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Robert A. Sedler
Wayne State University, rsedler@wayne.edu

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THE CONSTITUTION, RACIAL PREFERENCE, AND THE SUPREME COURT'S INSTITUTIONAL AMBIVALENCE: REFLECTIONS ON METRO BROADCASTING*

ROBERT A. SEDLERT

INTRODUCTION: THE “UNRESOLVABLE DILEMMA” AND THE UNMADE VALUE JUDGMENT

The matter of racial preference for black Americans and other traditionally disadvantaged racial-ethnic minorities in the allocation of governmental and societal benefits sharply divides American society today. It is a no-win issue, because it necessarily involves conflicting ideals and values. On the one hand, there is the ideal

† Professor of Law, Wayne State University. A.B. 1956, J.D. 1959, University of Pittsburgh. The author was of counsel on the amicus curiae brief filed in Metro Broadcasting on behalf of the Congressional Black Caucus, the NAACP, the National Black Media Coalition, and the League of United Latin American Citizens, urging the Court to uphold the FCC’s minority ownership policies.

1. Other racial-ethnic groups, such as Hispanics and Native Americans, have been subject to discrimination and victimization in American society, because the dominant white majority has perceived them as “non-white.” Since these groups have been subject to discrimination and victimization, for constitutional purposes, a legislative body should be able to include them in any racial preference given to black Americans. However, to the extent that the justification for a particular racial preference is overcoming the present consequences of identified past discrimination by governmental or private entities, that discrimination must be identified for each group to whom the preference is given. City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989). While Asian Americans have also been subject to racial discrimination and victimization, the consequences of that discrimination by and large do not remain. Asian Americans as a group appear to have a “fair share” of societal power and participation in relation to their representation among the general population and, as a group, do not suffer economic or educational disadvantage.

It is the consequences of the long history of discrimination against black Americans that have been the predicate for racial preferences designed to overcome those consequences. While other racial-ethnic groups may be included in a particular preference, the focal point of any preference has been the consequences of the racial discrimination suffered by black Americans.
of a racially neutral society, in which racial considerations play no part whatsoever in the allocation of the benefits of that society. On the other hand, American society has not even remotely come close to realizing that ideal. We have had a long history of racial discrimination against black Americans, and the consequences of this social history of racism for black Americans as a group are manifest in today's society. There is an enormous "economic gap" between blacks and whites, with blacks suffering disproportionate unemployment and underemployment. Black workers are concentrated in the low-paying and low-prestige occupations and earn a family income of only slightly more than half the family income of whites.3 There is likewise a racial "educational gap" with blacks continuing to lag significantly behind whites in terms of measured academic achievement and quality of educational experience.4 Above all, there is the racial "power gap." Blacks are seriously underrepresented in positions of societal power, in the "elite" professions, and in the "economic mainstream."5

At the present time, American society officially condemns and seeks to prevent the racial discrimination that has long been practiced against black Americans in all aspects of American life.

2. The term, social history of racism, is a convenient way of summarizing the history of discrimination against black Americans. The social history of racism was the aftermath of slavery, and like slavery, it was predicated on and justified by the supposed moral inferiority of the black race. It is a history of an official status of inferiority established by law, of rampant discrimination in employment, of ghettoization, of segregated and inadequate schooling, and of the denial of access to political and economic power. Racial discrimination was often commanded by government and, when not commanded, was tolerated and encouraged. Private entities and individuals added their significant contribution to this pattern of racism. Only in the past three decades has any real progress been made to halt the overt discrimination practiced against black Americans in the United States. See Sedler, The Constitution and the Consequences of the Social History of Racism (Essays in Honor of Justice Thurgood Marshall), 40 ARK. L. REV. 677, 677-682 (1987) [hereinafter Consequences].


4. Again, see the dreary litany of statistics, id. at 25 n.18. For a more focused discussion of the etiology of the racial "educational gap" as it appears in the 90% black Detroit school system, see Sedler, The Profound Impact of Milliken v. Bradley, 33 WAYNE L. REV. 1693, 1703-09 (1987).

5. For a discussion of the underrepresentation of blacks in the "elite" professions and the ownership of business enterprises, see Consequences, supra note 2, at 681 n.7.
We now have a system of prevention: the law prohibits present racial discrimination against blacks and provides remedies for such discrimination. The system of prevention, however, does not purport to deal directly with the present consequences of the social history of racism and is not designed to do so. It is premised on adherence to racial neutrality: the absence of racial discrimination. However, adherence to racial neutrality, given the present consequences of the social history of racism, will often put blacks at a disadvantage in comparison with whites and thus will perpetuate societal racial inequality. Precisely because the present consequences of the social history of racism are so pervasive and are self-perpetuating and self-reinforcing, the system of prevention, even if vigorously enforced, will do little to alter the condition of societal racial inequality and the disadvantaged and subordinate position of black Americans in this Nation.

Racial preference—the explicit use of race-conscious criteria designed to benefit blacks as a group—is a positive intervention directed against the present consequences of the social history of racism that are suffered by blacks as a group. It is intended to act on and to alleviate those consequences, bringing about a more equal participation of blacks with whites in important aspects of American life. Furthermore, it strives to reduce the condition of societal racial inequality and the disadvantaged and subordinate position of blacks.

Racial preference for blacks has its costs. The direct costs are borne by individual whites who would have received the benefit in question—a job in the government or private sector, admission to a law school or medical school of one's choice, the award of a government contract or broadcasting license—were it not for the preference for blacks. These whites suffer a clear disadvantage because of race, and it may be assumed that, for the most part, they did not benefit directly from the past discrimination against blacks. It cannot be doubted then that a policy of racial preference produces unfairness to individual whites, and it is this unfair result that gives rise to principled opposition to racial preference.

6. This unfairness seems most egregious to an adversely affected white when the particular black recipient of a preference is not a person who has been demonstrably disadvantaged by the consequences of the past discrimination, such as a black student from an advantaged background who went to good schools and subsequently, is admitted to a law school with a substantially lower grade point and LSAT score than a rejected white applicant.

7. The costs of racial preference, however, are not borne by whites as a
More significantly perhaps, racial preference is inconsistent with the ideal of a racially neutral society. Opponents of racial preference, invoking familiar aphorisms such as "the Constitution is color-blind," "two wrongs don't make a right," and "the cure is worse than the disease," contend that racial preference is not a legitimate method to overcome the present consequences of the social history of racism that are suffered by blacks as a group. They also contend that racial preference "stigmatizes blacks as inferior" and thus is self-defeating to the long-range goal of racial equality.

Since racial preference produces unfairness against individual whites and brings into play conflicting ideals and values, it is not surprising that the controversy over racial preference cannot be resolved as a matter of consensus. Persons of good will, who believe in the objective of a racially equal society, can disagree vehemently over the legitimacy of racial preference as a means of bringing about that objective. The "unresolvable dilemma" that American society faces today is that on the one hand, without positive intervention, such as racial preference, the present consequences of the social history of racism will not be overcome in the remotely foreseeable future, if ever. On the other hand, intervention by means of racial preference is inconsistent with the ideal of racial neutrality and unfairly imposes costs on innocent individual whites.

Today, however, in a number of different contexts, and perhaps with a variety of motivations, governmental bodies have provided for racial preference in governmental programs and operations. Public universities have race-conscious admissions policies. States and local governmental units have race-conscious hiring and promotional policies and have established procurement policies explicitly favoring minority business enterprises. Additionally, the federal government has various programs benefiting racial minorities, such as the "minority enhancement" and "distress sale" broadcasting policies at issue in *Metro Broadcasting.* The Constitution now comes into play, and the "unresolvable dilemma" now has a constitutional dimension. As a distinguished constitutional scholar has observed: "Once taken into our constitutional law group. Whites as a group now have full participation in all important aspects of American life and will not be injured if that participation is shared with blacks. Whites as a group, of course, have no legitimate interest in maintaining their present position of societal dominance.

system, the dialogue takes on a new seriousness. It is, therefore, critically important that we get the questions right and the answers right, because constitutional law is written in concrete and is not easily washed out by rain or tears."

In dealing with the constitutionality of the use of racial preference in governmental programs and operations, the Court has been struggling hard to "get the questions and the answers right." Clearly, it has failed to achieve an institutional consensus on the constitutional permissibility of governmental racial preference. This may be in no small part because it cannot institutionally agree on what the "right questions" are. It may fairly be suggested that the "unresolvable dilemma" that confronts American society on the question of racial preference has carried over to the Court, and that the Court has been suffering an extreme institutional ambivalence over the constitutional permissibility of racial preference. The Court institutionally has not been willing to make the hard and fundamental value judgment that would enable it to resolve the dilemma. Is the interest in trying to overcome the present consequences of the social history of racism and to bring about the equal participation of racial minorities in all important aspects of American life of sufficient importance and validity to justify a departure from the principle of racial neutrality and the resulting racial disadvantage to adversely affected individual whites?

If the Court had made the value judgment in favor of what I have called the equal participation objective, the constitutional controversy would be resolved. Racial preference designed to overcome the present consequences of the social history of racism and to bring about the equal participation of black Americans in all important aspects of American life would advance a constitutionally permissible objective. The only remaining question would be whether a particular form of racial preference is an appropriate means of achieving that objective. In this connection, the burden

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11. This fundamental question has been textually resolved in the Canadian Charter of Rights and Freedoms. Section 15, dealing with equality rights, contains two subsections. Subsection (1) provides that: "Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical
on adversely affected individual whites would have to be taken into account, and the particular form of preference could not be one that "unfairly trammels" the interests of individual whites.\footnote{12}

Conversely, the Court could have made the opposite value judgment. It could have held that the principle of racial neutrality was of such overriding significance that it precluded the government from using any racial preference for blacks as a means of trying to overcome the present consequences of the social history of racism and to advance the equal participation objective.\footnote{13} If the Court had made this value judgment, all forms of racial preference benefiting blacks would be unconstitutional and the government would have to use race-neutral means to try to bring about a condition of racial equality for blacks.

As things now stand, the Court institutionally has refused to make either value judgment. In the seminal \textit{Bakke} case,\footnote{14} four Justices, Brennan, White, Marshall and Blackmun, were willing to make the value judgment in favor of racial preference by taking the position that the government's interest in overcoming the present consequences of "\textit{societal discrimination}" was a sufficiently important interest to justify an appropriate use of race-conscious criteria directed toward this objective. They also contended that the use of race-conscious criteria for this purpose was a "benign" use,\footnote{15} the constitutionality of which should be evaluated

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\begin{itemize}
\item Subsection (2) goes on to provide that: "Subsection (1) does not prohibit any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."
\item 12. This is the standard the Court uses to determine if racial preference designed to alleviate the underrepresentation of minorities or women in an employer's work force is permissible under Title VII. United Steelworkers of America v. Weber, 443 U.S. 193, 208-09 (1979).
\item 13. In support of this proposition, it has been contended that the Constitution should be interpreted to prohibit the "differential treatment of other human beings by race," Van Alstyne, \textit{Rites of Passage: Race, the Supreme Court, and the Constitution}, 46 U. Chi. L. Rev. 775, 809 (1979), and that "the proper constitutional principle is not no 'invidious' racial or ethnic discrimination, but no use of racial or ethnic criteria in the distribution of governmental benefits or burdens." Posner, \textit{The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities}, 1974 Sup. Ct. Rev. 1, 25.
\item 15. "Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area." \textit{Id.} at 325.
\end{itemize}
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under the "important and substantial relationship" standard rather than under the "compelling governmental interest" standard.\textsuperscript{16} As we will see, the issue of the appropriate standard of review for "benign" racial classifications came to the fore again in \textit{Metro Broadcasting}. However, the position that overcoming the present consequences of "societal discrimination" justifies the use of race-conscious criteria has never commanded a majority of the Court and apparently, is no longer shared by Justice White.\textsuperscript{17} Thus, the Court in \textit{Bakke} failed to make the value judgment in favor of the constitutional permissibility of racial preference.

