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Civil Rights - Equal Protection - Race-Conscious Quotas Are Permissible under the Equal Protection Clause of the Fourteenth Amendment in Eliminating Discriminatory Promotional Policies Case Note.

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CIVIL RIGHTS—Equal Protection—Race-Conscious Quotas Are Permissible Under the Equal Protection Clause of the Fourteenth Amendment in Eliminating Discriminatory Promotional Policies

United States v. Paradise
__ U.S. __, 107 S. Ct. 1053, 94 L. Ed. 2d 203 (1987)

In 1972, Philip Paradise, Jr., a black male, was denied employment as a trooper with the Alabama Department of Public Safety (Department) for reasons he believed were racially motivated.[1] Subsequently, the National Association for the Advancement of Colored People (NAACP), joined by Paradise as a class representative, filed suit, alleging the Department practiced an intentional policy of excluding blacks from their trooper force in violation of the fourteenth amendment of the United States Constitution.[2] The United States District Court for the Northern District of Alabama found that the Department had engaged in a blatant and continuous practice of hiring discrimination,[3] and issued an order enjoining the Department from engaging in further discriminatory hiring practices.[4] The order also required that for each white cadet hired, a black cadet also be hired, until approximately twenty-five percent of the Department's force consisted of black troopers.[5]

After eleven years of litigation regarding the Department's continuing employment discrimination, Paradise again sought relief from the district

1. *See* United States v. Paradise, __ U.S. __, __, 107 S. Ct. 1053, 1058, 94 L. Ed. 2d 203, 212 (1987).

2. *See id.* at __, 107 S. Ct. at 1058, 94 L. Ed. 2d at 212. Philip Paradise, Jr., intervened as a representative "of a class of black Plaintiffs." *Id.* The United States was joined in the suit as a party plaintiff. *See id.*

3. *See id.* at __, 107 S. Ct. at 1058, 94 L. Ed. 2d at 212-13 (no black candidates hired in Department's thirty-seven year history other than as nonmerit system laborers)(citing NAACP v. Allen, 340 F. Supp. 703, 705 (M.D. Ala. 1972), *aff'd*, 493 F.2d 614 (5th Cir. 1974)).

4. *See id.* at __, 107 S. Ct. at 1058, 94 L. Ed. 2d at 213. The court "also enjoined the Department from engaging in any employment practices, including recruitment, examination, appointment, training, *promotion*, retention or any other personnel action, for the purpose or with the effect of discriminating against any employee, or actual or potential applicant for employment, on the ground of race or color." *Id.* (emphasis original)(quoting NAACP v. Allen, 340 F. Supp. 703, 706 (M.D. Ala. 1972), *aff'd*, 493 F.2d 614 (5th Cir. 1974)).

5. NAACP v. Allen, 340 F. Supp. 703, 706 (M.D. Ala. 1972), *aff'd*, 493 F.2d 614 (5th Cir. 1974). In addition, all eligibility and promotional registers were to be altered to conform with the court's decree. *See id.* at 704.

court.[6] This action, however, sought relief for the Department's discriminatory promotion policies rather than for its discriminatory hiring policies which had been the subject of the 1972 suit.[7] Although recognizing the Department's need to promote fifteen troopers to the rank of corporal,[8] the district court found an extensive need to remedy past and present promotional discrimination by the Department, noting that (1) the effects of discrimination within the Department "remain pervasive and conspicuous at all

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6. *See* United States v. Paradise, __ U.S. __, __, 107 S. Ct. 1053, 1062, 94 L. Ed. 2d 203, 218 (1987). In 1977, Paradise again sought relief from the district court, this time regarding the Department's discriminatory promotion practices. *See id.* at __, 107 S. Ct. at 1059, 94 L. Ed. 2d at 214. Two years later a partial consent decree was approved by the court whereby the Department agreed, within one year, to develop "a promotion procedure that would be fair to all applicants" in departmental promotions to the rank of corporal. *See id.* at __, 107 S. Ct. at 1060, 94 L. Ed. 2d at 214-15. Five days after this decision, the Department sought clarification of whether the 1972 hiring order applied to promotional practices. *See id.* at __, 107 S. Ct. at 1060, 94 L. Ed. 2d at 215 (finding no ambiguities, reaffirming order). In 1981, as no blacks had been promoted within the 1979 decree deadline, another consent decree was approved providing that the Department would promote troopers according to a "corporal promotion test" to be administered by the Department if all parties agreed such promotions did not adversely impact blacks. *See id.* at __, 107 S. Ct. at 1060-61, 94 L. Ed. 2d at 216. The promotion test was administered by the Department to 262 applicants. Only five blacks scored in the top half of the class of which the highest was ranked at number eighty. *See id.* at __, 107 S. Ct. at 1061, 94 L. Ed. 2d at 216. Pursuant to the test results, the Department proposed to promote between eight and ten applicants to corporal and announced its intention to promote between sixteen and twenty applicants before a new list was constructed. *See id.* The Department's promotion plan was rejected by the plaintiffs. In April 1983, the plaintiffs requested the enforcement of the 1979 and 1981 consent decrees. In addition the plaintiffs requested that a one-black-for-one-white promotional quota be instituted to redress the Department's continued refusal to "implement a fair procedure." *See id.* After a motion to enforce the 1979 and 1981 consent decrees was filed in the district court, four white troopers sought to intervene as class representative of white applicants who qualified as possible corporals, arguing the one-for-one quota was unconstitutional, unreasonable, and against public policy. *See id.* at __, 107 S. Ct. at 1061-62, 94 L. Ed. 2d at 217. The district court rejected the Department's selection procedures for promotions to corporal and ordered the Department to submit, by November 10, 1983, a new nondiscriminatory promotion plan for fifteen qualified troopers. *See id.* at __, 107 S. Ct. at 1062, 94 L. Ed. 2d at 217. The Department submitted a promotion plan to the district court which would allow four blacks to be promoted to corporal, while eleven whites would be promoted to the same position. The plaintiffs and district court rejected the Department's new promotion procedure as inadequate. *See id.*

7. *See* Paradise, __ U.S. at __, 107 S. Ct. at 1058, 94 L. Ed. 2d at 213. Paradise sought to enforce both the 1979 and 1981 consent decrees requiring that non-discriminatory *promotion* practices be implemented. *See id.* at __, 107 S. Ct. at 1062, 94 L. Ed. 2d at 218. *But see id.* at __, 107 S. Ct. at 1058, 94 L. Ed. 2d at 212 (original NAACP action challenged Department's discriminatory *hiring* policy).

8. *See* Paradise v. Prescott, 585 F. Supp. 72, 73 (M.D. Ala. 1983), *aff'd*, 767 F.2d 1514 (11th Cir. 1985). In 1983, the district court was confronted with a need to provide guidelines for promotion of fifteen troopers to the rank of corporal. *See* Paradise, __ U.S. at __, 107 S. Ct. at 1062, 94 L. Ed. 2d at 218.

ranks above the entry level position," (2) only four of sixty-six corporals were black, with no black representation for the ranks of sergeant, lieutenant, captain, or major, and (3) the discrimination continued despite the existence of two consent degrees signed by the Department in 1979 and 1981 voluntarily eliminating discriminatory promotional policies.[9] Accordingly, the district court held in favor of Paradise, ordering that: (1) at least fifty percent of all promotions be given to qualified black troopers; and (2) promotions be given until approximately twenty-five percent of each rank consisted of blacks or until the Department submitted a satisfactory plan for promotions.[10] Pursuant to the order, the Department promoted to corporal eight black applicants and eight white applicants.[11] The Department, however, appealed the district court decision, arguing that the promotion quota violated the equal protection clause of the fourteenth amendment.[12] The United States Court of Appeals for the Eleventh Circuit affirmed the district court's one-for-one promotion quota.[13] The Department appealed the order to the United States Supreme Court, which granted certiorari.[14] Held—*Affirmed.* Race-conscious promotion quotas are permissible under the equal protection clause of the fourteenth amendment to eliminate past and present discriminatory promotion policies.[15]

The equal protection clause of the fourteenth amendment[16] mandates that state governments treat equally all persons similarly situated.[17] Although

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9. *See* Paradise, __ U.S. at __, 107 S. Ct. at 1062-63, 94 L. Ed. 2d at 218-19.

