

THE CONTINUING RELEVANCE OF
RACE-CONSCIOUS REMEDIES AND PROGRAMS
IN INTEGRATING THE NATION'S WORKFORCE

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INTRODUCTION

*“[S]kills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints”*¹

By embracing diversity in education as a compelling governmental interest in the highly anticipated case of *Grutter v. Bollinger*,² the Supreme Court suggested that diversity is important in employment as well.³ Indeed, the Supreme Court cited favorably to the *amici curiae* brief by sixty-five of American’s largest corporations,⁴ which asserted that diversity in the workforce was necessary for survival of their companies.⁵ Yet, terms like “diversity” and “affirmative action” still remain catalysts for intense, and often emotional debate, even when discussed in the abstract.

An argument often made in favor of affirmative action programs is that they capture the essence of the anti-discrimination laws passed nearly forty years ago by attempting to remedy centuries of segregation. Some believe that the only way to achieve the goal of the Civil Rights Act of 1964 of full racial integration of mainstream institutions is through affirmative action programs. The vision that drove the passage of The Civil Rights Laws was illustrated vividly in President Lyndon Baines Johnson’s first State of the Union message, when he said that “[u]nfortunately, many Americans live on the outskirts of hope—some because of their poverty, and some because of theft [sic] color, and all too many because of both. Our task is to help replace their despair with opportunity.”⁶

Opponents sometimes argue that affirmative action programs are nothing more than “reverse discrimination” or “affirmative discrimination.”⁷ Ralph F. Boyd, Jr., former Assistant Attorney General for Civil Rights under President George W. Bush, summed up the limited role that he believed race should play in integrating our society. He explained that “[u]nless someone is a victim of actual discrimination, race

during 2003-2004.

1. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

2. *Id.* at 328.

3. *Id.* at 330.

4. *Id.*

5. See Brief of Amici Curiae 65 Leading American Businesses in Support of Respondents at 5-6, *Grutter* (No. 02-241).

6. President Lyndon B. Johnson, State of the Union Address (Jan. 8, 1964), available at www.hn.psu.edu/faculty/jmanis/poldocs/uspressu/SUaddressLBJohnson.pdf.

7. See, e.g., Roger Clegg, *Discrimination, Not Diversity*, LEGAL TIMES, June 3, 2002, at 78.

simply shouldn't play a role—or at least a prominent role—in decisions concerning what opportunities that person will have or not have.”⁸ Other opponents have been more blunt, asserting that “Title VII requires equal opportunity for everyone, not just ‘minorities and women,’ contains no requirement that all ‘effects of past discrimination’ be erased (they cannot be), and is completely at odds with a requirement that any workforce reflect a predetermined racial, ethnic, and gender balance.”⁹

Title VII of the Civil Rights Act of 1964 gave minorities hope that the discrimination so entrenched in our nation's workplace would be dismantled, and that there would be equal employment opportunity for all. Sadly, forty years later, racial disparities endure in virtually every aspect of employment despite the passage of federal laws banning employment discrimination.¹⁰

Remediating past discrimination and fostering diversity are the justifications used most often in support of affirmative action.¹¹ In the period following the passage of Title VII, a number of lawsuits were filed in an effort to dismantle the kind of systemic discrimination that was deeply ingrained in the American workplace.¹² In response, courts often remedied the more egregious cases of discrimination by ordering various kinds of affirmative action programs.¹³ This paper will argue that given the magnitude of the racial disparities that still exist in the workplace, many of these race-conscious legal remedies are as critical today as they were forty years ago. Moreover, voluntary affirmative action programs by employers can also be vital tools in integrating the workforce. The Supreme Court's recent recognition that diversity may serve as a com-

8. Assistant Attorney General Ralph F. Boyd, Jr., Remarks at the University of Missouri - St. Louis, Martin Luther King, Jr. Holiday (Jan. 20, 2003), at <http://www.usdoj.gov/crt/speeches/mlk2003.htm>.

9. Roger Clegg, *Civil Rights: Federal Employment Discrimination*, ENGAGE: THE JOURNAL OF THE FEDERALIST SOCIETY'S PRACTICE GROUPS, Oct. 2002, at 14, available at <http://www.fed-soc.org/publications/Engage/oct%2002.pdf>.

10. See discussion *infra*, Part I, pp. 84-89.

11. See discussion *infra*. Other justifications have also been offered and upheld. See *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996). In *Wittmer*, Chief Judge Posner held that the appointment of an African American to a lieutenant's job in a boot camp did not violate equal protection because the “boot camp . . . would not succeed in its mission of pacification and reformation with as white a staff as it would have had if a black male had not been appointed to one of the lieutenant slots.” *Id.* at 920. The *Wittmer* court recognized that an African American lieutenant was likely to be a more effective administrator at a boot camp with a majority of African American inmates. *Id.*

12. See *United States v. Paradise*, 480 U.S. 149, 153 (1987); *Wittmer*, 87 F.3d at 917; *United States v. City of Buffalo*, 457 F. Supp. 612 (W.D.N.Y. 1978), *modified and aff'd*, 633 F.2d 643 (2d Cir. 1980); *United States v. Local 638, Enterprise Ass'n of Pipefitters*, 347 F. Supp. 164, 165 (S.D.N.Y. 1972).

13. CHARLES V. DALE, AFFIRMATIVE ACTION REVISITED 3-9 (2002).

elling governmental interest justifying the use of appropriate race-conscious action should reinvigorate and further legitimize an employer's use of such programs.

We will focus on the continuing importance of race-conscious legal remedies in the workplace, as well as the application of diversity-based justifications for such policies. Part I provides a current snapshot of some of the racial disparities that continue to exist in the workplace. Part II discusses the Supreme Court's legal landscape regarding race-conscious remedies and programs, and explores the significance of the Court's *Grutter* decision to employment. Part III discusses several ongoing cases that demonstrate the continuing need for race-conscious legal remedies as well as voluntary affirmative action programs. Finally, the paper provides some recommendations for proponents of affirmative action as the twenty-first century progresses.

I. RACIAL DISPARITIES IN THE WORKPLACE TODAY

Despite significant advances in racial equality, racial disparities continue to exist on many levels in the nation's workforce. For example, the unemployment rate among African Americans in 2004 has been two times greater on average than the unemployment rate of Caucasians, and the unemployment rate among Hispanics has been one and a half times greater than the unemployment rate of Caucasians.¹⁴ A recent study found that the current unemployment rate for African Americans is rising faster than in any other economic downturn since the 1970s recession.¹⁵

Alarminglly, these disparities persist even when other, often distinguishing factors are equal. For example, significant differences in unemployment rates remain when comparing different races at equal educational levels. In particular, the unemployment rate in 1998 for African American males with a high school degree was two times greater than the unemployment rate of Caucasian males with a high school degree, and the unemployment rate for African Americans with a college degree

14. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, LABOR FORCE STATISTICS, tbls. A-2, A-3, at <http://data.bls.gov/servlet/surveyoutputServlet>. The unemployment rates in 2002 for African Americans and Hispanics were 10.2% and 7.5% respectively, while the unemployment rate for Caucasians was 5.1%. *Id.* Over the past 10 years, the ratio of the African American unemployment rate to the Caucasian unemployment rate has remained greater than two to one. *Id.* This ratio increased from 2.1 in 1993 to 2.4 in 1997, but decreased thereafter to 2.0 in 2002. *Id.*

15. See Louis Uchitelle, *Blacks Lose Better Jobs Faster As Middle-Class Work Drops*, N.Y. TIMES, July 12, 2003, at A1.

was one and a half times greater than that of Caucasians with a college degree.¹⁶ While there was only a 10% difference in the unemployment rates of Hispanics and Caucasians without a high school degree in 1998, the unemployment rate of Hispanic high school graduates was 30% higher than similarly educated Caucasians, and Hispanics with a college degree had a 40% higher unemployment rate.¹⁷

In addition to differences in unemployment rates, there continue to be gross disparities in wage rates between minorities and Caucasians. For example, in 1999, the average wage of African Americans was only about 75% of the average wage for Caucasians, and Hispanics earned only about 66% of the average wage for Caucasians (*See* Figure 1).¹⁸ These wage disparities varied significantly between men and women - black and Hispanic men earn on average only 65% of the average wage for Caucasian men, while African American women earned only 92% of Caucasian female earnings.¹⁹ Black males with no high school education earned 85% of the earnings of comparable Caucasians, while black high school graduates earned 83%, and college graduates only 71% of similar Caucasian earnings.²⁰ Similarly, Hispanic males with no high school education earned 93% of comparable Caucasian earnings, while high school graduates earned 76%, and college graduates earned only 72%.²¹

The pattern for women was very different. Black females with no high school degree earned 87% of the earnings of comparable Caucasian females, while high school graduates earned 90%, and college graduates earned 102%.²² Hispanic females with less than a high school education earned 102% of the earnings of comparable Caucasian females, while high school graduates earned 91%, and college graduates 90%.²³

16. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T. OF EDUC., DIGEST OF EDUC. STATISTICS TABLES AND FIGURES, tbl. 381, at <http://nces.ed.gov/pubs2002/digest2001/tables/dt381.asp>. Data used in this table is obtained from unpublished tabulations of the annual averages, prepared by U.S. Department of Labor, Bureau of Labor Statistics. *Id.* The data includes male and female unemployment rates, as well as the male/female combined rate.

17. *Id.*

18. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 2002, at 140, tbl. 211 (2002), available at <http://www.census.gov/statab/www>.