At the other end of the spectrum, it now appears that three Justices, Rehnquist, Scalia and Kennedy, and possibly O'Connor as well,\textsuperscript{18} are prepared to make the opposite value judgment. They have indicated that they believe that use of racial preference is unconstitutional in virtually all circumstances, and that efforts to bring about a condition of racial equality must be accomplished by race-neutral means.

Since five Members of the Court have never been willing to make the \textit{same} value judgment about the constitutional permissibility of racial preference either way, the fundamental value question has not been resolved institutionally by the Court. It is in this sense that the Court may be said to suffer an institutional ambivalence over the question.\textsuperscript{19} At least until \textit{Metro Broadcasting},\textsuperscript{20} it appeared that the Court, or more accurately, some mem-

\textsuperscript{16} \textit{Id.} at 358-62.

\textsuperscript{17} In \textit{City of Richmond v. J.A. Croson Co.}, 109 S. Ct. 706 (1989), Justice White joined in Justice O'Connor's opinion for the Court, including Part III-B, where she specifically rejected the city's claim that it was entitled to adopt a minority business enterprise "set aside" in order to remedy the present effects of past societal discrimination. \textit{Id.} at 723-28.

\textsuperscript{18} As will be discussed subsequently, the inclusion of Justice O'Connor in this group is based on her opinion in \textit{Metro Broadcasting}. While Justice O'Connor has repeatedly stated that the government has a "compelling" interest in overcoming the present consequences of identified past racial discrimination, she has strongly indicated that in most circumstances the government must advance this interest by "race-neutral" means. In no case in which she has participated, has she held constitutional the particular use of race-conscious criteria that was at issue. Furthermore, her opinion in \textit{Metro Broadcasting} indicates that she may be willing to make the value judgment against the constitutional permissibility of racial preference in all or virtually all circumstances.

\textsuperscript{19} As will be discussed subsequently, the replacement of Justice Brennan by Justice Souter could move the Court closer to an institutional consensus against the constitutional permissibility of racial preference.

\textsuperscript{20} 110 S. Ct. 2997 (1990).
bers of the Court, were looking for an "easy way out," by deciding the specific question presented in the particular case without addressing broader issues or resolving the fundamental value question. The racial preference cases typically have seen a number of separate opinions and narrow holdings giving little guidance beyond the specific kind of racial preference involved in the particular case. We will now consider the cases leading up to *Metro Broadcasting.*

**The Reflection of Institutional Ambivalence: From Bakke to Croson**

*Bakke,* the Court's seminal racial preference case, involved a constitutional challenge to a university medical school's race-conscious admissions policy, under which 16 of the 100 places were reserved for minority applicants. In that case, four Justices sought to avoid the constitutional question entirely by finding that the use of any racial preference in university admissions was prohibited by Title VI of the Civil Rights Act of 1964. This effort failed when Justice Powell joined Justices Brennan, White, Marshall and Blackmun to hold that Title VI prohibited only such use of race-conscious criteria as would be unconstitutional if employed by a governmental body. Thus, the Title VI and constitutional questions merged, and *Bakke* established the permissible use of race-conscious admissions criteria both for public universities and for private universities subject to Title VI.

That permissible use, according to Justice Powell, applying the "compelling governmental interest" standard of review, related to the university's interest in achieving a *racially diverse* student body. This interest, said Justice Powell, was "compelling," and justified the consideration of race as a "single, but important factor" in determining admission to the university. Since the use of a fixed racial quota, in Justice Powell's view, would "hinder rather than further attainment of genuine diversity," he found it to be unconstitutional. In order to bring about a holding of the

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21. *Id.*

22. An earlier case involving a challenge to a law school's race-conscious admissions program was dismissed as moot, when the plaintiff, who had been successful in the state trial court and had been permitted to enroll in the law school, had registered for the final term of his third year by the time the case had reached the Supreme Court. DeFunis v. Odegaard, 416 U.S. 312 (1974).

23. Powell strongly insisted that the "compelling governmental interest" standard of review applied to all uses of race-conscious criteria, including those benefiting racial minorities. 438 U.S. at 287-305.
Court on this issue, the Brennan opinion, joined in by White, Marshall and Blackmun, in effect agreed with Powell’s position, albeit in a footnote.24

As a practical matter, Bakke settled the question of the permissibility of racial preference in university admissions. After Bakke, the universities revised their racial-admissions programs in accordance with Powell’s “competitive consideration of race and ethnic origin” approach and justified the new programs as advancing the universities’ “compelling” interest in “attaining educational diversity.”25 Universities, now, need not advance the additional justification, as many universities had done prior to Bakke, that there is a strong public interest in increasing the number of minority physicians and lawyers. While this is obviously a major motivation for racial preference in admission to medical school and law school,26 the “educational diversity” justification is sufficient for constitutional purposes.27

The Powell approach in Bakke thus gave the Court, institutionally, an “easier way out” to decide the case.28 Bakke holds no

24. “We also agree... that a plan like the ‘Harvard’ plan is constitutional . . . at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination.” Id. at 326 n.1 (Brennan, J.) (footnote omitted).


26. For a discussion of this point, see The Constitution, supra note 3, at 131-33.

27. Powell also said that it was constitutionally permissible for the university to “pay some attention to the numbers” to ensure that in a given year a reasonable number of minority students would be enrolled. So long as the university does not impose a rigid “minimum quota,” it can take race into account in every case until it reaches its “goal” for that year. 438 U.S. at 316-19. While Justice Powell insisted that the difference between “goals” and “quotas” was of constitutional dimension, the effect of Bakke is to enable the universities to enroll a reasonable number of minority students each year.

Moreover, since the objective is to “attain racial and ethnic diversity,” the university is permitted to include other groups, such as Hispanics and Native Americans, in the preference. Because the various ethnic groups that comprise the white population and Asian Americans do not suffer from a demonstrable “educational gap,” the normal workings of a race-neutral admissions process (one based primarily on comparative objective academic indicators, such as grades and test scores) are likely to produce a reasonable number of students from other ethnic groups. In this sense, ethnic diversity is “built in,” and a university student body will reflect the ethnic mix of the geographic area from which the university’s student body is drawn. It is only because of the racial “educational gap” that race-conscious admissions policies are necessary to bring about racial diversity in the student body.

28. It was only Justice Powell who favored this approach. Four Justices,
more than that a university's interest in achieving a racially diverse student body justifies the "competitive consideration of race and ethnic origin" in making admissions decisions. While the matter of "racial diversity" could be relevant in other contexts, such as the teaching staff of a university or a public school, Bakke itself only dealt with admissions. It is not dispositive of a future case involving a different aspect of the "racial diversity" interest.

In his Bakke opinion, Justice Powell drew a sharp distinction between the interest in remediying the present effects of "societal discrimination," which he found to be insufficient, and the interest in remediying the present effects of a governmental body's own identified past racial discrimination, which he found to be "compelling." As he stated: "The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination."29 This is the one point on which the Court institutionally has been able to agree. As Justice O'Connor has put it: "The Court is in agreement that, whatever the formulation employed, remediying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program."30 However, as we will see in the discussion of Croson, state and local governments seeking to justify racial preference on this basis must have a "substantial basis in evidence" for finding the existence of past discrimination against blacks and any other included racial-ethnic minority. Additionally, governments may be required to show that race-neutral means will not be sufficient to achieve the remedial racial objective.31

Brennan, White, Marshall, and Blackmun, would have preferred to rest the decision on the university's interest in overcoming the present consequences of societal discrimination, while four others, Stevens, Burger, Rehnquist and Stewart, wanted to hold the university's race-conscious admissions program violative of Title VI. 438 U.S. at 411-21.

29. Id. at 307.
31. While the Court has upheld the power of the federal courts to order the implementation of a racially preferential hiring or promotional plan to remedy an employer's identified past discrimination, there is sharp disagreement over how much justification is required for the imposition of such a remedy. See Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421 (1986); United States v. Paradise, 480 U.S. 149 (1987). It may be that a majority of the Court, especially with the departure of Justice Brennan, will now hold that direct racial remediation ordinarily is not an appropriate means of overcoming the past discrimination. Instead, the Court will have to use other means, such as an injunction against racial discrimination, the affirmative recruitment of minority workers, and a monitoring of hiring practices.
In any event, by recognizing that (1) a public university's interest in achieving a racially diverse student body and (2) a governmental body's interest in overcoming the present consequences of its own identified past discrimination are "compelling governmental interests," justifying the precisely tailored use of race-conscious criteria, the Court institutionally has refused to make the value judgment in favor of racial neutrality. From an institutional standpoint, then, the Court has held that for certain purposes and in some circumstances, racial preference is constitutionally permissible and, in this sense, has rejected an overriding principle of racial neutrality. This institutional position was reaffirmed in Metro Broadcasting,32 where five Justices upheld the constitutionality of the Congressionally mandated racial preferences at issue.

In Fullilove v. Klutznick,33 decided in 1980, the Court found the "easier way out" in the "power of Congress." There the Court, in a 6-3 decision, upheld a 10% minority business enterprise set aside mandated in a Congressional grant to state and local governments for public works projects. The "compelling" interest involved was overcoming the present consequences of identified past racial discrimination against minority contractors in the awarding of government construction contracts. Chief Justice Burger’s plurality opinion, joined by Justices White and Powell, emphasized the broad power of Congress to find identified past racial discrimination and to take appropriate action to remedy it.

The legislation contained no preambulary findings of past discrimination, but Burger deemed this omission unimportant. He noted that Congress "may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings," and found that Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination.34 Burger emphasized Congress' broad powers under section 5 of the fourteenth amendment. Section 5, he said, "is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," and, as a result, "[i]n no organ of government, state or federal, does there repose a more comprehensive remedial

33. 448 U.S. 448 (1980).
34. Id. at 477-78.
power than in the Congress, expressly charged by the Constitution with competence and authority to enforce the equal protection guarantees. Burger also indicated that the Court should give deference to the Congressional determination that the particular form of racial preference was an appropriate means of accomplishing Congress’ remedial objective.

Justice Powell concurred separately in order to apply the “compelling governmental interest” test to the set-aside. In his application of this test, he too emphasized the power of Congress to make findings of past discrimination on a nationwide basis and to select the particular means forremedying the effects of that discrimination. Justices Marshall, Brennan and Blackmun applied the “substantial and important relationship” test as per the Brennan opinion in Bakke, and found that “the racial classifications employed . . . are substantially related to the achievement of the important and congressionally articulated goal of remedying the present effects of past racial discrimination.”

In Fullilove the “power of Congress” rationale enabled the Court institutionally to uphold the racial preference at issue in that case. Burger could sustain the preference on this basis without giving support to the use of racial preference by state and local governments. White, who is a strong proponent of federal power in a number of contexts, likewise, could join with Burger and

35. Id. at 476, 483. (Burger, C.J.).
36. “[D]oubts must be resolved in support of the congressional judgment that this limited program is a necessary step to effectuate the constitutional mandate for equality of economic opportunity.” Id. at 489.
37. As to the latter point, he stated: “I believe that Congress’ choice of a remedy should be upheld, however, if the means selected are equitable and reasonably necessary to the redress of identified discrimination. Such a test allows the Congress to exercise necessary discretion but preserves the essential safeguard of judicial review of racial classifications.” Id. at 510.
39. 448 U.S. at 521. Justice Stewart, joined by then Justice Rehnquist, dissented, as did Justice Stevens. The Stevens dissent reflects a hostility to minority business enterprise set-asides, indicating his view that they are overinclusive as applied beyond black-owned firms and counter productive to the objective of increasing governmental contracting opportunities for black-owned firms. Id. at 522-54 (Stevens, J., dissenting.) It is noteworthy that he voted to strike down the minority business enterprise set-aside in Croson as well.
40. In the Court’s just-concluded Term, for example, he authored the majority opinion in Missouri v. Jenkins, 110 S. Ct. 1651 (1990). Jenkins upheld the broad powers of federal courts to impose effective desegregation plans, including directing a school board to impose taxes, contrary to state law, where
Powell in upholding the set-aside on this basis, and implicitly move away from the "societal discrimination" justification that was the foundation of the Brennan opinion that he joined in *Bakke*. Powell could relate the "power of Congress" rationale to the "compelling governmental interest" standard that he so strongly advocated in *Bakke*: Congress could use its power to make generalized findings of past discrimination on a nationwide basis and to select the particular means for remedying the effects of that discrimination. Brennan, Marshall and Blackmun could supply the votes necessary for a judgment upholding the constitutionality of the set-aside while adhering to the "important and substantial relationship" standard of the Brennan opinion in *Bakke*. The end result again was for the Court to go no further than was necessary to uphold the particular racial preference in issue.

