Supp. 467 (S.D.N.Y. 1975); United States v. Local 638, Enterprise Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Compressed Air, Ice Machine, Air Conditioning, and General Pipefitters, 347 F. Supp. 164 (S.D.N.Y. 1972).

At least two contempt proceedings were brought by city and state officials when the union refused to abide by court orders. The cases were affirmed on three occasions by the Court of Appeals for the Second Circuit. *See* EEOC v. Local 638, 753 F.2d 1172 (2d Cir. 1985); EEOC v. Local 638, 565 F.2d 31 (2d Cir. 1977); EEOC v. Local 638, 532 F.2d 821 (2d Cir. 1976).

The union was found guilty of: 1) adopting discriminatory procedures and standards for admission into its apprenticeship program; 2) restricting the size of its membership in order to deny access to non-whites; 3) selectively organizing non-union sheetmetal shops with few, if any, minority employees, and admitting to membership only white employees from these shops; and 4) discriminating in favor of white applicants seeking to transfer from sister locals.

56. Section one of the fourteenth amendment states:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

57. 109 S. Ct. 706 (1989).

58. *Id.* at 722.

to a strict scrutiny analysis. The entire rationale for strict judicial review, as articulated in *United States v. Carolene Products*[59] and subsequent cases, was to provide judicial solicitude to groups unable to protect their interests through the normal workings of the political process because of historic forms of discrimination against them. Although whites who are members of different nationality or ethnic groups may have endured certain forms of discrimination, they have not suffered such treatment on the basis of their race. Even as ethnic or national minorities, whites rather than blacks possess the political power necessary to assure that their interests are taken into account.[60]

The Court's use of a strict scrutiny analysis to evaluate affirmative action plans that advantage blacks and disadvantage whites is a sure indication that such programs are in jeopardy.[61] As the vast majority of affirmative action plans involve decisions made by whites rather than blacks that disadvantage other whites, the question raised by *Croson* is whether strict scrutiny analysis will be applied to those programs.

The Court provided a tentative answer to this question in a case decided last term, *Metro Broadcasting, Inc. v. FCC*.[62] In that case, the Court addressed the constitutionality of two minority preference policies of the Federal Communications Commission. One policy awarded an enhancement for minority ownership in comparative proceedings for new licenses, and the other permitted, through a "distress sale" policy, a limited category of existing radio and television broadcast stations to be transferred only to minority controlled firms.[63] In upholding the constitutionality of both programs, the Court refused to apply a strict scrutiny analysis, concluding that "benign race measures mandated by Congress — even if those measures are not 'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination — are constitutionally permissible to the extent that they serve governmental objectives within the power of Congress and are substantially related to the achievement of those objectives."[64] In using this analysis, the Court followed *Fullilove v. Klutznick*,[65] a 1980 case which upheld a Congres-

59. 304 U.S. 144 (1938). Justice Stone set forth the following justifications for applying heightened scrutiny: "[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Id.* at 152 n.4.

60. In addition to race, gender has served as a ground for discriminating against a segment of the population. Women, for example, were barred by law from voting in some states until passage of the nineteenth amendment in 1920. A majority of the Court has yet to determine that gender-based classifications are subject to strict scrutiny. *See* Frontiero v. Richardson, 411 U.S. 677 (1973).

61. Historically, strict scrutiny has been described as "strict in theory, fatal in fact." Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

62. 110 S. Ct. 2997 (1989).

63. *Id.* at 3005.

64. *Id.* at 3008-09.

65. 448 U.S. 448 (1980).

sional set-aside for minority businesses. The *Metro Broadcasting* Court rejected the *Croson* strict scrutiny formula with the observation that "race conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments."[66] Four members of the Court dissented, arguing for the application of the strict scrutiny analysis and concluding that the F.C.C. programs were constitutionally deficient.[67]

Although the decision in *Metro Broadcasting* is a significant victory for affirmative action, the decision is quite limited and, placed in a broader context, does not provide much cause for celebration. As an initial matter, the decision only addresses affirmative action plans which have the imprimatur of Congress. The *Metro Broadcasting* decision does not concern plans that have been implemented by state and local governments[68] or private employers.[69] Presumably, the strict scrutiny analysis of *Croson* still governs plans by state and local governments even though such plans may employ "benign racial classifications." Additionally, the fact that four Justices dissented in *Metro Broadcasting* may foretell the disintegration of the Court majority which decided *Fullilove*.[70] Finally, the leadership provided by Justice Brennan in this area will no longer be present to assure the continuing vitality of previous cases which upheld affirmative action plans.[71]

CONCLUSION

Efforts to protect the legal validity of affirmative action plans have reached something of a crisis, with all signs pointing to the conclusion that judicial interference will increasingly undercut such plans. Not only is it necessary to establish demonstrable discrimination against minorities in order to justify the implementation of an affirmative action program, but once implemented, those programs are extremely limited as to beneficiaries. Moreover, they are subject to intense scrutiny by the courts. These trends, which run directly counter to civil rights law as it has developed since the late 1970s, are a direct consequence of the shift in the federal judiciary effectuated during the recent decade of Republican presidential rule. The retirement of Justice Bren-

66. 110 S. Ct at 3009.

67. *Id.* at 3028 (O'Connor, J., dissenting, joined by Rehnquist, C.J. & Scalia & Kennedy, JJ.); *id.* at 3044 (Kennedy, J., dissenting, joined by Scalia, J.).

68. *Id.* at 3009.

69. The Court did not address Title VII in the *Metro Broadcasting* decision.

70. The *Fullilove* majority consisted of former Chief Justice Burger and Justices White, Brennan, Marshall, Blackmun, and Powell. 448 U.S. 448. One should note Justice O'Connor's subtle observation in *Metro Broadcasting* that, "of course, *Fullilove* preceded our determination in *Croson* that strict scrutiny applies to preferences that favor members of minority groups, including challenges considered under the Fourteenth Amendment." 109 S. Ct. at 3032 (O'Connor, J., dissenting).

71. In each case where the Supreme Court, after full briefing and oral argument, issued a written opinion upholding an affirmative action plan, the opinion of the Court was authored by Justice Brennan, with the exception of *Fullilove*. 448 U.S. 448 (Burger, C.J.).

nan, and the age gap between Justices Marshall and Blackmun and the remainder of the Court, indicate that we are entering a new era of federal jurisprudence which will bring about significant, disheartening changes in many areas of civil rights law.

Since this shift in the federal judiciary was precipitated through the workings of the political process, efforts to counter a total evisceration of the civil rights gains written into law by the Warren Court of the sixties will have to be conducted through the political process. The result must be greater scrutiny of appointments to the federal bench and greater involvement of the legislative and executive branches of local, state, and federal government in protecting fundamental rights such as those encompassed by affirmative action.