19. *Id.*

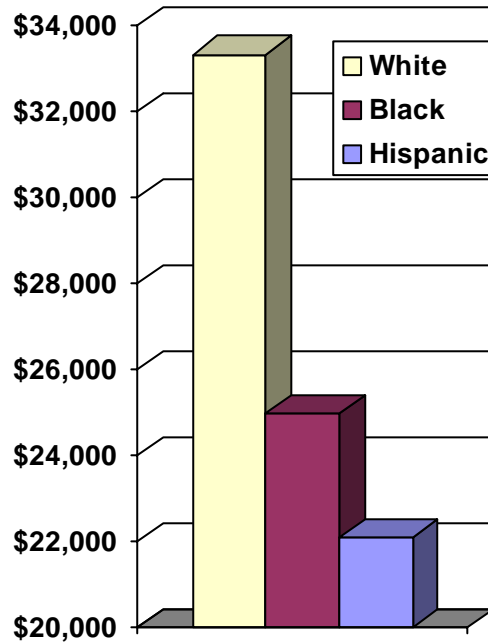
20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

Figure 1
Average Earnings
2000



Several recent studies confirm the continued existence of discrimination in hiring. In one study where African American applicants were paired with similarly situated Caucasian applicants, the study revealed that Caucasian applicants received 2.9 job offers for every 10 applications, while African American applicants received only 1.9 offers.²⁴ Another study involving similarly qualified Caucasian and Hispanic test applicants for entry-level jobs reported that Hispanics received 33%

24. E. Douglass Williams & Richard H. Sander, *The Prospects for "Putting America to Work" in the Inner City*, 81 GEO. L.J. 2030-31 (1993) (citing a study described in MARJORY AUSTIN TURNER ET AL., URBAN INST., OPPORTUNITIES DENIED, OPPORTUNITIES DIMINISHED: RACIAL DISCRIMINATION IN HIRING (1991)). The Urban Institute sent ten test pairs of job searchers on more than 400 job interviews in Chicago and Washington D.C., in response to "help wanted" ads. *Id.* at 2030. Each pair used similar scripts to describe their qualifications during the interviews. *Id.*

fewer interviews, and 52% fewer job offers, than their Caucasian counterparts.²⁵ These findings are consistent with another recent study²⁶ where résumés of similarly experienced and qualified African American and Caucasian females with racially identifiable names and addresses were mailed to employers in response to job advertisements.²⁷ Caucasian applicants had a 21% higher chance of being contacted for an interview than African Americans.²⁸ In the same study, when better qualified black female testers²⁹ applied in person for the same jobs as white female testers, the Caucasian applicants had a 16% higher chance of being offered a job.³⁰ Among those offered jobs, Caucasian applicants were offered an average of 36 hours of work per week (approximately equivalent to \$16,600 per year), as compared to 28 hours (approximately equivalent to \$12,900 per year) for African American applicants.³¹

These stark racial disparities in employment lead to several interrelated conclusions. First, the continued existence of significant differentials in unemployment and earnings when comparing individuals of different races with equal educational backgrounds (*see* Figure 2) supports the conclusion that discrimination is preventing minorities who are adequately qualified from receiving equal employment opportunities.³² This conclusion is further strongly supported by the paired applicant tests;

25. HARRY CROSS ET AL., URBAN INST., EMPLOYER HIRING PRACTICES: DIFFERENTIAL TREATMENT OF HISPANIC AND ANGLO JOB SEEKERS 61-62 (1990).

26. LEEANN LODDER ET AL., CHI URB. LEAGUE, RACIAL PREFERENCE AND SUBURBAN EMPLOYMENT OPPORTUNITIES 2 (2003) (describing a study conducted by the Civil Rights Investigations Project of the Legal Assistance Foundation of Metropolitan Chicago, with assistance from the Chicago Urban League and the University of Chicago). For the in-person tests the African American applicants' résumés showed stronger qualifications (e.g., "six to nine months longer in the retail field, a promotion with some managerial duties in her last job, and an award for sales and/or customer service"). *Id.* at 11.

27. *Id.* at 8. The applicant meant to be perceived as black was given the name "Keisha Williams" and given an address located in a predominantly black area of Chicago, while the "white" applicant was called Laura Whittaker and lived in the predominantly white North Side of Chicago. *Id.* These names and addresses were pre-tested with graduate students at the University of Chicago School of Business, who drew the predicted inferences about the race and skill levels of the applicants. *Id.*

28. *Id.* at 9.

29. *Id.* at 11.

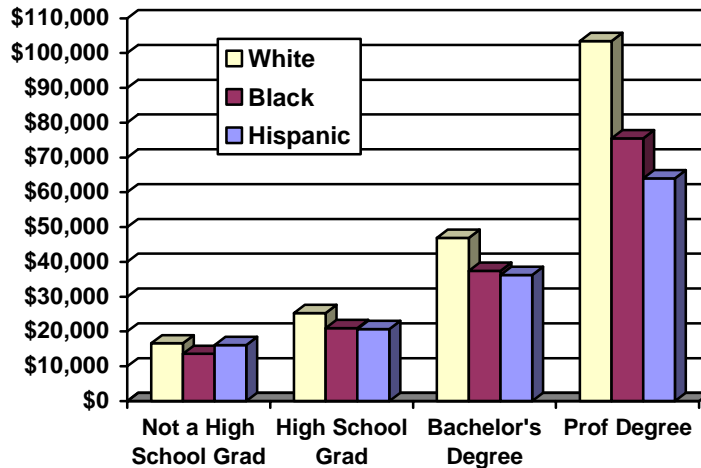
30. *Id.* at 15.

31. *Id.* African American applicants had to deal with more confrontational questions, during interviews, and had to work harder in general to keep their applications under consideration. *Id.* at 7, 15-16. Finally, when both applicants turned down a job offer, Caucasian applicants "were called back and offered a higher-paying management track position, or an opportunity to be considered for such a position by 8, employers while only 2 employers offered such opportunities to blacks." *Id.* at 15.

32. CENSUS BUREAU, *supra* note 18, at 140, tbl. 211.

even when African American applicants had somewhat better qualifications, they still were not chosen for the jobs.

Figure 2
Earnings By Highest Educational Attainment
1999



Finally, these disparities in the employment arena reflect the widespread racial disparities that exist elsewhere in society. For example, some studies show that the incarceration rate for African Americans is almost eight times that of Caucasians.³³ Additionally, although Caucasians outnumber African Americans and Hispanics in the general population, the total number of African Americans and Hispanics on welfare combined is proportionally greater than the total number of Caucasians on welfare.³⁴ Achievement test scores for African Americans and Hispanics consistently fall far below those of Caucasians.³⁵ Further, the Af-

33. See Pierre Thomas, *Study Suggests Black Male Prison Rate Impinges on Political Process*, WASH. POST., Jan. 30, 1997, at A3; see also, DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 340 n.33 (3d. ed. 1992) ("Blacks comprise almost 50 percent of the prison population, but only 12 percent of the national population.").

34. See Jason DeParle, *Shrinking Welfare Rolls Leave Record High Share of Minorities*, N.Y. TIMES, July 27, 1998, at A1.

35. See The College Board, *2002 College-Bound Seniors Tables and Related Items*, graph 10, at

http://www.collegeboard.com/prod_downloads/about/news_info/cbsenior/yr2002/pdf/graph10.pdf (last visited Feb. 7, 2005) (graph showing that on average, African Americans score more than 200 points lower than Caucasians on the SAT and Hispanics score close to 100 points lower than Caucasians).

frican American average life expectancy is almost eight years less than that of Caucasians, and African American infants die at a rate two and half times that of Caucasian infants.³⁶

II. CURRENT LEGAL FRAMEWORK REGARDING RACE-CONSCIOUS REMEDIES AND PROGRAMS

Before discussing the legal framework regarding affirmative action, it is useful to define the term as it is used throughout the paper. In this paper, “affirmative action” will refer to the use of race in various kinds of outreach, initiatives, or decision-making processes in order to increase access or enhance opportunities that generally have been more available to Caucasians than to minorities. The two legal justifications that have been traditionally used to defend affirmative action programs in court are remedying past discrimination and promoting diversity.³⁷ These legal justifications are the focus of the paper.

Statutory Framework Regarding Affirmative Action

Affirmative action in both public and private employment has its early roots in Executive Order 11246³⁸ and Title VII of the Civil Rights Act of 1964.³⁹ Signed by President Lyndon B. Johnson in 1965, Executive Order 11246 is the principle source of affirmative action requirements imposed by the federal government on private recipients of federal funds.⁴⁰ In particular, it mandates that certain private employers who contract with the federal government must adopt affirmative action plans, including placement goals and timetables to give preference to women and minorities.⁴¹ While smaller contractors are required to comply with the non-discrimination requirements of Executive Order 11246, larger contractors (those with contracts in excess of \$50,000) are man-

36. Peter T. Kilborn, *Health Gap Grows, With Black Americans Trailing Whites, Studies Say*, N.Y. TIMES, Jan. 26, 1998, at A16.

37. See, e.g., *United Steelworkers of America v. Weber*, 443 U.S. 193, 202-03 (1979); *Taxman v. Board of Educ. of the Township of Piscataway*, 91 F.3d 1547, 1557 (3d Cir. 1996); *Wittmer v. Peters*, 87 F.3d 916, 919-20 (3d Cir. 1996).

38. Exec. Order No. 11246, 3 C.F.R. 339 (1965). The Office of Federal Contract Compliance Programs, within the U.S. Department of Labor, is charged with enforcement of Executive Order 11246. 41 C.F.R. § 60-50.1 (2004).

39. 42 U.S.C. §§ 2000e – 2000e-17 (2000).

