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ADARAND CONSTRUCTORS, INC., PETITIONER v. FEDERICO PENA, SECRETARY OF TRANSPORTATION, ET AL.

ADARAND CONSTRUCTORS, INC. v. PENA, SECRETARY OF TRANSPORTATION, ET AL.

No. 93-1841

SUPREME COURT OF THE UNITED STATES

1995 U.S. LEXIS 4037

January 17, 1995, Argued
June 12, 1995, Decided

NOTICE: [*1] This preliminary LEXIS version is unedited and subject to revision.

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PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

SYLLABUS:
Most federal agency contracts must contain a subcontractor compensation clause, which gives a prime contractor a financial incentive to hire subcontractors certified as small businesses controlled by socially and economically disadvantaged individuals, and requires the contractor to presume that such individuals include minorities or any other individuals found to be disadvantaged by the Small Business Administration (SBA). The prime contractor under a federal highway construction contract containing such a clause awarded a subcontract to a company that was certified as a small disadvantaged business. The record does not reveal how the company obtained its certification, but it could have been by any one of three routes: [*2] under one of two SBA programs--known as the 8(a) and 8(d) programs--or by a state agency under relevant Department of Transportation regulations. Petitioner Adarand Constructors, Inc., which submitted the low bid on the subcontract but was not a certified business, filed suit against respondent federal officials, claiming that the race-based presumptions used in subcontractor compensation clauses violate the equal protection component of the Fifth Amendment's Due Process Clause. The District Court granted respondents summary judgment. In affirming, the Court of Appeals assessed the constitutionality of the federal race-based action under a lenient standard, resembling intermediate scrutiny, which it determined was required by Fullilove v. Klutznick, 448 U. S. 448, and Metro Broadcasting, Inc. v. FCC, 497 U. S. 547.

Held: The judgment is vacated, and the case is remanded.

16 F. 3d 1537, vacated and remanded.

JUSTICE O'CONNOR delivered an opinion with respect to Parts I, II, III-A, III-B, III-D, and IV, which was for the Court except insofar as it might be

inconsistent with the [*3] views expressed in JUSTICE SCALIA's concurrence, concluding that:

1. Adarand has standing to seek forward-looking relief. It has met the requirements necessary to maintain its claim by alleging an invasion of a legally protected interest in a particularized manner, and by showing that it is very likely to bid, in the relatively near future, on another Government contract offering financial incentives to a prime contractor for hiring disadvantaged subcontractors. See Lujan v. Defenders of Wildlife, 504 U. S. 555, 560. Pp. 7-10.

2. All racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. Pp. 10-29; 34-37.

(a) In Richmond v. J. A. Croson Co., 488 U. S. 469, a majority of the Court held that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments. While Croson did not consider what standard of review the Fifth Amendment requires for such action taken by the Federal Government, the Court's cases through Croson had established three general propositions with respect [*4] to governmental racial classifications. First, skepticism: "'any preference based on racial or ethnic criteria must necessarily receive a most searching examination,"' Wygant v. Jackson Board of Ed., 476 U. S. 267, 273-274. Second, consistency: "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification," Croson, supra, at 494. And third, congruence: "equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment," Buckley v. Valeo, 424 U. S. 1, 93. Taken together, these propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny. Pp. 10-23.

(b) However, a year after Croson, the Court, in Metro Broadcasting, upheld two federal race-based policies against a Fifth Amendment challenge. The Court repudiated the long-held notion that "it would be [*5] unthinkable that the same Constitution would impose a lesser duty on the Federal Government" than it does on a State to afford equal protection of the laws, Bolling v. Sharpe, 347 U. S. 497, 500, by holding that congressionally mandated "benign" racial classifications need only satisfy intermediate scrutiny. By adopting that standard, Metro Broadcasting departed from prior cases in two significant respects. First, it turned its back on Croson's explanation that strict scrutiny of governmental racial classifications is essential because it may not always be clear that a so-called preference is in fact benign. Second, it squarely rejected one of the three propositions established by this Court's earlier cases, namely, congruence between the standards applicable to federal and state race-based action, and in doing so also undermined the other two. Pp. 23-25.

(c) The propositions undermined by Metro Broadcasting all derive from the basic principle that the Fifth and Fourteenth Amendments protect persons, not groups. It follows from that principle that all governmental action based on race--a group classification long recognized as in most [*6] circumstances irrelevant and therefore prohibited--should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection has not been infringed. Thus, strict scrutiny is the proper standard for analysis of all racial

classifications, whether imposed by a federal, state, or local actor. To the extent that Metro Broadcasting is inconsistent with that holding, it is overruled. Pp. 25-29.

(d) The decision here makes explicit that federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest. Thus, to the extent that Fullilove held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling. Requiring strict scrutiny is the best way to ensure that courts will consistently give racial classifications a detailed examination, as to both ends and means. It is not true that strict scrutiny is strict in theory, but fatal in fact. Government is not disqualified from acting in response to the unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country. [*7] When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test set out in this Court's previous cases. Pp. 34-36.

3. Because this decision alters the playing field in some important respects, the case is remanded to the lower courts for further consideration. The Court of Appeals did not decide whether the interests served by the use of subcontractor compensation clauses are properly described as "compelling." Nor did it address the question of narrow tailoring in terms of this Court's strict scrutiny cases. Unresolved questions also remain concerning the details of the complex regulatory regimes implicated by the use of such clauses. Pp. 36-37.

JUSTICE SCALIA agreed that strict scrutiny must be applied to racial classifications imposed by all governmental actors, but concluded that government can never have a "compelling interest" in discriminating on the basis of race in order to "make up" for past racial discrimination in the opposite direction. Under the Constitution there can be no such thing as either a creditor or a debtor race. We are just one race in the eyes of government. [*8] Pp. 1-2.

JUDGES: O'CONNOR, J., announced the judgment of the Court and delivered an opinion with respect to Parts I, II, III-A, III-B, III-D, and IV, which was for the Court except insofar as it might be inconsistent with the views expressed in the concurrence of SCALIA, J., and an opinion with respect to Part III-C. Parts I, II, III-A, III-B, III-D, and IV of that opinion were joined by REHNQUIST, C. J., and KENNEDY and THOMAS, JJ., and by SCALIA, J., to the extent heretofore indicated; and Part III-C was joined by KENNEDY, J. SCALIA, J., and THOMAS, J., filed opinions concurring in part and concurring in the judgment. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined. SOUTER, J., filed a dissenting opinion, in which GINSBURG and BREYER, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which BREYER, J., joined.

OPINIONBY: O'CONNOR

OPINION: JUSTICE O'CONNOR announced the judgment of the Court and delivered an opinion with respect to Parts I, II, III-A, III-B, III-D, and IV, which is for the Court except insofar as it might be inconsistent with the views expressed in JUSTICE SCALIA's concurrence, and an opinion with respect to Part III-C in which JUSTICE KENNEDY joins.

Petitioner Adarand [*9] Constructors, Inc., claims that the Federal Government's practice of giving general contractors on government projects a financial incentive to hire subcontractors controlled by "socially and economically disadvantaged individuals," and in particular, the Government's use of race-based presumptions in identifying such individuals, violates the equal protection component of the Fifth Amendment's Due Process Clause. The Court of Appeals rejected Adarand's claim. We conclude, however, that courts should analyze cases of this kind under a different standard of review than the one the Court of Appeals applied. We therefore vacate the Court of Appeals' judgment and remand the case for further proceedings.

I

In 1989, the Central Federal Lands Highway Division (CFLHD), which is part of the United States Department of Transportation (DOT), awarded the prime contract for a highway construction project in Colorado to Mountain Gravel & Construction Company. Mountain Gravel then solicited bids from subcontractors for the guardrail portion of the contract. Adarand, a Colorado-based highway construction company specializing in guardrail work, submitted the low bid. Gonzales Construction Company [*10] also submitted a bid.

The prime contract's terms provide that Mountain Gravel would receive additional compensation if it hired subcontractors certified as small businesses controlled by "socially and economically disadvantaged individuals," App. 24. Gonzales is certified as such a business; Adarand is not. Mountain Gravel awarded the subcontract to Gonzales, despite Adarand's low bid, and Mountain Gravel's Chief Estimator has submitted an affidavit stating that Mountain Gravel would have accepted Adarand's bid, had it not been for the additional payment it received by hiring Gonzales instead. Id., at 28-31. Federal law requires that a subcontracting clause similar to the one used here must appear in most federal agency contracts, and it also requires the clause to state that "the contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act." 15 U. S. C. @@ 637(d)(2), (3). Adarand [*11] claims that the presumption set forth in that statute discriminates on the basis of race in violation of the Federal Government's Fifth Amendment obligation not to deny anyone equal protection of the laws.

These fairly straightforward facts implicate a complex scheme of federal statutes and regulations, to which we now turn. The Small Business Act, 72 Stat. 384, as amended, 15 U. S. C. @ 631 et seq. (Act), declares it to be "the policy of the United States that small business concerns, [and] small business concerns owned and controlled by socially and economically disadvantaged individuals, . . . shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." @ 8(d)(1), 15 U. S. C. @ 637(d)(1). The Act defines "socially disadvantaged individuals" as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities," @ 8(a)(5), 15 U. S. C. @ 637(a)(5), and it defines "economically disadvantaged individuals" as [*12] "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same

business area who are not socially disadvantaged." @ 8(a)(6)(A), 15 U. S. C. @ 637(a)(6)(A).

In furtherance of the policy stated in @ 8(d)(1), the Act establishes "the Government-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals" at "not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year." 15 U. S. C. @ 644(g)(1). It also requires the head of each Federal agency to set agency-specific goals for participation by businesses controlled by socially and economically disadvantaged individuals. Ibid.

The Small Business Administration (SBA) has implemented these statutory directives in a variety of ways, two of which are relevant here. One is the "8(a) program," which is available to small businesses controlled by socially and economically disadvantaged individuals as the SBA has defined [*13] those terms. The 8(a) program confers a wide range of benefits on participating businesses, see, e. g., 13 CFR @@ 124.303-124.311, 124.403 (1994); 48 CFR subpt. 19.8 (1994), one of which is automatic eligibility for subcontractor compensation provisions of the kind at issue in this case, 15 U. S. C. @ 637(d)(3)(C) (conferring presumptive eligibility on anyone "found to be disadvantaged . . . pursuant to section 8(a) of the Small Business Act"). To participate in the 8(a) program, a business must be "small," as defined in 13 CFR @ 124.102 (1994); and it must be 51% owned by individuals who qualify as "socially and economically disadvantaged," @ 124.103. The SBA presumes that Black, Hispanic, Asian Pacific, Subcontinent Asian, and Native Americans, as well as "members of other groups designated from time to time by SBA," are "socially disadvantaged," @ 124.105(b)(1). It also allows any individual not a member of a listed group to prove social disadvantage "on the basis of clear and convincing evidence," as described in @ 124.105(c). Social disadvantage is not enough to establish eligibility, however; SBA also requires each 8(a) program participant [*14] to prove "economic disadvantage" according to the criteria set forth in @ 124.106(a).

The other SBA program relevant to this case is the "8(d) subcontracting program," which unlike the 8(a) program is limited to eligibility for subcontracting provisions like the one at issue here. In determining eligibility, the SBA presumes social disadvantage based on membership in certain minority groups, just as in the 8(a) program, and again appears to require an individualized, although "less restrictive," showing of economic disadvantage, @ 124.106(b). A different set of regulations, however, says that members of minority groups wishing to participate in the 8(d) subcontracting program are entitled to a race-based presumption of social and economic disadvantage. 48 CFR @@ 19.001, 19.703(a)(2) (1994). We are left with some uncertainty as to whether participation in the 8(d) subcontracting program requires an individualized showing of economic disadvantage. In any event, in both the 8(a) and the 8(d) programs, the presumptions of disadvantage are rebuttable if a third party comes forward with evidence suggesting that the participant is not, in fact, either economically or socially disadvantaged. [*15] 13 CFR @@ 124.111(c)-(d), 124.601-124.609 (1994).

The contract giving rise to the dispute in this case came about as a result of the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. 100-17, 101 Stat. 132 (STURAA), a DOT appropriations measure. Section 106(c)(1) of STURAA provides that "not less than 10 percent" of the appropriated funds "shall be expended with small business concerns owned and controlled by

socially and economically disadvantaged individuals." 101 Stat. 145. STURAA adopts the Small Business Act's definition of "socially and economically disadvantaged individual," including the applicable race-based presumptions, and adds that "women shall be presumed to be socially and economically disadvantaged individuals for purposes of this subsection." @ 106(c)(2)(B), 101 Stat. 146. STURAA also requires the Secretary of Transportation to establish "minimum uniform criteria for State governments to use in certifying whether a concern qualifies for purposes of this subsection." @ 106(c)(4), 101 Stat. 146. The Secretary has done so in 49 CFR pt. 23, subpt. D (1994). Those regulations say that the certifying authority should presume both social and economic [*16] disadvantage (i. e., eligibility to participate) if the applicant belongs to certain racial groups, or is a woman. 49 CFR @ 23.62 (1994); 49 CFR pt. 23, subpt. D, App. C (1994). As with the SBA programs, third parties may come forward with evidence in an effort to rebut the presumption of disadvantage for a particular business. 49 CFR @ 23.69 (1994).

The operative clause in the contract in this case reads as follows:

"Subcontracting. This subsection is supplemented to include a Disadvantaged Business Enterprise (DBE) Development and Subcontracting Provision as follows:

"Monetary compensation is offered for awarding subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals. . . .

"A small business concern will be considered a DBE after it has been certified as such by the U. S. Small Business Administration or any State Highway Agency. Certification by other Government agencies, counties, or cities may be acceptable on an individual basis provided the Contracting Officer has determined the certifying agency has an acceptable and viable DBE certification program. If the Contractor requests payment under this provision, [*17] the Contractor shall furnish the engineer with acceptable evidence of the subcontractor(s) DBE certification and shall furnish one certified copy of the executed subcontract(s).

. . . . .

"The Contractor will be paid an amount computed as follows:

"1. If a subcontract is awarded to one DBE, 10 percent of the final amount of the approved DBE subcontract, not to exceed 1.5 percent of the original contract amount.

"2. If subcontracts are awarded to two or more DBEs, 10 percent of the final amount of the approved DBE subcontracts, not to exceed 2 percent of the original contract amount." App. 24-26.

To benefit from this clause, Mountain Gravel had to hire a subcontractor who had been certified as a small disadvantaged business by the SBA, a state highway agency, or some other certifying authority acceptable to the Contracting Officer. Any of the three routes to such certification described above--SBA's 8(a) or 8(d) program, or certification by a State under the DOT regulations--would meet that requirement. The record does not reveal how Gonzales obtained its certification as a small disadvantaged business.

After losing the guardrail subcontract to Gonzales, Adarand filed suit against [*18] various federal officials in the United States District Court for the District of Colorado, claiming that the race-based presumptions involved in the use of subcontracting compensation clauses violate Adarand's right to equal protection. The District Court granted the Government's motion for summary judgment. Adarand Constructors, Inc. v. Skinner, 790 F. Supp. 240 (1992). The Court of Appeals for the Tenth Circuit affirmed. 16 F. 3d 1537 (1994). It understood our decision in Fullilove v. Klutznick, 448 U. S. 448 (1980), to have adopted "a lenient standard, resembling intermediate scrutiny, in assessing" the constitutionality of federal race-based action. 16 F. 3d, at 1544. Applying that "lenient standard," as further developed in Metro Broadcasting, Inc. v. FCC, 497 U. S. 547 (1990), the Court of Appeals upheld the use of subcontractor compensation clauses. 16 F. 3d, at 1547. We granted certiorari. 512 U. S. (1994).

II

Adarand, in addition to its general prayer for "such other and further relief [*19] as to the Court seems just and equitable," specifically seeks declaratory and injunctive relief against any future use of subcontractor compensation clauses. App. 22-23 (complaint). Before reaching the merits of Adarand's challenge, we must consider whether Adarand has standing to seek forward-looking relief. Adarand's allegation that it has lost a contract in the past because of a subcontractor compensation clause of course entitles it to seek damages for the loss of that contract (we express no view, however, as to whether sovereign immunity would bar such relief on these facts). But as we explained in Los Angeles v. Lyons, 461 U. S. 95 (1983), the fact of past injury, "while presumably affording [the plaintiff] standing to claim damages . . ., does nothing to establish a real and immediate threat that he would again" suffer similar injury in the future. Id., at 105.

If Adarand is to maintain its claim for forward-looking relief, our cases require it to allege that the use of subcontractor compensation clauses in the future constitutes "an invasion of a legally protected interest which is (a) concrete and particularized, [*20] and (b) actual or imminent, not conjectural or hypothetical." Lujan v. Defenders of Wildlife, 504 U. S. 555, 560 (1992) (footnote, citations, and internal quotation marks omitted). Adarand's claim that the Government's use of subcontractor compensation clauses denies it equal protection of the laws of course alleges an invasion of a legally protected interest, and it does so in a manner that is "particularized" as to Adarand. We note that, contrary to the respondents' suggestion, see Brief for Respondents 29-30, Adarand need not demonstrate that it has been, or will be, the low bidder on a government contract. The injury in cases of this kind is that a "discriminatory classification prevents the plaintiff from competing on an equal footing." General Contractors v. Jacksonville, 508 U. S. , (1993) (slip op., at 11). The aggrieved party "need not allege that he would have obtained the benefit but for the barrier in order to establish standing." Id., at (slip op., at 9).

It is less clear, however, that the future use of subcontractor compensation clauses will cause Adarand "imminent" injury. We said in Lujan that "although [*21] 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to insure that the alleged injury is not too speculative for Article III purposes--that the injury is 'certainly impending.'" Lujan, supra, at 565, n. 2. We therefore must ask whether

Adarand has made an adequate showing that sometime in the relatively near future it will bid on another government contract that offers financial incentives to a prime contractor for hiring disadvantaged subcontractors.

We conclude that Adarand has satisfied this requirement. Adarand's general manager said in a deposition that his company bids on every guardrail project in Colorado. See Reply Brief for Petitioner 5-A. According to documents produced in discovery, the CFLHD let fourteen prime contracts in Colorado that included guardrail work between 1983 and 1990. Plaintiff's Motion for Summary Judgment in No. 90-C-1413, Exh. I, Attachment A (D. Colo.). Two of those contracts do not present the kind of injury Adarand alleges here. In one, the prime contractor did not subcontract out the guardrail work; in another, the prime contractor was itself a disadvantaged business, and in such cases [*22] the contract generally does not include a subcontractor compensation clause. Ibid.; see also id., Supplemental Exhibits, Deposition of Craig Actis 14 (testimony of CFLHD employee that 8(a) contracts do not include subcontractor compensation clauses). Thus, statistics from the years 1983 through 1990 indicate that the CFLHD lets on average one and one half contracts per year that could injure Adarand in the manner it alleges here. Nothing in the record suggests that the CFLHD has altered the frequency with which it lets contracts that include guardrail work. And the record indicates that Adarand often must compete for contracts against companies certified as small disadvantaged businesses. See id., Exh. F, Attachments 1-3. Because the evidence in this case indicates that the CFLHD is likely to let contracts involving guardrail work that contain a subcontractor compensation clause at least once per year in Colorado, that Adarand is very likely to bid on each such contract, and that Adarand often must compete for such contracts against small disadvantaged businesses, we are satisfied that Adarand has standing to bring this lawsuit.

III

The Government urges that "the Subcontracting [*23] Compensation Clause program is . . . a program based on disadvantage, not on race," and thus that it is subject only to "the most relaxed judicial scrutiny." Brief for Respondents 26. To the extent that the statutes and regulations involved in this case are race neutral, we agree. The Government concedes, however, that "the race-based rebuttable presumption used in some certification determinations under the Subcontracting Compensation Clause" is subject to some heightened level of scrutiny. Id., at 27. The parties disagree as to what that level should be. (We note, incidentally, that this case concerns only classifications based explicitly on race, and presents none of the additional difficulties posed by laws that, although facially race neutral, result in racially disproportionate impact and are motivated by a racially discriminatory purpose. See generally Arlington Heights v. Metropolitan Housing Development Corp., 429 U. S. 252 (1977); Washington v. Davis, 426 U. S. 229 (1976).)

Adarand's claim arises under the Fifth Amendment to the Constitution, which provides that "No person shall . . . be deprived [*24] of life, liberty, or property, without due process of law." Although this Court has always understood that Clause to provide some measure of protection against arbitrary treatment by the Federal Government, it is not as explicit a guarantee of equal treatment as the Fourteenth Amendment, which provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws" (emphasis added). Our cases have accorded varying degrees of significance to the difference in the language of those two Clauses. We think it necessary to

revisit the issue here.

A

Through the 1940s, this Court had routinely taken the view in non-race-related cases that, "unlike the Fourteenth Amendment, the Fifth contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress." Detroit Bank v. United States, 317 U. S. 329, 337 (1943); see also, e. g., Helvering v. Lerner Stores Corp., 314 U. S. 463, 468 (1941); LaBelle Iron Works v. United States, 256 U. S. 377, 392 (1921) ("Reference is made to cases decided under [*25] the equal protection clause of the Fourteenth Amendment . . . ; but clearly they are not in point. The Fifth Amendment has no equal protection clause"). When the Court first faced a Fifth Amendment equal protection challenge to a federal racial classification, it adopted a similar approach, with most unfortunate results. In Hirabayashi v. United States, 320 U. S. 81 (1943), the Court considered a curfew applicable only to persons of Japanese ancestry. The Court observed--correctly--that "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality," and that "racial discriminations are in most circumstances irrelevant and therefore prohibited." Id., at 100. But it also cited Detroit Bank for the proposition that the Fifth Amendment "restrains only such discriminatory legislation by Congress as amounts to a denial of due process," ibid., and upheld the curfew because "circumstances within the knowledge of those charged with the responsibility for maintaining the national defense afforded a rational [*26] basis for the decision which they made." Id., at 102.

Eighteen months later, the Court again approved wartime measures directed at persons of Japanese ancestry. Korematsu v. United States, 323 U. S. 214 (1944), concerned an order that completely excluded such persons from particular areas. The Court did not address the view, expressed in cases like Hirabayashi and Detroit Bank, that the Federal Government's obligation to provide equal protection differs significantly from that of the States. Instead, it began by noting that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] courts must subject them to the most rigid scrutiny." 323 U. S., at 216. That promising dictum might be read to undermine the view that the Federal Government is under a lesser obligation to avoid injurious racial classifications than are the States. Cf. id., at 234-235 (Murphy, J., dissenting) ("The order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment"). But [*27] in spite of the "most rigid scrutiny" standard it had just set forth, the Court then inexplicably relied on "the principles we announced in the Hirabayashi case," id., at 217, to conclude that, although "exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p. m. to 6 a. m.," id., at 218, the racially discriminatory order was nonetheless within the Federal Government's power. *

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* Justices Roberts, Murphy, and Jackson filed vigorous dissents; Justice Murphy argued that the challenged order "falls into the ugly abyss of racism." Korematsu, 323 U. S., at 233. Congress has recently agreed with the dissenters' position, and has attempted to make amends. See Pub. L. 100-383, @ 2(a), 102 Stat. 903 ("The Congress recognizes that . . . a grave injustice was done to

both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II").

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[*28]

In Bolling v. Sharpe, 347 U. S. 497 (1954), the Court for the first time explicitly questioned the existence of any difference between the obligations of the Federal Government and the States to avoid racial classifications. Bolling did note that "the 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,'" id., at 499. But Bolling then concluded that, "in view of [the] decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." Id., at 500.

Bolling's facts concerned school desegregation, but its reasoning was not so limited. The Court's observations that "distinctions between citizens solely because of their ancestry are by their very nature odious," Hirabayashi, 320 U. S., at 100, and that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect," Korematsu, 323 U. S., at 216, [*29] carry no less force in the context of federal action than in the context of action by the States--indeed, they first appeared in cases concerning action by the Federal Government. Bolling relied on those observations, 347 U. S., at 499, n. 3, and reiterated "'that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race,'" id., at 499 (quoting Gibson v. Mississippi, 162 U. S. 565, 591 (1896)) (emphasis added). The Court's application of that general principle to the case before it, and the resulting imposition on the Federal Government of an obligation equivalent to that of the States, followed as a matter of course.

Later cases in contexts other than school desegregation did not distinguish between the duties of the States and the Federal Government to avoid racial classifications. Consider, for example, the following passage from McLaughlin v. Florida, 379 U. S. 184, a 1964 case that [*30] struck down a race-based state law:

"We deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications 'constitutionally suspect,' Bolling v. Sharpe, 347 U. S. 497, 499; and subject to the 'most rigid scrutiny,' Korematsu v. United States, 323 U. S. 214, 216; and 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose, Hirabayashi v. United States, 320 U. S. 81, 100." Id., at 191-192.

McLaughlin's reliance on cases involving federal action for the standards applicable to a case involving state legislation suggests that the Court understood the standards for federal and state racial classifications to be the same.

Cases decided after McLaughlin continued to treat the equal protection obligations imposed by the Fifth and the Fourteenth Amendments as indistinguishable; one commentator [*31] observed that "in case after case, fifth amendment equal protection problems are discussed on the assumption that fourteenth amendment precedents are controlling." Karst, The Fifth Amendment's Guarantee of Equal Protection, 55 N. C. L. Rev. 541, 554 (1977). Loving v. Virginia, which struck down a race-based state law, cited Korematsu for the proposition that "the Equal Protection Clause demands that racial classifications . . . be subjected to the 'most rigid scrutiny.'" 388 U. S. 1, 11 (1967). The various opinions in Frontiero v. Richardson, 411 U. S. 677 (1973), which concerned sex discrimination by the Federal Government, took their equal protection standard of review from Reed v. Reed, 404 U. S. 71 (1971), a case that invalidated sex discrimination by a State, without mentioning any possibility of a difference between the standards applicable to state and federal action. Frontiero, 411 U. S., at 682-684 (plurality opinion of Brennan, J.); id., at 691 (Stewart, J., concurring in judgment); [*32] id., at 692 (Powell, J., concurring in judgment). Thus, in 1975, the Court stated explicitly that "this Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." Weinberger v. Wiesenfeld, 420 U. S. 636, 638, n. 2 (1975); see also Buckley v. Valeo, 424 U. S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment"); United States v. Paradise, 480 U. S. 149, 166, n. 16 (1987) (plurality opinion of Brennan, J.) ("The reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth"). We do not understand a few contrary suggestions appearing in cases in which we found special deference to the political branches of the Federal Government to be appropriate, e. g., Hampton v. Mow Sun Wong, 426 U. S. 88, 100, 101-102, n. 21 (1976) (federal power over immigration), to detract from this general rule.

B

Most of the cases [*33] discussed above involved classifications burdening groups that have suffered discrimination in our society. In 1978, the Court confronted the question whether race-based governmental action designed to benefit such groups should also be subject to "the most rigid scrutiny." Regents of Univ. of California v. Bakke, 438 U. S. 265, involved an equal protection challenge to a state-run medical school's practice of reserving a number of spaces in its entering class for minority students. The petitioners argued that "strict scrutiny" should apply only to "classifications that disadvantage 'discrete and insular minorities.'" Id., at 287-288 (opinion of Powell, J.) (citing United States v. Carolene Products Co., 304 U. S. 144, 152, n. 4 (1938)). Bakke did not produce an opinion for the Court, but Justice Powell's opinion announcing the Court's judgment rejected the argument. In a passage joined by Justice White, Justice Powell wrote that "the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." [*34] 438 U. S., at 289-290. He concluded that "racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." Id., at 291. On the other hand, four Justices in Bakke would have applied a less stringent standard of review to racial classifications "designed to further remedial purposes," see id., at 359 (Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part). And four Justices thought the case should be decided on statutory grounds. Id., at 411-412, 421 (STEVENS, J., joined by Burger, C. J., Stewart, and REHNQUIST, JJ., concurring

in judgment in part and dissenting in part).

Two years after Bakke, the Court faced another challenge to remedial race-based action, this time involving action undertaken by the Federal Government. In Fullilove v. Klutznick, 448 U. S. 448 (1980), the Court upheld Congress' inclusion of a 10% set-aside for minority-owned businesses in the Public Works Employment Act of 1977. As in Bakke, there was no opinion for the Court. [*35] Chief Justice Burger, in an opinion joined by Justices White and Powell, observed that "any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." 448 U. S., at 491. That opinion, however, "did not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as [Bakke]." Id., at 492. It employed instead a two-part test which asked, first, "whether the objectives of the legislation are within the power of Congress," and second, "whether the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible means for achieving the congressional objectives." Id., at 473. It then upheld the program under that test, adding at the end of the opinion that the program also "would survive judicial review under either 'test' articulated in the several Bakke opinions." Id., at 492. Justice Powell wrote separately to express his view that the plurality opinion had essentially applied [*36] "strict scrutiny" as described in his Bakke opinion--i. e., it had determined that the set-aside was "a necessary means of advancing a compelling governmental interest"--and had done so correctly. 448 U. S., at 496 (concurring opinion). Justice Stewart (joined by then-JUSTICE REHNQUIST) dissented, arguing that the Constitution required the Federal Government to meet the same strict standard as the States when enacting racial classifications, id., at 523, and n. 1, and that the program before the Court failed that standard. JUSTICE STEVENS also dissented, arguing that "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification," id., at 537, and that the program before the Court could not be characterized "as a 'narrowly tailored' remedial measure." Id., at 541. Justice Marshall (joined by Justices Brennan and Blackmun) concurred in the judgment, reiterating the view of four Justices in Bakke that any race-based governmental action designed to "remedy the present effects of past [*37] racial discrimination" should be upheld if it was "substantially related" to the achievement of an "important governmental objective"--i. e., such action should be subjected only to what we now call "intermediate scrutiny." 448 U. S., at 518-519.

In Wygant v. Jackson Board of Ed., 476 U. S. 267 (1986), the Court considered a Fourteenth Amendment challenge to another form of remedial racial classification. The issue in Wygant was whether a school board could adopt race-based preferences in determining which teachers to lay off. Justice Powell's plurality opinion observed that "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination," id., at 273, and stated the two-part inquiry as "whether the layoff provision is supported by a compelling state purpose and whether the means chosen to accomplish that purpose are narrowly tailored." Id., at 274. In other words, "racial classifications of any sort must be subjected to 'strict scrutiny.'" [*38] Id., at 285 (O'CONNOR, J., concurring in part and concurring in judgment). The plurality then concluded that the school board's interest in "providing minority role models for its minority students, as an attempt to alleviate the effects of societal discrimination," id., at 274, was not a compelling interest that

could justify the use of a racial classification. It added that "societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy," id., at 276, and insisted instead that "a public employer . . . must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination," id., at 277. Justice White concurred only in the judgment, although he agreed that the school board's asserted interests could not, "singly or together, justify this racially discriminatory layoff policy." Id., at 295. Four Justices dissented, three [*39] of whom again argued for intermediate scrutiny of remedial race-based government action. Id., at 301-302 (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting).

The Court's failure to produce a majority opinion in Bakke, Fullilove, and Wygant left unresolved the proper analysis for remedial race-based governmental action. See United States v. Paradise, 480 U. S., at 166 (plurality opinion of Brennan, J.) ("Although this Court has consistently held that some elevated level of scrutiny is required when a racial or ethnic distinction is made for remedial purposes, it has yet to reach consensus on the appropriate constitutional analysis"); Sheet Metal Workers v. EEOC, 478 U. S. 421, 480 (1986) (plurality opinion of Brennan, J.). Lower courts found this lack of guidance unsettling. See, e. g., Kromnick v. School Dist. of Philadelphia, 739 F. 2d 894, 901 (CA3 1984) ("The absence of an Opinion of the Court in either Bakke or Fullilove and the concomitant failure of the Court to articulate an analytic framework supporting [*40] the judgments makes the position of the lower federal courts considering the constitutionality of affirmative action programs somewhat vulnerable"), cert. denied, 469 U. S. 1107 (1985); Williams v. New Orleans, 729 F. 2d 1554, 1567 (CA5 1984) (en banc) (Higginbotham, J., concurring specially); South Florida Chapter of Associated General Contractors of America, Inc. v. Metropolitan Dade County, Fla., 723 F. 2d 846, 851 (CA11), cert. denied, 469 U. S. 871 (1984).

The Court resolved the issue, at least in part, in 1989. Richmond v. J. A. Croson Co., 488 U. S. 469 (1989), concerned a city's determination that 30% of its contracting work should go to minority-owned businesses. A majority of the Court in Croson held that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification," and that the single standard of review for racial classifications should be "strict scrutiny." Id., at 493-494 (opinion of O'CONNOR, [*41] J., joined by REHNQUIST, C. J., White, and KENNEDY, JJ.); id., at 520 (SCALIA, J., concurring in judgment) ("I agree . . . with JUSTICE O'CONNOR's conclusion that strict scrutiny must be applied to all governmental classification by race"). As to the classification before the Court, the plurality agreed that "a state or local subdivision . . . has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction," id., at 491-492, but the Court thought that the city had not acted with "a 'strong basis in evidence for its conclusion that remedial action was necessary,'" id., at 500 (majority opinion) (quoting Wygant, supra, at 277 (plurality opinion)). The Court also thought it "obvious that [the] program is not narrowly tailored to remedy the effects of prior discrimination." 488 U. S., at 508.

With Croson, the Court finally agreed that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments. But Croson of course had no occasion to declare what standard of review [*42]

the Fifth Amendment requires for such action taken by the Federal Government. Croson observed simply that the Court's "treatment of an exercise of congressional power in Fullilove cannot be dispositive here," because Croson's facts did not implicate Congress' broad power under @ 5 of the Fourteenth Amendment. Croson, 488 U. S., at 491 (plurality opinion); see also id., at 522 (SCALIA, J., concurring in judgment) ("Without revisiting what we held in Fullilove . . ., I do not believe our decision in that case controls the one before us here"). On the other hand, the Court subsequently indicated that Croson had at least some bearing on federal race-based action when it vacated a decision upholding such action and remanded for further consideration in light of Croson. H. K. Porter Co. v. Metropolitan Dade County, 489 U. S. 1062 (1989); see also Shurberg Broadcasting of Hartford, Inc. v. FCC, 876 F. 2d 902, 915, n. 16 (CADC 1989) (opinion of Silberman, J.) (noting the Court's action in H. K. Porter Co.), rev'd sub nom. Metro Broadcasting, Inc. v. FCC, 497 U. S. 547 (1990). [*43] Thus, some uncertainty persisted with respect to the standard of review for federal racial classifications. See, e. g., Mann v. City of Albany, Ga., 883 F. 2d 999, 1006 (CA11 1989) (Croson "may be applicable to race-based classifications imposed by Congress"); Shurberg, supra, at 910 (noting the difficulty of extracting general principles from the Court's fractured opinions); id., at 959 (Wald, J., dissenting from denial of rehearing en banc) ("Croson certainly did not resolve the substantial questions posed by congressional programs which mandate the use of racial preferences"); Winter Park Communications, Inc. v. FCC, 873 F. 2d 347, 366 (CADC 1989) (Williams, J., concurring in part and dissenting in part) ("The unresolved ambiguity of Fullilove and Croson leaves it impossible to reach a firm opinion as to the evidence of discrimination needed to sustain a congressional mandate of racial preferences"), aff'd sub nom. Metro Broadcasting, supra.

Despite lingering uncertainty in the details, however, the Court's cases through Croson had established three general propositions [*44] with respect to governmental racial classifications. First, skepticism: "'any preference based on racial or ethnic criteria must necessarily receive a most searching examination,'" Wygant, 476 U. S., at 273 (plurality opinion of Powell, J.); Fullilove, 448 U. S., at 491 (opinion of Burger, C. J.); see also id., at 523 (Stewart, J., dissenting) ("Any official action that treats a person differently on account of his race or ethnic origin is inherently suspect"); McLaughlin, 379 U. S., at 192 ("Racial classifications [are] 'constitutionally suspect'"); Hirabayashi, 320 U. S., at 100 ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people"). Second, consistency: "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification," Croson, 488 U. S., at 494 (plurality opinion); id., at 520 (SCALIA, J., concurring in judgment); see also [*45] Bakke, 438 U. S., at 289-290 (opinion of Powell, J.), i. e., all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized. And third, congruence: "equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment," Buckley v. Valeo, 424 U. S., at 93; see also Weinberger v. Wiesenfeld, 420 U. S., at 638, n. 2; Bolling v. Sharpe, 347 U. S., at 500. Taken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny. Justice Powell's defense of this conclusion bears repeating here:

"If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then [*46] constitutional standards may be applied consistently. Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, [Korematsu], but the standard of justification will remain constant. This is as it should be, since those political judgments are the product of rough compromise struck by contending groups within the democratic process. When they touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest. The Constitution guarantees that right to every person regardless of his background. Shelley v. Kraemer, 334 U. S. [1, 22 (1948)]." Bakke, 438 U. S., at 299 (opinion of Powell, J.) (footnote omitted).

A year later, however, the Court took a surprising turn. Metro Broadcasting, Inc. v. FCC, 497 U. S. 547 (1990), involved a Fifth Amendment challenge to two race-based policies of the Federal Communications Commission. In Metro Broadcasting, the Court repudiated the long-held notion that "it would [*47] be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" than it does on a State to afford equal protection of the laws, Bolling, supra, at 500. It did so by holding that "benign" federal racial classifications need only satisfy intermediate scrutiny, even though Croson had recently concluded that such classifications enacted by a State must satisfy strict scrutiny. "Benign" federal racial classifications, the Court said, "--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 important governmental objectives within the power of Congress and are substantially related to achievement of those objectives." Metro Broadcasting, 497 U. S., at 564-565 (emphasis added). The Court did not explain how to tell whether a racial classification should be deemed "benign," other than to express "confidence that an 'examination of the legislative scheme and its history' will separate benign measures from other types of racial classifications." Id., at 564, n. 12 [*48] (citation omitted).

Applying this test, the Court first noted that the FCC policies at issue did not serve as a remedy for past discrimination. Id., at 566. Proceeding on the assumption that the policies were nonetheless "benign," it concluded that they served the "important governmental objective" of "enhancing broadcast diversity," id., at 566-567, and that they were "substantially related" to that objective, id., at 569. It therefore upheld the policies.

By adopting intermediate scrutiny as the standard of review for congressionally mandated "benign" racial classifications, Metro Broadcasting departed from prior cases in two significant respects. First, it turned its back on Croson's explanation of why strict scrutiny of all governmental racial classifications is essential:

"Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose [*49] of strict scrutiny is to 'smoke out' illegitimate uses of

race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." Croson, supra, at 493 (plurality opinion of O'CONNOR, J.).

We adhere to that view today, despite the surface appeal of holding "benign" racial classifications to a lower standard, because "it may not always be clear that a so-called preference is in fact benign," Bakke, supra, at 298 (opinion of Powell, J.). "More than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system." Days, Fullilove, 96 Yale L. J. 453, 485 (1987).

Second, Metro Broadcasting squarely rejected one of the three propositions established by the Court's earlier equal protection cases, namely, congruence between the standards applicable to federal and state racial classifications, and in so doing also undermined [*50] the other two--skepticism of all racial classifications, and consistency of treatment irrespective of the race of the burdened or benefited group. See supra, at 21-22. Under Metro Broadcasting, certain racial classifications ("benign" ones enacted by the Federal Government) should be treated less skeptically than others; and the race of the benefited group is critical to the determination of which standard of review to apply. Metro Broadcasting was thus a significant departure from much of what had come before it.

The three propositions undermined by Metro Broadcasting all derive from the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect persons, not groups. It follows from that principle that all governmental action based on race--a group classification long recognized as "in most circumstances irrelevant and therefore prohibited," Hirabayashi, supra, at 100--should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed. These ideas have long been central to this Court's understanding of equal protection, and holding "benign" state [*51] and federal racial classifications to different standards does not square with them. "[A] free people whose institutions are founded upon the doctrine of equality," ibid., should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons. Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. To the extent that Metro Broadcasting is inconsistent with that holding, it is overruled.

In dissent, JUSTICE STEVENS criticizes us for "delivering a disconcerting lecture about the evils of governmental racial classifications," post, at 1. With respect, we believe his criticisms reflect a serious misunderstanding of our opinion.

JUSTICE STEVENS concurs in our view that courts should take a skeptical view of all governmental racial classifications. Post, at 1-2. He also allows that "nothing is inherently wrong with applying [*52] a single standard to fundamentally different situations, as long as that standard takes relevant

differences into account." Post, at 6. What he fails to recognize is that strict scrutiny does take "relevant differences" into account--indeed, that is its fundamental purpose. The point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking. See supra, at 24-25. And JUSTICE STEVENS concedes that "some cases may be difficult to classify," post, at 5, and n. 4; all the more reason, in our view, to examine all racial classifications carefully. Strict scrutiny does not "treat dissimilar race-based decisions as though they were equally objectionable," post, at 5; to the contrary, it evaluates carefully all governmental race-based decisions in order to decide which are constitutionally objectionable and which are not. By requiring strict scrutiny of racial classifications, we require courts to make sure that a governmental classification based on race, which [*53] "so seldom provides a relevant basis for disparate treatment," Fullilove, supra, at 534 (STEVENS, J., dissenting), is legitimate, before permitting unequal treatment based on race to proceed.

JUSTICE STEVENS chides us for our "supposed inability to differentiate between 'invidious' and 'benign' discrimination," because it is in his view sufficient that "people understand the difference between good intentions and bad." Post, at 5. But, as we have just explained, the point of strict scrutiny is to "differentiate between" permissible and impermissible governmental use of race. And JUSTICE STEVENS himself has already explained in his dissent in Fullilove why "good intentions" alone are not enough to sustain a supposedly "benign" racial classification: "Even though it is not the actual predicate for this legislation, a statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race. Because that perception--especially when fostered by the Congress of the United States--can only exacerbate rather than reduce racial prejudice, [*54] it will delay the time when race will become a truly irrelevant, or at least insignificant, factor. Unless Congress clearly articulates the need and basis for a racial classification, and also tailors the classification to its justification, the Court should not uphold this kind of statute." Fullilove, supra, at 545 (dissenting opinion) (emphasis added; footnote omitted); see also id., at 537 ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification"); Croson, supra, at 516-517 (STEVENS, J., concurring in part and concurring in judgment) ("Although [the legislation at issue] stigmatizes the disadvantaged class with the unproven charge of past racial discrimination, it actually imposes a greater stigma on its supposed beneficiaries"); supra, at 24-25; but cf. post, at 5-6 (STEVENS, J., dissenting). These passages make a persuasive case for requiring strict scrutiny of congressional racial classifications.

Perhaps it is not the standard of strict scrutiny itself, but our use of the concepts of "consistency" and "congruence" in conjunction with [*55] it, that leads JUSTICE STEVENS to dissent. According to JUSTICE STEVENS, our view of consistency "equates remedial preferences with invidious discrimination," post, at 6, and ignores the difference between "an engine of oppression" and an effort "to foster equality in society," or, more colorfully, "between a 'No Trespassing' sign and a welcome mat," post, at 2, 4. It does nothing of the kind. The principle of consistency simply means that whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the

Constitution's guarantee of equal protection. It says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny. The principle of consistency explains the circumstances in which the injury requiring strict scrutiny occurs. The application of strict scrutiny, in turn, determines whether a compelling governmental interest justifies the infliction of that injury.

Consistency does recognize that any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, [*56] whatever that race may be. This Court clearly stated that principle in Croson, see 488 U. S., at 493-494 (plurality opinion); id., at 520-521 (SCALIA, J., concurring in judgment); see also Shaw v. Reno, 509 U. S. , (1993); Powers v. Ohio, 499 U. S. 400, 410 (1991). JUSTICE STEVENS does not explain how his views square with Croson, or with the long line of cases understanding equal protection as a personal right.

JUSTICE STEVENS also claims that we have ignored any difference between federal and state legislatures. But requiring that Congress, like the States, enact racial classifications only when doing so is necessary to further a "compelling interest" does not contravene any principle of appropriate respect for a co-equal Branch of the Government. It is true that various Members of this Court have taken different views of the authority @ 5 of the Fourteenth Amendment confers upon Congress to deal with the problem of racial discrimination, and the extent to which courts should defer to Congress' exercise of that authority. See, e. g., Metro Broadcasting, supra, at 605-606 [*57] (O'CONNOR, J., dissenting); Croson, supra, at 486-493 (opinion of O'CONNOR, J., joined by REHNQUIST, C. J., and White, J.); id., at 518-519 (KENNEDY, J., concurring in part and concurring in judgment); id., at 521-524 (SCALIA, J., concurring in judgment); Fullilove, supra, at 472-473 (opinion of Burger, C. J.); id., at 500-502, and nn. 2-3, 515, and n. 14 (Powell, J., concurring); id., at 526-527 (Stewart, J., dissenting). We need not, and do not, address these differences today. For now, it is enough to observe that JUSTICE STEVENS' suggestion that any Member of this Court has repudiated in this case his or her previously expressed views on the subject, post, at 9-13, 17, is incorrect.

C

"Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of stare decisis demands special justification." Arizona v. Rumsey, 467 U. S. 203, 212 (1984). In deciding whether this case presents such justification, we recall Justice Frankfurter's admonition that "stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, [*58] however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." Helvering v. Hallock, 309 U. S. 106, 119 (1940). Remaining true to an "intrinsically sounder" doctrine established in prior cases better serves the values of stare decisis than would following a more recently decided case inconsistent with the decisions that came before it; the latter course would simply compound the recent error and would likely make the unjustified break from previously established doctrine complete. In such a situation, "special justification" exists to depart from the recently decided case.

As we have explained, Metro Broadcasting undermined important principles of this Court's equal protection jurisprudence, established in a line of cases stretching back over fifty years, see supra, at 11-23. Those principles together stood for an "embracing" and "intrinsically sound" understanding of equal protection "verified by experience," namely, that the Constitution imposes upon federal, state, and local governmental actors the same obligation to respect [*59] the personal right to equal protection of the laws. This case therefore presents precisely the situation described by Justice Frankfurter in Helvering: we cannot adhere to our most recent decision without colliding with an accepted and established doctrine. We also note that Metro Broadcasting's application of different standards of review to federal and state racial classifications has been consistently criticized by commentators. See, e. g., Fried, Metro Broadcasting, Inc. v. FCC: Two Concepts of Equality, 104 Harv. L. Rev. 107, 113-117 (1990) (arguing that Metro Broadcasting's adoption of different standards of review for federal and state racial classifications placed the law in an "unstable condition," and advocating strict scrutiny across the board); Devins, Metro Broadcasting, Inc. v. FCC: Requiem for a Heavyweight, 69 Texas L. Rev. 125, 145-146 (1990) (same); Linder, Review of Affirmative Action After Metro Broadcasting v. FCC: The Solution Almost Nobody Wanted, 59 UMKC L. Rev. 293, 297, 316-317 (1991) (criticizing "anomalous results as exemplified by the two different [*60] standards of review"); Katz, Public Affirmative Action and the Fourteenth Amendment: The Fragmentation of Theory After Richmond v. J.A. Croson Co. and Metro Broadcasting, Inc. v. Federal Communications Commission, 17 T. Marshall L. Rev. 317, 319, 354-355, 357 (1992) (arguing that "the current fragmentation of doctrine must be seen as a dangerous and seriously flawed approach to constitutional interpretation," and advocating intermediate scrutiny across the board).

