MUGWUMP, MEDIATOR, MACHIAVELLIAN, OR MAJORITY?
The Role of Justice O’Connor in the Affirmative Action Cases

by

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I am sure that these questions [involving affirmative action] . . . are going to come back before the Court in a variety of forms. I do believe that litigation in the area of affirmative action is far from resolved, as I see it, and that we will continue to have cases in this area.

Sandra Day O’Connor
Nomination Hearings
September 9, 1981

It was a prophetic statement from the nominee. Since Justice O’Connor’s appointment in 1981, affirmative action has been back before the Court on ten occasions. The cases have generated forty separate opinions and fill over 450 pages of the reporters. Yet, the matter is far from resolved, from either a statutory or a

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conventional perspective.

As the beneficiary of a form of affirmative action herself, Justice O'Connor was naturally expected to play a significant role in this particular controversy. She

President Reagan openly admitted that her appointment was in fulfillment of his election campaign promise “that one of my first appointments to the Supreme Court vacancy would be the most qualified woman that I could possibly find.” Presidential Statements Relating to the Nomination of Sandra Day O’Connor to the Supreme Court of the United States, Hearings at 6. See also Id. at 9, 11; Congressional Record Citations to Sandra Day O’Connor’s Nomination Including Roll Call Vote, Id. at 28. Although this was clearly a “mixed motive” type of decision, based on both sex and qualifications, the President’s admission would certainly satisfy Justice Brennan’s understanding of the “because of . . . sex” requirement of Title VII, in that President Reagan clearly “relied on sex-based considerations in coming to [his] decision.” Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1786 (1989). And it is unlikely that President Reagan could have satisfied what Justice Brennan has called an affirmative defense, namely that he “would have made the same decision even if [he] had not taken [Justice O’Connor’s] gender into account.” Id. at 1795. In sum, this proof/lack-of-proof combination would demonstrate that “but for” her sex, Sandra Day O’Connor would not have been nominated and appointed to the Supreme Court, thus also satisfying now Justice O’Connor’s own tests for causation and liability under Title VII. Id. at 1797. This is merely to say, of course, that her qualifications and her sex were both necessary conditions of her appointment, not that her sex alone was a sufficient condition (or the sole cause) of her appointment.

On the role of Justice O’Connor’s gender in her selection and performance as a Supreme Court Justice, see generally, Slotnick, Gender, Affirmative Action, and Recruitment to the Federal Bench, 14 Golden Gate U.L. Rev. 519 (1984); Cook, Women As Supreme Court Candidates: From Florence Allen to Sandra O’Connor, 65 Judicature 314 (1982).

See Kelso, Justice O’Connor Replaces Justice Stewart: What Effect on Constitutional Cases?, 13 Pac. L.J. 259, 270 (1982) (noting that Justice Stewart generally adhered to the “colorblind” theory of equal protection, the author concludes that “[h]ow Justice O’Connor approaches that question may make a real difference in whether the Court approves state or federal programs of affirmative action”).

At the time of her confirmation, however, it was difficult to predict what her position on affirmative action would be. As an Arizona legislator and state-court judge, Justice O’Connor had not been directly confronted with any true affirmative action issues, the closest being a busing proposal which she voted against. Congressional Record Citations, Hearings at 46. She had not written on the topic of affirmative action. And during her confirmation Hearings she declined to express any concrete opinions about affirmative action, on the theory that this was a likely matter to come before the Court. Hearings Before the Senate Committee, Hearings at 196. What she did say was thus limited to general restatements about what the Court had done in the past. Id. at 190 (recognizes affirmative remedial orders as a way of vindicating constitutional rights); id. at 196 (discussion of the “colorblind” theory); id. at 232 (identification of the various standards of review); id. at 260-61 (cryptic discussion of the disparate impact theory of discrimination as a form of affirmative action); id. at 274 (oblique reference to Bakke in the context of a discussion Supreme Court acceptance of cases for review). Thus, there was nothing specific in her record on which to base any predictions about how she might vote.

The evidence from which inferences might be drawn would have led to mixed conclusions. As a woman in a male-dominated profession, she might have been expected to be sensitive to the claimed justifications for affirmative action. But her reputation as a Reagan-style political conservative would have tended to negate that possibility. On the other hand, as a judicial conservative she could be expected to both defer to the judgment of legislatures and construe legislation according to its “plain meaning.” The former would produce an inclination to uphold governmental affirmative action plans, while the latter would require their invalidation where the statute, like Title VII, contains an unequivocal statutory prohibition against race and sex discrimination. Yet, again because of her purported judicial conservatism, it might have seemed likely that an adherence to stare decisis would restrain her from leading any major retreat from the Court’s prior decisions. Although she was regarded as a strict constructionist, it is problematic what that means in the context of the equal protection clause and affirmative action. Finally, Justice O’Connor’s reputation as
has not disappointed the Court watchers in this regard. She has written a separate opinion in nine out of the ten cases -- consisting of two majority opinions, four concurring opinions, two dissenting opinion, and one opinion concurring in part and dissenting in part. Justice O'Connor's record and outpourings of opinion are, however, subject to several different interpretations.

First, since she did not consistently align herself with either the "conservative" or the "liberal" wings of the Court on the affirmative action issue, for a time some people regarded Justice O'Connor as an intellectual "mugwump," one who refused to come down on either side of a clear ideological and constitutional fence.

Second, Justice O'Connor's early ambivalence was also explained as simply an attempt to forge a consensus. By eschewing the "extreme" positions and emphasizing the points of agreement among the members of the Court, some suggested that she was staking out a middle ground on which she hoped most the Court will ultimately agree. They thus saw her as an aspiring "mediator" between the conflicting factions on the Court.

Third, as time passed, some critics began to find a certain amount of disingenuity in Justice O'Connor's approach to affirmative action. Though she continued to give "lip service" to the idea of compensatory reverse discrimination, they discovered that she was actually willing to recognize its legitimacy in only the narrowest of circumstances. They regarded this as a devious and "Machiavellian" way of doing what the conservative wing was doing more openly.

The purpose of this article is to provide a critical analysis of Justice O'Connor's affirmative action opinions. It will show that while her early record provides justification for all three characterizations, her more recent decisions suggest the emergency of a more favorable image. Her opinions in Croson and Media Broadcasting reflect the realization that a narrow, hair-splitting approach to this critical social and constitutional crisis will do little to hasten its resolution; that there

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a non-ideological pragmatist might have suggested that she would follow an evolutionary, case-by-case approach to the problem, thus avoiding either of the two philosophical extremes. In a way, all of these predictions have proven true, and herein lies the enigma of Justice O'Connor position on affirmative action. Justices Brennan, Marshall, and Blackmun, who have voted in favor of affirmative action in every major case, form the core of the so-called "liberal" branch of the Court. Justices Rehnquist and Scalia, who are equally consistent in their opposition to affirmative action, represent the so-called "conservative" branch. The partial role reversals which occurred in Mississippi University For Women v. Hogan, 458 U.S. 718 (1982), discussed infra notes 7-18 and accompanying text, merely underscore the fact that this was not truly an "affirmative action" case, although I have included it in the analysis. Justices White, Powell, and Stevens, and former Chief Justice Burger have been somewhat idiosyncratic and unpredictable in their approach to affirmative action. See generally, Daly, Some Runs, Some Hits, Some Errors -- Keeping Score in the Affirmative Action Ballpark from Weber to Johnson, 30 B.C.L. Rev. 1, 45-80 (1988).

"Mugwumps.... now gen. used in a pej. manner, to insinuate that he is, to repeat the President of Princeton's definition, "a man with his mug on one side of the fence and his wump on the other."" E. Partridge, A Dictionary of Slang and Unconventional English (P. Beal 8th ed. 1984). Most people predict that Justice Souter, who has replaced Justice Brennan, will join the "conservative" camp on affirmative action.
is apparently no form of affirmative action that the liberal wing of the Court is unwilling to endorse, making her consensus by compromise approach a futile dream; and that, thus, there is no further reason to mask her true commitment to the principle of non-discrimination.

The article will further show that her opinions reflect certain analytical models and philosophical premises on which a coherent affirmative action jurisprudence can be based; that when fully worked out and articulated, these models and premises mandate a forthright repudiation of everything except the truly remedial forms of affirmative action; that this is the position she will ultimately take; and that around her will eventually form a new and consistent majority on the affirmative action issue.

Mississippi University For Women v. Hogan:

THE AFFIRMATIVE ACTION CASE THAT WASN’T

This was Justice O’Connor’s first opinion for the Court. It involved a state nursing school which discriminated in favor of women admittees, a policy which it said merely constituted “educational affirmative action.” An otherwise qualified male applicant to the school, who had been denied admission solely on the basis of his sex, claimed that the policy violated the equal protection clause.

In a five to four decision, the Supreme Court agreed. Justice O’Connor wrote the majority opinion, stating that: “In limited circumstances, a gender-based classification favoring one sex[e.g., “affirmative action”] can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened.” She then concluded that the policy could not be justified on those terms.

First, Justice O’Connor noted the absence of any disproportionate burden, or what she later referred to as “discriminatory barriers” against the entrance of

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8 Hogan, 458 U.S. at 727. The only time Justice O’Connor even used the term “affirmative action” was in connection with this claim by the school itself. In her mind the school was clearly engaged in something altogether different.
9 For an “affirmative action” case, Hogan produced an unusual alignment of the Justices. Justices Brennan and Marshall, from the pro-affirmative action wing of the Court, viewed this as impermissible discrimination. Justice Blackmun, the other member of the “liberal” troika, broke ranks on this case, but Justices Stevens and White went along, thus forming the majority. Justice Rehnquist, known for his consistent opposition to affirmative action, would have upheld the school’s discrimination against the male applicant. He was joined by the generally “conservative” Chief Justice Burger, by Justice Powell, and by the usually “liberal” Justice Blackmun. The explanation for this apparent line-crossing is, of course, that Hogan was an “affirmative action” case in name only.
10 Hogan, 458 U.S. at 728 (emphasis added).
11 Id. at 729.
women into the nursing profession. This, she said, was evidenced by statistics showing a high preponderance of women earning nursing degrees and holding jobs as nurses in both Mississippi and the rest of the country. This threshold requirement, that of showing the existence of prior discrimination by reference to a statistical imbalance, will later become the centerpiece of Justice O’Connor’s affirmative action theory.

The second element that the affirmative action plan lacked in this case was that of providing ‘‘assistance.’’ That is, rather than benefiting female nurses, she concluded that the state’s discriminatory admissions policy actually constituted a wrong not only against men, but also against women. Justice O’Connor’s explanation of this is somewhat unclear. What she said was that the admissions policy ‘‘tends to perpetuate the stereotyped view of nursing as an exclusively woman’s job,’’ and thus ‘‘lends credibility to the old view that women, not men should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy.’’

This could be taken in several ways. First, there is a suggestion in a footnote that the absence of men in the profession tends to depress wages, thus constituting a tangible injury to women nurses. Second, from the notion that only women should be nurses one might infer a corollary state policy that only certain professions are also suitable for women, thus constituting an intangible and somewhat speculative injury to women who desire to enter another profession. And third, there is the even broader notion that being treated by the state in a stereotypical fashion is itself an equal protection wrong against the nurse recipients of the treatment, even though they are otherwise being tangibly benefited by it.

Whatever Justice O’Connor meant, her recognition of the ‘‘down side’’ of allegedly benign and favorable treatment has significant implications when it is transferred into the context of the more traditional forms of affirmative action.

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12 Id. at 729. Presumably, if the school had adopted an affirmative action plan on behalf of under-represented male applicants, Justice O’Connor would have used the same statistics as justification. This, however, would seem to be inconsistent with her later rejection of ‘‘societal discrimination’’ as a grounds upon which a public employer can base a reverse discrimination employment plan. Wygant v. Jackson Bd. of Educ., 476 U.S. at 288. On the other hand, in that same case she also left open the possibility that achieving a diverse faculty might justify racial preferences in a school hiring context, with the source of the lack of diversity presumably being irrelevant. Id. at 288 n.4. Lack of diversity among the student body, again regardless of its cause, might be similarly regarded by Justice O’Connor--although her more recent opinions seem to reject that possibility.

13 Hogan, 458 U.S. at 729.

14 Id. at 730.

15 Id. at 729 n.15.

16 See Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1802 (1989) (O’Connor, J., concurring) (employment decisions based on a person’s failure to conform to certain gender stereotypes found to be illegal under Title VII).