10. *See id.* at __, 107 S. Ct. at 1062-63, 94 L. Ed. 2d at 218.

11. *See id.* at __, 107 S. Ct. at 1063, 94 L. Ed. 2d at 219. In 1984, eight black troopers and eight white troopers were promoted to corporal under the district court's order enforcing the consent decrees. *Id.* The Department subsequently submitted additional promotional procedures for the rank of corporal which were approved by the district court. *See id.* The court approved the promotion of up to thirteen troopers using the new departmental procedure and suspended the one-for-one promotion requirement for rank of corporal. *See id.* at __, 107 S. Ct. at 1063-64, 94 L. Ed. 2d at 219.

12. *See id.* at __, 107 S. Ct. at 1064, 94 L. Ed. 2d at 220.

13. *See id.* at __, 107 S. Ct. at 1064, 94 L. Ed. 2d at 219-20. The court of appeals added that the relief granted did not extend beyond what was necessary to succeed in remedying "the egregious and long-standing racial imbalances in the upper ranks of the Department." *Id.*

14. *See* United States v. Paradise, __ U.S. __, 106 S. Ct. 3331, 92 L. Ed. 2d 737 (1986) (petition for writ of certiorari granted). The Court limited its inquiry to whether the interim measure mandating a "one-black-for-one-white promotion requirement" was permissible under the fourteenth amendment." *See* Paradise, __ U.S. at __, 107 S. Ct. at 1057, 94 L. Ed. 2d at 212.

15. *See* Paradise, __ U.S. at __, 107 S. Ct. at 1074, 94 L. Ed. 2d at 232.

16. U.S. CONST. amend. XIV, § 1. The fourteenth amendment mandates that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

17. *See, e.g.*, City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985) (all persons similarly situated should be treated alike by state); Plyler v. Doe, 457 U.S. 202, 216 (1982)(legislature's responsibility to determine and insure that similarly situated persons receive equal treatment); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)(although

the equal protection guarantee within the fourteenth amendment applies specifically to the states,[18] the Supreme Court expanded this protection by recognizing that the due process clause of the fifth amendment, which applies to the federal government, contains an "equal protection component."[19] Although the equal protection component contained in the fifth amendment's due process clause[20] and the equal protection clause of the fourteenth amendment do not operate identically under all circumstances, the analysis under each amendment is similar,[21] thus ensuring that the principles of equal protection safeguard persons against unjustified state and federal governmental classifications.[22]

Some classifications, whether burdening or benefiting similarly situated individuals, are necessary under general processes of government.[23] If the

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discretion of legislatures is wide, taxation must be equally distributed among those similarly situated); *see also* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949)(those individuals similarly situated shall be similarly treated); Note, *Constitutional Law—Equal Protection—Mental Retardation Is Not A Quasi-Suspect Classification; Therefore, Classifications On That Basis Are Subject To Rational Relation Limitations*, City of Cleburne v. Cleburne Living Center, Inc., 17 ST. MARY'S L.J. 1053, 1053-83 (1986)(overviews requirements for classifications of similarly situated persons, particularly quasi-suspect classifications). *See generally Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065, 1076-77 (1969)(addresses treatment of similarly situated persons).

18. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954)(fourteenth amendment applies only to states). *See generally* R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW 314-17 (1986)(overview of applicability of fourteenth amendment as applied to states).

19. *See, e.g.*, Schweiker v. Wilson, 450 U.S. 221, 226 n.6 (1981)(federal government held to same standard through fifth amendment that states held to through fourteenth amendment); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 173 n.8 (1980)(if federal legislation valid under equal protection, valid under fifth amendment due process); Buckley v. Valeo, 424 U.S. 1, 93 (1976)(analysis of equal protection same under fourteenth amendment as under fifth amendment).

20. *See* U.S. CONST. amend. V. The due process clause of the fifth amendment of the United States Constitution states that no person shall "be deprived of life, liberty, or property, without due process of law . . . ." *Id.*

21. *See* Weinberger v. Wisenfeld, 420 U.S. 636, 638 n.2 (1975)(although fifth amendment has no equal protection clause, discrimination forbidden by due process clause); Schlesinger v. Ballard, 419 U.S. 498, 500 n.3 (1975)(due process clause prevents federal government from committing acts of discrimination that would violate due process). *But see* Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976)(overriding national interest may justify federal actions unacceptable for states). For an overview of the fifth amendment's role in equal protection analysis see generally Karst, *The Fifth Amendment's Guarantee Of Equal Protection*, 55 N.C. L. REV. 541, 542 (1977).

22. *Compare* Wygant v. Jackson Bd. of Educ., __ U.S. __, __, 106 S. Ct. 1842, 1846, 90 L. Ed. 2d 260, 268 (1986)(decisions of state school administrator based on race reviewable solely under fourteenth amendment) *with* Fullilove v. Klutznick, 448 U.S. 448, 496 (1980) (preference by federal governmental entity based upon race must be justified or classification violates due process clause of fifth amendment).

23. *See* Dittfurth, *A Theory of Equal Protection*, 14 ST. MARY'S L.J. 829, 831 (1983). Reasons for governmental discrimination are "often the result of political compromises, lim-

government, however, fails to treat similarly situated persons equally without adequate justification, such classification is subject to equal protection challenge.[24] In order to analyze classifications alleged to violate equal protection on a more uniform basis, the Supreme Court has developed three analytically distinct tiers of review to determine whether a challenged governmental classification comports with equal protection.[25]

Historically, the Court utilized two tests for determining the constitutionality of governmental classifications:[26] (1) the "rational relation" test, which is almost always satisfied by the government;[27] and (2) the "strict scrutiny" test, a narrow and difficult burden for the government to satisfy.[28] The first of these standards, was developed primarily to review social and economic classifications.[29] To satisfy this tier of review, the economic or social classifi-

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ited objectives, limited resources, prejudice or a blend of these reasons." *Id.* Governmental decision makers frequently discriminate among individuals in order to determine those who will bear the burden or benefits of governmental action. *Id.* Previous decisions concerning equal protection have recognized "that a state cannot function without classifying its citizens for various purposes and treating some differently from others." *Developments in the Law - Equal Protection*, 82 HARV. L. REV. 1065, 1076 (1969).

24. *See* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949). Constitutional challenges often stem from the unreasonableness of the classification. Classifications may be defined as designations of "a quality or characteristic or trait or relation, or any combination of these, the possession of which, by an individual, determines his membership in or inclusion within the class." *See id.*

25. *See* City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439-442 (1985) (discusses three standards of review); Note, *The Affirmative Action Controversy*, 3 HOFSTRA LABOR L.J. 111, 116 (1985)(three standards commonly referred to as rational basis, strict, and intermediate scrutiny standards); *see also* Dittfurth, *A Theory of Equal Protection*, 14 ST. MARY'S L.J. 829, 832 (1983)(Supreme Court created multi-tiered approach depending upon degree of "suspectness" determined for classification being challenged).