The next case to come before the Court, *Wygant v. Jackson Board of Education* decided in 1986, was much more difficult and did not lend itself to an "easier way out." The end result was a fragmented Court, and a 5-4 decision invalidating the particular racial preference involved in that case, but leaving unanswered two questions on which only a plurality had expressed an opinion. At issue in *Wygant* was a collective bargaining agreement between a school board and the teacher's union, providing for race-based out-of-line seniority layoffs to maintain the current level of black teachers in the system. Beginning in 1969, the school board, which had an increasing number of black students but very few black teachers, adopted an affirmative hiring plan, establishing a goal of 15% black faculty in each school building. The affirmative hiring plan succeeded in increasing the number of black teachers in the system. To ensure that the hiring gains would not be eroded by anticipated layoffs, in 1972 the school board and the union adopted a provision in the collective bargaining agreement providing for race-based out-of-line seniority layoffs. Under this provision, while teachers would still be laid off in reverse seniority order within each building, black teachers would not be laid off at a percentage rate greater than their percentage representation in the school system prior to layoff. The collective bargaining agreement thus preserved the benefits of the hiring necessary to implement a constitutionally-required desegregation plan. As he there noted, "state policy must give way when it operates to hinder vindication of federal constitutional guarantees." *Id.* at 1666 (quoting North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 45 (1971)).

gains during layoff, but at the expense of identified individual white teachers who were laid off despite having greater seniority than some black teachers who were retained.

The situation in Wygant demonstrated most cogently how racial preference for blacks can produce unfairness to individual whites. Since identified individual white teachers suffered race-based out-of-line seniority layoffs, they bore the entire burden of the school board's efforts to achieve a racially diverse faculty. In this sense, the burden was focused rather than diffused. In his plurality opinion in Wygant, Justice Powell contrasted this situation with race-based hiring goals, noting that layoffs disrupt settled expectations in a way that hiring goals did not: "Hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives." In Wygant, identified white individuals suffered a loss of settled expectations and were compelled to bear the entire burden of "faculty diversification." Much more so than in Bakke and Fullilove, the unfairness to individual whites in Wygant strongly militated against the Court's upholding the racial preference in issue.

The second difficulty in Wygant was the lack of a consistently articulated justification for the racial preference. When the school board adopted the affirmative hiring plan in 1969, its objective was simply to increase the number of black teachers in response to an increasing black student enrollment. Jackson is a small city in south-central Michigan, and in the 1960's had an increasing black population. By 1968, 15% of its students were black, but it

42. As he forthrightly stated: "Denial of a future employment opportunity is not as intrusive as loss of an existing job." Id. at 282-83.

43. The race-based admissions policy in Bakke meant only that a white applicant disadvantaged thereby would be unable to attend a particular school, and the minority set-aside for governmental procurement in Fullilove meant only that a non-minority enterprise disadvantaged thereby was unable to bid on a particular contract.

44. Experience throughout the Nation indicates that black teachers are employed almost entirely in school systems with substantial black student enrollments. Because the black population, especially outside the South, is concentrated primarily in the central cities of major metropolitan areas, most school systems outside the central cities have virtually no black students and correspondingly virtually no black teachers. It is only when there is some substantial black population movement into these systems that there is any concern with increasing the number of black teachers.
had only 4% black teachers. The affirmative hiring plan was adopted in response to racial tension in the community and the school system. The school board had made no finding that it had engaged in identified past discrimination against black teachers, and such a finding would have been difficult to sustain.

The most typical justification for increasing the number of black teachers in a school system with an increasing number of black students is that black teachers are necessary to serve as "role models" for the black students. The "role model" objective is analytically quite different from the "faculty diversification" objective. A racially integrated faculty, just as a racially integrated student body, can provide a different kind of educational experience, for white students as well as black students. Justice Stevens made this point very strongly in Wygant:

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

Likewise, in Wygant, Justice O'Connor emphasized that "[t]he goal of providing 'role models' discussed by the courts below should not be confused with the very different goal of promoting racial diversity among the faculty." The problem in Wygant was that the school board did not articulate the "faculty diversifica-

46. In all probability, not very many black teachers had applied for jobs in the Jackson system, either because they did not want to teach there, or because they knew that they would not be hired in a school system that had very few black students.
47. 476 U.S. at 315 (Stevens, J., dissenting) (footnote omitted).
48. Id. at 288 n.*
tion" justification when it adopted the hiring plan, and in the courts below it essentially argued the "role model" justification. In fact, it did not fully articulate the "faculty diversification" justification until the case came before the Supreme Court.

The third important problem in Wygant was that there was simply no record at all. The case was disposed of by the federal district court on cross-motions for summary judgment, and the "statement of facts" that the parties had proffered in support of their cross-motions was rather imprecise. Both parties submitted voluminous "lodgings" to the Supreme Court, and the school board claimed that the "lodgings" supported a finding of identified past discrimination. However, the school board had not made such a finding, and it did not argue in the courts below that the plan was adopted to remedy its own identified past discrimination.

The five Justice majority expressed itself in three separate opinions. The Powell opinion, joined in completely by Burger and Rehnquist and in part by O'Connor, made two points. First, the "societal discrimination" and "role model" justifications were insufficient to sustain any racial preference. Justice O'Connor joined this part of the opinion. Second, it was not necessary to consider whether the case should be remanded to enable the school board to make a showing of identified past discrimination because, whatever the justification, a provision for race-based out-of-line seniority layoffs was constitutionally impermissible. Justice White limited his brief concurrence to the constitutional impermissibility of the layoff provision. Thus, there were four votes on the Court for holding that race-based out-of-line seniority layoffs could not be used to advance any purpose, including overcoming the present effects of a governmental body's own identified past discrimination.

Justice O'Connor, in her concurrence, found it unnecessary to resolve this specific question. She emphasized that the governmental body has an "unquestionably compelling interest" in remedying the present effects of its identified past discrimination, and that it can make a showing of past discrimination when the plan is challenged in court by adversely affected whites. In the present case, however, neither the district court nor the court of appeals made "the proper inquiry into the legitimacy of the Board's

49. Id. at 274-76.
50. Id. at 282-84.
51. Id. at 294-95.
52. Id. at 289-91.
asserted remedial purpose; instead they relied upon governmental purposes ['societal discrimination' and 'role models'] that we have deemed insufficient to withstand strict scrutiny, and therefore failed to isolate a sufficiently important governmental purpose that could support the challenged provision."

In any event, the layoff provision was not "narrowly tailored to achieve its asserted remedial purpose," because it was keyed to a hiring goal "that itself has no relation to the remedying of employment discrimination." The hiring goal was keyed to the percentage of black students in the school system rather than to the percentage of qualified black teachers within the relevant labor pool, which is the benchmark for measuring and remedying the present consequences of identified past discrimination. O'Connor thus left open in Wygant the question of whether a race-based out-of-line seniority provision is constitutionally permissible as a means of preserving the goals of a hiring plan adopted to remedy proven identified past discrimination.

Justice Marshall, joined by Justices Brennan and Blackmun, argued that the Court should not have decided the constitutional issues in the posture in which they were presented, and should have remanded the case for findings as to the existence of identified past discrimination. They also indicated their view that the "faculty diversification" justification was constitutionally sufficient. Thirdly, they took the position that the race-based out-of-line seniority plan at issue here, which laid off teachers in reverse order of seniority, while maintaining existing racial percentages, was a constitutionally permissible means of advancing both the overcoming of identified past discrimination and "faculty diversification" interests. The Stevens dissent focused entirely on the "faculty diversification" interest and agreed with Marshall, Brennan and Blackmun that the layoff provision was a constitutionally permissible means of advancing that interest.

The end result of the Court's fragmentation in Wygant left undecided both a question as to the remedying of identified past discrimination, and a question as to achieving "faculty diversifi-

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53. Id. at 293.
54. Id. at 294.
55. Id.
56. Id. at 296, 312.
57. Id. at 306.
58. Id. at 309-12.
59. Id. at 313-20.
cation'' in a public school system. The answer that would be given by the Court to the first question, even without regard to the replacement of Brennan, is indicated by the positions taken by the Justices in subsequent cases. I have no doubt that O'Connor would now hold that a race-based out-of-line seniority layoff is a constitutionally impermissible means of advancing any asserted governmental interest, including maintaining hiring goals under a plan designed to remedy the governmental body's identified past discrimination. It may safely be assumed that Scalia and Kennedy, who have both expressed strong opposition to any form of racial preference, would hold this unconstitutional as well. Additionally, since Rehnquist and White held this unconstitutional in Wygant, there are now at least five votes on the Court for holding unconstitutional any race-based out-of-line seniority layoff adopted for any purpose.

I should add that I now find myself in agreement with this position. When the government is purportedly trying to remedy its own identified past discrimination (and certainly when it is acting to achieve "faculty diversification"), a cogent argument can be made that the costs of this effort should be borne by the government itself, and that it should not be achieved by destroying the "settled expectations" of particular and identified individual whites. To put it another way, in the constitutional equation, the conflict between the ideals of racial equality and racial neutrality may in some circumstances have to be resolved by imposing the cost burden on the involved governmental entity.

When the government has engaged in identified past racial discrimination it has violated the interests of blacks as a group. For example, when a city in the past has discriminated in the hiring of its police officers, it has violated the interests of its black citizenry in the equal participation in this very important aspect of municipal government. The city, then, has an affirmative con-

60. In Wygant, I was one of the lawyers on the amicus curiae brief filed by the Lawyers Committee for Civil Rights Under Law and the American Civil Liberties Union on behalf of the school board. My primary concern was that the Court would uphold the use of race-conscious criteria to advance the "faculty diversification" interest in the posture of that case, however, it seemed to me likely—as indeed it turned out—that if the Court invalidated the race-based out-of-line seniority layoff, it would not at the same time specifically uphold the "faculty diversification" interest. Under the collective bargaining agreement in Wygant, layoff did not always follow strict seniority, and we argued that the use of race could be sustained as one factor affecting the layoff determination. Still, I was troubled with that part of the argument in Wygant.
stitutional duty to remedy the present consequences of its identified past discrimination, and thus in a suit by adversely affected black citizens, it can be ordered to adopt an affirmative racial hiring and, or, promotion plan.\textsuperscript{61} When it voluntarily adopts a race-based hiring or promotions plan to remedy its own identified past discrimination, it is only doing what it is constitutionally required to do. Thus, it can defend the plan in a suit by adversely affected white officers by showing that it had a “substantial basis in evidence” for concluding that it had engaged in identified past discrimination against blacks.\textsuperscript{62}

If the city wants to engage in a layoff of police officers before the judicially mandated or voluntarily adopted racial hiring goals have been reached, it can be contended that using in-line seniority layoffs, resulting in the layoffs of black officers, violates the city’s affirmative duty to remedy its identified past discrimination. If this contention is sustained, then the city would be precluded from laying off the black officers, and thus would have to bear the costs of remedying its own constitutional violation.\textsuperscript{63} By the same token, since the city can properly be expected to bear the costs of remedying its own constitutional violation, it should be precluded from using race-based out-of-line seniority layoffs to lay off white officers instead. Here, to paraphrase Justice Powell in \textit{Wygant}, the city is “imposing the entire burden of [remedying the government’s constitutional violation] on particular individuals, often resulting in serious disruption of their lives.”\textsuperscript{64}

In other words, when a governmental body has engaged in identified past discrimination against blacks, an argument can be made that the Constitution should require it to bear the costs of remedying its own constitutional violation and preclude it from shifting the costs of remediation to: (1) blacks as a group by laying off the black officers it has hired to remedy its constitutional violation; or (2) particular individual whites by using race-based out-of-line seniority layoffs.