17 The idea had already surfaced in the Supreme Court’s prior affirmative action cases. See Defunis v. Odegaard, 416 U.S. at 343 (Douglas, J., dissenting); Regents of the Univ. of Cal. v. Bakke, 438 U.S. at 298 (opinion of Powell, J.); Fullilove v. Klutznick, 448 U.S. at 531-32 (Stewart, J., dissenting).
Notwithstanding the existence of remedial objectives, it recognizes that preferential treatment continues rather than cures the problems of discrimination, in that it reinforces the false but stereotypical notion that women, Blacks, and other minorities, being innately inferior, cannot obtain positions of importance in any other way.\(^8\) In any event, Justice O'Connor incorporated the stereotype or stigma thesis into her analysis in \textit{Hogan}, the first of her opinions; she was to use it again with great effect in \textit{Croson} and \textit{Metro Broadcasting}, her most recent.

\textit{Firefighters Union 1784 v. Stotts}.\(^9\)

\textbf{THE CLARIFICATION OF A PROCEDURAL POINT, BUT WITH SUBSTANTIAL SUBSTANTIVE IMPACT}

Justice O'Connor's concurring opinion in \textit{Stotts} probably reflects her experience as a trial court judge and her resulting attentiveness to the niceties of procedure. In 1977 a class action had been brought against the city of Memphis, Tennessee, alleging a pattern or practice of racial discrimination in the hiring and promotion of firefighters. The city settled the case by entering into a court-approved consent decree which established a fifty percent minority hiring “goal,” and a twenty percent minority promotion “goal” for vacancies in the department. In 1981, budget deficits required a substantial reduction in force. Pursuant to a memorandum of understanding with the union, layoffs were to be determined on the basis of seniority, and senior employees whose positions were abolished could “bump down” to a lower position. Black firefighters hired under the consent decree, lacking sufficient seniority to retain their jobs, sought and obtained a preliminary injunction against the implementation of the layoff plan. The Sixth Circuit Court of Appeals upheld the injunction.

After dealing with a mootness issue, Justice White, speaking for the Court, addressed the question of whether the district court had the power to issue the injunction. He noted that the court of appeals had justified it as either an \textit{enforcement} of the consent decree or a \textit{modification}. Justice White concluded that it could be justified on neither ground. The consent decree itself was silent on the question of layoffs, and he refused to read in any implied limitations. With respect to the modification question, Justice White concluded that the district court’s power to unilaterally modify a consent decree was limited by section 706(g) of Title VII,\(^{20}\) that

\[^8\] This raises the interesting question of whether a Black or a women who was philosophically opposed to an employer’s affirmative action plan would have standing to challenge that plan on the grounds that it attaches a stigma to whatever employment advancement this person might obtain.


\[^{20}\] 42 U.S.C. §2000e-5(g) (1982) defines and limits the power of a court to prescribe remedies for Title VII violations. The last sentence reads as follows:

\begin{quote}
No order of the court shall require the admission or reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended or discharged for any reason other than discrimination on
this section allows an award of fictional seniority only to the proven victims of illegal discrimination, that none of the beneficiaries of the modified consent decree met this qualification, and that the injunction was therefore improper.

Justice O'Connor joined in the Court's opinion, but felt compelled to also write a separate concurring opinion to reflect her "understanding" of the Court's holding. She seemed to enjoy tracing the unusual procedural history of the case, which she said was necessary in order to appreciate the Court's resolution of both the mootness issue and the substantive power issue. But she did this with a specific purpose in mind. She had noted a potential ambiguity in Justice White's opinion, and her grounds for resolving it add a significant new dimension to the case.

The offending language in Justice White's opinion was this: "It therefore seems to us that in light of Teamsters, the Court of Appeals imposed on the parties as an adjunct of settlement something that could not have been ordered had the case gone to trial and the plaintiffs proved that a pattern or practice of discrimination existed."21 Justice O'Connor wanted to clarify the identity of the "case" being referred to by Justice White.

What Justice White apparently had referred to was the case as originally filed; if it had gone to trial and the plaintiffs had proven a pattern or practice of discrimination but failed to prove that every member of the class (or at least those members who were later to be the beneficiaries of the amended consent decree) was a victim of this discrimination, then an across-the-board award of compensatory seniority would have been inappropriate. Justice O'Connor presumably did not disagree with that proposition.

Justice White's statement, however, arguably left open the possibility that plaintiffs in Title VII case could enter into a consent decree that was silent with respect to individual relief and then, if the need arose, come back to court later and prove individual victim status as the justification for a non-consensual judicial modification of that consent decree.

Justice O'Connor's concurring opinion shut the door on that possibility. She emphasized, as Justice White did not, the finality of the original consent decree. She noted that the plaintiffs could have gone to trial and proved individual victim status there, or they could have included the union in the negotiations and identified specific victims in the consent decree. But, she said, they did none of these things. Instead, they entered into a consent decree without establishing any specific victim's identity and thus waived the right to further relief.

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21 Firefighters Union 1784 v. Stotts, 467 U.S. at 579.
To allow respondents to obtain relief properly reserved for only identified victims or to prove their victim status now would undermine the certainty of obligation that is a condition precedent to employers' acceptance of, and unions' consent to, employment discrimination settlements. . . . Thus, when the Court states that this preferential relief could not have been awarded even had this case [the injunction case] gone to trial, . . . it is holding respondents to the bargain they struck during the consent decree negotiations in 1980 and thereby further the statutory policy of voluntary settlement.22

In sum, her procedural point was that the case the Supreme Court was reviewing involved an injunction modifying a consent decree. "When the Court disapproves the preliminary injunction issued in this litigation, it does so because respondents had no chance of succeeding on the merits of their claim."23 The reason they had no chance of succeeding on the merits was because they would be precluded from proving individual victim status at this late date. Therein lies the important substantive point. Justice O'Connor seems to be saying the court's unilateral modification of the consent decree was inappropriate, regardless of whether or not the relief was otherwise barred by section 706(g) because of the lack of identified victims. So construed, Stotts allows settlements and consent decrees to operate as a significant limitation on the power of a district court to later impose some form of affirmative action relief.24

The second significant aspect of Justice O'Connor's concurring opinion is her restatement of the limitations on the power of a district court to ever provide affirmative discrimination relief, in light of the limitations of section 706(g). Although it does not materially vary from the majority's statement,25 it is worth

22 Id. at 589.
23 Id. at 589.
24 Justice Stevens, also concurring, thought that Title VII limitations were irrelevant, id. at 590, but would have allowed the modification if the plaintiffs had been able to show "changed circumstances." Justice O'Connor believed that Title VII would preclude the modification here, no matter how significant the change in circumstances. Id. at 588. It is not clear whether her theory about the finality of the consent decree would allow for a "changed circumstances" exception in situations where the modification would not otherwise run afoul of Title VII.
25 Justice White, and presumably Justice O'Connor as well, derived this principle of victim-only preferential relief in part from Teamsters v. United States, 431 U.S. 324 (1977), which established a two-stage process for proving and then remedying "pattern or practice" (or systemic disparate treatment) employment discrimination claims. In the first stage, statistical imbalances (the so-called "prima facie" case), which the employer cannot refute or explain away, constitute proof of the existence of a practice of illegal discrimination, thus justifying the imposition of prospective injunctive relief and raising a presumption that every member of the class may have been victimized. In the second stage, however, that presumption is tested, and individual affirmative relief is then limited to the specific members of the class who have been actually victimized.

In later cases, Justice O'Connor has repeatedly used the prima facie case part of the Teamsters Stage I analysis as a basis for determining when voluntary affirmative action of some kind is justified; in Stotts she also implicitly used the Stage II analysis as the basis for determining who could be a beneficiary of court-ordered affirmative action. As will be shown later, all that remains is for Justice O'Connor to extend her
A court may not grant preferential treatment to any individual or group simply because the group to which they belong is adversely affected by a bona fide seniority system. Rather, a court may use its remedial powers, including its power to modify a consent decree, only to prevent future violations and to compensate identified victims of unlawful discrimination. . . . Even when its remedial powers are properly invoked, a district court may award preferential treatment only after carefully balancing the competing interests of discriminatees, innocent employees, and the employer. 26

Justice O'Connor's concurring opinion in the Stotts case reveals two things. It is the first evidence of her tendency to decide cases on the narrowest of possible grounds; that is, she would have found the injunction impermissible under a waiver theory, regardless of the statutory limitation. But second, her interpretation of the somewhat cryptic section 706(g), as limiting court-ordered preferential treatment to the identified victims of prior discrimination, can be seen as a prediction of a general unwillingness to read reverse discrimination allowances into the statute.

Wygant v. Jackson Board of Education: 27

A FAILED ATTEMPT TO PATCH OVER THE DIFFERENCES

Justice O'Connor's approach to her colleagues in this case is reminiscent of a harried scout leader trying to bring peace to a quarrelsome group of twelve-year olds bent on throwing mudballs at each other -- and it achieved about the same degree of success.

Here, the Board of Education had adopted a hiring goal of having the percentage of minority teachers mirror the percentage of minority students in the district. In order to safeguard the achievement of that goal, the Board and the union had also agreed to a contract term that provided for layoff in reverse order of seniority, except that the percentage of minority teachers could not drop. When the Board applied the provision, by laying off non-minority teachers with greater seniority than minority teachers who were retained, the non-minority teachers sued, claiming a violation of the equal protection clause.

The Supreme Court's judgment was that the layoff provision was unconstitutional. There was, however, no majority opinion. Justice Powell wrote the plurality

Teamsters analogy to include both the Stage I and the Stage II analyses in her evaluation of voluntary affirmative action plans under both Title VII and the Constitution.

26 Id. at 588.
opinion, which Chief Justice Burger and Justices Rehnquist joined totally, and which Justice O’Connor joined in part. She also wrote a separate opinion, as did Justice White, who thus provided the fifth vote in support of the judgment. Justice Marshall wrote a dissenting opinion, which Justices Brennan and Blackmun joined; and Justice Stevens wrote a separate dissenting opinion.

To put Justice O’Connor’s concurring opinion in context, and thus evaluate its significance, it is necessary to first briefly summarize both Justice Powell’s opinion and the dissenting opinion of Justice Marshall.

Justice Powell began with a restatement of the “strict scrutiny” test, which he said requires that any racial classification, whether it favors racial minorities or not, be justified by “compelling governmental interest” and that the means chosen to serve that interest be “narrowly tailored.” The two interests found by the court of appeals, that of curing the effects of societal discrimination and providing role models for minority students, he found to be less than compelling.

The Board’s interest in curing its own prior discrimination, which was apparently advanced for the first time before the Supreme Court, was recognized as a legitimate and compelling interest. However, Justice Powell said that when this interest is asserted, it must be proved. That is, “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.” That factual determination was lacking in this case, he concluded.

In Part IV of the plurality opinion, the part which Justice O’Connor refused to join, Justice Powell addressed the second prong of the “strict scrutiny” test, namely the requirement that “the means chosen to accomplish the State’s asserted purpose . . . be specifically and narrowly framed to accomplish that purpose.” He concluded that the means used in this case could not satisfy the test. Although he conceded that it is not necessarily impermissible for an affirmative action plan to impose burdens on “innocent parties,” he felt that the burden imposed in this case was too “intrusive.” He contrasted reverse discrimination in hiring, where he said “the burden to be borne by innocent individuals is diffused to a considerable extent

28 Id. at 274.
29 Because the case had been litigated under the societal discrimination and role model theories, the record contained inadequate evidence with respect to the existence of prior discrimination. Once the theory of the case changed, the parties found it necessary to file with the Supreme Court what Justice Marshall referred to as “submissions’ containing factual material that was not considered by the District Court or the Court of Appeals.” Id. at 295. Although Justice Marshall chided the parties for attempting to try the case de novo before the Supreme Court, he nevertheless relied heavily (albeit selectively) on this extra-record evidence in justifying his dissent -- for which he, in turn, was chided by Justice Powell. Id. at 278 n.5.
30 Id. at 277.
31 Id. at 280.
32 Id. at 281.
33 Id. at 283 n.11.
among society generally,"\textsuperscript{34} with racially based layoff priorities, which he said "impose the entire burden of achieving racial equality on particular individuals."\textsuperscript{35}

In dissent, Justice Marshall first disagreed with Justice Powell's use of the "strict scrutiny" test, claiming instead that remedial racial discrimination should be allowed if it serves "important government interests" and is "substantially related to achievement of those objectives."\textsuperscript{36} Obviously agreeing with the plurality that remedying past discrimination was a sufficient interest, Justice Marshall then concluded that if properly introduced as evidence, the informal findings of the Michigan Civil Rights Commission, which led to a settlement incorporating the challenged layoff policy, would provide the requisite evidentiary support.\textsuperscript{37}

Justice Marshall then turned to the question of whether the means used to achieve the desired purpose met the test, as he earlier had articulated it. He concluded that it did, in the sense that affirmative protection against layoff was absolutely necessary in order to make the preferential hiring policy effective. He likewise concluded that the layoff provision that had been hammered out in the crucible of racial turmoil, was, all things considered, the narrowest and most equitable possible.