40. Exec. Order No. 11246, 3 C.F.R. § 339 (1965).

41. 41 C.F.R. §§ 60-2.1, 60-2.16 (2004).

dated to do much more, including adopting written affirmative action plans.⁴²

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, sex, national origin, color, and religion and applies to all public and private employers with fifteen or more employees.⁴³ While there is no affirmative statutory duty for private employers to adopt affirmative action plans, courts may “order such affirmative action as may be appropriate” in cases where there are findings of discrimination.⁴⁴ Additionally, under the Equal Employment Opportunity Commission’s guidelines, federal agencies are required to develop affirmative action plans for all employees and job applicants.⁴⁵ In addition to Executive Order 11246 and Title VII, there are a number of other federal statutes and regulations mandating affirmative action, including in the areas of contracts, defense, public works, and transportation.⁴⁶

Government Based Affirmative Action Programs

Generally, the Supreme Court has developed two modes for judicial analysis of affirmative action programs. Whereas government-initiated programs implicate the Equal Protection Clause of the Fourteenth Amendment or the Due Process Clause of the Fifth Amendment,⁴⁷ pri-

42. *Id.* § 60-2.1.

43. 42 U.S.C. §§ 2000e(b), 2000e-2 (2000).

44. 42 U.S.C. §2000e-5(g)(1) (2000).

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees . . . or any other equitable relief as the court deems appropriate.

Id.

45. Title VII provides that the Equal Employment Opportunity Commission:

shall be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment.

42 U.S.C. § 2000e-16(b)(1).

The EEOC and the Office of Personnel Management have implemented rules to guide federal agencies in minority recruitment programs, including the requirement that each agency “must include annual specific determinations of underrepresentation for each group and must be accompanied by quantifiable indices by which progress toward eliminating underrepresentation can be measured.” 5 C.F.R. § 720.205(b) (2004).

46. For a complete discussion of the various federal affirmative action programs, see generally CHARLES V. DALE, *AFFIRMATIVE ACTION REVISITED* (2000).

47. See, e.g., *United Steelworkers v. Weber*, 443 U.S. 193, 197 (1979) (analyzing affirmative

vate employer affirmative action programs are only susceptible to challenges under Title VII.⁴⁸

For many years, the Supreme Court could not reach a majority consensus on the appropriate analysis for race-based government affirmative action policies.⁴⁹ In its 1995 decision in *Adarand Constructors, Inc. v. Pena*,⁵⁰ however, a majority of Supreme Court Justices held that “all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny,”⁵¹ thereby eliminating any distinction in tests applied to federal programs under the Due Process Clause, and state programs under the Equal Protection Clause.⁵² The strict scrutiny test requires that a policy “serve a compelling governmental interest, and . . . be narrowly tailored to further that interest.”⁵³ Strict scrutiny analysis applies to all race classifications in any governmental agency or organization in order to “smoke out illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect

action program instituted by collective bargaining between union and employer challenged by a private employee under Title VII only).

48. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 213 (1995) (discussing both the Fourteenth Amendment and Due Process clauses in analyzing government initiated affirmative action programs).

49. *See, e.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-98 (1989) (holding that the Fourteenth Amendment required strict scrutiny for local and state government affirmative action programs).

50. 515 U.S. at 227 (1995).

51. *Id.* Strict scrutiny analysis can be traced to earlier Court decisions, which involved challenges to the internment of Japanese Americans during World War II. *See Korematsu v. United States*, 323 U.S. 214, 216 (1944) (“all legal restrictions which curtail the civil rights of a single group are immediately suspect [and] . . . courts must subject them to the most rigid scrutiny”); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (“Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection.”). Importantly, these early challenges to discriminatory laws involved discrimination that significantly injured entire classes of minorities solely because of their race.

52. *Adarand*, 515 U.S. at 226-27. The *Adarand* Court overturned those portions of *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980), and *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564-65 (1990), which suggested that federal race-based classifications were subject to a less rigorous standard. *Id.* at 225-35.

53. *Adarand*, 515 U.S. at 235. The majority opinion rejected the Court’s use of an intermediate standard in *Metro Broad.* *See id.* at 226. The intermediate standard used in cases involving gender discrimination requires only that the government policy “serve important governmental objectives . . . and [be] substantially related to achievement of those objectives.” *Metro Broad.*, 497 U.S. at 564.

tool.”⁵⁴ In *Adarand*, Justice O’Connor rejected claims that this test is “‘strict in theory, but fatal in fact.’”⁵⁵

What qualifies as a “compelling state interest” or as “narrowly tailored” is not settled law. However, the Supreme Court has created some parameters for judicial analysis of these two prongs of the strict scrutiny test.⁵⁶ With regard to what qualifies as a “compelling state interest,” the Supreme Court has made clear that “we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination.”⁵⁷ To date, however, remedying past discrimination is the only ground on which the Supreme Court has upheld affirmative action policies in the employment context.⁵⁸

Furthermore, the Supreme Court has determined that remedial governmental programs based on general societal or industrial discrimination alone do not constitute a compelling governmental interest,⁵⁹ and has only upheld employment affirmative action policies created in response to specific findings of discrimination. In *Wygant v. Jackson Board of Education*,⁶⁰ the Supreme Court considered a policy that would protect schoolteachers from certain minority groups from being laid off.⁶¹ Applying strict scrutiny analysis, the Court concluded that arguments both about general societal discrimination and the importance of African American teachers as role models were insufficient to constitute a compelling government interest.⁶² Instead, the Court required that a public employer produce “convincing evidence that remedial action is

54. *Crosby*, 488 U.S. at 493.

55. *Adarand*, 515 U.S. at 237 (quoting *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring)). Justice O’Connor went on to state that “[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.” *Id.* at 237.

56. See *Grutter v. Bollinger*, 539 U.S. 306, 326-27 (2003); *Adarand*, 515 U.S. at 235-238; *Wygant v. Jackson Bd. Educ.*, 476 U.S. 267, 273-74 (1986).

57. *Grutter*, 539 U.S. at 328; see also *Wygant*, 476 U.S. at 286 (“[N]othing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently ‘important’ or ‘compelling’ to sustain the use of affirmative action policies.”) (O’Connor, J., concurring).

58. *Boston Police Superior Officers Fed’n v. Boston*, 147 F.3d 13, 19 (1998) (citing *Wygant*, 476 U.S. at 274).

59. *Wygant*, 476 U.S. at 276 (“Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.”).

60. *Id.*

61. *Id.* at 270.

62. *Id.* at 275-76, 278.

warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination.”⁶³

Similarly, in *City of Richmond v. J.A. Croson Co.*,⁶⁴ the Supreme Court was not persuaded by “a generalized assertion that there has been past discrimination in an entire industry,”⁶⁵ and held that no compelling interest was demonstrated because “none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry.”⁶⁶ The Court determined that reliance on the statistical disparity between the minority population in Richmond and the number of contracts awarded to minority firms was insufficient.⁶⁷ The Court elaborated that “for certain entry level positions or positions requiring minimal training,” such a statistical comparison “may be probative of a pattern of discrimination.”⁶⁸ However, “where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task.”⁶⁹

When examining the “narrow tailoring” prong of the test, the Court has considered a variety of factors including the need for relief, the availability of other race-neutral remedies, the flexibility of the plan, the duration of the plan, and the burden placed on third parties.⁷⁰ The Court in *Wygant* concluded that even if there had been a finding of prior discrimination, the policy would not have been tailored narrowly enough because a layoff policy, unlike a hiring plan, imposes significant burdens on Caucasians.⁷¹ The Court also determined that “less intrusive means of accomplishing similar purposes” were available.⁷² The Court in *Croson* frowned on the city’s lack of “any consideration of the use of race-neutral means” to accomplish their goals,⁷³ and determined that “the

63. *Id.* at 277.

64. 488 U.S. 469 (1989).

65. *Id.* at 498.

66. *Id.* at 505. The Court also found that the “random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond . . . strongly impugns the city’s claim of remedial motivation.” *Id.* at 506.

67. *Id.* at 501.

68. *Id.*

69. *Id.* at 501-02.

70. *See* *United States v. Paradise*, 480 U.S. 149, 171 (1987).

71. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 282-83 (1986).

72. *Id.* at 283-84.

73. *Croson*, 488 U.S. at 507; *see also* *Grutter v. Bollinger*, 539 U.S. 336, 339 (2003) (holding that “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative. . . . [but] serious, good faith consideration of workable race-neutral alternatives.”).

30% quota can not be said to be narrowly tailored to any goal, except perhaps outright racial balancing.”⁷⁴

Court Ordered Affirmative Action Programs

In other cases, however, the Supreme Court has upheld numerical goals for minority makeup or membership as narrowly tailored to serve compelling governmental interests. Though failing to agree on the appropriate mode of analysis,⁷⁵ a majority of Justices in *Local 28 of the Sheet Metal Workers International Association v. EEOC*⁷⁶ and a plurality in *United States v. Paradise*,⁷⁷ concluded that the affirmative action policies at issue in those cases would have satisfied the strict scrutiny test.⁷⁸ In *Sheet Metal Workers*, the Court upheld a court-ordered remedial affirmative action plan that set a specific goal for minority membership in a union.⁷⁹ The Court’s opinion noted, that in contrast to *Wygant*, there were repeated findings by lower courts that the government had a compelling interest in trying to remedy “egregious violations of Title VII.”⁸⁰ Five Justices also concluded that the plan was narrowly tailored because the district court had considered other remedies, the member-

74. *Croson*, 488 U.S. at 507.