\textsuperscript{62.} See \textit{e.g.}, Detroit Police Officers Ass’n v. Young, 608 F.2d 671 (6th Cir. 1979).

\textsuperscript{63.} See \textit{The Constitution}, supra note 3, at 703.

\textsuperscript{64.} 476 U.S. at 283.
The second question left unanswered in Wygant is whether a school board or a university's interest in maintaining "faculty diversification" is a sufficient interest to justify the use of racial considerations in hiring, such as by way of a "racial enhancement" factor, as per the Powell opinion in Bakke. The question is not answered by Wygant, since only four Justices—Brennan, who has now left the Court, Marshall, Blackmun and Stevens—held that this was a valid interest. The remaining Justices did not pass on the question. I think that White would agree that this interest is sufficient, since he found the "racial diversity" of the student body interest sufficient in Bakke and has never indicated any repudiation of his position in that case. Based on her statements in Wygant, I thought that Justice O'Connor might agree that this interest is sufficient, but the hostility to any use of racial preference in her Metro Broadcasting dissent makes her concurrence on this point questionable. At this point in time then, it cannot be said for certain that there would be at least five votes on the Court to uphold this limited use of racial preference in order to achieve "faculty diversification." The question, thus, must be considered an open one for now, although a lower court, in reliance on Bakke, could justifiably find such use of racial preference to be constitutionally permissible.

In City of Richmond v. J.A. Croson Company,66 decided in 1989, the Court, again, dealt with minority business enterprise set-asides, this time those adopted by a local governmental body. In the wake of Fullilove, many state and local governmental bodies adopted minority contractor construction set-aside programs, relying primarily on Congress' finding of industry-wide discrimination in Fullilove. In retrospect, Croson was a very unsympathetic case for an institutionally ambivalent Court to sustain the racial preference at issue. Minority business enterprise set-aside programs directly benefit minority business persons, who are among the more advantaged and politically influential segments of the minority community. While I maintain that such programs advance a strong societal interest in the equal participation of blacks in the American economic system and redound to the benefit of the entire black community,67 they may appear to some Members of the Court as a "windfall" for more advantaged and influential blacks.

65. The school board or university asserting such an interest will explain it in terms of "faculty diversification" and not in terms of "role model."
I find it interesting, for example, that Justice Stevens, who voted to sustain race-based out-of-line seniority layoffs to advance the "faculty diversification" interest in Wygant, voted to hold unconstitutional the minority business enterprise set-aside in Croson, just as he did in Fullilove.68

Second, a number of American cities, such as Richmond, now have black majorities and thus are very likely to adopt such programs. In Croson, Justice O'Connor, in justifying the application of "strict scrutiny" to the use of the racial preference, noted that blacks comprised approximately fifty percent of the Richmond population and that five of the nine seats on City Council were held by blacks. Thus, she concluded that "[t]he concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case."69 Likewise, Justice Scalia noted that in Richmond the set-aside "was directly beneficial to the dominant political group, which happens also to be the dominant racial group." He said that the same thing had doubtless happened in practice in other cities, with blacks "on the receiving end of the injustice." But, said Justice Scalia, "Where injustice is the game, turn-about is not fair play."70

Third, while the minority population of Richmond is almost entirely black, the terms of the set-aside were borrowed from the federal government's classification of "minority," which also included "Spanish-speaking, Oriental, Indian, Eskimo or Aleut persons." If there was past racial discrimination in Richmond's procurement policies, it certainly was against black enterprises, and the limited evidence of past discrimination that the city pre-

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68. As he stated in Croson: "The justification for the ordinance is the fact that in the past white contractors—and presumably other white citizens in Richmond—have discriminated against black contractors. The class of persons benefited by the ordinance is not, however, limited to victims of such discrimination; it encompasses persons who have never been in business in Richmond as well as minority contractors who may have been guilty of discriminating against members of other minority groups. Indeed, for all the record shows, all of the minority-business enterprises that have benefited from the ordinance may be firms that have prospered notwithstanding the discriminatory conduct that may have harmed other minority firms years ago. Ironically, minority firms that have survived in the competitive struggle rather than those that have perished, are most likely to benefit from an ordinance of this kind." 109 S. Ct. at 732-33.
69. Id. at 722.
70. Id. at 737.
sented related entirely to black enterprises. In Richmond, other racial-ethnic groups were mindlessly included in the preference. In some other cities, minority groups such as Hispanics and Asian Americans, which are small in numbers compared to the black population, are also included for political reasons. The inclusion of groups as to which there is no evidence at all of identified past discrimination impairs the legitimacy of the racial preference for black enterprises. As Justice O'Connor stated in *Croson*: “The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond, suggests that perhaps the city’s purpose was not in fact to remedy past discrimination.”

Finally, the city tried to justify the program as being necessary to overcome the present consequences of both “societal discrimination” and its own identified past discrimination, but had made no findings as to its own past discrimination and presented very limited evidence of such discrimination in the lower court. The only evidence of past discrimination against black enterprises in the award of governmental construction contracts was that (1) supporters of the Richmond set-aside stated that there had been discrimination in the construction industry, (2) minorities made up fifty percent of the city’s population, but had received less than one percent of the city’s prime contracts, (3) state and local contractors’ associations had a very small population of minority contractors, and (4) as brought out in *Fullilove*, Congress had determined in 1977 that nationally, minority participation in the construction industry had been hindered by the effects of past discrimination.

It was a relatively easy matter for the Court majority to find the Richmond set-aside program unconstitutional under existing doctrine and precedents. Since the Court has never held that remedying “societal discrimination” justifies racial preference, the only valid interest that could be asserted here was remedying the city’s own identified past discrimination, and the city’s evidence on that score was weak. O’Connor readily concluded that “[i]n sum, none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry.”

She discounted conclusionary statements that such discrimination existed as having “little probative value” and observed that since

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71. *Id.* at 728.
72. *Id.* at 724.
73. *Id.* at 727.
"special qualifications" were required for the award of contracts, a gross statistical disparity between the black percentage of the city's population and the percentage of contracts awarded to black firms was misplaced. To demonstrate a discriminatory exclusion of black firms, the relevant statistical pool had to be the qualified black contractors. In *Croson*, the city did not even know how many black firms in the relevant market area were qualified to perform the prime or subcontracting work for the city's construction contracts or the percentage of total city construction dollars the minority firms currently were receiving for subcontracting when in the city's prime contracts.\(^7\)

What the city was essentially relying on, of course, as had other cities and the states that adopted minority business enterprise construction set-asides, was Congress' findings of industry-wide discrimination against minority contractors that was the basis of the set-aside upheld in *Fullilove*. The crucial holding in *Croson* was that these findings could not be relied upon to uphold minority business enterprise set-asides adopted by states and local governments. Justice O'Connor first noted that these findings had extremely limited probative value for demonstrating the existence of discrimination in a particular city, since Congress' inclusion of the waiver provision in the program explicitly recognized that "the scope of the problem would vary from market area to market area."\(^7\) More significantly, while Congress can make generalized findings of discrimination under its section 5 powers, the states "must identify that discrimination, public or private, with some specificity before they may use race-conscious relief."\(^7\)

The O'Connor opinion, joined in on this point by Rehnquist, White and Kennedy, and by Scalia in his separate opinion, also reaffirmed that the "strict scrutiny" of the "compelling governmental interest" standard applied to the use of race-conscious

\(^7\) *Id.* at 724-25.  
\(^7\) *Id.* at 726.  
\(^7\) *Id.* at 727. The city also argued, in reliance on *Fullilove*, that it need not make specific findings of discrimination in order to engage in race-conscious relief. In rejecting this argument, O'Connor emphasized that, "Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment," and that to allow the states to "identify and redress the effects of society-wide discrimination" would "be contrary to the intentions of the Framers of the Fourteenth Amendment who desired to place clear limits on the States' use of race as a criterion for legislative action and to have the federal courts enforce those limitations." *Id.* at 719.
criteria favoring racial minorities. Although not necessary to the
decision of the case, O'Connor indicated that there may be "appropriate means" problems with the use of a minority business enterprise set-aside even to remedy identified past discrimination. First, she noted that there was no evidence that the city had considered the use of race-neutral means to increase minority business participation in city contracting. She said that many of the barriers to minority participation in the construction industry appeared to be race-neutral, such as the lack of capital or inability to meet bonding requirements and thus, the city was incorrect to rely on these barriers as a justification for use of race-conscious classifications. If the city were to act on these barriers, such as by a race-neutral program of city financing for small firms, this would "a fortiori, lead to greater minority participation." Second, the rigid racial quota appeared to involve nothing more than "racial balancing." There was no effort to determine whether a particular minority firm had suffered from the effects of the past discrimination. Since successful firms would participate fully in the program, it was not "narrowly tailored to remedy the effects of prior discrimination."

The thrust of Croson then is that states and local governments may adopt minority business enterprise set-aside programs only to remedy the present consequences of identified past discrimination for which they were responsible, and that they must have a "strong basis in evidence" for finding the existence of such past discrimination. Even if this burden is satisfied, there still may be questions of whether racial preference is justified at all if race-neutral means might be effective, and of what kinds of minority firms may receive the preference. As a result of Croson, the constitutional barriers to the adoption of minority business enterprise set-asides by states and local governments are formidable.

What is very interesting, however, is how O'Connor in Part V of her opinion, which is expressly joined in by Rehnquist, White and Kennedy, and Scalia in his separate opinion, proceed to tell states and local governments how they can increase contracting

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77. Id. 720-23. Scalia, however, was not willing to concede that racial preference could be used even to remedy the government's own identified past racial discrimination. Id. at 735-39.
78. Id. at 728 (emphasis in original).
79. Id. at 729.
80. This includes discrimination against minority firms by private entities holding government contracts. Id. at 720.
opportunities for racial minorities in a race-neutral and thus constitutionally permissible way. As O'Connor states: "Even in the absence of evidence of discrimination, the city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races." These include "simplification of bidding procedures, relaxation of bonding requirements, ... training and financial aid for 'disadvantaged entrepreneurs of all races,' and prohibiting discrimination in the provision of credit or bonding by local suppliers and banks." As she concludes: "Business as usual should not mean business pursuant to the unthinking exclusion of certain members of our society from its rewards."

Scalia picks up the theme in his separate opinion and makes the point that as long as the basis for a preference is race-neutral, it does not matter, for constitutional purposes, that blacks will benefit disproportionately from the preference. He suggests that in the field of governmental contracting, the state "may adopt a preference for small businesses, or even for new businesses, which would make it easier for those previously excluded by discrimination to enter the field." He goes on to say, "Such programs may well have racially disproportionate impact, but they are not based on race." He later adds:

Since blacks have been disproportionately disadvantaged by racial discrimination, any race-neutral remedial programs aimed at the disadvantaged as such will have a disproportionately beneficial impact on blacks. Only such a program, and not one that operates on the basis of race, is in accord with the letter and the spirit of our Constitution.

81. O'Connor also emphasizes that they can stop present discrimination. If they have evidence that non-minority contractors systematically exclude minority businesses from subcontracting opportunities, they can end the discriminatory exclusion. They can also take remedial action based on an inference of discriminatory exclusion if they find a significant statistical disparity between the number of available qualified minority contractors for a particular service and the number actually engaged by the city or its prime contractors. Id. at 729.
82. Id. at 729 (emphasis added).
83. Id. at 730.
84. Id. at 738.
85. Id.
86. Id. at 739 (emphasis in original).
At least five Members of the Court, O'Connor, Rehnquist, White, Scalia and Kennedy, appear to be saying that governmental bodies should try to overcome the present consequences of the social history of racism by the use of race-neutral policies that are intended to and will have the effect of disproportionately benefiting blacks. As Scalia emphasizes, as long as the policies are expressed in terms of race-neutral criteria, and whites meeting those criteria receive the benefits of the policies, there is no constitutional problem.