26. *See* Dittfurth, *A Theory of Equal Protection*, 14 ST. MARY'S L.J. 829, 833 (1983) (Warren Court had two-tier analysis consisting of rational relation and strict scrutiny test).

27. *See* City of Cleburne, 473 U.S. at 440 (classification presumed valid if rationally related to state interest); *see also* Comment, *Still Newer Equal Protection: Impermissible Purpose Review In The 1984 Term*, 53 U. CHI. L. REV. 1454, 1455 (1986)(rational basis for classification by governmental entity easily established).

28. *See generally* Ely, *Equal Protection And Affirmative Action In Job Promotions: A Prospective Analysis of* United States v. Paradise, 17 CUMB. L. REV. 205, 214 (1986)(strict scrutiny, in which challenged classification is presumed unconstitutional, is court's most rigorous test).

29. *See, e.g.*, United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 175 (1980)(citing Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911))(social and economic classifications valid as long as "reasonable basis" exists); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976)(classification must only rationally relate to legitimate state interest if no curtailment of fundamental personal right or discrimination against inherently suspect class exists); Lehnhausen v. Lakeshore Auto Parts Co., 410 U.S. 356, 359 (1973)(classifications concerning taxation that are not violative of federal right are given large leeway); Levy v. Louisiana, 391 U.S. 68, 71 (1968)("applying the Equal Protection Clause to social and economic legislation, we give great latitude to the legislature in making classifications."). For a complete review of

cation must rationally relate to a legitimate governmental interest.[30] To survive strict scrutiny, a compelling governmental interest must exist for the classification, and the means used must be narrowly tailored to accomplish the classification's purpose.[31] Due to the limitations of the two tests, another classification evolved, imposing a standard of scrutiny greater than the mere reasonable relation standard, but somewhat less rigorous than strict scrutiny.[32] The Burger Court eventually solidified this notion of an intermediate standard into what is now commonly termed "intermediate scrutiny."[33]

"Intermediate scrutiny" has become the standard by which the Court examines classifications based upon traits such as gender[34] or illegitimacy.[35]

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the three equal protection standards, with special emphasis on the reasonable relation test, see generally Comment, *Still Newer Equal Protection: Impermissible Purpose Review In the 1984 Term*, 53 U. CHI. L. REV. 1454 (1986). In reviewing certain economic and social classifications in light of the fourteenth amendment's equal protection clause, courts have traditionally applied the rational basis standard. That standard requires that a classification be rationally related to legitimate governmental objectives. In applying the rational relation standard, courts have almost always found that a required rational relationship exists between the classification and the governmental objective. *See id.*

30. *See, e.g.*, Schweiker v. Wilson, 450 U.S. 221, 230 (1981)(economic classifications justified if rationally related to legitimate governmental objectives); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174-75 (1980)(if economic or social act has reasonable relation to classification, no constitutional violation); *see also* McGowan v. Maryland, 366 U.S. 420, 425-26 (1961)(states have wide discretion for matters such as Sunday law provisions which effect sale of certain commodities). *See generally* Note, *Legislative Purpose, Rationality and Equal Protection*, 82 YALE L.J. 123, 123 (1972)(examines rational relation test and its development in regard to fourteenth amendment).

31. *See* Wygant v. Jackson Bd. of Educ., __ U.S. __, __, 106 S. Ct. 1842, 1846, 90 L. Ed. 2d 260, 268 (1986).

32. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762, 763 (1977)(Court held classifications based on illegitimacy not required to survive strict scrutiny, however, scrutiny utilized "not a toothless one"); Glona v. American Guarantee Co., 391 U.S. 73, 81-82 (1968)(Harlan, J., dissenting)(although classification based upon illegitimacy need not be based upon compelling state interest, more than mere rational relationship for classification required); Levy v. Louisiana, 391 U.S. 68, 71-72 (1968)(Court questioned advisability of using rational relation test for illegitimacy); *see also* Gunther, *The Supreme Court 1971 Term, Foreword: In Search Of Evolving Doctrine On A Changing Court: A Model For A New Equal Protection*, 86 HARV. L. REV. 1, 17-18 (1972)(describes Court's discontent with two-tiered standard of review).

33. *See* Comment, *Still Newer Equal Protection: Impermissible Purpose Review In the 1984 Term*, 53 U. CHI. L. REV. 1454, 1456-57 (1986)(new middle tier developed for quasi-suspect classifications).

34. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-24 (1981)(equal protection challenge of state statute excluding males from state-supported nursing schools). In *Hogan*, the Court maintained that a statute which classifies individuals based on gender must (1) serve an *important* governmental objective, and (2) *substantially* relate to the accomplishment of those objectives. *See id.* at 724; *see also* Kirchberg v. Feenstra, 450 U.S. 455, 460 (1981)(gender-based discrimination must be tailored to further important governmental interest); Reed v. Reed, 404 U.S. 71, 76 (1971)(gender classification must be reasonable and sub-

This middle tier requires that such a classification (1) serve important governmental objectives, and (2) substantially relate to the achievement of those objectives.[36] Even though "intermediate scrutiny" has been subject to considerable criticism due to its past inconclusive definitions,[37] the standard continues to serve as a viable basis of review in a variety of classifications subject to equal protection challenges.[38]

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stantially relate to object of legislation). *See generally* Roberts, *Gender-Based Draft Registration, Congressional Policy and Equal Protection: A Proposal For Differential Middle-Tier Review*, 27 WAYNE L. REV. 35, 44-50 (1980)(summarizes Court's interpretation of gender based classifications).

35. *See* Mills v. Habluetzel, 456 U.S. 91, 94 (1982)(invalidating child support statute requiring father of illegitimate child to establish proof of paternity before age of one or child's claim for support barred). The Court in *Mills* noted that classifications based on illegitimacy must substantially relate to legitimate state interests. *See id.* at 99 (citing Lalli v. Lalli, 439 U.S. 259, 265 (1978)); *see also* Seeburger, *The Muddle of the Middle Tier: The Coming Crisis in Equal Protection*, 48 MO. L. REV. 587, 598-602 (1983)(overviews recent cases involving middle tier scrutiny of classifications based upon illegitimacy). For a review of illegitimacy and its relation to classifications and the fourteenth amendment see generally Note, *Illegitimacy and Equal Protection*, 49 N.Y.U. L. REV. 479 (1974).

36. *See* Craig v. Boren, 429 U.S. 190, 197 (1976). In *Craig*, the Court reviewed an Oklahoma statute which prohibited selling 3.2 percent alcohol to males under twenty-one years of age and to females under age eighteen. *See id.* at 191-92. The Court noted classifications by gender must serve important governmental objectives and substantially relate to the achievement of those objectives. *See id.* at 197. *See generally* Roberts, *Gender-Based Draft Registration, Congressional Policy and Equal Protection: A Proposal For Deferential Middle-Tier Review*, 27 WAYNE L. REV. 35 (1980)(provides information on middle-tier review emphasis gender based classifications); Note, *Constitutional Law-Equal Protection-Mental Retardation Is Not a Quasi-Suspect Classification; Therefore, Classifications On That Basis Are Subject To Rational Limitations*, City of Cleburne v. Cleburne Living Center, Inc., 17 ST. MARY'S L.J. 1053 (1986)(addresses middle-tier scrutiny specifically relating to classifications of retarded persons).