Our past practice in similar situations supports our action today. In United States v. Dixon, 509 U. S. (1993), we overruled the recent case of Grady v. Corbin, 495 U. S. 508 (1990), because Grady "lacked constitutional roots" and was "wholly inconsistent with earlier Supreme Court precedent." Dixon, supra, at , (slip op., at 14-15, 22-23). In Solorio v. United States, 483 U. S. 435(1987) , we overruled O'Callahan v. Parker, 395 U. S. 258 (1969), which had caused "confusion" and had rejected "an unbroken line of decisions from 1866 to 1960." Solorio, supra, at 439-441, 450-451. [*61] And in Continental T. V., Inc. v. GTE Sylvania Inc., 433 U. S. 36 (1977), we overruled United States v. Arnold, Schwinn & Co., 388 U. S. 365 (1967), which was "an abrupt and largely unexplained departure" from precedent, and of which "the great weight of scholarly opinion had been critical." Continental T. V., supra, at 47-48, 58. See also, e. g., Payne v. Tennessee, 501 U. S. 808, 830 (1991) (overruling Booth v. Maryland, 482 U. S. 496 (1987), and South Carolina v. Gathers, 490 U. S. 805 (1989)); Monell v. New York City Dept. of Social Services, 436 U. S. 658, 695-701 (1978) (partially overruling Monroe v. Pape, 365 U. S. 167 (1961), because Monroe was a "departure from prior practice" that had not engendered substantial reliance); Swift & Co. v. Wickham, 382 U. S. 111, 128-129 (1965) (overruling Kesler v. Department of Public Safety of Utah, 369 U. S. 153 (1962), [*62] to reaffirm "pre-Kesler precedent" and restore the law to the "view . . . which this Court has traditionally taken" in older cases).

It is worth pointing out the difference between the applications of stare decisis in this case and in Planned Parenthood of Southeastern Pa. v. Casey, 505 U. S. (1992). Casey explained how considerations of stare decisis inform thedec ision whether to overrule a long-established precedent that has become integrated into the fabric of the law. Overruling precedent of that kind

naturally may have consequences for "the ideal of the rule of law," id., at (slip op., at 12). In addition, such precedent is likely to have engendered substantial reliance, as was true in Casey itself, id., at (slip op., at 14)("F or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail"). But in this case, as we have explained, we do not face a precedent of that kind, because Metro Broadcasting itself departed from [*63] our prior cases--and did so quite recently. By refusing to follow Metro Broadcasting, then, we do not depart from the fabric of the law; we restore it. We also note that reliance on a case that has recently departed from precedent is likely to be minimal, particularly where, as here, the rule set forth in that case is unlikely to affect primary conduct in any event. Cf. Allied-Bruce Terminix Cos. v. Dobson, 513 U. S. , (1995) (slip op., at 6)(decli ning to overrule Southland Corp. v. Keating, 465 U. S. 1 (1984), where "private parties have likely written contracts relying upon Southland as authority" in the ten years since Southland was decided).

JUSTICE STEVENS takes us to task for what he perceives to be an erroneous application of the doctrine of stare decisis. But again, he misunderstands our position. We have acknowledged that, after Croson, "some uncertainty persisted with respect to the standard of review for federal racial classifications," supra, at 21, and we therefore do not say that we "merely restore the status quo ante" today, post, at 17. But as we have described supra, at 11-25, we [*64] think that well-settled legal principles pointed toward a conclusion different from that reached in Metro Broadcasting, and we therefore disagree with JUSTICE STEVENS that "the law at the time of that decision was entirely open to the result the Court reached," post, at 17. We also disagree with JUSTICE STEVENS that Justice Stewart's dissenting opinion in Fullilove supports his "novelty" argument, see post, at 19, and n. 13. Justice Stewart said that "under our Constitution, any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid," and that "'equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.'" Fullilove, supra, at 523, and n. 1. He took the view that "the hostility of the Constitution to racial classifications by government has been manifested in many cases decided by this Court," and that "our cases have made clear that the Constitution is wholly neutral in forbidding such racial discrimination, whatever the race may be of those who are its victims." Id., at 524. Justice Stewart gave no indication that he thought [*65] he was addressing a "novel" proposition, post, at 19. Rather, he relied on the fact that the text of the Fourteenth Amendment extends its guarantee to "persons," and on cases like Buckley, Loving, McLaughlin, Bolling, Hirabayashi, and Korematsu, see Fullilove, supra, at 524-526, as do we today. There is nothing new about the notion that Congress, like the States, may treat people differently because of their race only for compelling reasons.

"The real problem," Justice Frankfurter explained, "is whether a principle shall prevail over its later misapplications." Helvering, 309 U. S., at 122. Metro Broadcasting's untenable distinction between state and federal racial classifications lacks support in our precedent, and undermines the fundamental principle of equal protection as a personal right. In this case, as between that principle and "its later misapplications," the principle must prevail.

D

Our action today makes explicit what Justice Powell thought implicit in the Fullilove lead opinion: federal racial classifications, like those of a State, must serve a compelling governmental interest, and [*66] must be narrowly tailored to further that interest. See Fullilove, 448 U. S., at 496 (concurring opinion). (Recall that the lead opinion in Fullilove "did not adopt . . . the formulas of analysis articulated in such cases as [Bakke]." Id., at 492 (opinion of Burger, C. J.).) Of course, it follows that to the extent (if any) that Fullilove held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling. But we need not decide today whether the program upheld in Fullilove would survive strict scrutiny as our more recent cases have defined it.

Some have questioned the importance of debating the proper standard of review of race-based legislation. See, e. g., post, at 6-7 (STEVENS, J., dissenting); Croson, 488 U. S., at 514-515, and n. 5 (STEVENS, J., concurring in part and concurring in judgment); cf. Metro Broadcasting, 497 U. S., at 610 (O'CONNOR, J., dissenting) ("This dispute regarding the appropriate standard of review may strike some as a lawyers' quibble over words"). But we agree with JUSTICE [*67] STEVENS that, "because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate," and that "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." Fullilove, supra, at 533-535, 537 (dissenting opinion) (footnotes omitted). We think that requiring strict scrutiny is the best way to ensure that courts will consistently give racial classifications that kind of detailed examination, both as to ends and as to means. Korematsu demonstrates vividly that even "the most rigid scrutiny" can sometimes fail to detect an illegitimate racial classification, compare Korematsu, 323 U. S., at 223 ("To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race"), [*68] with Pub. L. 100-383, @ 2(a), 102 Stat. 903-904 ("These actions [of relocating and interning civilians of Japanese ancestry] were carried out without adequate security reasons . . . and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership"). Any retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future.

Finally, we wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." Fullilove, supra, at 519 (Marshall, J., concurring in judgment). The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it. As recently as 1987, for example, every Justice of this Court agreed that the Alabama Department of Public Safety's "pervasive, systematic, and obstinate discriminatory conduct" justified a narrowly tailored race-based remedy. See United States v. Paradise, 480 U. S., at 167 (plurality opinion of Brennan, J.); id., at 190 [*69] (STEVENS, J., concurring in judgment); id., at 196 (O'CONNOR, J., dissenting). When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test this Court has set out in previous cases.

IV

Because our decision today alters the playing field in some important respects, we think it best to remand the case to the lower courts for further consideration in light of the principles we have announced. The Court of Appeals, following Metro Broadcasting and Fullilove, analyzed the case in terms of intermediate scrutiny. It upheld the challenged statutes and regulations because it found them to be "narrowly tailored to achieve [their] significant governmental purpose of providing subcontracting opportunities for small disadvantaged business enterprises." 16 F. 3d, at 1547 (emphasis added). The Court of Appeals did not decide the question whether the interests served by the use of subcontractor compensation clauses are properly described as "compelling." It also did not address the question of narrow tailoring in terms of our strict [*70] scrutiny cases, by asking, for example, whether there was "any consideration of the use of race-neutral means to increase minority business participation" in government contracting, Croson, supra, at 507, or whether the program was appropriately limited such that it "will not last longer than the discriminatory effects it is designed to eliminate," Fullilove, supra, at 513 (Powell, J., concurring).

Moreover, unresolved questions remain concerning the details of the complex regulatory regimes implicated by the use of subcontractor compensation clauses. For example, the SBA's 8(a) program requires an individualized inquiry into the economic disadvantage of every participant, see 13 CFR @ 124.106(a) (1994), whereas the DOT's regulations implementing STURAA @ 106(c) do not require certifying authorities to make such individualized inquiries, see 49 CFR @ 23.62 (1994); 49 CFR pt. 23, subpt. D, App. C (1994). And the regulations seem unclear as to whether 8(d) subcontractors must make individualized showings, or instead whether the race-based presumption applies both to social and economic disadvantage, compare 13 CFR @ 124.106(b) (apparently requiring 8(d) participants [*71] to make an individualized showing), with 48 CFR @ 19.703(a)(2) (1994) (apparently allowing 8(d) subcontractors to invoke the race-based presumption for social and economic disadvantage). See generally Part I, supra. We also note an apparent discrepancy between the definitions of which socially disadvantaged individuals qualify as economically disadvantaged for the 8(a) and 8(d) programs; the former requires a showing that such individuals' ability to compete has been impaired "as compared to others in the same or similar line of business who are not socially disadvantaged," 13 CFR @ 124.106(a)(1)(i) (1994) (emphasis added), while the latter requires that showing only "as compared to others in the same or similar line of business," @ 124.106(b)(1). The question whether any of the ways in which the Government uses subcontractor compensation clauses can survive strict scrutiny, and any relevance distinctions such as these may have to that question, should be addressed in the first instance by the lower courts.

Accordingly, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

CONCURBY: SCALIA [*72] (In Part); THOMAS (In Part)

CONCUR: JUSTICE SCALIA, concurring in part and concurring in the judgment.

I join the opinion of the Court, except Part III-C, and except insofar as it may be inconsistent with the following: In my view, government can never have a "compelling interest" in discriminating on the basis of race in order to "make up" for past racial discrimination in the opposite direction. See Richmond v. J. A. Croson Co., 488 U. S. 469, 520 (1989) (SCALIA, J., concurring in judgment). Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus upon the individual, see Amdt. 14, @ 1 ("Nor shall any State . . . deny to any person" the equal protection of the laws) (emphasis added), and its rejection of dispositions based on race, see Amdt. 15, @ 1 (prohibiting abridgment of the right to vote "on account of race") or based on blood, see Art. III, @ 3 ("No Attainder of Treason shall work Corruption of Blood"); Art. I, @ 9 ("No Title of Nobility shall be granted by the United [*73] States"). To pursue the concept of racial entitlement--even for the most admirable and benign of purposes--is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.

It is unlikely, if not impossible, that the challenged program would survive under this understanding of strict scrutiny, but I am content to leave that to be decided on remand.

JUSTICE THOMAS, concurring in part and concurring in the judgment.

I agree with the majority's conclusion that strict scrutiny applies to all government classifications based on race. I write separately, however, to express my disagreement with the premise underlying JUSTICE STEVENS' and JUSTICE GINSBURG's dissents: that there is a racial paternalism exception to the principle of equal protection. I believe that there is a "moral [and] constitutional equivalence," post, at 3, (STEVENS, J., dissenting), between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. Government cannot make us equal; it can only recognize, [*74] respect, and protect us as equal before the law.

That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged. There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution. See Declaration of Independence ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness").

These programs not only raise grave constitutional questions, they also undermine the moral basis of the equal protection principle. Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that such classifications [*75] ultimately have a destructive impact on the individual and our society. Unquestionably, "invidious [racial] discrimination is an engine of oppression," post, at 3. It is also

true that "remedial" racial preferences may reflect "a desire to foster equality in society," ibid. But there can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called "benign" discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences. Indeed, JUSTICE STEVENS once recognized the real harms stemming from seemingly "benign" discrimination. See Fullilove v. Klutznick, 448 U. S. 448, 545 (1980) (STEVENS, J., dissenting) (noting that [*76] "remedial" race legislation "is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race").

In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. * In each instance, it is racial discrimination, plain and simple.

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* It should be obvious that every racial classification helps, in a narrow sense, some races and hurts others. As to the races benefitted, the classification could surely be called "benign." Accordingly, whether a law relying upon racial taxonomy is "benign" or "malign," ante, at 5 (GINSBURG, J., dissenting); see also, ante, at 6 (STEVENS, J., dissenting) (addressing differences between "invidious" and "benign" discrimination), either turns on "'whose ox is gored,'" Regents of the Univ. of California v. Bakke, 438 U. S. 265, 295 n. 35 (1978) (Powell, J.) (quoting, A. Bickel, The Morality of Consent 133 (1975)), or on distinctions found only in the eye of the beholder.

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[*77]

DISSENTBY: STEVENS; SOUTER; GINSBURG

DISSENT: JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

Instead of deciding this case in accordance with controlling precedent, the Court today delivers a disconcerting lecture about the evils of governmental racial classifications. For its text the Court has selected three propositions, represented by the bywords "skepticism," "consistency," and "congruence." See ante, at 21-22. I shall comment on each of these propositions, then add a few words about stare decisis, and finally explain why I believe this Court has a duty to affirm the judgment of the Court of Appeals.

I

The Court's concept of skepticism is, at least in principle, a good statement of law and of common sense. Undoubtedly, a court should be wary of a governmental decision that relies upon a racial classification. "Because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire

body politic," a reviewing court must satisfy itself that the reasons for any such classification are "clearly identified and unquestionably legitimate." Fullilove v. Klutznick, 448 U. S. 448, 533-535 (1980) [*78] (STEVENS, J., dissenting). This principle is explicit in Chief Justice Burger's opinion, id., at 480; in Justice Powell's concurrence, id., at 496; and in my dissent in Fullilove, id., at 533-534. I welcome its renewed endorsement by the Court today. But, as the opinions in Fullilove demonstrate, substantial agreement on the standard to be applied in deciding difficult cases does not necessarily lead to agreement on how those cases actually should or will be resolved. In my judgment, because uniform standards are often anything but uniform, we should evaluate the Court's comments on "consistency," "congruence," and stare decisis with the same type of skepticism that the Court advocates for the underlying issue.

II

The Court's concept of "consistency" assumes that there is no significant difference between a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of that minority notwithstanding its incidental burden on some members of the majority. In my opinion that assumption [*79] is untenable. There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception of the Government's constitutional obligation to "govern impartially," Hampton v. Mow Sun Wong, 426 U. S. 88, 100 (1976), should ignore this distinction. n1

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n1 As JUSTICE GINSBURG observes, post, at 3, 5-6, the majority's "flexible" approach to "strict scrutiny" may well take into account differences between benign and invidious programs. The majority specifically notes that strict scrutiny can accommodate "'relevant differences,'" ante, at 26; surely the intent of a government actor and the effects of a program are relevant to its constitutionality. See Missouri v. Jenkins, U. S. , (1995) (O'CONNOR,J., concu rring) (slip op., at 10-11) ("Time and again, we have recognized the ample authority legislatures possess to combat racial injustice . . . . It is only by applying strict scrutiny that we can distinguish between unconstitutional discrimination and narrowly tailored remedial programs that legislatures may enact to further the compelling governmental interest in redressing the effects of past discrimination").

Even if this is so, however, I think it is unfortunate that the majority insists on applying the label "strict scrutiny" to benign race-based programs. That label has usually been understood to spell the death of any governmental action to which a court may apply it. The Court suggests today that "strict scrutiny" means something different--something less strict--when applied to benign racial classifications. Although I agree that benign programs deserve different treatment than invidious programs, there is a danger that the fatal language of "strict scrutiny" will skew the analysis and place well-crafted benign programs at unnecessary risk.

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[*80]

To illustrate the point, consider our cases addressing the Federal Government's discrimination against Japanese Americans during World War II, Hirabayashi v. United States, 320 U. S. 81 (1943), and Korematsu v. United States, 323 U. S. 214 (1944). The discrimination at issue in those cases was invidious because the Government imposed special burdens--a curfew and exclusion from certain areas on the West Coast n2 --on the members of a minority class defined by racial and ethnic characteristics. Members of the same racially defined class exhibited exceptional heroism in the service of our country during that War. Now suppose Congress decided to reward that service with a federal program that gave all Japanese-American veterans an extraordinary preference in Government employment. Cf. Personnel Administrator of Mass. v. Feeney, 442 U. S. 256 (1979). If Congress had done so, the same racial characteristics that motivated the discriminatory burdens in Hirabayashi and Korematsu would have defined the preferred class of veterans. Nevertheless, "consistency" surely would not require [*81] us to describe the incidental burden on everyone else in the country as "odious" or "invidious" as those terms were used in those cases. We should reject a concept of "consistency" that would view the special preferences that the National Government has provided to Native Americans since 1834 n3 as comparable to the official discrimination against African Americans that was prevalent for much of our history.

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n2 These were, of course, neither the sole nor the most shameful burdens the Government imposed on Japanese Americans during that War. They were, however, the only such burdens this Court had occasion to address in Hirabayashi and Korematsu. See Korematsu, 323 U. S., at 223 ("Regardless of the true nature of the assembly and relocation centers . . . we are dealing specifically with nothing but an exclusion order").

n3 See Morton v. Mancari, 417 U. S. 535, 541 (1974). To be eligible for the preference in 1974, an individual had to "'be one fourth or more degree Indian blood and be a member of a Federally-recognized tribe.'" Id., at 553, n. 24, quoting 44 BIAM 335, 3.1 (1972). We concluded that the classification was not "racial" because it did not encompass all Native Americans. 417 U. S., at 553-554. In upholding it, we relied in part on the plenary power of Congress to legislate on behalf of Indian tribes. Id., at 551-552. In this case the Government relies, in part, on the fact that not all members of the preferred minority groups are eligible for the preference, and on the special power to legislate on behalf of minorities granted to Congress by @ 5 of the 14th Amendment.

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[*82]

The consistency that the Court espouses would disregard the difference between a "No Trespassing" sign and a welcome mat. It would treat a Dixiecrat Senator's decision to vote against Thurgood Marshall's confirmation in order to keep African Americans off the Supreme Court as on a par with President Johnson's evaluation of his nominee's race as a positive factor. It would equate a law that made black citizens ineligible for military service with a program aimed at recruiting black soldiers. An attempt by the majority to exclude

members of a minority race from a regulated market is fundamentally different from a subsidy that enables a relatively small group of newcomers to enter that market. An interest in "consistency" does not justify treating differences as though they were similarities.

The Court's explanation for treating dissimilar race-based decisions as though they were equally objectionable is a supposed inability to differentiate between "invidious" and "benign" discrimination. Ante, at 23-25. But the term "affirmative action" is common and well understood. Its presence in everyday parlance shows that people understand the difference between good intentions and bad. As [*83] with any legal concept, some cases may be difficult to classify, n4 but our equal protection jurisprudence has identified a critical difference between state action that imposes burdens on a disfavored few and state action that benefits the few "in spite of" its adverse effects on the many. Feeney, 442 U. S., at 279.

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n4 For example, in Richmond v. J. A. Croson Co., 488 U. S. 469 (1989), a majority of the members of the city council that enacted the race-based set-aside were of the same race as its beneficiaries.

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Indeed, our jurisprudence has made the standard to be applied in cases of invidious discrimination turn on whether the discrimination is "intentional," or whether, by contrast, it merely has a discriminatory "effect." Washington v. Davis, 426 U. S. 229 (1976). Surely this distinction is at least as subtle, and at least as difficult to apply, see id., at 253-254 (concurring opinion), [*84] as the usually obvious distinction between a measure intended to benefit members of a particular minority race and a measure intended to burden a minority race. A state actor inclined to subvert the Constitution might easily hide bad intentions in the guise of unintended "effects"; but I should think it far more difficult to enact a law intending to preserve the majority's hegemony while casting it plausibly in the guise of affirmative action for minorities.

Nothing is inherently wrong with applying a single standard to fundamentally different situations, as long as that standard takes relevant differences into account. For example, if the Court in all equal protection cases were to insist that differential treatment be justified by relevant characteristics of the members of the favored and disfavored classes that provide a legitimate basis for disparate treatment, such a standard would treat dissimilar cases differently while still recognizing that there is, after all, only one Equal Protection Clause. See Cleburne v. Cleburne Living Center, Inc., 473 U. S. 432, 451-455 (1985) (STEVENS, J., concurring); San Antonio Independent School Dist. v. Rodriguez, 411 U. S. 1, 98-110 (1973) [*85] (Marshall, J., dissenting). Under such a standard, subsidies for disadvantaged businesses may be constitutional though special taxes on such businesses would be invalid. But a single standard that purports to equate remedial preferences with invidious discrimination cannot be defended in the name of "equal protection."

Moreover, the Court may find that its new "consistency" approach to race-based classifications is difficult to square with its insistence upon rigidly separate categories for discrimination against different classes of individuals. For example, as the law currently stands, the Court will apply

"intermediate scrutiny" to cases of invidious gender discrimination and "strict scrutiny" to cases of invidious race discrimination, while applying the same standard for benign classifications as for invidious ones. If this remains the law, then today's lecture about "consistency" will produce the anomalous result that the Government can more easily enact affirmative-action programs to remedy discrimination against women than it can enact affirmative-action programs to remedy discrimination against African Americans--even though the primary purpose of the Equal Protection Clause [*86] was to end discrimination against the former slaves. SeeAssociated General Contractors of Cal., Inc. v. SanFrancisco, 813 F. 2d 922 (CA9 1987) (striking down racial preference under strict scrutiny while upholding gender preference under intermediate scrutiny). When a court becomes preoccupied with abstract standards, it risks sacrificing common sense at the altar of formal consistency.

As a matter of constitutional and democratic principle, a decision by representatives of the majority to discriminate against the members of a minority race is fundamentally different from those same representatives' decision to impose incidental costs on the majority of their constituents in order to provide a benefit to a disadvantaged minority. n5 Indeed, as I have previously argued, the former is virtually always repugnant to the principles of a free and democratic society, whereas the latter is, in some circumstances, entirely consistent with the ideal of equality. Wygant v. Jackson Board of Ed., 476 U. S. 267, 316-317 (1986) (STEVENS, J., dissenting). n6 By insisting on a doctrinaire notion of "consistency" in the standard [*87] applicable to all race-based governmental actions, the Court obscures this essential dichotomy.

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n5 In his concurrence, JUSTICE THOMAS argues that the most significant cost associated with an affirmative-action program is its adverse stigmatic effect on its intended beneficiaries. Ante, at 2-3. Although I agree that this cost may be more significant than many people realize, see Fullilove, 448 U. S., at 545 (STEVENS, J., dissenting), I do not think it applies to the facts of this case. First, this is not an argument that petitioner Adarand, a white-owned business, has standing to advance. No beneficiaries of the specific program under attack today have challenged its constitutionality--perhaps because they do not find the preferences stigmatizing, or perhaps because their ability to opt out of the program provides them all the relief they would need. Second, even if the petitioner in this case were a minority-owned business challenging the stigmatizing effect of this program, I would not find JUSTICE THOMAS' extreme proposition--that there is a moral and constitutional equivalence between an attempt to subjugate and an attempt to redress the effects of a caste system, ante, at 1--at all persuasive. It is one thing to question the wisdom of affirmative-action programs: there are many responsible arguments against them, including the one based upon stigma, that Congress might find persuasive when it decides whether to enact or retain race-based preferences. It is another thing altogether to equate the many well-meaning and intelligent lawmakers and their constituents--whether members of majority or minority races--who have supported affirmative action over the years, to segregationists and bigots.

Finally, although JUSTICE THOMAS is more concerned about the potential effects of these programs than the intent of those who enacted them (a proposition at odds with this Court's jurisprudence, see Washington v. Davis, 426 U. S. 229 (1976), but not without a strong element of common sense, see id., at 252-256 (STEVENS, J., concurring); id., at 256-270 (BRENNAN, J.,

dissenting)), I am not persuaded that the psychological damage brought on by affirmative action is as severe as that engendered by racial subordination. That, in any event, is a judgment the political branches can be trusted to make. In enacting affirmative action programs, a legislature intends to remove obstacles that have unfairly placed individuals of equal qualifications at a competitive disadvantage. See Fullilove, 448 U. S., at 521 (Marshall, J., concurring in judgment). I do not believe such action, whether wise or unwise, deserves such an invidious label as "racial paternalism," ante, at 1 (opinion of THOMAS, J.). If the legislature is persuaded that its program is doing more harm than good to the individuals it is designed to benefit, then we can expect the legislature to remedy the problem. Significantly, this is not true of a government action based on invidious discrimination. [*88]

n6 As I noted in Wygant:

"There is . . . a critical difference between a decision to exclude a member of a minority race because of his or her skin color and a decision to include more members of the minority in a school faculty for that reason.

"The exclusionary decision rests on the false premise that differences in race, or in the color of a person's skin, reflect real differences that are relevant to a person's right to share in the blessings of a free society. As noted, that premise is 'utterly irrational,' Cleburne v. Cleburne Living Center, 473 U. S. 432, 452 (1985), and repugnant to the principles of a free and democratic society. Nevertheless, the fact that persons of different races do, indeed have differently colored skin, may give rise to a belief that there is some significant difference between such persons. The inclusion of minority teachers in the educational process inevitably tends to dispel that illusion whereas their exclusion could only tend to foster it. The inclusionary decision is consistent with the principle that all men are created equal; the exclusionary decision is at war with that principle. One decision accords with the Equal Protection Clause of the Fourteenth Amendment; the other does not. Thus, consideration of whether the consciousness of race is exclusionary or inclusionary plainly distinguishes the Board's valid purpose in this case from a race-conscious decision that would reinforce assumptions of inequality." 476 U. S., at 316-317 (STEVENS, J., dissenting).

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III

The Court's concept of "congruence" assumes that there is no significant difference between a decision by the Congress of the United States to adopt an affirmative-action program and such a decision by a State or a municipality. In my opinion that assumption is untenable. It ignores important practical and legal differences between federal and state or local decisionmakers.

These differences have been identified repeatedly and consistently both in opinions of the Court and in separate opinions authored by members of today's majority. Thus, in Metro Broadcasting, Inc. v. FCC, 497 U. S. 547 (1990), in which we upheld a federal program designed to foster racial diversity in broadcasting, we identified the special "institutional competence" of our National Legislature. Id., at 563. "It is of overriding significance in these cases," we were careful to emphasize, "that the FCC's minority ownership

programs have been specifically approved--indeed, mandated--by Congress." Ibid. We recalled the several opinions in Fullilove that admonished this Court to "'approach our task with appropriate deference to the Congress, [*90] a co-equal branch charged by the Constitution with the power to "provide for the . . . general Welfare of the United States" and "to enforce, by appropriate legislation," the equal protection guarantees of the Fourteenth Amendment.' [Fullilove, 448 U. S.], at 472; see also id., at 491; id., at 510, and 515-516, n. 14 (Powell, J., concurring); id., at 517-520 (MARSHALL, J., concurring in judgment)." Id., at 563. We recalled that the opinions of Chief Justice Burger and Justice Powell in Fullilove had "explained that deference was appropriate in light of Congress' institutional competence as the National Legislature, as well as Congress' powers under the Commerce Clause, the Spending Clause, and the Civil War Amendments." Ibid. (citations and footnote omitted).

The majority in Metro Broadcasting and the plurality in Fullilove were not alone in relying upon a critical distinction between federal and state programs. In his separate opinion in Richmond v. J. A. Croson Co., 488 U. S. 469, 520-524 (1989), JUSTICE SCALIA discussed the basis for this distinction. He observed that "it is one thing to permit racially based [*91] conduct by the Federal Government--whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment, see U. S. Const., Amdt. 14, @ 5--and quite another to permit it by the precise entities against whose conduct in matters of race that Amendment was specifically directed, see Amdt. 14, @ 1." Id., at 521-522. Continuing, JUSTICE SCALIA explained why a "sound distinction between federal and state (or local) action based on race rests not only upon the substance of the Civil War Amendments, but upon social reality and governmental theory." Id., at 522.

"What the record shows, in other words, is that racial discrimination against any group finds a more ready expression at the state and local than at the federal level. To the children of the Founding Fathers, this should come as no surprise. An acute awareness of the heightened danger of oppression from political factions in small, rather than large, political units dates to the very beginning of our national history. See G. Wood, The Creation of the American Republic, 1776-1787, pp. 499-506 (1969). As James Madison observed in support [*92] of the proposed Constitution's enhancement of national powers:

"'The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plan of oppression. Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.' The Federalist No. 10, pp. 82-84 (C. Rossiter ed. 1961)." Id., at 523 (SCALIA, J., concurring in judgment).

In her plurality opinion in Croson, JUSTICE O'CONNOR also emphasized the importance of this distinction when she responded to the City's argument that Fullilove was controlling. She wrote:

"What appellant ignores is that Congress, [*93] unlike any State or political subdivision, has a specific constitutional mandate to enforce the

dictates of the Fourteenth Amendment. The power to 'enforce' may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations. The Civil War Amendments themselves worked a dramatic change in the balance between congressional and state power over matters of race." 488 U. S., at 490 (plurality opinion of O'CONNOR, J., joined by REHNQUIST, C.J., and White, J.) (citations omitted).

An additional reason for giving greater deference to the National Legislature than to a local law-making body is that federal affirmative-action programs represent the will of our entire Nation's elected representatives, whereas a state or local program may have an impact on nonresident entities who played no part in the decision to enact it. Thus, in the state or local context, individuals who were unable to vote for the local representatives who enacted a race-conscious program may nonetheless feel the effects of that program. This difference recalls the goals of the Commerce [*94] Clause, U. S. Const., Art. I, @ 8, cl. 3, which permits Congress to legislate on certain matters of national importance while denying power to the States in this area for fear of undue impact upon out-of-state residents. See Southern Pacific Co. v. Arizona ex rel. Sullivan, 325 U. S. 761, 767-768, n. 2 (1945) ("To the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected").

Ironically, after all of the time, effort, and paper this Court has expended in differentiating between federal and state affirmative action, the majority today virtually ignores the issue. See ante, at 28-29. It provides not a word of direct explanation for its sudden and enormous departure from the reasoning in past cases. Such silence, however, cannot erase the difference between Congress' institutional competence and constitutional authority to overcome historic racial subjugation and the States' lesser power to do so.

Presumably, the majority is now satisfied that its theory of "congruence" between the [*95] substantive rights provided by the Fifth and Fourteenth Amendments disposes of the objection based upon divided constitutional powers. But it is one thing to say (as no one seems to dispute) that the Fifth Amendment encompasses a general guarantee of equal protection as broad as that contained within the Fourteenth Amendment. It is another thing entirely to say that Congress' institutional competence and constitutional authority entitles it to no greater deference when it enacts a program designed to foster equality than the deference due a State legislature. n7 The latter is an extraordinary proposition; and, as the foregoing discussion demonstrates, our precedents have rejected it explicitly and repeatedly. n8

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n7 Despite the majority's reliance on Korematsu v. United States, 323 U. S. 214 (1944), ante, at 12, that case does not stand for the proposition that federal remedial programs are subject to strict scrutiny. Instead, Korematsu specifies that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect." 323 U. S., at 216, quoted ante, at 12 (emphasis added). The programs at issue in this case (as in most affirmative-action cases) do not "curtail the civil rights of a single racial group"; they benefit certain racial groups and impose an indirect burden on the majority. [*96]

n8 We have rejected this proposition outside of the affirmative-action context as well. In Hampton v. Mow Sun Wong, 426 U. S. 88, 100 (1976), we held:

"The federal sovereign, like the States, must govern impartially. The concept of equal justice under law is served by the Fifth Amendment's guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment. Although both Amendments require the same type of analysis, see Buckley v. Valeo, 424 U. S. 1, 93 [(1976)], the Court of Appeals correctly stated that the two protections are not always coextensive. Not only does the language of the two Amendments differ, but more importantly, there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State. On the other hand, when a federal rule is applicable to only a limited territory, such as the District of Columbia, or an insular possession, and when there is no special national interest involved, the Due Process Clause has been construed as having the same significance as the Equal Protection Clause."

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[*97]

Our opinion in Metro Broadcasting relied on several constitutional provisions to justify the greater deference we owe to Congress when it acts with respect to private individuals. 497 U. S., at 563. In the programs challenged in this case, Congress has acted both with respect to private individuals and, as in Fullilove, with respect to the States themselves. n9 When Congress does this, it draws its power directly from @ 5 of the Fourteenth Amendment. n10 That section reads: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." One of the "provisions of this article" that Congress is thus empowered to enforce reads: "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., Amdt. 14, @ 1. The Fourteenth Amendment directly empowers Congress at the same time it expressly limits the States. n11 This is no accident. It represents our Nation's consensus, [*98] achieved after hard experience throughout our sorry history of race relations, that the Federal Government must be the primary defender of racial minorities against the States, some of which may be inclined to oppress such minorities. A rule of "congruence" that ignores a purposeful "incongru-ity" so fundamental to our system of government is unacceptable.

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n9 The funding for the preferences challenged in this case comes from the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), 101 Stat. 132, in which Congress has granted funds to the States in exchange for a commitment to foster subcontracting by disadvantaged business enterprises, or "DBE's." STURAA is also the source of funding for DBE preferences in federal highway contracting. Approximately 98% of STURAA's funding is allocated to the States. Brief for Respondents 38, n. 34. Moreover, under STURAA States are empowered to certify businesses as "disadvantaged" for purposes of receiving subcontracting preferences in both state and federal contracts. STURAA @ 106(c)(4), 101 Stat. 146.1

In this case, Adarand has sued only the federal officials responsible for

implementing federal highway contracting policy; it has not directly challenged DBE preferences granted in state contracts funded by STURAA. It is not entirely clear, then, whether the majority's "congruence" rationale would apply to federally regulated state contracts, which may conceivably be within the majority's view of Congress' @ 5 authority even if the federal contracts are not. See Metro Broadcasting, 497 U. S., at 603-604 (O'CONNOR, J., dissenting). As I read the majority's opinion, however, it draws no distinctions between direct federal preferences and federal preferences achieved through subsidies to States. The extent to which STURAA intertwines elements of direct federal regulations with elements of federal conditions on grants to the States would make such a distinction difficult to sustain. [*99]

n10 Because Congress has acted with respect to the States in enacting STURAA, we need not revisit today the difficult question of @ 5's application to pure federal regulation of individuals.

n11 We have read @ 5 as a positive grant of authority to Congress, not just to punish violations, but also to define and expand the scope of the Equal Protection Clause. Katzenbach v. Morgan, 384 U. S. 641 (1966). In Katzenbach, this meant that Congress under @ 5 could require the States to allow non-English-speaking citizens to vote, even if denying such citizens a vote would not have been an independent violation of @ 1. Id., at 648-651. Congress, then, can expand the coverage of @ 1 by exercising its power under @ 5 when it acts to foster equality. Congress has done just that here; it has decided that granting certain preferences to minorities best serves the goals of equal protection.

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In my judgment, the Court's novel doctrine of "congruence" is seriously misguided. Congressional deliberations about a matter as important as affirmative [*100] action should be accorded far greater deference than those of a State or municipality.

IV

The Court's concept of stare decisis treats some of the language we have used in explaining our decisions as though it were more important than our actual holdings. In my opinion that treatment is incorrect.

This is the third time in the Court's entire history that it has considered the constitutionality of a federal affirmative-action program. On each of the two prior occasions, the first in 1980, Fullilove v. Klutznick, 448 U. S. 448, and the second in 1990, Metro Broadcasting, Inc. v. FCC, 497 U. S. 547, the Court upheld the program. Today the Court explicitly overrules Metro Broadcasting (at least in part), ante, at 25-26, and undermines Fullilove by recasting the standard on which it rested and by calling even its holding into question, ante, at 34. By way of explanation, JUSTICE O'CONNOR advises the federal agencies and private parties that have made countless decisions in reliance on those cases that "we do not depart from the fabric of the law; we restore it." Ante, at 32. A skeptical observer [*101] might ask whether this pronouncement is a faithful application of the doctrine of stare decisis. n12 A brief comment on each of the two ailing cases may provide the answer.

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n12 Our skeptical observer might also notice that JUSTICE O'CONNOR's explanation for departing from settled precedent is joined only by JUSTICE KENNEDY. Ante, at 1. Three members of the majority thus provide no explanation whatsoever for their unwillingness to adhere to the doctrine of stare decisis.

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In the Court's view, our decision in Metro Broadcasting was inconsistent with the rule announced in Richmond v. J. A. Croson Co., 488 U. S. 469 (1989). Ante, at 23-24. But two decisive distinctions separate those two cases. First, Metro Broadcasting involved a federal program, whereas Croson involved a city ordinance. Metro Broadcasting thus drew primary support from Fullilove, which predated Croson and which Croson distinguished on the grounds of the federal-state dichotomy [*102] that the majority today discredits. Although members of today's majority trumpeted the importance of that distinction in Croson, they now reject it in the name of "congruence." It is therefore quite wrong for the Court to suggest today that overruling Metro Broadcasting merely restores the status quo ante, for the law at the time of that decision was entirely open to the result the Court reached. Today's decision is an unjustified departure from settled law.

Second, Metro Broadcasting's holding rested on more than its application of "intermediate scrutiny." Indeed, I have always believed that, labels notwithstanding, the FCC program we upheld in that case would have satisfied any of our various standards in affirmative-action cases--including the one the majority fashions today. What truly distinguishes Metro Broadcasting from our other affirmative-action precedents is the distinctive goal of the federal program in that case. Instead of merely seeking to remedy past discrimination, the FCC program was intended to achieve future benefits in the form of broadcast diversity. Reliance on race as a legitimate means of achieving diversity was first endorsed by Justice [*103] Powell in Regents of Univ. of California v. Bakke, 438 U. S. 265, 311-319 (1978). Later, in Wygant v. Jackson Board of Ed., 476 U. S. 267 (1986), I also argued that race is not always irrelevant to governmental decisionmaking, see id., at 314-315 (STEVENS, J., dissenting); in response, JUSTICE O'CONNOR correctly noted that, although the School Board had relied on an interest in providing black teachers to serve as role models for black students, that interest "should not be confused with the very different goal of promoting racial diversity among the faculty." Id., at 288, n. She then added that, because the school board had not relied on an interest in diversity, it was not "necessary to discuss the magnitude of that interest or its applicability in this case." Ibid.

Thus, prior to Metro Broadcasting, the interest in diversity had been mentioned in a few opinions, but it is perfectly clear that the Court had not yet decided whether that interest had sufficient magnitude to justify a racial classification. Metro Broadcasting, of course, answered [*104] that question in the affirmative. The majority today overrules Metro Broadcasting only insofar as it is "inconsistent with [the] holding" that strict scrutiny applies to "benign" racial classifications promulgated by the Federal Government. Ante, at 26. The proposition that fostering diversity may provide a sufficient interest to justify such a program is not inconsistent with the Court's holding today--indeed, the question is not remotely presented in this case--and I do not take the Court's opinion to diminish that aspect of our decision in Metro

Broadcasting.

The Court's suggestion that it may be necessary in the future to overrule Fullilove in order to restore the fabric of the law, ante, at 34, is even more disingenuous than its treatment of Metro Broadcasting. For the Court endorses the "strict scrutiny" standard that Justice Powell applied in Bakke, see ante, at 22-23, and acknowledges that he applied that standard in Fullilove as well, ante, at 16-17. Moreover, Chief Justice Burger also expressly concluded that the program we considered in Fullilove was valid under any of the tests articulated in Bakke, which of course included [*105] Justice Powell's. 448 U. S., at 492. The Court thus adopts a standard applied in Fullilove at the same time it questions that case's continued vitality and accuses it of departing from prior law. I continue to believe that the Fullilove case was incorrectly decided, see id., at 532-554 (STEVENS, J., dissenting), but neither my dissent nor that filed by Justice Stewart, id., at 522-532, contained any suggestion that the issue the Court was resolving had been decided before. n13 As was true of Metro Broadcasting, the Court in Fullilove decided an important, novel, and difficult question. Providing a different answer to a similar question today cannot fairly be characterized as merely "restoring" previously settled law.

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n13 Of course, Justice Stewart believed that his view, disapproving of racial classifications of any kind, was consistent with this Court's precedents. See ante, at 33, citing 448 U. S., at 523-526. But he did not claim that the question whether the Federal Government could engage in race-conscious affirmative action had been decided before Fullilove. The fact that a justice dissents from an opinion means that he disagrees with the result; it does not usually mean that he believes the decision so departs from the fabric of the law that its reasoning ought to be repudiated at the next opportunity. Much less does a dissent bind or authorize a later majority to reject a precedent with which it disagrees.

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V

The Court's holding in Fullilove surely governs the result in this case. The Public Works Employment Act of 1977 (1977 Act), 91 Stat. 116, which this Court upheld in Fullilove, is different in several critical respects from the portions of the Small Business Act (SBA), 72 Stat. 384, as amended, 15 U. S. C. @ 631 et seq., and the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), 101 Stat. 132, challenged in this case. Each of those differences makes the current program designed to provide assistance to disadvantaged business enterprises (DBE's) significantly less objectionable than the 1977 categorical grant of $ 400 million in exchange for a 10% set-aside in public contracts to "a class of investors defined solely by racial characteristics." Fullilove, 448 U. S., at 532 (STEVENS, J., dissenting). In no meaningful respect is the current scheme more objectionable than the 1977 Act. Thus, if the 1977 Act was constitutional, then so must be the SBA and STURAA. Indeed, even if my dissenting views in Fullilove had prevailed, this program would be valid.

Unlike the 1977 Act, [*107] the present statutory scheme does not make race the sole criterion of eligibility for participation in the program. Race

does give rise to a rebuttable presumption of social disadvantage which, at least under STURAA, n14 gives rise to a second rebuttable presumption of economic disadvantage. 49 CFR @ 23.62 (1994). But a small business may qualify as a DBE, by showing that it is both socially and economically disadvantaged, even if it receives neither of these presumptions. 13 CFR @@ 124.105(c), 124.106 (1995); 48 CFR @ 19.703 (1994); 49 CFR pt. 23, subpt. D., Appendixes A and C (1994). Thus, the current preference is more inclusive than the 1977 Act because it does not make race a necessary qualification.

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n14 STURAA accords a rebuttable presumption of both social and economic disadvantage to members of racial minority groups. 49 CFR @ 23.62 (1994). In contrast, @ 8(a) of the SBA accords a presumption only of social disadvantage, 13 CFR @ 124.105(b) (1995); the applicant has the burden of demonstrating economic disadvantage, id., @ 124.106. Finally, @ 8(d) of the SBA accords at least a presumption of social disadvantage, but it is ambiguous as to whether economic disadvantage is presumed or must be shown. See 15 U. S. C. @ 637(d)(3) (1988 ed. and Supp. V); 13 CFR @ 124.601 (1995).

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More importantly, race is not a sufficient qualification. Whereas a millionaire with a long history of financial successes, who was a member of numerous social clubs and trade associations, would have qualified for a preference under the 1977 Act merely because he was an Asian American or an African American, see Fullilove, 448 U. S., at 537-538, 540, 543-544, and n. 16, 546 (STEVENS, J., dissenting), neither the SBA nor STURAA creates any such anomaly. The DBE program excludes members of minority races who are not, in fact, socially or economically disadvantaged. n15 13 CFR @ 124.106(a)(ii) (1995); 49 CFR @ 23.69 (1994). The presumption of social disadvantage reflects the unfortunate fact that irrational racial prejudice--along with its lingering effects--still survives. n16 The presumption of economic disadvantage embodies a recognition that success in the private sector of the economy is often attributable, in part, to social skills and relationships. Unlike the 1977 set-asides, the current preference is designed to overcome the social and economic disadvantages that are often associated with racial characteristics. If, in a particular case, these [*109] disadvantages are not present, the presumptions can be rebutted. 13 CFR @@ 124.601-124.610 (1995); 49 CFR @ 23.69 (1994). The program is thus designed to allow race to play a part in the decisional process only when there is a meaningful basis for assuming its relevance. In this connection, I think it is particularly significant that the current program targets the negotiation of subcontracts between private firms. The 1977 Act applied entirely to the award of public contracts, an area of the economy in which social relationships should be irrelevant and in which proper supervision of government contracting officers should preclude any discrimination against particular bidders on account of their race. In this case, in contrast, the program seeks to overcome barriers of prejudice between private parties--specifically, between general contractors and subcontractors. The SBA and STURAA embody Congress' recognition that such barriers may actually handicap minority firms seeking business as subcontractors from established leaders in the industry that have a history of doing business with their golfing partners. Indeed, minority subcontractors may face more obstacles than direct, intentional [*110] racial prejudice: they may face particular barriers

simply because they are more likely to be new in the business and less likely to know others in the business. Given such difficulties, Congress could reasonably find that a minority subcontractor is less likely to receive favors from the entrenched businesspersons who award subcontracts only to people with whom--or with whose friends--they have an existing relationship. This program, then, if in part a remedy for past discrimination, is most importantly a forward-looking response to practical problems faced by minority subcontractors.

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n15 The Government apparently takes this exclusion seriously. See Autek Systems Corp. v. United States, 835 F. Supp. 13 (DC 1993) (upholding Small Business Administration decision that minority business owner's personal income disqualified him from DBE status under @ 8(a) program), aff'd, 43 F. 3d 712 (CADC 1994).

n16 "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." Ante, at 35.

"Our findings clearly state that groups such as black Americans, Hispanic Americans, and Native Americans, have been and continue to be discriminated against and that this discrimination has led to the social disadvantagement of persons identified by society as members of those groups." 124 Cong. Rec. 34097 (1978)

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The current program contains another forward-looking component that the 1977 set-asides did not share. Section 8(a) of the SBA provides for periodic review of the status of DBE's, 15 U. S. C. @ 637(a)(B)-(C) (1988 ed., Supp. V); 13 CFR @ 124.602(a) (1995), n17 and DBE status can be challenged by a competitor at any time under any of the routes to certification. 13 CFR @ 124.603 (1995); 49 CFR @ 23.69 (1994). Such review prevents ineligible firms from taking part in the program solely because of their minority ownership, even when those firms were once disadvantaged but have since become successful. The emphasis on review also indicates the Administration's anticipation that after their presumed disadvantages have been overcome, firms will "graduate" into a status in which they will be able to compete for business, including prime contracts, on an equal basis. 13 CFR @ 124.208 (1995). As with other phases of the statutory policy of encouraging the formation and growth of small business enterprises, this program is intended to facilitate entry and increase competition in the free market.

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n17 The Department of Transportation strongly urges States to institute periodic review of businesses certified as DBE's under STURAA, 49 CFR pt. 23, subpt. D, App. A (1994), but it does not mandate such review. The Government points us to no provisions for review of @ 8(d) certification, although such review may be derivative for those businesses that receive @ 8(d) certification as a result of @ 8(a) or STURAA certification.

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Significantly, the current program, unlike the 1977 set-aside, does not establish any requirement--numerical or otherwise--that a general contractor must hire DBE subcontractors. The program we upheld in Fullilove required that 10% of the federal grant for every federally funded project be expended on minority business enterprises. In contrast, the current program contains no quota. Although it provides monetary incentives to general contractors to hire DBE subcontractors, it does not require them to hire DBE's, and they do not lose their contracts if they fail to do so. The importance of this incentive to general contractors (who always seek to offer the lowest bid) should not be underestimated; but the preference here is far less rigid, and thus more narrowly tailored, than the 1977 Act. Cf. Bakke, 438 U. S., at 319-320 (opinion of Powell, J.) (distinguishing between numerical set-asides and consideration of race as a factor).