75. In *Paradise*, the Justices were divided on whether the same analysis should apply to court-ordered programs and policies implemented by other governmental bodies. 480 U.S. 149 (1987). Justice Powell asserted that “[b]ecause racial distinctions are inherently suspect whether they are imposed by a legislature or a court, we have never measured court-ordered, affirmative-action remedies against a less demanding standard.” *Id.* at 187 n.2. In contrast, Justice Stevens argued that the Court should review all judicial decrees under the same standard and that district courts should have “broad and flexible authority” to issue remedial measures after a finding of a violation. *Id.* at 190. Justice Stevens asserted that Justice O’Connor’s quotation from *Wygant* in her dissent in *Paradise*, in which the word “governmental” is substituted for “state” serves as evidence of her effort to extend strict scrutiny to judicial decrees. *Id.* at 190 n.1. Notably, in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) Justice O’Connor used broad language when she suggested that “all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.” (emphasis added).

76. 478 U.S. 421 (1986).

77. 480 U.S. 149 (1987).

78. In *Paradise*, the plurality stated that “the relief order satisfies even strict scrutiny analysis,” 480 U.S. at 167, while in his concurrence, Justice Stevens evaluated the policy on a less demanding abuse of discretion standard without addressing whether the policy would have satisfied strict scrutiny. *Id.* at 195 n.1, and corresponding text. Four Justices in *Sheet Metal Workers* concluded “that the relief ordered in this case passes even the most rigorous test – it is narrowly tailored to further the Government’s compelling interest in remedying past discrimination.” 478 U.S. at 480. Justice Powell concurred separately, but likewise concluded that the policy served a compelling governmental interest and was narrowly tailored. *See id.* at 485.

79. *Sheet Metal Workers*, 478 U.S. at 483.

80. *Id.* at 480-81, 485 (Powell, J., concurring in part and concurring in the judgment).

ship goal was temporary, and the plan had “only a marginal impact on the interests of white workers.”⁸¹

In *Paradise*, the Supreme Court upheld an order requiring the Alabama state troopers to promote one African American trooper for each Caucasian trooper promoted.⁸² The state troopers had failed to comply with various consent decrees, and the Court determined that there was a compelling governmental interest in remedying their “pervasive, systematic, and obstinate discriminatory conduct.”⁸³ The Court concluded that it was “doubtful” whether other effective remedies were available to the District Court,⁸⁴ and that the one-for-one requirement was narrowly tailored because it “was flexible, waivable, and temporary in application,”⁸⁵ and because the “relationship between the numerical relief ordered and the percentage of nonwhites in the relevant work force”⁸⁶ was not arbitrary, but rather the result of “a delicate calibration of the rights and interests of the plaintiff class, the Department, and the white troopers.”⁸⁷ In addition, the Court noted that in contrast to the policy involved in *Wygant*, the requirement only postponed Caucasian promotions and did not require the layoff of any Caucasian employee.⁸⁸

Consent decrees involving affirmative action represent a hybrid between private and governmental action. As the Supreme Court has recognized in *International Association of Firefighters v. City of Cleveland*,⁸⁹ consent decrees “have attributes of contracts and of judicial decrees.”⁹⁰ However, in that case, the Court stated that “there does not

81. *Id.* at 481.

82. 480 U.S. at 185-86.

83. *Id.* at 167. In her opinion in *Adarand*, Justice O'Connor noted that in *Paradise*, every Justice had agreed that the discrimination of the Alabama state troopers justified a race-based remedy. 515 U.S. at 237. The Court disagreed in *Paradise*, however, on whether the remedy adopted was narrowly tailored. 480 U.S. at 198 (O'Connor, J., dissenting) (asserting that the one for one remedy imposed was not narrowly tailored because there was no rational relationship between the percentage of minority workers to be promoted and the percentage of minority group members in the total relevant work force).

84. *Paradise*, 480 U.S. at 177.

85. *Id.* at 178.

86. *Id.* at 179.

87. *Id.* at 181-82.

88. *Id.* at 182-83.

89. 478 U.S. 501, 519 (1986).

90. *Id.* (quoting *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 236 (1975)). Parties to an employment law dispute may resolve contested issues through a consent decree, which is essentially a written settlement agreement approved by a court. 45C AM. JUR. 2D *Job Discrimination* § 2360 (2004). Although its objective is to end litigation, consent decrees are subject to interpretation, modification, collateral attack, and dissolution. Therefore a consent decree contains elements of both a contract and a court order. *Id.*

seem to be any reason to distinguish between voluntary action taken in a consent decree and voluntary action taken entirely outside the context of litigation.”⁹¹ As a result, some would argue that consent decrees involving government employers must satisfy strict scrutiny, while those involving private employers should be subject to the same Title VII analysis as voluntary private affirmative action plans.

Private Affirmative Action Programs

Voluntary Plans Aimed at Remediating Past Discrimination

The cases discussed above were decided based on Fourteenth Amendment equal protection principles.⁹² Importantly, because there are no constitutional implications with regard to private employers, strict scrutiny analysis does not apply to their voluntarily implemented affirmative action programs. The Supreme Court’s decision in *Johnson v. Transportation Agency, Santa Clara County*⁹³ recognizes this distinction.⁹⁴ In *Johnson*, the Court observed that “Title VII . . . was enacted pursuant to the commerce power to regulate purely private decisionmaking and was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments.”⁹⁵ The Court made clear that public employers, who are required to satisfy constitutional requirements, must remain mindful that any relevant statutory provisions may not extend as far as the Constitution does.⁹⁶ This reminder to public employers is an express rejection of Justice Scalia’s contention in his dissent in *Johnson* “that the obligations of a public employer under Title VII must be identical to its obligations under the Constitution.”⁹⁷ From

91. *Firefighters*, 478 U.S. at 517.

92. *Local 28 of the Sheet Metal Workers Int’l Ass’n v. EEOC*, 478 U.S. 421, 479-80 (1985) was decided under Title VII; however, because a majority of the Court went on to find that the relief would have satisfied even the more demanding strict scrutiny test, it is included under the constitutional analysis section.

93. 480 U.S. 616 (1987) (deciding issue under Title VII analysis and avoiding application of Constitutional tests). See also *id.* at 649 (O’Connor, J., concurring) (arguing that “the proper initial inquiry in evaluating the legality of an affirmative action plan by a *public* employer under Title VII is no different from that required by the Equal Protection clause).

94. See also *id.* at 649 (O’Connor, J., concurring) (arguing that “the proper initial inquiry in evaluating the legality of an affirmative action plan by a *public* employer under Title VII is no different from that required by the Equal Protection clause).

95. *Id.* at 627-28 n.6.

96. *Id.* at 628.

97. *Id.* at 649.

these holdings it becomes clear that private affirmative action programs are reviewed under a less stringent standard than the one applied to government programs.

In *United Steelworkers v. Weber*,⁹⁸ the Court upheld a private employer's voluntary affirmative action program under Title VII.⁹⁹ The *Weber* Court held that a literal reading of Title VII prohibiting all race-conscious employment decisions would be contrary to the legislation's purposes.¹⁰⁰ Citing legislative history, the majority recognized that Congress' primary concern in enacting Title VII of the Civil Rights Act of 1964 was with "the plight of the Negro in our economy,"¹⁰¹ and that the goal of Title VII was to "open employment opportunities for Negroes in occupations which have been traditionally closed to them."¹⁰² He noted the potential for irony if a law enacted to make amends for our country's long history of racial injustice motivated "the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish . . . racial segregation and hierarchy."¹⁰³ Thus, the *Weber* Court held that voluntary affirmative action programs are valid under Title VII if they are intended to "eliminate conspicuous racial imbalance in traditionally segregated job categories,"¹⁰⁴ and do "not unnecessarily trammel the interests of white employees."¹⁰⁵

In *Weber*, a voluntary agreement between a union and an employer included a provision requiring that 50% of employees selected for promotional training be African American until the racial imbalances in the company were eliminated.¹⁰⁶ The Court upheld the agreement, concluding that no Caucasian workers would be fired, that Caucasians could still advance in the company, and that the plan was temporary.¹⁰⁷ The *Weber* Court recognized a private employer's desire to "eliminate traditional patterns of racial segregation" as a permissible reason for adopting an

98. 443 U.S. 193 (1979).

99. *Id.* at 209.

100. *Id.* at 203-04.

101. *Id.* at 202.

102. *Id.* at 203 (quoting Sen. Humphrey, 110 CONG. REC. 6548 (1964)). Justice Brennan's extensive citations to the legislative record in the Court's opinion highlight the racial disparities that existed when Title VII was passed. In particular, he observed that "[i]n 1947 the nonwhite unemployment rate was only 64 percent higher than the white rate; in 1962 it was 124 percent higher." *Id.* at 202 (quoting 110 CONG. REC. 6547 (1964)). He noted that "Congress considered this a serious social problem." *Id.*

103. *Id.* at 204.

104. *Id.* at 209.

105. *Id.* at 208.

106. *Id.* at 197-98.

107. *Id.* at 208-09.

affirmative action plan.¹⁰⁸ The Court did not require that the employer have engaged in discrimination itself.¹⁰⁹

The *Johnson* decision, which upheld a plan to consider gender as one of various factors for promoting employees into jobs in which women had been significantly underrepresented, came less than a decade after the *Weber* decision.¹¹⁰ The *Johnson* Court clarified that “an employer seeking to justify the adoption of a plan need not point to its own prior discriminatory practices, nor even to evidence of an ‘arguable violation’ on its part.”¹¹¹

Significantly, in passing the Civil Rights Act of 1991, Congress explicitly stated that the Act did not affect legal, voluntary affirmative action.¹¹² Indeed, while Congress overruled some of the devastating Supreme Court decisions of the late 1980s,¹¹³ it did nothing to overrule *Weber* and *Johnson*, thereby creating a strong presumption that the 1991 Act affirmatively incorporated the legal principles of both *Weber* and *Johnson*.