Into this maelstrom of conflicting ideas and sometimes strongly worded opinions walks Justice O'Connor. In the first part of her concurring opinion, she vainly tries to pour oil on the troubled waters.

With respect to the disagreement over the applicable test, she says that the "disparities . . . do not preclude a fair measure of consensus" and that in most affirmative action cases the difference between a "compelling" and an "important" government interest would be unimportant.\textsuperscript{38} Citing her colleagues profusely, she further shows the existence of a Court consensus over a number of propositions: that remedying past or present discrimination by a state agency is of sufficient importance to justify a carefully constructed affirmative action program; that this does not require the existence of contemporaneous findings of actual discrimination, as long as the agency has a "firm basis" for believing that remedial action is

\textsuperscript{34} Id. at 282. This is a meaningless assertion. In the last analysis, it is still some specific non-minority individual (or individuals) who will be denied a job, even if the identity of that individual cannot be ascertained because he or she is a member of a class, any of whom might be the actual victim -- i.e., the person who, but for the affirmative action in hiring, would have gotten the job. And while it may make an employer, and Justice Powell, "feel better" for not knowing the specific victim of the discrimination, the bombardier whose casualties are anonymous to him is just as culpable as is the sniper who chooses his prey on an individual basis.

\textsuperscript{35} Id. at 283 n.11. Justice Powell apparently would have used the same analysis to justify DeFunis' non-admission to law school, but not his removal from school during the third year. Id. at 267 n.1.

\textsuperscript{36} Id. at 301-02.

\textsuperscript{37} Justice Marshall, thus, would have remanded the case for further findings of fact. Id. at 306. Justice Powell, believed that much of the evidence relied on by Justice Marshall had already been introduced into evidence in one of the earlier related lawsuits, where the court nevertheless concluded that it was insufficient to prove that the Board had discriminated. Id. at 278-79 n.5.

\textsuperscript{38} Id. at 286.
required; that the promotion of racial diversity and other possible interests might justify some form of affirmative action; and that the constitutionally permitted means ‘‘need not be limited to the remediing of specific instances of identified discrimination.’’

Her assertion of unanimity over that last proposition is highly controversial. It has been read as saying that affirmative action is not necessarily unconstitutional merely because it prefers individuals who are not the proven victims of prior discrimination. If that is what Justice O’Connor intended to say, then it is not supported by the ‘‘authority’’ she cites. To the contrary, this authority suggests that Justice O’Connor was merely referring to the nature of the factual predicate for affirmative action, not the identity of its beneficiaries. Nevertheless, since this has now become the critical issue from both a statutory and a constitutional perspective, it is unfortunate that Justice O’Connor was not more careful in how she phrased her early claims of unanimity.

In any event, she concluded that ‘‘in the final analysis, the diverse formulations and the number of separate writings put forth by various Members of the Court in these difficult cases do not necessarily reflect an intractable fragmentation in opinion with respect to certain core principles.’’ Justice O’Connor then proceeds to elaborate further on these points of agreement, as well as others made in the parts of the plurality opinion to which she subscribed.

Finally, the claim of unanimity on the victim-specific issue is belied by Justice White’s concurrence, where he gives special attention to the fact that none of the beneficiaries ‘‘has been shown to be a victim of any racial discrimination.’’ Id. at 295 (White, J., concurring).

Unfortunately, Supreme Court decisions are often drafted largely by law clerks, although this apparently varies from Justice to Justice. However, it has been reported that ‘‘Justice O’Connor does little original drafting of opinions and confines herself to relatively light editing when she is satisfied with the substance.’’ Taylor, Swing Vote on the Constitution, AM. L. W., June 1989, at 69. This may explain the lack of correlation between what she seems to say and the authority she cites in support of it.

Justice Marshall also distilled two ‘‘noteworthy’’ results from among the various opinions: ‘‘a majority of the Court has explicitly rejected the argument that an affirmative-action plan must be preceded by a formal finding that the entity seeking to institute the plan has committed discriminatory acts in the past; and the Court has left open whether layoffs may be used as an instrument of remedial action.’’ Wygant, 476 U.S. at 312 n.7. The latter result can be attributed to Justice O’Connor’s refusal to join in Part IV of the plurality opinion, a refusal that was no doubt gratifying to Justice Marshall.
Of particular interest is her discussion of the nature and allocation of the burden of proof in a reverse discrimination case. She indicated that the burden is on the plaintiffs who are challenging the affirmative action plan, and suggests that this burden is satisfied by merely showing that "the purpose and effect of the plan is to impose a race-based classification"—an easily satisfied burden in most affirmative action cases. She then suggests that the burden shifts to the defendant to submit evidence demonstrating that it had a "firm basis for believing that remedial action was appropriate." As an example of what evidence would suffice, she suggests proof of a statistical disparity between the percentage of qualified minorities employed by the school and the percentage of qualified minorities in the relevant labor pool. If the defendant employer satisfies that burden, then she says that the ultimate burden is on the plaintiffs to show that the statistical evidence does not in fact support an inference of intentional discrimination or that the plan is not "narrowly tailored."

Although Justice O'Connor does not yet cite the case by name, she is obviously relying here on the first part of the Teamsters test for proving systemic disparate treatment discrimination under Title VII. In a Teamsters case, the plaintiff can use statistics to establish what the Court referred to as a "prima facie case." Then, a burden of production shifts to the defendant to rebut the plaintiff's case by showing that the statistics are "either inaccurate or insignificant." If the defendant fails to do this, then the court may conclude that a violation has occurred and at least order prospective relief. Since under the full Teamsters analysis liability does not attach until the plaintiff's statistics have survived challenge by the defendant, Justice O'Connor is technically correct in saying that her borrowing of the "prima facie case" aspect, as providing justification for affirmative action, does not impose on a public employer "the burden of convincing the court of its liability for prior unlawful discrimination."

Although the Teamsters test will play a key role in the evolution of Justice O'Connor's affirmative action jurisprudence, it was not the reason why she wrote a separate concurring opinion here. Rather, Justice O'Connor's disagreement with the plurality was over the need for even deciding whether this layoff procedure or any layoff procedure is an impermissible means for achieving the objective of remedying

44 Id. at 292-93.
45 Id. at 293.
46 Id. at 292.
48 Id. at 336.
49 Id. at 360. Normally, a plaintiff will attempt to either (1) disprove the accuracy of the data or the validity of the plaintiff's statistical methodology; (2) neutralize the statistics with counter-statistics tending to show the absence of discrimination; or (3) explain the statistics away by showing that the disparity was caused by factors other than intentional discrimination. See Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984) cert. denied, 471 U.S. 1115 (1985); Payne v. Travenol Laboratories, Inc., 673 F.2d 798 (5th Cir. 1982).
50 Teamsters, 431 U.S. at 361.
past discrimination. Since an alternative grounds was available, she hoped to avoid the issue that so bitterly divided the plurality and the dissenters.

Her alternative ground was this: By its own terms, the hiring goal was linked to achieving a parity between the percentage of minority teachers and the percentage of minority students. But since a disparity in that regard is no evidence of discrimination, the hiring goal itself had no relation to the remedying of employment discrimination, and the layoff provision which was intended to safeguard that hiring goal was likewise unrelated to the state interest being asserted -- thus constituting an impermissible means.

Justice O'Conner's attempt to find common ground was unavailing. Justice Marshall said he could not go along with her thesis, because there was no record evidence showing the absence of a disparity between workforce and labor pool populations at the time the layoffs occurred. The plurality, on the other hand, was apparently discontent with the narrowness of her approach. One can only surmise that Justice Powell and the others saw the need to address a constitutional issue of this importance from the perspective of broader principles, and to construct a theory of affirmative-action/equal-protection analysis that would be instructive of the limits beyond which the state cannot go. Justice O'Connor would have done better to have joined that effort and used her influence to incorporate into the constitutional equation some of her Stotts philosophy about proper beneficiaries of "remedial" reverse discrimination.

Local 28, Sheet Metal Workers v. EEOC:

AGAIN THE SEARCH FOR NARROW BUT COMMON GROUND

The conciliatory tone that Justice O'Connor adopted in Wygant is totally lacking in her concurring/dissenting opinion in this case. Indeed, she could barely keep her pique under control. Her opinion does contain a common ground on which most of the Court could have stood, without abandoning any of their more fundamental beliefs about the permissibility of affirmative action, but once again she was unsuccessful in forging that consensus.

52 Nevertheless, one commentator has concluded that "the tenor of her opinion ... radiated a receptivity to the Powell position." Buchanan, Johnson v. Transportation Agency, Santa Clara County: A Paradigm of Affirmative Action, 26 Hous. L. Rev. 229, 262 (1989).


54 Wygant, 476 U.S. at 300 n.3. The only evidence of this consisted of certain extra-record "lodgings," in the form of statistical charts prepared by the plaintiffs. Justice Marshall, however, was not willing for the Court to engage in factfinding on this issue, suggesting that if the matter were relevant then it should be a subject of inquiry on remand.

This case involved a labor union and its affiliated apprenticeship committee that had been found guilty of racial discrimination in the administration of its apprenticeship and membership admissions policies. Among the remedies ultimately imposed by the district court were the establishment of a fund designed to increase the pool of qualified minority applicants and the establishment of a goal of 29.23% minority membership by a date certain. The union challenged these remedies on both statutory and constitutional grounds, with their principal argument being that “they extend race-conscious preferences to individuals who are not the identified victims of petitioner’s unlawful discrimination.”

The Court upheld the imposition of these remedies. There was, however, no majority opinion on the critical affirmative action issue. Justice Brennan wrote a plurality opinion, which was joined by Justices Marshall, Blackmun, and Stevens. Justice Powell agreed with the result, on essentially the same grounds as the plurality, but explained and justified it in less sweeping terms than Justice Brennan. On the affirmative action issue, Justice O'Connor dissented, as did Justices White and Rehnquist and Chief Justice Burger.

The union had argued that a requirement that it grant membership preferences to minority applicants was expressly prohibited by section 706(g) of Title VII, the last sentence of which in essence prohibits a court from ordering a union to admit an individual who was “refused admission . . . for any reason other than discrimination.” Adopting his version of a “plain meaning” interpretation of the statute, Justice Brennan concluded that this does not literally say that affirmative relief must be limited to the specific victims of past discrimination. Justice Brennan concluded, moreover, that such relief was indeed consistent with the broader purposes of the act, that it was supported by, rather than inconsistent with, the legislative history, and that such relief was not foreclosed by the Court’s decision in Stotts. In that regard, Justice Brennan admitted that there was language in Stotts which seemed to preclude the award of affirmative relief to any non-victims. First intimating that this was mere dicta, he nevertheless went on to distinguish Stotts on the ground that the affirmative relief there flowed to specific individual non-victims while the affirmative relief in this case flowed to the entire class.

With respect to when this type of affirmative action relief could be ordered, Justice Brennan laid down a four-pronged test: (1) that such relief be necessary to remedy the discrimination and erase its lingering effects; (2) that the percentage figure be regarded as a flexible goal rather than a strict racial quota; (3) that it be a temporary measure; (4) and that it not unnecessarily trammel the rights and interests of non-minority employees. He concluded that the order in this case met all the requirements.

In dealing with the equal protection issue, Justice Brennan admitted a lack of

56 Id. at 440.
Court consensus on the proper test, but said the order in this case satisfied even the most stringent one. Despite the fact that his was only a plurality opinion with respect to the affirmative action issue, Justice Brennan nevertheless put together a statement of the "holding" which he said six members of the Court agreed to, namely "that a district court may, in appropriate circumstances, order preferential relief benefiting individuals who are not the actual victims of discrimination as a remedy for violations of Title VII."\(^{58}\) Justice Brennan obviously recognized the centrality of that point in the entire affirmative action debate and was thus determined to get it on the record:

It is against the background of the plurality opinion that Justice O'Connor's concurring/dissenting\(^{59}\) opinion must be viewed. She first briefly took Justice Brennan to task for his contrived and cavalier treatment of the \(\textit{Stotts}\) case, which she said read section 706(g) "as embodying a policy against court-ordered remedies under Title VII that award racial preferences in employment to individuals who have not been subjected to unlawful discrimination."\(^{60}\) But conceding Justice Brennan's point that a majority of the Court was now willing to allow some court-ordered affirmative relief to non-victims,\(^{61}\) she then proceeded to base her dissent on narrower grounds.