Finally, the record shows a dramatic contrast between the sparse deliberations that preceded the 1977 Act, see Fullilove, 448 U. S., at 549-550 (STEVENS, J., dissenting), and the extensive hearings conducted in several [*113] Congresses before the current program was developed. n18 However we might evaluate the benefits and costs--both fiscal and social--of this or any other affirmative-action program, our obligation to give deference to Congress' policy choices is much more demanding in this case than it was in Fullilove. If the 1977 program of race-based set-asides satisfied the strict scrutiny dictated by Justice Powell's vision of the Constitution--a vision the Court expressly endorses today--it must follow as night follows the day that the Court of Appeals' judgment upholding this more carefully crafted program should be affirmed.

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n18 The Government points us to the following legislative history:

H. R. 5612, To amend the Small Business Act to Extend the current SBA 8(a) Pilot Program: Hearing on H. R. 5612 before the Senate Select Committee on Small Business, 96th Cong., 2d Sess. (1980); Small and Minority Business in the Decade of the 1980's (Part 1): Hearings before the House Committee on Small Business, 97th Cong., 1st Sess. (1981); Minority Business and Its Contribution to the U. S. Economy: Hearing Before the Senate Committee on Small Business, 97th Cong., 2d Sess. (1982); Federal Contracting Opportunities for Minority and Women-Owned Businesses--An Examination of the 8(d) Subcontracting Program: Hearings before the Senate Committee on Small Business, 98th Cong., 1st Sess. (1983); Women Entrepreneurs--Their Success and Problems: Hearing before the Senate Committee on Small Business, 98th Cong., 2d Sess. (1984); State of Hispanic Small Business in America: Hearing Before the Subcommittee on SBA and SBIC Authority, Minority Enterprise, and General Small Business Problems of the House Committee on Small Business, 99th Cong., 1st Sess. (1985); Minority Enterprise and General Small Business Problems: Hearing before the Subcommittee on SBA and SBIC Authority, Minority Enterprise, and General Small Business Problems of the House Committee on Small Business, 99th Cong., 2d Sess. (1986); Disadvantaged Business Set-Asides in Transportation Construction Projects: Hearings before the Subcommittee on Procurement, Innovation, and Minority Enterprise Development of the House Committee on Small Business, 100th Cong., 2d Sess. (1988); Barriers to Full Minority Participation in Federally Funded Highway Construction Projects:

Hearing Before a Subcommittee of the House Committee on Government Operations, 100th Cong., 2d Sess. (1988); Surety Bonds and Minority Contractors: Hearing before the Subcommittee on Commerce, Consumer Protection, and Competitiveness of the House Committee on Energy and Commerce, 100th Cong., 2d Sess. (1988); Small Business Problems: Hearings before the House Committee on Small Business, 100th Cong., 1st Sess. (1987). See Brief for Respondents 9-10, n. 9.

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VI

My skeptical scrutiny of the Court's opinion leaves me in dissent. The majority's concept of "consistency" ignores a difference, fundamental to the idea of equal protection, between oppression and assistance. The majority's concept of "congruence" ignores a difference, fundamental to our constitutional system, between the Federal Government and the States. And the majority's concept of stare decisis ignores the force of binding precedent. I would affirm the judgment of the Court of Appeals.

JUSTICE SOUTER, with whom JUSTICE GINSBURG and JUSTICE BREYER join, dissenting.

As this case worked its way through the federal courts prior to the grant of certiorari that brought it here, petitioner Adarand Constructors, Inc. was understood to have raised only one significant claim: that before a federal agency may exceed the goals adopted by Congress in implementing a race-based remedial program, the Fifth and Fourteenth Amendments require the agency to make specific findings of discrimination, as under Richmond v. J. A. Croson Co., 488 U. S. 469 (1989), sufficient to justify surpassing the congressional objective. See 16 F. 3d 1537, 1544 (CA10 1994) [*115] ("The gravamen of Adarand's argument is that the CFLHD must make particularized findings of past discrimination to justify its race-conscious SCC program under Croson because the precise goals of the challenged SCC program were fashioned and specified by an agency and not by Congress"); Adarand Constructors, Inc. v. Skinner, 790 F. Supp. 240, 242 (Colo. 1992) ("Plaintiff's motion for summary judgment seeks a declaratory judgment and permanent injunction against the DOT, the FHA and the CFLHD until specific findings of discrimination are made by the defendants as allegedly required by City of Richmond v. Croson"); cf. Complaint P28, App. 20 (federal regulations violate the Fourteenth and Fifteenth Amendments by requiring "the use of racial and gender preferences in the award of federally financed highway construction contracts, without any findings of past discrimination in the award of such contracts").

Although the petition for certiorari added an antecedent question challenging the use, under the Fifth and Fourteenth Amendments, of any standard below strict scrutiny to judge the constitutionality of the statutes under which the respondents [*116] acted, I would not have entertained that question in this case. The statutory scheme must be treated as constitutional if Fullilove v. Klutznick, 448 U. S. 448 (1980), is applied, and petitioners did not identify any of the factual premises on which Fullilove rested as having disappeared since that case was decided.

As the Court's opinion explains in detail, the scheme in question provides financial incentives to general contractors to hire subcontractors who have

been certified as disadvantaged business enterprises on the basis of certain race-based presumptions. See generally ante, at 3-6. These statutes (or the originals, of which the current ones are reenactments) have previously been justified as providing remedies for the continuing effects of past discrimination, see, e.g., Fullilove, supra, at 465-466 (citing legislative history describing SBA @ 8(a) as remedial); S. Rep. No. 100-4, p. 11 (1987) (Committee Report stating that DBE provision of STURAA was "necessary to remedy the discrimination faced by socially and economically disadvantaged persons"), and the Government has so defended them in this case, Brief for Respondents [*117] 33. Since petitioner has not claimed the obsolescence of any particular fact on which the Fullilove Court upheld the statute, no issue has come up to us that might be resolved in a way that would render Fullilove inapposite. See, e.g., 16 F. 3d, at 1544 ("Adarand has stipulated that section 502 of the Small Business Act . . . satisfies the evidentiary requirements of Fullilove"); Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment in No. 90-C-1413 (D. Colo.), p. 12 (Fullilove is not applicable to the case at bar because "first and foremost, Fullilove stands for only one proposition relevant here: the ability of the U. S. Congress, under certain limited circumstances, to adopt a race-based remedy").

In these circumstances, I agree with JUSTICE STEVENS's conclusion that stare decisis compels the application of Fullilove. Although Fullilove did not reflect doctrinal consistency, its several opinions produced a result on shared grounds that petitioner does not attack: that discrimination in the construction industry had been subject to government acquiescence, with effects that remain and [*118] that may be addressed by some preferential treatment falling within the congressional power under @ 5 of the Fourteenth Amendment. n1 Fullilove, 448 U. S., at 477-478 (opinion of Burger, C. J.); id., at 503 (Powell, J., concurring); id., at 520-521 (Marshall, J., concurring in judgment). Once Fullilove is applied, as JUSTICE STEVENS points out, it follows that the statutes in question here (which are substantially better tailored to the harm being remedied than the statute endorsed in Fullilove, see ante, at 19-25 (STEVENS, J., dissenting)) pass muster under Fifth Amendment due process and Fourteenth Amendment equal protection.

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n1 If the statutes are within the @ 5 power, they are just as enforceable when the national government makes a construction contract directly as when it funnels construction money through the states. In any event, as JUSTICE STEVENS has noted, see ante, at 11, n. 5, 12, n. 6, it is not clear whether the current challenge implicates only Fifth Amendment due process or Fourteenth Amendment equal protection as well.

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The Court today, however, does not reach the application of Fullilove to the facts of this case, and on remand it will be incumbent on the Government and petitioner to address anew the facts upon which statutes like these must be judged on the Government's remedial theory of justification: facts about the current effects of past discrimination, the necessity for a preferential remedy, and the suitability of this particular preferential scheme. Petitioner could, of course, have raised all of these issues under the standard employed by the Fullilove plurality, and without now trying to read the current congressional

evidentiary record that may bear on resolving these issues I have to recognize the possibility that proof of changed facts might have rendered Fullilove's conclusion obsolete as judged under the Fullilove plurality's own standard. Be that as it may, it seems fair to ask whether the statutes will meet a different fate from what Fullilove would have decreed. The answer is, quite probably not, though of course there will be some interpretive forks in the road before the significance of strict scrutiny for congressional remedial statutes becomes entirely [*120] clear.

The result in Fullilove was controlled by the plurality for whom Chief Justice Burger spoke in announcing the judgment. Although his opinion did not adopt any label for the standard it applied, and although it was later seen as calling for less than strict scrutiny, Metro Broadcasting, Inc. v. FCC, 497 U. S. 547, 564 (1990), none other than Justice Powell joined the plurality opinion as comporting with his own view that a strict scrutiny standard should be applied to all injurious race-based classifications. Fullilove, supra, at 495-496 (Powell, J., concurring) ("Although I would place greater emphasis than THE CHIEF JUSTICE on the need to articulate judicial standards of review in conventional terms, I view his opinion announcing the judgment as substantially in accord with my views"). Chief Justice Burger's noncategorical approach is probably best seen not as more lenient than strict scrutiny but as reflecting his conviction that the treble-tiered scrutiny structure merely embroidered on a single standard of reasonableness whenever an equal protection challenge required a balancing of justification against probable harm. See Cleburne v. Cleburne Living Center, Inc., 473 U. S. 432, 451 (1985) [*121] (STEVENS, J., concurring, joined by Burger, C. J.). Indeed, the Court's very recognition today that strict scrutiny can be compatible with the survival of a classification so reviewed demonstrates that our concepts of equal protection enjoy a greater elasticity than the standard categories might suggest. See ante, at 35 ("we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' Fullilove, supra, at 519 (Marshall, J., concurring in judgment)"); see also Missouri v. Jenkins, post, at (O'CONNOR, J., concurring) (slip op., at 11) ("But it is not true that strict scrutiny is 'strict in theory, but fatal in fact'").

In assessing the degree to which today's holding portends a departure from past practice, it is also worth noting that nothing in today's opinion implies any view of Congress's @ 5 power and the deference due its exercise that differs from the views expressed by the Fullilove plurality. The Court simply notes the observation in Croson "that the Court's 'treatment of an exercise of congressional power in Fullilove cannot be dispositive here,' because Croson's facts did not implicate Congress' broad [*122] power under @ 5 of the Fourteenth Amendment," ante, at 20, and explains that there is disagreement among today's majority about the extent of the @ 5 power, ante, at 28-29. There is therefore no reason to treat the opinion as affecting one way or another the views of @ 5 power, described as "broad," ante, at 20, "unique," Fullilove, supra, at 500 (Powell, J., concurring), and "unlike [that of] any state or political subdivision," Croson, 488 U. S., at 490 (opinion of O'CONNOR, J.). See also Jenkins, post, at (O'CONNOR, J., concurring) (slip op., at 11) ("Congress . . . enjoys '"discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,"' Croson, 488 U. S., at 490 (quoting Katzenbach v. Morgan, 384 U. S., at 651)"). Thus, today's decision should leave @ 5 exactly where it is as the source of an interest of the national government sufficiently important to satisfy the corresponding requirement of the strict scrutiny test.

Finally, I should say that I do not understand that today's decision will necessarily [*123] have any effect on the resolution of an issue that was just as pertinent under Fullilove's unlabeled standard as it is under the standard of strict scrutiny now adopted by the Court. The Court has long accepted the view that constitutional authority to remedy past discrimination is not limited to the power to forbid its continuation, but extends to eliminating those effects that would otherwise persist and skew the operation of public systems even in the absence of current intent to practice any discrimination. See Albemarle Paper Co. v. Moody, 422 U. S. 405, 418 (1975) ("Where racial discrimination is concerned, 'the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future,'") quoting Louisiana v. United States, 380 U. S. 145, 154 (1965). This is so whether the remedial authority is exercised by a court, see ibid.; Green v. School Board of New Kent County, 391 U. S. 430, 437 (1968), the Congress, see Fullilove, 448 U. S., at 502 [*124] (Powell, J., concurring), or some other legislature, see Croson, supra, at 491-492 (opinion of O'CONNOR, J.). Indeed, a majority of the Court today reiterates that there are circumstances in which Government may, consistently with the Constitution, adopt programs aimed at remedying the effects of past invidious discrimination. See, e.g., ante, at , (opinion of O'CONNOR, J.) (slip op., at 26-27, 35); id., at (STEVENS, J., with whom GINSBURG, J., joins, dissenting) (slip op., at 2); id., at , (GINSBURG, J., with whom BREYER, J. joins, dissenting) (slip op. at 3, 6); Jenkins, post, at (O'CONNOR, J., concurring) (slip op. at 11) (noting the critical difference "between unconstitutional discrimination and narrowly tailored remedial programs that legislatures may enact to further the compelling governmental interest in redressing the effects of past discrimination").

When the extirpation of lingering discriminatory effects is thought to require a catch-up mechanism, like the racially preferential inducement under the statutes considered here, the result may be that some members of the historically favored race are hurt by that remedial mechanism, [*125] however innocent they may be of any personal responsibility for any discriminatory conduct. When this price is considered reasonable, it is in part because it is a price to be paid only temporarily; if the justification for the preference is eliminating the effects of a past practice, the assumption is that the effects will themselves recede into the past, becoming attenuated and finally disappearing. Thus, Justice Powell wrote in his concurring opinion in Fullilove that the "temporary nature of this remedy ensures that a race-conscious program will not last longer than the discriminatory effects it is designed to eliminate." 448 U. S., at 513; ante, at 37 (opinion of the Court).

Surely the transition from the Fullilove plurality view (in which Justice Powell joined) to today's strict scrutiny (which will presumably be applied as Justice Powell employed it) does not signal a change in the standard by which the burden of a remedial racial preference is to be judged as reasonable or not at any given time. If in the District Court Adarand had chosen to press a challenge to the reasonableness of the burden of these statutes, n2 more than a decade [*126] after Fullilove had examined such a burden, I doubt that the claim would have fared any differently from the way it will now be treated on remand from this Court.

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n2 I say "press a challenge," because petitioner's Memorandum in Support of Summary Judgment did include an argument challenging the reasonableness of the duration of the statutory scheme; but the durational claim was not, so far as I am aware, stated elsewhere, and, in any event, was not the gravamen of the complaint.

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JUSTICE GINSBURG, with whom JUSTICE BREYER joins, dissenting.

For the reasons stated by JUSTICE SOUTER, and in view of the attention the political branches are currently giving the matter of affirmative action, I see no compelling cause for the intervention the Court has made in this case. I further agree with JUSTICE STEVENS that, in this area, large deference is owed by the Judiciary to "Congress' institutional competence and constitutional authority to overcome historic racial subjugation." Ante, at 12-13 (STEVENS, J., dissenting); [*127] see id., at 14-15. n1 I write separately to underscore not the differences the several opinions in this case display, but the considerable field of agreement--the common understandings and concerns--revealed in opinions that together speak for a majority of the Court.

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n1 On congressional authority to enforce the equal protection principle, see, e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U. S. 241, 286 (1964) (Douglas, J., concurring) (recognizing Congress' authority, under @ 5 of the Fourteenth Amendment, to "put an end to all obstructionist strategies and allow every person--whatever his race, creed, or color--to patronize all places of public accommodation without discrimination whether he travels interstate or intrastate."); id., at 291, 293 (Goldberg, J., concurring) ("primary purpose of the Civil Rights Act of 1964 . . . is the vindication of human dignity"; "Congress clearly had authority under both @ 5 of the Fourteenth Amendment and the Commerce Clause" to enact the law); G. Gunther, Constitutional Law 147-151 (12th ed. 1991).

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I

The statutes and regulations at issue, as the Court indicates, were adopted by the political branches in response to an "unfortunate reality": "the unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country." Ante, at 35 (lead opinion). The United States suffers from those lingering effects because, for most of our Nation's history, the idea that "we are just one race," ante, at 2 (SCALIA, J., concurring in part and concurring in judgment), was not embraced. For generations, our lawmakers and judges were unprepared to say that there is in this land no superior race, no race inferior to any other. In Plessy v. Ferguson, 163 U. S. 537 (1896), not only did this Court endorse the oppressive practice of race segregation, but even Justice Harlan, the advocate of a "color-blind" Constitution, stated:

"The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I

doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles [*129] of constitutional liberty." Id., at 559 (Harlan, J., dissenting).

Not until Loving v. Virginia, 388 U. S. 1 (1967), which held unconstitutional Virginia's ban on interracial marriages, could one say with security that the Constitution and this Court would abide no measure "designed to maintain White Supremacy." Id., at 11. n2

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n2 The Court, in 1955 and 1956, refused to rule on the constitutionality of antimiscegenation laws; it twice declined to accept appeals from the decree on which the Virginia Supreme Court of Appeals relied in Loving. See Naim v. Naim, 197 Va. 80, 87 S. E. 2d 749, vacated and remanded, 350 U. S. 891 (1955), reinstated and aff'd, 197 Va. 734, 90 S. E. 2d 849, app. dism'd, 350 U. S. 985 (1956). Naim expressed the state court's view of the legislative purpose served by the Virginia law: "to preserve the racial integrity of [Virginia's] citizens"; to prevent "the corruption of blood," "a mongrel breed of citizens," and "the obliteration of racial pride." 197 Va., at 90, 87 S. E. 2d, at 756.

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The divisions in this difficult case should not obscure the Court's recognition of the persistence of racial inequality and a majority's acknowledgement of Congress' authority to act affirmatively, not only to end discrimination, but also to counteract discrimination's lingering effects. Ante, at 35 (lead opinion); see also ante, at 6 (SOUTER, J., dissenting). Those effects, reflective of a system of racial caste only recently ended, are evident in our workplaces, markets, and neighborhoods. Job applicants with identical resumes, qualifications, and interview styles still experience different receptions, depending on their race. n3 White and African-American consumers still encounter different deals. n4 People of color looking for housing still face discriminatory treatment by landlords, real estate agents, and mortgage lenders. n5 Minority entrepreneurs sometimes fail to gain contracts though they are the low bidders, and they are sometimes refused work even after winning contracts. n6 Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, n7 keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely [*131] to become this country's law and practice.

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n3 See, e.g., H. Cross, et al., Employer Hiring Practices: Differential Treatment of Hispanic and Anglo Job Seekers 42 (Urban Institute Report 90-4, 1990) (e.g., Anglo applicants sent out by investigators received 52% more job offers than matched Hispanics); M. Turner, et al., Opportunities Denied, Opportunities Diminished: Racial Discrimination in Hiring xi (Urban Institute Report 91-9, 1991) ("In one out of five audits, the white applicant was able to advance farther through the hiring process than his black counterpart. In one out of eight audits, the white was offered a job although his equally qualified black partner was not. In contrast, black auditors advanced farther than their white counterparts only 7 percent of the time, and received job offers while their white partners did not in 5 percent of the audits.").

n4 See, e.g., Ayres, Fair Driving: Gender and Race Discrimination in Retail Car Negotiations, 104 Harv. L. Rev. 817, 821-822, 819, 828 (1991) ("blacks and women simply cannot buy the same car for the same price as can white men using identical bargaining strategies"; the final offers given white female testers reflected 40 percent higher markups than those given white male testers; final offer markups for black male testers were twice as high, and for black female testers three times as high as for white male testers). [*132]

n5 See, e.g., A Common Destiny: Blacks and American Society 50 (G. Jaynes & R. Williams eds., 1989) ("In many metropolitan areas one-quarter to one-half of all [housing] inquiries by blacks are met by clearly discriminatory responses."); M. Turner, et al., U. S. Department of Housing and Urban Development, Housing Discrimination Study: Synthesis i-vii (1991) (1989 audit study of housing searches in 25 metropolitan areas; over half of African-American and Hispanic testers seeking to rent or buy experienced some form of unfavorable treatment compared to paired white testers); Leahy, Are Racial Factors Important for the Allocation of Mortgage Money?, 44 Am. J. Econ. & Soc. 185, 193 (1985) (controlling for socioeconomic factors, and concluding that "even when neighborhoods appear to be similar on every major mortgage-lending criterion except race, mortgage-lending outcomes are still unequal").

n6 See, e.g., Associated General Contractors v. Coalition for Economic Equity, 950 F. 2d 1401, 1415 (CA9 1991) (detailing examples in San Francisco).

n7 Cf. Wygant v. Jackson Bd. of Ed., 476 U. S. 267, 318 (1986) (STEVENS, J., dissenting); Califano v. Goldfarb, 430 U. S. 199, 222-223 (1977) (STEVENS, J., concurring in judgment).

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Given this history and its practical consequences, Congress surely can conclude that a carefully designed affirmative action program may help to realize, finally, the "equal protection of the laws" the Fourteenth Amendment has promised since 1868. n8

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n8 On the differences between laws designed to benefit an historically disfavored group and laws designed to burden such a group, see, e.g., Carter, When Victims Happen To Be Black, 97 Yale L. J. 420, 433-434 (1988) ("Whatever the source of racism, to count it the same as racialism, to say that two centuries of struggle for the most basic of civil rights have been mostly about freedom from racial categorization rather than freedom from racial oppression, is to trivialize the lives and deaths of those who have suffered under racism. To pretend . . . that the issue presented in Bakke was the same as the issue in Brown is to pretend that history never happened and that the present doesn't exist.").

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II

The lead opinion uses one term, [*134] "strict scrutiny," to describe the standard of judicial review for all governmental classifications by race. Ante, at 34-36. But that opinion's elaboration strongly suggests that the strict standard announced is indeed "fatal" for classifications burdening groups that have suffered discrimination in our society. That seems to me, and, I believe, to the Court, the enduring lesson one should draw from Korematsu v. United States, 323 U. S. 214 (1944); for in that case, scrutiny the Court described as "most rigid," id., at 216, nonetheless yielded a pass for an odious, gravely injurious racial classification. See ante, at 12 (lead opinion). A Korematsu-type classification, as I read the opinions in this case, will never again survive scrutiny: such a classification, history and precedent instruct, properly ranks as prohibited.

For a classification made to hasten the day when "we are just one race," ante, at 2 (SCALIA, J., concurring in part and concurring in judgment), however, the lead opinion has dispelled the notion that "strict scrutiny" is "'fatal in fact.'" Ante, at 35 (quoting Fullilove v. Klutznick, 448 U. S. 448, 519 (1980) [*135] (Marshall, J., concurring in judgment)). Properly, a majority of the Court calls for review that is searching, in order to ferret out classifications in reality malign, but masquerading as benign. See ante, at 26-28 (lead opinion). The Court's once lax review of sex-based classifications demonstrates the need for such suspicion. See, e.g., Hoyt v. Florida, 368 U. S. 57, 60 (1961) (upholding women's "privilege" of automatic exemption from jury service); Goesaert v. Cleary, 335 U. S. 464 (1948) (upholding Michigan law barring women from employment as bartenders); see also Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N. Y. U. L. Rev. 675 (1971). Today's decision thus usefully reiterates that the purpose of strict scrutiny "is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking," ante, at 26 (lead opinion), "to 'differentiate between' permissible and impermissible governmental use of race," id., at 27, to distinguish "'between a "No Trespassing" sign and a welcome mat.'" Id., at 28.

Close [*136] review also is in order for this further reason. As JUSTICE SOUTER points out, ante, at 7 (dissenting opinion), and as this very case shows, some members of the historically favored race can be hurt by catch-up mechanisms designed to cope with the lingering effects of entrenched racial subjugation. Court review can ensure that preferences are not so large as to trammel unduly upon the opportunities of others or interfere too harshly with legitimate expectations of persons in once-preferred groups. See, e.g., Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm'n, 482 F. 2d 1333, 1341 (CA2 1973).

* * *

While I would not disturb the programs challenged in this case, and would leave their improvement to the political branches, I see today's decision as one that allows our precedent to evolve, still to be informed by and responsive to changing conditions.

frequency of nonpolice helicopter flights. See 4 W. LaFave, Search and Seizure § 11.2(b), p. 228 (2d ed. 1987) (burdens of proof relevant to Fourth Amendment issues may be based on a judicial estimate of the probabilities involved). Thus, because I believe that private helicopters rarely fly over curtilages at an altitude of 400 feet, I would impose upon the prosecution the burden of proving contrary facts necessary to show that Riley lacked a reasonable expectation of privacy. Indeed, I would establish this burden of proof for any helicopter surveillance case in which the flight occurred below 1,000 feet—in other words, for any aerial surveillance case not governed by the Court's decision in *California* v. *Ciraolo*, 476 U. S. 207 (1986).

In this case, the prosecution did not meet this burden of proof, as JUSTICE BRENNAN notes. This failure should compel a finding that a Fourth Amendment search occurred. But because our prior cases gave the parties little guidance on the burden of proof issue, I would remand this case to allow the prosecution an opportunity to meet this burden.

The order of this Court, however, is not to remand the case in this manner. Rather, because JUSTICE O'CONNOR would impose the burden of proof on Riley and because she would not allow Riley an opportunity to meet this burden, she joins the plurality's view that no Fourth Amendment search occurred. The judgment of the Court, therefore, is to reverse outright on the Fourth Amendment issue. Accordingly, for the reasons set forth above, I respectfully dissent.

CITY OF RICHMOND v. J. A. CROSON CO.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 87-998. Argued October 5, 1988—Decided January 23, 1989

Appellant city adopted a Minority Business Utilization Plan (Plan) requiring prime contractors awarded city construction contracts to subcontract at least 30% of the dollar amount of each contract to one or more "Minority Business Enterprises" (MBE's), which the Plan defined to include a business from anywhere in the country at least 51% of which is owned and controlled by black, Spanish-speaking, Oriental, Indian, Eskimo, or Aleut citizens. Although the Plan declared that it was "remedial" in nature, it was adopted after a public hearing at which no direct evidence was presented that the city had discriminated on the basis of race in letting contracts or that its prime contractors had discriminated against minority subcontractors. The evidence that was introduced included: a statistical study indicating that, although the city's population was 50% black, only 0.67% of its prime construction contracts had been awarded to minority businesses in recent years; figures establishing that a variety of local contractors' associations had virtually no MBE members; the city's counsel's conclusion that the Plan was constitutional under *Fullilove* v. *Klutznick*, 448 U. S. 448; and the statements of Plan proponents indicating that there had been widespread racial discrimination in the local, state, and national construction industries. Pursuant to the Plan, the city adopted rules requiring individualized consideration of each bid or request for a waiver of the 30% set-aside, and providing that a waiver could be granted only upon proof that sufficient qualified MBE's were unavailable or unwilling to participate. After appellee construction company, the sole bidder on a city contract, was denied a waiver and lost its contract, it brought suit under 42 U. S. C. § 1983, alleging that the Plan was unconstitutional under the Fourteenth Amendment's Equal Protection Clause. The Federal District Court upheld the Plan in all respects, and the Court of Appeals affirmed, applying a test derived from the principal opinion in *Fullilove*, *supra*, which accorded great deference to Congress' findings of past societal discrimination in holding that a 10% minority set-aside for certain federal construction grants did not violate the equal protection component of the Fifth Amendment. However, on appellee's petition for certiorari in this case, this Court vacated and remanded for further consideration in light of its intervening decision in *Wygant* v. *Jackson Board of Education*, 476 U. S. 267, in

which the plurality applied a strict scrutiny standard in holding that a race-based layoff program agreed to by a school board and the local teachers' union violated the Fourteenth Amendment's Equal Protection Clause. On remand, the Court of Appeals held that the city's Plan violated both prongs of strict scrutiny, in that (1) the Plan was not justified by a compelling governmental interest, since the record revealed no prior discrimination by the city itself in awarding contracts, and (2) the 30% set-aside was not narrowly tailored to accomplish a remedial purpose.

Held: The judgment is affirmed.

822 F. 2d 1355, affirmed.

JUSTICE O'CONNOR delivered the opinion of the Court with respect to Parts I, III–B, and IV, concluding that:

1. The city has failed to demonstrate a compelling governmental interest justifying the Plan, since the factual predicate supporting the Plan does not establish the type of identified past discrimination in the city's construction industry that would authorize race-based relief under the Fourteenth Amendment's Equal Protection Clause. Pp. 498–506.

(a) A generalized assertion that there has been past discrimination in the entire construction industry cannot justify the use of an unyielding racial quota, since it provides no guidance for the city's legislative body to determine the precise scope of the injury it seeks to remedy and would allow race-based decisionmaking essentially limitless in scope and duration. The city's argument that it is attempting to remedy various forms of past societal discrimination that are alleged to be responsible for the small number of minority entrepreneurs in the local contracting industry fails, since the city also lists a host of nonracial factors which would seem to face a member of any racial group seeking to establish a new business enterprise, such as deficiencies in working capital, inability to meet bonding requirements, unfamiliarity with bidding procedures, and disability caused by an inadequate track record. Pp. 498–499.

(b) None of the "facts" cited by the city or relied on by the District Court, singly or together, provide a basis for a prima facie case of a constitutional or statutory violation by *anyone* in the city's construction industry. The fact that the Plan declares itself to be "remedial" is insufficient, since the mere recitation of a "benign" or legitimate purpose for a racial classification is entitled to little or no weight. Similarly, the views of Plan proponents as to past and present discrimination in the industry are highly conclusory and of little probative value. Reliance on the disparity between the number of prime contracts awarded to minority businesses and the city's minority population is also misplaced, since the proper statistical evaluation would compare the percentage of MBE's

in the relevant market that are qualified to undertake city subcontracting work with the percentage of total city construction dollars that are presently awarded to minority subcontractors, neither of which is known to the city. The fact that MBE membership in local contractors' associations was extremely low is also not probative absent some link to the number of MBE's eligible for membership, since there are numerous explanations for the dearth of minority participation, including past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial choices. Congress' finding in connection with the set-aside approved in *Fullilove* that there had been nationwide discrimination in the construction industry also has extremely limited probative value, since, by including a waiver procedure in the national program, Congress explicitly recognized that the scope of the problem would vary from market area to market area. In any event, Congress was acting pursuant to its unique enforcement powers under § 5 of the Fourteenth Amendment. Pp. 499–504.

(c) The "evidence" relied upon by JUSTICE MARSHALL's dissent—the city's history of school desegregation and numerous congressional reports—does little to define the scope of any injury to minority contractors in the city or the necessary remedy, and could justify a preference of any size or duration. Moreover, JUSTICE MARSHALL's suggestion that discrimination findings may be "shared" from jurisdiction to jurisdiction is unprecedented and contrary to this Court's decisions. Pp. 504–506.

(d) Since there is *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the city's construction industry, the Plan's random inclusion of those groups strongly impugns the city's claim of remedial motivation. P. 506.

2. The Plan is not narrowly tailored to remedy the effects of prior discrimination, since it entitles a black, Hispanic, or Oriental entrepreneur from anywhere in the country to an absolute preference over other citizens based solely on their race. Although many of the barriers to minority participation in the construction industry relied upon by the city to justify the Plan appear to be race neutral, there is no evidence that the city considered using alternative, race-neutral means to increase minority participation in city contracting. Moreover, the Plan's rigid 30% quota rests upon the completely unrealistic assumption that minorities will choose to enter construction in lockstep proportion to their representation in the local population. Unlike the program upheld in *Fullilove*, the Plan's waiver system focuses upon the availability of MBE's, and does not inquire whether the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors. Given the fact that the city must already consider bids and

waivers on a case-by-case basis, the city's only interest in maintaining a quota system rather than investigating the need for remedial action in particular cases would seem to be simply administrative convenience, which, standing alone, cannot justify the use of a suspect classification under equal protection strict scrutiny. Pp. 507–508.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE and JUSTICE WHITE, concluded in Part II that if the city could identify past discrimination in the local construction industry with the particularity required by the Equal Protection Clause, it would have the power to adopt race-based legislation designed to eradicate the effects of that discrimination. The principal opinion in *Fullilove* cannot be read to relieve the city of the necessity of making the specific findings of discrimination required by the Clause, since the congressional finding of past discrimination relied on in that case was made pursuant to Congress' unique power under § 5 of the Amendment to enforce, and therefore to identify and redress violations of, the Amendment's provisions. Conversely, § 1 of the Amendment, which includes the Equal Protection Clause, is an explicit constraint upon the power of States and political subdivisions, which must undertake any remedial efforts in accordance with the dictates of that section. However, the Court of Appeals erred to the extent that it followed by rote the *Wygant* plurality's ruling that the Equal Protection Clause requires a showing of prior discrimination by the governmental unit involved, since that ruling was made in the context of a race-based policy that affected the particular public employer's own work force, whereas this case involves a state entity which has specific state-law authority to address discriminatory practices within local commerce under its jurisdiction. Pp. 486–493.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE KENNEDY, concluded in Parts III–A and V that:

1. Since the Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely on their race, *Wygant*'s strict scrutiny standard of review must be applied, which requires a firm evidentiary basis for concluding that the underrepresentation of minorities is a product of past discrimination. Application of that standard, which is not dependent on the race of those burdened or benefited by the racial classification, assures that the city is pursuing a remedial goal important enough to warrant use of a highly suspect tool and that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype. The relaxed standard of review proposed by JUSTICE MARSHALL's dissent does not provide a means for determining that a racial classification is in fact "designed to further remedial goals," since it accepts the remedial nature of the classification

before examination of the factual basis for the classification's enactment and the nexus between its scope and that factual basis. Even if the level of equal protection scrutiny could be said to vary according to the ability of different groups to defend their interests in the representative process, heightened scrutiny would still be appropriate in the circumstances of this case, since blacks constitute approximately 50% of the city's population and hold five of nine seats on the City Council, thereby raising the concern that the political majority may have acted to disadvantage a minority based on unwarranted assumptions or incomplete facts. Pp. 493–498.

2. Even in the absence of evidence of discrimination in the local construction industry, the city has at its disposal an array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races who have suffered the effects of past societal discrimination, including simplification of bidding procedures, relaxation of bonding requirements, training, financial aid, elimination or modification of formal barriers caused by bureaucratic inertia, and the prohibition of discrimination in the provision of credit or bonding by local suppliers and banks. Pp. 509–511.

JUSTICE STEVENS, although agreeing that the Plan cannot be justified as a remedy for past discrimination, concluded that the Fourteenth Amendment does not limit permissible racial classifications to those that remedy past wrongs, but requires that race-based governmental decisions be evaluated primarily by studying their probable impact on the future. Pp. 511–518.

(a) Disregarding the past history of racial injustice, there is not even an arguable basis for suggesting that the race of a subcontractor or contractor on city projects should have any relevance to his or her access to the market. Although race is not always irrelevant to sound governmental decisionmaking, the city makes no claim that the public interest in the efficient performance of its construction contracts will be served by granting a preference to minority-business enterprises. Pp. 512–513.

(b) Legislative bodies such as the city council, which are primarily policymaking entities that promulgate rules to govern future conduct, raise valid constitutional concerns when they use the political process to punish or characterize past conduct of private citizens. Courts, on the other hand, are well equipped to identify past wrongdoers and to fashion remedies that will create the conditions that presumably would have existed had no wrong been committed, and should have the same broad discretion in racial discrimination cases that chancellors enjoy in other areas of the law to fashion remedies against persons who have been proved guilty of violations of law. Pp. 513–514.

(c) Rather than engaging in debate over the proper standard of review to apply in affirmative-action litigation, it is more constructive to try to identify the characteristics of the advantaged and disadvantaged classes that may justify their disparate treatment. Here, instead of carefully identifying those characteristics, the city has merely engaged in the type of stereotypical analysis that is the hallmark of Equal Protection Clause violations. The class of persons benefited by the Plan is not limited to victims of past discrimination by white contractors in the city, but encompasses persons who have never been in business in the city, minority contractors who may have themselves been guilty of discrimination against other minority group members, and firms that have prospered notwithstanding discriminatory treatment. Similarly, although the Plan unquestionably disadvantages some white contractors who are guilty of past discrimination against blacks, it also punishes some who discriminated only before it was forbidden by law and some who have never discriminated against anyone. Pp. 514–517.

JUSTICE KENNEDY concluded that the Fourteenth Amendment ought not to be interpreted to reduce a State's power to eradicate racial discrimination and its effects in both the public and private sectors, or its absolute duty to do so where those wrongs were caused intentionally by the State itself, except where there is a conflict with federal law or where, as here, a state remedy itself violates equal protection. Although a rule striking down all racial preferences which are not necessary remedies to victims of unlawful discrimination would serve important structural goals by eliminating the necessity for courts to pass on each such preference that is enacted, that rule would be a significant break with this Court's precedents that require a case-by-case test, and need not be adopted. Rather, it may be assumed that the principle of race neutrality found in the Equal Protection Clause will be vindicated by the less absolute strict scrutiny standard, the application of which demonstrates that the city's Plan is not a remedy but is itself an unconstitutional preference. Pp. 518–520.

JUSTICE SCALIA, agreeing that strict scrutiny must be applied to all governmental racial classifications, concluded that:

1. The Fourteenth Amendment prohibits state and local governments from discriminating on the basis of race in order to undo the effects of past discrimination, except in one circumstance: where that is necessary to eliminate their own maintenance of a system of unlawful racial classification. Moreover, the State's remedial power in that instance extends no further than the scope of the constitutional violation, and does not encompass the continuing effects of a discriminatory system once the system itself has been eliminated. Pp. 520–525.

2. The State remains free to undo the effects of past discrimination in permissible ways that do not involve classification by race—for example, by according a contracting preference to small or new businesses or to actual victims of discrimination who can be identified. In the latter instance, the classification would not be based on race but on the fact that the victims were wronged. Pp. 526–528.

O'CONNOR, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III–B, and IV, in which REHNQUIST, C. J., and WHITE, STEVENS, and KENNEDY, JJ., joined, an opinion with respect to Part II, in which REHNQUIST, C. J., and WHITE, J., joined, and an opinion with respect to Parts III–A and V, in which REHNQUIST, C. J., and WHITE and KENNEDY, JJ., joined. STEVENS, J., *post*, p. 511, and KENNEDY, J., *post*, p. 518, filed opinions concurring in part and concurring in the judgment. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 520. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 528. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 561.

John Payton argued the cause for appellant. With him on the briefs were *Mark S. Hersh*, *Drew St. J. Carneal*, *Michael L. Sarahan*, *Michael K. Jackson*, and *John H. Pickering*.

Walter H. Ryland argued the cause and filed a brief for appellee.*

*Briefs of *amici curiae* urging reversal were filed for the State of Maryland by *J. Joseph Curran, Jr.*, Attorney General, and *Charles O. Monk II*, Deputy Attorney General; for the State of Michigan by *Frank J. Kelley*, Attorney General, *Louis J. Caruso*, Solicitor General, and *Brent E. Simmons*, Assistant Attorney General; for the State of New York et al. by *Robert Abrams*, Attorney General of New York, *O. Peter Sherwood*, Solicitor General, and *Suzanne M. Lynn*, *Marjorie Fujiki*, and *Marla Tepper*, Assistant Attorneys General, *John K. Van de Kamp*, Attorney General of California, *Joseph I. Lieberman*, Attorney General of Connecticut, *Frederick D. Cooke*, Corporation Counsel of the District of Columbia, *Neil F. Hartigan*, Attorney General of Illinois, *James M. Shannon*, Attorney General of Massachusetts, *Hubert H. Humphrey III*, Attorney General of Minnesota, *W. Cary Edwards*, Attorney General of New Jersey, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *Dave Frohnmayer*, Attorney General of Oregon, *James E. O'Neil*, Attorney General of Rhode Island, *T. Travis Medlock*, Attorney General of South Carolina, *Kenneth O. Eikenberry*, Attorney General of Washington, *Charles G. Brown*, Attorney Gen-

JUSTICE O'CONNOR announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III–B, and IV, an opinion with respect to Part II, in which THE CHIEF JUSTICE and JUSTICE WHITE join, and an opinion with respect to Parts III–A and V, in which THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE KENNEDY join.

In this case, we confront once again the tension between the Fourteenth Amendment's guarantee of equal treatment to all citizens, and the use of race-based measures to amelio-

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eral of West Virginia, *Donald Hanaway*, Attorney General of Wisconsin, and *Joseph B. Meyer*, Attorney General of Wyoming; for the Alpha Kappa Alpha Sorority et al. by *Eva Jefferson Paterson, Robert L. Harris, Judith Kurtz, William C. McNeill III*, and *Nathaniel Colley;* for the American Civil Liberties Union et al. by *Edward M. Chen, Steven R. Shapiro, John A. Powell*, and *John Hart Ely;* for the city of San Francisco, California, et al. by *Louise H. Renne* and *Burk E. Delventhal;* for the Lawyer's Committee for Civil Rights under Law et al. by *Stephen J. Pollak, James R. Bird, Paula A. Sweeney, Grover Hankins, Judith L. Lichtman, Conrad K. Harper, Stuart J. Land, Norman Redlich, William L. Robinson, Judith A. Winston*, and *Antonia Hernandez;* for the Maryland Legislative Black Caucus by *Koteles Alexander* and *Bernadette Gartrell;* for the Minority Business Enterprise Legal Defense and Education Fund, Inc., et al. by *Anthony W. Robinson, H. Russell Frisby, Jr.*, and *Andrew L. Sandler;* for the NAACP Legal Defense and Educational Fund, Inc., by *Julius L. Chambers, Charles Stephen Ralston, Ronald L. Ellis, Eric Schnapper, Napoleon B. Williams, Jr.*, and *Clyde E. Murphy;* and for the National League of Cities et al. by *Benna Ruth Solomon* and *David A. Strauss.*

Briefs of *amici curiae* urging affirmance were filed for the United States by *Solicitor General Fried, Assistant Attorney General Reynolds, Deputy Solicitor General Ayer, Deputy Assistant Attorney General Clegg, Glen G. Nager*, and *David K. Flynn;* for the Anti-Defamation League of B'nai B'rith by *Robert A. Helman, Michele Odorizzi, Daniel M. Harris, Justin J. Finger, Jeffrey P. Sinensky*, and *Jill L. Kahn;* for Associated Specialty Contractors, Inc., by *John A. McGuinn* and *Gary L. Lieber;* for the Equal Employment Advisory Council by *Robert E. Williams* and *Douglas S. McDowell;* for the Mountain States Legal Foundation by *Constance E. Brooks;* for the Pacific Legal Foundation by *Ronald A. Zumbrun* and *John H. Findley;* for the Southeastern Legal Foundation, Inc., by *G. Stephen Parker;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Paul D. Kamenar.*

rate the effects of past discrimination on the opportunities enjoyed by members of minority groups in our society. In *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980), we held that a congressional program requiring that 10% of certain federal construction grants be awarded to minority contractors did not violate the equal protection principles embodied in the Due Process Clause of the Fifth Amendment. Relying largely on our decision in *Fullilove*, some lower federal courts have applied a similar standard of review in assessing the constitutionality of state and local minority set-aside provisions under the Equal Protection Clause of the Fourteenth Amendment. See, *e. g.*, *South Florida Chapter, Associated General Contractors of America, Inc.* v. *Metropolitan Dade County*, 723 F. 2d 846 (CA11), cert. denied, 469 U. S. 871 (1984); *Ohio Contractors Assn.* v. *Keip*, 713 F. 2d 167 (CA6 1983). Since our decision two Terms ago in *Wygant* v. *Jackson Board of Education*, 476 U. S. 267 (1986), the lower federal courts have attempted to apply its standards in evaluating the constitutionality of state and local programs which allocate a portion of public contracting opportunities exclusively to minority-owned businesses. See, *e. g.*, *Michigan Road Builders Assn., Inc.* v. *Milliken*, 834 F. 2d 583 (CA6 1987), appeal docketed, No. 87–1860; *Associated General Contractors of Cal.* v. *City and Cty. of San Francisco*, 813 F. 2d 922 (CA9 1987). We noted probable jurisdiction in this case to consider the applicability of our decision in *Wygant* to a minority set-aside program adopted by the city of Richmond, Virginia.

I

On April 11, 1983, the Richmond City Council adopted the Minority Business Utilization Plan (the Plan). The Plan 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 (MBE's). Ordinance No. 83–69–59, codified in Richmond, Va., City Code, § 12–156(a) (1985). The 30% set-

aside did not apply to city contracts awarded to minority-owned prime contractors. *Ibid.*

The Plan defined an MBE as "[a] business at least fifty-one (51) percent of which is owned and controlled . . . by minority group members." § 12–23, p. 941. "Minority group members" were defined as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." *Ibid.* There was no geographic limit to the Plan; an otherwise qualified MBE from anywhere in the United States could avail itself of the 30% set-aside. The Plan declared that it was "remedial" in nature, and enacted "for the purpose of promoting wider participation by minority business enterprises in the construction of public projects." § 12–158(a). The Plan expired on June 30, 1988, and was in effect for approximately five years. *Ibid.*[1]

The Plan authorized the Director of the Department of General Services to promulgate rules which "shall allow waivers in those individual situations where a contractor can prove to the satisfaction of the director that the requirements herein cannot be achieved." § 12–157. To this end, the Director promulgated Contract Clauses, Minority Business Utilization Plan (Contract Clauses). Paragraph D of these rules provided:

> "No partial or complete waiver of the foregoing [30% set-aside] requirement shall be granted by the city other than in exceptional circumstances. To justify a waiver, it must be shown that every feasible attempt has been made to comply, and it must be demonstrated that sufficient, relevant, qualified Minority Business Enterprises . . . are unavailable or unwilling to participate in the contract to enable meeting the 30% MBE goal." ¶ D. Record, Exh. 24, p. 1; see *J. A. Croson Co.* v. *Richmond*, 779 F. 2d 181, 197 (CA4 1985) *(Croson I)*.

[1] The expiration of the ordinance has not rendered the controversy between the city and appellee moot. There remains a live controversy between the parties over whether Richmond's refusal to award appellee a contract pursuant to the ordinance was unlawful and thus entitles appellee to damages. See *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1, 8–9 (1978).

The Director also promulgated "purchasing procedures" to be followed in the letting of city contracts in accordance with the Plan. *Id.*, at 194. Bidders on city construction contracts were provided with a "Minority Business Utilization Plan Commitment Form." Record, Exh. 24, p. 3. Within 10 days of the opening of the bids, the lowest otherwise responsive bidder was required to submit a commitment form naming the MBE's to be used on the contract and the percentage of the total contract price awarded to the minority firm or firms. The prime contractor's commitment form or request for a waiver of the 30% set-aside was then referred to the city Human Relations Commission (HRC). The HRC verified that the MBE's named in the commitment form were in fact minority owned, and then either approved the commitment form or made a recommendation regarding the prime contractor's request for a partial or complete waiver of the 30% set-aside. *Croson I*, 779 F. 2d, at 196. The Director of General Services made the final determination on compliance with the set-aside provisions or the propriety of granting a waiver. *Ibid.* His discretion in this regard appears to have been plenary. There was no direct administrative appeal from the Director's denial of a waiver. Once a contract had been awarded to another firm a bidder denied an award for failure to comply with the MBE requirements had a general right of protest under Richmond procurement policies. Richmond, Va., City Code, § 12–126(a) (1985).