Affirmative Action Plans Justified by the Need for Diversity

The Supreme Court has not yet reviewed affirmative action programs in employment justified by diversity, not by remedying past discrimination. The Supreme Court was prepared to address this very issue when it granted *certiorari* in the Third Circuit’s *en banc* decision of *Board of Education v. Taxman*,¹¹⁴ but the case settled just months before oral argument.¹¹⁵

108. *Id.* at 201.

109. *Id.* at 204.

110. *Johnson v. Transp. Agency, Santa Clara County*, 480 U.S. 616, 641-42 (1987).

111. *Id.* at 630 (quoting *Weber*, 443 U.S. at 212-13).

112. See H.R. REP. NO. 102-40, pt. 1, at 93 (1991); 137 CONG. REC. S7024 (daily ed. June 4, 1991) (“Nothing in the amendments . . . shall be construed to affect . . . voluntary employer actions for work force diversity, or affirmative action or conciliation agreements . . .”).

113. See H.R. REP. NO. 102-40, pt. 2, at 2-4 (1991) (stating that the Civil Rights Act of 1964 overrules *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989); *Lorance v. AT&T Techn.*, 490 U.S. 900 (1989); *Flight Attendants v. Zipes* 491 U.S. 754 (1989); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987); *Library of Cong. v. Shaw*, 478 U.S. 310 (1986); *Indep. Fed’n of Evans v. Jeff D.*, 475 U.S. 717 (1986)).

114. 91 F.3d 1547 (3d Cir. 1996) (*en banc*).

115. Because a number of civil rights organizations were deeply concerned that the case would set bad precedent – possibly abolishing almost all affirmative action – they contributed significant sums of money to settle the case. See Abby Goodnough, *Financial Details are Revealed in Affirmative Action Settlement*, N.Y. TIMES, Dec. 6, 1997, at B5. The Supreme Court denied a petition for *certiorari* in a case in which the Seventh Circuit upheld a police force’s affirmative action promotion

In *Taxman*, the Board of Education had to lay off one of two teachers due to budgetary problems.¹¹⁶ The two teachers being considered, an African American and a Caucasian, had equal seniority and qualifications.¹¹⁷ In deciding to lay off the Caucasian teacher, the Board relied upon a race-conscious affirmative action plan, believing that it was important to maintain a diverse teaching staff.¹¹⁸ Taxman, the Caucasian teacher, then filed a reverse discrimination suit claiming that the Board had unlawfully used race as the deciding factor in her layoff.¹¹⁹ The Third Circuit granted *en banc* review to decide whether “Title VII permits an employer with a racially balanced work force to grant a non-remedial racial preference in order to promote ‘racial diversity.’”¹²⁰

Eight judges found that the Board of Education violated Title VII when it used race to determine which teacher to layoff, concluding that Title VII permits race-based decision making only for the narrow purpose of remedying the present effects of past discrimination.¹²¹ The majority based its opinion on both statutory interpretation of Title VII,¹²² and on its narrow application in *Weber* and *Johnson*.¹²³

Citing heavily from the legislative history, the court found that “Title VII was enacted to further two primary goals: to end discrimination on the basis of race, color, religion, sex or national origin . . . and to remedy the segregation and underrepresentation of minorities that discrimination has caused in our Nation’s work force.”¹²⁴ The majority opinion recognized that because Congress intended Title VII to eliminate both facial discrimination and the *consequences* of historical discrimination, affirmative action plans “can co-exist with the Act’s anti-discrimination mandate.”¹²⁵ The court asserted that this language supports the view that only remedial affirmative action programs are permissible under Title VII.¹²⁶ Furthermore, the majority believed their

program based upon a diversity justification. *Petit v. City of Chicago*, 352 F.3d 1111, 1114 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 2426 (2004).

116. 91 F.3d at 1551.

117. *Id.*

118. *Id.* at 1551-52.

119. *Id.* at 1552.

120. *Id.* at 1549-50.

121. *Id.* at 1547, 1557, 1560.

122. *Id.* at 1557-58.

123. *Id.* at 1558.

124. *Id.* at 1557.

125. *Id.*

126. *Id.*

opinion to be in accord with the *Weber* and *Johnson* decisions in requiring that the basis for any affirmative action plan be remedial.¹²⁷

In a vigorous dissent, Chief Judge Sloviter, along with three other judges, argued that an affirmative action program aimed at promoting diversity in the teaching staff was entirely consistent with the purposes animated by Title VII, as well as with *Weber* and *Johnson*.¹²⁸ First, the dissent pointed out that the *Weber* Court did not prohibit non-remedial affirmative action programs, explicitly stating that “[w]e need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans.”¹²⁹ Further, the dissent noted that the majority opinion in *Johnson* did not attempt to clarify the nebulous boundaries set by the *Weber* Court.¹³⁰ Concluding that the Supreme Court had not foreclosed diversity as a justification for affirmative action in employment, the dissent asserted that “[t]he effort to remedy the consequences of past discrimination . . . cannot be isolated from the statute’s broader aim to eliminate those patterns that were potential causes of continuing or future discrimination.”¹³¹ The dissent declared racial diversity in the classroom to be “an important means of combating the attitudes that can lead to future patterns of discrimination,” consistent with the purposes of Title VII, and recognized that “[i]t 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.”¹³² Thus, the dissent concluded that racial diversity in the teaching staff was a permissible goal under Title VII to support a race-conscious affirmative action program voluntarily adopted by the school board.¹³³

127. *Id.* at 1558.

128. *Id.* at 1569-74. Judge Sloviter noted that the *Taxman* decision did not raise any constitutional issues because the school failed to assert a constitutional challenge. *Id.* at 1568.

129. *Id.* at 1570 (quoting *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979)).

130. *Id.* (quoting *Johnson v. Transp. Agency, Santa Clara County*, 480 U.S. 616, 642 (Stevens, J., concurring)).

131. *Id.* at 1571 (citation omitted).

132. *Id.* at 1572 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 315 (1985) (Stevens, J., dissenting)).

133. *Id.* at 1574. A few years after *Taxman*, the Third Circuit re-affirmed that an affirmative action program can only be based on remedial justification in order to withstand judicial scrutiny. *Schurr v. Resorts Int’l Hotel, Inc.*, 196 F.3d 486, 497 (3d Cir. 1999). The only other reported case to touch on this issue prior to *Gutter v. Bollinger*, 539 U.S. 306 (2003), was *Cunico v. Pueblo School District.*, 917 F.2d 431 (10th Cir. 1990). In *Cunico*, a Caucasian social worker who was laid off by a Colorado school district, claimed that the district discriminated against her on the basis of race in violation of both Title VII and the Constitution by retaining a less senior, African American social worker. *Id.* at 434-36. The district asserted in its defense that even though there was no evidence of past discriminatory conduct on its part that would justify a remedial affirmative action plan, its de-

The Potential Effect of Grutter in Employment

On June 23, 2003, in the historic decision *Grutter*, the Supreme Court upheld the constitutionality of race-conscious admissions policies designed to promote diversity in higher education.¹³⁴ In explaining why diversity is a compelling governmental interest, the Court recognized as a fundamental principle that legal education “must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.”¹³⁵ The Court noted that the benefits of a diverse student body are “substantial” in that diversity “promotes ‘cross-racial understanding,’ helps to break down racial stereotypes and ‘enables [students] to better understand persons of different races.’”¹³⁶ The Court further recognized that diversity in higher education is “‘important and laudable’ because ‘classroom discussion is livelier, more spirited, and simply more enlightening and interesting’ when the students have ‘the greatest possible variety of backgrounds.’”¹³⁷

The *Grutter* decision has important implications for affirmative action programs in employment. First, as discussed above, although the Supreme Court has not yet addressed the constitutionality of non-remedial affirmative action programs in employment, the *Grutter* Court

cision was lawful because it was made pursuant to a valid affirmative action plan, which sought to “achieve a diverse, multi-racial faculty and staff capable of providing excellence in the education of its students and for the welfare and enrichment of the community.” *Id.* at 436, 437 n.3, 438. Affirming the district court’s judgment in the plaintiff’s favor, the Tenth Circuit stated that “[t]he purpose of race-conscious affirmative action must be to remedy the effects of past discrimination against a disadvantaged group that itself has been the victim of discrimination.” *Id.* at 437. Because the record did not contain evidence of past or present discrimination against African Americans by the district, or proof of a statistical imbalance in the district’s workforce, the court held that the district’s decision to lay off the plaintiff violated the first prong of either a Title VII or Equal Protection analysis in that there was no compelling governmental interest at stake. *Id.* at 438-39. The Tenth Circuit did not set forth its reasons for concluding that affirmative action must be remedial in order to be lawful, but cited generally to *Weber*, 443 U.S. 193, *Wygant*, 476 U.S. 267, and to *Regents of the University of California v. Baake*, 438 U.S. 265, 300-01 (1978). *Cunico*, 917 F.2d at 437.

134. *Grutter*, 539 U.S. 306. On the same day in a 6-3 decision, the Court struck down the University of Michigan’s undergraduate admissions policy that was designed to increase diversity because it was not narrowly tailored to provide individualized consideration of an applicant’s overall qualifications. *Gratz v. Bollinger*, 539 U.S. 244, 270-71, 275 (2003).

135. *Grutter*, 539 U.S. at 332-33. The Court further recognized that “law schools ‘cannot be effective in isolation from the individuals and institutions with which the law interacts.’” *Id.* at 332 (citation omitted).

136. *Id.* at 330 (quoting the Application to Petition for Certiorari at 246a).

137. *Id.*

explicitly stated that “we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination.”¹³⁸ This holding clearly opens the door to other justifications for affirmative action programs that extend beyond the traditionally accepted remedial justifications. Accordingly, it would seem that arguments in favor of non-remedial affirmative action, similar to the arguments in the *Taxman* dissents, would not be foreclosed.