The Court's holding in Croson, coupled with Part V of the O'Connor opinion and the Scalia opinion, sends a very clear "behavioral message" to state and local governmental units that want to increase minority participation in governmental contracting. The first part of the "behavioral message" is: Don't use race-based set-asides or other forms of racial preference. The second part of the "behavioral message" is: Increasing minority participation in governmental contracting is a socially desirable policy objective, which you should achieve by race-neutral means, in particular, means directed at increasing the participation of small businesses. In this connection, the Court is also saying: You may also adopt criteria that will ensure that minority business enterprises will benefit, even disproportionately, to white-owned business enterprises.

In light of this "behavioral message," if I were advising a state or local governmental unit seeking to increase minority participation in governmental contracting, I would advise it to adopt a preference for locally owned small businesses. "Small business" should be defined to include as many of the minority-owned businesses as possible in the particular area. The size of the preference should be large enough to give minority-owned businesses substantially the same amount of business they would have received under a minority business enterprise set-aside. Also, it should include white-owned firms who qualify under the designated criteria. Of course, such a preference imposes additional procurement costs. There will be a substantial increase in the proportion of contracts which will go into a "sheltered market" rather than be subject to completely competitive bidding. The governmental body will have to make a political judgment as to the cost it is.

87. Apparently this means that for constitutional purposes, the policies would not be considered to amount to intentional racial discrimination, despite the racial motivation, because whites meeting the expressed criteria would also be entitled to the benefits.
willing to bear in order to achieve this objective, but that is another matter. Particularly where cities are involved, the definition of "locally owned" can be tied to the definition of "small business" so as to maximize the number of minority firms that will be included in the preference (given the concentration of the minority population in the central cities, most minority firms are likely to be "locally owned" in this circumstance). The Court has made it clear that this kind of "race-neutral" preference is constitutionally permissible. 8 This race-neutral preference is certainly the safest course for state and local governmental units to follow if they wish to increase governmental contracting opportunities for minority firms.

Metro Broadcasting

In Metro Broadcasting, 9 the Court dealt with two forms of minority preference, adopted by the FCC in its 1978 Statement of Policy on Minority Ownership of Broadcasting Facilities, that were designed to increase the exceedingly small percentage of minority-owned broadcasting facilities. 90 Under the "minority enhancement" policy, the FCC considers minority ownership as a "plus" factor

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88. A classification in favor of "small businesses" is subject only to deferential rational basis review. A governmental body clearly has a legitimate interest in increasing the contracting opportunities for small businesses, and a small business set-aside or "sheltered market" is rationally related to the advancement of that interest.

With regards to "resident" preference, a governmental body is constitutionally entitled to give preference to its own residents in the expenditure of its own funds. Resident preference in governmental contracting is not subject to negative commerce clause challenge, White v. Massachusetts Council of Constr. Employers, 460 U.S. 204 (1983), and can probably survive a privileges and immunities challenge on the ground that there is a need for the city to favor its own residents (e.g., it has a relatively high unemployment rate). See United Bldg. Trades Council v. Camden, 465 U.S. 208 (1984).


90. The FCC used the standard federal definition of "minority" to include Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian, and Asian American. These groups total one-fifth of the overall population. However, in 1978, when these policies were adopted, minority groups owned less than 1% of the Nation’s radio and television stations and, in 1986, they owned just 2.1% of the more than 11,000 stations. As late entrants, the minority broadcasters often have been able to obtain only the less valuable stations, serving geographically limited markets with relatively small audiences, 110 S. Ct. at 3002 n.1, 3003.
in comparative proceedings for new licenses.\textsuperscript{91} Only a station in which the minority owner actively participates in the day-to-day management of the station will be eligible for this "plus" factor.\textsuperscript{92}

Under the "distress sale" policy, the FCC permits a licensee who faces a threat of revocation or non-renewal to assign the license to a FCC-approved minority firm. The assignee must meet the FCC's basic qualifications, the minority ownership must exceed fifty percent or be controlling, the purchase must be made before the start of the revocation or renewal hearing, and the purchase price must not exceed seventy-five percent of fair market value.\textsuperscript{93}

The FCC minority ownership policies have two related, but distinct objectives, one relating to minority communities and the other to the larger non-minority viewing and listening public. Since it is the licensee who is ultimately responsible for identifying and serving the needs of the licensee's audiences, one objective of the policies is to increase programming targeted toward the interests and needs of minority communities. The other objective is to increase the presentation of minority views and perspectives to the viewing and listening public.\textsuperscript{94} These objectives can be grouped

\begin{itemize}
  \item The other factors are: (1) diversification of control of mass media communications; (2) the integration of ownership and management, \textit{i.e.}, full-time participation in station operation by the owners; (3) proposed program service; (4) past broadcast record; (5) efficient use of the frequency; and (6) the applicant's character. \textsuperscript{91} Id. at 3005.

  \item There is also a "gender enhancement" policy that was not at issue in \textit{Metro Broadcasting}. \textsuperscript{92} Id. at 3005. In \textit{Metro Broadcasting}, the "minority enhancement" factor proved decisive. The "minority credit" for Rainbow, a station that was 90\% Hispanic-owned, outweighed Metro Broadcasting's "local residence" and "civic participation" advantage. The applicants were roughly equal on the other factors. \textsuperscript{93} Id. at 3005-06. In many cases, however, the "minority enhancement" factor was insufficient to overcome the other factors, and the minority applicant did not receive the license. \textsuperscript{94} Id. at 3026 n.50.

  \item In \textit{Astroline Communications v. Shurberg Broadcasting}, the companion case to \textit{Metro Broadcasting}, a television station in Hartford, Connecticut, whose license was up for a renewal hearing, was permitted to execute a "distress sale" to Astroline, a minority firm. As a result, the FCC would not consider Shurberg's mutually exclusive application to build a television station in Hartford. \textsuperscript{91} Id. at 3007.

  \item As stated in the FCC Task Force Report on Minority Ownership in Broadcasting:

    Acute underrepresentation of minorities among the owners of broadcasting properties is troublesome because it is the licensee who is ultimately responsible for identifying and serving the needs of his or her audience. Unless minorities are encouraged to enter the mainstream of
together as "enhancing broadcast diversity." In adopting the "minority enhancement" and "distress sale" policies, the FCC necessarily concluded that there was a correlation between minority ownership and the objective of "enhancing broadcast diversity." That is, the FCC found that minority-owned broadcasting facilities in the aggregate would be more likely to target their programming toward the interests and needs of minority communities and to present minority views and perspectives to the viewing and listening public. According to the Court majority in *Metro Broadcasting,* "[t]he FCC has determined that increased minority participation in broadcasting promotes programming diversity," and "[t]he FCC's conclusion that there is an empirical nexus between minority ownership and broadcast diversity is a product of its expertise." 95

In 1986, the FCC undertook an inquiry into the validity of its minority ownership policies and decided to hold in abeyance action on licensing proceedings and "distress sales" in which a minority preference would be dispositive. Congress intervened to protect the policies by the use of its appropriations power. In 1987, the continuing resolution appropriating funds for Fiscal Year 1988 provided: "That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales . . . to expand minority and women ownership of broadcasting licenses, including those established in Statement of Policy on Minority Ownership of Broadcast Facilities . . . ." 96 Congress reiterated this prohibition in appropriating funds for Fiscal Year 1989 and Fiscal Year 1990. 97 As a result, *Metro Broadcasting,* like *Fullilove,* but unlike *Wygant* and *Croson,* involved a racial preference in the programs and operations of the federal government that was specifically authorized by Congress. 98

the commercial broadcasting business, a substantial portion of our citizenry will remain underserved and the larger, non-minority audience will be deprived of the views of minorities.


95. Id. at 3011.


98. It is not disputed that Congressional policy set forth in appropriations legislation has the same force and status as Congressional policy set forth in other legislation. 110 S. Ct. at 3016 n.29.
The Court then could find an “easier way out” in *Metro Broadcasting* by invoking the “power of Congress” rationale that it had employed in *Fullilove*. *Metro Broadcasting* was an even stronger case for the “power of Congress” rationale, since here Congress was also exercising its broad powers to regulate the allocation of broadcasting licenses “in the public interest.” Precisely because the award of broadcasting licenses involves the allocation of scarce frequencies, Congress has the responsibility, grounded in first amendment concerns, to ensure that the award of a broadcasting license is in the “public interest,” and that there is the “widest possible diversity” in broadcast programming. As the Court has stated: “The ‘public interest’ standard necessarily invites reference to First Amendment principles, and, in particular, to the First Amendment goal of achieving ‘the widest possible dissemination of information from diverse and antagonistic sources.’”

Likewise, for constitutional purposes, the interest of the listening and viewing public is far more significant than the interest of the holder of a broadcast license. Broadcasters are “‘fiduciaries for the public,’” and “‘the people as a whole retain their interest in free speech by radio, [and other forms of broadcast] and their collective right to have the medium function consistently with the ends and purposes of the First Amendment.’” Thus, “Congress may . . . seek to assure that the public receives through this medium a balanced presentation of information on issues of public importance that otherwise might not be addressed if control of the medium were left entirely in the hands of those who own and operate broadcasting stations.” Because of Congress’ broad power to regulate broadcasting “in the public interest” and to ensure the promotion of diversity of viewpoint, it may impose access and “fair presentation” requirements on broadcasting that may not under the first amendment be imposed on newspapers.

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101. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969). “[I]t is the right of the viewers and listeners, not the right of broadcasters, which is paramount.”
102. 468 U.S. at 377.
The broad power of Congress to regulate broadcasting "in the public interest" and to achieve the "widest possible dissemination of information from diverse and antagonistic sources" would surely justify Congress' efforts to promote racial diversity in broadcasting. Indeed, it would have been possible for the Court in *Metro Broadcasting* to treat the case as one primarily about diversity in broadcast programming, and only secondarily as one about racial preference.

Totally apart from the "power of Congress" rationale, the Court in *Bakke* had recognized that the interest of a public university in achieving a racially diverse student body was "compelling." If the interest in achieving "racial diversity" in a university student body was "compelling" because it contributed to the presentation of diverse viewpoints within the student body, then it is difficult to see why the FCC's interest in achieving "racial diversity" in broadcasting for the benefit of the viewing and listening public would not be equally "compelling."

The "power of Congress" rationale would also enable the Court to readily find that the particular policies were an appropriate means of advancing the interest in "enhancing broadcast diversity." The Court could defer to the expertise of the FCC and the subsequent endorsement of the FCC's policies by Congress to support the conclusion that there was a "nexus" between minority ownership and "enhancing broadcast diversity." The FCC's institutional expertise in all facets of broadcasting would justify its

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105. The premise of a "racially diverse" student body is that all students benefit from exposure to students of different races during the educational process. A black student can share with white students the perspective that comes from "the experience of being black in America." See *Racial Preference*, supra note 10, at 1245-48.

In the context of "enhanced broadcasting diversity," the perspective that comes from "the experience of being black in America" relates to the broadcaster's exercise of editorial discretion in programming decisions. As a result of this experience, a black broadcaster may have a different view as to what is "important" or "relevant" than a white broadcaster. The black broadcaster may have a greater sensitivity to issues of discrimination or poverty. He or she may have a better understanding of what matters may be of particular interest to black persons and to white persons concerned with questions of equality. Likewise, there may be greater familiarity with the work of black writers and perhaps a different assessment of the significance of their work. The point is that precisely because of the broadcaster's race and the different life experience and resulting perspective that comes from being a black person in America, the black broadcaster has something to bring to broadcast programming that is qualitatively different from what a white broadcaster can bring.
conclusion that a broadcasting facility that was minority owned would be more likely to target its programming toward the interests and needs of minority communities and would be more likely to present minority viewpoints and perspectives to the viewing and listening public. Likewise, while the "distress sale" policy provided for an absolute racial preference, its appropriateness could be justified again as a matter of deference to the expertise of the FCC and the judgment of Congress. It also applied only in a very limited number of situations and would not seriously impair the opportunities of non-minority firms to acquire broadcasting licenses.