The Plan was adopted by the Richmond City Council after a public hearing. App. 9–50. Seven members of the public spoke to the merits of the ordinance: five were in opposition, two in favor. Proponents of the set-aside provision relied on a study which indicated that, while the general population of Richmond was 50% black, only 0.67% of the city's prime con-

struction contracts had been awarded to minority businesses in the 5-year period from 1978 to 1983. It was also established that a variety of contractors' associations, whose representatives appeared in opposition to the ordinance, had virtually no minority businesses within their membership. See Brief for Appellant 22 (chart listing minority membership of six local construction industry associations). The city's legal counsel indicated his view that the ordinance was constitutional under this Court's decision in *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980). App. 24. Councilperson Marsh, a proponent of the ordinance, made the following statement:

> "There is some information, however, that I want to make sure that we put in the record. I have been practicing law in this community since 1961, and I am familiar with the practices in the construction industry in this area, in the State, and around the nation. And I can say without equivocation, that the general conduct of the construction industry in this area, and the State, and around the nation, is one in which race discrimination and exclusion on the basis of race is widespread." *Id.*, at 41.

There was no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors. See *id.*, at 42 (statement of Councilperson Kemp) ("[The public witnesses] indicated that the minority contractors were just not available. There wasn't a one that gave any indication that a minority contractor would not have an opportunity, if he were available").

Opponents of the ordinance questioned both its wisdom and its legality. They argued that a disparity between minorities in the population of Richmond and the number of prime contracts awarded to MBE's had little probative value in establishing discrimination in the construction industry. *Id.*, at 30 (statement of Councilperson Wake). Representatives of various contractors' associations questioned whether there

were enough MBE's in the Richmond area to satisfy the 30% set-aside requirement. *Id.*, at 32 (statement of Mr. Beck); *id.*, at 33 (statement of Mr. Singer); *id.*, at 35–36 (statement of Mr. Murphy). Mr. Murphy noted that only 4.7% of all construction firms in the United States were minority owned and that 41% of these were located in California, New York, Illinois, Florida, and Hawaii. He predicted that the ordinance would thus lead to a windfall for the few minority firms in Richmond. *Ibid.* Councilperson Gillespie indicated his concern that many local labor jobs, held by both blacks and whites, would be lost because the ordinance put no geographic limit on the MBE's eligible for the 30% set-aside. *Id.*, at 44. Some of the representatives of the local contractors' organizations indicated that they did not discriminate on the basis of race and were in fact actively seeking out minority members. *Id.*, at 38 (statement of Mr. Shuman) ("The company I work for belonged to all these [contractors'] organizations. Nobody that I know of, black, Puerto Rican or any minority, has ever been turned down. They're actually sought after to join, to become part of us"); see also *id.*, at 20 (statement of Mr. Watts). Councilperson Gillespie expressed his concern about the legality of the Plan, and asked that a vote be delayed pending consultation with outside counsel. His suggestion was rejected, and the ordinance was enacted by a vote of six to two, with Councilperson Gillespie abstaining. *Id.*, at 49.

On September 6, 1983, the city of Richmond issued an invitation to bid on a project for the provision and installation of certain plumbing fixtures at the city jail. On September 30, 1983, Eugene Bonn, the regional manager of J. A. Croson Company (Croson), a mechanical plumbing and heating contractor, received the bid forms. The project involved the installation of stainless steel urinals and water closets in the city jail. Products of either of two manufacturers were specified, Acorn Engineering Company (Acorn) or Bradley Manufacturing Company (Bradley). Bonn determined that

to meet the 30% set-aside requirement, a minority contractor would have to supply the fixtures. The provision of the fixtures amounted to 75% of the total contract price.

On September 30, Bonn contacted five or six MBE's that were potential suppliers of the fixtures, after contacting three local and state agencies that maintained lists of MBE's. No MBE expressed interest in the project or tendered a quote. On October 12, 1983, the day the bids were due, Bonn again telephoned a group of MBE's. This time, Melvin Brown, president of Continental Metal Hose (Continental), a local MBE, indicated that he wished to participate in the project. Brown subsequently contacted two sources of the specified fixtures in order to obtain a price quotation. One supplier, Ferguson Plumbing Supply, which is not an MBE, had already made a quotation directly to Croson, and refused to quote the same fixtures to Continental. Brown also contacted an agent of Bradley, one of the two manufacturers of the specified fixtures. The agent was not familiar with Brown or Continental, and indicated that a credit check was required which would take at least 30 days to complete.

On October 13, 1983, the sealed bids were opened. Croson turned out to be the only bidder, with a bid of $126,530. Brown and Bonn met personally at the bid opening, and Brown informed Bonn that his difficulty in obtaining credit approval had hindered his submission of a bid.

By October 19, 1983, Croson had still not received a bid from Continental. On that date it submitted a request for a waiver of the 30% set-aside. Croson's waiver request indicated that Continental was "unqualified" and that the other MBE's contacted had been unresponsive or unable to quote. Upon learning of Croson's waiver request, Brown contacted an agent of Acorn, the other fixture manufacturer specified by the city. Based upon his discussions with Acorn, Brown subsequently submitted a bid on the fixtures to Croson. Continental's bid was $6,183.29 higher than the price Croson had included for the fixtures in its bid to the city. This

constituted a 7% increase over the market price for the fixtures. With added bonding and insurance, using Continental would have raised the cost of the project by $7,663.16. On the same day that Brown contacted Acorn, he also called city procurement officials and told them that Continental, an MBE, could supply the fixtures specified in the city jail contract. On November 2, 1983, the city denied Croson's waiver request, indicating that Croson had 10 days to submit an MBE Utilization Commitment Form, and warned that failure to do so could result in its bid being considered unresponsive.

Croson wrote the city on November 8, 1983. In the letter, Bonn indicated that Continental was not an authorized supplier for either Acorn or Bradley fixtures. He also noted that Acorn's quotation to Brown was subject to credit approval and in any case was substantially higher than any other quotation Croson had received. Finally, Bonn noted that Continental's bid had been submitted some 21 days after the prime bids were due. In a second letter, Croson laid out the additional costs that using Continental to supply the fixtures would entail, and asked that it be allowed to raise the overall contract price accordingly. The city denied both Croson's request for a waiver and its suggestion that the contract price be raised. The city informed Croson that it had decided to rebid the project. On December 9, 1983, counsel for Croson wrote the city asking for a review of the waiver denial. The city's attorney responded that the city had elected to rebid the project, and that there is no appeal of such a decision. Shortly thereafter Croson brought this action under 42 U. S. C. § 1983 in the Federal District Court for the Eastern District of Virginia, arguing that the Richmond ordinance was unconstitutional on its face and as applied in this case.

The District Court upheld the Plan in all respects. See Supplemental App. to Juris. Statement 112–232 (Supp. App.). In its original opinion, a divided panel of the Fourth Circuit

Court of Appeals affirmed. *Croson I*, 779 F. 2d. 181 (1985). Both courts applied a test derived from "the common concerns articulated by the various Supreme Court opinions" in *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980), and *University of California Regents* v. *Bakke*, 438 U. S. 265 (1978). See *Croson I*, *supra*, at 188. Relying on the great deference which this Court accorded Congress' findings of past discrimination in *Fullilove*, the panel majority indicated its view that the same standard should be applied to the Richmond City Council, stating:

> "Unlike the review we make of a lower court decision, our task is not to determine if there was sufficient evidence to sustain the council majority's position in any traditional sense of weighing the evidence. Rather, it is to determine whether 'the legislative history . . . demonstrates that [the council] reasonably concluded that . . . private and governmental discrimination had contributed to the negligible percentage of public contracts awarded minority contractors.'" 779 F. 2d, at 190 (quoting *Fullilove*, *supra*, at 503 (Powell, J., concurring)).

The majority found that national findings of discrimination in the construction industry, when considered in conjunction with the statistical study concerning the awarding of prime contracts in Richmond, rendered the city council's conclusion that low minority participation in city contracts was due to past discrimination "reasonable." *Croson I*, 779 F. 2d, at 190, and n. 12. The panel opinion then turned to the second part of its "synthesized *Fullilove*" test, examining whether the racial quota was "narrowly tailored to the legislative goals of the Plan." *Id.*, at 190. First, the court upheld the 30% set-aside figure, by comparing it not to the number of MBE's in Richmond, but rather to the percentage of minority persons in the city's population. *Id.*, at 191. The panel held that to remedy the effects of past discrimination, "a set-aside program for a period of five years obviously must require more than a 0.67% set-aside to encourage minorities to enter

the contracting industry and to allow existing minority contractors to grow." *Ibid.* Thus, in the court's view the 30% figure was "reasonable in light of the undisputed fact that minorities constitute 50% of the population of Richmond." *Ibid.*

Croson sought certiorari from this Court. We granted the writ, vacated the opinion of the Court of Appeals, and remanded the case for further consideration in light of our intervening decision in *Wygant* v. *Jackson Board of Education*, 476 U. S. 267 (1986). See 478 U. S. 1016 (1986).

On remand, a divided panel of the Court of Appeals struck down the Richmond set-aside program as violating both prongs of strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *J. A. Croson Co.* v. *Richmond*, 822 F. 2d 1355 (CA4 1987) *(Croson II)*. The majority found that the "core" of this Court's holding in *Wygant* was that, "[t]o show that a plan is justified by a compelling governmental interest, a municipality that wishes to employ a racial preference cannot rest on broad-brush assumptions of historical discrimination." 822 F. 2d, at 1357. As the court read this requirement, "[f]indings of *societal* discrimination will not suffice; the findings must concern 'prior discrimination *by the government unit involved*.'" *Id.*, at 1358 (quoting *Wygant*, *supra*, at 274) (emphasis in original).

In this case, the debate at the city council meeting "revealed no record of prior discrimination by the city in awarding public contracts . . . ." *Croson II*, *supra*, at 1358. Moreover, the statistics comparing the minority population of Richmond to the percentage of *prime* contracts awarded to minority firms had little or no probative value in establishing prior discrimination in the relevant market, and actually suggested "more of a political than a remedial basis for the racial preference." 822 F. 2d, at 1359. The court concluded that, "[i]f this plan is supported by a compelling governmental interest, so is every other plan that has been enacted in the past or that will be enacted in the future." *Id.*, at 1360.

The Court of Appeals went on to hold that even if the city had demonstrated a compelling interest in the use of a race-based quota, the 30% set-aside was not narrowly tailored to accomplish a remedial purpose. The court found that the 30% figure was "chosen arbitrarily" and was not tied to the number of minority subcontractors in Richmond or to any other relevant number. *Ibid.* The dissenting judge argued that the majority had "misconstrue[d] and misapplie[d]" our decision in *Wygant*. 822 F. 2d, at 1362. We noted probable jurisdiction of the city's appeal, 484 U. S. 1058 (1988), and we now affirm the judgment.

II

The parties and their supporting *amici* fight an initial battle over the scope of the city's power to adopt legislation designed to address the effects of past discrimination. Relying on our decision in *Wygant*, appellee argues that the city must limit any race-based remedial efforts to eradicating the effects of its own prior discrimination. This is essentially the position taken by the Court of Appeals below. Appellant argues that our decision in *Fullilove* is controlling, and that as a result the city of Richmond enjoys sweeping legislative power to define and attack the effects of prior discrimination in its local construction industry. We find that neither of these two rather stark alternatives can withstand analysis.

In *Fullilove*, we upheld the minority set-aside contained in § 103(f)(2) of the Public Works Employment Act of 1977, Pub. L. 95–28, 91 Stat. 116, 42 U. S. C. § 6701 *et seq.* (Act) against a challenge based on the equal protection component of the Due Process Clause. The Act authorized a $4 billion appropriation for federal grants to state and local governments for use in public works projects. The primary purpose of the Act was to give the national economy a quick boost in a recessionary period; funds had to be committed to state or local grantees by September 30, 1977. The Act also contained the following requirement: "'Except to the extent the Secretary

determines otherwise, no grant shall be made under this Act . . . unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises.'" *Fullilove*, 448 U. S., at 454 (quoting 91 Stat. 116, 42 U. S. C. § 6705(f)(2)). MBE's were defined as businesses effectively controlled by "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." *Ibid.*

The principal opinion in *Fullilove*, written by Chief Justice Burger, did not employ "strict scrutiny" or any other traditional standard of equal protection review. The Chief Justice noted at the outset that although racial classifications call for close examination, the Court was at the same time "bound to approach [its] task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the . . . general Welfare of the United States' and 'to enforce by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment." 448 U. S., at 472. The principal opinion asked two questions: first, were the objectives of the legislation within the power of Congress? Second, was the limited use of racial and ethnic criteria a permissible means for Congress to carry out its objectives within the constraints of the Due Process Clause? *Id.*, at 473.

On the issue of congressional power, the Chief Justice found that Congress' commerce power was sufficiently broad to allow it to reach the practices of prime contractors on federally funded local construction projects. *Id.*, at 475–476. Congress could mandate state and local government compliance with the set-aside program under its § 5 power to enforce the Fourteenth Amendment. *Id.*, at 476 (citing *Katzenbach* v. *Morgan*, 384 U. S. 641, 651 (1966)).

The Chief Justice next turned to the constraints on Congress' power to employ race-conscious remedial relief. His opinion stressed two factors in upholding the MBE set-aside.

First was the unique remedial powers of Congress under § 5 of the Fourteenth Amendment:

> "Here we deal . . . not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that *in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress*, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." 448 U. S., at 483 (principal opinion) (emphasis added).

Because of these unique powers, the Chief Justice concluded that "Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to *declare certain conduct unlawful*, it may, as here, authorize and induce state action to avoid such conduct." *Id.*, at 483–484 (emphasis added).

In reviewing the legislative history behind the Act, the principal opinion focused on the evidence before Congress that a nationwide history of past discrimination had reduced minority participation in federal construction grants. *Id.*, at 458–467. The Chief Justice also noted that Congress drew on its experience under § 8(a) of the Small Business Act of 1953, which had extended aid to minority businesses. *Id.*, at 463–467. The Chief Justice concluded that "Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination." *Id.*, at 478.

The second factor emphasized by the principal opinion in *Fullilove* was the flexible nature of the 10% set-aside. Two "congressional assumptions" underlay the MBE program: first, that the effects of past discrimination had impaired the competitive position of minority businesses, and second, that "adjustment for the effects of past discrimination" would assure that at least 10% of the funds from the federal grant program would flow to minority businesses. The Chief Justice noted that both of these "assumptions" could be "rebutted" by a grantee seeking a waiver of the 10% requirement. *Id.*, at 487–488. Thus a waiver could be sought where minority businesses were not available to fill the 10% requirement or, more importantly, where an MBE attempted "to exploit the remedial aspects of the program by charging an unreasonable price, *i. e.*, a price not attributable to the present effects of prior discrimination." *Id.*, at 488. The Chief Justice indicated that without this fine tuning to remedial purpose, the statute would not have "pass[ed] muster." *Id.*, at 487.

In his concurring opinion, Justice Powell relied on the legislative history adduced by the principal opinion in finding that "Congress reasonably concluded that private and governmental discrimination had contributed to the negligible percentage of public contracts awarded minority contractors." *Id.*, at 503. Justice Powell also found that the means chosen by Congress, particularly in light of the flexible waiver provisions, were "reasonably necessary" to address the problem identified. *Id.*, at 514–515. Justice Powell made it clear that other governmental entities might have to show more than Congress before undertaking race-conscious measures: "The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of the governmental body." *Id.*, at 515–516, n. 14.

Appellant and its supporting *amici* rely heavily on *Fullilove* for the proposition that a city council, like Congress, need not make specific findings of discrimination to engage in race-conscious relief. Thus, appellant argues "[i]t would be a perversion of federalism to hold that the federal government has a compelling interest in remedying the effects of racial discrimination in its own public works program, but a city government does not." Brief for Appellant 32 (footnote omitted).

What appellant ignores is that Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to "enforce" may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations. See *Katzenbach* v. *Morgan*, 384 U. S., at 651 ("Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment"). See also *South Carolina* v. *Katzenbach*, 383 U. S. 301, 326 (1966) (similar interpretation of congressional power under § 2 of the Fifteenth Amendment). The Civil War Amendments themselves worked a dramatic change in the balance between congressional and state power over matters of race. Speaking of the Thirteenth and Fourteenth Amendments in *Ex parte Virginia*, 100 U. S. 339, 345 (1880), the Court stated: "They were intended to be, what they really are, limitations of the powers of the States and enlargements of the power of Congress."

That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate. Section 1 of the Fourteenth Amendment is an explicit *constraint* on state power, and the States must undertake any remedial efforts in accordance with that provision. To hold otherwise would be to cede control over the content of the Equal Protection Clause to the 50 state legislatures and their myriad political subdivisions. The mere recitation of a benign or compensatory purpose for the use of a racial classification would essentially entitle the States to exercise the full power of Congress under § 5 of the Fourteenth Amendment and insulate any racial classification from judicial scrutiny under § 1. We believe that such a result would be contrary to the intentions of

the Framers of the Fourteenth Amendment, who desired to place clear limits on the States' use of race as a criterion for legislative action, and to have the federal courts enforce those limitations. See *Associated General Contractors of Cal.* v. *City and Cty. of San Francisco*, 813 F. 2d, at 929 (Kozinski, J.) ("The city is not just like the federal government with regard to the findings it must make to justify race-conscious remedial action"); see also Days, Fullilove, 96 Yale L. J. 453, 474 (1987) (hereinafter Days) ("*Fullilove* clearly focused on the constitutionality of a *congressionally* mandated set-aside program") (emphasis in original); Bohrer, *Bakke, Weber*, and *Fullilove:* Benign Discrimination and Congressional Power to Enforce the Fourteenth Amendment, 56 Ind. L. J. 473, 512–513 (1981) ("Congress may authorize, pursuant to section 5, state action that would be foreclosed to the states acting alone").

We do not, as JUSTICE MARSHALL's dissent suggests, see *post*, at 557–560, find in § 5 of the Fourteenth Amendment some form of federal pre-emption in matters of race. We simply note what should be apparent to all—§ 1 of the Fourteenth Amendment stemmed from a distrust of state legislative enactments based on race; § 5 is, as the dissent notes, "'a *positive* grant of legislative power'" to Congress. *Post*, at 557, quoting *Katzenbach* v. *Morgan*, *supra*, at 651 (emphasis in dissent). Thus, our treatment of an exercise of congressional power in *Fullilove* cannot be dispositive here. In the *Slaughter-House Cases*, 16 Wall. 36 (1873), cited by the dissent, *post*, at 560, the Court noted that the Civil War Amendments granted "additional powers to the Federal government," and laid "additional restraints upon those of the States." 16 Wall., at 68.

It would seem equally clear, however, that a state or local subdivision (if delegated the authority from the State) has the authority to eradicate the effects of private discrimina-

tion within its own legislative jurisdiction.[2] This authority must, of course, be exercised within the constraints of § 1 of the Fourteenth Amendment. Our decision in *Wygant* is not to the contrary. *Wygant* addressed the constitutionality of the use of racial quotas by local school authorities pursuant to an agreement reached with the local teachers' union. It was in the context of addressing the school board's power to adopt a race-based layoff program affecting its own work force that the *Wygant* plurality indicated that the Equal Protection Clause required "some showing of prior discrimination by the governmental unit involved." *Wygant*, 476 U. S., at 274. As a matter of state law, the city of Richmond has legislative authority over its procurement policies, and can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment. To this extent, on the question of the city's competence, the Court of Appeals erred in following *Wygant* by rote in a case involving a state entity which has state-law authority to address discriminatory practices within local commerce under its jurisdiction.

Thus, if the city could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice. Cf. *Norwood* v. *Harrison*, 413 U. S. 455, 465 (1973) ("Racial discrimination in state-operated schools is barred by the Constitution and [i]t is also axiomatic that a state may not induce,

[2] In its original panel opinion, the Court of Appeals held that under Virginia law the city had the legal authority to enact the set-aside program. *Croson I*, 779 F. 2d 181, 184–186 (CA4 1985). That determination was not disturbed by the court's subsequent holding that the Plan violated the Equal Protection Clause.

encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish") (citation and internal quotations omitted).

III

A

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to *any person* within its jurisdiction the equal protection of the laws." (Emphasis added.) As this Court has noted in the past, the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Shelley* v. *Kraemer*, 334 U. S. 1, 22 (1948). The Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. To whatever racial group these citizens belong, their "personal rights" to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.

Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility. See *University of*

California Regents v. *Bakke*, 438 U. S., at 298 (opinion of Powell, J.) ("[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth"). We thus reaffirm the view expressed by the plurality in *Wygant* that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification. *Wygant*, 476 U. S., at 279–280; *id.*, at 285–286 (O'CONNOR, J., concurring in part and concurring in judgment). See also *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 105 (1973) (MARSHALL, J., dissenting) ("The highly suspect nature of classifications based on race, nationality, or alienage is well established") (footnotes omitted).

Our continued adherence to the standard of review employed in *Wygant* does not, as JUSTICE MARSHALL's dissent suggests, see *post*, at 552, indicate that we view "racial discrimination as largely a phenomenon of the past" or that "government bodies need no longer preoccupy themselves with rectifying racial injustice." As we indicate, see *infra*, at 509–510, States and their local subdivisions have many legislative weapons at their disposal both to punish and prevent present discrimination and to remove arbitrary barriers to minority advancement. Rather, our interpretation of § 1 stems from our agreement with the view expressed by Justice Powell in *Bakke* 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." *Bakke*, *supra*, at 289–290.

Under the standard proposed by JUSTICE MARSHALL's dissent, "race-conscious classifications designed to further remedial goals," *post*, at 535, are forthwith subject to a relaxed standard of review. How the dissent arrives at the legal conclusion that a racial classification is "designed to further remedial goals," without first engaging in an examination of

the factual basis for its enactment and the nexus between its scope and that factual basis, we are not told. However, once the "remedial" conclusion is reached, the dissent's standard is singularly deferential, and bears little resemblance to the close examination of legislative purpose we have engaged in when reviewing classifications based either on race or gender. See *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 648 (1975) ("[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme"). The dissent's watered-down version of equal protection review effectively assures that race will always be relevant in American life, and that the "ultimate goal" of "eliminat[ing] entirely from governmental decisionmaking such irrelevant factors as a human being's race," *Wygant*, *supra*, at 320 (STEVENS, J., dissenting) (footnote omitted), will never be achieved.

Even were we to accept a reading of the guarantee of equal protection under which the level of scrutiny varies according to the ability of different groups to defend their interests in the representative process, heightened scrutiny would still be appropriate in the circumstances of this case. One of the central arguments for applying a less exacting standard to "benign" racial classifications is that such measures essentially involve a choice made by dominant racial groups to disadvantage themselves. If one aspect of the judiciary's role under the Equal Protection Clause is to protect "discrete and insular minorities" from majoritarian prejudice or indifference, see *United States* v. *Carolene Products Co.*, 304 U. S. 144, 153, n. 4 (1938), some maintain that these concerns are not implicated when the "white majority" places burdens upon itself. See J. Ely, Democracy and Distrust 170 (1980).

In this case, blacks constitute 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 mi-

nority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case. See Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723, 739, n. 58 (1974) ("Of course it works both ways: a law that favors Blacks over Whites would be suspect if it were enacted by a predominantly Black legislature").

In *Bakke, supra*, the Court confronted a racial quota employed by the University of California at Davis Medical School. Under the plan, 16 out of 100 seats in each entering class at the school were reserved exclusively for certain minority groups. *Id.*, at 288–289. Among the justifications offered in support of the plan were the desire to "reduc[e] the historic deficit of traditionally disfavored minorities in medical school and the medical profession" and the need to "counte[r] the effects of societal discrimination." *Id.*, at 306 (citations omitted). Five Members of the Court determined that none of these interests could justify a plan that completely eliminated nonminorities from consideration for a specified percentage of opportunities. *Id.*, at 271–272 (Powell, J.) (addressing constitutionality of Davis plan); *id.*, at 408 (STEVENS, J., joined by Burger, C. J. and Stewart and REHNQUIST, JJ. concurring in judgment in part and dissenting in part) (addressing only legality of Davis admissions plan under Title VI of the Civil Rights Act of 1964).

Justice Powell's opinion applied heightened scrutiny under the Equal Protection Clause to the racial classification at issue. His opinion decisively rejected the first justification for the racially segregated admissions plan. The desire to have more black medical students or doctors, standing alone, was not merely insufficiently compelling to justify a racial classification, it was "discrimination for its own sake," forbidden by the Constitution. *Id.*, at 307. Nor could the second concern, the history of discrimination in society at large, justify a racial quota in medical school admissions. Justice Powell contrasted the "focused" goal of remedying "wrongs

worked by specific instances of racial discrimination" with "the remedying of the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past." *Ibid.* He indicated that for the governmental interest in remedying past discrimination to be triggered "judicial, legislative, or administrative findings of constitutional or statutory violations" must be made. *Ibid.* Only then does the government have a compelling interest in favoring one race over another. *Id.*, at 308–309.

In *Wygant*, 476 U. S. 267 (1986), four Members of the Court applied heightened scrutiny to a race-based system of employee layoffs. Justice Powell, writing for the plurality, again drew the distinction between "societal discrimination" which is an inadequate basis for race-conscious classifications, and the type of identified discrimination that can support and define the scope of race-based relief. The challenged classification in that case tied the layoff of minority teachers to the percentage of minority students enrolled in the school district. The lower courts had upheld the scheme, based on the theory that minority students were in need of "role models" to alleviate the effects of prior discrimination in society. This Court reversed, with a plurality of four Justices reiterating the view expressed by Justice Powell in *Bakke* that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Wygant, supra*, at 276.

The role model theory employed by the lower courts failed for two reasons. First, the statistical disparity between students and teachers had no probative value in demonstrating the kind of prior discrimination in hiring or promotion that would justify race-based relief. 476 U. S., at 276; see also *id.*, at 294 (O'CONNOR, J., concurring in part and concurring in judgment) ("The disparity between the percentage of minorities on the teaching staff and the percentage of minorities in the student body is not probative of employment discrimination"). Second, because the role model theory had no

relation to some basis for believing a constitutional or statutory violation had occurred, it could be used to "justify" race-based decisionmaking essentially limitless in scope and duration. *Id.*, at 276 (plurality opinion) ("In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future").

B

We think it clear that the factual predicate offered in support of the Richmond Plan suffers from the same two defects identified as fatal in *Wygant*. The District Court found the city council's "findings sufficient to ensure that, in adopting the Plan, it was remedying the present effects of past discrimination in the *construction industry*." Supp. App. 163 (emphasis added). Like the "role model" theory employed in *Wygant*, a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It "has no logical stopping point." *Wygant, supra*, at 275 (plurality opinion). "Relief" for such an ill-defined wrong could extend until the percentage of public contracts awarded to MBE's in Richmond mirrored the percentage of minorities in the population as a whole.

Appellant argues that it is attempting to remedy various forms of past discrimination that are alleged to be responsible for the small number of minority businesses in the local contracting industry. Among these the city cites the exclusion of blacks from skilled construction trade unions and training programs. This past discrimination has prevented them "from following the traditional path from laborer to entrepreneur." Brief for Appellant 23–24. The city also lists a host of nonracial factors which would seem to face a member of any racial group attempting to establish a new business enterprise, such as deficiencies in working capital, inability to meet bonding requirements, unfamiliarity with bidding procedures, and disability caused by an inadequate track record. *Id.*, at 25–26, and n. 41.

While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia. Like the claim that discrimination in primary and secondary schooling justifies a rigid racial preference in medical school admissions, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.

It is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination, just as it was sheer speculation how many minority medical students would have been admitted to the medical school at Davis absent past discrimination in educational opportunities. Defining these sorts of injuries as "identified discrimination" would give local governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor.

These defects are readily apparent in this case. The 30% quota cannot in any realistic sense be tied to any injury suffered by anyone. The District Court relied upon five predicate "facts" in reaching its conclusion that there was an adequate basis for the 30% quota: (1) the ordinance declares itself to be remedial; (2) several proponents of the measure stated their views that there had been past discrimination in the construction industry; (3) minority businesses received 0.67% of prime contracts from the city while minorities constituted 50% of the city's population; (4) there were very few minority contractors in local and state contractors' associations; and (5) in 1977, Congress made a determination that the effects of past discrimination had stifled minority participation in the construction industry nationally. Supp. App. 163–167.

None of these "findings," singly or together, provide the city of Richmond with a "strong basis in evidence for its conclusion that remedial action was necessary." *Wygant*, 476 U. S., at 277 (plurality opinion). There is nothing approaching a prima facie case of a constitutional or statutory violation by *anyone* in the Richmond construction industry. *Id.*, at 274–275; see also *id.*, at 293 (O'CONNOR, J., concurring).

The District Court accorded great weight to the fact that the city council designated the Plan as "remedial." But the mere recitation of a "benign" or legitimate purpose for a racial classification is entitled to little or no weight. See *Weinberger* v. *Wiesenfeld*, 420 U. S., at 648, n. 16 ("This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation"). Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice.

The District Court also relied on the highly conclusionary statement of a proponent of the Plan that there was racial discrimination in the construction industry "in this area, and the State, and around the nation." App. 41 (statement of Councilperson Marsh). It also noted that the city manager had related his view that racial discrimination still plagued the construction industry in his home city of Pittsburgh. *Id.*, at 42 (statement of Mr. Deese). These statements are of little probative value in establishing identified discrimination in the Richmond construction industry. The factfinding process of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary. See *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U. S. 483, 488–489 (1955). But when a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification's relevance to its goals. See *McLaughlin* v. *Florida*, 379 U. S. 184, 190–192 (1964). A

governmental actor cannot render race a legitimate proxy for a particular condition merely by declaring that the condition exists. See *id.*, at 193; *Wygant, supra*, at 277. The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis. See *Korematsu* v. *United States*, 323 U. S. 214, 235–240 (1944) (Murphy, J., dissenting).

Reliance on the disparity between the number of prime contracts awarded to minority firms and the minority population of the city of Richmond is similarly misplaced. There is no doubt that "[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination" under Title VII. *Hazelwood School Dist.* v. *United States*, 433 U. S. 299, 307–308 (1977). But it is equally clear that "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Id.*, at 308, n. 13. See also *Mayor of Philadelphia* v. *Educational Equality League*, 415 U. S. 605, 620 (1974) ("[T]his is not a case in which it can be assumed that all citizens are fungible for purposes of determining whether members of a particular class have been unlawfully excluded").

In the employment context, we have recognized that for certain entry level positions or positions requiring minimal training, statistical comparisons of the racial composition of an employer's work force to the racial composition of the relevant population may be probative of a pattern of discrimination. See *Teamsters* v. *United States*, 431 U. S. 324, 337–338 (1977) (statistical comparison between minority truck-drivers and relevant population probative of discriminatory exclusion). But where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating

discriminatory exclusion must be the number of minorities qualified to undertake the particular task. See *Hazelwood*, *supra*, at 308; *Johnson* v. *Transportation Agency, Santa Clara County*, 480 U. S. 616, 651–652 (1987) (O'CONNOR, J., concurring in judgment).

In this case, the city does not even know how many MBE's in the relevant market are qualified to undertake prime or subcontracting work in public construction projects. Cf. *Ohio Contractors Assn.* v. *Keip*, 713 F. 2d, at 171 (relying on percentage of minority *businesses* in the State compared to percentage of state purchasing contracts awarded to minority firms in upholding set-aside). Nor does the city know what percentage of total city construction dollars minority firms now receive as subcontractors on prime contracts let by the city.

To a large extent, the set-aside of subcontracting dollars seems to rest on the unsupported assumption that white prime contractors simply will not hire minority firms. See *Associated General Contractors of Cal.* v. *City and Cty. of San Francisco*, 813 F. 2d, at 933 ("There is no finding—and we decline to assume—that male caucasian contractors will award contracts only to other male caucasians").[3] Indeed, there is evidence in this record that overall minority participation in city contracts in Richmond is 7 to 8%, and that minority contractor participation in Community Block Development Grant *construction* projects is 17 to 22%. App. 16 (statement of Mr. Deese, City Manager). Without any information on minority participation in subcontracting, it is quite simply impossible to evaluate overall minority representation in the city's construction expenditures.

[3] Since 1975 the city of Richmond has had an ordinance on the books prohibiting both discrimination in the award of public contracts and employment discrimination by public contractors. See Reply Brief for Appellant 18, n. 42 (citing Richmond, Va., City Code, § 17.2 *et seq.* (1985)). The city points to no evidence that its prime contractors have been violating the ordinance in either their employment or subcontracting practices. The complete silence of the record concerning enforcement of the city's own antidiscrimination ordinance flies in the face of the dissent's vision of a "tight-knit industry" which has prevented blacks from obtaining the experience necessary to participate in construction contracting. See *post*, at 542–543.

The city and the District Court also relied on evidence that MBE membership in local contractors' associations was extremely low. Again, standing alone this evidence is not probative of any discrimination in the local construction industry. There are numerous explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial choices. Blacks may be disproportionately attracted to industries other than construction. See The State of Small Business: A Report of the President 201 (1986) ("Relative to the distribution of all businesses, black-owned businesses are more than proportionally represented in the transportation industry, but considerably less than proportionally represented in the wholesale trade, manufacturing, and finance industries"). The mere fact that black membership in these trade organizations is low, standing alone, cannot establish a prima facie case of discrimination. Cf. *Bazemore* v. *Friday*, 478 U. S. 385, 407–408 (1986) (mere existence of single race clubs in absence of evidence of exclusion by race cannot create a duty to integrate).

For low minority membership in these associations to be relevant, the city would have to link it to the number of local MBE's eligible for membership. If the statistical disparity between eligible MBE's and MBE membership were great enough, an inference of discriminatory exclusion could arise. In such a case, the city would have a compelling interest in preventing its tax dollars from assisting these organizations in maintaining a racially segregated construction market. See *Norwood*, 413 U. S., at 465; *Ohio Contractors*, *supra*, at 171 (upholding minority set-aside based in part on earlier District Court finding that "the state had become 'a joint participant' with private industry and certain craft unions in

a pattern of racially discriminatory conduct which excluded black laborers from work on public construction contracts").

Finally, the city and the District Court relied on Congress' finding in connection with the set-aside approved in *Fullilove* that there had been nationwide discrimination in the construction industry. The probative value of these findings for demonstrating the existence of discrimination in Richmond is extremely limited. By its inclusion of a waiver procedure in the national program addressed in *Fullilove*, Congress explicitly recognized that the scope of the problem would vary from market area to market area. See *Fullilove*, 448 U. S., at 487 (noting that the presumption that minority firms are disadvantaged by past discrimination may be rebutted by grantees in individual situations).

Moreover, as noted above, Congress was exercising its powers under § 5 of the Fourteenth Amendment in making a finding that past discrimination would cause federal funds to be distributed in a manner which reinforced prior patterns of discrimination. While the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief. Congress has made national findings that there has been societal discrimination in a host of fields. If all a state or local government need do is find a congressional report on the subject to enact a set-aside program, the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity. See Days 480–481 ("[I]t is essential that state and local agencies also establish the presence of discrimination in their own bailiwicks, based either upon their own fact-finding processes or upon determinations made by other competent institutions").

JUSTICE MARSHALL apparently views the requirement that Richmond identify the discrimination it seeks to remedy in its own jurisdiction as a mere administrative headache, an

"onerous documentary obligatio[n]." *Post*, at 548. We cannot agree. In this regard, we are in accord with JUSTICE STEVENS' observation in *Fullilove*, that "[b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate." *Fullilove*, *supra*, at 533–535 (dissenting opinion) (footnotes omitted). The "evidence" relied upon by the dissent, the history of school desegregation in Richmond and numerous congressional reports, does little to define the scope of any injury to minority contractors in Richmond or the necessary remedy. The factors relied upon by the dissent could justify a preference of any size or duration.

Moreover, JUSTICE MARSHALL's suggestion that findings of discrimination may be "shared" from jurisdiction to jurisdiction in the same manner as information concerning zoning and property values is unprecedented. See *post*, at 547, quoting *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 51–52 (1986). We have never approved the extrapolation of discrimination in one jurisdiction from the experience of another. See *Milliken* v. *Bradley*, 418 U. S. 717, 746 (1974) ("Disparate treatment of white and Negro students occurred within the Detroit school system, and not elsewhere, and on this record the remedy must be limited to that system").

In sum, none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry. We, therefore, hold that the city has failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race. To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for "remedial relief" for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity

and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs. "Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications . . . ." *Bakke*, 438 U. S., at 296–297 (Powell, J.). We think such a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality.

The foregoing analysis applies only to the inclusion of blacks within the Richmond set-aside program. There is *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry. The District Court took judicial notice of the fact that the vast majority of "minority" persons in Richmond were black. Supp. App. 207. It may well be that Richmond has never had an Aleut or Eskimo citizen. The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination.

If a 30% set-aside was "narrowly tailored" to compensate black contractors for past discrimination, one may legitimately ask why they are forced to share this "remedial relief" with an Aleut citizen who moves to Richmond tomorrow? The gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation. See *Wygant*, 476 U. S., at 284, n. 13 (haphazard inclusion of racial groups "further illustrates the undifferentiated nature of the plan"); see also Days 482 ("Such programs leave one with the sense that the racial and ethnic groups favored by the set-aside were added without attention to whether their inclusion was justified by evidence of past discrimination").

IV

As noted by the court below, it is almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way. We limit ourselves to two observations in this regard.

First, there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting. See *United States v. Paradise*, 480 U. S. 149, 171 (1987) ("In determining whether race-conscious remedies are appropriate, we look to several factors, including the efficacy of alternative remedies"). Many of the barriers to minority participation in the construction industry relied upon by the city to justify a racial classification appear to be race neutral. If MBE's disproportionately lack capital or cannot meet bonding requirements, a race-neutral program of city financing for small firms would, *a fortiori*, lead to greater minority participation. The principal opinion in *Fullilove* found that Congress had carefully examined and rejected race-neutral alternatives before enacting the MBE set-aside. See *Fullilove*, 448 U. S., at 463–467; see also *id.*, at 511 (Powell, J., concurring) ("[B]y the time Congress enacted [the MBE set-aside] in 1977, it knew that other remedies had failed to ameliorate the effects of racial discrimination in the construction industry"). There is no evidence in this record that the Richmond City Council has considered any alternatives to a race-based quota.

Second, the 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing. It rests upon the "completely unrealistic" assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population. See *Sheet Metal Workers v. EEOC*, 478 U. S. 421, 494 (1986) (O'CONNOR, J., concurring in part and dissenting in part) ("[I]t is completely unrealistic to assume that individuals of

one race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination").

Since the city must already consider bids and waivers on a case-by-case basis, it is difficult to see the need for a rigid numerical quota. As noted above, the congressional scheme upheld in *Fullilove* allowed for a waiver of the set-aside provision where an MBE's higher price was not attributable to the effects of past discrimination. Based upon proper findings, such programs are less problematic from an equal protection standpoint because they treat all candidates individually, rather than making the color of an applicant's skin the sole relevant consideration. Unlike the program upheld in *Fullilove*, the Richmond Plan's waiver system focuses solely on the availability of MBE's; there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors.

Given the existence of an individualized procedure, the city's only interest in maintaining a quota system rather than investigating the need for remedial action in particular cases would seem to be simple administrative convenience. But the interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification. See *Frontiero* v. *Richardson*, 411 U. S. 677, 690 (1973) (plurality opinion) ("[W]hen we enter the realm of 'strict judicial scrutiny,' there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality"). Under Richmond's scheme, a successful black, Hispanic, or Oriental entrepreneur from anywhere in the country enjoys an absolute preference over other citizens based solely on their race. We think it obvious that such a program is not narrowly tailored to remedy the effects of prior discrimination.

V

Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction. If the city of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion. Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise. See *Bazemore* v. *Friday*, 478 U. S., at 398; *Teamsters* v. *United States*, 431 U. S., at 337–339. Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria. See, *e. g.*, *New York State Club Assn.* v. *New York City*, 487 U. S. 1, 10–11, 13–14 (1988). In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.

Nor is local government powerless to deal with individual instances of racially motivated refusals to employ minority contractors. Where such discrimination occurs, a city would be justified in penalizing the discriminator and providing appropriate relief to the victim of such discrimination. See generally *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 802–803 (1973). Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified. See *Teamsters*, *supra*, at 338.

Even in the absence of evidence of discrimination, the city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding

procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination or neglect. Many of the formal barriers to new entrants may be the product of bureaucratic inertia more than actual necessity, and may have a disproportionate effect on the opportunities open to new minority firms. Their elimination or modification would have little detrimental effect on the city's interests and would serve to increase the opportunities available to minority business without classifying individuals on the basis of race. The city may also act to prohibit discrimination in the provision of credit or bonding by local suppliers and banks. Business as usual should not mean business pursuant to the unthinking exclusion of certain members of our society from its rewards.

In the case at hand, the city has not ascertained how many minority enterprises are present in the local construction market nor the level of their participation in city construction projects. The city points to no evidence that qualified minority contractors have been passed over for city contracts or subcontracts, either as a group or in any individual case. Under such circumstances, it is simply impossible to say that the city has demonstrated "a strong basis in evidence for its conclusion that remedial action was necessary." *Wygant*, 476 U. S., at 277.

Proper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects. Such findings also serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself. Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics. "[I]f there is no duty to attempt either to measure the recovery by the wrong or to distribute that recovery within the injured class in an evenhanded way, our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate 'a piece of the action' for its members." *Fullilove*, 448 U. S., at 539 (STEVENS, J., dissenting). Because the city of Richmond has failed to identify the need for remedial action in the awarding of its public construction contracts, its treatment of its citizens on a racial basis violates the dictates of the Equal Protection Clause. Accordingly, the judgment of the Court of Appeals for the Fourth Circuit is

Affirmed.

JUSTICE STEVENS, concurring in part and concurring in the judgment.

A central purpose of the Fourteenth Amendment is to further the national goal of equal opportunity for all our citizens. In order to achieve that goal we must learn from our past mistakes, but I believe the Constitution requires us to evaluate our policy decisions—including those that govern the relationships among different racial and ethnic groups—primarily by studying their probable impact on the future. I therefore do not agree with the premise that seems to underlie today's decision, as well as the decision in *Wygant* v. *Jackson Board of Education*, 476 U. S. 267 (1986), that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong. See *ante*, at 493–494.[1] I do, however, agree with the Court's explana-

[1] In my view the Court's approach to this case gives unwarranted deference to race-based legislative action that purports to serve a purely remedial goal, and overlooks the potential value of race-based determinations that may serve other valid purposes. With regard to the former point—as I explained at some length in *Fullilove* v. *Klutznick*, 448 U. S. 448, 532–554 (1980) (dissenting opinion)—I am not prepared to assume that even a more narrowly tailored set-aside program supported by stronger findings would be constitutionally justified. Unless the legislature can identify both the particular victims and the particular perpetrators of past

tion of why the Richmond ordinance cannot be justified as a remedy for past discrimination, and therefore join Parts I, III–B, and IV of its opinion. I write separately to emphasize three aspects of the case that are of special importance to me.

First, the city makes no claim that the public interest in the efficient performance of its construction contracts will be served by granting a preference to minority-business enterprises. This case is therefore completely unlike *Wygant*, in which I thought it quite obvious that the school board had reasonably concluded that an integrated faculty could provide educational benefits to the entire student body that could not be provided by an all-white, or nearly all-white, faculty. As I pointed out in my dissent in that case, even if we completely disregard our history of racial injustice, race is not always irrelevant to sound governmental decisionmaking.[2] In the

discrimination, which is precisely what a court does when it makes findings of fact and conclusions of law, a *remedial* justification for race-based legislation will almost certainly sweep too broadly. With regard to the latter point: I think it unfortunate that the Court in neither *Wygant* nor this case seems prepared to acknowledge that some race-based policy decisions may serve a legitimate public purpose. I agree, of course, that race is so seldom relevant to legislative decisions on how best to foster the public good that legitimate justifications for race-based legislation will usually not be available. But unlike the Court, I would not totally discount the legitimacy of race-based decisions that may produce tangible and fully justified future benefits. See n. 2, *infra;* see also Justice Powell's discussion in *University of California Regents* v. *Bakke*, 438 U. S. 265, 311–319 (1978).

[2] "Rather than analyzing a case of this kind by asking whether minority teachers have some sort of special entitlement to jobs as a remedy for sins that were committed in the past, I believe that we should first ask whether the Board's action advances the public interest in educating children for the future.

"[I]n our present society, race is not always irrelevant to sound governmental decisionmaking. To take the most obvious example, in law enforcement, if an undercover agent is needed to infiltrate a group suspected of ongoing criminal behavior—and if the members of the group are all of the same race—it would seem perfectly rational to employ an agent of that race rather than a member of a different racial class. Similarly, in a city

case of public contracting, however, if we disregard the past, there is not even an arguable basis for suggesting that the race of a subcontractor or general contractor should have any relevance to his or her access to the market.

Second, this litigation involves an attempt by a legislative body, rather than a court, to fashion a remedy for a past wrong. Legislatures are primarily policymaking bodies that promulgate rules to govern future conduct. The constitutional prohibitions against the enactment of *ex post facto* laws and bills of attainder reflect a valid concern about the use of the political process to punish or characterize past conduct of private citizens.[3] It is the judicial system, rather than the legislative process, that is best equipped to iden-

with a recent history of racial unrest, the superintendent of police might reasonably conclude that an integrated police force could develop a better relationship with the community and thereby do a more effective job of maintaining law and order than a force composed only of white officers.

"In the context of public education, it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty. For one of the most important lessons that the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous 'melting pot' do not identify essential differences among the human beings that inhabit our land. It is one thing for a white child to be taught by a white teacher that color, like beauty, is only 'skin deep'; it is far more convincing to experience that truth on a day-to-day basis during the routine, ongoing learning process." *Wygant* v. *Jackson Board of Education*, 476 U. S., at 313–315 (footnotes omitted).

[3] See U. S. Const., Art. I, § 9, cl. 3, § 10, cl. 1. Of course, legislatures frequently appropriate funds to compensate victims of past governmental misconduct for which there is no judicial remedy. See, *e. g.*, Pub. L. 100–383, 102 Stat. 903 (provision of restitution to interned Japanese-Americans during World War II). Thus, it would have been consistent with normal practice for the city of Richmond to provide direct monetary compensation to any minority-business enterprise that the city might have injured in the past. Such a voluntary decision by a public body is, however, quite different from a decision to require one private party to compensate another for an unproven injury.

tify past wrongdoers and to fashion remedies that will create the conditions that presumably would have existed had no wrong been committed. Thus, in cases involving the review of judicial remedies imposed against persons who have been proved guilty of violations of law, I would allow the courts in racial discrimination cases the same broad discretion that chancellors enjoy in other areas of the law. See *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 15–16 (1971).[4]

Third, instead of engaging in a debate over the proper standard of review to apply in affirmative-action litigation,[5] I believe it is more constructive to try to identify the characteristics of the advantaged and disadvantaged classes that may justify their disparate treatment. See *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 452–453 (1985) (STEVENS, J., concurring).[6] In this case that approach convinces me that, instead of carefully identifying the characteristics of the two classes of contractors that are respectively favored and disfavored by its ordinance, the Richmond City Council has merely engaged in the type of stereotypical analysis that is a hallmark of violations of the Equal Protection Clause. Whether we look at the class of persons benefited by the ordinance or at the disadvantaged class, the same conclusion emerges.

The justification for the ordinance is the fact that in the past white contractors—and presumably other white citizens in Richmond—have discriminated against black contractors. The class of persons benefited by the ordinance is not, however, limited to victims of such discrimination—it encompasses persons who have never been in business in Richmond as well as minority contractors who may have been guilty of discriminating against members of other minority groups. Indeed, for all the record shows, all of the minority-business enterprises that have benefited from the ordinance may be firms that have prospered notwithstanding the discriminatory conduct that may have harmed other minority firms years ago. Ironically, minority firms that have survived in the competitive struggle, rather than those that have perished, are most likely to benefit from an ordinance of this kind.