Second, and perhaps more importantly, language from the *Grutter* decision suggests that diversity may be a compelling governmental interest in employment, as well as in education. Relying on briefs filed by major American corporations, the Court recognized that the benefits of affirmative action “are not theoretical but real, *as major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.*”¹³⁹ Indeed, one of the *amici curiae* briefs relied upon by the *Grutter* Court declared that “[e]mployees at every level of an organization must be able to work effectively with people who are different from themselves. [The *a*]mici [businesses] need the talent and creativity of a workforce that is as diverse as the world around it.”¹⁴⁰

The *Grutter* Court further claimed that if leaders are to be perceived as legitimate, leadership opportunities must be openly available to “talented and qualified individuals of every race and ethnicity.”¹⁴¹ This language, as well as the Court’s reliance on the *amici* brief filed by major American corporations, certainly suggests that some of the justifications used to support affirmative action in *Grutter* can be translated to the em-

138. *Id.* at 328; *cf.* *Johnson v. Transp. Agency, Santa Clara County*, 480 U.S. 616, 649 (1987) (O’Connor, J., observing that, “As I read *Weber*, . . . the Court also determined that Congress had balanced these two competing concerns by permitting affirmative action only as a remedial device to eliminate actual or apparent discrimination or the lingering effects of this discrimination.”); *Wygant*, 476 U.S. at 286 (O’Connor J., concurring) (“And certainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently ‘important’ or ‘compelling’ to sustain the use of affirmative action policies.”).

139. *Grutter*, 539 U.S. at 330 (emphasis added) (citing Brief of Amici Curiae for 3M and Brief of Amici Curiae for General Motors Corp). Similarly, in recognizing the importance of diversity in the military, the Court noted that a “‘highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle mission to provide national security,’” and further observed that “‘the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the ROTC use limited race-conscious recruiting and admissions policies.”” *Id.* at 331 (citation omitted).

140. See Brief of Amici Curiae for 65 Leading American Businesses in Support of Respondents at 5-6, *Grutter* (Nos. 02-241 and 02-516).

141. 539 U.S. at 332.

ployment context. The assertion by the largest American corporations that workforce diversity is crucial to their survival firmly supports the argument that diversity should constitute a compelling governmental interest. There is no logical reason why diversity in *public* employment should be viewed as any less compelling. Whether analyzed under a constitutional standard or under Title VII, *Grutter* provides persuasive authority for justification of affirmative action plans in all types of employment.

So far, only one court has extended the diversity justification for affirmative action plans (as outlined in *Grutter*) to the employment context. In *Petit v. City of Chicago*,¹⁴² the Seventh Circuit upheld an affirmative action promotion policy in the Chicago Police Department.¹⁴³ Examining the effectiveness of the police in ensuring public safety, public trust of the police, and officers' attitudes, the court held that the police department had "a compelling interest in a diverse population at the rank of sergeant in order to set the proper tone in the department and to earn the trust of the community, which in turn increases police effectiveness in protecting the city."¹⁴⁴ Next, the court turned to the specific affirmative action program implemented by the police department to ensure that it met the "narrowly tailored" prong of the strict scrutiny test.¹⁴⁵ The department had standardized the examination scores of employees based on race, to "produce results that reflected the score a candidate *would have received* if the test had not had an adverse racial impact."¹⁴⁶ The court agreed that this method conformed to the Supreme Court's directive in *Grutter* that race must be used in "a flexible, non-mechanical way."¹⁴⁷ Moreover, the affirmative action program instituted by the Chicago police, as required by *Grutter*, was only used for a limited time.¹⁴⁸ The *Petit* court even went so far as to assert that the need for diversity in a "large metropolitan police force" is even more compelling

142. 352 F.3d 1111 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 2426 (2004).

143. *Id.* at 1118.

144. *Id.* at 1115; *cf.* *Hayes v. N. State Law Enforcement Officers Assoc.*, 10 F.3d 207, 214-15 (4th Cir. 1993) (requiring a "strong basis in evidence" to justify diversity and "operational needs" as legitimate bases for affirmative action within a police force).

145. *Petit*, 352 F.3d at 1115 (quoting *Grutter*, 539 U.S. at 333).

146. *Id.* at 1117 (emphasis added). As one of the employees of the City of Chicago Department of Personnel explained, the race-based standardization is a way of "removing differences between the scores of two or more groups of test-takers," where "there is no objective reason to assume the two groups should have scored differently." *Id.*

147. *Id.* at 1116 (quoting *Grutter*, 539 U.S. at 333).

148. *See id.* at 1117-18. ("[T]he results of this examination were not used after 1991, and no race-conscious promotions have been made since that time.").

than the need for diversity in an educational setting.¹⁴⁹ The Supreme Court declined review of the decision.¹⁵⁰

III. RACE-CONSCIOUS LEGAL REMEDIES AND PROGRAMS ARE STILL NECESSARY IN THE 21ST CENTURY

Given the racial disparities highlighted in Section I, race-conscious remedies and affirmative action programs are undoubtedly still needed to overcome the vestiges of past discrimination in an effort to fully integrate our nation's workforce. The current challenge is to use these various race-conscious remedies and programs in a manner that will withstand judicial scrutiny, especially as our judiciary and some aspects of our society are arguably becoming increasingly conservative and hostile to affirmative action.¹⁵¹ Affirmative action proponents should start by maximizing and refining affirmative action plans that have already passed the judicial litmus test.

The Johnson and Weber Decisions Must Be Reinvigorated by Affirmative Action Proponents

Proponents of affirmative action programs must remain aware of the continued vitality of both *Johnson* and *Weber*, as these cases are the essential tools for implementing effective affirmative action plans. As discussed *supra*, neither *Johnson* nor *Weber* defined the boundaries for the permissible justifications of affirmative action programs in the employment context.¹⁵² Given the Court's recognition in *Grutter* that remedying past discrimination may not be the only permissible justification for affirmative action,¹⁵³ proponents should loudly advocate race-conscious programs supported by other justifications.

Moreover, proponents of affirmative action should endeavor to remind courts, as the *Weber* Court pointed out, that "it was clear to Congress that '[t]he crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to

149. *Id.* at 1114.

150. 124 S. Ct. 2426 (2004).

151. See generally Darlene C. Goring, *Private Problem, Public Solution: Affirmative Action in the 21st Century*, 33 AKRON L. REV. 209 (2000).

152. See *supra* notes 123-24 and accompanying text.

153. *Grutter*, 539 U.S. 306, 328 (2003); see also *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (stating that a state interest in promotion of racial diversity, particularly in the context of higher education has been found sufficient to warrant the use of affirmative action).

them,' and it was to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed."¹⁵⁴ This backdrop of inequality in the workforce during the 1960s created a bold contrast for the Court's decision to uphold the voluntary affirmative action program in *Weber*. Nearly forty years later, we still face many of the same racial disparities in the workplace.

Just as the *Weber* Court acknowledged that in 1964, "the rate of Negro unemployment ha[d] gone up consistently as compared with white unemployment for the past 15 years,"¹⁵⁵ the current unemployment rate of African Americans is two times that of Caucasians and rising faster than in any other economic downturn since the 1970s. Likewise, significant disparities exist in the income levels of comparable African Americans and Caucasians.¹⁵⁶ Thus, Congress' 1964 declaration that the disparity in the unemployment rate "is a social malaise and a social situation which we should not tolerate" is highly relevant even today.¹⁵⁷ Demonstrative statistical evidence, coupled with the pertinent language of *Weber* outlining the goals of Title VII, serve as powerful reminders of the continuing necessity for affirmative action plans. Accordingly, public and private employers should employ both remedial and other justifications in support of affirmative action. Combining *Grutter*-type diversity arguments with historically successful remedial justifications will enhance the chances of affirmative action programs passing judicial muster.

*As the Nation's Civil Rights "Enforcer," the Federal Government
Should Push For and Support the Continued Use of Remedial Relief*

In the early 1970s, there were a number of "pattern and practice" lawsuits brought against employers under Title VII.¹⁵⁸ Between 1972 and 1983, the Department of Justice, charged with authority to bring discrimination suits against states and municipalities, brought 106 suits

154. 443 U.S. 193, 203 (1979) (citation omitted).

155. *Id.* at 202 (citing to 110 CONG. REC. 6548 (1964) (remarks of Sen. Clark)).

156. *See supra* Part I, pp. 84-89.

157. *Weber*, 443 U.S. at 202 (citing to 110 Cong. Rec. 7220 (1964) (remarks of Sen. Clark)).

158. Debra Baker, *Backdraft*, 86 A.B.A. J. 48, 49 (2000). The term "pattern and practice" originated in language in 28 U.S.C. § 2000e-6 (Title VII). Senator Humphrey clarified that "a pattern or practice would be present only where the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336, n.16 (1977) (citing 110 CONG. REC. 14270 (1964) (describing specific examples of a "pattern or practice")). The Court noted in *Teamsters* that the term "was not intended as a term of art, and the words reflect only their usual meaning." *Id.*

against public employers, most of whom were fire and police departments.¹⁵⁹ Of these suits, ninety-three settled by consent decrees.¹⁶⁰ Virtually every one of these consent decrees incorporated some form of affirmative action, from hiring goals to recruitment programs aimed at increasing the number of minorities in public employment.¹⁶¹ Most notably, the EEOC brought lawsuits against some of this country's largest unions, which had historically refused to admit minorities.¹⁶² These lawsuits also often concluded with consent decrees that incorporated various forms of race-conscious relief.¹⁶³

In recent years, many of these consent decrees have increasingly come under attack, due in part to the Supreme Court's 1989 decision in *Martin v. Wilks*, which allowed Caucasian employees to challenge judicially-approved consent decrees, even after they failed to timely intervene in the case.¹⁶⁴ Opponents also worry that courts may issue consent decrees solely to clear their dockets of decades-old cases, while ignoring important issues that should be fleshed out in court.¹⁶⁵ Despite great concern that lifting these consent decrees may harm the progress made by the Civil Rights Act and its advocates during the past forty years,¹⁶⁶ the Department of Justice ("DOJ") is doing little to stop this trend, and in some cases is even the party requesting that the courts lift these consent decrees.¹⁶⁷

159. Baker, *supra* note 158, at 49.

160. *Id.*

161. See, e.g., *United States v. NAACP*, 779 F.2d 881, 882 (2d Cir. 1985) (affirming lower court order establishing hiring goal for blacks, Hispanics and women); see also *United States v. City of Buffalo*, 633 F.2d 643, 647 (2d Cir. 1980) (affirming lower court order implementing a hiring plan to employ minorities previously discriminated against); *United States v. City of Miami*, 614 F.2d 1322, 1343 (5th Cir. 1980) (establishing a recruitment program with local area schools to inform minority and female applicants of employment opportunities).