Seizing upon Justice Brennan's distinction between permissible goals and impermissible quotas, she argued with considerable vigor that remedial racial quotas were absolutely prohibited by the statute. She derived this from section 703(j) which provides that "nothing contained in this sub-chapter [including, she said, the remedial power granted by section 706(g)] shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group . . . on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . employ[ed] by any employ[er]."\(^{62}\) She then proceeded to distinguish permissible goals from impermissible quotas, as follows:

To be consistent with §703(j), a racial hiring or membership goal must be intended to serve merely as a benchmark for measuring compliance with Title VII and eliminating the lingering effects of past discrimination, rather than as a rigid numerical requirement that must unconditionally be met on pain of sanctions. To hold an employer or union to

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\(^{58}\) \textit{Local 28,} 478 U.S. at 482. The six consisted of the four who subscribed to the plurality opinion itself (Justices Brennan, Marshall, Blackmun, and Stevens), plus Justice Powell who concurred separately and Justice White who, though he dissented, did make that concession.

\(^{59}\) The concurring aspects of her opinion were limited to the Court's conclusions about the propriety of the statistical evidence that the district court relied on, the non-punitive nature of the contempt citations, and the authority of the district court to appoint an administrator. On the critical affirmative action issue, her opinion is pure dissent.

\(^{60}\) \textit{Local 28,} 478 U.S. at 489.

\(^{61}\) Justice Rehnquist, joined by Chief Justice Burger, held firm to the position that section 706(g) does not allow "the granting of relief to those who were not victims at the expense of innocent non-minority workers injured by racial preferences." \textit{Id.} at 500.

achievement of a particular percentage of minority employment or membership, and to do so regardless of circumstances such as economic conditions or the number of available qualified minority applicants, is to impose an impermissible quota. By contrast, a permissible goal should require only a good faith effort on the employer's or union's part to come within a range demarcated by the goal itself.63

Relying then on the mandatory language of the district court order and the analysis of Judge Winter's dissent in the Court of Appeals, Justice O'Connor found that under this test the remedial order qualified as a quota rather than a goal. Justice White agreed with that assessment,64 and Justice Powell would have agreed but for the fact that the district court had previously enforced its order in a flexible rather than a rigid manner.65

Instead of standing fast to her position in Stotts that section 703(g) precludes the award of any affirmative relief to non-victims, Justice O'Connor's endless search for the middle ground led her instead into the Serbonian Bog66 of the hazy distinction between "goals" and "quotas."67

Local 93, Firefighters v. Cleveland:68

A CONCURRENCE WITHOUT A PURPOSE

The issue in this case was whether section 706(g) precludes court approval of a consent decree which affords preferential promotion treatment to minority employees who were not shown to have ever been the victim of the employer's discriminatory practices. As Justice Rehnquist argued vigorously in his dissent, one would have thought the issue had been resolved by the decision in Stotts.

Justice Brennan, however, again narrowly construed Stotts. His interpretation of the decision to which he originally dissented was that it merely held that section 706(g) imposed a limit on the power of the district court to unilaterally modify a consent decree over the objections of the parties, but that the section imposed no

63 Local 28, 478 U.S. at 495.
64 Id. at 499-50 (agreeing with Judge Winter's conclusion that as a practical matter compliance with the order would require the displacement of nonminority members).
65 Id. at 489 n.4.
66 "A gulf profound as that Serbonian bog . . . where armies whole have sunk." J. MILTON, PARADISE LOST, Book II, 1.592. The reference is to a "large marshy tract of land in the northern part of ancient Egypt in which entire armies are said to have been swallowed up." The Random House Dictionary of the English Language 1302 (1966).
67 The parties in Regents of the Univ. of Cal. v. Bakke, 438 U.S. at 288, had engaged in the same fruitless quibbling over whether to label the medical school's preferential admissions policy the establishment of a "goal" of the filling of a "quota." As Justice Powell correctly pointed out, "this semantic distinction is beside the point." Id. at 289. See also, Abram, Affirmative Action: Fair Shakers and Social Engineers, 99 HARV. L. REV. 1312, 1320 (1986).
limits on consent decrees that were the result of voluntary agreement. The relevant limits, rather, were those contained in the substantive provisions of section 703 of the statute, as construed by Weber.

Justice O'Connor concurred, in her shortest affirmative action opinion yet, explaining that "I write separately to emphasize that the Court's holding is a narrow one." It is not clear what Justice O'Connor thought she was accomplishing by this. Justice Brennan had four other subscribers to his opinion anyway, making it a true majority opinion, and her concurrence thus in no way limits the precedential significance of the case. Indeed, it is not even clear what she objected to in Justice Brennan's opinion. Her primary focus was in assuaging Justice White's fear that the decision eliminated the need for any factual predicate for the adoption of race-conscious practices, which she says is not what the Court held or even suggested. Beyond that, while she attempts to strip the majority opinion bare of everything but its holding, she does not provide any alternative explanation for the decision.

Three unadorned points thus emerge from her concurring opinion. First, she believes that voluntary affirmative action plans are to be evaluated under the substantive provisions of section 703, presumably as construed by Weber, while the validity of court-ordered affirmative relief must be judged under section 706(g). While this is technically correct, it does not address the question of why the policy of section 706(g) should not be read into the section 703 substantive provision. Second, she apparently believes that the standards are different; while section 706(g) prohibits a court from ordering preferential treatment to anyone but a proven victim, section 703 presumably allows for some degree of greater latitude in this regard. This leaves unanswered the critical question of how much more latitude is allowed, and why. And third, she believes that consent decrees fall in the "voluntary" rather than "court-ordered" category. Given her expertise as a proceduralist, it would have been interesting to have seen her attempt to deal with Chief Justice Rehnquist's dissent on that point.

In sum, while Justice O'Connor's position is sometimes unclear when she explains it, as in the earlier cases, it is doubly so when she does not, as in this case.


**NO AFFIRMATIVE ACTION IN TERREX**

This case marks the entrance of Justice O'Connor's first full-blown dissent. It

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69 Id. at 530.
70 It has been reported by a former clerk to Justice Brennan that during his tenure of employment Justice O'Connor was "especially reluctant to join Brennan's opinions, even when her own positions were similar, whether because she was 'uncomfortable with the rhetoric, or uncertain what little time bombs had been planted by Brennan's clerks and wanted to make her understanding of the Court's holding clear.'" Taylor, supra note 42, at 68.
involved what was repeatedly referred to as "pervasive, systematic, and obstinate discriminatory conduct" by the Alabama Department of Public Safety and its continued refusal to develop a promotion policy that did not have an adverse effect on Black troopers. Ultimately, the federal district court imposed a one-for-one promotional quota that was subject to three conditions: the existence of qualified Blacks, an under representation of Blacks in the higher rank, and the absence of a departmentally developed promotion plan that did not have an adverse impact.

Justice Brennan announced the judgment of the Court and delivered a plurality opinion which Justices Marshall, Blackmun, and Powell joined. Again noting the lack of consensus on the proper standard for evaluating equal protection claims, Justice Brennan nevertheless opted for an application of the strict scrutiny test, and proceeded to show how the district court's fifty percent promotion quota survived even that more stringent standard.

Justice Stevens took the position that judicial discretion in ordering affirmative race-conscious relief was subject only to a requirement of "reasonableness." Although on this point Justice Stevens was apparently in disagreement with the entire Court, he chose to blame Justice O'Connor for advancing "the novel theory" that some stricter standard of review is necessary.

Justice O'Connor did indeed dissent, in an opinion joined by Chief Justice Rehnquist and Justice Scalia; Justice White said that he agreed with "much" of what she said. True to form, Justice O'Connor rested her case on relatively narrow factual grounds, rather than on any broad constitutional principles. Her point was this: "The order at issue in this case clearly has one purpose, and one purpose only -- to compel the Department to develop a promotion procedure that would not have an adverse impact on blacks." Since that objective could be achieved by alternatives not involving racial classifications, alternatives which the district court did not even consider, she concluded that the one-for-one promotion quota was in no way "necessary" or "narrowly tailored" and that Justice Brennan's purported application of a strict scrutiny test was thus a sham. To the contrary, she concluded that "given the singular in terrorem purpose of the district court order, it cannot survive

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72 Id. at 167 (Justice Brennan's plurality opinion) & 196 (quoted in Justice O'Connor's dissenting opinion).
73 The ultimate objective was to attain a 25% Black representation, since that reflected the percentage of Blacks in the relevant labor market.
74 Paradise, 480 U.S. at 190.
75 Id. at 190 n.1.
76 Professor Graglia has observed that "[b]ecause she refused to reject the fundamental fallacy that granting benefits to some individuals on the basis of race can be justified as a remedy for injuries to different individuals, she could not argue that all such discrimination was impermissible, and she was reduced to quibbling about when, according to her more fastidious taste, it would be permissible." Graglia, The "Remedy" Rationale for Requiring or Permitting Otherwise Prohibited Discrimination: How the Court Overcame the Constitution and the 1964 Civil Rights Act, 22 SUFFOLK U.L. REV. 569, 605 (1988).
77 Id. at 197.
78 Id. (the plurality "purports to apply strict scrutiny"); Id. at 200 (the plurality, "purporting to apply strict scrutiny").
strict scrutiny."’

Johnson v. Transportation Agency, Santa Clara County.

STARE DECISIS, STATISTICS, AND SEX

Since in the past women “had not been strongly motivated to seek training or employment” in the skilled positions with the Santa Clara County road department, the result was that there were no women in those positions, even though women constituted approximate thirty-six percent of the area labor force. Apparently believing this raw statistical disparity was itself evidence of some kind of social evil requiring governmental correction, the Agency set about to alter those statistics by adopting an “‘Affirmative Action Plan.’” Parity was established as a long-term goal, with the more realistic short-term goal of the “‘social engineers’” being that of merely taking sex “‘into account’” when making employment and promotion decisions.

When the promotional position of road dispatcher became available, twelve employees applied for it. Seven of these were certified as eligible for appointment, including Paul Johnson (male) and Diane Joyce (female). Johnson scored higher on the initial interview than Joyce, and after a second interview a panel of agency supervisors recommended that Johnson be promoted. Prior to the second interview, Joyce contacted the County Affirmative Action Office, who contacted the Agency’s Affirmative Action Coordinator, who then intervened with a recommendation that Joyce be promoted. The head of the Agency, who had discretion to promote any of the seven, chose Joyce. Johnson brought suit under Title VII.

Speaking for a majority of five, Justice Brennan stated that the legality of the affirmative action plan was to be determined under the Weber criteria -- i.e., the existence of a “‘conspicuous . . . imbalance in traditionally segregated job categories,’” a plan to correct this unbalance which does not “‘unnecessarily trammel the interests of the white employees’” (e.g., result in anyone’s discharge), which does not

79 Id. at 199.
81 Id. at 621 (summarizing what was said in the Agency’s affirmative action plan).
82 The term is derived from Abram, Affirmative Action: Fair Shakers and Social Engineers, 99 HARV. L. REV. 1312, 1313 (1986):

During the late 1960s, the civil rights community began to splinter and, certainly by the mid-1970s, much of its leadership had become preoccupied with equality of results. . . . Absent discrimination, these result-oriented leaders claimed, all groups would be represented in the institutions and occupations of society roughly in proportion to their representation in the population. These leaders continue to believe that the only way to measure equality is in terms of such representation, and that it is the government’s role to bring about proportional representation in short order. Because this new vision of the civil rights movement requires the attainment of predetermined ends, rather than the abolition of barriers to fair participation, I will call its adherents “‘social engineers.’"
create "an absolute bar to the advancement of white employees," which is designed as a temporary measure to "eliminate a manifest racial imbalance" rather than maintain a racial balance. He concluded that the Agency affirmative action plan, as applied to Joyce, satisfied those criteria.

Justice O'Connor refused to join the majority opinion, because of its "‘expansive and ill-defined approach to voluntary affirmative action by public employers.’" Apparently, the bone of contention lay in the majority's refusal to read constitutional constraints into Title VII when the statute is being applied against a public employer. The majority read Weber as merely requiring the existence of a "‘conspicuous . . . imbalance in traditionally segregated work categories,’" regardless of whether that imbalance was of such statistical significance as to also constitute proof of a prima facie case of discrimination by the employer in question. In Wygant, however, for constitutional purposes the factual predicate of an affirmative action plan was said to be the existence of a "‘firm basis’" for believing that remedial action was necessary, which was then defined in terms of a statistical disparity sufficient to support a prima facie case.

Although that was the point of difference, Justice O'Connor's position is not entirely clear. If her concurring opinion is read narrowly, then it merely says that the stronger factual predicate of Wygant is read into Title VII only when a public employer is involved. However, she nowhere expressly limits her theory in that fashion. To the contrary, she asserts that Weber and Wygant involved the same underlying concerns, and concludes that the Wygant analysis is entirely consistent with the Weber analysis. That conclusion, however, is untenable in light of the Court's studied refusal in Weber to adopt the "‘arguable violation’" theory of Judge Wisdom, who had dissented below. It would thus appear that Justice O'Connor's penchant for stare decisis, which led her to refuse to join the dissent in overruling Weber, does not preclude some imaginative reinterpretation of the precedent, in a manner reminiscent of Justice Brennan's treatment of Stotts.