The ordinance is equally vulnerable because of its failure to identify the characteristics of the disadvantaged class of

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[4] As I pointed out in my separate opinion concurring in the judgment in *United States* v. *Paradise*, 480 U. S. 149, 193–194 (1987):

"A party who has been found guilty of repeated and persistent violations of the law bears the burden of demonstrating that the chancellor's efforts to fashion effective relief exceed the bounds of 'reasonableness.' The burden of proof in a case like this is precisely the opposite of that in cases such as *Wygant* v. *Jackson Board of Education*, 476 U. S. 267 (1986), and *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980), which did not involve any proven violations of law. In such cases the governmental decisionmaker who would make race-conscious decisions must overcome a strong presumption against them. No such burden rests on a federal district judge who has found that the governmental unit before him is guilty of racially discriminatory conduct that violates the Constitution."

[5] "There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases." *Craig* v. *Boren*, 429 U. S. 190, 211–212 (1976) (STEVENS, J., concurring).

[6] "I have always asked myself whether I could find a 'rational basis' for the classification at issue. The term 'rational,' of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. Thus, the word 'rational'—for me at least—includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially.

"In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a 'tradition of disfavor' by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment? In most cases the answer to these questions will tell us whether the statute has a 'rational basis.'" *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S., at 452–453 (STEVENS, J., concurring).

white contractors that justify the disparate treatment. That class unquestionably includes some white contractors who are guilty of past discrimination against blacks, but it is only habit, rather than evidence or analysis, that makes it seem acceptable to assume that every white contractor covered by the ordinance shares in that guilt. Indeed, even among those who have discriminated in the past, it must be assumed that at least some of them have complied with the city ordinance that has made such discrimination unlawful since 1975.[7] Thus, the composition of the disadvantaged class of white contractors presumably includes some who have been guilty of unlawful discrimination, some who practiced discrimination before it was forbidden by law,[8] and some who have never discriminated against anyone on the basis of race. Imposing a common burden on such a disparate class merely because each member of the class is of the same race stems from reliance on a stereotype rather than fact or reason.[9]

There is a special irony in the stereotypical thinking that prompts legislation of this kind. Although it stigmatizes the disadvantaged class with the unproven charge of past racial discrimination, it actually imposes a greater stigma on its

[7] See *ante*, at 502, n. 3.

[8] There is surely some question about the power of a legislature to impose a statutory burden on private citizens for engaging in discriminatory practices at a time when such practices were not unlawful. Cf. *Teamsters* v. *United States*, 431 U. S. 324, 356–357, 360 (1977).

[9] There is, of course, another possibility that should not be overlooked. The ordinance might be nothing more than a form of patronage. But racial patronage, like a racial gerrymander, is no more defensible than political patronage or a political gerrymander. Cf. *Karcher* v. *Daggett*, 462 U. S. 725, 744–765 (1983) (STEVENS, J., concurring); *Rogers* v. *Lodge*, 458 U. S. 613, 631–653 (1982) (STEVENS, J., dissenting); *Mobile* v. *Bolden*, 446 U. S. 55, 83–94 (1980) (STEVENS, J., concurring in judgment); *Cousins* v. *City Council of Chicago*, 466 F. 2d 830, 848–853 (CA7) (Stevens, J., dissenting), cert. denied, 409 U. S. 893 (1972). A southern State with a long history of discrimination against Republicans in the awarding of public contracts could not rely on such past discrimination as a basis for granting a legislative preference to Republican contractors in the future.

supposed beneficiaries. For, as I explained in my opinion in *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980):

> "[E]ven though it is not the actual predicate for this legislation, a statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race." *Id.*, at 545.
>
> "The risk that habitual attitudes toward classes of persons, rather than analysis of the relevant characteristics of the class, will serve as a basis for a legislative classification is present when benefits are distributed as well as when burdens are imposed. In the past, traditional attitudes too often provided the only explanation for discrimination against women, aliens, illegitimates, and black citizens. Today there is a danger that awareness of past injustice will lead to automatic acceptance of new classifications that are not in fact justified by attributes characteristic of the class as a whole.
>
> "When [government] creates a special preference, or a special disability, for a class of persons, it should identify the characteristic that justifies the special treatment. When the classification is defined in racial terms, I believe that such particular identification is imperative.
>
> "In this case, only two conceivable bases for differentiating the preferred classes from society as a whole have occurred to me: (1) that they were the victims of unfair treatment in the past and (2) that they are less able to compete in the future. Although the first of these factors would justify an appropriate remedy for past wrongs, for reasons that I have already stated, this statute is not such a remedial measure. The second factor is simply not true. Nothing in the record of this case, the legislative history of the Act, or experience that we may notice judicially provides any support for such a proposition." *Id.*, at 552–554 (footnote omitted).

Accordingly, I concur in Parts I, III–B, and IV of the Court's opinion, and in the judgment.

JUSTICE KENNEDY, concurring in part and concurring in the judgment.

I join all but Part II of JUSTICE O'CONNOR's opinion and give this further explanation.

Part II examines our case law upholding congressional power to grant preferences based on overt and explicit classification by race. See *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980). With the acknowledgment that the summary in Part II is both precise and fair, I must decline to join it. The process by which a law that is an equal protection violation when enacted by a State becomes transformed to an equal protection guarantee when enacted by Congress poses a difficult proposition for me; but as it is not before us, any reconsideration of that issue must await some further case. For purposes of the ordinance challenged here, it suffices to say that the State has the power to eradicate racial discrimination and its effects in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself. The Fourteenth Amendment ought not to be interpreted to reduce a State's authority in this regard, unless, of course, there is a conflict with federal law or a state remedy is itself a violation of equal protection. The latter is the case presented here.

The moral imperative of racial neutrality is the driving force of the Equal Protection Clause. JUSTICE SCALIA's opinion underscores that proposition, quite properly in my view. The rule suggested in his opinion, which would strike down all preferences which are not necessary remedies to victims of unlawful discrimination, would serve important structural goals, as it would eliminate the necessity for courts to pass upon each racial preference that is enacted. Structural protections may be necessities if moral imperatives are to be obeyed. His opinion would make it crystal clear to the

political branches, at least those of the States, that legislation must be based on criteria other than race.

Nevertheless, given that a rule of automatic invalidity for racial preferences in almost every case would be a significant break with our precedents that require a case-by-case test, I am not convinced we need adopt it at this point. On the assumption that it will vindicate the principle of race neutrality found in the Equal Protection Clause, I accept the less absolute rule contained in JUSTICE O'CONNOR's opinion, a rule based on the proposition that any racial preference must face the most rigorous scrutiny by the courts. My reasons for doing so are as follows. First, I am confident that, in application, the strict scrutiny standard will operate in a manner generally consistent with the imperative of race neutrality, because it forbids the use even of narrowly drawn racial classifications except as a last resort. Second, the rule against race-conscious remedies is already less than an absolute one, for that relief may be the only adequate remedy after a judicial determination that a State or its instrumentality has violated the Equal Protection Clause. I note, in this connection, that evidence which would support a judicial finding of intentional discrimination may suffice also to justify remedial legislative action, for it diminishes the constitutional responsibilities of the political branches to say they must wait to act until ordered to do so by a court. Third, the strict scrutiny rule is consistent with our precedents, as JUSTICE O'CONNOR's opinion demonstrates.

The ordinance before us falls far short of the standard we adopt. The nature and scope of the injury that existed; its historical or antecedent causes; the extent to which the city contributed to it, either by intentional acts or by passive complicity in acts of discrimination by the private sector; the necessity for the response adopted, its duration in relation to the wrong, and the precision with which it otherwise bore on whatever injury in fact was addressed, were all matters unmeasured, unexplored, and unexplained by the city council. We

are left with an ordinance and a legislative record open to the fair charge that it is not a remedy but is itself a preference which will cause the same corrosive animosities that the Constitution forbids in the whole sphere of government and that our national policy condemns in the rest of society as well. This ordinance is invalid under the Fourteenth Amendment.

JUSTICE SCALIA, concurring in the judgment.

I agree with much of the Court's opinion, and, in particular, with JUSTICE O'CONNOR's conclusion that strict scrutiny must be applied to all governmental classification by race, whether or not its asserted purpose is "remedial" or "benign." *Ante*, at 493, 495. I do not agree, however, with JUSTICE O'CONNOR's dictum suggesting that, despite the Fourteenth Amendment, state and local governments may in some circumstances discriminate on the basis of race in order (in a broad sense) "to ameliorate the effects of past discrimination." *Ante*, at 476–477. The benign purpose of compensating for social disadvantages, whether they have been acquired by reason of prior discrimination or otherwise, can no more be pursued by the illegitimate means of racial discrimination than can other assertedly benign purposes we have repeatedly rejected. See, *e. g.*, *Wygant* v. *Jackson Board of Education*, 476 U. S. 267, 274–276 (1986) (plurality opinion) (discrimination in teacher assignments to provide "role models" for minority students); *Palmore* v. *Sidoti*, 466 U. S. 429, 433 (1984) (awarding custody of child to father, after divorced mother entered an interracial remarriage, in order to spare child social "pressures and stresses"); *Lee* v. *Washington*, 390 U. S. 333 (1968) *(per curiam)* (permanent racial segregation of all prison inmates, presumably to reduce possibility of racial conflict). The difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency—fatal to a Nation such as ours—to classify and judge men and women on the basis of their country of origin or the color of their skin. A solution

to the first problem that aggravates the second is no solution at all. I share the view expressed by Alexander Bickel that "[t]he lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society." A. Bickel, The Morality of Consent 133 (1975). At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates, cf. *Lee* v. *Washington*, *supra*—can justify an exception to the principle embodied in the Fourteenth Amendment that "[o]ur Constitution is colorblind, and neither knows nor tolerates classes among citizens," *Plessy* v. *Ferguson*, 163 U. S. 537, 559 (1896) (Harlan, J., dissenting); accord, *Ex parte Virginia*, 100 U. S. 339, 345 (1880); 2 J. Story, Commentaries on the Constitution § 1961, p. 677 (T. Cooley ed. 1873); T. Cooley, Constitutional Limitations 439 (2d ed. 1871).

We have in some contexts approved the use of racial classifications by the Federal Government to remedy the effects of past discrimination. I do not believe that we must or should extend those holdings to the States. In *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980), we upheld legislative action by Congress similar in its asserted purpose to that at issue here. And we have permitted federal courts to prescribe quite severe, race-conscious remedies when confronted with egregious and persistent unlawful discrimination, see, *e. g.*, *United States* v. *Paradise*, 480 U. S. 149 (1987); *Sheet Metal Workers* v. *EEOC*, 478 U. S. 421 (1986). As JUSTICE O'CONNOR acknowledges, however, *ante*, at 486–491, it is one thing to permit racially based conduct by the Federal Government—whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment, see U. S. Const., Amdt. 14, § 5—and quite another to permit it by the precise entities against whose conduct in

matters of race that Amendment was specifically directed, see Amdt. 14, § 1. As we said in *Ex parte Virginia*, *supra*, at 345, the Civil War Amendments were designed to "take away all possibility of oppression by law because of race or color" and "to be . . . limitations on the power of the States and enlargements of the power of Congress." Thus, without revisiting what we held in *Fullilove* (or trying to derive a rationale from the three separate opinions supporting the judgment, none of which commanded more than three votes, compare 448 U. S., at 453–495 (opinion of Burger, C. J., joined by WHITE and Powell, JJ.), with *id.*, at 495–517 (opinion of Powell, J.), and *id.*, at 517–522 (opinion of MARSHALL, J., joined by BRENNAN and BLACKMUN, JJ.)), I do not believe our decision in that case controls the one before us here.

A sound distinction between federal and state (or local) action based on race rests not only upon the substance of the Civil War Amendments, but upon social reality and governmental theory. It is a simple fact that what Justice Stewart described in *Fullilove* as "the dispassionate objectivity [and] the flexibility that are needed to mold a race-conscious remedy around the single objective of eliminating the effects of past or present discrimination"—political qualities already to be doubted in a national legislature, *Fullilove*, *supra*, at 527 (Stewart, J., with whom REHNQUIST, J., joined, dissenting)—are substantially less likely to exist at the state or local level. The struggle for racial justice has historically been a struggle by the national society against oppression in the individual States. See, *e. g.*, *Ex parte Virginia*, *supra* (denying writ of habeas corpus to a state judge in custody under federal indictment for excluding jurors on the basis of race); H. Hyman & W. Wiecek, Equal Justice Under Law, 1835–1875, pp. 312–334 (1982); Logan, Judicial Federalism in the Court of History, 66 Ore. L. Rev. 454, 494–515 (1988). And the struggle retains that character in modern times. See, *e. g.*, *Brown* v. *Board of Education*, 349 U. S. 294 (1955) (*Brown II*); *United States* v. *Montgomery Board of Education*, 395 U. S. 225 (1969); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971); *Griffin* v. *Prince Edward County School Board*, 377 U. S. 218 (1964); *Cooper* v. *Aaron*, 358 U. S. 1 (1958). Not all of that struggle has involved discrimination against blacks, see, *e. g.*, *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886) (Chinese); *Hernandez* v. *Texas*, 347 U. S. 475 (1954) (Hispanics), and not all of it has been in the Old South, see, *e. g.*, *Columbus Board of Education* v. *Penick*, 443 U. S. 449 (1979); *Keyes* v. *School Dist. No. 1, Denver, Colorado*, 413 U. S. 189 (1973). What the record shows, in other words, is that racial discrimination against any group finds a more ready expression at the state and local than at the federal level. To the children of the Founding Fathers, this should come as no surprise. An acute awareness of the heightened danger of oppression from political factions in small, rather than large, political units dates to the very beginning of our national history. See G. Wood, The Creation of the American Republic, 1776–1787, pp. 499–506 (1969). As James Madison observed in support of the proposed Constitution's enhancement of national powers:

> "The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plan of oppression. Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other." The Federalist No. 10, pp. 82–84 (C. Rossiter ed. 1961).

The prophesy of these words came to fruition in Richmond in the enactment of a set-aside clearly and directly beneficial to the dominant political group, which happens also to be the dominant racial group. The same thing has no doubt happened before in other cities (though the racial basis of the preference has rarely been made textually explicit)—and blacks have often been on the receiving end of the injustice. Where injustice is the game, however, turnabout is not fair play.

In my view there is only one circumstance in which the States may act *by race* to "undo the effects of past discrimination": where that is necessary to eliminate their own maintenance of a system of unlawful racial classification. If, for example, a state agency has a discriminatory pay scale compensating black employees in all positions at 20% less than their nonblack counterparts, it may assuredly promulgate an order raising the salaries of "all black employees" to eliminate the differential. Cf. *Bazemore* v. *Friday*, 478 U. S. 385, 395–396 (1986). This distinction explains our school desegregation cases, in which we have made plain that States and localities sometimes have an obligation to adopt race-conscious remedies. While there is no doubt that those cases have taken into account the continuing "effects" of previously mandated racial school assignment, we have held those effects to justify a race-conscious remedy only because we have concluded, in that context, that they perpetuate a "dual school system." We have stressed each school district's constitutional "duty to *dismantle* its dual system," and have found that "[e]ach instance of a failure or refusal to fulfill this affirmative duty *continues the violation* of the Fourteenth Amendment." *Columbus Board of Education* v. *Penick*, *supra*, at 458–459 (emphasis added). Concluding in this context that race-neutral efforts at "dismantling the state-imposed dual system" were so ineffective that they might "indicate a lack of good faith," *Green* v. *New Kent County School Board*, 391 U. S. 430, 439 (1968); see also

Raney v. *Board of Education of Gould School Dist.*, 391 U. S. 443 (1968), we have permitted, as part of the local authorities' "affirmative duty to disestablish the dual school system[s]," such voluntary (that is, noncourt-ordered) measures as attendance zones drawn to achieve greater racial balance, and out-of-zone assignment by race for the same purpose. *McDaniel* v. *Barresi*, 402 U. S. 39, 40–41 (1971). While thus permitting the use of race to *de*classify racially classified students, teachers, and educational resources, however, we have also made it clear that the remedial power extends no further than the scope of the continuing constitutional violation. See, *e. g.*, *Columbus Board of Education* v. *Penick*, *supra*, at 465; *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406, 420 (1977); *Milliken* v. *Bradley*, 418 U. S. 717, 744 (1974); *Keyes* v. *School Dist. No. 1, Denver, Colorado*, *supra*, at 213. And it is implicit in our cases that after the dual school system has been completely disestablished, the States may no longer assign students by race. Cf. *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424 (1976) (federal court may not require racial assignment in such circumstances).

Our analysis in *Bazemore* v. *Friday*, *supra*, reflected our unwillingness to conclude, outside the context of school assignment, that the continuing effects of prior discrimination can be equated with state maintenance of a discriminatory system. There we found both that the government's adoption of "wholly neutral admissions" policies for 4-H and Homemaker Clubs sufficed to remedy its prior constitutional violation of maintaining segregated admissions, and that there was no further obligation to use racial reassignments to eliminate continuing effects—that is, any remaining all-black and all-white clubs. 478 U. S., at 407–408. "[H]owever sound *Green* [v. *New Kent County School Board*, *supra*] may have been in the context of the public schools," we said, "it has no application to this wholly different milieu." *Id.*, at 408. The same is so here.

A State can, of course, act "to undo the effects of past discrimination" in many permissible ways that do not involve classification by race. In the particular field of state contracting, for example, it may adopt a preference for small businesses, or even for new businesses—which would make it easier for those previously excluded by discrimination to enter the field. Such programs may well have racially disproportionate impact, but they are not based on race. And, of course, a State may "undo the effects of past discrimination" in the sense of giving the identified victim of state discrimination that which it wrongfully denied him—for example, giving to a previously rejected black applicant the job that, by reason of discrimination, had been awarded to a white applicant, even if this means terminating the latter's employment. In such a context, the white jobholder is not being selected for disadvantageous treatment because of his race, but because he was wrongfully awarded a job to which another is entitled. That is worlds apart from the system here, in which those to be disadvantaged are identified solely by race.

I agree with the Court's dictum that a fundamental distinction must be drawn between the effects of "societal" discrimination and the effects of "identified" discrimination, and that the situation would be different if Richmond's plan were "tailored" to identify those particular bidders who "suffered from the effects of past discrimination by the city or prime contractors." *Ante*, at 507–508. In my view, however, the reason that would make a difference is not, as the Court states, that it would justify race-conscious action—see, *e. g.*, *ante*, at 504–506, 507–508—but rather that it would enable race-neutral remediation. Nothing prevents Richmond from according a contracting preference to identified victims of discrimination. While most of the beneficiaries might be black, neither the beneficiaries nor those disadvantaged by the preference would be identified *on the basis of their race.* In other words, far from justifying racial classification, identification of actual victims of discrimination makes it less supportable than ever, because more obviously unneeded.

In his final book, Professor Bickel wrote:

> "[A] racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice. Moreover, it can easily be turned against those it purports to help. The history of the racial quota is a history of subjugation, not beneficence. Its evil lies not in its name, but in its effects: a quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant." Bickel, The Morality of Consent, at 133.

Those statements are true and increasingly prophetic. Apart from their societal effects, however, which are "in the aggregate disastrous," *id.*, at 134, it is important not to lose sight of the fact that even "benign" racial quotas have individual victims, whose very real injustice we ignore whenever we deny them enforcement of their right not to be disadvantaged on the basis of race. *Johnson* v. *Transportation Agency, Santa Clara County*, 480 U. S. 616, 677 (1987) (SCALIA, J., dissenting). As Justice Douglas observed: "A DeFunis who is white is entitled to no advantage by virtue of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner." *DeFunis* v. *Odegaard*, 416 U. S. 312, 337 (1974) (dissenting opinion). When we depart from this American principle we play with fire, and much more than an occasional DeFunis, Johnson, or Croson burns.

It is plainly true that in our society blacks have suffered discrimination immeasurably greater than any directed at other racial groups. But those who believe that racial preferences can help to "even the score" display, and reinforce, a manner of thinking by race that was the source of the injustice and that will, if it endures within our society, be the

source of more injustice still. The relevant proposition is not that it was blacks, or Jews, or Irish who were discriminated against, but that it was individual men and women, "created equal," who were discriminated against. And the relevant resolve is that that should never happen again. Racial preferences appear to "even the score" (in some small degree) only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered in the past to a black man should be compensated for by discriminating against a white. Nothing is worth that embrace. Since blacks have been disproportionately disadvantaged by racial discrimination, any race-neutral remedial program aimed at the disadvantaged *as such* will have a disproportionately beneficial impact on blacks. Only such a program, and not one that operates on the basis of race, is in accord with the letter and the spirit of our Constitution.

Since I believe that the appellee here had a constitutional right to have its bid succeed or fail under a decisionmaking process uninfected with racial bias, I concur in the judgment of the Court.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, dissenting.

It is a welcome symbol of racial progress when the former capital of the Confederacy acts forthrightly to confront the effects of racial discrimination in its midst. In my view, nothing in the Constitution can be construed to prevent Richmond, Virginia, from allocating a portion of its contracting dollars for businesses owned or controlled by members of minority groups. Indeed, Richmond's set-aside program is indistinguishable in all meaningful respects from—and in fact was patterned upon—the federal set-aside plan which this Court upheld in *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980).

A majority of this Court holds today, however, that the Equal Protection Clause of the Fourteenth Amendment blocks Richmond's initiative. The essence of the majority's

position[1] is that Richmond has failed to catalog adequate findings to prove that past discrimination has impeded minorities from joining or participating fully in Richmond's construction contracting industry. I find deep irony in second-guessing Richmond's judgment on this point. As much as any municipality in the United States, Richmond knows what racial discrimination is; a century of decisions by this and other federal courts has richly documented the city's disgraceful history of public and private racial discrimination. In any event, the Richmond City Council *has* supported its determination that minorities have been wrongly excluded from local construction contracting. Its proof includes statistics showing that minority-owned businesses have received virtually no city contracting dollars and rarely if ever belonged to area trade associations; testimony by municipal officials that discrimination has been widespread in the local construction industry; and the same exhaustive and widely publicized federal studies relied on in *Fullilove*, studies which showed that pervasive discrimination in the Nation's tight-knit construction industry had operated to exclude minorities from public contracting. These are precisely the types of statistical and testimonial evidence which, until today, this Court had credited in cases approving of race-conscious measures designed to remedy past discrimination.

More fundamentally, today's decision marks a deliberate and giant step backward in this Court's affirmative-action jurisprudence. Cynical of one municipality's attempt to redress the effects of past racial discrimination in a particular industry, the majority launches a grapeshot attack on race-conscious remedies in general. The majority's unnecessary pronouncements will inevitably discourage or prevent governmental entities, particularly States and localities, from acting to rectify the scourge of past discrimination. This is

[1] In the interest of convenience, I refer to the opinion in this case authored by JUSTICE O'CONNOR as "the majority," recognizing that certain portions of that opinion have been joined by only a plurality of the Court.

the harsh reality of the majority's decision, but it is not the Constitution's command.

I

As an initial matter, the majority takes an exceedingly myopic view of the factual predicate on which the Richmond City Council relied when it passed the Minority Business Utilization Plan. The majority analyzes Richmond's initiative as if it were based solely upon the facts about local construction and contracting practices adduced during the city council session at which the measure was enacted. *Ante*, at 479–481. In so doing, the majority downplays the fact that the city council had before it a rich trove of evidence that discrimination in the Nation's construction industry had seriously impaired the competitive position of businesses owned or controlled by members of minority groups. It is only against this backdrop of documented national discrimination, however, that the local evidence adduced by Richmond can be properly understood. The majority's refusal to recognize that Richmond has proved itself no exception to the dismaying pattern of national exclusion which Congress so painstakingly identified infects its entire analysis of this case.

Six years before Richmond acted, Congress passed, and the President signed, the Public Works Employment Act of 1977, Pub. L. 95–28, 91 Stat. 116, 42 U. S. C. § 6701 *et seq.* (Act), a measure which appropriated $4 billion in federal grants to state and local governments for use in public works projects. Section 103(f)(2) of the Act was a minority business set-aside provision. It required state or local grantees to use 10% of their federal grants to procure services or supplies from businesses owned or controlled by members of statutorily identified minority groups, absent an administrative waiver. In 1980, in *Fullilove*, *supra*, this Court upheld the validity of this federal set-aside. Chief Justice Burger's principal opinion noted the importance of overcoming those "criteria, methods, or practices thought by Congress to have the effect of defeating, or substantially impairing, ac-

cess by the minority business community to public funds made available by congressional appropriations." *Fullilove*, 448 U. S., at 480. Finding the set-aside provision properly tailored to this goal, the Chief Justice concluded that the program was valid under either strict or intermediate scrutiny. *Id.*, at 492.

The congressional program upheld in *Fullilove* was based upon an array of congressional and agency studies which documented the powerful influence of racially exclusionary practices in the business world. A 1975 Report by the House Committee on Small Business concluded:

> "The effects of past inequities stemming from racial prejudice have not remained in the past. The Congress has recognized the reality that past discriminatory practices have, to some degree, adversely affected our present economic system.
>
> "While minority persons comprise about 16 percent of the Nation's population, of the 13 million businesses in the United States, only 382,000, or approximately 3.0 percent, are owned by minority individuals. The most recent data from the Department of Commerce also indicates that the gross receipts of all businesses in this country totals about $2,540.8 billion, and of this amount only $16.6 billion, or about 0.65 percent was realized by minority business concerns.
>
> "These statistics are not the result of random chance. *The presumption must be made that past discriminatory systems have resulted in present economic inequities.*" H. R. Rep. No. 94–468, pp. 1–2 (1975) (quoted in *Fullilove*, *supra*, at 465) (opinion of Burger, C. J.) (emphasis deleted and added).

A 1977 Report by the same Committee concluded:

> "[O]ver the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present,

this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities. Minorities, until recently, have not participated to any measurable extent, in our total business system generally, or in the construction industry in particular." H. R. Rep. No. 94-1791, p. 182 (1977), summarizing H. R. Rep. No. 94-468, p. 17 (1976) (quoted in *Fullilove*, *supra*, at 466, n. 48).

Congress further found that minorities seeking initial public contracting assignments often faced immense entry barriers which did not confront experienced nonminority contractors. A report submitted to Congress in 1975 by the United States Commission on Civil Rights, for example, described the way in which fledgling minority-owned businesses were hampered by "deficiencies in working capital, inability to meet bonding requirements, disabilities caused by an inadequate 'track record,' lack of awareness of bidding opportunities, unfamiliarity with bidding procedures, preselection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavor minority businesses." *Fullilove*, *supra*, at 467 (summarizing United States Comm'n on Civil Rights, Minorities and Women as Government Contractors (May 1975)).

Thus, as of 1977, there was "abundant evidence" in the public domain "that minority businesses ha[d] been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination." *Fullilove*, *supra*, at 477-478.[2] Significantly, this evidence demonstrated that discrimination had prevented existing or nascent minority-owned businesses from obtaining not only federal contracting assignments, but state and local ones as well. See *Fullilove*, *supra*, at 478.[3]

The members of the Richmond City Council were well aware of these exhaustive congressional findings, a point the

[2] Other Reports indicating the dearth of minority-owned businesses include H. R. Rep. No. 92-1615, p. 3 (1972) (Report of the Subcommittee on Minority Small Business Enterprise, finding that the "long history of racial bias" has created "major problems" for minority businessmen); H. R. Doc. No. 92-194, p. 1 (1972) (text of message from President Nixon to Congress, describing federal efforts "to press open new doors of opportunity for millions of Americans to whom those doors had previously been barred, or only half-open"); H. R. Doc. No. 92-169, p. 1 (1971) (text of message from President Nixon to Congress, describing paucity of minority business ownership and federal efforts to give "every man an equal chance at the starting line").

[3] Numerous congressional studies undertaken after 1977 and issued before the Richmond City Council convened in April 1983 found that the exclusion of minorities had continued virtually unabated—and that, because of this legacy of discrimination, minority businesses across the Nation had still failed, as of 1983, to gain a real toehold in the business world. See, *e. g.*, H. R. Rep. No. 95-949, pp. 2, 8 (1978) (Report of House Committee on Small Business, finding that minority businesses "are severely undercapitalized" and that many minorities are disadvantaged "because they are identified as members of certain racial categories"); S. Rep. No. 95-1070, pp. 14-15 (1978); (Report of Senate Select Committee on Small Business, finding that the federal effort "has fallen far short of its goal to develop strong and growing disadvantaged small businesses," and "recogniz[ing] the pattern of social and economic discrimination that continues to deprive racial and ethnic minorities, and others, of the opportunity to participate fully in the free enterprise system"); S. Rep. No. 96-31, pp. IX, 107 (1979) (Report of Senate Select Committee on Small Business, finding that many minorities have "suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control"); S. Rep. No. 96-974, p. 3 (1980) (Report of Senate Select Committee on Small Business, finding that government aid must be "significantly increased" if minority-owned businesses are to "have the maximum practical opportunity to develop into viable small businesses"); H. R. Rep. No. 97-956, p. 35 (1982) (Report of House Committee on Small Business, finding that federal programs to aid minority businesses have had "limited success" to date, but concluding that success could be "greatly expanded" with "appropriate corrective actions"); H. R. Rep. No. 98-3, p. 1 (1983) (Report of House Committee on Small Business, finding that "the small business share of Federal contracts continues to be inadequate").

majority, tellingly, elides. The transcript of the session at which the council enacted the local set-aside initiative contains numerous references to the 6-year-old congressional set-aside program, to the evidence of nationwide discrimination barriers described above, and to the *Fullilove* decision itself. See, *e. g.*, App. 14–16, 24 (remarks of City Attorney William H. Hefty); *id.*, at 14–15 (remarks of Councilmember William J. Leidinger); *id.*, at 18 (remarks of minority community task force president Freddie Ray); *id.*, at 25, 41 (remarks of Councilmember Henry L. Marsh III); *id.*, at 42 (remarks of City Manager Manuel Deese).

The city council's members also heard testimony that, although minority groups made up half of the city's population, only 0.67% of the $24.6 million which Richmond had dispensed in construction contracts during the five years ending in March 1983 had gone to minority-owned prime contractors. *Id.*, at 43 (remarks of Councilmember Henry W. Richardson). They heard testimony that the major Richmond area construction trade associations had virtually no minorities among their hundreds of members.[4] Finally, they heard testimony from city officials as to the exclusionary history of the local construction industry.[5] As the District Court noted, not a

[4] According to testimony by trade association representatives, the Associated General Contractors of Virginia had no blacks among its 130 Richmond-area members, App. 27–28 (remarks of Stephen Watts); the American Subcontractors Association had no blacks among its 80 Richmond members, *id.*, at 36 (remarks of Patrick Murphy); the Professional Contractors Estimators Association had 1 black member among its 60 Richmond members, *id.*, at 39 (remarks of Al Shuman); the Central Virginia Electrical Contractors Association had 1 black member among its 45 members, *id.*, at 40 (remarks of Al Shuman); and the National Electrical Contractors Association had 2 black members among its 81 Virginia members. *Id.*, at 34 (remarks of Mark Singer).

[5] Among those testifying to the discriminatory practices of Richmond's construction industry was Councilmember Henry Marsh, who had served as mayor of Richmond from 1977 to 1982. Marsh stated:

"I have been practicing law in this community since 1961, and I am familiar with the practices in the construction industry in this area, in the State, and around the nation. And I can say without equivocation, that the general conduct in the construction industry in this area, and the State and around the nation, is one in which race discrimination and exclusion on the basis of race is widespread.

"I think the situation involved in the City of Richmond is the same . . . . I think the question of whether or not remedial action is required is not open to question." *Id.*, at 41.

Manuel Deese, who in his capacity as City Manager had oversight responsibility for city procurement matters, stated that he fully agreed with Marsh's analysis. *Id.*, at 42.

single person who testified before the city council denied that discrimination in Richmond's construction industry had been widespread. Civ. Action No. 84–0021 (ED Va., Dec. 3, 1984) (reprinted in Supp. App. to Juris. Statement 164–165).[6] So long as one views Richmond's local evidence of discrimination against the backdrop of systematic nationwide racial discrimination which Congress had so painstakingly identified in this very industry, this case is readily resolved.

II

"Agreement upon a means for applying the Equal Protection Clause to an affirmative-action program has eluded this Court every time the issue has come before us." *Wygant* v. *Jackson Bd. of Education*, 476 U. S. 267, 301 (1986) (MARSHALL, J., dissenting). My view has long been that race-conscious classifications designed to further remedial goals "must serve important governmental objectives and must be substantially related to achievement of those objectives" in order to withstand constitutional scrutiny. *University of California Regents* v. *Bakke*, 438 U. S. 265, 359 (1978) (joint opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.) (citations omitted); see also *Wygant*, *supra*, at 301–302 (MARSHALL, J., dissenting); *Fullilove*, 448 U. S., at 517–519

[6] The representatives of several trade associations did, however, deny that their particular organizations engaged in discrimination. See, *e. g.*, *id.*, at 38 (remarks of Al Shuman, on behalf of the Central Virginia Electrical Contractors Association).

(MARSHALL, J., concurring in judgment). Analyzed in terms of this two-pronged standard, Richmond's set-aside, like the federal program on which it was modeled, is "plainly constitutional." *Fullilove*, *supra*, at 519 (MARSHALL, J., concurring in judgment).

A

1

Turning first to the governmental interest inquiry, Richmond has two powerful interests in setting aside a portion of public contracting funds for minority-owned enterprises. The first is the city's interest in eradicating the effects of past racial discrimination. It is far too late in the day to doubt that remedying such discrimination is a compelling, let alone an important, interest. In *Fullilove*, six Members of this Court deemed this interest sufficient to support a race-conscious set-aside program governing federal contract procurement. The decision, in holding that the federal set-aside provision satisfied the equal protection principles under any level of scrutiny, recognized that the measure sought to remove "barriers to competitive access which had their roots in racial and ethnic discrimination, and which continue today, even absent any intentional discrimination or unlawful conduct." 448 U. S., at 478; see also *id.*, at 502–506 (Powell, J., concurring); *id.*, at 520 (MARSHALL, J., concurring in judgment). Indeed, we have repeatedly reaffirmed the government's interest in breaking down barriers erected by past racial discrimination in cases involving access to public education, *McDaniel* v. *Barresi*, 402 U. S. 39, 41 (1971); *University of California Regents* v. *Bakke*, 438 U. S., at 320 (opinion of Powell, J.); *id.*, at 362–364 (joint opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.), employment, *United States* v. *Paradise*, 480 U. S. 149, 167 (1987) (plurality opinion); *id.*, at 186–189 (Powell, J., concurring), and valuable government contracts, *Fullilove*, 448 U. S., at 481–484 (opinion of Burger, C. J.); *id.*, at 496–497 (Powell,

J., concurring); *id.*, at 521 (MARSHALL, J., concurring in judgment).

Richmond has a second compelling interest in setting aside, where possible, a portion of its contracting dollars. That interest is the prospective one of preventing the city's own spending decisions from reinforcing and perpetuating the exclusionary effects of past discrimination. See *Fullilove*, 448 U. S., at 475 (noting Congress' conclusion that "the subcontracting practices of prime contractors could perpetuate the prevailing impaired access by minority businesses to public contracting opportunities"); *id.*, at 503 (Powell, J., concurring).

The majority pays only lipservice to this additional governmental interest. See *ante*, at 491–493, 503–504. But our decisions have often emphasized the danger of the government tacitly adopting, encouraging, or furthering racial discrimination even by its own routine operations. In *Shelley* v. *Kraemer*, 334 U. S. 1 (1948), this Court recognized this interest as a constitutional command, holding unanimously that the Equal Protection Clause forbids courts to enforce racially restrictive covenants even where such covenants satisfied all requirements of state law and where the State harbored no discriminatory intent. Similarly, in *Norwood* v. *Harrison*, 413 U. S. 455 (1973), we invalidated a program in which a State purchased textbooks and loaned them to students in public and private schools, including private schools with racially discriminatory policies. We stated that the Constitution requires a State "to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination." *Id.*, at 467; see also *Gilmore* v. *City of Montgomery*, 417 U. S. 556 (1974) (upholding federal-court order forbidding city to allow private segregated schools which allegedly discriminated on the basis of race to use public parks).

The majority is wrong to trivialize the continuing impact of government acceptance or use of private institutions or structures once wrought by discrimination. When government channels all its contracting funds to a white-dominated community of established contractors whose racial homogeneity is the product of private discrimination, it does more than place its *imprimatur* on the practices which forged and which continue to define that community. It also provides a measurable boost to those economic entities that have thrived within it, while denying important economic benefits to those entities which, but for prior discrimination, might well be better qualified to receive valuable government contracts. In my view, the interest in ensuring that the government does not reflect and reinforce prior private discrimination in dispensing public contracts is every bit as strong as the interest in eliminating private discrimination—an interest which this Court has repeatedly deemed compelling. See, *e. g.*, *New York State Club Assn.* v. *New York City*, 487 U. S. 1, 14, n. 5 (1988); *Board of Directors of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U. S. 537, 549 (1987); *Roberts* v. *United States Jaycees*, 468 U. S. 609, 623 (1984); *Bob Jones University* v. *United States*, 461 U. S. 574, 604 (1983); *Runyon* v. *McCrary*, 427 U. S. 160, 179 (1976). The more government bestows its rewards on those persons or businesses that were positioned to thrive during a period of private racial discrimination, the tighter the deadhand grip of prior discrimination becomes on the present and future. Cities like Richmond may not be constitutionally required to adopt set-aside plans. But see *North Carolina Bd. of Education* v. *Swann*, 402 U. S. 43, 46 (1971) (Constitution may require consideration of race in remedying state-sponsored school segregation); *McDaniel*, *supra*, at 41 (same, and stating that "[a]ny other approach would freeze the status quo that is the very target of all desegregation processes"). But there can be no doubt that when Richmond acted affirmatively to stem the perpetuation of patterns of discrimination through

its own decisionmaking, it served an interest of the highest order.

2

The remaining question with respect to the "governmental interest" prong of equal protection analysis is whether Richmond has proffered satisfactory proof of past racial discrimination to support its twin interests in remediation and in governmental nonperpetuation. Although the Members of this Court have differed on the appropriate standard of review for race-conscious remedial measures, see *United States* v. *Paradise*, 480 U. S., at 166, and 166–167, n. 17 (plurality opinion); *Sheet Metal Workers* v. *EEOC*, 478 U. S. 421, 480 (1986) (plurality opinion), we have always regarded this factual inquiry as a practical one. Thus, the Court has eschewed rigid tests which require the provision of particular species of evidence, statistical or otherwise. At the same time we have required that government adduce evidence that, taken as a whole, is sufficient to support its claimed interest and to dispel the natural concern that it acted out of mere "paternalistic stereotyping, not on a careful consideration of modern social conditions." *Fullilove* v. *Klutznick*, *supra*, at 519 (MARSHALL, J., concurring in judgment).

The separate opinions issued in *Wygant* v. *Jackson Bd. of Education*, a case involving a school board's race-conscious layoff provision, reflect this shared understanding. Justice Powell's opinion for a plurality of four Justices stated that "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." 476 U. S., at 277. JUSTICE O'CONNOR's separate concurrence required "a firm basis for concluding that remedial action was appropriate." *Id.*, at 293. The dissenting opinion I authored, joined by JUSTICES BRENNAN and BLACKMUN, required a government body to present a "legitimate factual predicate" and a reviewing court to "genuinely consider the circumstances of the provision at issue." *Id.*, at 297, 303. Finally, JUSTICE

STEVENS' separate dissent sought and found "a rational and unquestionably legitimate basis" for the school board's action. *Id.*, at 315–316. Our unwillingness to go beyond these generalized standards to require specific types of proof in all circumstances reflects, in my view, an understanding that discrimination takes a myriad of "ingenious and pervasive forms." *University of California Regents* v. *Bakke*, 438 U. S., at 387 (separate opinion of MARSHALL, J.).

The varied body of evidence on which Richmond relied provides a "strong," "firm," and "unquestionably legitimate" basis upon which the city council could determine that the effects of past racial discrimination warranted a remedial and prophylactic governmental response. As I have noted, *supra*, at 530–534, Richmond acted against a backdrop of congressional and Executive Branch studies which demonstrated with such force the nationwide pervasiveness of prior discrimination that Congress presumed that "'present economic inequities'" in construction contracting resulted from "'past discriminatory systems.'" *Supra*, at 531 (quoting H. R. Rep. No. 94–468, pp. 1–2 (1975)). The city's local evidence confirmed that Richmond's construction industry did not deviate from this pernicious national pattern. The fact that just 0.67% of public construction expenditures over the previous five years had gone to minority-owned prime contractors, despite the city's racially mixed population, strongly suggests that construction contracting in the area was rife with "present economic inequities." To the extent this enormous disparity did not itself demonstrate that discrimination had occurred, the descriptive testimony of Richmond's elected and appointed leaders drew the necessary link between the pitifully small presence of minorities in construction contracting and past exclusionary practices. That *no one* who testified challenged this depiction of widespread racial discrimination in area construction contracting lent significant weight to these accounts. The fact that area trade associations had virtually no minority members dramatized the extent of present

inequities and suggested the lasting power of past discriminatory systems. In sum, to suggest that the facts on which Richmond has relied do not provide a sound basis for its finding of past racial discrimination simply blinks credibility.

Richmond's reliance on localized, industry-specific findings is a far cry from the reliance on generalized "societal discrimination" which the majority decries as a basis for remedial action. *Ante*, at 496, 499, 505. But characterizing the plight of Richmond's minority contractors as mere "societal discrimination" is not the only respect in which the majority's critique shows an unwillingness to come to grips with why construction-contracting in Richmond is essentially a whites-only enterprise. The majority also takes the disingenuous approach of disaggregating Richmond's local evidence, attacking it piecemeal, and thereby concluding that no *single* piece of evidence adduced by the city, "standing alone," see, *e. g.*, *ante*, at 503, suffices to prove past discrimination. But items of evidence do not, of course, "stan[d] alone" or exist in alien juxtaposition; they necessarily work together, reinforcing or contradicting each other.

In any event, the majority's criticisms of individual items of Richmond's evidence rest on flimsy foundations. The majority states, for example, that reliance on the disparity between the share of city contracts awarded to minority firms (0.67%) and the minority population of Richmond (approximately 50%) is "misplaced." *Ante*, at 501. It is true that, when the factual predicate needed to be proved is one of *present* discrimination, we have generally credited statistical contrasts between the racial composition of a work force and the general population as proving discrimination only where this contrast revealed "gross statistical disparities." *Hazelwood School Dist.* v. *United States*, 433 U. S. 299, 307–308 (1977) (Title VII case); see also *Teamsters* v. *United States*, 431 U. S. 324, 339 (1977) (same). But this principle does not impugn Richmond's statistical contrast, for two reasons. First, considering how minuscule the share of Richmond pub-

lic construction contracting dollars received by minority-owned businesses is, it is hardly unreasonable to conclude that this case involves a "gross statistical disparit[y]." *Hazelwood School Dist., supra*, at 307. There are roughly equal numbers of minorities and nonminorities in Richmond—yet minority-owned businesses receive *one-seventy-fifth* of the public contracting funds that other businesses receive. See *Teamsters, supra*, at 342, n. 23 ("[F]ine tuning of the statistics could not have obscured the glaring absence of minority [bus] drivers. . . . [T]he company's inability to rebut the inference of discrimination came not from a misuse of statistics but from 'the inexorable zero'") (citation omitted) (quoted in *Johnson* v. *Transportation Agency, Santa Clara County*, 480 U. S. 616, 656–657 (1987) (O'CONNOR, J., concurring in judgment)).

Second, and more fundamentally, where the issue is not present discrimination but rather whether *past* discrimination has resulted in the *continuing exclusion* of minorities from a historically tight-knit industry, a contrast between population and work force is entirely appropriate to help gauge the degree of the exclusion. In *Johnson* v. *Transportation Agency, Santa Clara County, supra*, JUSTICE O'CONNOR specifically observed that, when it is alleged that discrimination has prevented blacks from "obtaining th[e] experience" needed to qualify for a position, the "relevant comparison" is not to the percentage of blacks in the pool of qualified candidates, but to "the total percentage of blacks in the labor force." *Id.*, at 651; see also *Steelworkers* v. *Weber*, 443 U. S. 193, 198–199, and n. 1 (1979); *Teamsters, supra*, at 339, n. 20. This contrast is especially illuminating in cases like this, where a main avenue of introduction into the work force—here, membership in the trade associations whose members presumably train apprentices and help them procure subcontracting assignments—is itself grossly dominated by nonminorities. The majority's assertion that the city "does not even know how many MBE's in the relevant market are qualified," *ante*, at 502, is thus entirely beside the

point. If Richmond indeed has a monochromatic contracting community—a conclusion reached by the District Court, see Civ. Action No. 84–0021 (ED Va. 1984) (reprinted in Supp. App. to Juris. Statement 164)—this most likely reflects the lingering power of past exclusionary practices. Certainly this is the explanation Congress has found persuasive at the national level. See *Fullilove*, 448 U. S., at 465. The city's requirement that prime public contractors set aside 30% of their subcontracting assignments for minority-owned enterprises, subject to the ordinance's provision for waivers where minority-owned enterprises are unavailable or unwilling to participate, is designed precisely to ease minority contractors into the industry.

The majority's perfunctory dismissal of the testimony of Richmond's appointed and elected leaders is also deeply disturbing. These officials—including councilmembers, a former mayor, and the present city manager—asserted that race discrimination in area contracting had been widespread, and that the set-aside ordinance was a sincere and necessary attempt to eradicate the effects of this discrimination. The majority, however, states that where racial classifications are concerned, "simple legislative assurances of good intention cannot suffice." *Ante*, at 500. It similarly discounts as minimally probative the city council's designation of its set-aside plan as remedial. "[B]lind judicial deference to legislative or executive pronouncements," the majority explains, "has no place in equal protection analysis." *Ante*, at 501.

No one, of course, advocates "blind judicial deference" to the findings of the city council or the testimony of city leaders. The majority's suggestion that wholesale deference is what Richmond seeks is a classic straw-man argument. But the majority's trivialization of the testimony of Richmond's leaders is dismaying in a far more serious respect. By disregarding the testimony of local leaders and the judgment of local government, the majority does violence to the very principles of comity within our federal system which this

Court has long championed. Local officials, by virtue of their proximity to, and their expertise with, local affairs, are exceptionally well qualified to make determinations of public good "within their respective spheres of authority." *Hawaii Housing Authority* v. *Midkiff*, 467 U. S. 229, 244 (1984); see also *FERC* v. *Mississippi*, 456 U. S. 742, 777–778 (1982) (O'CONNOR, J., concurring in judgment in part and dissenting in part). The majority, however, leaves any traces of comity behind in its headlong rush to strike down Richmond's race-conscious measure.