My point then is that in *Metro Broadcasting*, the Court clearly could have taken an "easier way out" by invoking the "power of Congress" rationale of *Fullilove*. The Court's upholding of the policies in issue on that basis would have had no precedential effect for a case involving a challenge to the racial-preference policies of states and local governments. As it turned out, five Members of the Court were willing to go this route, but four Members were not. The sharp division of the Court in *Metro Broadcasting* may be an indication that positions on the Court have hardened, and that the Court's seeming institutional ambivalence toward the permissibility of racial preference is now the result of a fundamental disagreement within the Court over the basic value question of the constitutional permissibility of any racial preference. We will come back to this point in the concluding portion of this writing.

In *Metro Broadcasting*, five Justices, Brennan, White, Marshall, Blackmun and Stevens, in an opinion by Justice Brennan, and over the very strong dissents of Justice O'Connor, joined by Chief Justice Rehnquist, and Justices Scalia and Kennedy (Kennedy also wrote a brief separate opinion, joined in by Scalia), relied on the "power of Congress" rationale to uphold both of the FCC's minority-preference policies. More significant perhaps than the result in the case is the way that both the majority and the dissent dealt with the constitutional doctrine and precedent.

Ever since *Bakke*, Justices Brennan, Marshall and Blackmun have insisted that the constitutional permissibility of racial-preference programs benefiting minorities—"benign" racial

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106. The "minority enhancement" policy involved the same kind of consideration of race as a "plus factor" that the Court had found to be an appropriate means of advancing the university's interest in a racially diverse student body in *Bakke*. 
preference\textsuperscript{107}—should be determined under the "important and substantial relationship" standard rather than under the seemingly more "strict" "compelling governmental interest" standard.\textsuperscript{108} In Metropolitan Broadcasting, Justices White and Stevens joined with Justices Brennan, Marshall and Blackmun to hold that the "important and substantial relationship" standard was the applicable standard to determine the constitutionality of the use of racial preference mandated or authorized by Congress in federal programs and operations. According to the Brennan opinion, "[i]t is of overriding significance in these cases that the FCC's minority ownership programs have been specifically approved—indeed mandated—by Congress."\textsuperscript{109} He then pointed out that in Fullilove, the Burger opinion did not apply "strict scrutiny"\textsuperscript{110} and that he, Marshall and Blackmun wanted to apply the "important and substantial relationship" standard. There were now five votes on the Court to apply that standard to the use of racial preference mandated or authorized by Congress.

We hold that benign race-conscious measures mandated by Congress—even if these measures are not 'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to the achievement of those objectives.\textsuperscript{111}

\textsuperscript{107} See supra notes 14-15 and accompanying text.

\textsuperscript{108} While Justice White joined the Brennan opinion in Bakke, he would seem to have abandoned this position in regard to the use of racial preference by state and local governments, since he joined the "compelling governmental interest" part of the O'Connor opinion in Croson.

\textsuperscript{109} 110 S. Ct. at 3008-09.

\textsuperscript{110} It will be recalled that White joined the Burger opinion fully. Powell also joined the Burger opinion, but wrote separately to sustain the racial preference under the "compelling governmental interest" standard.

\textsuperscript{111} 110 S. Ct. at 3008-09 (footnote omitted). Given the fact that Justice White joined unreservedly in the Burger opinion in Fullilove and has generally been supportive of the exercise of federal power, it is perhaps not surprising, in retrospect, that he agreed to the adoption of this standard of review to determine the validity of Congressionally approved racial preference. While Justice Stevens dissented in Fullilove, he has generally discounted the significance of the articulated standard of review in determining the constitutional permissibility of racial preference. See Croson, 109 S. Ct. at 732-34 (Stevens, J., concurring). Since he strongly maintains that race or ethnic origin is a valid consideration in advancing
In her dissent, Justice O'Connor insisted that there was a significant difference between the "compelling governmental interest" standard and the "important and substantial relationship" standard. As she stated:

The standard of review establishes whether and when the Court and the Constitution allow the government to employ racial classifications. A lower standard signals that the Government may resort to racial distinctions more readily. The Court's departure from our cases is disturbing enough, but more disturbing still is the renewed toleration of racial classifications that its new standard of review embodies.112

In *Bakke*, where the conflict over the appropriate standard of review for "benign" racial classifications first surfaced, both Justice Powell, who argued strongly for the "compelling governmental interest" standard, and Justice Brennan, arguing for an "important and substantial relationship" standard, agreed that there was a significant difference between the two standards. Powell contended that any classification based on race was "inherently suspect" and therefore, was subject to "the most exacting judicial examination."113 Emphasizing that regardless of the purportedly "benign" purpose for the racial classification, the effect was felt by an individual. He said that when classifications "touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest."114 Brennan agreed with Powell about the dangers in the use of "benign" racial classifications and rejected the university's argument that a "benign" racial classification need pass muster only under the "rational relationship" test. He too insisted on "strict scrutiny," but maintained that "strict scrutiny" was being applied under the "important and substantial relationship" standard. "[O]ur review under the Fourteenth Amendment should be strict—not 'strict' in theory and fatal in fact, because it is stigma that causes fatality—but strict and searching nonetheless."115

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the diversity objective, as brought out in his concurrence in *Metro Broadcasting*, he would be readily disposed to join in the standard of review part of the Brennan opinion. 110 S. Ct. at 3028.

112. *Id.* at 3033 (O'Connor, J., dissenting).
113. 438 U.S. at 291.
114. *Id.* at 299.
115. *Id.* at 361-62 (footnote omitted).
In my own view, the difference between Powell and Brennan over the appropriate standard of review reflects a more significant disagreement over which governmental interests are of sufficient importance and validity to justify the use of race-conscious criteria favoring blacks. In *Bakke*, Powell maintained that overcoming societal discrimination was not a "compelling" interest, while Brennan maintained that it was an "important" interest. But, Powell agreed that the university's interest in achieving a diverse student body was "compelling." Whether that interest is labelled "compelling" or "important," the same kind of value judgment has to be made: that the interest is of sufficient importance and validity to justify the resulting racial detriment to adversely affected whites. In *Bakke*, Powell made that value judgment in favor of "racial diversity" in a university's student body, and the "Brennan four" joined with him to provide a holding on that issue.

Where the articulated standard of review may have some independent analytical significance is in determining the question of "appropriate means." If the articulated test is "precisely tailored," the Court may give somewhat more scrutiny to the appropriateness of the particular use of race-conscious criteria to advance the asserted interest than if the articulated test is "substantially related." To put it another way, the articulated test may reflect the degree of scrutiny that the Court will give to the particular use of race-conscious criteria that is at issue. Under "precisely tailored," the Court may demand a stronger showing of the necessity of using race-conscious criteria and may consider the availability of "less drastic" or "racially neutral" means to advance the asserted interest. For example, in *Bakke*, Powell said that the university could not use race as a "surrogate" for the likelihood of a physician's willingness to practice in currently underserved minority communities, observing that there were more precise and reliable ways to identify particular applicants who would practice there.116

In practice, however, the same showing of the necessity and appropriateness of using the particular means of racial preference could be required under either standard. In *Bakke*, Justice Powell took the position that the "Harvard" plan—the competitive con-

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116. "An applicant of whatever race who has demonstrated his concern for disadvantaged minorities in the past and who declares that practice in such a community is his primary professional goal would be more likely to contribute to the alleviation of the medical shortage than one who is chosen entirely on the basis of race and disadvantage." 438 U.S. at 311.
sideration of race and ethnic origin in the admissions process—was "precisely tailored" to the university's "compelling" interest in achieving a racially diverse student body. In *Furillov*, he concurred separately in order to apply the "compelling governmental interest" standard to the permissibility of the Congressionally approved minority business enterprise set-aside and gave some deference to Congress' choice of a particular means for remedi ung the identified discrimination. When Congress acts, the question, according to Powell, is whether the means selected are "equitable and reasonably necessary to the redress of identified discrimination." 117

My point then is that under either the "compelling governmental interest" standard or the "important and substantial relationship" standard, the Court has to make the same kind of value judgment as to the validity and importance of the interest asserted to justify the use of a racial preference. As a practical matter, the Court can give the same kind of scrutiny to the appropriateness and necessity of the particular use of race-conscious criteria under either standard, including some deference to Congressional judgment in approving the racial preference in issue.

Interestingly enough, Justice O'Connor in *Wygant*, went out of her way to downplay the difference between the Powell and Brennan formulations of "strict scrutiny" in *Bakke*. She noted that the Powell formulation "reflects the belief, apparently held by all Members of this Court, that racial classifications of any sort must be subject to 'strict scrutiny,' however defined." 118 She also noted that although the Powell formulation may be viewed as "more stringent," "the disparities between the two tests do not preclude a fair measure of consensus," and "as regards certain state interests commonly relied upon in formulating affirmative action programs, the distinction between a 'compelling' and an 'important' governmental purpose may be a negligible one." 119

Why then does Justice O'Connor in *Metro Broadcasting* now argue that the articulated standard of review does make a significant difference? And why did the majority of the Court insist on the express adoption of the "important and substantial relationship" standard, since appropriate deference could be given to FCC

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117. He noted that "[s]uch a test allows the Congress to exercise necessary discretion but preserves the essential safeguard of judicial review of racial classifications." 448 U.S. at 510.
118. 476 U.S. at 285.
119. Id. at 286.
and Congressional findings under the "compelling governmental interest" standard, as per the Powell opinion in *Fullilove*? Additionally, why did Justice White and Justice Stevens join Justices Brennan, Marshall and Blackmun in the adoption of the "important and substantial relationship" standard to determine the constitutional permissibility of Congressionally approved "benign" racial preferences?

The first question is answered most easily. In O'Connor's view, the adoption of a seemingly lower articulated standard of review marks a "renewed toleration of racial classifications." In effect, the holding and rationale of *Metro Broadcasting*, coupled with the holding of *Fullilove*, established as a matter of constitutional doctrine that Congress has greater power than the states to adopt programs of racial preference. In *Metro Broadcasting*, O'Connor made very clear her strong opposition to racial preference, and seemingly joined with Rehnquist, Scalia and Kennedy to make a value judgment against the constitutional permissibility of virtually any racial preference. She discussed all the objections to racial preference, challenged the concept of a "benign" racial preference, insisted that the interest in "enhancing broadcast diversity" clearly is not a "compelling" one and argued that in any event this interest could be advanced by "race-neutral" means.

The five Justices comprising the *Metro Broadcasting* majority may have had different motivations for coming together on the express adoption of the "important and substantial relationship" standard. Brennan, Marshall and Blackmun have always contended that this is the appropriate standard by which to evaluate all "benign" racial preference, and being unable to get a Court majority to agree with this proposition, have accepted "half a loaf" in the adoption of this standard to evaluate Congressionally approved racial preferences.

As we have seen in our discussion of the other cases, Justices White and Stevens are the most ambivalent Justices on the constitutional permissibility of racial preference. Of the members of the current Court, they are the only ones who have voted to uphold racial preferences in some cases and to invalidate them in others. Justice White joined the Brennan opinion in *Bakke* to uphold the use of racial preference to overcome the present con-

120. 110 S. Ct. at 3033.

121. *Id.* at 3028-37. She also contended that since the asserted interest could be advanced by "race-neutral" means, the FCC's programs were unconstitutional even under the "important and substantial relationship" standard. *Id.* at 3037.
sequences of societal discrimination, although now he apparently has moved away from this position.\textsuperscript{122} He, however, is a strong proponent of federal power,\textsuperscript{123} and a seemingly lower standard of review to evaluate the constitutional permissibility of Congressionally approved racial preference is consistent with the Burger opinion in \textit{Fullilove}, which he joined unreservedly.