162. See, e.g., *EEOC v. Local 28*, 532 F.2d 821, 825 (2d Cir. 1991) ("[A]ll the routes into Local 28 have been blocked to minority group members as a result of discriminatory practices by Local 28 . . ."); see also *EEOC v. Local 28*, 401 F. Supp. 467, 487 (S.D.N.Y. 1975).

163. See, e.g., *EEOC v. Local 28*, 532 F.2d at 829; see also *EEOC v. Local 28*, 401 F. Supp. at 489.

164. 490 U.S. 755, 762-63 (1989). The Court bases its holding on the requirement of Rules 19 and 24 of the Federal Rules of Civil Procedure that parties to a lawsuit must have the burden to join additional parties because they best understand the scope of the action, effectively barring preclusion for failure to intervene. See *id.* at 765.

165. See, e.g., *id.* at 768.

166. See, e.g., *Bennett v. Arrington*, 20 F.3d 1525, 1537 (11th Cir. 1994) (arguing that consent decrees are consistent with Title VII's purpose to implement race-conscious affirmative action plans, but that decrees must not unduly burden the interests of candidates denied employment as a result of the decree).

167. See *United States v. NAACP*, 779 F.2d 881, 882 (2d Cir. 1985); *United States v. City of Buffalo*, 457 F. Supp. 612, 617 (W.D.N.Y. 1978), *modified and aff'd*, 633 F.2d 643 (2d Cir. 1980).

The following cases illustrate the federal government's recent position regarding consent decrees, and further reinforce the need for remedial affirmative action programs. In addition, they amplify the need for all parties to focus on establishing valid selection practices that will eventually eliminate the need for affirmative action.

*United States v. City of Buffalo*¹⁶⁸

In 1974, the DOJ brought suit against the City of Buffalo, alleging that the city's police and fire departments engaged in a pattern and practice of employment discrimination against African Americans, Hispanics and women, in violation of Title VII and the Fourteenth Amendment.¹⁶⁹ Following a trial on the merits, the district court held that the City had unlawfully discriminated against those minorities in hiring for the position of police officer.¹⁷⁰ A Final Decree and Order was entered in 1979, which ordered, among other things, interim hiring goals for minorities in the police department.¹⁷¹ The district court ordered the remedial measures to stay in place until the City of Buffalo created a valid police test – one that actually tested an applicant's ability to become a police officer.¹⁷²

In 1985, the DOJ sought to have the remedial hiring decree modified because part of it was race-conscious.¹⁷³ This effort was made despite the fact that the DOJ had originally drafted the race-conscious order that the district court ultimately adopted in the 1979 decree.¹⁷⁴ Both the district court¹⁷⁵ and the Second Circuit¹⁷⁶ rejected outright the DOJ's effort to do away with the race-conscious remedies, emphasizing that the original order made clear that until the City proved that its selection procedures were valid, the hiring goals had to remain in effect.¹⁷⁷

In 2002, the DOJ, under President Bush, asked the district court to vacate the race-conscious remedies, once again asserting them to be un-

168. 457 F. Supp. 612. The Second Circuit affirmed this Court's order in *NAACP*, 779 F.2d 881.

169. *City of Buffalo*, 457 F. Supp. at 617-18.

170. *Id.* at 639.

171. *Id.*; see *United States v. City of Buffalo*, 633 F.2d 643, 646 (2d Cir.1980); *NAACP*, 779 F.2d at 882-83.

172. *City of Buffalo*, 633 F.2d at 646 n.1; *United States v. City of Buffalo*, 609 F. Supp. 1252, 1254 (W.D.N.Y. 1985).

173. *City of Buffalo*, 609 F. Supp. at 1253.

174. *Id.*

175. *Id.*

176. *NAACP*, 779 F.2d at 884.

177. *City of Buffalo*, 609 F. Supp. at 1254.

constitutional.¹⁷⁸ The DOJ made this request notwithstanding the fact that the Court had not yet ruled on whether the City of Buffalo's new police selection procedure was in compliance with the court's order mandating the creation of a valid police test.¹⁷⁹ Up until November 2001, the DOJ had maintained that although the scoring of the latest police test did not have an adverse impact, there was insufficient evidence that the test was valid.¹⁸⁰ The DOJ's own experts testified at trial that same year that in the absence of additional evidence, they could not state that the test was valid.¹⁸¹ The DOJ made clear at trial, in court documents, and in subsequent letters that it questioned the validity of the test and opposed the dissolution of the Consent Order until this vital aspect of the Court's remedial relief was satisfied.¹⁸²

However, in 2003, the DOJ reversed its position by offering to dismiss the case.¹⁸³ In short, the DOJ proposed that the city be permitted to use a discriminatory, invalid test, despite the City having failed for twenty-four years to comply with a court order to create a non-discriminatory test.¹⁸⁴ The DOJ also argued that other race-conscious remedies were unconstitutional, including the hiring of seven African American police officers, who the City should have hired pursuant to the district court's "applicant flow order" of 1989, in order to make up the "shortfall" in the appointment of black candidates."¹⁸⁵ The district court

178. *United States v. City of Buffalo*, No. 73-CV-414, slip op. at 2 (W.D.N.Y. 2003).

179. *Id.* at 5-8. In 1993, the Western District of New York held that the City of Buffalo "had met the labor force composition goal," but that "until a decision [was] made . . . on the issue of whether the City ha[d] selection procedures in place that [met] relevant legal standards," the interim hiring goal, requiring that a "percentage of Blacks, Hispanics and women equal to the respective percentages of those groups . . . who took the written examination" must be kept in place. *Id.* at 3.

180. *Id.* at 5.

181. *Id.* at 10-11.

182. See United States' Response to Motion to Validate at 1-2, 15-17, 19, *United States v. City of Buffalo* (No. 73-CV-414C) (W.D.N.Y. 2001); United States' Response to Oct. 1, 2001 Settlement Order at 1-2, *City of Buffalo* (No. 73-CV-414C); Record at 508-511, *City of Buffalo* (No. 73-CV-414C).

183. *City of Buffalo*, No. 73-CV-414 at 7; see also *The Bush Administration Takes Aim: Civil Rights Under Attack*, LEADERSHIP CONF. ON CIV. RIGHTS EDUC. FUND, at 29-30 (2003), available at http://www.civilrights.org/publications/reports/taking_aim/bush_takes_aim.pdf ("As recently as June 2001 – in the early months of the Bush administration – the Justice Department opposed such [employment] tests. But one year later the Department adopted a completely different position and insisted that the same career lawyer who had worked for years opposing the tests take the opposite position in court.").

184. See *City of Buffalo*, No. 73-CV-414 at 7.

185. *Id.* at 13-16. The City's failure to hire these seven black candidates for the police force was allegedly due to "the City's erroneous interpretation of its obligations under the Applicant Flow Order." *Id.* at 14.

recently denied the DOJ's request to dismiss the case, and rejected the DOJ's arguments that race-conscious relief violated the Constitution.¹⁸⁶

*Sheet Metal Workers International Association Local 28 v. EEOC*¹⁸⁷

Similar to *United States v. Buffalo*, *Sheet Metal Workers* illustrates the continued importance and necessity of race-conscious remedies decades after the lawsuit was originally filed in 1976. Ironically, the Supreme Court reviewed this case in 1986 and upheld the use of race-conscious remedies.¹⁸⁸ Yet, almost twenty years after this decision, and more than thirty years after this case was originally brought, African American union members still receive substantially less work than their Caucasian co-workers, and have yet to be able to compete for work on the same basis as their Caucasian co-workers.¹⁸⁹

The DOJ originally brought this case in 1971 against Local 28 of the International Sheet Metal Workers' Union, alleging a pattern of discrimination against African Americans and Hispanics.¹⁹⁰ Following a trial in 1975, the district court found that Local 28 had discriminated

186. *Id.* at 19, 21.

187. 478 U.S. 421 (1986).

188. *Id.* at 445 (holding that "§ 706(g) of Title 7 does not prohibit a court from ordering, in appropriate circumstances, affirmative race-conscious relief as a remedy for past discrimination.>").