Had the majority paused for a moment on the facts of the Richmond experience, it would have discovered that the city's leadership is deeply familiar with what racial discrimination is. The members of the Richmond City Council have spent long years witnessing multifarious acts of discrimination, including, but not limited to, the deliberate diminution of black residents' voting rights, resistance to school desegregation, and publicly sanctioned housing discrimination. Numerous decisions of federal courts chronicle this disgraceful recent history. In *Richmond* v. *United States*, 422 U. S. 358 (1975), for example, this Court denounced Richmond's decision to annex part of an adjacent county at a time when the city's black population was nearing 50% because it was "infected by the impermissible purpose of denying the right to vote based on race through perpetuating white majority power to exclude Negroes from office." *Id.*, at 373; see also *id.*, at 382 (BRENNAN, J., dissenting) (describing Richmond's "flagrantly discriminatory purpose . . . to avert a transfer of political control to what was fast becoming a black-population majority") (citation omitted).[7]

In *Bradley* v. *School Bd. of Richmond*, 462 F. 2d 1058, 1060, n. 1 (CA4 1972), aff'd by an equally divided Court, 412

[7] For a disturbing description of the lengths to which some Richmond white officials went during recent decades to hold in check growing black political power, see J. Moeser & R. Dennis, The Politics of Annexation—Oligarchic Power in a Southern City 50–188 (1982).

U. S. 92 (1973), the Court of Appeals for the Fourth Circuit, sitting en banc, reviewed in the context of a school desegregation case Richmond's long history of inadequate compliance with *Brown* v. *Board of Education*, 347 U. S. 483 (1954), and the cases implementing its holding. The dissenting judge elaborated:

> "The sordid history of Virginia's, and Richmond's attempts to circumvent, defeat, and nullify the holding of *Brown I* has been recorded in the opinions of this and other courts, and need not be repeated in detail here. It suffices to say that there was massive resistance and every state resource, including the services of the legal officers of the state, the services of private counsel (costing the State hundreds of thousands of dollars), the State police, and the power and prestige of the Governor, was employed to defeat *Brown I*. In Richmond, as has been mentioned, not even freedom of choice became actually effective until 1966, *twelve years after the decision of Brown I*." 462 F. 2d, at 1075 (Winter, J.) (emphasis in original) (footnotes and citations omitted).

The Court of Appeals majority in *Bradley* used equally pungent words in describing public and private housing discrimination in Richmond. Though rejecting the black plaintiffs' request that it consolidate Richmond's school district with those of two neighboring counties, the majority nonetheless agreed with the plaintiffs' assertion that "within the City of Richmond there has been state (also federal) action tending to perpetuate apartheid of the races in ghetto patterns throughout the city." *Id.*, at 1065 (citing numerous public and private acts of discrimination).[8]

[8] Again the dissenting judge—who would have consolidated the school districts—elaborated:

"[M]any other instances of state and private action contribut[ed] to the concentration of black citizens within Richmond and white citizens without. These were principally in the area of residential development. Racially restrictive convenants were freely employed. Racially discriminatory

When the legislatures and leaders of cities with histories of pervasive discrimination testify that past discrimination has infected one of their industries, armchair cynicism like that exercised by the majority has no place. It may well be that "the autonomy of a State is an essential component of federalism," *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 588 (1985) (O'CONNOR, J., dissenting), and that "each State is sovereign within its own domain, governing its citizens and providing for their general welfare," *FERC* v. *Mississippi*, *supra*, at 777 (O'CONNOR, J., dissenting), but apparently this is not the case when federal judges, with nothing but their impressions to go on, choose to disbelieve the explanations of these local governments and officials. Disbelief is particularly inappropriate here in light of the fact that appellee Croson, which had the burden of proving unconstitutionality at trial, *Wygant*, 476 U. S., at 277–278 (plurality opinion), has *at no point* come forward with *any* direct evidence that the city council's motives were anything other than sincere.[9]

Finally, I vehemently disagree with the majority's dismissal of the congressional and Executive Branch findings

practices in the prospective purchase of county property by black purchasers were followed. Urban renewal, subsidized public housing and government-sponsored home mortgage insurance had been undertaken on a racially discriminatory basis. [The neighboring counties] provided schools, roads, zoning and development approval for the rapid growth of the white population in each county at the expense of the city, without making any attempt to assure that the development that they made possible was integrated. Superimposed on the pattern of government-aided residential segregation . . . had been a discriminatory policy of school construction, i. e., the selection of school construction sites in the center of racially identifiable neighborhoods manifestly to serve the educational needs of students of a single race.

"The majority does not question the accuracy of these facts." 462 F. 2d, at 1075–1076 (Winter, J.) (emphasis in original) (footnote omitted).

[9] Cf. *Fullilove* v. *Klutznick*, 448 U. S. 448, 541 (1980) (STEVENS, J., dissenting) (noting statements of sponsors of federal set-aside that measure was designed to give their constituents "a piece of the action").

noted in *Fullilove* as having "extremely limited" probative value in this case. *Ante*, at 504. The majority concedes that Congress established nothing less than a "presumption" that minority contracting firms have been disadvantaged by prior discrimination. *Ibid.* The majority, inexplicably, would forbid Richmond to "share" in this information, and permit only Congress to take note of these ample findings. *Ante*, at 504–505. In thus requiring that Richmond's local evidence be severed from the context in which it was prepared, the majority would require cities seeking to eradicate the effects of past discrimination within their borders to reinvent the evidentiary wheel and engage in unnecessarily duplicative, costly, and time-consuming factfinding.

No principle of federalism or of federal power, however, forbids a state or local government to draw upon a nationally relevant historical record prepared by the Federal Government. See *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 51–52 (1986) (city is "entitled to rely on the experiences of Seattle and other cities" in enacting an adult theater ordinance, as the First Amendment "does not require a city . . . to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the cities relies upon is reasonably believed to be relevant to the problem that the city addresses"); see also *Steelworkers* v. *Weber*, 443 U. S., at 198, n. 1 ("Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice"); cf. *Wygant*, *supra*, at 296 (MARSHALL, J., dissenting) ("No race-conscious provision that purports to serve a remedial purpose can be fairly assessed in a vacuum").[10] Of course, Richmond could have built an even more

[10] Although the majority sharply criticizes Richmond for using data which it did not itself develop, it is noteworthy that the federal set-aside program upheld in *Fullilove* was adopted as a floor amendment "without any congressional hearings or investigation whatsoever." L. Tribe, American Constitutional Law 345 (2d ed. 1988). The principal opinion in *Fullilove*

compendious record of past discrimination, one including additional stark statistics and additional individual accounts of past discrimination. But nothing in the Fourteenth Amendment imposes such onerous documentary obligations upon States and localities once the reality of past discrimination is apparent. See *infra*, at 555–561.

B

In my judgment, Richmond's set-aside plan also comports with the second prong of the equal protection inquiry, for it is substantially related to the interests it seeks to serve in remedying past discrimination and in ensuring that municipal contract procurement does not perpetuate that discrimination. The most striking aspect of the city's ordinance is the similarity it bears to the "appropriately limited" federal set-aside provision upheld in *Fullilove*. 448 U. S., at 489. Like the federal provision, Richmond's is limited to five years in duration, *ibid.*, and was not renewed when it came up for reconsideration in 1988. Like the federal provision, Richmond's contains a waiver provision freeing from its subcontracting requirements those nonminority firms that demonstrate that they cannot comply with its provisions. *Id.*, at 483–484. Like the federal provision, Richmond's has a minimal impact on innocent third parties. While the measure affects 30% of *public* contracting dollars, that translates to only

justified the set-aside by relying heavily on the aforementioned studies by agencies like the Small Business Administration and on legislative reports prepared in connection with prior, failed legislation. See *Fullilove* v. *Klutznick*, 448 U. S., at 478 (opinion of Burger, C. J.) ("Although the Act recites no preambulary 'findings' on the subject, we are satisfied that Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination"); see also *id.*, at 549–550, and n. 25 (STEVENS, J., dissenting) (noting "perfunctory" consideration accorded the set-aside provision); Days, Fullilove, 96 Yale L. J. 453, 465 (1987) ("One can only marvel at the fact that the minority set-aside provision was enacted into law without hearings or committee reports, and with only token opposition") (citation and footnote omitted).

3% of overall Richmond area contracting. Brief for Appellant 44, n. 73 (recounting federal census figures on construction in Richmond); see *Fullilove*, *supra*, at 484 (burden shouldered by nonminority firms is "relatively light" compared to "overall construction contracting opportunities").

Finally, like the federal provision, Richmond's does not interfere with any vested right of a contractor to a particular contract; instead it operates entirely prospectively. 448 U. S., at 484. Richmond's initiative affects only future economic arrangements and imposes only a diffuse burden on nonminority competitors—here, businesses owned or controlled by nonminorities which seek subcontracting work on public construction projects. The plurality in *Wygant* emphasized the importance of not disrupting the settled and legitimate expectations of innocent parties. "While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive." *Wygant*, 476 U. S., at 283; see *Steelworkers* v. *Weber*, *supra*, at 208.

These factors, far from "justify[ing] a preference of any size or duration," *ante*, at 505, are precisely the factors to which this Court looked in *Fullilove*. The majority takes issue, however, with two aspects of Richmond's tailoring: the city's refusal to explore the use of race-neutral measures to increase minority business participation in contracting, *ante*, at 507, and the selection of a 30% set-aside figure. *Ante*, at 507–508. The majority's first criticism is flawed in two respects. First, the majority overlooks the fact that since 1975, Richmond has barred both discrimination by the city in awarding public contracts and discrimination by public contractors. See Richmond, Va., City Code § 17.1 *et seq.* (1985). The virtual absence of minority businesses from the city's contracting rolls, indicated by the fact that such businesses have received less than 1% of public contracting dollars,

strongly suggests that this ban has not succeeded in redressing the impact of past discrimination or in preventing city contract procurement from reinforcing racial homogeneity. Second, the majority's suggestion that Richmond should have first undertaken such race-neutral measures as a program of city financing for small firms, *ante*, at 507, ignores the fact that such measures, while theoretically appealing, have been discredited by Congress as ineffectual in eradicating the effects of past discrimination in this very industry. For this reason, this Court in *Fullilove* refused to fault Congress for not undertaking race-neutral measures as precursors to its race-conscious set-aside. See *Fullilove*, 448 U. S., at 463–467 (noting inadequacy of previous measures designed to give experience to minority businesses); see also *id.*, at 511 (Powell, J., concurring) ("By the time Congress enacted [the federal set-aside] in 1977, it knew that other remedies had failed to ameliorate the effects of racial discrimination in the construction industry"). The Equal Protection Clause does not require Richmond to retrace Congress' steps when Congress has found that those steps lead nowhere. Given the well-exposed limitations of race-neutral measures, it was thus appropriate for a municipality like Richmond to conclude that, in the words of JUSTICE BLACKMUN, "[i]n order to get beyond racism, we must first take account of race. There is no other way." *University of California Regents* v. *Bakke*, 438 U. S., at 407 (separate opinion).[11]

[11] The majority also faults Richmond's ordinance for including within its definition of "minority group members" not only black citizens, but also citizens who are "Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons." *Ante*, at 506. This is, of course, precisely the same definition Congress adopted in its set-aside legislation. *Fullilove*, *supra*, at 454. Even accepting the majority's view that Richmond's ordinance is overbroad because it includes groups, such as Eskimos or Aleuts, about whom no evidence of local discrimination has been proffered, it does not necessarily follow that the balance of Richmond's ordinance should be invalidated.

As for Richmond's 30% target, the majority states that this figure "cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing." *Ante*, at 507. The majority ignores two important facts. First, the set-aside measure affects only 3% of overall city contracting; thus, any imprecision in tailoring has far less impact than the majority suggests. But more important, the majority ignores the fact that Richmond's 30% figure was patterned directly on the *Fullilove* precedent. Congress' 10% figure fell "roughly halfway between the present percentage of minority contractors and the percentage of minority group members in the Nation." *Fullilove*, *supra*, at 513–514 (Powell, J., concurring). The Richmond City Council's 30% figure similarly falls roughly halfway between the present percentage of Richmond-based minority contractors (almost zero) and the percentage of minorities in Richmond (50%). In faulting Richmond for not presenting a different explanation for its choice of a set-aside figure, the majority honors *Fullilove* only in the breach.

III

I would ordinarily end my analysis at this point and conclude that Richmond's ordinance satisfies both the governmental interest and substantial relationship prongs of our Equal Protection Clause analysis. However, I am compelled to add more, for the majority has gone beyond the facts of this case to announce a set of principles which unnecessarily restricts the power of governmental entities to take race-conscious measures to redress the effects of prior discrimination.

A

Today, for the first time, a majority of this Court has adopted strict scrutiny as its standard of Equal Protection Clause review of race-conscious remedial measures. *Ante*, at 493–494; *ante*, at 520 (SCALIA, J., concurring in judgment). This is an unwelcome development. A profound difference separates governmental actions that themselves are racist,

and governmental actions that seek to remedy the effects of prior racism or to prevent neutral governmental activity from perpetuating the effects of such racism. See, *e. g.*, *Wygant* v. *Jackson Bd. of Education*, 476 U. S., at 301–302 (MARSHALL, J., dissenting); *Fullilove*, *supra*, at 517–519 (MARSHALL, J., concurring in judgment); *University of California Regents* v. *Bakke*, 438 U. S., at 355–362 (joint opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.).

Racial classifications "drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism" warrant the strictest judicial scrutiny because of the very irrelevance of these rationales. *Id.*, at 357–358. By contrast, racial classifications drawn for the purpose of remedying the effects of discrimination that itself was race based have a highly pertinent basis: the tragic and indelible fact that discrimination against blacks and other racial minorities in this Nation has pervaded our Nation's history and continues to scar our society. As I stated in *Fullilove:* "Because the consideration of race is relevant to remedying the continuing effects of past racial discrimination, and because governmental programs employing racial classifications for remedial purposes can be crafted to avoid stigmatization, . . . such programs should not be subjected to conventional 'strict scrutiny'—scrutiny that is strict in theory, but fatal in fact." *Fullilove*, *supra*, at 518–519 (citation omitted).

In concluding that remedial classifications warrant no different standard of review under the Constitution than the most brutal and repugnant forms of state-sponsored racism, a majority of this Court signals that it regards racial discrimination as largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice. I, however, do not believe this Nation is anywhere close to eradicating racial discrimination or its vestiges. In constitutionalizing its wishful think-

ing, the majority today does a grave disservice not only to those victims of past and present racial discrimination in this Nation whom government has sought to assist, but also to this Court's long tradition of approaching issues of race with the utmost sensitivity.

B

I am also troubled by the majority's assertion that, even if it did not believe generally in strict scrutiny of race-based remedial measures, "the circumstances of this case" require this Court to look upon the Richmond City Council's measure with the strictest scrutiny. *Ante*, at 495. The sole such circumstance which the majority cites, however, is the fact that blacks in Richmond are a "dominant racial grou[p]" in the city. *Ibid.* In support of this characterization of dominance, the majority observes that "blacks constitute approximately 50% of the population of the city of Richmond" and that "[f]ive of the nine seats on the City Council are held by blacks." *Ibid.*

While I agree that the numerical and political supremacy of a given racial group is a factor bearing upon the level of scrutiny to be applied, this Court has never held that numerical inferiority, standing alone, makes a racial group "suspect" and thus entitled to strict scrutiny review. Rather, we have identified *other* "traditional indicia of suspectness": whether a group has been "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." *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 28 (1973).

It cannot seriously be suggested that nonminorities in Richmond have any "history of purposeful unequal treatment." *Ibid.* Nor is there any indication that they have any of the disabilities that have characteristically afflicted those groups this Court has deemed suspect. Indeed, the numerical and political dominance of nonminorities within

the State of Virginia and the Nation as a whole provides an enormous political check against the "simple racial politics" at the municipal level which the majority fears. *Ante*, at 493. If the majority really believes that groups like Richmond's nonminorities, which constitute approximately half the population but which are outnumbered even marginally in political fora, are deserving of suspect class status for these reasons alone, this Court's decisions denying suspect status to women, see *Craig* v. *Boren*, 429 U. S. 190, 197 (1976), and to persons with below-average incomes, see *San Antonio Independent School Dist.*, *supra*, at 28, stand on extremely shaky ground. See *Castaneda* v. *Partida*, 430 U. S. 482, 504 (1977) (MARSHALL, J., concurring).

In my view, the "circumstances of this case," *ante*, at 495, underscore the importance of *not* subjecting to a strict scrutiny straitjacket the increasing number of cities which have recently come under minority leadership and are eager to rectify, or at least prevent the perpetuation of, past racial discrimination. In many cases, these cities will be the ones with the most in the way of prior discrimination to rectify. Richmond's leaders had just witnessed decades of publicly sanctioned racial discrimination in virtually all walks of life—discrimination amply documented in the decisions of the federal judiciary. See *supra*, at 544–546. This history of "purposefully unequal treatment" forced upon minorities, not imposed by them, should raise an inference that minorities in Richmond had much to remedy—and that the 1983 set-aside was undertaken with sincere remedial goals in mind, not "simple racial politics." *Ante*, at 493.

Richmond's own recent political history underscores the facile nature of the majority's assumption that elected officials' voting decisions are based on the color of their skins. In recent years, white and black councilmembers in Richmond have increasingly joined hands on controversial matters. When the Richmond City Council elected a black man mayor in 1982, for example, his victory was won with the

support of the city council's four white members. Richmond Times-Dispatch, July 2, 1982, p. 1, col. 1. The vote on the set-aside plan a year later also was not purely along racial lines. Of the four white councilmembers, one voted for the measure and another abstained. App. 49. The majority's view that remedial measures undertaken by municipalities with black leadership must face a stiffer test of Equal Protection Clause scrutiny than remedial measures undertaken by municipalities with white leadership implies a lack of political maturity on the part of this Nation's elected minority officials that is totally unwarranted. Such insulting judgments have no place in constitutional jurisprudence.

C

Today's decision, finally, is particularly noteworthy for the daunting standard it imposes upon States and localities contemplating the use of race-conscious measures to eradicate the present effects of prior discrimination and prevent its perpetuation. The majority restricts the use of such measures to situations in which a State or locality can put forth "a prima facie case of a constitutional or statutory violation." *Ante*, at 500. In so doing, the majority calls into question the validity of the business set-asides which dozens of municipalities across this Nation have adopted on the authority of *Fullilove*.

Nothing in the Constitution or in the prior decisions of this Court supports limiting state authority to confront the effects of past discrimination to those situations in which a prima facie case of a constitutional or statutory violation can be made out. By its very terms, the majority's standard effectively cedes control of a large component of the content of that constitutional provision to Congress and to state legislatures. If an antecedent Virginia or Richmond law had defined as unlawful the award to nonminorities of an overwhelming share of a city's contracting dollars, for example, Richmond's subsequent set-aside initiative would then satisfy

the majority's standard. But without such a law, the initiative might not withstand constitutional scrutiny. The meaning of "equal protection of the laws" thus turns on the happenstance of whether a state or local body has previously defined illegal discrimination. Indeed, given that racially discriminatory cities may be the ones least likely to have tough antidiscrimination laws on their books, the majority's constitutional incorporation of state and local statutes has the perverse effect of inhibiting those States or localities with the worst records of official racism from taking remedial action.

Similar flaws would inhere in the majority's standard even if it incorporated only federal antidiscrimination statutes. If Congress tomorrow dramatically expanded Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*—or alternatively, if it repealed that legislation altogether—the meaning of equal protection would change precipitately along with it. Whatever the Framers of the Fourteenth Amendment had in mind in 1868, it certainly was not that the content of their Amendment would turn on the amendments to or the evolving interpretations of a federal statute passed nearly a century later.[12]

[12] Although the majority purports to "adher[e] to the standard of review employed in *Wygant*," *ante*, at 494, the "prima facie case" standard it adopts marks an implicit rejection of the more generally framed "strong basis in evidence" test endorsed by the *Wygant* v. *Jackson Bd. of Education*, 476 U. S. 267 (1986) plurality, and the similar "firm basis" test endorsed by JUSTICE O'CONNOR in her separate concurrence in that case. See *id.*, at 289; *id.*, at 286. Under those tests, proving a prima facie violation of Title VII would appear to have been but one means of adducing sufficient proof to satisfy Equal Protection Clause analysis. See *Johnson* v. *Transportation Agency, Santa Clara County*, 480 U. S. 616, 632 (1987) (plurality opinion) (criticizing suggestion that race-conscious relief be conditioned on showing of a prima facie Title VII violation).

The rhetoric of today's majority opinion departs from *Wygant* in another significant respect. In *Wygant*, a majority of this Court rejected as unduly inhibiting and constitutionally unsupported a requirement that a municipality demonstrate that its remedial plan is designed only to benefit specific victims of discrimination. See 476 U. S., at 277–278; *id.*, at 286

To the degree that this parsimonious standard is grounded on a view that either § 1 or § 5 of the Fourteenth Amendment substantially disempowered States and localities from remedying past racial discrimination, *ante*, at 490–491, 504, the majority is seriously mistaken. With respect, first, to § 5, our precedents have never suggested that this provision—or, for that matter, its companion federal-empowerment provisions in the Thirteenth and Fifteenth Amendments—was meant to pre-empt or limit state police power to undertake race-conscious remedial measures. To the contrary, in *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966), we held that § 5 "is a *positive* grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Id.*, at 651 (emphasis added); see *id.*, at 653–656; *South Carolina* v. *Katzenbach*, 383 U. S. 301, 326–327 (1966) (interpreting similar provision of the Fifteenth Amendment to empower Congress to "implemen[t] the rights created" by its passage); see also *City of Rome* v.

(O'CONNOR, J., concurring in part and concurring in judgment); *id.*, at 305 (MARSHALL, J., dissenting). JUSTICE O'CONNOR noted the Court's general agreement that a "remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required. . . . [A] plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently 'narrowly tailored,' or 'substantially related,' to the correction of prior discrimination by the state actor." *Id.*, at 286–287. The majority's opinion today, however, hints that a "specific victims" proof requirement might be appropriate in equal protection cases. See, *e. g.*, *ante*, at 504 (States and localities "must identify that discrimination . . . with some specificity"). Given that just three Terms ago this Court rejected the "specific victims" idea as untenable, I believe these references—and the majority's cryptic "identified discrimination" requirement—cannot be read to require States and localities to make such highly particularized showings. Rather, I take the majority's standard of "identified discrimination" merely to require some quantum of proof of discrimination within a given jurisdiction that exceeds the proof which Richmond has put forth here.

United States, 446 U. S. 156, 173 (1980) (same). Indeed, we have held that Congress has this authority even where no constitutional violation has been found. See *Katzenbach* v. *Morgan*, *supra* (upholding Voting Rights Act provision nullifying state English literacy requirement we had previously upheld against Equal Protection Clause challenge). Certainly *Fullilove* did not view § 5 either as limiting the traditionally broad police powers of the States to fight discrimination, or as mandating a zero-sum game in which state power wanes as federal power waxes. On the contrary, the *Fullilove* plurality invoked § 5 only because it provided specific and certain authorization for the Federal Government's attempt to impose a race-conscious condition on the dispensation of federal funds by state and local grantees. See *Fullilove*, 448 U. S., at 476 (basing decision on § 5 because "[i]n certain contexts, there are limitations on the reach of the Commerce Power").

As for § 1, it is too late in the day to assert seriously that the Equal Protection Clause prohibits States—or for that matter, the Federal Government, to whom the equal protection guarantee has largely been applied, see *Bolling* v. *Sharpe*, 347 U. S. 497 (1954)—from enacting race-conscious remedies. Our cases in the areas of school desegregation, voting rights, and affirmative action have demonstrated time and again that race is constitutionally germane, precisely because race remains dismayingly relevant in American life.

In adopting its prima facie standard for States and localities, the majority closes its eyes to this constitutional history and social reality. So, too, does JUSTICE SCALIA. He would further limit consideration of race to those cases in which States find it "necessary to eliminate their own maintenance of a system of unlawful racial classification"—a "distinction" which, he states, "explains our school desegregation cases." *Ante*, at 524 (SCALIA, J., concurring in judgment). But this Court's remedy-stage school desegregation decisions cannot so conveniently be cordoned off. These decisions (like those involving voting rights and affirmative action)

stand for the same broad principles of equal protection which Richmond seeks to vindicate in this case: all persons have equal worth, and it is permissible, given a sufficient factual predicate and appropriate tailoring, for government to take account of race to eradicate the present effects of race-based subjugation denying that basic equality. JUSTICE SCALIA's artful distinction allows him to avoid having to repudiate "our school desegregation cases," *ibid.*, but, like the arbitrary limitation on race-conscious relief adopted by the majority, his approach "would freeze the status quo that is the very target" of the remedial actions of States and localities. *McDaniel* v. *Barresi*, 402 U. S., at 41; see also *North Carolina Bd. of Education* v. *Swann*, 402 U. S., at 46 (striking down State's flat prohibition on assignment of pupils on basis of race as impeding an "effective remedy"); *United Jewish Organizations* v. *Carey*, 430 U. S. 144, 159–162 (1977) (upholding New York's use of racial criteria in drawing district lines so as to comply with § 5 of the Voting Rights Act).

The fact is that Congress' concern in passing the Reconstruction Amendments, and particularly their congressional authorization provisions, was that States would *not* adequately respond to racial violence or discrimination against newly freed slaves. To interpret any aspect of these Amendments as proscribing state remedial responses to these very problems turns the Amendments on their heads. As four Justices, of whom I was one, stated in *University of California Regents* v. *Bakke*:

> "[There is] no reason to conclude that the States cannot voluntarily accomplish under § 1 of the Fourteenth Amendment what Congress under § 5 of the Fourteenth Amendment validly may authorize or compel either the States or private persons to do. A contrary position would conflict with the traditional understanding recognizing the competence of the States to initiate measures consistent with federal policy in the absence of congressional pre-emption of the subject matter. *Nothing*

whatever in the legislative history of either the Fourteenth Amendment or the Civil Rights Acts even remotely suggests that the States are foreclosed from furthering the fundamental purpose of equal opportunity to which the Amendment and those Acts are addressed. Indeed, voluntary initiatives by the States to achieve the national goal of equal opportunity have been recognized to be essential to its attainment. 'To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment.' *Railway Mail Assn.* v. *Corsi*, 326 U. S. 88, 98 (Frankfurter, J., concurring)." 438 U. S., at 368 (footnote omitted; emphasis added).

In short, there is simply no credible evidence that the Framers of the Fourteenth Amendment sought "to transfer the security and protection of all the civil rights . . . from the States to the Federal government." The *Slaughter-House Cases*, 16 Wall. 36, 77–78 (1873).[13] The three Reconstruction Amendments undeniably "worked a dramatic change in the balance between congressional and state power," *ante*, at 490: they forbade state-sanctioned slavery, forbade the state-sanctioned denial of the right to vote, and (until the content of the Equal Protection Clause was substantially applied to the Federal Government through the Due Process Clause of the Fifth Amendment) uniquely forbade States to deny equal protection. The Amendments also specifically empowered the Federal Government to combat discrimination at a time when the breadth of federal power under the Constitution was less apparent than it is today. But nothing in the Amendments themselves, or in our long history of interpreting or applying those momentous charters, suggests that

[13] Tellingly, the sole support the majority offers for its view that the Framers of the Fourteenth Amendment intended such a result are two law review articles analyzing this Court's recent affirmative-action decisions, and a Court of Appeals decision which relies upon statements by James Madison. *Ante*, at 491. Madison, of course, had been dead for 32 years when the Fourteenth Amendment was enacted.

States, exercising their police power, are in any way constitutionally inhibited from working alongside the Federal Government in the fight against discrimination and its effects.

IV

The majority today sounds a full-scale retreat from the Court's longstanding solicitude to race-conscious remedial efforts "directed toward deliverance of the century-old promise of equality of economic opportunity." *Fullilove*, 448 U. S., at 463. The new and restrictive tests it applies scuttle one city's effort to surmount its discriminatory past, and imperil those of dozens more localities. I, however, profoundly disagree with the cramped vision of the Equal Protection Clause which the majority offers today and with its application of that vision to Richmond, Virginia's, laudable set-aside plan. The battle against pernicious racial discrimination or its effects is nowhere near won. I must dissent.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN joins, dissenting.

I join JUSTICE MARSHALL's perceptive and incisive opinion revealing great sensitivity toward those who have suffered the pains of economic discrimination in the construction trades for so long.

I never thought that I would live to see the day when the city of Richmond, Virginia, the cradle of the Old Confederacy, sought on its own, within a narrow confine, to lessen the stark impact of persistent discrimination. But Richmond, to its great credit, acted. Yet this Court, the supposed bastion of equality, strikes down Richmond's efforts as though discrimination had never existed or was not demonstrated in this particular litigation. JUSTICE MARSHALL convincingly discloses the fallacy and the shallowness of that approach. History is irrefutable, even though one might sympathize with those who—though possibly innocent in themselves—benefit from the wrongs of past decades.

So the Court today regresses. I am confident, however, that, given time, it one day again will do its best to fulfill the great promises of the Constitution's Preamble and of the guarantees embodied in the Bill of Rights—a fulfillment that would make this Nation very special.

UNITED STATES v. BROCE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 87-1190. Argued October 4, 1988—Decided January 23, 1989

Respondents pleaded guilty to two separate conspiracy indictments in a single proceeding in District Court. One indictment charged respondents with entering into an agreement to rig bids on a certain highway project in violation of the Sherman Act, and the other made similar charges with respect to a different project. After the District Court conducted a hearing, at which respondents were represented by counsel, and found the guilty pleas free and voluntary and made with an understanding of their consequences and of the nature of the charges, convictions were entered on the pleas and sentences were imposed. Respondents subsequently filed a motion to vacate the convictions and sentences under the second indictment, contending, in reliance on the District Court's holding in another case involving the same bid-rigging conspiracy, that only one conspiracy existed and that double jeopardy principles required their convictions and sentences to be set aside. The District Court denied the motion, but the Court of Appeals reversed, holding that notwithstanding their guilty pleas, respondents were entitled to introduce evidence outside the original record to support their one-conspiracy claim, since in pleading guilty they admitted only the acts described in the indictments, not their legal consequences, and that moreover, since the indictments did not expressly state that the two conspiracies were separate, no such concessions could be inferred from the pleas. On remand, the District Court granted the motion, finding that there was only a single conspiracy, and the Court of Appeals affirmed.

Held: Respondents' double jeopardy challenge is foreclosed by their guilty pleas and convictions. Pp. 569–576.

(a) In holding that the admissions inherent in a guilty plea "go only to the acts constituting the conspiracy," the Court of Appeals misapprehended the nature and effect of the plea. By entering a guilty plea, the accused does not simply state that he did the discrete acts described in the indictment; he admits guilt of a substantive crime. Here, the indictments alleged two distinct agreements, and the Court of Appeals erred in concluding that because the indictments did not explicitly state that the conspiracies were separate, respondents did not concede their separate nature by pleading guilty to both. When respondents pleaded

paid, inactive officers were not employees); EEOC Decision No. 80–23, 1980 WL 8891 (E.E.O.C.) at *1–*2, 26 Fair Empl. Prac. Cas. (BNA) 1807, 1808 (Aug. 27, 1980) (trustees who held exclusive authority to control and manage a trust and its assets were employers, not employees of trust).

The J & H directors hold nearly all of the firm's equity. All directors forgo regular salary, and instead are compensated solely on basis of the firm's performance.[5] Board members have final authority over specific areas of business, and often manage regional offices or entire lines of business. Each director is statutorily entitled by New Jersey law to one vote at meetings of the board. N.J.Stat.Ann. § 14A:6–7.1(1) & (4) (West 1969 & Supp.1996). The board has the power to dissolve the corporation, *id.* §§ 14A:12–1(1)(b), :12–4 & :12–2, amend the bylaws, *id.* § 14A:2–9, amend the certificate of incorporation, *id.* § 14A:9–2, approve mergers or consolidations, *id.* § 14A:10–3, remove and appoint officers, *id.* § 14A:6–16, and determine the duties that officers shall perform, *id.* § 14A:6–15. Because they own and control the company, J & H's directors should be considered employ*ers*—not employ*ees*—for the same reasons that a general partner is considered a "business owner[ ] and manager[ ]," not an employee.[6] *Hyland*, 794 F.2d at 797. *See also Fountain*, 925 F.2d at 1400.

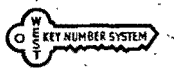
Furthermore, the status of J & H's directors should be ascertained in relation to the challenged employment practice. That is because an individual may be both an employer and employee for purposes of the anti-discrimination laws. For example, a manager may be considered an "employer" in hiring or firing of subordinates, yet qualify as an "employee" if he were terminated for an impermissible reason. In my view, the J & H directors are acting as "employers" when they decide among themselves the issues of tenure and retirement that bind them all. At the very least, a material issue remains as to whether the J & H directors are employees or employers under the ADEA. *See Sempier v. Johnson & Higgins*, 45 F.3d 724, 728 n. 4. (3d Cir.) ("To the extent that [the plaintiff-director] on remand pursues relief [under the ADEA] related to his status as a director, this issue should be *resolved by trial* on the basis of the parties' proof of his functions at J & H in that capacity." (emphasis added)), *cert. denied*, — U.S. —, 115 S.Ct. 2611, 132 L.Ed.2d 854 (1995); *see also Caruso v. Peat, Marwick, Mitchell & Co.*, 717 F.Supp. 218, 222–223 (S.D.N.Y.1989) (denying defendant's motion for summary judgment because material issues remained as to whether plaintiff-partner was an "employee") (Walker, J.); *Caruso v. Peat, Marwick, Mitchell & Co.*, 779 F.Supp. 332, 333 & 334 n. 2 (S.D.N.Y.1991) (question of plaintiff's employee status was decided by jury).

D.

In sum, it is true that J & H's directors do some things that employees do. But what is relevant here is that they alone hold all the legal and financial power to direct the corporation's acts. The challenged retirement policy is one that only the directors have the power to adopt. It affects only themselves; it impacts equally and without discrimination on each; and it is part of a comprehensive contractual arrangement governing the stock ownership, management succession, and economic destiny of J & H. J & H has established a material question of fact as to whether this policy impacts the directors as employees or as employers. But I think the issue is so clear on this record that I would reverse.

5. Directors receive (i) draws from the directors' salary pool, which depends on the performance of the firm, and (ii) dividends on any dividend-paying stock they hold, the amount of which, again, depends entirely on the performance of the firm. From time to time, directors may be awarded by their fellow directors with additional shares for outstanding contributions to the enterprise.

6. As the majority notes, J & H is precluded by *Hyland* from arguing that its corporate directors are *de facto* partners in a general partnership as a defense to liability under the ADEA. *Hyland*, 794 F.2d at 797–98. But J & H is not making that argument. Instead, J & H argues that the directors hold ownership interests, legal authority and decision-making power commensurate with traditional employers, and for that reason cannot be considered employers in electing to bind themselves to J & H's retirement policy.



Sharon TAXMAN, Plaintiff-Intervenor,

v.

BOARD OF EDUCATION OF the TOWNSHIP OF PISCATAWAY, Appellant.

Sharon TAXMAN, Appellant,

v.

BOARD OF EDUCATION OF the TOWNSHIP OF PISCATAWAY.

Nos. 94–5090, 94–5112.

United States Court of Appeals, Third Circuit.

Argued Nov. 29, 1995.

Reargued In Banc May 14, 1996.

Decided Aug. 8, 1996.

As Amended Aug. 21, 1996.

United States brought Title VII action challenging school board's affirmative action plan of preferring minority teachers over nonminority teachers in layoff decisions where teachers were equally qualified. White teacher intervened as plaintiff, asserting claims under Title VII and New Jersey Law Against Discrimination (NJLAD). Following denial of board's motion to dismiss, 798 F.Supp. 1093, the United States District Court for the District of New Jersey, Maryanne Trump Barry, J., 832 F.Supp. 836, entered summary judgment for United States and teacher. Board and teacher appealed. Following denial of United States' request to file brief as amicus curiae in support of reversal of judgment, 1995 WL 704036, the Court of Appeals, Mansmann, Circuit Judge, held that: (1) nonremedial affirmative action plans are prohibited by Title VII; (2) board's plan violated Title VII, since it was adopted for purpose of promoting racial diversity, rather than to remedy discrimination or effects of past discrimination, and since it unnecessarily trammelled nonminority interests, in that it was governed by board's whim, was of unlimited duration, and imposed job loss on tenured nonminority employees; (3) plan violated NJLAD; (4) teacher would be awarded 100% backpay; (5) district court did not abuse its discretion in calculating prejudgment interest using Internal Revenue Service (IRS) adjusted prime rate; and (6) teacher was not entitled to punitive damages under NJLAD.

Affirmed.

Stapleton, Circuit Judge, concurred and filed opinion.

Sloviter, Chief Judge, dissented and filed opinion in which Lewis and McKee, JJ., joined.

Scirica, Circuit Judge, dissented and filed opinion in which Sloviter, Chief Judge, joined.

Lewis, Circuit Judge, dissented and filed opinion in which McKee, J., joined.

McKee, Circuit Judge, dissented and filed opinion in which Sloviter, Chief Judge, and Lewis, J., joined.

1. Federal Courts ⟹766

Court of Appeals' review of district court's decision on summary judgment is plenary. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

2. Civil Rights ⟹378

Once employee establishes prima facie case of employment discrimination, burden of production shifts to employer to show legitimate nondiscriminatory reason for the decision. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

3. Civil Rights ⟹154

In employment discrimination action, employer's assertion that adverse employment action was taken pursuant to affirmative action plan may constitute legitimate nondiscriminatory reason for action. Civil

Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

4. Civil Rights ⇐378

When employer offers affirmative action plan as legitimate nondiscriminatory reason for adverse employment decision in Title VII action, burden of production shifts back to employee to show that asserted nondiscriminatory reason is pretext and that affirmative action plan is invalid. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

5. Statutes ⇐184, 188, 217, 217.2

Court of Appeals would look for purposes of statute in plain meaning of its provisions and in its legislative history and historical context.

6. Civil Rights ⇐141

Title VII was enacted to further two primary goals, which were to end discrimination on basis of race, color, religion, sex, or national origin, thereby guaranteeing equal opportunity in workplace, and to remedy segregation and underrepresentation of minorities that discrimination has caused in nation's work force. Civil Rights Act of 1964, § 701 et seq., 703(a–d, *l*), as amended, 42 U.S.C.A. § 2000e et seq., 2000e–2(a–d, *l*).

7. Civil Rights ⇐141

Title VII was written to eradicate not only discrimination per se, but consequences of prior discrimination as well. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

8. Civil Rights ⇐154

Unless affirmative action plan has remedial purpose, it is prohibited by Title VII, since it cannot be said to mirror Title VII's purposes of eradicating discrimination and its consequences. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

9. Civil Rights ⇐142

Promoting racial diversity for education's sake is not an objective of Title VII; no positive legislative history supported such goal, and Congress did not address such goal in amending Title VII to cover academic institutions. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

10. Civil Rights ⇐154

School board's affirmative action plan of preferring minority teachers over nonminority teachers in layoff decisions where teachers were equally qualified violated Title VII; plan was not adopted to remedy discrimination or effects of past discrimination, but instead for nonremedial purpose of promoting racial diversity for sake of education, and plan unnecessarily trammelled nonminority interests, in that it was devoid of goals and standards and thus governed by board's whim, was of unlimited duration, and imposed job loss on tenured nonminority employees. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

11. Civil Rights ⇐154

While hiring goals impose diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives, and such burden is too intrusive, for purposes of determining whether affirmative action plan violates Title VII. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

12. Civil Rights ⇐154

Under New Jersey law, as predicted by Court of Appeals, school board's affirmative action plan of preferring minority teachers over nonminority teachers in layoff decisions where teachers were equally qualified violated New Jersey Law Against Discrimination (NJLAD), since plan was not adopted to remedy discrimination or effects of past discrimination, and plan unnecessarily trammelled nonminority interests. N.J.S.A. 10:5–1 et seq.

13. Civil Rights ⇐401

Teacher who was laid off pursuant to affirmative action plan that violated Title VII would be awarded 100% backpay, even though school board, had it not invoked its affirmative action plan, would have followed its usual procedure of using coin toss or other random procedure to decide whether teacher or another person would be laid off, arguably resulting in teacher having only 50% chance of keeping her job. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

14. Civil Rights ⇐401

In deciding backpay issues, district court has wide latitude to locate just result and to further the make whole remedy of Title VII in light of the circumstances of a particular case. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

15. Interest ⇐31

District court did not abuse its discretion in calculating prejudgment interest using Internal Revenue Service (IRS) adjusted prime rate, rather than using statute governing interest on money judgment in civil case recovered in district court. 28 U.S.C.A. § 1961(a).

16. Interest ⇐39(2.10)

Matter of prejudgment interest is left to discretion of district court.

17. Interest ⇐31

Although court may use postjudgment standards of statute governing interest on money judgment in civil case recovered in district court, it is not compelled to do so. 28 U.S.C.A. § 1961(a).

18. Civil Rights ⇐454

Under New Jersey law, teacher who was laid off pursuant to affirmative action plan which violated New Jersey Law Against Discrimination (NJLAD) was not entitled to punitive damages; school board did not act willfully, wantonly, or outrageously. N.J.S.A. 10:5–1 et seq.

19. Civil Rights ⇐454

Under New Jersey law, as predicted by Court of Appeals, assessment of punitive damages against public employer is allowed under New Jersey Law Against Discrimination (NJLAD). N.J.S.A. 10:5–1 et seq.

20. Damages ⇐91(1)

Under New Jersey law, punitive damages are to be awarded only when wrongdoer's conduct is especially egregious.

21. Damages ⇐91(1)

Under New Jersey law, to warrant punitive award, defendant's conduct must have been wantonly reckless or malicious.

22. Damages ⇐91(1)

Under New Jersey law, for punitive damages to be warranted, there must be intentional wrongdoing in the sense of evil-minded act accompanied by wanton and willful disregard to rights of another.

23. Damages ⇐91(1)

Under New Jersey law, the key to right to punitive damages is wrongfulness of defendant's intentional action.

David B. Rubin (argued), Metuchen, NJ, for Board of Education of the Township of Piscataway.

Stephen E. Klausner (argued), Klausner, Hunter, Cige & Seid, Somerville, NJ, for Sharon Taxman.

Before: SLOVITER,* Chief Judge, MANSMANN and MCKEE, Circuit Judges.

Before: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE and SAROKIN,** Circuit Judges.

OPINION OF THE COURT

MANSMANN, Circuit Judge.

In this Title VII matter, we must determine whether the Board of Education of the Township of Piscataway violated that statute when it made race a factor in selecting which of two equally qualified employees to lay off. Specifically, we must decide whether Title VII permits an employer with a racially bal-

* The Honorable William D. Hutchinson was a member of the original panel which heard argument in this appeal on January 24, 1995. He died on October 8, 1995, before the appeal was resolved; Chief Judge Sloviter was designated to serve in his place on the reconstituted panel.

** Judge Sarokin heard argument but retired from office prior to the issuance of the opinion.

anced work force to grant a non-remedial racial preference in order to promote "racial diversity".

It is clear that the language of Title VII is violated when an employer makes an employment decision based upon an employee's race. The Supreme Court determined in *United Steelworkers v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), however, that Title VII's prohibition against racial discrimination is not violated by affirmative action plans which first, "have purposes that mirror those of the statute" and second, do not "unnecessarily trammel the interests of the [non-minority] employees," *id.* at 208, 99 S.Ct. at 2730.

We hold that Piscataway's affirmative action policy is unlawful because it fails to satisfy either prong of *Weber*. Given the clear antidiscrimination mandate of Title VII, a non-remedial affirmative action plan, even one with a laudable purpose, cannot pass muster. We will affirm the district court's grant of summary judgment to Sharon Taxman.

I.[1]

In 1975, the Board of Education of the Township of Piscataway, New Jersey, developed an affirmative action policy applicable to employment decisions. The Board's Affirmative Action Program, a 52-page document, was originally adopted in response to a regulation promulgated by the New Jersey State Board of Education. That regulation directed local school boards to adopt "affirmative action programs," N.J. Admin. Code Tit. 6 § 6:4–1.3(b), to address employment as well as school and classroom practices and to ensure equal opportunity to all persons regardless of race, color, creed, religion, sex or national origin. N.J. Admin. Code Tit. 6 §§ 6:4–1.5, 6:4–1.6(a). In 1983 the Board also adopted a one page "Policy", entitled "Affirmative Action—Employment Practices." It is not clear from the record whether the "Policy" superseded or simply added to the "Program," nor does it matter for purposes of this appeal.

The 1975 document states that the purpose of the Program is "to provide equal educational opportunity for students and equal employment opportunity for employees and prospective employees," and "to make a concentrated effort to attract . . . minority personnel for all positions so that their qualifications can be evaluated along with other candidates." The 1983 document states that its purpose is to "ensure[ ] equal employment opportunity . . . and prohibit[ ] discrimination in employment because of [, *inter alia*,] race. . . ."

The operative language regarding the means by which affirmative-action goals are to be furthered is identical in the two documents. "In all cases, the most qualified candidate will be recommended for appointment. However, when candidates appear to be of equal qualification, candidates meeting the criteria of the affirmative action program will be recommended." The phrase "candidates meeting the criteria of the affirmative action program" refers to members of racial, national origin or gender groups identified as minorities for statistical reporting purposes by the New Jersey State Department of Education, including Blacks. The 1983 document also clarifies that the affirmative action program applies to "every aspect of employment including . . . layoffs. . . ."[2]

The Board's affirmative action policy did not have "any remedial purpose"; it was not adopted "with the intention of remedying the results of any prior discrimination or identified underrepresentation of minorities within the Piscataway Public School System." At all relevant times, Black teachers were neither "underrepresented" nor "underutilized" in the Piscataway School District work force.[3] Indeed, statistics in 1976 and 1985 showed that the percentage of Black employees in the job category which included teachers exceeded the percentage of Blacks in the available work force.

A.

In May, 1989, the Board accepted a recommendation from the Superintendent of Schools to reduce the teaching staff in the Business Department at Piscataway High School by one. At that time, two of the teachers in the department were of equal seniority, both having begun their employment with the Board on the same day nine years earlier. One of those teachers was intervenor plaintiff Sharon Taxman, who is White, and the other was Debra Williams, who is Black. Williams was the only minority teacher among the faculty of the Business Department.

Decisions regarding layoffs by New Jersey school boards are highly circumscribed by state law; nontenured faculty must be laid off first, and layoffs among tenured teachers in the affected subject area or grade level must proceed in reverse order of seniority. N.J. Stat. Ann. § 18A:28–9 *et seq.* Seniority for this purpose is calculated according to specific guidelines set by state law. N.J. Stat. Ann. § 18A:28–10; N.J. Admin. Code Tit. 6 § 6:3–5.1. Thus, local boards lack discretion to choose between employees for layoff, except in the rare instance of a tie in seniority between the two or more employees eligible to fill the last remaining position.

The Board determined that it was facing just such a rare circumstance in deciding between Taxman and Williams. In prior decisions involving the layoff of employees with equal seniority, the Board had broken the tie through "a random process which included drawing numbers out of a container, drawing lots or having a lottery."[4] In none of those instances, however, had the employees involved been of different races.

In light of the unique posture of the layoff decision, Superintendent of Schools Burton Edelchick recommended to the Board that the affirmative action plan be invoked in order to determine which teacher to retain. Superintendent Edelchick made this recommendation "because he believed Ms. Williams and Ms. Taxman were tied in seniority, were equally qualified, and because Ms. Williams was the only Black teacher in the Business Education Department."

While the Board recognized that it was not bound to apply the affirmative action policy, it made a discretionary decision to invoke the policy to break the tie between Williams and Taxman. As a result, the Board "voted to terminate the employment of Sharon Taxman, effective June 30, 1988. . . ."