Justice Stevens, however, dissented in \textit{Fullilove}, and had not indicated that there was to be any deference to Congressional use of racial preference. But, he strongly favors the use of racial preference to achieve racial diversity in a number of circumstances. In his brief separate opinion in \textit{Metro Broadcasting}, he noted first that "[t]oday the Court squarely rejects the proposition that a governmental decision that rests on a racial classification is never permissible except as a remedy for past wrong."\textsuperscript{124} He then said that "the Court demonstrates that this case falls within the extremely narrow category of governmental decisions for which racial or ethnic heritage may provide a rational basis for differential treatment."\textsuperscript{125} Thus, he concluded: "The public interest in broadcast diversity—like the interest in an integrated police force, diversity in the composition of a public school faculty or diversity in the student body of a professional school—is in my view unquestionably legitimate."\textsuperscript{126}

Stevens also says that he joins both the opinion and the judgment of the Court.\textsuperscript{127} Thus, he endorses the "important and substantial relationship" test as the appropriate standard by which to evaluate the constitutional permissibility of Congressionally approved racial preferences, such as those involved in \textit{Fullilove}. However, he dissented in \textit{Fullilove} and has indicated his opposition to minority business enterprise set-asides. Query whether Stevens would vote to uphold such a set-aside in another \textit{Fullilove} case. I suspect that he might, now that he has accepted the proposition that Congress has greater power than the states to adopt racial preference programs.

In any event, the Court has now promulgated this proposition as a matter of constitutional doctrine. The "important and substantial relationship" standard is the articulated basis for evaluating

\textsuperscript{122.} \textit{See supra} note 108. \\
\textsuperscript{123.} \textit{See supra} note 40. \\
\textsuperscript{124.} 110 S. Ct. at 3028. \\
\textsuperscript{125.} \textit{Id.} \\
\textsuperscript{126.} \textit{Id.} (footnotes omitted). \\
\textsuperscript{127.} \textit{Id.}
the constitutionality of Congressionally approved racial preference programs. In *Metro Broadcasting*, the majority emphasized that this standard applied to a racial preference adopted pursuant to any exercise of Congressional power, not merely the exercise of its implementing power under section 5 of the fourteenth amendment. Justice O'Connor argued to the contrary, that any deference to Congressional judgment in *Fullilove* was premised on section 5's "specific constitutional mandate to enforce the dictates of the Fourteenth Amendment" against the states, and that section 5 was completely inapposite in assessing the constitutionality of the Congressionally approved racial preference at issue here. She also argued that at most, *Fullilove* applies only to "congressional measures that seek to remedy identified past discrimination." 

In my view, in determining the constitutional permissibility of a Congressionally approved racial preference, the focus should be on the implementing clauses of the thirteenth, fourteenth and fifteenth amendments, taken as a whole. These provisions give Congress broad powers to bring about a condition of racial equality in this Nation and to deal with the consequences of private as well as governmental discrimination. As Chief Justice Burger noted in *Fullilove*, section 5 of the fourteenth amendment "is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," and that "in no organ of government, state or federal, does there

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128. In this connection, it noted that the Burger opinion in *Fullilove* referred to Congress' "employ[ing] an amalgam of its specifically delegated powers." *Id.* at 3008 n.11.

129. *Id.* at 3031 (quoting, *Croson*, 488 U.S. at 490 (O'Connor, J.)).

130. *Id.* at 3031.

131. *Id.*

132. It is my submission that the broad organic purpose of the Reconstruction Amendments, taken as a whole, was to bring about a condition of black freedom in the United States. *See Consequences, supra* note 2, at 731-34.

133. *See, e.g.*, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (Congress, acting under the implementation clause of the thirteenth amendment, can prohibit racial discrimination in housing by private persons). In *Fullilove*, Justice Powell referred to the thirteenth amendment, observing that, "I believe that the Enforcement Clauses of the Thirteenth and Fourteenth Amendments give Congress a similar measure of discretion to choose a suitable remedy for the redress of racial discrimination." 448 U.S. at 508.

134. 448 U.S. at 476 (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)).
repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." Therefore, he concluded, when the Court reviews the constitutionality of a program of racial preference authorized by Congress, it is "bound to approach [its] task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power . . . 'to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment."  

The point to be emphasized is that the specific constitutional grant of Congressional power to implement racial equality in this Nation, contained in the thirteenth, fourteenth, and fifteenth amendments, justifies a constitutional proposition that Congress has greater power than the states to adopt programs of racial preference. It also justifies a greater degree of judicial deference to Congress' finding of the necessity for the use of racial preference to implement particular objectives and its choice of the specific means of racial preference for implementing those objectives.  

In addition, whenever Congress chooses to employ racial preference, its action, in theory, represents a national consensus. There is no concern, as expressed by O'Connor in Croson, that a black political majority in a given city or political subdivision will use its power in a deliberately discriminatory manner. Interestingly enough, it was Justice Scalia who made this point in Croson. He pointed out that "'[a] sound distinction between federal and state (or local) action based on race rests not only upon the substance of the Civil War Amendments, but upon social reality and gov-

135. Id. at 483.
136. Id. at 472. Interestingly enough, in Croson, Justice O'Connor appeared to take a broader view of Congress' implementing power and the resulting scope of judicial review than she did in Metro Broadcasting. There she said "that Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment," which includes "the power to define the situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." This being so said Justice O'Connor, "Congress may identify and redress the effects of society-wide discrimination." 109 S. Ct. at 719 (emphasis in original). Clearly Justice O'Connor's view of the Court's role in reviewing the use of race-conscious criteria by Congress in the exercise of its implementing powers has shifted in the year between Croson and Metro Broadcasting.
137. However, as indicated by Powell's opinion in Fullilove, this deference can be accommodated within the framework of an articulated "compelling governmental interest" standard of review.
ernmental theory.” He says that “[t]he struggle for racial justice has historically been a struggle by the national society against oppression in the individual States,” and that the historical record shows that “racial discrimination against any group finds a more ready expression at the state and local rather than at the federal level.” To the extent then that the Court gives some degree of deference to Congressional judgment when Congress has adopted or authorized programs of racial preference, its action, as Justice Scalia said in Croson, is consistent with “social reality and governmental theory.” For these reasons, there can be no principled objection to a constitutional proposition that gives Congress greater power than the states to adopt programs of racial preference and directs the Court to give some degree of deference to Congressional judgment in this circumstance.

In Metro Broadcasting, the Court majority readily found that the “minority enhancement” policy and the “distress sale” policy were “substantially related” to the achievement of the government’s “important” interest in “enhancing broadcast diversity.” “[T]he interest in enhancing broadcast diversity,” said Justice Brennan, “is, at the very least, an important governmental objective and is therefore a sufficient basis for the Commission’s minority ownership policies.” Brennan drew the analogy to the “diverse student body” in Bakke contributing to a “robust exchange of ideas,” and concluded that, “the diversity of views and information on the airwaves serves important First Amendment values.”

138. Croson, 109 S. Ct. at 736 (Scalia, J., concurring).
139. Id.
140. Id. at 737.
141. Moreover, Congress institutionally must be responsive to a national constituency in which whites are in the political majority. In this regard, Dean Ely’s observations as to a reduced level of scrutiny for racial classifications favoring minorities are pertinent: “[T]he reasons for being unusually suspicious, and, consequently, employing a stringent brand of review, are lacking. A White majority is unlikely to disadvantage itself for reasons of racial prejudice; nor is it likely to be tempted either to underestimate the needs and deserts of Whites relative to those of others, or to overestimate the costs of devising an alternative classification that would extend to certain Whites the advantages generally extended to Blacks.” Ely, The Constitutionality of Reverse Racial Classification, 41 U. Chi. L. Rev. 723, 735 (1974).
142. 110 S. Ct. at 3010.
143. See supra note 105.
144. 110 S. Ct. at 3010. “The benefits of such diversity are not limited to the members of the minority groups who gain access to the broadcasting industry by virtue of the ownership policies; rather, the benefits redound to all members of the viewing and listening audience.” Id. at 3011.
On the matter of "substantially related," Brennan said that with respect to the "complex empirical question" of the nexus between minority ownership and programming diversity, the Court was required to give "great weight to the decisions of Congress and the experience of the Commission." He reviewed at length the empirical basis of the FCC's determination that increased minority participation in broadcasting promotes programming diversity, as reflected in its 1978 Statement of Policy, and Congressional involvement in the matter. He noted that "the judgment that there is a link between expanded minority ownership and broadcast diversity does not rest on impermissible stereotyping." "Rather, both Congress and the FCC maintain simply that expanded minority ownership of broadcasting outlets will, in the aggregate, result in greater broadcast diversity," and "[a] broadcasting industry with representative minority participation will produce more variation and diversity than will one whose ownership is drawn from a single racially and ethnically homogeneous group." He also reviewed the history of other FCC efforts to increase minority ownership and participation in broadcasting and concluded that "[i]n short, the Commission established minority ownership preferences only after long experience demonstrated that race-neutral means could not produce adequate broadcasting diversity." Finally, he concluded that the burden of the FCC's policies on non-minority firms was slight, focusing on the fact that "applicants have no settled expectation that their applications will be granted without consideration of public interest factors such as minority ownership." He also noted that under the "minority enhancement" policy: (1) minority ownership does not guarantee that an applicant will prevail, citing a number of examples where the license was not given to the minority applicant; and (2) that the "distress sale" policy affects only a small fraction of broadcast licenses and then only in very specific circumstances.

The Brennan opinion illustrates his application of "strict scrutiny" under the "important and substantial relationship" standard. There was a careful review of the factual determinations by federal administrative agencies and by the Congress, but at the same time

145. Id.
146. Id. at 3016.
147. Id. at 3016-17.
148. Id. at 3022.
149. Id. at 3026.
150. Id. at 3027.
there was a deference to their expertise and experience. There was also a careful consideration of the nature and extent of the burden that the racial preference imposes on non-minorities, especially in regard to defeating settled expectations. However, it is clear that under this application of "strict scrutiny," racial-preference programs mandated or authorized by Congress are likely to be sustained against constitutional challenge.

The O'Connor dissent, while applying "very strict scrutiny" to the use of the preferences in issue to advance the objective of "enhancing broadcast diversity," focused more on the insubstantiality of the asserted interest to justify racial preference. She said that the only interest that modern equal protection doctrine has recognized as "compelling" to support the use of racial classifications is the interest in remedying the effects of identified past discrimination.\textsuperscript{151} The interest in increasing the diversity of broadcasting viewpoints, stated O'Connor, was clearly not a "compelling" interest. "It is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications."\textsuperscript{152} She also stated that the assertion of this interest presents an "unsettled First Amendment issue," since the measures adopted by the FCC are "designed to amplify a distinct set of views or the views of a particular class of speakers."\textsuperscript{153} She concluded that even if the interest in increasing broadcast diversity is legitimate in one context, "it does not suddenly become important enough to justify distinctions based on race."\textsuperscript{154}

Justice O'Connor's application of "strict scrutiny" to the use of the racial preferences to advance the asserted interests cannot be separated from her view as to the impermissibility of the asserted interest in the first place. She insisted that the premise that there is a nexus between minority ownership of broadcasting facilities, and targeting programming toward the needs and interests of minority communities and presenting minority viewpoints rests on "impermissible racial stereotyping." Instead, the FCC should use race-neutral means, such as evaluating applicants on their ability

\textsuperscript{151} She seemingly ignores the holding in Bakke and makes no reference to her discussion of "diversity" and other possible "compelling" interests in Wygant. She also suggests that "[t]he 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 broadcasting licenses." Id. at 3033.
\textsuperscript{152} Id. at 3034.
\textsuperscript{153} Id. at 3036.
\textsuperscript{154} Id.
and commitment to provide the programming the FCC believes would address underrepresented viewpoints, and should implement an effective ascertainment policy to ensure the continued broadcasting of such programs.\textsuperscript{155} She also contended that there has been an insufficient showing of a nexus between minority ownership and enhancing broadcast diversity: “To the extent that the FCC cannot show the nexus to be nearly complete, that failure confirms that the chosen means do not directly advance the asserted interest, that the policies rest instead upon illegitimate stereotypes, and that individualized determinations must replace the FCC’s use of race as a proxy for the desired programming.”\textsuperscript{156} Finally, she found that the programs unduly burdened the interests of non-minority broadcasting firms. She stated that the “distress sale” policy operated exactly like an absolute racial quota, and the “racial enhancement” policy was clearly the dispositive factor in a substantial percentage of comparative proceedings.\textsuperscript{157}

Although O’Connor’s application of “very strict scrutiny” occurred in the context of the use of the particular forms of racial preference to advance what she considered to be an improper interest, logically the same kind of application would be required to determine the permissibility of the use of racial preference to advance the concededly “compelling” interest in overcoming identified past discrimination. As in \textit{Croson}, O’Connor is saying that “race-neutral” means must almost always be employed even to overcome the present consequences of identified past discrimination.