189. For the past thirty years, this case has addressed the discrimination that African Americans and Hispanics have suffered, and continue to suffer, at the hands of Local 28. *See, e.g.*, Local 28 v. EEOC, 478 U.S. 421, 477 (1986) (affirming the court's order of affirmative action goals given the union's "long history of 'foot-dragging resistance'" to court orders enjoining them from engaging in discriminatory practices); EEOC v. Local 28, 170 F.3d 279, 284 (2d Cir. 1999) (affirming the court's award of back pay and recognizing that the union's "argument that there is no basis for holding it responsible for the hours disparity of many nonwhites flies in the face of repeated judicial findings of intentional, systematic racial discrimination"); EEOC v. Local 638, 81 F.3d 1162, 1173-74 (2d Cir. 1996) (affirming the court's finding of discriminatory practices by union business agents); EEOC v. Local 28, 565 F.2d 31, 36 n.8 (2d Cir. 1977) (noting "overwhelming evidence of purposeful racial discrimination"); EEOC v. Local 28, 532 F.2d 821, 825 (2d Cir. 1976) (Local 28 has "consistently and egregiously violated Title VII."); EEOC v. Local 638, 401 F. Supp. 467, 487 (S.D.N.Y. 1975) ("Local 28 has maintained clearly discernable discriminatory practices in recruitment, selection, training and admission to membership of non-white workers.>").

190. EEOC v. Local 638, 401 F. Supp. 467 (S.D.N.Y. 1975). Among the pattern and practice allegations in the government's complaint were the failure and refusal of the union to: (1) admit nonwhites to the union; (2) refer nonwhites for work; (3) recruit nonwhites for union membership and employment comparable to whites; (4) permit contractors in collective bargaining agreements with the union to fulfill their affirmative action obligations under Executive Order 11246 by their refusal to refer African Americans to them (the collective bargaining agreements require the contractors to employ 70-80% of the union's members and apprentices); and (5) take reasonable steps to inform nonwhites of employment opportunities in the sheet metal trade or take any other affirmative action to remedy the effects of past racially discriminatory practices in violation of Title VII of the Civil Rights Act of 1964. *Id.* at 471, 474.

against nonwhite workers in violation of Title VII of the Civil Rights Act of 1964, and entered an Order permanently enjoining Local 28 from discriminating in recruitment or admission to the union.¹⁹¹ The district court ultimately entered an order mandating various forms of affirmative action, including setting a minority membership goal of twenty-nine percent.¹⁹² The district court held Local 28 in civil contempt in 1982 and again in 1983 for failure to meet certain affirmative action goals in compliance with court orders.¹⁹³ After these contempt proceedings, the district court adopted an Amended Affirmative Action Plan and Order,¹⁹⁴ which was ultimately affirmed by the Supreme Court in *Local 28 v. EEOC*.¹⁹⁵

In July 1993, the government initiated a new round of contempt proceedings against Local 28, resulting in another contempt finding by the district court in 1995.¹⁹⁶ After over thirty years, with no less than three contempt findings against the union, the government plaintiffs and the union began settlement discussions in 2001.¹⁹⁷ Importantly, the gov-

191. *Id.* at 487, 488, 489.

192. *Id.* at 489. Among the findings of the Court were: (1) the apprentice entrance exam had an adverse impact on nonwhites and that there was no validity for the exam; (2) no convincing evidence was presented that the requirement of a high school diploma or equivalent was the appropriate level of minimum education for the union's apprentice program (note that the court took judicial notice that whites obtain diplomas at a higher rate than nonwhites); (3) it could not find that the apprentice program application which requires that the applicant list his/her arrest record discriminates in practice against nonwhites; (4) the union denied qualified nonwhites direct access to membership by failing to administer yearly journeyman tests; (5) the union denied nonwhites direct access to membership by administering journeyman tests that were not validated by EEOC Guidelines; (6) the union denied nonwhites direct access to membership by organizing non-union sheet metal shops with few non-white employees and/or admitting only whites from those shops; and (7) the union denied nonwhites direct access to membership by refusing their transfers from sister locals and accepting white transfer members from sister locals. *Id.* at 481-87.

193. *See* *EEOC v. Local 638*, No. 2877 (HFW), 1982 WL 445, *4 (S.D.N.Y. 1982), *aff'd in part, rev'd in part*, 753 F.2d 1172 (2d Cir. 1985), *aff'd sub nom, Local 28 v. EEOC*, 478 U.S. 421 (1986).

194. *See* *EEOC v. Local 638*, 753 F.2d at 1175 (2d Cir. 1985).

195. *Local 28 v. EEOC*, 478 U.S. at 439-40 (affirming with modifications).

196. *EEOC v. Local 28*, 889 F. Supp. 642, 647, 669 (S.D.N.Y. 1995) *aff'd in part, rev'd in part*, 81 F.3d 1162 (2d Cir. 1996) (vacating and remanding the back pay award, reversing the hiring hall and job rotation systems, and affirming all other orders with minor modifications). This time, the district court ordered, *inter alia*, back pay, the creation of a hiring hall and job rotation system, the elimination of certain reinstatement requirements, and the appointment of a field monitor to ensure compliance. *Id.* at 669-85. On remand, the court again held Local 28 in contempt, *see* *EEOC v. Local 638*, 13 F. Supp. 2d 453 (S.D.N.Y. 1999) *aff'd in part, rev'd in part*, 170 F.3d 279 (2d Cir. 1999), and held a hearing to determine Local 28's ability to provide the back pay compensation. *Id.* at 465. The court determined that Local 28 was able to deposit about \$2.6 million into an escrow account and could afford to pay an additional \$900,000 per year going forward. *EEOC v. Local 28*, 117 F. Supp. 2d 386, 393-94 (S.D.N.Y. 2000) *aff'd*, 247 F.3d 333 (2d Cir. 2001).

197. *See* *EEOC v. Local 638*, No. 71-2877, 2002 U.S. Dist. LEXIS 24448, at *1 (S.D.N.Y.

ernment began these negotiations notwithstanding the facts that, first, the union had never paid the court-ordered back pay owed to hundreds of minority members, and, second, had never attained the court-ordered minority membership goal.¹⁹⁸ Finally, despite the Court's expert's opinion that the damages in lost wages due to the disparity were around \$150 million, the proposed settlement offer was a mere \$4.4 million.¹⁹⁹

Immediately prior to the fairness hearing, nearly one hundred non-white union members filed written objections to the proposed \$4.4 million consent order, asserting that the order was "woefully inadequate."²⁰⁰ On July 22, 2003, the district court granted the motion to intervene, recognizing that the interests of the African American and Hispanic union members were no longer being adequately represented by the government, noting that "it doubted that [government] plaintiffs 'would present this kind of compromise . . . if plaintiffs were really representing' non-white Local 28 members."²⁰¹

Further, the judge emphatically rejected the proposed consent order.²⁰² The court noted that "[a]t the fairness hearing, the courtroom was literally brimming with nonwhite objectors" and recognized that "over 100 current and former Local 28 members submitted written objections to the court, most of which contained specific, relevant concerns about the Proposed Order."²⁰³ The court went on to recognize that the \$4.4 million was inadequate in light of the fact that the "[c]ourt experts have already determined the level of claimants' damages to be nearly \$150 million."²⁰⁴ Significantly, recognizing that "[m]uch of the litigation to date has resulted from Local's 28 non-compliance with this court's orders after liability was established in 1975," the court further stated that "[t]he Union should not be rewarded for dragging its feet until government plaintiffs reached a point of exhaustion."²⁰⁵

Affirmative action, as described in the cases discussed above, has begun to allow minorities to attain jobs that have historically excluded them. Now, however, it is vital that the minorities not only stay in these

Dec. 19, 2002).

198. *Id.* at *4; *see* EEOC v. Local 638, No. 71-2877, 2003 U.S. Dist. LEXIS 13591, at *9 (S.D.N.Y. Aug. 4, 2003).

199. EEOC, 2003 U.S. Dist. LEXIS 13591, at *8.

200. EEOC v. Local 638, No. 71-2877, 2003 U.S. Dist. LEXIS 13190, at *4 (S.D.N.Y. July 22, 2003).

201. EEOC, 2003 U.S. Dist. LEXIS 13190, at *4-*5.

202. EEOC, 2003 U.S. Dist. LEXIS 13591, at *8-*10.

203. *Id.* at *4-5.

204. *Id.* at *8.

205. *Id.* at *9-10.

jobs, but that they participate meaningfully in their work. Indeed, the purpose of anti-discrimination laws was not only entry into the job market, but equal opportunity to compete.

Public employers, as a reflection of the multicultural people they represent, should be the model employers in terms of diversity and sound application of affirmative action programs. Undoubtedly, the DOJ and the EEOC, as our nation's civil rights enforcement arms, should be the foremost advocates for the appropriate use of affirmative action, and should support justifications that go beyond those that have traditionally and consistently been accepted by the courts. Given the Supreme Court's recent endorsement of diversity as a compelling governmental interest in *Grutter*, the DOJ enforcement strategy should be clear—they should fully support affirmative action, relying on a broad range of justifications and ensuring that race-conscious selection devices developed by the employers are in place. When the federal agencies fail to take this proactive approach, they should be held accountable so we do not run the risk of falling back forty years.

You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "you are free to compete with all the others," and still justly believe that you have been completely fair. . . . We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result.²⁰⁶

The words of President Lyndon B. Johnson capture the vision upon which our nation's enforcement agencies, including the EEOC and DOJ Division of Civil Rights, were founded. It is the government's duty, indeed its mandate, to achieve this vision, and not to undermine it.

CONCLUSION

Opponents of affirmative action argue that the ideal of a colorblind society is inherently incompatible with affirmative action. This rhetoric, however, ignores the shameful role that race has played, and continues to play, in nearly every aspect of society, including in employment. There can be no doubt that discrimination, although no longer as overt as

206. Lyndon B. Johnson, Commencement Address at Howard University, "To Fulfill These Rights," June 4, 1965, available at www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp.

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it was forty years ago, continues to be widespread and rampant. The Court in *Grutter* observed that “[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”²⁰⁷ With racial disparities still so entrenched in nearly every aspect of employment, affirmative action is imperative if this dream is to ever be realized.

207. 539 U.S. 306, 332 (2003).