At her deposition, Paula Van Riper, the Board's Vice President at the time of the layoff, described the Board's decision-making process. According to Van Riper, after the Board recognized that Taxman and Williams were of equal seniority, it assessed their classroom performance, evaluations, volunteerism and certifications and determined that they were "two teachers of equal ability" and "equal qualifications."

At his deposition Theodore H. Kruse, the Board's President, explained his vote to apply the affirmative action policy as follows:

> A. Basically I think because I had been aware that the student body and the community which is our responsibility, the schools of the community, is really quite diverse and there—I have a general feeling during my tenure on the board that it was valuable for the students to see in the various employment roles a wide range of background, and that it was also valuable to the work force and in particular to the

1. This matter is before us on the grant of summary judgment. *See United States v. Board of Educ. of Township of Piscataway*, 832 F.Supp. 836 (D.N.J.1993). Except where we have stated otherwise, the facts are taken directly from the stipulations submitted by the parties for purposes of summary judgment.

2. We use the terms "policy" or "plan" hereafter to refer generally to the affirmative action program adopted by the Board in 1975 as modified, if at all, by the 1983 document.

3. In the use of designations such as "Black", "White", and "Minority", we adopt the terms used by both the district court and the parties in their stipulated facts.

4. The dissent of Chief Judge Sloviter characterizes the use of a random process as "a solution that could be expected of the state's gaming tables." We take issue with this characterization, noting that those wiser than we have advised that "the lot puts an end to disputes and is decisive in a controversy between the mighty." *Proverbs* 18:18 (New American). Furthermore, the use of a random process is not something which the court has imposed upon the Board but is instead a mechanism adopted by the Board itself in reaching a decision in prior employment matters. Board of Education Brief at 3.

teaching staff that they have—they see that in each other.

Asked to articulate the "educational objective" served by retaining Williams rather than Taxman, Kruse stated:

A. In my own personal perspective I believe by retaining Mrs. Williams it was sending a very clear message that we feel that our staff should be culturally diverse, our student population is culturally diverse and there is a distinct advantage to students, to all students, to be made—come into contact with people of different cultures, different background, so that they are more aware, more tolerant, more accepting, more understanding of people of all background.

Q. What do you mean by the phrase you used, culturally diverse?

A. Someone other than—different than yourself. And we have, our student population and our community has people of all different background, ethnic background, religious background, cultural background, and it's important that our school district encourage awareness and acceptance and tolerance and, therefore, I personally think it's important that our staff reflect that too.

B.

Following the Board's decision, Taxman filed a charge of employment discrimination with the Equal Employment Opportunity Commission. Attempts at conciliation were unsuccessful, and the United States filed suit under Title VII against the Board in the United States District Court for the District of New Jersey.[5] Taxman intervened, asserting claims under both Title VII and the New Jersey Law Against Discrimination (NJLAD).

Following discovery, the Board moved for summary judgment and the United States and Taxman cross-moved for partial summary judgment only as to liability. The district court denied the Board's motion and granted partial summary judgment to the United States and Taxman, holding the Board liable under both statutes for discrimination on the basis of race. *United States v. Board of Educ. of Township of Piscataway*, 832 F.Supp. 836, 851 (D.N.J.1993).

A trial proceeded on the issue of damages. By this time, Taxman had been rehired by the Board and thus her reinstatement was not an issue. The court awarded Taxman damages in the amount of $134,014.62 for backpay, fringe benefits and prejudgment interest under Title VII. A jury awarded an additional $10,000 for emotional suffering under the NJLAD. The district court denied the United States' request for a broadly worded injunction against future discrimination, finding that there was no likelihood that the conduct at issue would recur, but it did order the Board to give Taxman full seniority reflecting continuous employment from 1980. Additionally, the court dismissed Taxman's claim for punitive damages under the NJLAD.

The Board appealed, contending that the district court erred in granting Taxman summary judgment as to liability. The Board also contends, in the alternative, that the court erred in awarding Taxman 100% backpay and in awarding prejudgment interest at the IRS rate rather than under 28 U.S.C. § 1961. Taxman cross-appealed, contending that the district court erred in dismissing her claim for punitive damages. Subsequently, the United States sought leave to file a brief as amicus curiae in support of reversal of the judgment, representing that it could no longer support the judgment of the district court. By order of November 17, 1995, we denied the United States' request. We treated the position of the United States at the original argument before this court on January 24, 1995, as a motion to withdraw as a party, which we granted. Thus, the only parties before us on this appeal are the Board and Taxman.

[1] This court has jurisdiction over the appeals under 28 U.S.C. § 1291. Our review of the district court's decision on summary judgment is plenary. *Waldron v. SL Industries*, 56 F.3d 491, 496 (3d Cir.1995).

5. The suit did not assert a Fourteenth Amendment Equal Protection claim. By the time suit was filed, the statute of limitations had run for claims based on 42 U.S.C. § 1983.

II.

In relevant part, Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment" or "to limit, segregate, or classify his employees ... in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise affect his status as an employee" on the basis of "race, color, religion, sex, or national origin."[6] 42 U.S.C. § 2000e–2(a). For a time, the Supreme Court construed this language as absolutely prohibiting discrimination in employment, neither requiring nor permitting any preference for any group. *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 643, 107 S.Ct. 1442, 1457–58, 94 L.Ed.2d 615 (1987) (Stevens, J., concurring) (citing, *inter alia*, *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971), and *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280, 96 S.Ct. 2574, 2579, 49 L.Ed.2d 493 (1976)).

In 1979, however, the Court interpreted the statute's "antidiscriminatory strategy" in a "fundamentally different way", *id.* at 644, 107 S.Ct. at 1458, holding in the seminal case of *United Steelworkers v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), that Title VII's prohibition against racial discrimination does not condemn all voluntary race-conscious affirmative action plans. In *Weber*, the Court considered a plan implemented by Kaiser Aluminum & Chemical Corporation. Prior to 1974, Kaiser hired as craftworkers only those with prior craft experience. *Id.* at 198, 99 S.Ct. at 2724–25. Because they had long been excluded from craft unions, Blacks were unable to present the credentials required for craft positions. *Id.* Moreover, Kaiser's hiring practices, although not admittedly discriminatory with regard to minorities, were questionable. *Id.* at 210, 99 S.Ct. at 2730. As a consequence, while the local labor force was about 39% Black, Kaiser's labor force was less than 15% Black and its crafts-work force was less than 2% Black. *Id.* at 198, 99 S.Ct. at 2724–25. In 1974, Kaiser entered into a collective bargaining agreement which contained an affirmative action plan. The plan reserved 50% of the openings in an in-plant craft-training program for Black employees until the percentage of Black craft-workers in the plant reached a level commensurate with the percentage of Blacks in the local labor force. *Id.* at 198, 99 S.Ct. at 2724–25. During the first year of the plan's operation, 13 craft-trainees were selected, seven of whom were Black and six of whom were White. *Id.* at 199, 99 S.Ct. at 2725.

Thereafter, Brian Weber, a White production worker, filed a class action suit, alleging that the plan unlawfully discriminated against White employees under Title VII. Relying upon a literal reading of subsections 703(a) and (d)[7] of the Act, 42 U.S.C. § 2000e–2(a), (d), and upon the Court's decision in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. at 273, 96 S.Ct. at 2574, where the Court held that Title VII forbids discrimina-

6. Section 2000e–2(a) of Title VII states:

§ 2000e–2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or nationality; or

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

42 U.S.C. § 2000e–2(a).

7. For subsection 2000e–2(a) of Title VII, see n.5, *supra*. Subsection 2000e–2(d) of the Act provides:

(d) Training program

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

42 U.S.C. § 2000e–2(d).

tion against Whites as well as Blacks, the plaintiffs argued that it necessarily followed that the Kaiser plan, which resulted in junior Black employees receiving craft training in preference to senior White employees, violated Title VII. *Id.* at 199, 99 S.Ct. at 2725. The district court agreed and entered a judgment in favor of the plaintiffs; the Court of Appeals for the Fifth Circuit affirmed. *Id.* at 200, 99 S.Ct. at 2725–26.

The Supreme Court, however, reversed, noting initially that although the plaintiffs' argument was not "without force", it disregarded "the significance of the fact that the Kaiser–USWA plan was an affirmative action plan voluntarily adopted by private parties to eliminate traditional patterns of racial segregation." *Id.* at 201, 99 S.Ct. at 2726. The Court then embarked upon an exhaustive review of Title VII's legislative history and identified Congress' concerns in enacting Title VII's prohibition against discrimination—the deplorable status of Blacks in the nation's economy, racial injustice, and the need to open employment opportunities for Blacks in traditionally closed occupations. *Id.* at 202–204, 99 S.Ct. at 2726–2728. Against this background, the Court concluded that Congress could not have intended to prohibit private employers from implementing programs directed toward the very goal of Title VII—the eradication of discrimination and its effects from the workplace:

> 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," 110 Cong. Rec. 6552 (1964) (remarks of Sen. Humphrey), constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

Id. at 204, 99 S.Ct. at 2728.

The Court found support for its conclusion in the language and legislative history of section 2000e–2(j) of Title VII which expressly provides that nothing in the Act requires employers to grant racial preferences.[8] According to the Court, the opponents of Title VII had raised two arguments: the Act would be construed to impose obligations upon employers to integrate their work forces through preferential treatment of minorities, and even without being obligated to do so, employers with racially imbalanced work forces would grant racial preferences. *Id.* at 205, 99 S.Ct. at 2728. Since Congress addressed only the first objection and did not specifically prohibit affirmative action efforts in section 2000e–2(j), the Court inferred that Congress did not intend that Title VII forbid all voluntary race-conscious preferences. *Id.* at 205–06, 99 S.Ct. at 2728. The Court further reasoned that since Congress also intended in section 2000e–2(j) "to avoid undue federal regulation of private businesses," a prohibition against all voluntary affirmative action would disserve this end by "augment[ing] the power of the Federal government and diminish[ing] traditional management prerogatives...." *Id.* at 206–07, 99 S.Ct. at 2729.

The Court then turned to the Kaiser plan in order to determine whether it fell on the "permissible" side of the "line of demarcation between permissible and impermissible affirmative action plans." *Id.* at 208, 99 S.Ct. at 2729–30. The Court upheld the Kaiser plan because its purpose "mirror[ed] those of the statute" and it did not "unnecessarily trammel the interests of the [non-minority] employees":

> The purposes of the plan mirror those of the statute. Both were designed to break down old patterns of racial segregation and hierarchy. Both were structured to "open employment opportunities for Negroes in occupations which have been traditionally closed to them." 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey).
>
> At the same time, the plan does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new black hires. Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white. Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance.

Id. at 208, 99 S.Ct. at 2730 (citation and footnote omitted).

In 1987, the Supreme Court decided a second Title VII affirmative action case, *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. at 616, 107 S.Ct. at 1442. There, the Santa Clara County Transit District Board of Supervisors implemented an affirmative action plan stating that "'mere prohibition of discriminatory practices [was] not enough to remedy the effects of past discriminatory practices and to permit attainment of an equitable representation of minorities, women and handicapped persons.'" *Id.* at 620, 107 S.Ct. at 1446. The plan noted that women were represented in numbers far less than their proportion of the available work force in the Agency as a whole and in the skilled craft worker job category relevant to the case, and observed that a lack of motivation in women to seek training or employment where opportunities were limited partially explained the underrepresentation. *Id.* at 621, 107 S.Ct. at 1446. The plan authorized the Agency to consider as one factor the gender of a qualified candidate in making promotions to positions with a traditionally segregated job classification in which women were significantly underrepresented. *Id.* at 620–21, 107 S.Ct. at 1446. The plan did not set quotas, but had as its long-term goal the attainment of a work force whose composition reflected the proportion of women in the area labor force. *Id.* at 621–22, 107 S.Ct. at 1446. Acknowledging the practical difficulties in attaining the long-term goal, including the limited number of qualified women, the plan counseled that short range goals be established and annually adjusted to serve as realistic guides for actual employment decisions. *Id.* at 622, 107 S.Ct. at 1447.

On December 12, 1979, the Agency announced a vacancy for the promotional position of road dispatcher. At the time, none of the 238 positions in the applicable job category was occupied by a woman. *Id.* at 621, 107 S.Ct. at 1446. The Agency Director, authorized to choose any of seven applicants who had been deemed eligible, promoted Diane Joyce, a qualified woman, over Paul Johnson, a qualified man. *Id.* at 624–25, 107 S.Ct. at 1448. As the Agency Director testified: "'I tried to look at the whole picture, the combination of her qualifications and Mr. Johnson's qualifications, their test scores, their expertise, their background, affirmative action matters, things like that.... I believe it was a combination of all those.'" *Id.* at 625, 107 S.Ct. at 1448.

Johnson sued, alleging that the Agency's employment decision constituted unlawful sex discrimination under Title VII. Evaluating the plan against the criteria announced in *Weber*, the district court held that the plan did not satisfy *Weber*'s criterion that the plan be temporary. *Id.* at 625, 107 S.Ct. at 1448. The Court of Appeals for the Ninth Circuit reversed, holding that since the plan provided for the attainment, rather than the maintenance, of a balanced work force, the absence of an express termination date in the plan was not dispositive of its validity. *Id.* at 625–26, 107 S.Ct. at 1448–49. The court of appeals further held that the plan had been adopted "to address a conspicuous imbalance in the Agency's work force, and neither unnecessarily trammeled the rights of other employees, nor created an absolute bar to their advancement." *Id.* at 626, 107 S.Ct. at 1449.

The Supreme Court affirmed. Declaring its prior analysis in *Weber* controlling, the

8. Section 2000e–2(j) states:

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section or other area.

42 U.S.C. § 2000e–2(j).

Court examined whether the employment decision at issue "was made pursuant to a plan prompted by concerns similar to those of the employer in *Weber*" and whether "the effect of the [p]lan on males and nonminorities [was] comparable to the effects of the plan in that case." *Id.* at 631, 107 S.Ct. at 1451. The first issue the Court addressed, therefore, was whether "consideration of the sex of applicants for Skilled Craft jobs was justified by the existence of a 'manifest imbalance' that reflected underrepresentation of women in 'traditionally segregated job categories.'" *Id.* at 631, 107 S.Ct. at 1451–52 (quoting *Weber*, 443 U.S. at 197, 99 S.Ct. at 2724). Although the Court did not set forth a quantitative measure for determining what degree of disproportionate representation in an employer's work force would be sufficient to justify affirmative action, it made clear that the terms "manifest imbalance" and "traditionally segregated job category" were not tantamount to a *prima facie* case of discrimination against an employer since the constraints of Title VII and the Federal Constitution on voluntarily adopted affirmative action plans are not identical. *Johnson*, 480 U.S. at 632, 107 S.Ct. at 1452. In this regard, the Court further reasoned that requiring an employer in a Title VII affirmative action case to show that it had discriminated in the past "would be inconsistent with *Weber*'s focus on statistical imbalance, and could inappropriately create a significant disincentive for employers to adopt an affirmative action plan". *Id.* at 633, 107 S.Ct. at 1453 (footnote omitted).

Reviewing Agency statistics which showed that women were concentrated in traditionally female jobs and represented a lower percentage in other jobs than would be expected if traditional segregation had not occurred, the Court concluded that the decision to promote Joyce was made pursuant to a plan designed to eliminate work force imbalances in traditionally segregated job categories and thus satisfied *Weber*'s first prong. *Id.* at 634, 107 S.Ct. at 1453. Moving to *Weber*'s second prong, whether the plan unnecessarily trammeled the rights of male employees, the Court concluded that the plan passed muster because it authorized merely that consideration be given to affirmative action concerns when evaluating applicants; gender was a "plus" factor, only one of several criteria that the Agency Director considered in making his decision; no legitimate, firmly rooted expectation on the part of Johnson was denied since the Agency Director could have promoted any of the seven candidates classified as eligible; even though Johnson was refused a promotion, he retained his employment; and the plan was intended to attain a balanced work force, not to maintain one. *Id.* at 638–40, 107 S.Ct. at 1455–56.

III.

[2–4] We analyze Taxman's claim of employment discrimination under the approach set forth in *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Once a plaintiff establishes a *prima facie* case, the burden of production shifts to the employer to show a legitimate nondiscriminatory reason for the decision; an affirmative action plan may be one such reason. *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 626, 107 S.Ct. 1442, 1449, 94 L.Ed.2d 615 (1987). When the employer satisfies this requirement, the burden of production shifts back to the employee to show that the asserted nondiscriminatory reason is a pretext and that the affirmative action plan is invalid. *Id.*

For summary judgment purposes, the parties do not dispute that Taxman has established a *prima facie* case or that the Board's decision to terminate her was based on its affirmative action policy. The dispositive liability issue, therefore, is the validity of the Board's policy under Title VII.

IV.

[5] Having reviewed the analytical framework for assessing the validity of an affirmative action plan as established in *United Steelworkers v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), and refined in *Johnson*, 480 U.S. at 616, 107 S.Ct. at 1442, we turn to the facts of this case in order to determine whether the racial diversity purpose of the Board's policy mirrors the purposes of the statute. We look for the purposes of Title VII in the plain meaning of the

Act's provisions and in its legislative history and historical context. *See Edwards v. Aguillard*, 482 U.S. 578, 594–95, 107 S.Ct. 2573, 2583, 96 L.Ed.2d 510 (1987) (in determining a statute's purpose, courts look to the statute's words, legislative history, historical context and the sequence of events leading to its passage).

A.

[6] Title VII was enacted to further two primary goals: to end discrimination on the basis of race, color, religion, sex or national origin, thereby guaranteeing equal opportunity in the workplace, and to remedy the segregation and underrepresentation of minorities that discrimination has caused in our Nation's work force.

Title VII's first purpose is set forth in section 2000e–2's several prohibitions, which expressly denounce the discrimination which Congress sought to end. 42 U.S.C. § 2000e–2(a)–(d), (*l*); *McDonnell Douglas*, 411 U.S. at 800, 93 S.Ct. at 1823 ("The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."). This antidiscriminatory purpose is also reflected in the Act's legislative history. In an interpretative memorandum entered into the Congressional Record, Senators Case and Clark, comanagers of the Senate bill, stated:

> To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin. Any other criterion or qualification for employment is not affected by this title.
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> * * * * * *
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> . . . [Title VII] expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications. Indeed the very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color.

110 Cong. Rec. 7213, 7247 (1964), *quoted in Price Waterhouse v. Hopkins*, 490 U.S. 228, 243, 109 S.Ct. 1775, 1787, 104 L.Ed.2d 268 (1989).

Title VII's second purpose, ending the segregative effects of discrimination, is revealed in the congressional debate surrounding the statute's enactment. In *Weber*, the Court carefully catalogued the comments made by the proponents of Title VII which demonstrate the Act's remedial concerns. *Weber*, 443 U.S. at 202–04, 99 S.Ct. at 2726–28. By way of illustration, we cite Senator Clark's remarks to the Senate:

> The rate of Negro unemployment has gone up consistently as compared with white unemployment for the past 15 years. This is a social malaise and a social situation which we should not tolerate. That is one of the principal reasons why the bill should pass.

Id. (quoting 110 Cong. Rec. at 7220) (statement of Sen. Clark). Likewise, Senator Humphrey spoke of the Nation's need "'to open employment opportunities for Negroes which have been traditionally closed to them,'" and to assist those who have "'been excluded from the American dream for so long[.]'" *Id.* (quoting 110 Cong. Rec. at 6548, 6552) (statements of Sen. Humphrey).

[7] The significance of this second corrective purpose cannot be overstated. It is only because Title VII was written to eradicate not only discrimination per se but the *consequences* of prior discrimination as well, that racial preferences in the form of affirmative action can co-exist with the Act's antidiscrimination mandate.

[8] Thus, based on our analysis of Title VII's two goals, we are convinced that unless an affirmative action plan has a remedial purpose, it cannot be said to mirror the purposes of the statute, and, therefore, cannot satisfy the first prong of the *Weber* test.

We see this case as one involving straightforward statutory interpretation controlled by the text and legislative history of Title VII as interpreted in *Weber* and *Johnson*. The statute on its face provides that race

cannot be a factor in employer decisions about hires, promotions, and layoffs, and the legislative history demonstrates that barring considerations of race from the workplace was Congress' primary objective. If exceptions to this bar are to be made, they must be made on the basis of what *Congress* has said. The affirmative action plans at issue in *Weber* and *Johnson* were sustained only because the Supreme Court, examining those plans in light of congressional intent, found a secondary congressional objective in Title VII that had to be accommodated—i.e., the elimination of the effects of past discrimination in the workplace. Here, there is no congressional recognition of diversity as a Title VII objective requiring accommodation.[9]

Accordingly, it is beyond cavil that the Board, by invoking its affirmative action policy to lay off Sharon Taxman, violated the terms of Title VII. While the Court in *Weber* and *Johnson* permitted some deviation from the antidiscrimination mandate of the statute in order to erase the effects of past discrimination, these rulings do not open the door to additional non-remedial deviations. Here, as in *Weber* and *Johnson*, the Board must justify its deviation from the statutory mandate based on positive legislative history, not on its idea of what is appropriate.[10]

B.

[9] The Board recognizes that there is no positive legislative history supporting its goal of promoting racial diversity "for education's sake", and concedes that there is no caselaw approving such a purpose to support an affirmative action plan under Title VII. "[T]he Board would have [us] infer the propriety of this purpose from fragments of other authority." *Board of Educ. of Township of Piscataway*, 832 F.Supp. at 845.

The Board first attempts to meet its obligations with respect to Title VII by arguing that Congress meant to cover the situation presented here "when it amended Title VII in 1972 to cover academic institutions public and private." A review of a Senate Committee's explanation for recommending the amendment, however, reveals that Congress neither addressed nor embraced the racial diversity purpose before us. Instead, Congress pursued, in Title VII's 1972 amendment with regard to the nation's schools, the same purposes it had pursued in 1964 when enacting the original statute with respect to

9. Our dissenting colleagues would have us substitute our judgment for that expressed by Congress and extend the reach of Title VII to encompass "means of combatting the attitudes that can lead to future patterns of discrimination." Such a dramatic rewriting of the goals underlying Title VII does not have support in the Title VII caselaw.

10. Although no other reported case has addressed the precise question before us, we believe that the decision reached by the Court of Appeals for the Tenth Circuit in *Cunico v. Pueblo School Dist. No. 60*, 917 F.2d 431 (10th Cir. 1990), merits mention. There the plaintiff, a White social worker who was laid off during a reduction in force, sued her employer, a Colorado school district, under Title VII and the Constitution for discriminating against her on the basis of race by retaining Wayne Hunter, a less senior Black social worker. The district asserted in its defense that even though there was no evidence of past discriminatory conduct on its part to justify remedial race-conscious affirmation action, its decision was lawful because it was made pursuant to an valid affirmative action plan and aimed at retaining the district's only Black administrator. *Id.* at 436, 439. The affirmative action plan at issue had two long-range goals: "to achieve a diverse, multi-racial faculty and staff capable of providing excellence in the education of its students and for the welfare and enrichment of the community" and "to achieve equity for all individuals through equal employment opportunity policies and practices." *Id.* at 437 n. 3.

Affirming the district court's judgment in the plaintiff's favor, the court of appeals stated that "[t]he purpose of race-conscious affirmative action must be to remedy the effects of past discrimination against a disadvantaged group that itself has been the victim of discrimination." *Id.* at 437 (citing, *inter alia*, *United Steelworkers v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), and *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986)) (footnote omitted). Because the record did not contain evidence of past or present discrimination against Blacks by the district or proof of a statistical imbalance in the district's work force, the court held that the district's decision to lay off the plaintiff violated the first prong of either a Title VII or Equal Protection analysis. *Id.* at 438–39 & n. 5. Unfortunately, the court did not set forth its reasons for concluding that affirmative action must be remedial to be lawful.

other employers, namely, the elimination of discriminatory employment practices and the abolition of discrimination's invidious effects:

> The presence of discrimination in the Nation's educational institutions is no secret.... This discrimination, however, is not limited to the students alone. Discriminatory practices against faculty, staff, and other employees is also common.
>
> As in other areas of employment, statistics for educational institutions indicate that minorities and women are precluded from the more prestigious and higher-paying positions, and are relegated to the more menial and lower-paying jobs. While in elementary and secondary school systems Negroes accounted for approximately 10% of the total number of positions in the higher-paying and more prestigious positions in institutions of higher learning, blacks constituted only 2.2% of all positions, most of these being found in all-black or predominantly black institutions. Women are similarly subject to discriminatory patterns. Not only are they generally under-represented in institutions of higher learning, but those few that do obtain positions are generally paid less and advanced more slowly than their male counterparts. Similarly, while women constitute 67% of elementary and secondary school teachers, out of 778,000 elementary and secondary school principals, 78% of elementary school principals are men and 94% of secondary school principals are men.
>
> ... There is nothing in the legislative background of Title VII, nor does any national policy suggest itself, to support the present exemption. In fact, the Committee believes that the existence of discrimination in educational institutions is particularly critical. It is difficult to imagine a more sensitive area than educational institutions, where the youth of the Nation are exposed to a multitude of ideas and impressions that will strongly influence their future development. To permit discrimination here would, more than in any other area, tend to promote existing misconceptions and stereotypical categorizations which in turn would lead to future patterns of discrimination.

S.Rep. 415, 92nd Cong., 1st Sess. 12 (1971). *See Johnson*, 480 U.S. at 627–28 n. 6, 107 S.Ct. at 1449–50 n. 6 ("While public employers were not added to the definition of 'employer' in Title VII until 1972, there is no evidence that this mere addition to the definitional section of the statute was intended to transform the substantive standard governing employer conduct.").

We find the Board's reliance on Fourteenth Amendment caselaw misplaced as well. We are acutely aware, as is the Board, that the federal courts have never decided a "pure" Title VII case where racial diversity for education's sake was advanced as the sole justification for a race-based decision. The Board argues that in deciding just such a case, we should look to the Supreme Court's endorsement of diversity as a goal in the Equal Protection context. This argument, however, is based upon a faulty premise.

In relying on Equal Protection cases to support its diversity goal, we understand the Board to reason as follows: The Supreme Court observed in *Johnson* that "the statutory prohibition [in Title VII] with which an employer must contend was not intended to extend as far as that of the Constitution", 480 U.S. at 628 n. 6, 107 S.Ct. at 1449–50 n. 6. Accordingly, a purpose which survives constitutional strict scrutiny necessarily passes muster under Title VII's permissible purpose test—since the Court has endorsed the concept of diversity in Equal Protection cases, it would approve the Board's diversity purpose in this Title VII case, where the limitations on purpose are less stringent.

We are convinced, however, that *Johnson*'s footnote six, 480 U.S. at 627–28 n. 6, 107 S.Ct. at 1449–50 n. 6, in which the Court contrasted the reach of Title VII with that of the Constitution, does not speak to the purposes that may support affirmative action under the former but not the latter. We read the Court's observation to relate, instead, to the factual predicate that employers must offer to prove the need for remedial efforts in Title VII as contrasted with Equal Protection affirmative action cases.

In *Johnson*, the Court held that the legality of the Santa Clara County Transportation Agency's plan under Title VII must be guid-

ed by the Court's determination in *Weber* that affirmative action is lawful if an employer can point to a " 'manifest imbalance . . . in traditionally segregated job categories.' " 480 U.S. at 630–32, 107 S.Ct. at 1451–52 (quoting *Weber*, 443 U.S. at 197, 99 S.Ct. at 2724). In *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), by contrast, the Court determined that under the Constitution a public employer's remedial affirmative action initiatives are valid only if crafted to remedy its own past or present discrimination; that is, societal discrimination is an insufficient basis for "imposing discretionary *legal* remedies against innocent people." *Id.* at 274–76, 106 S.Ct. at 1847–48. In the plurality's words, affirmative action must be supported by "a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary." *Id.* at 277, 106 S.Ct. at 1849.

When the Court in *Johnson* observed that Title VII's statutory prohibition does not extend as far as the Constitution, it was addressing one of Justice Scalia's arguments in dissent that since obligations under Title VII and the Constitution are identical, a public employer's adoption of an affirmative action plan in a Title VII case should be governed by the prior discrimination standard set forth in *Wygant*. *Johnson*, 480 U.S. at 627–28 n. 6, 107 S.Ct. at 1449–50 n. 6.[11]

While the Supreme Court may indeed at some future date hold that an affirmative action purpose that satisfies the Constitution must necessarily satisfy Title VII, it has yet to do so.

Were we to accept that equal protection standards may be imported into Title VII analysis, we are still unpersuaded that the Equal Protection caselaw validates the Board's asserted goal of racial diversity. We cannot agree with the Board that the racial diversity purpose is supported by both the Supreme Court's holding and the dissenting opinions in *Wygant*. The Court in *Wygant*, although divided, agreed that under the Equal Protection Clause, racial classifications in the context of affirmative action must be justified by a compelling state purpose and the means chosen to effectuate that purpose must be narrowly tailored; that societal discrimination alone will not justify a racial classification; that evidence of prior discrimination by an employer must be presented before remedial racial classifications can be employed; and that the "role model" theory proposed by the employer as a basis for race-conscious state action was unacceptable because it would have allowed discriminatory hiring and layoff well beyond the point necessary for any remedial purpose and did not bear any relationship to the harm caused by prior discrimination. *Id.* at 270–78, 106 S.Ct. at 1845–49 *id.* at 284–93, 106 S.Ct. at 1852–57 (O'Connor, J., concurring in part and concurring in the Court's judgment); *id.* at 294–95, 106 S.Ct. at 1858 (White, J., concurring in the Court's judgment). The dissenting Justices believed that the Constitution would allow a public employer to preserve the integration it had achieved through a legitimate affirmative action hiring plan by thereafter apportioning layoffs between minority and nonminority groups. *Id.* at 306, 106 S.Ct. at 1863–64 (Marshall, J., dissenting, joined by Brennan and Blackmun, JJ.); *id.* at 267–68, 106 S.Ct. at 1843–44 (Stevens, J., dissenting).

We are also unpersuaded by the Board's contention that Equal Protection cases arising in an education context support upholding the Board's purpose in a Title VII action. These Equal Protection cases, unlike the case at hand, involved corrective efforts to confront racial segregation or chronic minority underrepresentation in the schools. In this context, we are not at all surprised that the goal of diversity was raised. While we wholeheartedly endorse any statements in these cases extolling the educational value of exposing students to persons of diverse races and backgrounds, given the framework in which they were made, we cannot accept them as authority for the conclusion that the Board's non-remedial racial diversity goal is a permissible basis for affirmative action under Title VII. *See, e.g., Wygant*, 476 U.S. at 267, 106 S.Ct. at 1842 (Marshall, J., dissenting) (noting that the racially-conscious layoff provision at issue was aimed at preserving the faculty integration achieved by the Jackson, Michigan Public Schools in the early 1970s through affirmative action; minority representation went from 3.9% in 1969 to 8.8% in 1971); *Columbus Board of Education v. Penick*, 443 U.S. 449, 467, 99 S.Ct. 2941, 2951–52, 61 L.Ed.2d 666 (1979) (condemning intentional segregation and the creation of racially-identifiable schools practiced by the Columbus, Ohio Board of Education); *Regents of the University of California v. Bakke*, 438 U.S. 265, 272, 98 S.Ct. 2733, 2738, 57 L.Ed.2d 750 (1978) (Powell, J., announcing the judgment of the Court) (observing that the 1968 class of the Medical School of the University of California at Davis contained three Asians, no Blacks, no Mexican-Americans and no American Indians); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971) (observing that 14,000 Black pupils in the Charlotte-Mecklenburg, North Carolina school system attended 21 schools that were at least 99% Black); *Kromnick v. School Dist. of Philadelphia*, 739 F.2d 894, 897 (3d Cir.1984) (recognizing that "[t]he Philadelphia School System has long suffered from *de facto* segregation by race of students and faculty"), *cert. denied*, 469 U.S. 1107, 105 S.Ct. 782, 83 L.Ed.2d 777 (1985).

More specifically, two Supreme Court cases upon which the Board relies, *Bakke*, 438 U.S. at 265, 98 S.Ct. at 2733, and *Metro Broadcasting Inc. v. FCC*, 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990), are inapposite. *Bakke* involved a rejected White applicant's challenge under the Constitution and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, to a special admissions program instituted by the Medical School of the University of California at Davis which essentially set aside 16 places for minority candidates. Justice Powell, whose vote was necessary both to establish the validity of considering race in admission decisions and to invalidate the racial quota before the Court,[12] was of the opinion that the attain-

11. In his dissent in *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987), Justice Scalia stated:

> The most significant proposition of law established by today's decision is that racial or sexual discrimination is permitted under Title VII when it is intended to overcome the effect, not of the employer's own discrimination, but of societal attitudes that have limited the entry of certain races, or of a particular sex, into certain jobs. Even if the societal attitudes in question consisted exclusively of conscious discrimination by other employers, this holding would contradict a decision of this Court rendered only last Term. *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), held that the objective of remedying societal discrimination cannot prevent remedial affirmative action from violating the Equal Protection Clause. While Mr. Johnson does not advance a constitutional claim here, it is most unlikely that Title VII was intended to place a *lesser* restraint on discrimination by public actors than is established by the Constitution.

Id. at 664, 107 S.Ct. at 1468–69 (Scalia, J., dissenting) (citations omitted).

Justice White also dissented on these grounds:

> My understanding of *Weber* was, and is, that the employer's plan did not violate Title VII because it was designed to remedy the intentional and systematic exclusion of blacks by the employer and the unions from certain job categories. That is how I understood the phrase "traditionally segregated jobs" that we used in that case. The Court now interprets it to mean nothing more than a manifest imbalance between one identifiable group and another in an employer's labor force. As so interpreted, that case, as well as today's decision, as JUSTICE SCALIA so well demonstrates, is a perversion of Title VII. I would overrule *Weber* and reverse the judgment below.

Id. at 657, 107 S.Ct. at 1465 (White, J., dissenting).

Justice O'Connor, however, believed the *Wygant* analysis to be "entirely consistent" with *Weber*. *Id.* at 650–51, 107 S.Ct. at 1461–62 (O'Connor, J., concurring in the Court's judgment).

12. Chief Justice Burger and Justices Stewart, Rehnquist and Stevens concluded that the Davis program violated Title VI and declined to address the constitutional question. *Regents of the University of California v. Bakke*, 438 U.S. 265, 408–21, 98 S.Ct. 2733, 2808–15, 57 L.Ed.2d 750 (Stevens, J., concurring in the Court's judgment in part and dissenting in part, joined by Burger, C.J., Stewart and Rehnquist, JJ.). Justice Powell addressed the constitutional issue and concluded that race may be taken into account in school admissions. *Id.* at 311–15, 98 S.Ct. at 2759–61 (Powell, J., announcing the judgment of the Court). In Justice Powell's view, however, Davis failed to show that its program was necessary to promote a constitutionally permissible purpose. *Id.* at 315–20, 98 S.Ct. at 2761–63. Accordingly, these Members of the Court formed a Majority of five, affirming the California Supreme Court's order invalidating the Davis program and ordering the plaintiff's medical school admission.

ment of a "diverse student body" is a constitutionally permissible goal for an institution of higher education. Justice Powell pointed out that the academic freedom that has been viewed as a "special concern" of the First Amendment includes "the freedom of a university to make its own judgments as to the selection of its student body" and that "[t]he atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body." *Bakke*, 438 U.S. at 312, 98 S.Ct. at 2760 (footnote omitted). He then agreed with Davis' assertion that its interest in diversity implicated First Amendment concerns:

> Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the "robust exchange of ideas," [Davis] invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.

Id. at 313, 98 S.Ct. at 2760.

Davis' reservation of a specified number of seats in each class for individuals from preferred ethnic groups to further its diversity purpose, however, was unacceptable because, according to Justice Powell, it misconceived the nature of the state interest that would justify consideration of race or ethnic background:

> It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Davis' special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity.

Id. at 315, 98 S.Ct. at 2761 (footnote omitted).[13]

Bakke's factual and legal setting, as well as the diversity that universities aspire to in their student bodies, are, in our view, so different from the facts, relevant law and the racial diversity purpose involved in this case that we find little in *Bakke* to guide us.

Likewise, statements regarding the value of programming diversity made by the Court in *Metro Broadcasting* when it upheld two minority preference policies adopted by the Federal Communications Commission, 497 U.S. at 547, 110 S.Ct. at 2997, have no application here.[14] The diversity interest the Court found sufficient under the Constitution to support a racial classification had nothing whatsoever to do with the concerns that underlie Title VII. Citing *Bakke*, the Court concluded that "[j]ust as a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated, the diversity of views and information on the airwaves serves important First Amendment values." *Id.* at 568, 110 S.Ct. at 3010 (citation omitted).

Finally, we turn to the Board's argument that the diversity goal underlying its application of the affirmative action policy was endorsed in Justice O'Connor's concurring opinion in *Wygant* and in Justice Stevens' concurring opinion in *Johnson*. We find that these statements are slender reeds indeed and any bearing that they may have in the situation presented here is minimal. While Justice O'Connor did refer favorably to *Bakke* and the notion of racial diversity in institutions of higher learning, *Wygant*, 476 U.S. at 286, 106 S.Ct. at 1853 (O'Connor, J., concurring), just one year later in *Johnson*, a Title VII case, she rejected Justice Steven's expansive view of the purposes that may underlie affirmative action, stating: "[C]ontrary to the intimations in JUSTICE STEVENS' concurrence, this Court did not approve preferences for minorities 'for any reason that might seem sensible from a business or social point of view.'" *Johnson*, 480 U.S. at 649, 107 S.Ct. at 1461 (O'Connor, J., concurring in the Court's judgment). As for Justice Stevens' concurrence in *Johnson*, while he clearly pondered the idea of "forward-looking" affirmative action where employers do not focus on "'purgfing] their own past sins of discrimination'", *id.* at 647, 107 S.Ct. at 1460 (Stevens, J., concurring), his comments are not controlling.

V.

[10] Since we have not found anything in the Board's arguments to convince us that this case requires examination beyond statutory interpretation, we return to the point at which we started: the language of Title VII itself and the two cases reviewing affirmative action plans in light of that statute. Our analysis of the statute and the caselaw convinces us that a non-remedial affirmative action plan cannot form the basis for deviating from the antidiscrimination mandate of Title VII.

The Board admits that it did not act to remedy the effects of past employment discrimination. The parties have stipulated that neither the Board's adoption of its affirmative action policy nor its subsequent decision to apply it in choosing between Taxman and Williams was intended to remedy the results of any prior discrimination or identified underrepresentation of Blacks within the Piscataway School District's teacher workforce as a whole. Nor does the Board contend that its action here was directed at remedying any *de jure* or *de facto* segregation. *But see Piscataway Township Bd. of Educ. v. Burke*, 158 N.J.Super. 436, 386 A.2d 439 (App.Div.), *appeal dismissed*, 79 N.J. 473, 401 A.2d 230 (1978). Even though the Board's race-conscious action was taken to avoid what could have been an all-White faculty within the Business Department, the Board concedes that Blacks are not underrepresented in its teaching workforce as a whole or even in the Piscataway High School.

Rather, the Board's sole purpose in applying its affirmative action policy in this case was to obtain an educational benefit which it believed would result from a racially diverse faculty. While the benefits flowing from diversity in the educational context are significant indeed, we are constrained to hold, as did the district court, that inasmuch as "the Board does not even attempt to show that its affirmative action plan was adopted to remedy past discrimination or as the result of a manifest imbalance in the employment of minorities," 832 F.Supp. at 845, the Board has failed to satisfy the first prong of the *Weber* test. *United States v. Board of Educ.*

Justices Brennan, White, Marshall and Blackmun concluded that the program, created for the purpose of remedying the effects of past societal discrimination, was constitutional. *Id.* at 324–79, 98 S.Ct. at 2765–94 (Brennan, J., concurring in the Court's judgment in part and dissenting in part, joined by White, Marshall and Blackmun, JJ.). Thus, along with Justice Powell, they formed a majority of five, reversing the state court's order prohibiting Davis from establishing race-conscious programs in the future.

13. Although the issues resolved differ from those before us, we note the decision of the Court of Appeals for the Fifth Circuit in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.1996). There the plaintiffs, non-minority applicants to the University of Texas law school, challenged racial preferences in admissions, alleging violations of the Fourteenth Amendment Equal Protection Clause, derivative statutory violations of 42 U.S.C. §§ 1981 and 1983 and of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Holding what the Supreme Court has never explicitly held that the need for student body diversity in higher education can never serve as a compelling justification for racial classifications, the court of appeals stated that racial classifications are justified only to remedy the effects of past discrimination and must be narrowly tailored to achieve that end. In reaching this conclusion, the court noted Justice Powell's references to diversity in *Bakke*, writing:

> Justice Powell's view in *Bakke* is not controlling on [the diversity] issue. While he announced the judgment, no other Justice joined in that part of the opinion discussing the diversity rationale. In *Bakke*, the word "diversity" is mentioned no where except in Justice Powell's single-justice opinion. In fact, the four-Justice opinion . . . implicitedly rejected Powell's position. . . . Thus, only one Justice concluded that race could be used solely for the reason of obtaining a heterogenous student body.

78 F.3d at 944.

14. *Metro Broadcasting* was overruled in *Adarand Constructors, Inc. v. Pena*, — U.S. —, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995).

of Township of Piscataway, 832 F.Supp. 836, 848 (D.N.J.1993).

We turn next to the second prong of the *Weber* analysis. This second prong requires that we determine whether the Board's policy "unnecessarily trammel[s] . . . [nonminority] interests. . . ." *Weber*, 443 U.S. at 208, 99 S.Ct. at 2730. Under this requirement, too, the Board's policy is deficient.

We begin by noting the policy's utter lack of definition and structure.[15] While it is not for us to decide how much diversity in a high school facility is "enough," the Board cannot abdicate its responsibility to define "racial diversity" and to determine what degree of racial diversity in the Piscataway School is sufficient.

The affirmative action plans that have met with the Supreme Court's approval under Title VII had objectives, as well as benchmarks which served to evaluate progress, guide the employment decisions at issue and assure the grant of only those minority preferences necessary to further the plans' purpose. *Johnson*, 480 U.S. at 621–22, 107 S.Ct. at 1446 (setting forth long-range and short-term objectives to achieve "'a statistically measurable yearly improvement in hiring, training and promotion of minorities and women . . . in all major job classifications where they are underrepresented'."); *Weber*, 443 U.S. at 193, 99 S.Ct. at 2721 (reserving for Black employees 50% of the openings in craft-training programs until the percentage of Black craftworkers reflected the percentage of Blacks in the available labor force). By contrast, the Board's policy, devoid of goals and standards, is governed entirely by the Board's whim, leaving the Board free, if it so chooses, to grant racial preferences that do not promote even the policy's claimed purpose. Indeed, under the terms of this policy, the Board, in pursuit of a "racially diverse" work force, could use affirmative action to discriminate against those whom Title VII was enacted to protect. Such a policy unnecessarily trammels the interests of nonminority employees.

Moreover, both *Weber* and *Johnson* unequivocally provide that valid affirmative action plans are "temporary" measures that seek to "'attain'", not "maintain" a "permanent racial . . . balance." *Johnson*, 480 U.S. at 639–40, 107 S.Ct. at 1456. *See Weber*, 443 U.S. at 208, 99 S.Ct. at 2729–30. The Board's policy, adopted in 1975, is an established fixture of unlimited duration, to be resurrected from time to time whenever the Board believes that the ratio between Blacks and Whites in any Piscataway School is skewed. On this basis alone, the policy contravenes *Weber*'s teaching. *See Cunico v. Pueblo School Dist. No. 60*, 917 F.2d 431, 440 (10th Cir.1990) (holding that the school district's layoff decision aimed at ensuring the employment of the district's only Black administrator was "outright racial balancing" in violation of *Weber*'s second prong).

[11] Finally, we are convinced that the harm imposed upon a nonminority employee by the loss of his or her job is so substantial and the cost so severe that the Board's goal of racial diversity, even if legitimate under Title VII, may not be pursued in this particular fashion. This is especially true where, as here, the nonminority employee is tenured. In *Weber* and *Johnson*, when considering whether nonminorities were unduly encumbered by affirmative action, the Court found it significant that they retained their employment. *Weber*, 443 U.S. at 208, 99 S.Ct. at 2729–30 (observing that the plan did not require the discharge of nonminority workers); *Johnson*, 480 U.S. at 638, 107 S.Ct. at 1455 (observing that the nonminority employee who was not promoted nonetheless kept his job). We, therefore, adopt the plurality's pronouncement in *Wygant* that "[w]hile hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive." *Wygant*, 476 U.S. at 283, 106 S.Ct. at 1852 (footnote omitted).

15. Despite the suggestion in the dissent of Chief Judge Sloviter to the contrary, we do not intend this statement to suggest that a policy, in order to pass muster, must set a "specific numerical goal." The absence of goals, while it may not have been fatal alone, is a factor contributing to the overall vagueness of the plan.

Accordingly, we conclude that under the second prong of the *Weber* test, the Board's affirmative action policy violates Title VII. In addition to containing an impermissible purpose, the policy "unnecessarily trammel[s] the interests of the [nonminority] employees." *Weber*, 443 U.S. at 208, 99 S.Ct. at 2730.

VI.

[12] The district court did not analyze Taxman's claims based on the New Jersey Law Against Discrimination and we need not do so in detail here. The parties have agreed that the legal analysis required by the state statute is essentially the same as that undertaken in Title VII cases. While the New Jersey Supreme Court has yet to consider a voluntarily adopted affirmative action plan in light of the NJLAD, it is undisputed that the NJLAD has been interpreted to parallel Title VII. In *Peper v. Princeton Univ. Bd. of Trustees*, 77 N.J. 55, 389 A.2d 465, 478 (1978), the Supreme Court of New Jersey wrote that "where [Title VII] standards are useful and fair, it is in the best interests of everyone concerned to have some uniformity in the law."

Given that statement, we predict that the New Jersey Supreme Court would follow the analytical directive of *Weber* and *Johnson*. Analysis of this case under the NJLAD would, therefore, lead to the same result as that which we have reached under Title VII. Sharon Taxman is entitled to summary judgment on her claim made under the NJLAD.

VII.

[13] Having found the Board liable under Title VII, we turn our attention to the issue of damages, addressing first the district court's order that Taxman be awarded one hundred percent backpay for the entire period of her layoff. The Board argues that where a backpay award is appropriate, the court's goal should be to restore "'the conditions and relationships that would have been had there been no'" unlawful discrimination. *Teamsters v. United States*, 431 U.S. 324, 372, 97 S.Ct. 1843, 1873, 52 L.Ed.2d 396 (1977) (quoting *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 769, 96 S.Ct. 1251, 1266, 47 L.Ed.2d 444 (1976)). According to the Board, the district court's award of one hundred percent backpay was plainly unfair. Had it not invoked the affirmative action plan, the Board would have followed its usual procedure, using a coin toss or other random process to break the seniority tie between Williams and Taxman. Taxman, therefore, would have stood no more than a fifty percent chance of keeping her job had there been no unlawful discrimination.[16]

[14] We disagree. In deciding backpay issues, a district court has wide latitude to "locate 'a just result'" and to further the "make whole remedy of Title VII in light of the circumstances of a particular case." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424–25, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280 (1975). While Taxman cannot be returned to the position that she held prior to her layoff—one of virtually precise equality with Williams in terms of the factors relevant to the decision—she can be returned to a position of financial equality with Williams through a one hundred percent backpay award. We are convinced that this award

16. The Board finds support for its fifty percent backpay limit in *Dougherty v. Barry*, 869 F.2d 605 (D.C.Cir.1989). There eight white firefighters alleged that the District of Columbia Fire Department violated Title VII in promoting two black firefighters. The district court's award of full backpay to each of the plaintiffs was reversed on appeal. On remand, the district court was instructed to award each plaintiff a fraction of the promotion's value via a formula taking into account the percentage likelihood that he would actually have received one of the promotions. *Id.* at 614, 615. The court of appeals believed that "[d]ividing the value of the promotions . . . more closely approximate[d] the goal of 'recreat[ing] the conditions and relationships that would have been had there been no' unlawful discrimination," since each plaintiff had less than a 100% chance of being promoted. *Id.* (quoting *International Broth. of Teamsters v. United States*, 431 U.S. 324, 372, 97 S.Ct. 1843, 1873, 52 L.Ed.2d 396 (1977)).