In a brief separate dissent, Justices Kennedy and Scalia launch a scathing attack on any use of racial preference in governmental programs and operations, stating that: (1) the Court majority “exhumes \textit{Plessy’s}\textsuperscript{158} deferential approach to racial classifications;”\textsuperscript{159} (2) the Constitution does not permit the government to “discriminate among its citizens on the basis of race in order to serve interests so trivial as ‘broadcast diversity;’”\textsuperscript{160} and (3) the effect of the Court’s decision is “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.’”\textsuperscript{161}

\textsuperscript{155.} \textit{Id.} at 3039-40.
\textsuperscript{156.} \textit{Id.} at 3041.
\textsuperscript{157.} \textit{Id.}
\textsuperscript{158.} \textit{Plessy v. Ferguson}, 163 U.S. 537 (1896).
\textsuperscript{159.} 110 S. Ct. at 3044 (Kennedy, J., dissenting).
\textsuperscript{160.} \textit{Id.} at 3045.
\textsuperscript{161.} 110 S. Ct. at 3047.
Metro Broadcasting makes it clear that the positions on the Court with respect to the constitutional permissibility of racial preference in governmental programs and operations have hardened. We will now consider how this hardening of positions may affect the future direction of the Court in dealing with cases presenting this fundamental constitutional issue.

Some Concluding Observations

We have suggested earlier that the "unresolvable dilemma" that confronts American society on the question of racial preference has carried over to the Court and that the Court institutionally has not been able to make the hard and fundamental value judgment that would enable it to resolve the dilemma. There have not been five Justices willing to hold that the interest in trying to overcome the present consequences of the social history of racism and in bringing about the equal participation of black Americans in all important aspects of American life is of sufficient importance and validity to justify a departure from the principle of racial neutrality and the resulting racial disadvantage to adversely affected whites. Only three Justices, Brennan, who has now left the Court, Marshall and Blackmun, have taken this position and have consistently voted to uphold the constitutionality of the particular racial preference in issue in all of the cases coming before the Court. Conversely, at the present time it appears that Justices Rehnquist, Scalia, Kennedy and possibly Justice O'Connor, have made the value judgment against the constitutional permissibility of racial preference. They have indicated that they believe that the use of racial preference is unconstitutional in all or virtually all circumstances, and that efforts to bring about a condition of racial equality must be accomplished by "race-neutral" means. The vehemence of O'Connor's dissent in Metro Broadcasting is at least some indication that she has made the value judgment against the constitutional permissibility of racial preference. She has also voted against the constitutionality of the particular use of racial preference in every case in which she has participated. While she has repeatedly stated that the government has a "compelling" interest in overcoming the present consequences of identified past racial discrimination, she has strongly indicated that in most circumstances the government must advance this interest by "race-neutral" means. Likewise in her Wygant concurrence, she left open the possibility that she might find a school board's interest in "faculty diversification" to be "compelling," but I would think this less likely in light of her rejection of "enhanced broadcast diversity" as a "compelling" interest in Metro Broadcasting. In any event, it must be assumed that in a given case Justice O'Connor would be strongly disposed to find unconstitutional the particular use of racial preference that is in issue.

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fact that these Justices have made the value judgment against the constitutional permissibility of racial preference clearly does not demonstrate their hostility to the ideal of racial equality. Quite to the contrary, they have repeatedly recognized the enormous consequences of the social history of racism that are suffered by black Americans as a group and have endorsed governmental action directed toward ending the condition of societal racial inequality. They insist, however, that as a constitutional matter, this goal must be accomplished by the use of "race-neutral" means.

The use of "race-neutral" means to achieve racial objectives may seem to be a very appealing solution to the societal and constitutional controversy over racial preference. Such a solution preserves the ideal of racial neutrality while recognizing the legitimate interests of black Americans in achieving a condition of societal racial equality in this Nation. As Justice O'Connor stated in *Croson*: "Business as usual should not mean business pursuant to the unthinking exclusion of certain members of our society from its rewards."¹⁶³ Scalia makes the point even more strongly in *Croson*, when he says that preference for the "disadvantaged" will disproportionately benefit blacks: "Since blacks have been disproportionately disadvantaged by racial discrimination, any race-neutral remedial programs aimed at the disadvantaged as such will have a disproportionately beneficial impact on blacks."¹⁶⁴ In a similar vein, when the *Bakke* case was before the California Supreme Court, that court took the position that the use of race-conscious admissions criteria was unconstitutional, because the university could secure the admission of minority students by giving preference to "disadvantaged students of all races."¹⁶⁵

This is not the place to discuss the efficacy of "race-neutral" means to accomplish racial objectives and to bring about a condition of societal racial equality in this Nation.¹⁶⁶ If the Constitution were interpreted as prohibiting all or virtually all racial preference, as a matter of constitutional necessity, "race-neutral" means would be the only means that could be employed in any

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163. 109 S. Ct. at 730.
164. 109 S. Ct. at 739 (emphasis in original).
166. For a discussion as to why a preference for "disadvantaged students of all races" is problematical as regards the increased admission of black students, see *id.* at 343-45.
effort to benefit blacks, and the ideal of racial neutrality would be preserved. I doubt, however, that such a constitutional stricture would cause the societal controversy over racial preference to abate significantly. The race-based motivation for the "race-neutral" program would still remain, and if blacks would benefit disproportionately from such "race-neutral" programs, as Scalia maintains they could, then whites would still bear disproportionately the costs of the program. Nonetheless, the constitutional controversy over racial preference would come to an end.\footnote{167}

With the departure of Justice Brennan from the Court, and with his replacement, it is quite possible that the Court could end up making the fundamental value judgment against the constitutional impermissibility of racial preference. However, the Court institutionally has to deal with the \textit{stare decisis} effect of its previously decided cases and the doctrine the Court has promulgated in those cases. Any prediction as to what the Court will do in the future in this highly controversial area is sheer speculation.

\footnote{167. As I have discussed elsewhere, the Court's constitutional doctrine in the area of racial equality has developed with reference to the concept of \textit{invidious racial discrimination}. See \textit{Racial Preference}, supra note 10, at 1228-30. The Court could have held in \textit{Korematsu}, for example, that the Constitution prohibits \textit{all} racial discrimination. If it had done so, the racial exclusion order in \textit{Korematsu} would have been held unconstitutional without further inquiry. \textit{Korematsu v. United States}, 323 U.S. 214 (1944). If this had been the constitutional doctrine, as some commentators contend it should be, there probably never would have been an issue as to the constitutionality of "benign" racial discrimination. See \textit{supra} note 13. Governmental bodies would have known that they could not employ race-conscious criteria favoring blacks, and, instead, would have had to resort to "race-neutral" methods of advancing racial objectives. If a law school or medical school, for example, wanted to increase the number of minority students, it would know that it could do so only by the use of "race-neutral" means, such as a preference for "disadvantaged" students.

Instead, the Court has interpreted the Constitution as prohibiting only \textit{invidious racial discrimination}, the use of race-conscious criteria that is not "necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate." \textit{Loving v. Virginia}, 388 U.S. 1, 11 (1967). Thus, under the Court's current constitutional doctrine, the use of racial preference benefiting racial minorities must be analyzed with reference to the concept of invidious racial discrimination. When such use satisfies the "strict scrutiny" of the "compelling governmental interest" standard or "important and substantial relationship" standard when mandated or authorized by Congress, it does not amount to invidious racial discrimination, and is not unconstitutional. An absolute prohibition against the use of "benign" racial preference, therefore, would properly require the Court to undertake a complete reconsideration of the invidious racial discrimination concept.}
Therefore, I will conclude by doing no more than reviewing the precedents and doctrine and suggesting some possibilities for the future direction of the Court.

Based on *Metro Broadcasting* and *Fullilove*, the Court has held that Congress has greater power than the states to adopt racial preference programs and that Congressionally approved racial preference programs are to be tested under the "important and substantial relationship" standard of review rather than the purportedly more strict "compelling governmental interest." It is possible that a newly constituted Court would revisit *Metro Broadcasting*, and as O'Connor argued in her dissent, would limit Congressional power to reaching past discriminatory state action under section 5 of the fourteenth amendment, and would hold that the "compelling governmental interest" standard applies to Congressionally approved racial preference programs. On the other hand, it is possible that the Court will accept the holding and doctrine of these cases, and to this extent, will be more disposed to uphold Congressionally approved racial preference programs.

In *Bakke*, the Court upheld as constitutional the use of race-conscious admissions programs to achieve racial diversity in a university student body. If the question squarely arose again, it is possible that O'Connor and one or more of the other Justices would accept as constitutional the use of race-conscious admissions criteria for this purpose. More significantly, I do not think that the Court institutionally is prepared to reconsider *Bakke*, and so it is not likely to grant certiorari to any case to review the constitutionality of a university's race-conscious admissions program. I also think it is possible that if squarely presented with the question, a Court majority might uphold the use of a "racial enhancement" factor, again as per *Bakke*, in faculty hiring decisions by a school board or university in order to achieve "faculty diversification."

Coming now to the use of racial preference to overcome the present consequences of identified past discrimination for which the government is responsible, it is true, as Justice O'Connor has stated, that "[t]he Court is in agreement that . . . remedying past or present racial discrimination . . . is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program."168 However, the likelihood of the Court upholding a particular racial preference program, adopted

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by state or local governments to advance this objective, at the present time is at best problematical. Croson makes clear that the governmental body must have a "substantial basis in evidence" for finding the existence of past discrimination, and that its findings in this regard will be subject to very careful judicial scrutiny. Most of the "identified past discrimination" cases where lower federal courts have upheld racially preferential hiring and promotion programs have involved discrimination in the police force and other components of the civil service of state and local governments. This discrimination has been notorious and widespread in times past, and usually there would be no problem in showing that there is a "substantial basis in evidence" for finding the existence of identified past discrimination. 169 Racially preferential hiring and promotion programs directed toward overcoming the present consequences of this "easily identified" past discrimination have long been in place in many cities and states, and cases involving such programs are not now likely to come before the Court.

If the Court does grant review in another case where a state or local governmental body asserts the "identified past discrimination" justification, it is likely that this will be a minority business enterprise set-aside case or another case where it may be difficult to satisfy the "substantial basis in evidence" test. There is also the possibility that a Court majority will find that the particular form of racial preference was not "precisely tailored" to advance the remedial objective, because there was no showing that a "race-neutral" method would not be effective for this purpose. Thus, constitutional doctrine is that, "remediying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program," 170 however, as a practical matter, it may be difficult to sustain a particular use of racial preference on this basis. Again, as regards efforts to increase the participation of minority firms in governmental contracting, a governmental body would be better advised to adopt a racially neutral "locally owned small business" preference.

In summary, to the extent that the Court will be willing to uphold the constitutionality of racial preference, it is more likely to be programs authorized by Congress or other governmental

169. See, e.g., Detroit Police Officers Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979).
170. Wygant, 476 U.S. at 286.
programs involving a limited racial preference, such as a "racial enhancement" factor, to achieve a racially diverse student body, or to create "faculty diversification" in the public schools or universities. It will uphold racial preference designed to overcome the present consequences of identified past discrimination for which the government is responsible only if the governmental body satisfies the exacting "substantial basis in evidence" test and possibly even then, only if race-neutral means would not be effective to advance the remedial objective. This is not very likely to happen in practice.

While the Court has not yet resolved its institutional ambivalence as to the constitutional permissibility of racial preference, the positions on the Court have now hardened, and the views of eight Justices can readily be ascertained. It is possible that the addition of two new Justices will see the Court make the institutional value judgment against the constitutional permissibility of racial preferences, but this is by no means certain. At least for now, the end result of the Court's institutional ambivalence has been a constitutional compromise over a fundamental issue that eludes both constitutional and societal consensus in this Nation. It may be that this constitutional compromise will continue to be the "better part of constitutional wisdom."