37. *See* Craig, 429 U.S. at 220 (Rehnquist, J., dissenting). Justice Rehnquist questioned the validity of the Court's holding that laws which treat males differently from females must have important governmental objectives and substantially relate to accomplishing those objectives. *See id.* Justice Rehnquist maintained that the equal protection clause does not contain language that would support the Court's requirement. *See id.* at 220-21. A federal district judge remarked that a lower court faced with the problem of analyzing the Supreme Court's middle tier has an "uncomfortable feeling, somewhat similar to a man playing a shell game who is not absolutely sure there is a pea." *See* Vorchheimer v. School Dist. of Philadelphia, 400 F. Supp. 326, 340-41 (E.D. Pa. 1975), *rev'd*, 532 F.2d 880 (3d Cir. 1976), *aff'd*, 430 U.S. 703 (1977), *cited in* Comment, *Still New Equal Protection: Impermissible Purpose Review In The 1984 Term*, 53 U. CHI. L. REV. 1454, 1457 n.11 (1986); *see also* Hull, *Sex Discrimination and The Equal Protection Clause: An Analysis of* Kahn v. Shevin *and* Orr v. Orr, 30 SYRACUSE L. REV. 639, 671 (1979)("Unlike the lenient rational relationship or the rigorous strict scrutiny test, the middle-tier has no predictable application.").

38. *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)(gender classifications must have important governmental objectives and substantially relate to those objectives); Mills, 456 U.S. at 99 (classifications based on illegitimacy must substantially relate to legitimate state interests).

The third standard of review, "strict scrutiny," is used primarily for addressing "inherently suspect" classifications[39] and classifications which effect certain fundamental rights.[40] Under "strict scrutiny," a classification is presumed unconstitutional,[41] thereby imposing upon the government the burden of providing that a compelling governmental interest exists for the classification.[42] The Supreme Court developed a two-part strict scrutiny test to determine whether sufficient justification exists for an inherently suspect or fundamental right classification by the government.[43] First, the state or federal entity must establish that the classification is necessary to promote a compelling governmental interest.[44] Second, the instrumentality chosen to

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39. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429, 432 (1984)(classifications based upon race subject to exacting scrutiny); *Developments In the Law - Equal Protection*, 82 HARV. L. REV. 1065, 1088 (1969)(inherently suspect classifications traditionally grouped into those that classify race, alienage or national origin). Those classifications which are based solely upon ancestry have also been consistently repudiated by the Court as being odious and against the doctrine of equality. *See* Wygant v. Jackson Bd. of Educ., __ U.S. __, __, 106 S. Ct. 1842, 1846, 90 L. Ed. 2d 260, 268 (1986)(citing Loving v. Virginia, 388 U.S. 1, 11 (1967)(quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)). The Supreme Court has further held that there is no rationality for classifications which are based upon nationality. *See* Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886). Therefore, enforcement of these classifications is a denial of constitutional equal protection. *See id.*

40. *See* Gunther, *The Supreme Court 1971 Term, Foreword: In Search of Evolving Doctrine On A Changing Court: A Model For A New Equal Protection*, 86 HARV. L. REV. 1, 8-9 (1972). Classifications which affect an individual's fundamental rights include among others, voting rights, the right of interstate travel, and the right to criminal appeals. *See id.*; *see also* Shapiro v. Thompson, 394 U.S. 618, 630 (1960)(citing United States v. Guest, 383 U.S. 745, 757-58)(1966)(right of travel occupies fundamental concept of federal Union); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 664-65 (1966)(voting is fundamental political right protected by equal protection); Griffin v. Illinois, 351 U.S. 12, 17 (1956)(appellate review evolved as fundamental part of trial system); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)(marriage and procreation fundamental rights).

41. *See, e.g.*, Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979)(racial classifications presumptively invalid); Ely, *Equal Protection And Affirmative Action In Job Promotions: A Prospective Analysis of* United States v. Paradise, 17 CUMB L. REV. 205, 214 (1986) (court applying strict scrutiny presumes classification unconstitutional); Dittfurth, *A Theory of Equal Protection*, 14 ST. MARY'S L.J. 829, 833 (1983)(classification on upper tier presumed unconstitutional).

42. *See e.g.*, City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985) (strict scrutiny requires classification serve compelling state interest); Ely, *Equal Protection And Affirmative Action In Job Promotions: A Prospective Analysis of* United States v. Paradise, 17 CUMB. L. REV. 205, 214 (1986)(presumption will prevail unless classifier can provide evidence of compelling governmental interest in achieving goal).

43. *See, e.g.*, Palmore, 466 U.S. at 432 (state must show compelling governmental interest exists in making classification). In addition, the Court in *Palmore* determined that the classification must be necessary to accomplish a legitimate purpose. *See id.* at 432-33.

44. *See* Wygant, __ U.S. at __, 106 S. Ct. at 1846, 90 L. Ed. 2d at 268; *see also* City of Cleburne, 473 U.S. at 440 (classification based upon race must be tailored to compelling state interest).

accomplish this must be "narrowly tailored" to achieve its purpose.[45] Classifications on the basis of race have consistently faced strict scrutiny review and thus are rarely justifiable by the government.[46] However, in an effort to remedy the existing remnants of past discrimination, judicial acceptance of some narrowly defined "benign" race-conscious classifications has developed.[47]

In recent years, very few constitutional issues have created as much debate and controversy as has the use of benign racial classifications.[48] Benign racial classifications, often utilized under the auspices of an affirmative action program, are those classifications which are based upon race or ethnicity with the goal of increasing opportunities for racial or ethnic minorities.[49]

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45. *See* City of Cleburne, 473 U.S. at 440 (classification based on race must be tailored narrowly to achievement of stated purpose).

46. *See* Wygant, __ U.S. at __, 106 S. Ct. at 1846, 90 L. Ed. 2d at 268 (classification based on race must be narrowly tailored to satisfy compelling governmental interest); *accord* City of Cleburne, 473 U.S. at 440; Palmore, 466 U.S. at 432; Fullilove v. Klutznick, 448 U.S. 448, 491 (1980).

47. *See, e.g.* International Ass'n of Firefighters v. City of Cleveland, __ U.S. __, __, 106 S. Ct. 3063, 3072, 92 L. Ed. 2d 405, 418-19 (1986)(upholding promotion requirement for minorities based on Title VII action); Sheet Metal Workers' Int'l Ass'n v. EEOC, __ U.S. __, __, 106 S. Ct. 3019, 3054, 92 L. Ed. 2d 344, 392 (1986)(upheld racial quota for union based on Title VII action); Fullilove, 448 U.S. at 492 (upholding constitutionality of preferential treatment to minority business).

48. *See* DeFunis v. Odegaard, 416 U.S. 312, 350 (1974)(Brennan, J., dissenting)("Few constitutional questions in recent history have stirred as much debate . . . ."). "Benign" racial classification are defined as those racial classifications which benefit, rather than burden a particular minority. *See* R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW 440 (1986). The ultimate goal of affirmative action, racial equality, is seldom the focus of a constitutional objection. The issue, rather, addresses the means used to achieve those goals, namely preferences and quotas skewed toward the benefit of racial minorities. These constitutional challenges stem from a conflict between the two basic goals of equal protection: (1) removing the barriers that remain to racial equality, and (2) treatment by the government of all individuals on the basis of merit, rather than race. *See id. See generally* Greenwalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 559 (1975). The author addresses what level of judicial scrutiny is required when state educational institutions desire to expand minority enrollment by preferential admission policies that may discriminate against non-minority and better qualified applicants. *See id.*; *see also* Cox, *The Question of "Voluntary" Racial Employment Quotas and Some Thoughts On Judicial Role*, 23 ARIZ. L. REV. 86, 88-89 (1981)(discusses two opposing views concerning affirmative action plans). The author notes that the 'reverse discrimination debate' focuses upon "the clash of the 'fundamental value' of racial neutrality and the belief that racial minorities disadvantaged by historical racially based decision making may be assured of equal economic, political, and social participation in American Society only by taking race into account in allocating scarce resources." *Id.* at 88.