Justice O'Connor then purports to apply her test to the facts of this case, emphasizing the importance of paying close attention to both the affirmative action plan and the manner in which it was applied with respect to Joyner and Johnson. She notes that the long-term goal was to obtain a parity between the percentage of women employed by the Agency and the percentage of women in the Santa Clara County workforce. She then says that if the Agency had used this goal in making hiring decisions, it would have violated Title VII. This is true, because that statistical

83 Johnson, 480 U.S. at 648.
84 Compare her comments, id. at 649, with the majority's response, id. at 627 n.6 & 632.
85 That is certainly an element of her original statement of the thesis. "In my view, the proper initial inquiry in evaluating the legality of an affirmative action plan by a public employer under Title VII is not different from that required by the Equal Protection Clause." Id. at 649 (emphasis added).
87 Johnson, 480 U.S. 648.
disparity would not be probative under the Teamsters prima facie case analysis. Rather, she said that to constitute a permissible goal, the desired parity must be between the percentage of women employed by the Agency in the relevant job and the percentage of qualified women in the area workforce. She then compared the percentage of women employed by the agency in skilled craft positions (none) with the percentage of qualified women in the area workforce (5%), and concluded that the Agency thus had a "firm basis" for believing that remedial affirmative action was justified.

The Johnson facts may reveal how Justice O'Connor's "factual predicate" for affirmative action differs slightly from a total Stage I proof of discrimination under Teamsters. In a systemic disparate treatment class action, the plaintiffs would undoubtedly attempt to establish the prima facie case by using the comparison referred to by Justice O'Connor. This would not, however, constitute a liability-attaching proof of discrimination until these statistics survived the employer's rebuttal evidence. When the percentage of qualified women in the area workforce is as low as it was in this case, an employer could undoubtedly neutralize the plaintiff's statistics with counter-statistics -- namely, a comparison of the percentage of women employed by the Agency in these job categories with the percentage of qualified applicants with this specific employer.88

Justice O'Connor apparently would not consider these counter-statistics relevant to the question of whether an employer had the requisite "factual predicate" for adopting an affirmative action plan of some kind.89 But these counter-statistics should be relevant to Justice O'Connor in determining what kind of affirmative action is permitted. If the plaintiffs in this case could have shown that the applicant flow was sufficiently low so as to make the disparity statistically insignificant, then the "inexorable zero"90 number of women in skilled positions at the time the affirmative action plan was adopted would have to be explained by reference to so-called "societal discrimination" -- namely, the sterotypcial notion that road maintenance is not "women's work." Justice O'Connor could have then further reasoned that while government may have a legitimate or at least unobjectionable interest in remedying that kind of past discrimination through active recruitment and encouragement of women to enter the field, the holding in Wygant precludes the use of "societal discrimination" as the justification for affirmative action in the form of preferential treatment by a government agency that had not in fact previously discriminated.

88 Indeed, the Supreme Court in Teamsters recognized the superiority of actual applicant flow data, although it allowed the use of more generalized statistics in that case. Teamsters v. United States, 431 U.S. at 342 n.23. And applicant flow data is frequently used to rebut the plaintiffs' more generalized statistics. See, e.g., Lee v. Washington County Bd. of Educ., 625 F.2d 1235, 1238 (5th Cir. 1980); Valentino v. U.S. Postal Serv., 511 F. Supp. 917, 953 (D.D.C. 1981), aff'd, 674 F.2d 56 (D.C. Cir. 1982).
89 And perhaps this is what she means when she says that her statistical imbalance approach does not require an employer to "prove" its prior discrimination. Johnson, 480 U.S. at 652.
90 Id. at 657 (quoting from Teamsters, 431 U.S. at 342 n.23).
Justice O’Connor did not take that approach. Rather, having established the necessary “firm basis” for an affirmative action plan of some kind, Justice O’Connor then proceeded to evaluate preferential treatment aspects of it from a far more tolerant perspective. In this regard, she agreed with Justice Scalia that “an affirmative action program that automatically and blindly promotes those marginally qualified candidates falling within a preferred race or gender category” would violate Title VII.91 Justice O’Connor, however, goes on to say that this is not such a case because the Director of the Agency, in addition to Joyce’s sex, also took into account the relative qualifications, test score, experience, and background.

Like Justice Powell in Bakke, Justice O’Connor obviously believes that using race or sex as merely a “plus factor” somehow excuses or justifies the resulting discrimination against a person not sharing that racial or sexual characteristic.92 However, she fails to explain why that is so.93 A decision-maker’s alleged reliance on a variety of criteria, with race or sex only being “one factor,” may have the appearance of greater fairness and of thus modulating the harm to employees who lack that factor. To be sure, it gives the white male a chance to compete that is lacking when race or sex is an absolute prerequisite. And in this case the Agency Director said that if Joyce’s experience had been less than Johnson’s by a greater margin than it was, then he might have gotten the promotion.94 That, however, was of small consolation to Johnson. Because of his sex, greater experience requirements (which he lacked) were imposed on him than were imposed on her. Thus, even though it was only “one factor” in the decision, it was also the decisive one; sex was as much a “but for” cause of his non-promotion as sex would have been were it the sole and absolute prerequisite. In sum, Justice O’Connor’s disagreement with Justice Scalia is based on a distinction without a difference.

The broader implications of Justice O’Connor’s concurring opinion are even

91 Id. at 656.
92 On the other hand, in Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989), involving proof of causation in a mixed motive employment discrimination case, Justice O’Connor indicated that even if race or sex is nothing more than a “substantial factor” in reaching a negative employment decision (i.e., a “minus” rather than a “plus” factor), this nevertheless satisfies the first step in the proof of a Title VII violation. Id. at 1798. Justice O’Connor, thus, uses the same “additional factor” analysis to both establish illegal discrimination, on the one hand, and to justify its exercise, on the other. This is nonsensical. If affirmative discrimination is going to be justified, it must be by reference to something other than the fact that it is discriminatory.
93 Regents of the Univ. of Cal. v. Bakke, 265 U.S. at 317 (opinion of Powell, J.); see also, Fullilove v. Klutznick, 448 U.S. at 498-99 (Powell, J., concurring). Justice Powell, however, used the “plus factor” analysis within the context of an admissions program that was designed to serve the school’s interest in achieving a diverse student body; in that context there is a rational nexus between the interest and the means being used to serve it. But the state interest in Johnson, according to Justice O’Connor’s theory, was presumably that of remedying prior discrimination, not in achieving sexual diversity for its own sake. And it is not clear how the “plus factor” approach relates to or serves that remedial interest. To the contrary, it would seem that an absolute rather than a relative preference would be more logical.
94 Johnson, 480 U.S. at 656. This is like telling him that he would have won the race if he just could have run his 120 yards faster than she ran her 100 yards. That is hardly more fair than disqualifying him from the race altogether.
more troubling. First, she unwittingly but implicitly recognizes as a legitimate goal, under both the statute and the Constitution, the achievement of fixed ethnic and sexual employee ratios. That is why the Transportation Agency adopted its affirmative action plan. Although Justice O'Connor tries desperately to fit this case into a remedial mold, she is ultimately unsuccessful in either altering or disguising its true shape. It is thus unfortunate that she did not simply condemn it for what it was.\(^9\)

Second, under her approach, if the requisite statistical disparity exists, then there are virtually no practical limits on an employer’s power to engage in reverse discrimination. Justice O'Connor’s ‘‘plus factor’’ analysis is simply an invitation to fraud. How is a court to determine whether an employer really used race or sex merely as a weighted ‘‘plus factor’’ rather than as the sole or determinative factor? Most employers who adopt affirmative action plans -- usually out of fear of litigation, loss of government contracts, or just bad publicity -- are interested in achieving results (proper employment statistics), not in the fairness of the process (taking many factors into account). The easiest way to achieve those results is to exercise an absolute preference until the desired parity is reached. Justice O'Connor says you cannot do that, because it is not fair to non-minorities. But she then allows employers to accomplish exactly the same result, subject only to the requirement that they go through the motions of considering and weighing a variety of factors.\(^9\)

Justice O'Connor’s concurring opinion in Johnson makes a mockery of her assertion in Hogan that gender-conscious decision making is permissible under the Equal Protection clause in only ‘‘limited circumstances.’’\(^9\) To the contrary, her approach sanctifies affirmative action in its most common and widespread form. The inexplicability of Justice O'Connor’s concurring opinion in this case has thus led some to suspect that she was simply unwilling to deny to Joyce what she herself had been the beneficiary of -- namely, a ‘‘plus factor’’ form of sex-based affirmative action.\(^9\)

One early commentator, recognizing the irony of a conservative/female affirmative action appointment to the Supreme Court, described Justice O'Connor’s

\(^9\) Accord, DeFunis v. Odegaard, 416 U.S. at 342 (Douglas, J., dissenting) (‘‘The Equal Protection Clause commands the elimination of racial [and sexual] barriers, not their creation in order to satisfy our theory of how society ought to be organized’’); Fullilove, 448 U.S. at 529 (Stewart, J., dissenting) (‘‘since the guarantee of equal protection immunizes from capricious governmental treatment ‘persons’ -- not ‘races,’ it can never countenance laws that seek racial balance as a goal in and of itself’’).

\(^9\) Critics have claimed that the ‘‘one factor’’ approach of Bakke is being used by law school admissions committees as a verbal facade behind which they hide what is in fact a policy of admitting a fixed number of percentage of minority students. In Marsh v. Board of Educ., 581 F. Supp. 614, 625-26 n.64 (E.D. Mich. 1983), the court said it hoped this was not happening. ‘‘The Tartuffe of the law would be the law school professor who lectures his students in the morning on the devious way by which the southern school districts avoided Brown v. Board of Education and then -- later in the day -- devises strategies for evading and frustrating the law of Bakke.’’ Justice O'Connor’s ‘‘one factor’’ approach to affirmative action is subject to the same potential for manipulation.

\(^9\) Hogan, 458 U.S. at 728.

\(^9\) Graglia, supra note 76, at 614.
dilemma in the following terms:

While she accepts the inevitability of her representative role with grace, she looks ahead to the time when sex identity will lose its significance in the selection of public officials. She has an ideal of the sex neutrality in political roles which is in advance of the culture. . . .

In *Johnson*, Justice O'Connor may have indeed played a "representative role" pleasing to those of the feminist persuasion. In the next case, however, she comes much closer to her ideal -- and with a delightful vengeance!

*City of Richmond v. J.A. Croson Company.*

A DEATH KNELL FOR AFFIRMATIVE ACTION?

This case involved a Richmond, Virginia, thirty percent minority business set-aside ordinance. A six to three majority of the Supreme Court agreed that the ordinance violated the equal protection clause. Although the majority view was expressed in four separate opinions, a strong anti-affirmative action coalition seemed to be drawing together. Justice Marshall offered fierce and lengthy resistance, but he was eventually forced to concede the battle and, for the moment, the larger campaign against strict scrutiny of race-conscious remedial efforts. And though far from surrendering the cause altogether, Justice Blackmun's short but melancholy dissent was surely reflective of the gloom in the liberal camp.

The case was seen by many as sounding the death knell for affirmative action, and Justice O'Connor delivered the principal eulogy. Although she was unable to garner majority support for all of her points, Justice O'Connor advanced them with unusual vigor and style. She overcame a difficult precedent upholding a similar kind of affirmative action; she hammered home the need for strict scrutiny of all racially-based governmental decisions, whether benign or otherwise; and she demonstrated that her requirement of a "factual predicate" had some teeth to it.

In justifying its set-aside program, the City relied primarily on the Supreme Court's prior decision in *Fullilove v. Klutznick*, which upheld a ten percent federal set-aside on behalf of minority government contractors. Croson relied on *Wygant*, and successfully convinced the court of appeals that since the city had not shown that it had previously discriminated against minority contractors, the factual predicate for affirmative action was lacking. Justice O'Connor found that neither case was controlling.