The district court rejected the Board's *Dougherty*-type solution pointing out that, unlike *Dougherty*, this case involves only one discriminatory decision and one backpay award. The court concluded that it is appropriate for the Board, as wrongdoer, to bear the burden of having deprived Taxman of the opportunity to win the "coin toss" and retain her position.

most closely approximates the conditions that would have prevailed in the absence of discrimination.

We find an additional basis for our holding in the analysis set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). In that case, the Supreme Court held that where an employee proves that discrimination played a role in an employment decision, the employer will not be found "liable if it can prove that, even if it had not taken [race] into account it would have come to the same decision regarding a particular person." *Id.* at 242, 109 S.Ct. at 1786. Here, Taxman has clearly established that the Board is liable and that she was not paid during the relevant period. Under the logic of *Hopkins*, the Board cannot avoid a one hundred percent backpay award unless it can establish, by a preponderance of the evidence, that Taxman would have received some lesser amount had the Board not taken race into account. This, of course, the Board cannot do.

Given the law and the circumstances presented in this case, we are convinced that the district court's analysis with respect to backpay reflects the sound exercise of judicial discretion and we will affirm the award.

[15] The Board further contends that the district court erred in calculating prejudgment interest using the IRS adjusted prime rate. According to the Board, the district court should have applied the post-judgment rate set forth in 28 U.S.C. § 1961(a). This argument is meritless.

[16, 17] The matter of prejudgment interest is left to the discretion of the district court. Although a court "may" use the post-judgment standards of 28 U.S.C. § 1961(a), *Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59, 63 (3d Cir.1986), it is not compelled to do so. *E.E.O.C. v. Wooster Brush Co. Employees Relief Ass'n.*, 727 F.2d 566, 579 (1984). The adjusted prime rate, established periodically by the Secretary of the Treasury and codified in 26 U.S.C. § 6621, has been used regularly by district courts to calculate prejudgment interest. *See, e.g., E.E.O.C. v. Erie County*, 751 F.2d 79, 82 (1984) (trial court did not abuse its discretion in using adjusted prime rate to calculate the amount of prejudgment interest to be paid on backpay award under the Equal Pay Act).

We thus hold that the district court's calculation of pre-judgment interest was consistent with the sound exercise of judicial discretion.

[18] Finally, in her cross-appeal, Taxman asks that we find that the district court erred in dismissing her claim for punitive damages under the NJLAD.

[19] At a January 5, 1994 proceeding devoted to the issue of damages, the district court reaffirmed a decision made at a pretrial conference to "strike the punitive damages claim" on the ground that "there is no evidence to support [it]." [17] (App. at 209). The court made the following comment with respect to punitive damages:

> I didn't say I felt the board—I may have said that the board acted in good faith, but I think what I did say is that there's no evidence that would support any claim for punitive damages. And I struck the punitive damages claim.
>
> There's absolutely no evidence that the board acted willfully, wantonly, outrageously or in any other way than trying its best to make the best of a very unhappy situation.

[20–23] The New Jersey Supreme Court has established a high threshold requirement which must be met before an award of punitive damages can be sustained. Punitive damages are to be awarded only "'when the wrongdoer's conduct is especially egregious.'" *Rendine v. Pantzer*, 141 N.J. 292, 313, 661 A.2d 1202, 1215 (1995). "To warrant a punitive award, the defendant's conduct must have been wantonly reckless or malicious. There must be an intentional wrongdoing in the sense of an 'evilminded' act accompanied by a wanton and willful disregard to the rights of another. . . . The key to the right to punitive damages is the wrongfulness of the intentional action." *Id.* "[The New Jersey] case indicates that the requirement [of willfulness or wantonness] may be satisfied upon a showing that there has been a deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference or consequences." *Id.* (citation omitted). "[The New Jersey courts have] stated that proof of actual malice [is] 'a condition precedent to a punitive damages award.'" *Id.* (citation omitted).

Having examined the record evidence in this case against the background of the New Jersey punitive damages standard, we agree with the district court that the evidence would not support a finding that the Board acted willfully, wantonly or outrageously in dismissing Taxman. We conclude, therefore, that Taxman's claim for punitive damages was properly dismissed.

VIII.

While we have rejected the argument that the Board's non-remedial application of the affirmative action policy is consistent with the language and intent of Title VII, we do not reject in principle the diversity goal articulated by the Board. Indeed, we recognize that the differences among us underlie the richness and strength of our Nation. Our disposition of this matter, however, rests squarely on the foundation of Title VII. Although we applaud the goal of racial diversity, we cannot agree that Title VII permits an employer to advance that goal through non-remedial discriminatory measures.

Having found that the district court properly concluded that the affirmative action plan applied by the Board to lay off Taxman is invalid under Title VII, and that the district court did not err in calculating Taxman's damages or in dismissing her claim for punitive damages, we will affirm the judgment of the district court.

17. We agree with the district court's determination that the NJLAD allows assessment of punitive damages against a public employer. In *Abbamont v. Piscataway Township Board of Education*, 138 N.J. 405, 650 A.2d 958 (1994), the Supreme Court of New Jersey held that punitive damages are available against a public employer under New Jersey's Conscientious Employee Protection Act (CEPA). We are convinced that the Supreme Court of New Jersey would apply the logic of *Abbamont* to find that punitive damages are available under the NJLAD as well.

STAPLETON, Circuit Judge, concurring:

I agree that the Board's non-remedial affirmative action decision is unlawful because non-remedial affirmative action employment decisions cannot pass muster under Title VII. It is unnecessary, however, for the court to decide whether the Board's actions unnecessarily trammel Taxman's interests. Accordingly, I would express no opinion on that issue. I join the remainder of the court's opinion.

SLOVITER, Chief Judge, dissenting, with whom Judges LEWIS and McKEE join.

In the law, as in other professions, it is often how the question is framed that determines the answer that is received. Although the divisive issue of affirmative action continues on this country's political agenda, I do not see this appeal as raising a broad legal referendum on affirmative action policies. Indeed, it is questionable whether this case is about affirmative action at all, as that term has come to be generally understood—i.e. preference based on race or gender of one deemed "less qualified" over one deemed "more qualified." Nor does this case even require us to examine the parameters of the affirmative action policy originally adopted in 1975 by the Board of Education of the Township of Piscataway (School Board or Board) in response to a state regulation requiring affirmative action programs or the Board's concise 1983 one-page affirmative action policy.

Instead, the narrow question posed by this appeal can be restated as whether Title VII *requires* a New Jersey school or school board, which is faced with deciding which of two equally qualified teachers should be laid off, to make its decision through a coin toss or lottery, a solution that could be expected of the state's gaming tables, or whether Title VII *permits* the school board to factor into the decision its bona fide belief, based on its experience with secondary schools, that students derive educational benefit by having a Black faculty member in an otherwise all-White department. Because I believe that the area of discretion left to employers in

educational institutions by Title VII encompasses the School Board's action in this case, I respectfully dissent.

The posture in which the legal issue in this case is presented is so stripped of extraneous factors that it could well serve as the question for a law school moot court. I emphasize at the outset issues that this case does *not* present. We need not decide whether it is permissible for a school to lay off a more qualified employee in favor of a less qualified employee on the basis of race, because that did not happen here. Nor need we consider what requirements Title VII may impose on unwilling employers, or how much racial diversity in a high school faculty may be "enough."

Significantly, although the School Board is a public employer, this case does not place before us for decision the limits on race-conscious action imposed on public entities by the Constitution because we are presented with no constitutional claim. Therefore, we must measure the Board's actions under the restraints imposed by Title VII rather than the more demanding ones imposed on government action by the Equal Protection Clause. In this respect the case is similar to that presented in *Johnson v. Transportation Agency, Santa Clara County,* 480 U.S. 616, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987), where the Supreme Court noted that even though the defendant was a public employer it would decide the case only under Title VII because no constitutional issue was raised or addressed below. *See id.* at 620 n. 2, 107 S.Ct. at 1446 n. 2. The Court also made clear that for purposes of Title VII, the same standard applies to public and private employers, stating that "[t]he fact that a public employer must also satisfy the Constitution does not negate the fact that the *statutory* prohibition with which that employer must contend was not intended to extend as far as that of the Constitution." *Id.* at 628 n. 6, 107 S.Ct. at 1449–50 n. 6. This was an express rejection of Justice Scalia's contention "that the obligations of a public employer under Title VII must be identical to its obligations under the Constitution." *Id.* at 627 n. 6, 107 S.Ct. at 1449–50 n. 6; *see also id.* at 649, 107 S.Ct. at 1461 (O'Connor, J., concurring). Thus it is important to keep in mind that we must measure the Board's action in this case against the same standard we would apply to a private school.

I.

When in May 1989 the School Board was faced with the disagreeable necessity of reducing by one the teaching staff in the Business Department of Piscataway High School, it recognized that reference to the applicable New Jersey law, which provides the roadmap in terms of seniority, would not suffice here because the two teachers had equal seniority. The Board, which has the responsibility of gauging the educational requirements of the students under its charge, would have to resort to its own experience as there were no other prescribed guidelines. It did not then turn to the affirmative action policy to make the decision based on race. There was no built-in quota, expressed or implied, for minority faculty, and Taxman does not so suggest. On the contrary, the Board next considered a variety of undoubtedly relevant factors, any one of which might have tipped the scales in favor of laying off one teacher or the other. Had Taxman been deemed a better teacher than Williams, that alone could have pointed the arrow in her direction. Or, had Williams participated in volunteer activity while Taxman spent her spare time in other activities, that alone could have accounted for Williams' retention. The deposition testimony of several board members who participated in the decision indicates that before the affirmative action policy was considered, a number of other criteria were discussed to break the tie, including work performance, certifications, evaluations, teaching ability, and volunteerism. The two teachers with the least seniority, Taxman and Williams, were determined to be equal with respect to each of these other criteria.

The Board's Vice President, Paula Van Riper, testified:

> [T]he seniority and the person's qualifications came into play first. If one was more senior than the other, it would have ended right there, if they were of like seniority. From that point it was based on their work performance and their evaluations.... There was some consideration given ... to the various other activities that they did.... But certainly the weight would be given to their performance in the classroom. At that point we were told that these are two teachers of equal ability, equal qualifications, I should say. They ... both[ ] had good evaluations, they were good teachers, they were supportive of the school district, volunteered in various ways and they ... had similar certification or like certification and their seniority was the same so therefore they were equal.

Da179–80.

The equal position of both teachers in light of all relevant criteria was also stressed by the Director of Personnel, Gordon Moore, who explained: "we ... concluded that work history or performance criteria [were] not going to be usable in breaking the tie, because there was no distinction that could be made." Da177.

In its opinion, the majority declares the School Board's affirmative action policy unlawful. An examination of the so-called affirmative action policy reveals that it does nothing more than place before the School Board the need to consider minority personnel among other *equally qualified* candidates for employment decisions. Da5, 53. That this was a necessary reminder in 1975 when the policy was formed can hardly be gainsaid. I believe that it also was a useful reminder in 1989, when this School Board was faced with this decision, and perhaps even today.

A review of the record makes clear that the Board did not view itself as bound to select Williams for retention by the 1975 affirmative action policy, which speaks only of recommendations, but after discussion and consideration the Board made a discretionary decision to select Williams for retention to further the educational goal of a diverse faculty. Da72, 94.

The Board members described their purpose in using the goal of diversity underlying the previously adopted affirmative action policy as a factor in the layoff decision as reflecting the "general feeling ... that it was valuable for the students to see in the various employment roles a wide range of background[s]," Da74, and "the desire to have a diverse teaching staff in the school district." Da175–76. It was also intended to send "a very clear message that we feel that our staff should be culturally diverse [for the benefit of the students]" and to "encourage awareness and acceptance and tolerance [of people of all backgrounds]." Da75. Thus, the Board took into consideration that if Williams were laid off, the Business Department faculty at the school would be all White. Da94, 110, 168, 175–176.

II.

It was the Board's decision to include the desire for a racially diverse faculty among the various factors entering into its discretionary decision that the majority of this court brands a Title VII violation as a matter of law. *No* Supreme Court case compels that anomalous result. Notwithstanding the majority's literal construction of the language of Title VII, no Supreme Court case has ever interpreted the statute to preclude consideration of race or sex for the purpose of insuring diversity in the classroom as *one of many* factors in an employment decision, the situation presented here. Moreover, in the only two instances in which the Supreme Court examined under Title VII, without the added scrutiny imposed by the Equal Protection Clause, affirmative action plans voluntarily adopted by employers that gave preference to race or sex as a determinative factor, the Court upheld both plans.

In its 1979 decision in *United Steelworkers v. Weber,* 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), the Court held that an agreement between a private company and a union that sought to remedy the historical exclusion of Blacks from skilled craft unions by reserving half the openings in an in-house training program for Blacks did not violate Title VII. A scarce decade later, it reached a similar decision in *Johnson v. Transportation Agency, Santa Clara County,* 480 U.S. 616, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987), where the plan that the Court upheld authorized consideration of the gender of a qualified applicant as one of various factors for

promoting employees into jobs in which women had been significantly underrepresented.

The majority presents *Weber* and *Johnson* as if their significance lies in the obstacle course they purportedly establish for any employer adopting an affirmative action program. But, as the Justices of the Supreme Court recognized, the significance of each of those cases is that the Supreme Court *sustained* the affirmative action plans presented; and in doing so deviated from the literal interpretation of Title VII precluding use of race or gender in any employment action. As Justice Brennan explained in *Weber*, "It is a 'familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.' " *Weber*, 443 U.S. at 201, 99 S.Ct. at 2726 (quoting *Holy Trinity Church v. United States*, 143 U.S. 457, 459, 12 S.Ct. 511, 512, 36 L.Ed. 226 (1892)). The Justices dissenting in those cases noted and vigorously objected to the departure. *See, e.g., Weber*, 443 U.S. at 222, 228, 99 S.Ct. at 2737, 2740 (Rehnquist, J., dissenting) (asserting that the majority "eludes the clear statutory language" and that Kaiser's affirmative action plan is "flatly prohibited by the plain language of Title VII"); *Johnson*, 480 U.S. at 670, 107 S.Ct. at 1471 (Scalia, J., dissenting) ("It is well to keep in mind just how thoroughly *Weber* rewrote the statute it purported to construe . . . *Weber* disregarded the text of the statute, invoking instead its 'spirit' ").

While the majority in this case views the Supreme Court's articulation of the factors that rationalized its upholding of the affirmative action plans in those cases as establishing boundaries, no language in either *Weber* or *Johnson* so states and, in fact, there is language to the contrary. The majority draws the line at the factors used in those cases. In both *Weber* and *Johnson*, the Court inquired whether consideration of race in the employment decision was justified by a permissible purpose, and then examined the effect on nonminorities to ascertain whether the action taken "unnecessarily trammel[ed] the interests of the white employees." *Weber*, 443 U.S. at 208, 99 S.Ct. at 2730; *Johnson*, 480 U.S. at 630, 107 S.Ct. at 1451.

However, it does not follow as a matter of logic that because the two affirmative action plans in *Weber* and *Johnson* which sought to remedy imbalances caused by past discrimination withstood Title VII scrutiny, every affirmative action plan that pursues some purpose other than correcting a manifest imbalance or remedying past discrimination will run afoul of Title VII. Indeed, the Court in *Weber* explicitly cautioned that its holding in that case should not be read to define the outer boundaries of the area of discretion left to employers by Title VII for the voluntary adoption of affirmative action measures. The Court stated:

> We need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans. It suffices to hold that the challenged Kaiser-USWA affirmative action plan falls on the permissible side of the line. The purposes of the plan mirror those of the statute. Both were designed to break down old patterns of racial segregation and hierarchy. Both were structured to "open employment opportunities for Negroes in occupations which have been traditionally closed to them."

Weber, 443 U.S. at 208, 99 S.Ct. at 2729–30. *See also id.* at 215–16, 99 S.Ct. at 2733–34 (Blackmun, J., concurring)(noting that Kaiser plan "is a moderate one" and that "the Court's opinion does not foreclose other forms of affirmative action").

The majority opinion in *Johnson* made no attempt to draw the line that *Weber* left undefined. *See Johnson*, 480 U.S. at 642, 107 S.Ct. at 1457 (Stevens, J., concurring) ("I write . . . to . . . emphasize that the opinion does not establish the permissible outer limits of voluntary [affirmative action] programs"). Although Justice O'Connor's concurring opinion argued that permissible purposes under Title VII were limited to those that served to remedy past discrimination, *Johnson* 480 U.S. at 649, 107 S.Ct. at 1461, her vote was the sixth in favor of the majority's holding and therefore not crucial to the outcome of the case. It follows that her narrow reading should not be read as constituting the view of the Court. *See Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977).

The majority here has taken the language of *Weber* where the Court observed that the plan's purposes "mirrored" those of the statute, and has elevated it to a litmus test under which an affirmative action plan can only pass muster under Title VII if particular language in the text or legislative history of the statute can be identified that matches the articulated purpose of the plan. Nothing in *Weber* suggests that the Court intended by its "mirroring" language to create such a rigid test.

In *Weber*, when the Court found that the purposes of the plan were consistent with those of Title VII, it did so by reference not only to the language of the legislative history, but to the historical context from which the Act arose as well. *Id.* at 201, 99 S.Ct. at 2726. In *Johnson*, the Court made no attempt at all to identify language in the legislative history paralleling the particular objectives of the plan it sustained. Thus, even in those cases the Court did not demonstrate the kind of close fit between the plan and the statutory history demanded of the Board in this case.

In *Weber*, the Court's examination into the purposes of Title VII led it to the conclusion that the Act was designed to promote "the integration of blacks into the mainstream of American society," *Weber*, 443 U.S. at 202, 99 S.Ct. at 2727, and the breakdown of "old patterns of racial segregation and hierarchy," *id.* at 208, 99 S.Ct. at 2730. The Kaiser affirmative action plan was consistent with these sweeping, broadly stated purposes and hence was sustained.

Of course, I do not disagree with the majority that "Title VII was written to eradicate not only discrimination per se but the consequences of prior discrimination," but I do not believe that in doing so, Congress intended to limit the reach of Title VII to remedying past discrimination, thereby turning a blind eye toward those social forces that give rise to future discrimination. Title VII, which was a part of the Civil Rights Act of 1964, was fundamentally forward-looking legislation, and that purpose should not be ignored.

The effort to remedy the consequences of past discrimination (such as the "patterns of segregation and hierarchy" referred to in *Weber*, 443 U.S. at 208, 99 S.Ct. at 2730), cannot be isolated from the statute's broader aim to eliminate those patterns that were potential causes of continuing or future discrimination. The causal relationship is illustrated by the industry at issue in *Weber*, where the Court noted that the ongoing imbalance in the hiring of craftworkers had its roots in a history of discrimination that had excluded Blacks from craft unions and thus prevented them from acquiring the necessary qualifications. *Id.* at 198, 99 S.Ct. at 2724. In describing the overarching goal toward which the Civil Rights Act was aimed, the House Report spoke of the need to "eliminat[e] all of the *causes and consequences* of racial and other types of discrimination against minorities." H.R.Rep. No. 914, 88th Cong., 1st Sess., pt. 1, at 18 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2393 (emphasis added).

Thus, using the approach taken in *Weber* and *Johnson* as a springboard, actions consistent with and in furtherance of the broad statutory goal of eliminating the causes of discrimination are not per se proscribed by Title VII. This generation of young people may not recall that in 1964 racial homogeneity in schools was viewed as among the most fundamental and pernicious aspects of the social pattern undergirding the system of discrimination that the Civil Rights Act sought to dismantle. In the years leading up to the Act's passage, school integration was one of the focal points of the civil rights movement. The Senate Report accompanying the 1972 amendments to Title VII, when it was expanded to cover state and local governments, noted the connection between racial homogeneity in schools and attitudes that lead to discrimination:

> It is difficult to imagine a more sensitive area than educational institutions where the youth of the Nation are exposed to a multitude of ideas and impressions that will strongly influence their future development. To permit discrimination here [among faculty and staff] would, more than in any other area, tend to promote existing

misconceptions and stereotypical categorizations which in turn would lead to future patterns of discrimination.

S.Rep. No. 415, 92nd Cong., 1st Sess. 12 (1971).

In other contexts, the Court has repeatedly recognized racial diversity in the classroom as an important means of combatting the attitudes that can lead to future patterns of discrimination. As Justice Stevens observed in *Wygant*:

> In the context of public education, it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty. For one of the most important lessons that the American public schools teach is that the diverse ethnic, cultural and national backgrounds that have been brought together in our famous "melting pot" do not identify essential differences among the human beings that inhabit our land. It is one thing for a white child to be taught by a white teacher that color, like beauty, is only "skin deep"; it is far more convincing to experience that truth on a day-to-day basis during the routine ongoing learning process.

476 U.S. at 315, 106 S.Ct. at 1868–69 (Stevens, J., dissenting). *See also Johnson*, 480 U.S. at 647, 107 S.Ct. at 1460 (Stevens, J., concurring) (noting educational benefit to be derived from racial diversity, " 'by dispelling for black and white students alike any idea that white supremacy governs our social institutions' " (quoting Sullivan, *The Supreme Court—Comment, Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 Harv.L.Rev. 78, 96 (1986))); *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 473, 102 S.Ct. 3187, 3196, 73 L.Ed.2d 896 (1982) ("Attending an ethnically diverse school may help . . . prepar[e] minority children 'for citizenship in our pluralistic society,' while, we may hope, teaching members of the racial majority 'to live in harmony and mutual respect' with children of minority heritage."(citations omitted)); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 461, 467, 99 S.Ct. 2941, 2948, 2951, 61 L.Ed.2d 666 (1979) (disapproving policies that "deprive black students of opportunities for contact with and learning from white teachers, and . . . deprive white students of similar opportunities to meet, know and learn from black teachers"); *Kromnick v. School District of Philadelphia*, 739 F.2d 894, 905 (3d Cir.1984)("Schools are great instruments in teaching social policy [from which students learn] from the images and experiences that surround them . . . a spirit of tolerance and mutual benefit."), *cert. denied*, 469 U.S. 1107, 105 S.Ct. 782, 83 L.Ed.2d 777 (1985).

It is "ironic indeed" that the promotion of racial diversity in the classroom, which has formed so central a role in this country's struggle to eliminate the causes and consequences of racial discrimination, is today held to be at odds with the very Act that was triggered by our "Nation's concern over centuries of racial injustice." *Weber*, 443 U.S. at 204, 99 S.Ct. at 2728. Nor does it seem plausible that the drafters of Title VII intended it to be interpreted so as to require a local school district to resort to a lottery to determine which of two qualified teachers to retain, rather than employ the School Board's own educational policy undertaken to insure students an opportunity to learn from a teacher who was a member of the very group whose treatment motivated Congress to enact Title VII in the first place. In my view, the Board's purpose of obtaining the educational benefit to be derived from a racially diverse faculty is entirely consistent with the purposes animating Title VII and the Civil Rights Act of 1964.

The majority criticizes the Board's use of caselaw construing the Equal Protection Clause in this Title VII case, notwithstanding the Supreme Court's explicit statement in *Johnson* that Title VII's constraint on affirmative action was "not intended to extend as far as that of the Constitution." 480 U.S. at 628 n. 6, 107 S.Ct. at 1449–50 n. 6. Nothing in the Court's language in the *Johnson* footnote suggests that we confine it to the particular factual context in which it was made, and the Court is certainly sufficiently articulate to limit its language when so inclined. Nor is the *Johnson* footnote the only place where the Court signified its understanding that

Title VII imposes fewer limitations on employers' voluntary affirmative action than does the Constitution. In *Weber*, the Court spoke of the "narrowness of [its] inquiry" since the plan did not involve state action and hence did not present an alleged violation of the Equal Protection Clause, *Weber*, 443 U.S. at 200, 99 S.Ct. at 2726, and later stated that "Title VII . . . was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments." *id.* at 206 n. 6, 99 S.Ct. at 2729 n. 6 (quoted in *Johnson*, 480 U.S. at 627 n. 6, 107 S.Ct. at 1449–50 n. 6). The latter statement was not made in a discussion that had to do with the "factual predicate" for demonstrating the need for remedial affirmative action, as the majority would confine the similar language in *Johnson*.

In any event, ultimately it is the Supreme Court rather than this one that will decide whether Title VII allows an employer more discretion to implement race-conscious employment policies than does the Constitution in the employer's effort to promote the underlying goals of the Act. But, in the absence of any dispositive precedent, I believe it would be shortsighted for us to disregard the Supreme Court's statements regarding the advantages of diversity in an educational context when examining the limited use to which diversity was used as a factor in the Board's decision here. In *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), where the Court considered a University of California affirmative action program for student admissions, Justice Powell, who announced the judgment of the Court, recognized that a diverse student body leads to a "robust exchange of ideas," *id.* at 312, 98 S.Ct. at 2760 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629 (1967)), and noted that the "essential" elements of academic freedom include the ability not only to select the student body but to determine "who may teach," *id.* (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263, 77 S.Ct. 1203, 1218, 1 L.Ed.2d 1311 (1957)).

In *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), the Court held that preferential protection against layoffs afforded to minority teachers by the public school board's affirmative action plan could not be sustained, because the school board's proffered justification for the plan—that minority teachers were needed to provide role models for minority students—was not sufficiently compelling to withstand the strict scrutiny to which it was subject under the Fourteenth Amendment. *Id.* at 274–276, 106 S.Ct. at 1847–48 (Powell, J., joined by Burger, C.J., Rehnquist, J. and O'Connor, J.); *id.* at 288, 106 S.Ct. at 1854 (O'Connor, J., concurring); *id.* at 295, 106 S.Ct. at 1858 (White, J., concurring). However, Justice O'Connor, in her concurring opinion which was the decisive vote in the Court's holding, specifically distinguished the goal of providing role models from "the very different goal of promoting racial diversity among the faculty," explicitly leaving open the possibility that the latter goal might be sufficiently compelling to pass constitutional muster. *Id.* at 288 n. *, 106 S.Ct. at 1854 n. *. She also made a favorable reference to Justice Powell's endorsement of diversity in the classroom in *Bakke*, stating, "although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." *Id.* at 286, 106 S.Ct. at 1853. Her position, plus that of the four dissenting justices, (Marshall, J., dissenting, joined by Brennan & Blackmun, JJ.) (seeking "to achieve diversity and stability for the benefit of *all* students" through faculty integration is a constitutionally sufficient purpose); *id.* at 315, 106 S.Ct. at 1869 (Stevens, J., dissenting) (" 'recognition of the desirability of multi-ethnic representation on the teaching faculty' " is a "completely sound educational purpose" (citation omitted)), meant there were five justices in *Wygant* who approved in general terms the concept that the educational benefit derived from diversity in the classroom can constitute an acceptable justification for affirmative action. *See also Britton v. South Bend Community School Corp.*, 819 F.2d 766, 773 n. 1 (7th Cir.) (en banc) (Flaum & Bauer, JJ., concurring) ("Remedying past discrimination is not necessarily the only government pur-

pose sufficiently compelling to justify the remedial use of race. Providing faculty diversity may be a second."), *cert. denied*, 484 U.S. 925, 108 S.Ct. 288, 98 L.Ed.2d 248 (1987); *Zaslawsky v. Board of Education of Los Angeles*, 610 F.2d 661, 664 (9th Cir.1979)(in equal protection context, purpose of "enhanc[ing] the educational opportunities available to the students by achieving better racial balance in the teaching faculty . . . has been well recognized and approved by the Supreme Court").

I therefore respectfully disagree with the majority, both in its construction of *Weber* and *Johnson* as leaving no doors open for any action that takes race into consideration in an employment situation other than to remedy past discrimination and the consequential racial imbalance in the workforce, and in what appears to be its limited view of the purposes of Title VII. I would hold that a school board's bona fide decision to obtain the educational benefit to be derived from a racially diverse faculty is a permissible basis for its voluntary affirmative action under Title VII scrutiny.

III.

It is undeniable that, in the abstract, a layoff imposes a far greater burden on the affected employee than a denial of promotion or even a failure to hire. In this case, however, it cannot be said with any certainty that Taxman would have avoided the layoff had the Board's decision not been race-conscious. If a random selection had been made, Taxman would have had no more than a fifty-percent chance of not being laid off. Thus, this was not a situation where Taxman had a "legitimate and firmly rooted expectation" of no layoff. *Johnson*, 480 U.S. at 638, 107 S.Ct. at 1455; *cf. Mackin v. City of Boston*, 969 F.2d 1273, 1278 (1st Cir.1992) (where, even in absence of affirmative action scheme, White applicants "could not reasonably have felt assured that they would be appointed," plan did not disturb any legitimate expectations), *cert. denied*, 506 U.S. 1078, 113 S.Ct. 1043, 122 L.Ed.2d 352 (1993).

This differs from the situation of an employee who is next in line for a promotion by the objective factor of seniority. Taxman's qualifications were merely equal to those of her competitor for this purpose. In *Johnson* the Court held that because there were six other employees who also met the qualifications for the job, Johnson had no "entitlement" or "legitimate firmly rooted expectation" in the promotion, even though he had scored higher than the others on the qualifying test. *Johnson*, 480 U.S. at 638, 107 S.Ct. at 1455; *see Peightal v. Metropolitan Dade County*, 940 F.2d 1394, 1408 (11th Cir.1991) (affirmative action plan valid under Title VII where it never requires hiring unqualified person over qualified person), *cert. denied*, 502 U.S. 1073, 112 S.Ct. 969, 117 L.Ed.2d 134 (1992); *cf. United States v. Paradise*, 480 U.S. 149, 177–78, 107 S.Ct. 1053, 1070, 94 L.Ed.2d 203 (1987) (same under equal protection). Moreover, just as the plaintiff in *Johnson* remained eligible for promotion in the future, 480 U.S. at 638, 107 S.Ct. at 1455, Taxman retained recall rights after her layoff, and did in fact regain her job.

The majority relies in part on *Wygant*, where the Supreme Court found that the use of faculty layoffs to meet affirmative action goals in a public school system imposed too heavy a burden on White employees. *Wygant*, 476 U.S. at 282–83, 106 S.Ct. at 1851. However, the Court's holding that the *Wygant* plan was not "narrowly tailored" for purposes of an equal protection challenge is not dispositive of the present inquiry as to whether a plan "unnecessarily trammels" the rights of White employees for Title VII purposes. Not only was a different legal standard applicable but *Wygant* is also distinguishable because the *Wygant* plan caused nonminority teachers with *more* seniority to be laid off in order to retain minority teachers with *less* seniority. *Wygant*, 476 U.S. at 282, 106 S.Ct. at 1851. The *Wygant* plan actually caused teachers to be laid off who, in the absence of the plan, would have had no risk of layoff. That burden—increasing the chance of layoff from zero to one hundred percent—is significantly heavier than that imposed on Taxman, who would have had a substantial chance of being laid off even absent any consideration of diversity.

Only three members of the Court subscribed to language in the plurality opinion in *Wygant* suggesting that the use of layoffs to

accomplish affirmative action goals will *never* survive strict scrutiny. *See* 476 U.S. at 284, 106 S.Ct. at 1852. The two concurring justices did not go that far. *See id.* at 293, 106 S.Ct. at 1857 (O'Connor, J., concurring) ("[n]or is it necessary, in my view, to resolve the troubling question[ ] whether any layoff provision could survive strict scrutiny"); *id.* at 295, 106 S.Ct. at 1858 (White, J., concurring) (confining his conclusion to the specifics of the layoff policy at issue). Therefore I do not read *Wygant* to hold that no race-conscious layoff decision will survive Title VII scrutiny.

The majority gives a similarly narrow reading to *Weber* and *Johnson*, construing these cases to impose a wooden, "unequivocal" requirement that all affirmative action plans must be explicitly temporary in order to be valid. Majority at 1564. In fact, the *Johnson* plan itself "contain[ed] no explicit end date," *Johnson*, 480 U.S. at 639, 107 S.Ct. at 1456, and the Court indicated that only certain plans that are particularly burdensome on nonminorities in other respects need necessarily be expressly temporary. "Express assurance that a program is only temporary may be necessary *if* the program actually sets aside positions according to specific numbers." *Id.* at 639–40, 107 S.Ct. at 1456 (emphasis added). The Supreme Court's references to the temporary duration of the plans at issue in *Weber* and *Johnson* are more accurately construed as an understandable effort to assure that race does not become a permanently embedded consideration in employment decisions. The significant consideration is whether there has been an effort "to minimize the effect of the program on other employees," not whether the underlying policy is set to run a specified number of years. *Id.* at 640, 107 S.Ct. at 1456.

In the situation before us, I see ample basis from which to deduce an effort to minimize the effect of the Board's affirmative action policy on non-minority employees. One such aspect is the discretionary nature of the policy. The Board is free not to apply the policy, even to break a tie. Also significant is the infrequency with which the Board has resorted to the policy. Although it may be of little comfort to Taxman, the fact that this is the first time in the twenty years since the policy was adopted that it has been applied to a layoff decision demonstrates the minimum impact on White teachers as a whole. And since, by its own terms, it only applies in the rare instances in which two candidates are of different races but equal qualifications and the department in question is not already diverse, it is likely that it will continue to be infrequently applied. *See* District Court's Final Judgment and Contingent Order, entered February 15, 1994 at 2 (denying request for broad injunction because "[t]here is, in the court's view, no likelihood that the conduct at issue in this case will recur").

In this connection, I deem it further evidence of the Board's interest in minimizing any adverse effect on non-minorities that it has not defined diversity by any specific numerical goal. Although the majority regards that as a major concern, I view the lack of any such figure as an indication that the Board's plan does not impose a fixed quota with the rigidity attendant thereto.

It is not the province of this court to intrude into what is essentially an educational decision. Once we have determined that promoting faculty diversity for educational purposes can be a valid justification for an appropriately limited race-conscious action, it is not our role to second-guess the judgment of educators as to the level of diversity that produces the educational environment they deem appropriate. The Board's action is an attempt to create an educational environment that will maximize the ability of students to address racial stereotypes and misconceptions born of lack of familiarity. I find it difficult to believe that an Act that was given birth by the tensions of the civil rights era precludes it from doing so under the facts before us here. Given the record before us, the consequence of the narrow reading that the majority gives *Weber* and *Johnson* is the very irony that the Supreme Court said would result from interpreting this civil rights statute in a manner divorced from its historic context. As the Court noted in *Weber*:

[i]t 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," 110 Cong. Rec. 6552 (1964) (remarks of Sen. Humphrey), constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

Weber, 443 U.S. at 204, 99 S.Ct. at 2728.

I return to the question raised at the outset: whether Title VII *requires* that the Board toss a coin to make the layoff selection between equally situated employees. In his opinion for the majority in *Weber*, Justice Brennan noted the distinction made by Congress between *requiring* and *permitting* affirmative action by employers. *See Weber*, 443 U.S. at 205–06, 99 S.Ct. at 2728. He deemed it important that, while Congress explicitly provided that Title VII should not be interpreted to *require* any employer to grant preferential treatment to a group because of its race, Congress never stated that Title VII should not be interpreted to *permit* certain voluntary efforts.

In this case, the majority gives too little consideration to the tie-breaking method that its holding will impose on the Board. It points to no language in Title VII to suggest that a lottery is required as the solution to a layoff decision in preference to a reasoned decision by members of the School Board, some of whom are experienced educators, that the race of a faculty member has a relevant educational significance if the department would otherwise be all White. While it may seem fairer to some, I see nothing in Title VII that *requires* use of a lottery.

Because I cannot say that faculty diversity is not a permissible purpose to support the race-conscious decision made here and because the Board's action was not overly intrusive on Taxman's rights, I would reverse the grant of summary judgment for Taxman under Title VII and direct that summary judgment be granted to the School Board.[1]

SCIRICA, Circuit Judge, dissenting, with whom Chief Judge SLOVITER joins.

While I find much with which I agree in the majority's opinion, I am constrained to express my disagreement because I believe education presents unique concerns.

In *University of California Regents v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), Justice Powell recognized that "the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Id.* at 313, 98 S.Ct. at 2760 (citation omitted). As he noted, in the university: "[A] great deal of learning occurs . . . through interactions among students of both sexes, of different races, religions, and backgrounds . . . ." *Id.* at 312–13 n. 48, 98 S.Ct. at 2760 n. 48 (citation omitted). Eighteen years later, the wisdom of this statement resonates as strongly as ever. When added to a university's high academic standards, this exposure constitutes a formidable educational experience.

In this case, the Piscataway Board of Education concluded that a diverse faculty also serves a compelling educational purpose; namely, it benefits students in the business department by exposing them to teachers with varied backgrounds. The Board implemented a program that, in limited circumstances, allows consideration of race as a factor in school employment decisions. The Board did not countenance the layoff of a more-qualified teacher in the place of a less-qualified one. It did not prefer teachers junior in seniority to those with more experience. Rather it concluded that when teachers are equal in ability and in all other respects—and only then—diversity of the faculty is a relevant consideration.

I do not believe Title VII prevents a school district, in the exercise of its professional judgment, from preferring one equally qualified teacher over another for a valid educational purpose.

Accordingly, I respectfully dissent.

LEWIS, Circuit Judge, with whom Judge McKEE joins, dissenting.

I join in Chief Judge Sloviter's dissent, as well as those of each of my dissenting colleagues.

I would only add that we should be mindful of the effects the majority's approach will impose upon legitimate, thoughtful efforts to redress the vestiges of our Nation's history of discrimination in the workplace and in education; efforts which, in seeking to achieve pluralism and diversity, have helped define and enrich our offices and institutions, and which were intended to open, and keep open, the doors of opportunity to those who have "been excluded from the American dream for so long." *See* 110 Cong. Rec. 6552 (1964) (excerpted from Sen. Humphrey's remarks). This, after all, is what I had always thought Title VII was intended to accomplish. More importantly, as Chief Judge Sloviter notes, these goals are plainly supported by the statute's legislative history. Thus, while the majority holds that Title VII *only* allows race to be considered in remedying a history of intentional discrimination or a "manifest imbalance," I believe this conclusion is fundamentally at odds with the overriding goals of the statute. And the real-life impact of the majority's unprecedented construction of Title VII is readily apparent when one contemplates the myriad of difficult decisions that employers across the nation face everyday.

Somewhere out there in the real world, for example, there is a law firm with a racial make-up (a workforce) akin to Piscataway High School's; a firm which lacks a history of intentional discrimination in hiring but, due to economic concerns, must decide between retaining one of two attorneys—the first and only black associate to work in its prestigious anti-trust department, or his equally qualified white counterpart. The firm's management committee may decide that to lay-off the black associate would be an unwise and potentially damaging business decision because it would negate the large investment of time, effort and money spent trying to recruit and retain minority lawyers. In other words, the firm may believe that diversity would be good for business and good for itself, so, everything else being equal, it decides to lay-off the white associate.

In a situation such as this, the firm's reliance upon race *as one among many factors* in making its decision is the type of management prerogative which is totally consistent with the goals and underlying purpose behind Title VII. *See Weber*, 443 U.S. at 206, 99 S.Ct. at 2728–29 (noting that Title VII's legislative history demonstrates that the statute was not intended to place unnecessary limits upon "management prerogatives"). After it reads the majority's decision, however, it seems clear that the firm will be forced to disregard its own better business judgment, forsake its recent recruiting successes among minorities and, I suppose, flip a coin on its own future as well as the young associates', all in order to avoid the specter of Title VII liability and an enormous damage award.

At times, a private college, with a handful of Latinos on its faculty and with no history of intentional discrimination in hiring, is faced with the unenviable task of deciding which of two young associate professors with indistinguishable records to grant tenure in a particular department. The only difference between the two is that one is white and the other is Latino. After reviewing all of the other factors and finding them in equipoise, the tenure committee may decide to offer the position to the Latino associate professor because there has never been a tenured Latino professor in any department at the college, and because it believes his presence at the college will be a significant benefit to the entire student body. As with the law firm, this decision is entirely consistent with Title

1. Because I think the school board is not liable I will not dwell on the issue of damages. I note simply that there is much logic to the Board's argument that Taxman should be awarded fifty percent rather than one hundred percent of the backpay she would have received had she not been laid off. The record shows that, had the Board not based its decision on race, it would have chosen between Taxman and Williams by means of a coin toss or lottery. Since in such circumstances Taxman would have stood only a fifty-percent chance of retaining her job, a fifty-percent backpay award most accurately "'recreate[s] the conditions and relationships that would have been had there been no' " consideration of race. *Teamsters v. United States*, 431 U.S. 324, 372, 97 S.Ct. 1843, 1873, 52 L.Ed.2d 396 (1977) (quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 769, 96 S.Ct. 1251, 1266, 47 L.Ed.2d 444 (1976)); *see Dougherty v. Barry*, 869 F.2d 605 (D.C.Cir.1989).

VII because it is motivated by some of the same concerns that lead Congress to enact the statute. *See Weber*, 443 U.S. at 208, 99 S.Ct. at 2729–30 (noting that the plan was valid under Title VII in part because the "purposes . . . mirror those of the statute").

But again, the majority's rationale will thwart the college's ability to rely upon its independent judgment in deciding what is in the best interests of the students whom it is charged with educating. Instead, according to the majority, that important judgment is better exercised (in this case may *only* be exercised) by resorting to a coin-flip.

One could cite countless other examples of the significant and ultimately counterproductive effects of the majority's narrow construction of Title VII, but suffice it to say that in my view, Title VII was not enacted to *prevent* the thoughtful, deliberative processes employed by such a law firm or college. I believe that in this case the school board's decision to consider race, among other factors, in an attempt to ensure a diverse faculty for its students was in furtherance of Title VII's goal of breaking-down "existing misconceptions and stereotypical categorizations which in turn lead to future patterns of discrimination." *See* S.Rep. No. 415, 92nd Cong., 1st Sess. 12 (1971). Accordingly, its decision was as legal as it was laudable.

I believe the majority's decision eviscerates the purpose and the goals of Title VII. I respectfully dissent.

McKEE, Circuit Judge, dissenting, with whom SLOVITER, Chief Judge and LEWIS, Circuit Judge join.

I join each the opinions of my dissenting colleagues, but write only to elaborate upon what I consider to be important considerations in our analysis. "The prohibition against racial discrimination in §§ 703(a) and (d) of Title VII must [ ] be read against the background of the legislative history of Title VII and the historical context from which the Act arose." *United Steelworkers v. Weber*, 443 U.S. 193, 201, 99 S.Ct. 2721, 2726, 61 L.Ed.2d 480 (1979).

We have now come full circle. A law enacted by Congress in 1964 to move this country closer to an integrated society and away from the legacy of "separate but equal" is being interpreted as outlawing this Board of Education's good faith effort to teach students the value of diversity. The selection of Ms. Williams meant that the business department would retain the only Black teacher tenured in that department in anyone's memory. Board President Theodore H. Kruse testified that it was his "general feeling . . . that it was valuable for the students to see in the various employment roles a wide range of background[s]" and that diversity "was also valuable to the work force and in particular to the teaching staff." Da74. Kruse further explained that "by retaining Mrs. Williams it was sending a very clear message that we feel that our student population is culturally diverse and there is a distinct advantage to students . . . to be made . . . more aware, more tolerant, more accepting, more understanding of people of all background[s]." Da75. I can not believe that Title VII was intended to strike down such an action.

As Chief Judge Sloviter points out, the majority's ruling is based upon an interpretation of *United Steelworkers v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), and *Johnson v. Transportation Agency*, 480 U.S. 616, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987) that conflicts with the language used in those cases. *See supra* at 1569–71 (Sloviter, C.J., dissenting). The majority's conclusion that affirmative action plans not limited to attempts to remedy past discrimination run afoul of Title VII simply ignores the legislative history that *Weber* and *Johnson* require us to consider.

> Given the interpretation of [Title VII] the Court adopted in *Weber*, I see no reason why the employer has any duty, prior to granting a preference to a qualified minority employee, to determine whether his past conduct might constitute an arguable violation of Title VII. Indeed, in some instances the employer might find it more helpful to focus on the future. Instead of retroactively scrutinizing his own or society's possible exclusions of minorities in the past to determine the outer limits of a valid affirmative-action program—or indeed, any particular affirmative-action decision—in many cases the employer will find it more appropriate to consider other legitimate reasons to give preferences to members of under-represented groups. Statutes enacted for the benefit of minority groups should not block these forward-looking considerations.

480 U.S. at 646–47, 107 S.Ct. at 1459–60 (Stevens, J., concurring). This is particularly true in the field of education where young people are developing opinions and beliefs that will determine their attitudes as citizens, and this country's future. Under such circumstances, the School Board considered Ms. Williams' race as a factor that was weighed in the balance with all other factors in making a very difficult choice between two equally fine teachers.

Similar consideration of an employee's sex has been upheld in *Johnson*. There, the Court stated:

> We therefore hold that the Agency appropriately took into account as one factor the sex of [the employee] in determining that she should be promoted to the road dispatcher position. The decision to do so was made pursuant to an affirmative action plan that represents a moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the Agency's work force. Such a plan is fully consistent with Title VII, for it embodies the contribution that voluntary employer action can make in eliminating the vestiges of discrimination in the workplace.

480 U.S. at 641–42, 107 S.Ct. at 1457. Thus, I disagree with the majority's conclusion that "there is no congressional recognition of diversity as a Title VII objective requiring accommodation." Maj. Op. at 1558.

To be sure, I can understand the majority's concern over allowing race to be a factor in any decision. History loudly proclaims the evil that can spring from such practices, and it is sometimes all too easy to simply ignore that evil when the practice appears to be driven by a benign purpose. However, I do not believe that what the Board of Education was attempting to do here, nor the individualized manner in which it was attempting to do it, runs afoul of a Congressional enactment cloaked in the legislative history recounted herein, and in the opinions of my colleagues.

Not that long ago the President's Commission on Civil Disorders (the "Kerner Commission") warned that "[o]ur nation is moving toward two societies, one black, one white—separate and unequal." REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, at 1 (March 1, 1968). Some may view the Board's efforts here as yet another push in that direction. Indeed, if we were writing upon a clean slate that would no doubt be true. But of course, we do not do that. The shadows and images that moved Congress to enact Title VII in 1964 are already etched into our slate, and they define the reality that should guide our analysis. The Board has responded to those shadows with an action that is a narrow, individualized and reasoned attempt to foster respect for diversity. Because that is consistent with the purposes of Title VII, I respectfully dissent.

AMENDED JUDGMENT

Aug. 21, 1996.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel November 29, 1995 and reargued before the Court in banc May 14, 1996.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered February 15, 1994, be, and the same is hereby affirmed. Costs taxed against the appellant in each appeal. All of the above in accordance with the opinion of this Court.

WESTLAW KEY NUMBER SYSTEM