49. *See* Choper, *The Constitutionality of Affirmative Action: Views From The Supreme Court*, 70 KY. L.J. 1,1 (1981-82)(race-conscious government programs, also called affirmative action, benign discrimination, or reverse discrimination programs, classify individuals on the "basis of race or ethnicity with the aim of helping, rather than harming racial and ethnic

Recent Supreme Court decisions have shifted the Court's primary emphasis from determining whether benign classifications are ever constitutional to the development of rules which will govern them in the future.[50] The Supreme Court, however, has had particular difficulty in providing a majority opinion concerning the proper standard of review to apply to benign racial classifications.[51]

Swann v. Charlotte-Mecklenburg Board of Education[52] is one of the first cases in which the Supreme Court addressed the powers of the district court to redress a finding of past discrimination.[53] The Court in *Swann* upheld the district court's use of a busing plan designed to eliminate existing segregation.[54] In recognizing the need to effectively redress past discrimination, the Court noted that once illegal segregation is shown, the equitable powers of a

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minorities."). For an overview of types of affirmative action programs see Kilgore, *Goals, Quotas, Preferences and Set Asides: An Appropriate Affirmative Action Response To Discrimination?*, 19 VAL. U.L. REV. 829, 829 (1984). The Supreme Court has addressed affirmative action plans in the following cases: *International Ass'n of Firefighters v. City of Cleveland*, __ U.S. __, __, 106 S. Ct. 3063, 3066-67, 92 L. Ed. 2d 405, 412 (1986)(preferential promotions of minorities); *Sheet Metal Workers Int'l Ass'n v. EEOC*, __ U.S. __, __, 106 S. Ct. 3019, 3031, 92 L. Ed. 2d 344, 365 (1986)(racial quota for admission to union); and *Wygant v. Jackson Bd. of Educ.*, __ U.S. __, 106 S. Ct. 1842, 1844, 90 L. Ed. 2d 260, 266 (1986)(preferential treatment of minorities in teacher layoffs). *See* Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 78 (1986)(overviews affirmative action cases decided in 1985 term of Supreme Court).

50. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 368 (1978)(reaffirming Supreme Court has recognized "the affirmative use of race is consistent with the equal protection component of the Fifth Amendment and therefore the Fourteenth Amendment."); *see also* Morris, *New Light On Racial Affirmative Action*, 20 U.C. DAVIS L. REV. 219, 220 (1987). The Supreme Court now believes that both positions on the affirmative action controversy including those that advocate the need to redress past discrimination through affirmative action programs and those who oppose racial discrimination of any kind, express legitimate concerns. The Supreme Court must now balance the interests of those burdened by, but also innocent of, racial discrimination with minorities' interests in overcoming discrimination. *See id.* For an overview predicting the future role of affirmative action see generally Duncan, *The Future Of Affirmative Action: A Jurisprudential/Legal Critique*, 17 HARV. C.R.-C.L. L. REV. 503, 503 (1982). The author states that "the ultimate objective of affirmative action is to bring about a society in which 'persons will be regarded as persons and discrimination will be an ugly feature that is behind us.' " *Id.*

51. *See* R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW 440 (1986). Although "strict scrutiny" has been the traditional standard of review for racial classifications, it remains unclear whether the same standard applies to benign classifications. *See id.*

52. 402 U.S. 1 (1971).

53. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 5 (1971)(Court granted certiorari to review scope of federal court's power "to eliminate racially separate public schools established and maintained by state action").

54. *See id.* at 32. The Court determined the "the essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case." *Id.* at 15 (citing Hecht Co. v. Bowles, 321 U.S. 321, 329-30 (1944)).

district court to create a remedy are "broad, for breadth and flexibility are inherent in equitable remedies."[55] The Court first reviewed the constitutionality of an affirmative action plan incorporating benign racial classifications in *Regents of the University of California v. Bakke*.[56] In *Bakke*, the Supreme Court held unconstitutional a school admissions program which accorded minority students preferential admission status over more qualified non-minority students.[57] The five Justices who addressed the constitutionality of the classification, however, could not agree as to which standard of review was applicable, arguing for approaches ranging from strict to intermediate scrutiny.[58] Although the Court did not adopt a clear standard of review in

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55. *See id.* The district court ordered the use of a school rezoning plan designed to eliminate segregation. *See id.* at 10-11.

56. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). The plaintiff in *Bakke*, a white applicant, was denied admission to medical school because of the school's affirmative action plan, which gave minority students with lower entrance exam scores preferential admission status. *See id.* at 269-71, 276. In response to his rejection for admission, Bakke filed suit against the school, alleging a violation of the equal protection clause of the fourteenth amendment. *See id.* at 269-70; *see also* Choper, *The Constitutionality of Affirmative Action: Views From The Supreme Court*, 70 KY. L.J. 1 (1981-82)(court first addressed constitutional issue in *Bakke*); Ely, *Equal Protection and Affirmative Action In Job Promotions: A Prospective Analysis of* United States v. Paradise, 17 CUMB. L. REV. 205, 219 (1986-87)(issue of benign racial classifications first addressed in *Bakke*). *But see* Lavinsky, *The Affirmative Action Trilogy And Benign Racial Classifications—Evolving Law In Need Of Standards*, 27 WAYNE L. REV. 1, 5 (1980). The author notes that *DeFunis v. Odegaard* presented the first constitutional challenge of a minority admissions affirmative action program before the Supreme Court. In *DeFunis*, the Court held the case moot because Marco DeFunis had already been admitted to the medical school under a court order and was graduating. *See id.* (citing DeFunis v. Odgaard, 416 U.S. 312, 319-20 (1974)). Justice Douglas in *DeFunis* dissented, stating that the "strict scrutiny" standard was applicable to the use of racial classifications. *See id.* (citing DeFunis v. Odegaard, 416 U.S. 312, 333 (1974)). The author noted that Justice Douglas rejected the idea that a compelling state interest existed in his conclusion that any state-sponsored preference favoring one race over another was "invidious" and against the equal protection clause. *See id.* For an overview of the *Bakke* decision and its relation to equal protection, see Karst & Horowitz, *The* Bakke *Opinions And The Equal Protection Doctrine*, 14 HARV. C.R.-C.L. REV. 7, 7 (1979)(calling attention to degree of doctrinal convergence between Justice Powell and four other Justices who analyzed constitutional issue in *Bakke*).

57. *See* Bakke, 438 U.S. at 270-75 (claim based on equal protection violation due to preferential treatment of minorities).

58. *See id.* at 290-91. Justice Powell advocated use of strict scrutiny as to benign racial classifications, while Justices Brennan, White, Marshall, and Blackmun used "intermediate scrutiny" in their analysis of the constitutionality of the classification. *See id.* at 359. These same Justices stated that those classifications whose purpose is to aid minorities must substantially relate to an important governmental objective. *See id.*; *see also* Ely, *Equal Protection and Affirmative Action In Job Promotions: A Prospective Analysis of* United States v. Paradise, 17 CUMB. L. REV. 215, 219-29 (1986-87)(after *Bakke* it was evident that the "Justices were far from reaching a consensus on the standard for measuring the constitutionality of affirmative action programs."); Tribe, *Perspectives on* Bakke: *Equal Protection, Procedural Fairness, Or*

Bakke, the framework for future constitutional analysis was laid by five Justices who intimated that a heightened level of scrutiny would be applied to benign racial classifications.[59] In *Fullilove v. Klutznick*,[60] the Court was once again unable to provide a majority opinion on the proper standard of review to be applied to benign racial classifications.[61] In upholding an affirmative action plan which required the withholding of ten percent of state and local government construction projects for minority businesses, Chief Justice Burger noted that the program would survive both the intermediate and the strict scrutiny test of *Bakke*.[62] Thus, four Justices reiterated their interpretations that either the intermediate or the strict scrutiny standard were applicable to benign racial classifications.[63]

In 1986, the decision in *Wygant v. Jackson Board of Education*[64] pro-

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Structural Injustice?, 92 HARV. L. REV. 864, 865 (1979)("It would be foolhardy to attempt to derive too much meaning from *Bakke*'s message in the area of equal protection.").