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101 448 U.S. 448 (1980).
Central to her treatment of both cases is the implicit assumption that employment affirmative action must be justified by reference to remedial purposes. With respect to Wygant, Justice O’Connor then drew a distinction between affirmative action in government employment and affirmative action in government spending. Although her explication of this distinction is less than clear, it apparently turns on the potential that each form of government action has for being remedial (albeit still not in the victim-specific sense of the word). In the hiring context, affirmative discrimination by a government agency can serve to remedy either so-called “societal discrimination” which has produced certain employment patterns or prior discrimination by the specific government agency itself. In Wygant, the Court said that the former remedial purpose was impermissible, thus leaving nothing but the latter as the necessary factual predicate. Government spending, however, has the potential for “remedying” prior discrimination by identifiable actors other than the spending agency itself -- namely prime contractors who may have discriminated against minority-controlled subcontractors. In other words, she was apparently saying that Wygant merely held that an affirmative action actor cannot attempt to remedy societal discrimination; Wygant did not say that the prior discrimination had to be limited to the affirmative action actor personally -- thus leaving it open to allow an affirmative action actor to also attempt to remedy the discrimination of someone for whom the actor was indirectly responsible.

With Wygant out of the way, Justice O’Connor then turned to Fullilove. Like many of the Supreme Court’s affirmative action cases, there was no majority opinion in that case, which made it ripe for being restated in newer terms and then distinguished. Justice O’Connor’s restatement, however, again failed to garner a majority -- thus leaving the exact nature of the relationship between the two cases something of a mystery.

It would have been better if she had simply repudiated the decision as standing for nothing. Instead, she began with Chief Justice Burger’s plurality opinion which had emphasized that Congress had an express power under section 5 of the fourteenth amendment to enforce the equal protection guarantee, a power not granted to the states. This seems to be saying that “a law that is an equal protection violation when enacted by a State becomes transformed into an equal protection guarantee when enacted by Congress,” a proposition to which Justice Kennedy could not assent. Although she obviously did not explicate her position with sufficient clarity to satisfy Justice Kennedy, one can assume that Justice O’Connor was saying some-
thing less nonsensical than that. The clue may lie in her quotation from Justice Powell's concurring opinion, to the effect that "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." This distinction between the required degree of specificity, more for states than the federal government, is supported both by considerations of federalism, which Justice O'Connor emphasizes were altered by the Civil War Amendments, and by the notion of separation of powers. Supreme Court deference to the factual findings of Congress is one thing; Supreme Court deference to the Richmond City Council is quite another.

Once again, by splitting some very thin hairs, Justice O'Connor staked out a ground that was too narrow for three of her concurring colleagues -- Justices Kennedy, Stevens, and Scalia. This failure to deal decisively with Fullilove would come back and haunt Justice O'Connor in Metro Broadcasting.

Next, Justice O'Connor defended again the strict scrutiny approach to equal protection issues involving race, regardless of who is benefited or burdened by the classification scheme. Here, Justice O'Connor is at her finest, speaking with clarity and moral conviction.

In defending what is sometimes referred to as the "colorblind" theory of equal protection, she emphasized that fourteenth amendment rights attach to the individ-

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106 Id. at 719 (emphasis added) (quoting Fullilove, 448 U.S. at 515-16 n.14). The unitalicized portion of the quote is still troublesome, in that it suggests that some form of affirmative action could be regarded as a remedy for prior equal protection violations when enacted by the federal government, but an equal protection violation in its own right when enacted by state governments. That is, since state power is limited only by the constitutional constraints, to the extent that federal power is substantively "broader" this necessarily means that it empowers the Congress to violate the Constitution -- an extraordinary internal inconsistency that Justice Powell surely did not intend to read into the document.

107 Justice Kennedy stated that obvious but easily overcome objection to the reconciliation of Fullilove and City of Richmond upon federal versus state lines. However, his real basis for refusing to join Justice O'Connor was that the issue was not before them. Apparently, he was willing to leave Fullilove to dangle in the wind, pending a proper opportunity to overrule it.

108 Justice Stevens dissented in Fullilove, and he was apparently still not willing to concede the correctness of the result, as Justice O'Connor position implicitly does.

109 The term derives from the dissent of the first Justice Harlan in Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), where he rejected "separate but equal" as a viable constitutional doctrine. His position was ultimately vindicated in Brown v. Board of Education, 347 U.S. 483 (1954), albeit on the basis of sociological considerations rather than moral or constitutional principles.

The "colorblind" theory of constitutional law is, of course, a great stumbling block to the proponents of affirmative action, who dismiss it as a "myth" and a "slogan" and exercise great ingenuity in attempting to prove that it does not really mean what it says. See Strauss, The Myth of Colorblindness, 1986 SUP. CT.
ual," thus making membership in any particular racial group irrelevant to the quantum of an individual's right of equal treatment. Quoting from Justice Powell's decision in *Bakke*, she reaffirmed 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."  

Next, she pointed out that allegedly benign but non-remedial racial classifications carry a danger of stigmatic harm, in that "they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." Strict scrutiny is thus necessary, she said, to distinguish racial preferences that are truly remedial from those that are not.

She also stated that while racial classifications may be allowed to serve short-term remedial goals, the "ultimate goal" is to eliminate "entirely from governmental decision making such irrelevant factors as a human being’s race," and that strict scrutiny is necessary in order to make that a reality. Agreeing with Justice Powell's observation in *Bakke* that the mere desire to have more Black medical students and doctors was nothing more than "discrimination for its own sake," she likewise implicitly rejected the notion that there is something intrinsically good about proportionate racial and sexual representation in all aspects of American life, which is the unstated premise of most non-remedial affirmative action plans -- including the one that she approved in *Johnson*.

And finally, though she deals with it gingerly, she recognized that the City of Richmond's seemingly high-minded affirmative action on behalf of powerless minorities may have actually been nothing more than the raw exercise of political power by the dominant racial group. Thus, whatever justification there might be for applying a relaxed standard to decisions by a racial majority to enact classification which disadvantage itself, she said those justification were inapposite here.
In sum, although all of what Justice O’Connor said here was in the context of justifying the strict scrutiny test, her comments are also germane to the question of which racial classifications can ever satisfy that test. The implications of this are far more significant than the Court’s intramural quarrel over the proper test to use.

In any event, Justice Kennedy joined Chief Justice Rehnquist and Justice White in this portion of Justice O’Connor’s opinion, and since Justice Scalia likewise agreed that strict scrutiny was the appropriate test, this established for the first time a majority on the standard of review issue.

The question before her was thus narrowed to this: Did the City of Richmond have strong basis for believing that remedial action was appropriate (i.e. that it or its prime contractors had previously discriminated against minority contractors and sub-contractors) and if so was the minority set-aside program narrowly framed to serve that remedial purpose?

In Parts III.B and IV, which had majority support, Justice O’Connor proceeded to show that the City Council had relied on little more than generalized assertions of past discrimination and had not even considered the use of race-neutral means for increasing minority business participation in city contracting. The details of that factual analysis, and of Justice Marshall’s careful rebuttal need not concern us. What is significant is the fact that Justice O’Connor still implicitly accepts the proposition that prior discrimination against one member of the minority class can justify later “remedial” discrimination in favor of another member of the minority class. Her disagreement with Justice Marshall was simply over the sufficiency of the proof of the prior discrimination.

In contrast, Justice Scalia circumvented that whole factual controversy by rejecting the underlying premise. In essence, his point was that affirmative

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116 City of Richmond, 109 S. Ct. at 735. Rather than debate over which standard of review to use in affirmative action cases, Justice Stevens went off on an idiosyncratic evaluation of the disparate treatment by reference to “characteristics of the advantaged and disadvantaged classes.” Id. at 732. Seeing that the advantaged was not limited to prior victims and that the disadvantaged class was not limited to perpetrators, he concluded that the classification was based on purely stereotypical thinking that a hallmark of equal protection violations.

117 In Part V of her opinion, Justice O’Connor states in positive terms what a city might do in response to the problem of prime contractor discrimination against minority subcontractors. Apparently, neither Justice Scalia nor Justice Stevens was willing to join her in this gratuitous legal advice.

118 The logical converse is that discrimination by one member of the non-minority class will justify later reverse discrimination against another member of the non-minority class. In Fullilove, Chief Justice Burger had justified reverse discrimination against non-perpetrators in just those terms. He said that “in the past some non-minority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities.” Fullilove, 448 U.S. at 485 (emphasis added). Justice O’Connor’s requirement that the “factual predicate” of prior discrimination relate to the affirmative action actor (or those for which it might be indirectly responsible, e.g., discriminating contractors) implicitly rejects that proposition. However, by being perpetrator-specific but not victim-specific, Justice O’Connor’s approach seems to be more punitive than remedial.
discrimination could never be regarded as truly remedial unless it was in favor of the original victim -- which was clearly not the objective of the Richmond set-aside program. Justice O'Connor, however, was apparently not yet willing to accept that proposition, and chose instead to resolve the case on the narrower grounds of the lack of a factual predicate showing specific discrimination against anybody.

*Martin v. Wilks.*

**Justice O'Connor**

**Mute**

This is the only affirmative action case in which Justice O'Connor did not write an opinion of some kind. It is also the only affirmative action case ever to have only a majority and a dissenting opinion. Justice O'Connor was content to simply join the majority opinion, written by Chief Justice Rehnquist.

The case involved the question of whether a voluntary consent decree between a group of minority plaintiffs and a public employer could provide a defense to the employer in a reverse discrimination case brought later by a group of non-minority plaintiffs. The majority held that the doctrine of "impermissible collateral attack" did not immunize parties to a consent decree from charges of discrimination by nonparties for actions taken pursuant to the decree.

The *Martin* case was a significant defeat for the proponents forces of affirmative action; another nail in the coffin. Yet the decision was actually argued and decided on rather technical procedural grounds. Even the dissent, probably because it was written by Justice Stevens rather than one of the liberal troika, was devoid of the usual polemics. Thus, little can be said about Justice O'Connor's "silent concurrence" with the result. Certainly, it puts a limiting gloss on her Stotts emphasis of the finality of consent degrees. On the other hand, it is entirely consistent with her *Firefighters* view that consent decrees are more like voluntary affirmative action plans than they are injunctions and that the reverse discrimination resulting from them is as subject to challenge by a nonparty as was the affirmative action plan in *Weber.*

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119 On the other hand, she did regard as less "problematic" a set-aside program, like the one in *Fullilove,* which at least made provision for limiting the entitlement to minority businesses who could show that they were in fact still suffering from "the effects of past discrimination by the city or prime contractors." *City of Richmond,* 109 S. Ct. at 729. Thus, "actual victim" status seems to be an important consideration to Justice O'Connor, but not yet a controlling one.


121 Chief Justice Rehnquist wrote the majority opinion, and was joined by Justices White, O'Connor, Scalia, and Kennedy. Justice Stevens filed the dissenting opinion, which Justices Brennan, Marshall, and Blackmun joined.

122 More interesting in this regard would be a comparison of Chief Justice Rehnquist's position in this case with his dissent in *Firefighters.*
This case involved the constitutionality of a Federal Communication Commission policy of treating minority ownership and participation in management as a "plus factor" when granting licenses for new radio or television broadcast stations. Its companion case, Astroline Communications Co. v. Shurberg Broadcasting of Hartford, involved the constitutionality of an FCC "distress sale" policy of allowing a broadcaster whose qualifications to hold a license have come into question to transfer that license before an FCC hearing on the matter, but only if the transfer is to a qualified minority enterprise. In a five-to-four decision, the Supreme Court upheld the constitutionality of both policies.

Justice Brennan’s opinion for the Court, his last, is a tedious compendium of legislative history, social science studies, and self-serving FCC opinions and policy statements establishing that diversity of broadcast viewpoint is in the public interest and that the race of ethnic grouping of a broadcaster is a generally reliable determinant of the viewpoints of that broadcaster.

Having drunk deeply from the muddy waters of broadcast demographics and the sociology of race and culture, Justice Brennan then turned to the constitutional issue. The obstacle he had to overcome was the J.A. Croson case, where a majority of the Court held that even remedial or "benign" racial classifications were subject to strict scrutiny. Sensing that it would be difficult if not impossible for these policies to satisfy that test, Justice Brennan staged a brilliant maneuver. He simply recruited Justice White from the camp of the Croson strict scrutinizers, and the affirmative action "funeral procession" suddenly became a celebration.

Drawing then on the uncertain Fullilove/Croson distinction between federal and state reverse discrimination, Justice Brennan concluded that state action in this regard is subject to strict scrutiny while federal action, even when it is predicated on the commerce clause rather than section 5 of the 14th amendment, is entitled to a higher level of deference. "We hold that benign race-conscious measures mandated by Congress... 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." Although Justice O'Connor argued that the FCC policies could not even satisfy that intermediate level of scrutiny, Justice Brennan’s notion of what the test required was considerably more relaxed.

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123 110 S. Ct. 2997 (1990). This case was heard together with Astroline Communications Co. v. Shurberg Broadcasting of Hartford, Inc.
124 Id. at 3008-09.
Justice Stevans, jubilant that the Court had finally endorsed his non-remedial "future benefits" theory of affirmative action, filed a short concurring opinion.

Justice Kennedy, joined by Justice Scalia, wrote a trenchant dissent which compared the majority's allegedly "benign" racist mentality with that of the long-since repudiated "separate but equal" philosophy of Plessy v. Ferguson and with the current apartheid policies of South Africa. Displaying a delightful aphoristic ability, Justice Kennedy concluded by expressing regret that "after a century of judicial opinions we interpret the Constitution to do no more than move us from 'separate but equal' to 'unequal but benign.'"127

It was left to Justice O'Connor, however, to write the principal dissent, in which she was joined by the Chief Justice and Justices Scalia and Kennedy. Although it is a lengthy opinion, the salient points are easy to summarize. She repeats the points she made in Croson, namely that the Court should apply the same strict standard of scrutiny to evaluate all racial classifications -- whether they are imposed by the federal or state government. She then shows that the FCC policies in question do not pass that test. She strongly intimates that remedying prior discrimination is probably the only governmental interest that would be "compelling" enough to ever warrant racial classifications; and even if the classification is not thusly limited, increasing diversity of broadcast viewpoints would not qualify as "compelling" in any event. And even if it did, the use of race or ethnicity as a proxy for diversity of viewpoint does not reflect a narrow tailoring of the means to the desired end. This is because there are other alternatives available for achieving the desired diversity and because the alternative chosen by the FCC imposes an undue burden on those who do not happen to be members of the favored racial or ethnic groups.130

125 163 U.S. 537 (1896).
126 Justice Brennan apparently took great umbrage at this on the grounds that these examples were hardly of "benign" discrimination, while the FCC policies were. 110 S.Ct. at 3008 n. 12. The distinction between "benign" and "malicious" racial discrimination is not the point, however. The point is that both flow from the exact same rootstock idea that race is somehow a relevant, indeed important, determinant of human entitlement.
127 110 S. Ct. at 3047 (Kennedy, J., dissenting).
128 Justice O'Connor's explication of the Fullilove/Croson federal/state distinction continues to be somewhat uncertain. She again asserted, as she had in Croson, that Fullilove involved the exercise by Congress of its unique remedial power under section 5 of the 14th amendment to remedy identified past discrimination. 110 S. Ct. at 3030. Apparently, her point is that while the Equal Protection standard of review remains the same, i.e., strict scrutiny, it is easier for Congress to satisfy the test than it is for state and local governments. More telling is her point that the test Justice Brennan now reads into Fullilove is virtually identical to the test proffered there by Justice Marshall, but rejected by the majority. Id. at 3032.
129 She had left this possibility open in Wygant, 476 U.S. at 288 n.*. Now, however, she unequivocally states that "modern equal protection doctrine has recognized only one such [compelling] interest: remedying the effects of racial discrimination." 110 S. Ct. at 3034.
130 Justice O'Connor gives short shrift to the argument that nonminorities were not unduly burdened because race and ethnicity were only regarded as a "plus factor." She shows that it is of little consolation to a discriminated-against applicant to learn that race was only a factor" in the decision, when that factor turns out to be the dispositive one. 110 S. Ct. at 3043. This should be compared with her highly questionable analysis of the "plus factor" concept in Johnson. See text at notes 92-94, supra.
Justice O'Connor's argumentation of each of these points is meticulous, and she ultimately demonstrates that while the majority verbalizes an intermediate standard of review, in actuality it is applying little more than the toothless "rational relationship" test previously used only for evaluating economic regulations.\(^3\)

The previous description of Justice Brennan's points, and Justice O'Connor's counterpoints is, however, enormously superficial. Yet, most of the Supreme Court debate has been superficial. Certain fundamental premises were always implicit in the opinions, but they were only implicit. However, in Metro Broadcasting -- although they are sometimes still buried "between the lines" and otherwise scattered among the discussion of the proper test and other detritus of constitutional jurisprudence -- the more fundamental premises of the Justices are finally becoming evident.\(^3\) And they confirm the obvious, namely that on affirmative action the Supreme Court is now deeply and irreconcilably divided.

The division occurs over two distinct but closely affiliated points. The first relates to the relative importance of race and ethnicity in defining our "identity" as human beings. The second relates to whether humans are to be viewed primarily as individuals or merely as fungible components of a larger group, which in the affirmative action context would be determined by race or ethnic background.

Justice Brennan's contingency apparently believes that race and ethnicity not only do play a major role in defining who we are, thus influencing our perceptions and opinions over a broad spectrum of issues;\(^3\) he also apparently believes that this is desirable. There are and should be distinct "Black," "Arab," "Hispanic," etc. interests, viewpoints, and cultural preferences. The object, thus, is not to integrate these racial and ethnic groups into a larger national community; the object, rather, is to insure that each group receives its "fair share" of the nation's social, economic, and political benefits.\(^3\)

In Justice Brennan's view, race and ethnicity are not only important. In addition, when dealing with them the focus should be on the racial or ethnic group itself. He readily admits that the notion of a "Black" or "Hispanic viewpoint"

\(^{131}\) 110 S. Ct. at 3029; see also, id. at 3041 ("The Court's lengthy discussion of this issue [the nexus between means and ends] ... purports to establish only that some relation exists between owners' race and programming: i.e., that the FCC's choice to focus on allocation of licenses is rationally related to the asserted ends") (emphasis added).

\(^{132}\) The fundamental premises are more evident in the opinions of Justice O'Connor and Justice Kennedy than they are in the opinion of Justice Brennan. Indeed, Justice Kennedy takes Justice Brennan to task for this apparent unwillingness to even deal with the implicit premises of his position. 110 S. Ct. at 3044-47 (Kennedy, J., dissenting).

\(^{133}\) His opinion is liberally sprinkled with references to materials which allegedly prove this.

\(^{134}\) His reliance on some of the voting rights cases are particularly telling in this regard. He notes that many of these cases "operate on the assumption that minorities have particular viewpoints and interests worthy of protection" and that a state may "deliberately creat[e] or preserv[e] black majorities in particular districts ...." 110 S. Ct. at 3019.
involves a generalization and that not every member of the class will always share
the same viewpoint. But since he believes the generalization is inductively valid
(i.e. "on the whole" and "in the aggregate" most members of a racial grouping will
share common interests and viewpoints), the focus is properly on the group. It is
thus of no consequence to him that a particular beneficiary of the FCC's policy of
racial preference might not happen to fall within the stereotype. It is a benefit that
flows to the racial group, and how it is distributed within that group is not important.
He likewise evaluates the impact of the "distress sale" policy by focusing on the
burden that it has on nonminorities as a group, and concludes that the burden is slight
since there have been only a relatively few number of such sales. The burden on
the specific nonminority who has disqualified from participating in particular sale
is simply of no consequence it him.

The upshot of these two points of view is that the individual is important only
because of his or her membership in a particular racial or ethnic group; and the proper
state of affairs will exist only when the racial and ethnic composition of every sub-
unit of society mirrors the racial and ethnic composition of society as a whole. And
since this is not going to occur naturally, the "social engineers" of government must
establish and then maintain, forever, the correct proportion.

Given Justice Brennan's premises, one can hardly be surprised that he would
look with favor upon the two FCC policies. And since the two policies were thus
consistent with his world view, their constitutionality was easily assured. Every-
thing else was mere afterthought and formal justification.

Justice O'Connor and her allies, on the other hand, proceed from an entirely
different set of premises. They apparently believe that race and ethnicity are among
the least important of human characteristics -- probably from a social and certainly
from a constitutional perspective. A person's identity as a person, rather, is
measured by that person's morals, intellect, diligence, and achievements, not from
the fortuity of race or ancestry. Justice O'Connor believes that little good can ever
come out of a preoccupation with racial and ethnic differences, and that the
Balkanization of the nation along those lines is bound to produce tension, hostility,
and conflict.

135 Id. at 3018.
136 Justice Brennan's theory, apparently, that it is permissible to act upon generalizations that are based on
valid imperical data and "analysis," 110 S. Ct. at 3017-18, and that it becomes "impermissible stereotyp-
ing," 110 S. Ct. at 3018, only when it is the result of unreasoned habits and reactions. For a discussion of
the dangers of this kind of reasoning, see note 142, infra.
137 110 S. Ct. at 3027.
138 Although Justice Brennan contends otherwise, there is no natural end to this kind of discrimination.
("Proportionality is a destination we shall never reach. We shall always be arriving and never there.")
139 Justice O'Connor viewed the diversity justification as little more than a smoke screen for "proportional
representation of various races" and "outright racial balancing." 110 S. Ct. at 3035.
140 Id. at 3029:
To her, thus, "'benign racial classification' is a contradiction in terms."\textsuperscript{141} It dehumanizes, stigmatizes, and limits even its alleged beneficiaries. In *Mississippi University for Women v. Hogan* she found that women did not benefit from the perpetuation of the stereotype that nursing was a "suitable" profession from them. The caricature of a "Black broadcaster," on which the FCC policies were apparently based, similarly consigns each individual entrepreneur of that race to a preconceived and narrowly defined role in the broadcasting industry. The "'benign' label is also self-contradictory, in Justice O'Connor's view, because the use of racial classifications always disadvantages someone of the race not being favored, even if other opportunities are available to this person. "'[I]t is no response to a person denied admission at one school, or discharged from one job, solely on the basis of race, that other schools or employers do not discriminate'\textsuperscript{142} or, she might have added, that many other nonminority persons were not disadvantaged on that basis.

Justice O'Connor's almost blanket rejection of race and ethnicity as a relevant determinant is simply part and parcel of her broader view that persons should be evaluated by reference to what they are as individuals rather than by reference to their membership in an especially favored or disfavored class. The basic unit for moral and legal analysis is not the group, with its members merely being regarded as fungible components; in her view, rather, the basic unit is the individual, with groups being a mere byproduct of choice or chance.\textsuperscript{143} Thus, even if it is generally true that Blacks as a class tend to enjoy Rap or Reggae music more than whites do, or have a higher incident of arrest and conviction per thousand,\textsuperscript{144} Justice O'Connor would

\begin{quotation}
The dangers of such classifications are clear. They endorse race-based reasoning and the conception of a National divided into racial blocks, thus contributing to an escalation of racial hostility and conflict. . . . Such policies may embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts -- their very worth as citizens -- according to a criterion barred to the Government by history and the Constitution. . . . Racial classifications, whether providing benefits to or burdening particular racial or ethnic groups, may stigmatize those groups singled out for different treatment and may create considerable tension with the Nation's widely shared commitment to evaluating individuals upon their individual merit.
\end{quotation}

\textsuperscript{141} *Id.* at 3032.

\textsuperscript{142} *Id.* at 3043. The quotation is loaded with significance. In his opinion, Justice Brennan had relied on, and thus reaffirmed, Justice Powell's theory in *Bakke* that racial diversity among students serves as a justification for racially discriminatory admissions policies. 110 S. Ct. at 3017. Justice O'Connor, of course, rejected the diversity theory in the context of broadcast licenses, and this quotation suggests that she now might be of the view that *Bakke* was also wrongly decided.

\textsuperscript{143} She notes that "'we are a Nation not of black and white alone, but one teeming with divergent communities knitted together by various traditions and carried forth, above all, by individuals.'" 110 S.Ct. at 3033 (emphasis added).

\textsuperscript{144} See, e.g., *Gregory v. Litton Systems, Inc.*, 316 F. Supp. 401 (C.D. Cal. 1970), aff'd with modifications, 472 F.2d 631 (9th Cir. 1972) (arrest records); *Green v. Missouri Pacific Railroad Co.*, 523 F.2d 1290 (8th Cir. 1975) (conviction records). These cases arose under the Title VII "'disparate impact'" theory of discrimination, first articulated in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). That theory is likewise predicated on a concept of "'group wrongs'" and is subject thus to the same objections as affirmative action. See REPORT TO THE ATTORNEY GENERAL, REDEFINING DISCRIMINATION: DISPARATE IMPACT AND THE INSTITUTIONALIZATION OF AFFIRMATIVE ACTION 20-30 (1987). The sad irony is that in establishing a disparate impact violation minority plaintiffs are often required to present statistical evidence that, in essence, confirms the validity of what would otherwise merely be regarded as the prejudiced and stereotypical viewpoint of the bigot. Justice
apparently not be willing to deal with a particular member of that class merely on the basis of that assumption. If achieving diversity of broadcast viewpoints is thus the goal, then she would identify diversity on an individual basis, not by reference to some racial or ethnic proxy.

Justice O'Connor's world view of race/ethnicity and individual's/groups is far more consistent with constitutional principle than is Justice Brennan's. The opening lines of her dissent state with crystal clarity:

At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens "as individuals, not 'as simply components of a racial, religious, sexual or national class.'" ... Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think.