59. *See* Bakke, 438 U.S. at 359. Justices Brennan, White, Marshall, and Blackmun believed that intermediate scrutiny should be applied to benign racial classifications, *see id.* at 359, whereas Justice Powell believed that strict scrutiny should be applied, *see id.* at 288-91. Justice Powell noted that "the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." *Id.* If both are not accorded the same protection, then it is not equal." *Id.* at 289-90.

60. 448 U.S. 448 (1980).

61. *See* Fullilove v. Klutznick, 448 U.S. 448, 492 (1980). The plaintiffs alleged that a federal ten-percent set-aside fund for minority businesses violated the equal protection component of the due process clause of the fifth amendment. *See id.* at 455; *see also* Note, *The Affirmative Action Controversy*, 3 HOFSTRA LABOR L.J. 111, 121 (1985)("As in *Bakke*, the Court failed to achieve a majority opinion regarding the correct level of scrutiny applicable in affirmative action cases.").

62. *See* Fullilove, 448 U.S. at 492. Chief Justice Burger stated that "our analysis demonstrates that the MBE provision would survive judicial review under either 'test' articulated in the several *Bakke* opinions," which were the intermediate and strict scrutiny analyses. *Id.*

63. *See id.* at 519. Justices Brennan, Marshall, and Blackmun chose "intermediate" scrutiny as the appropriate standard of review to apply to benign racial classifications. *See id.* Justice Powell reiterated his contention that as in *Bakke*, strict scrutiny was the applicable standard of review to apply to benign racial classifications. *See id.* at 496 (Powell, J., concurring). Justices Stewart and Rehnquist dissented, stating that all forms of racial discrimination were invidious, regardless of who received their benefits. *See id.* at 526-28 (Stewart, J., dissenting). Justice Stevens dissented, stating that the legislation was not narrowly tailored to its purpose because the benefits given were not adequately distributed. *See id.* at 552-53 (Stevens, J., dissenting). Chief Justice Burger, in effect, stated that the minority business provision would have been valid under either the "strict" or "intermediate" scrutiny test outlined in *Bakke*. *See id.* at 492 (plurality opinion); *see also* R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW 450 (1986). The *Fullilove* decision clarified some opinions by Justices "on affirmative action issues while leaving a new set of questions regarding the constitutionality of affirmative actions programs." *Id.*

64. __ U.S. __, 106 S. Ct. 1842, 90 L. Ed. 2d 260 (1986). A collective bargaining agreement provision provided for preferential protection in layoffs of minority employees. *See* Wygant v. Jackson Bd. of Educ., __ U.S. __, __, 106 S. Ct. 1842, 1844, 90 L. Ed. 2d 260, 266

duced the first signal of the Court's consolidation in recognizing the merits of racial classifications.[65] Although again there was no majority opinion on which standard of review to apply, eight justices agreed on the viability of affirmative action programs to redress past discrimination.[66] The Court in *Wygant* upheld an affirmative action program which gave preferential treatment to minority teachers in layoffs.[67] Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor agreed that all racial classifications, including benign racial classifications, should be governed by strict scrutiny.[68] The plurality explicitly agreed, therefore, that racially benign classifications must be narrowly tailored to accomplish a compelling governmental interest.[69] The Supreme Court has not, however, in the four cases that have

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(1986). A group of white teachers challenged the provision as being a violation of the fourteenth amendment. *See id.* at __, 106 S. Ct. at 1846, 90 L. Ed. 2d at 268.

65. *See id.* at __, 106 S. Ct. at 1850, 90 L.Ed.2d at 273 (Powell joined by O'Connor, JJ., Rehnquist, C.J., opinion)(classifications to eradicate discrimination may be called for limited use of properly tailored remedies based on race); *see also id.* at __, 106 S. Ct. 1861, 90 L. Ed. 2d at 287 (Marshall, joined by Brennan, Blackmun, JJ., dissenting)("Despite the Court's inability to agree on a route, we have reached a common destination in sustaining affirmative action against constitutional attack.").

66. *See generally* Morris, *New Light On Racial Affirmative Action*, 20 U.C. DAVIS L. REV. 219, 235 (1987). The author notes that although no majority opinion was given by the Court in *Wygant*, "eight Justices agreed on one proposition: remedying past or present illegal racial discrimination caused by a government entity warrants the voluntary use of a proper, carefully constructed, and not overly burdensome affirmative action program." *Id.*

67. *See* Wygant, __ U.S. at __, 106 S. Ct. at 1842, 90 L. Ed. 2d at 275. The Court held that "the Board's selection of layoffs as the means to accomplish even a valid purpose cannot satisfy the demands of the Equal Protection Clause." *Id.*

68. *See id.* at __, 106 S. Ct. at 1846, 90 L. Ed. 2d at 268. Justice Powell, writing for the plurality, joined by Chief Justice Burger and Justices Rehnquist and O'Connor, reaffirmed that the level of scrutiny was the same, regardless of whether the classification proposed was of a group who had not been historically discriminated against by government. *See id.* (citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 n.9 (1982); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291-99 (1978)).

69. *See id.* at __, 106 S. Ct. at 1846, 90 L. Ed. 2d at 268. The level of review chosen by the plurality, strict scrutiny, consists of a two-prong analysis. First, the classifications must be based upon a compelling governmental interest. *See id.* (citing Palmore v. Sidoti, 466 U.S. 429, 432 (1984); Loving v. Virginia, 388 U.S. 1, 11 (1967)). Second, the Court in *Wygant* held that the means used to accomplish the classification's purpose must be narrowly tailored to that goal. *See id.* Justice Powell in *Wygant* stated that societal discrimination alone was not sufficient to justify racial classifications. *See id.* at __, 106 S. Ct. at 1848, 90 L. Ed. 2d at 270. Instead, Justice Powell required a showing of previous discrimination by a governmental entity before he would permit the use of limited racial classifications. *See id.* at __, 106 S. Ct. at 1847, 90 L. Ed. 2d at 269. In addition, Justice Powell stated that "while hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives," *Id.* at __, 106 S. Ct. at 1851-52, 90 L. Ed. 2d at 274. For those reasons, Justice Powell concluded that the preferential layoffs proposed in *Wygant* were unnecessarily intrusive and as such were not narrowly tailored. *See id.* at __, 106 S. Ct. at 1852, 90 L. Ed. 2d

addressed the constitutionality of benign racial classifications, provided a majority opinion on the correct standard of review.[70]

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at 275. Justice O'Connor asserted, in a concurring opinion, that the strict scrutiny standard should be used to determine the constitutionality of benign racial classifications. *See id.* at __, 106 S. Ct. at 1857, 90 L. Ed. 2d at 281-82 (O'Connor, J., concurring). In sum, Justice O'Connor believed that the lower courts failed to find any legitimate governmental purpose sufficient to withstand strict scrutiny. *See id.* at __, 106 S. Ct. at 1857, 90 L. Ed. 2d at 281. Justice O'Connor rejected the use of a "reasonableness" test when addressing whether the provision was narrowly tailored because reasonableness is not a valid inquiry under any applicable equal protection standard articulated by the Court. In addition, Justice O'Connor believed the layoff provision was not narrowly tailored to accomplish its remedial purpose because it was "keyed to a hiring goal" that had no relation to remedying employment discrimination. *See id.* Justices Marshall, Brennan, and Blackmun, dissenting, stated that the record was too inconclusive to come to a reasonable decision. *See id.* at __, 106 S. Ct. at 1858, 90 L. Ed. 2d at 282-83 (Marshall, J., dissenting). Justice Marshall stated that since the plurality had seriously erred in the analysis of the case's merits, further expression of disagreement with the plurality's conclusions was necessary. *See id.* at __ , 106 S. Ct. at 1058, 90 L. Ed. 2d at 283. Justice Marshall stated that the layoffs would be shared by both black and white teachers. *See id.* at __, 106 S. Ct. at 1859-60, 90 L. Ed. 2d at 284. Finally, Justice Marshall believed that the provision "was a legitimate and necessary response both to racial discrimination and to educational imperatives." *Id.* at __, 106 S. Ct. at 1866, 90 L. Ed. 2d at 293.

70. *See* Sheet Metal Workers' Int'l Ass'n v. EEOC, __ U.S. __, __, 106 S. Ct. 3019, 3052, 92 L. Ed. 2d 344, 390 (1986)(Justices have not agreed on proper standard to be used in analyzing constitutionality of race conscious classifications). There has been one additional case that has addressed in part the constitutionality of benign racial classifications. *See id.* at __, 106 S. Ct. at 3054, 92 L. Ed. 2d at 392 (1986). In *Sheet Metal Workers*, a union was found to have engaged in discrimination against both blacks and Hispanic individuals in violation of Title VII of the Civil Rights Act of 1964. *See id.* at __, 106 S. Ct. at 3024, 92 L. Ed. 2d at 357. The union was ordered by the district court to halt all discriminatory practices and to admit a specified percentage of nonwhites to the union. In 1982, the association was found in contempt of this earlier order. The association challenged this contempt order as well as the remedies given to the minority members on the basis that a district court cannot order race conscious relief under the remedial power of Title VII to unidentified victims of discrimination. *See id.* at __, 106 S. Ct. at 3024-25, 92 L. Ed. 2d at 357. Five Justices came to the consensus that the district court did not err in holding that preferential treatment programs concerning minorities did not necessarily violate the Constitution. *See id.* at __, 106 S. Ct. at 3054, 92 L. Ed. 2d at 392 (1986). Justices Brennan, Blackmun, Marshall, and Stevens noted that it was unnecessary to decide which standard of review to apply to this benign racial classification because it would survive the most rigorous test. *See id.* at __ 106 S. Ct. at 3053, 94 L. Ed. 2d at 391 (plurality opinion). Justice Powell, however, concurring in the decision, considered strict scrutiny to be the appropriate standard of review. *See id.* at __, 106 S. Ct. at 3055, 92 L. Ed. 2d at 393-394 (Powell, J., concurring). As in *Fullilove*, Justice Powell asserted that any preference which relied upon racial criteria must be viewed by the most searching examination. *See id.* (citing Fullilove v. Klutznick, 448 U.S. 448, 491 (1980)). In *Sheet Metal Workers*, Justice Powell outlined four factors to consider when determining whether a remedy is "narrowly tailored" to its purpose. *See id.* at __, 106 S. Ct. at 3055, 92 L. Ed. 2d at 394. Those factors included:

> (i) the efficacy of alternative remedies; (ii) the planned duration of the remedy; (iii) the relationship between the percentage of minority workers to be employed and the percent-

In *United States v. Paradise*,[71] the Supreme Court, once again without providing a majority opinion, used a combination of two equal protection analyses to uphold the validity of a court ordered promotion quota based solely on race.[72] First, the plurality held that the quota was constitutionally justified because the benign racial classification survived strict scrutiny analysis.[73] The Court recognized that the government's need to remedy continued discrimination and the pervasive effects of past discrimination by the Department was compelling.[74] The Court noted that the Department had continually resisted lower court orders attempting to remedy the Department's discriminatory promotion policies.[75] Having found that the quota served a compelling government interest, the plurality rejected the Department's contention that the quota was not narrowly tailored as the term had been traditionally defined under strict scrutiny review.[76]

Initially, the plurality in *Paradise* outlined factors which must be considered in a determination of whether race-conscious remedies are narrowly

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age of minority group members in the relevant population or work force; and (iv) the availability of waiver provisions if the hiring plan could not be met.

Id. Justice Powell concluded that the union's egregious violations of Title VII without doubt provided a compelling governmental interest to justify the classification. *See id.*

71. __ U.S. __, 107 S. Ct. 1053, 94 L. Ed. 2d 203 (1987).

72. *See* United States v. Paradise, __ U.S.__, __, 107 S. Ct. 1053, 1074, 94 L. Ed. 2d 203, 232 (1987)(plurality opinion). First, the plurality applied the two-prong analysis of strict scrutiny to the classification in *Paradise*. *See id.* at __, 107 S. Ct. at 1064-73, 94 L. Ed. 2d at 220-31. In addition to the strict scrutiny standard, the plurality added the *Swann* rationale, which gives broad discretion to district court judges in formulating remedies for past discrimination. *See id.* at __, 107 S. Ct. at 1073-74, 94 L. Ed. 2d at 231-32.

73. *See id.* at __, 107 S. Ct. at 1074, 94 L. Ed. 2d at 232. The plurality found that the district court's order of a fifty-percent promotional requirement was permissible under the fourteenth amendment because a compelling governmental interest existed in eradicating the effects of the Department's discriminatory promotional policy and because the race conscious relief was narrowly tailored to legitimate, laudable purposes recognized by the district court. *See id.* at __, 107 S. Ct. at 1066-73, 94 L. Ed. 2d at 223-31.

74. *See id.* at __, 107 S. Ct. at 1065, 94 L. Ed. 2d at 220-21 (unquestionable governmental interest in remedying almost forty years of excluding blacks from positions in upper ranks of Department). The plurality also outlined the objectives of the district court's order: (1) to eliminate the "long term, open, and pervasive" policies of discrimination within the Department; (2) to expedite compliance in the Department of prior consent decrees outlining non-racial promotional policies, and (3) to eliminate the detrimental "effects of the Department's delay in producing such a procedure" ensuring non-racial promotion guidelines. *Id.* at __, 107 S. Ct. at 1067, 94 L. Ed. 2d at 223-24.