In sum, Metro Broadcasting reveals a fundamental difference in how the members of the Court think. Justice Brennan thinks in terms of racial and ethnic groupings, and of insuring that a proportionately equal share of society's goods go to each of these groups. From this perspective, almost any form of affirmative action will be attractive. Justice O'Connor thinks in terms of individuals whose identifying characteristics relate to each individual's unique merit and worth, and of insuring that government does not allocate its benefits on any other basis, particularly on the basis of race. From this perspective, no form of affirmative action, as the term is currently understood, can be deemed acceptable.

Those two views sharply divide the Court. And the disagreement will not be resolved through arguments over the proper level of scrutiny, the distinction between state and federal action, the significance of obscure precedents, or the existence of

Brennan's distinguishment of "good" stereotypes from "bad," depending on whether they are valid or not, 110 S.Ct. at 3018, thus carries with it some very dangerous implications.

In Western Air Lines v. Criswell, 472 U.S. 400 (1985), the Court indicated that if a generalization about age was true but not universally so (i.e. the employer could not show that all or substantially all persons of that age lacked the requisite qualifications), then age could not be used as a proxy unless the employer could show that an individual determination was impossible or impractical. In sum, even if a generalization is valid, it is not rational (or fair) to act on it, vis-a-vis any specific class member, without first attempting to confirm the truth of the generality with respect to that class member.

Justice O'Connor stated: The policy is overinclusive: many members of a particular racial or ethnic group will have no interest in advancing the views the FCC believes to be underrepresented, or will find them utterly foreign. The policy is underinclusive: it awards no preference to disfavored individuals who may be particularly well versed in and committed to presenting those views.

110 S. Ct. at 3039.

110 S.Ct. at 3028.
necessary factual predicates. At this point, a change in the composition of the Court is the only way a consistent resolution of the affirmative action issue is going to be achieved. Justice Brennan's retirement, and Justice Souter's appointment as his replacement, represent a significant step in that direction.

**Justice O'Connor v. Justice O'Connor:**

**THE CONFLICT RESOLVED**

Like the Supreme Court itself, over the last ten years Justice O'Connor has often been at war with herself over affirmative action. She began by attempting to resolve the conflict on an essentially ad hoc basis. It was not a successful approach.\(^\text{148}\) It is virtually impossible to synthesize her early decisions into a coherent theory of affirmative action. They were too contextually oriented and fact-specific to be of much use in predicting how other affirmative action cases should be resolved. Thus, even if a majority of the Court had joined in some of her "narrow" opinions, their value as precedent would be limited and uncertain.\(^\text{149}\)

The fundamental issue that Justice O'Connor was striving so hard to avoid was whether a governmental unit, limited by the equal protection clause of the Constitution, or a private employer, limited by the non-discrimination mandate of Title VII, could ever afford racially preferential treatment to anyone other than a specifically identified victim of that unit's or that employer's own prior discrimination. She probably avoided the issue because she realized that if public and private conduct were limited in that fashion, it would mean an absolute end to "affirmative action" as it is currently understood and practiced -- a seemingly radical position that she was apparently reluctant to take.

Although she still avoided that ultimate issue in *Croson*, her opinion in that case and in *Metro Broadcasting* each reflect a growing willingness to approach the affirmative action issue on a broader and more principled basis. At the constitutional level, she has thus become virtually absolute in her opposition. Indeed, in *Metro Broadcasting* she even implicitly resolved the specific issue she had so long avoided. In characterizing *Fullilove*, she said that "the Court upheld the challenged set-aside only because it contained a waiver provision that ensured that the program served its

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\(^\text{148}\) But see, Daly, *Some Runs, Some Hits, Some Errors -- Keeping Score in the Affirmative Action Ballpark From Weber to Johnson*, 30 B.C.L. Rev. 1, 78 (1988): "That she has not been entirely successful does not undermine her prospects of success in the future. The nonaligned character of her jurisprudence makes her an ideal 'play-maker' for the next nine innings."

\(^\text{149}\) Her affirmative action decisions are not alone in being subject to this criticism. "She often leaves lower court judges guessing at how the next case should be resolved. In one recent case, for example, two Reagan-appointed judges and a Carter-appointed judge needed to decide a dispute over attorneys' fees based on a precedent in which O'Connor's lone concurrence had tipped the balance. 'Her word is the law of the land, but we just didn't know what to make of it,' one of the judges recalls. 'She left the issues very, very unsettled.'" Taylor, *Swing Vote on the Constitution*, Am. Law., June 1989, at 74.
remedial function in particular cases."150 On the other hand, she also indicated that "the FCC or Congress may yet conclude after suitable examination that narrowly tailored race-conscious measures are required to remedy discrimination that may be identified in the allocation of broadcast licenses,"151 without any suggestion that this preferential treatment would have to be limited to proven victims of the FCC's prior discrimination.

Although she still evidences some ambivalence on the issue, if it is again squarely presented to her, Justice O'Connor is very likely to resolve it in favor of limiting affirmative action to this form of victim-specific relief, both as a matter of statutory and constitutional law.

The analysis on which this conclusion is based begins with her premise that race conscious affirmative relief is appropriate, under both the equal protection clause and Title VII, primarily if not exclusively as a "remedy" for prior discrimination. While she would probably recognize that some non-remedial race conscious decisions might be appropriate in unusual and extraordinary circumstances (such as where the police need a Black police officer to infiltrate a Black drug gang), she has expressly rejected all the other more commonly asserted justifications -- promoting diversity (in broadcasting, and probably in education as well),152 providing role models, and simply achieving what is regarded as the "proper" racial mix.

Next, there is her recognition that the "remedy" theory of justification necessarily assumes the existence of a "violation," and a great deal of her jurisprudence is devoted to the question of how the existence of this "violation" can be established for remedial affirmative action purposes. The existence of a "violation," however, also assumes a "perpetrator." With respect to this facet of the theory, she has repeatedly indicated that an affirmative action actor is privileged to "remedy" only the prior discrimination of that actor, or someone for whom the actor is responsible, but not the prior discrimination of society as a whole. Finally, the notion of a "violation" necessarily implies the existence of a "victim," and the notion of a "remedy" necessarily implies a "beneficiary" of that remedy. Justice O'Connor has not yet adequately addressed the "victim/beneficiary" aspects of her theory -- in either the constitutional or the statutory context.

There is, of course, the dictum in Metro Broadcasting which suggests that the minority set-aside in Fullilove was sustained only because there was a provision in the statute which would limit the beneficiaries of the preference to those who had previously been victimized by the discrimination. The broader aspects of her Croson

150 110 S.Ct. at 3039 (emphasis added).
151 Id. at 3033.
152 In Metro Broadcasting, however, Justice Brennan pointedly reminded Justice O'Connor of her admission in Wygant that racial diversity and possibility other governmental interests might be sufficient to justify race-conscious governmental action. 110 S.Ct. at 3010-11 n. 15.
The notion of non-victim specific "remedial" affirmative action makes sense only if you assume that the original wrong was against "the group" and that the later remedy is for "the group's" benefit. Under that view it thus does not make any difference that the original victim was M and the current beneficiary is M'. That is how Justice Brennan would view it. Justice O'Connor, however, is not of that school. In *Croson* she emphasized that rights attach to individuals, not groups, and in *Metro Broadcasting* she repeatedly reaffirmed that and, indeed, rejected the whole conceptual framework on which the theory of group rights/wrongs is based. Under her view, the proper focus of analysis is on the individual as an individual, not as some fungible component of a group. It is thus inconceivable that Justice O'Connor would now ever concede the legitimacy of anything but victim-specific remedial affirmative action.

This conclusion, moreover, is generally consistent with Justice O'Connor's earlier, more technical affirmative action jurisprudence -- modified somewhat and then carried to its logical conclusion. The first step in the reformulation of Justice O'Connor's approach begins with the *Teamsters* case, around which much of her affirmative action analysis is based. She already uses the *Teamsters* prima facie case -- namely, evidence of a statistical disparity, which raises an inference of discrimination that has not yet been challenged by other statistics or alternative explanations -- as the "factual predicate" for the existence of some kind of affirmative action. The next two steps in the suggested analysis merely build on this *Teamsters* analogy. That is, if the affirmative action occurs in the form of hiring, promoting, or otherwise favoring a particular minority employee over non-minority employees, then the action must be able to survive two challenges.

First, as under the *Teamsters* analysis, if the non-minority employees can show that the statistical disparity is a result of societal rather than the employer's discrimination, then there is no legal justification for any kind of minority preferential treatment that disadvantages non-minorities. This is simply fuses together the rebuttal portion of the *Teamsters* approach to liability with her *Wygant* rejection of "societal discrimination" as a justification for affirmative action.

Second, even if the inference of employer discrimination survives the challenge, thus justifying remedial preferences with respect to who gets hired or promoted, the *Teamster's* analogy suggests that this merely moves the enquiry to a higher level of specificity. Since Justice O'Connor subscribes to the idea that

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153 See Graggiia, *supra* note 76, at 592.
154 Justice Blackmun's philosophy of affirmative action is similarly predicated on the notion that it operates as a remedy that "is provided to the class as a whole rather than individual members." *Stotts*, 467 U.S. at 613 (Blackmun, J., dissenting).
constitutional and statutory rights attach to individuals as individuals rather than as members of a particular sex, race, or ethnic group, and that remedies are similarly oriented, it would thus be reasonable for her to also utilize, by analogy, the second stage of the Teamsters analysis. In a Teamsters case, once a violation is established through the use of statistical evidence, then the plaintiffs must show that each particular claimant for a job applied or would have applied but for the employer's discrimination, and therefore was a "potential victim of the proved discrimination." This shifts the burden onto the employer to disprove the victim status of particular plaintiffs, by showing that they would not have been hired anyway, for nondiscriminatory reasons.

It would be consistent with Justice O'Connor's premises for a similar approach to be taken in the affirmative action context. The beneficiaries of affirmative action, or the defendant employer on their behalf, should be required to make some showing that they were likely or probable victims of the prior discrimination, as evidenced by the statistics. The proof of this perhaps need not be as rigorous as it would be in a true Teamsters or Stotts context, thus maintaining the viability of Justice O'Connor's Firefighters thesis that voluntary affirmative action should be evaluated by a somewhat more tolerant standard than that used for court-ordered affirmative action. But the distinction between voluntary and court-ordered affirmative action is not so great as to dispense altogether with the need for employer justification for preferring one particular minority employee over non-minority employees. That justification must be "probable victim status," for to afford preferential treatment to minorities who were not even remotely within range of the prior discrimination is totally inconsistent with Justice O'Connor's theory that affirmative discrimination can be justified only for "remedial" purposes.

This approach is the logical extension of certain important strands in the affirmative action cloth of Justice O'Connor, and its ultimate adoption will require only a minor unraveling of her prior handiwork. Her admission in Paradise that preferential treatment of nonvictims might be appropriate when "truly" or "manifestly" necessary and used "sparingly" can be dismissed as dicta. She will also have to agree to overrule Weber, which she was not willing to do in Johnson because "that question was not raised, briefed, or argued in this Court or in the courts below." In an appropriate case, given the utter speciousness of the Weber decision, it is not unlikely that she would follow Justice Scalia's lead in repudiat-

155 431 U.S. at 362.
156 In all probability, if the employer could make that showing, this would be conclusive of the entitlement issue. Once probable victim status is established, it is unlikely that the plaintiffs in an affirmative action case would be able to disprove that on an individual basis. The second part of the Teamsters remedy proof would thus pass out of the picture.
157 480 U.S. at 197.
158 480 U.S. at 648.
ing it. With Weber out of the way, her disappointing analysis in Johnson, which was clearly based on Weber as its precedent, would become of historical interest only. It would in no way limit the complete development of her Teamsters analogy for affirmative action.

CONCLUSION

However valid the characterizations might have been at some point in time, Justice O'Connor is currently neither a mugwump, a mediator, nor a Machiavellian. All three images were the result of a narrow, hesitant, often compromising approach that she has since abandoned. Her opinions in Croson and Metro Broadcasting, rather, are now firmly based on fundamental principles of constitutional law, which she applies logically, rigorously, and without equivocation. When you cut through all the legal technicalities and details, her position is simple and clear. Whether benign or malignant, decisions about a person that are based on that person’s race and ethnicity are contrary to the letter and spirit of American law. One can only hope that at some time if the future that is all she will need to say, in an opinion that speaks, not just for a majority, but for an entire Court of like-minded justices.

Dr. Martin Luther King once said, "I have a dream that my four little children will one day live in a Nation where they will not be judged by the color of their skins, but by the conduct of their character." Justice Sandra Day O'Connor has not lost sight of that dream.

\[\text{A TREASURE OF THE WORLD'S GREAT SPEECHES 839 (H. Peterson, ed. 1965).}\]