75. *See id.* at __, 107 S. Ct. at 1066, 94 L. Ed. 2d at 223. The plurality stated that the Department's continued resistance to the district court's orders and the societal interest in enforcing compliance with judgments of federal courts supported their contention that a compelling governmental interest existed. *See id.*

76. *See id.* The plurality rejected the Department's argument that the implemented promotional procedures were not narrowly tailored as "to remedy past discrimination and eliminate its lingering effects." *Id.*

tailored to achieve their purpose.[77] The plurality reasoned that the one-for-one promotional quota was narrowly tailored to its purposes because it was (1) necessary, with no other effective alternative,[78] (2) flexible, waivable, and temporary in application,[79] (3) rational in its numerical basis for relief,[80]

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77. *See id.* at __, 107 S. Ct. at 1067, 94 L. Ed. 2d at 223. The Court listed the following factors, suggested by Justice Powell, as relevant to a determination of the appropriateness of race-conscious remedies: "the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties." *Id.*

78. *See id.* The Department proposed in its urgent request to promote fifteen troopers to the rank of corporal that four blacks and eleven whites be promoted, and that additional time be given the Department to allow the department to develop and implement a non-discriminatory, promotional procedure. The Department argued that this proposal would have allowed promotions to be accomplished without adverse effect to black candidates. *See id.* The Supreme Court disagreed, concluding that this option would not serve the district court's purposes. *See id.* at __, 107 S. Ct. at 1068, 94 L. Ed. 2d at 224. The plurality held that the Department's promotional proposal ignored: 1) the district court's concern that acceptable promotional procedures be adopted quickly; and 2) the injury sustained by the plaintiff class which resulted from the Department's delays in complying with the 1972 district court order and the 1979 and 1981 consent decrees. *See id.* at __, 107 S. Ct. at 1068, 94 L. Ed. 2d at 224-25. The plurality similarly rejected the Government's suggestion that heavy fines be imposed on the Department pending compliance. *See id.* at __, 107 S. Ct. at 1068-69, 94 L. Ed. 2d at 225. The plurality held that the Department was already required to pay for the plaintiff's extensive litigation costs, and this had not prevented the Department's foot-dragging. *See id.* at __, 107 S. Ct. at 1069, 94 L. Ed. 2d at 225. Furthermore, the Court suggested, imposing fines would have done nothing to compensate the plaintiffs for the Department's delays, again contravening the original purpose of the district court's order. *See id.* at __, 107 S. Ct. at 1069, 94 L. Ed. 2d at 226.

79. *See id.* at __, 107 S. Ct. at 1070, 94 L. Ed. 2d at 227. The plurality concluded that the one-for-one promotional requirement was flexible in its application to all ranks. *See id.* In so holding, the plurality found that the promotional requirement (1) could be waived if qualified black candidates could not be located, (2) applied only when the Department had a need to make promotions, (3) existed only as long as the Department lacked a non-discriminatory promotional procedure, and (4) was initiated as a one-time occurrence. *See id.* at __, 107 S. Ct. at 1070-71, 94 L. Ed. 2d at 227-28.

80. *See id.* at __, 107 S. Ct. at 1071, 94 L. Ed. 2d at 228. The Court rejected the Government's contention that the one-for-one requirement was arbitrary because it did not bear a relationship to the twenty-five percent labor pool of relevant applicants. *See id.* The plurality reasoned that the fifty-percent requirement was not the goal of the classification, "rather it represents the speed at which the goal of twenty-five percent will be achieved." *Id.* at __, 107 S. Ct. at 1071, 94 L. Ed. 2d at 228-29. The plurality analogized the fifty-percent requirement in *Sheet Metal Workers*, which controlled the speed of fulfilling a hiring goal. *See id.* The plurality added that the district court could not accept a twenty-five percent requirement because this would ignore the effects of past discrimination by the Department and its delays in submitting non-discriminatory promotional procedures. *See id.* at __, 107 S. Ct. at 1072, 94 L. Ed. 2d at 229. The plurality concluded that the fifty-percent figure represented "a delicate calibration of the rights and interests of the plaintiff class, the Department, and the white troopers." *See id.*

and (4) did not impose unacceptable burdens on third parties.[81] Second, the plurality in *Paradise* intimated the affirmative action plan was constitutional under *Swann*'s holding that district court judges' equitable powers accord them broad discretion in redressing discrimination.[82] Based on this reasoning, the plurality approved the district court's implementation of a race-conscious promotional quota;[83] however, it failed to clarify what role *Swann*

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81. *See id.* at __, 107 S. Ct. at 1073, 94 L. Ed. 2d at 230. The plurality stated that the one-for-one promotion requirement did not place "an unacceptable burden on innocent third parties." *Id.* The plurality based its conclusion upon the facts that: (1) "denial of future promotion is not considered as intrusive as the loss of a job"; and (2) "qualified white candidates simply have to compete with qualified black troopers." *Id.* at __, 107 S. Ct. at 1073, 94 L. Ed. 2d at 230-31.

82. *See id.* at __, 107 S. Ct. at 1073, 94 L. Ed. 2d at 231. The plurality in *Paradise* maintained that the equitable powers of a district court to remedy a violation of the fourteenth amendment are broad and flexible. *See id.* (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971)). Thus, once a violation of a right through discrimination is found, a district court has a duty to issue decrees which will eliminate discriminatory acts of the past and prevent discrimination in the future. *See id.* (citing Louisiana v. United States, 380 U.S. 145, 154 (1965)). The plurality explained that remedial plans have not been "limited to the least restrictive means of implementation." *Id.* Instead, the plurality stated, when creating a remedy to correct discrimination the district court must balance the rights of parties within the bounds of statutes and the Constitution as opposed to simply establishing the least restrictive remedy. *See id.* The plurality also recognized that "the district court has first-hand experience with the parties and is best qualified to deal with the 'flinty, intractable realities of day-to-day implementation of constitutional demands." *Id.* at __, 107 S. Ct. at 1074, 94 L. Ed. 2d at 232 (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 6 (1971)). The plurality concluded that the district court properly balanced both the rights of the plaintiff as well as the collective interests of the white troopers, and had designed a narrowly tailored remedy. *See id.* "Narrowly tailored," the plurality contended, "does not operate to remove all discretion from the District Court." *Id.*

83. *See id.* at __, 107 S. Ct. at 1074, 94 L. Ed. 2d at 232 (race-conscious relief justified and narrowly tailored to purpose). Although joining in the plurality opinion, Justice Powell wrote a separate concurrence to the plurality's opinion, stating that the instant case in many ways paralleled *Sheet Metal Workers v. EEOC* because both cases considered the many years of acquiescence by a discriminator to repeated district court judgments. *See id.* at __, 107 S. Ct. at 1074, 94 L. Ed. 2d at 233 (Powell, J., concurring). Justice Powell did, however, note some distinctions in the two cases: (1) *Sheet Metal Workers* involved a Title VII claim, but *Paradise* involved an alleged violation of the fourteenth amendment; and (2) the district court in *Sheet Metal Workers* had cited the discriminator (Union) for contempt. *See id.* at __, 107 S. Ct. at 1075, 94 L. Ed. 2d at 233. However, Justice Powell concluded that, as in *Sheet Metal Workers*, a compelling governmental interest existed. *See id.* Finally, Justice Powell outlined his analysis and factors for addressing whether a classification is narrowly tailored, which closely paralleled the reasoning of the plurality in determining whether the district court's order was narrowly tailored. *See id.* at __, 107 S. Ct. at 1075-76, 94 L. Ed. 2d at 233-35. Justice Powell partially distinguished the applicability of the *Swann* analysis in the instant case because although

> broadly relevant, they differ significantly from the Court's subsequent affirmative action decisions. To be sure, a pupil who is bused from a neighborhood school to a comparable

would play when infused into traditional strict scrutiny analysis.[84]

Concurring in the opinion, Justice Stevens agreed that race-conscious quotas were appropriate to remedy discriminatory actions by a state government.[85] Justice Stevens disagreed, however, with the plurality's view that strict scrutiny analysis is applicable to benign racial classifications.[86] Justice Stevens reasoned that the broad remedial power of a district court recognized in *Swann* was present in *Paradise*.[87] It is the party who has consistently violated the law, Justice Stevens contended, who bears the burden of showing that the court's remedy exceeds the limits of "reasonableness."[88]

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school in a different neighborhood may be inconvenienced. But the position of bused pupils is far different from that of employees who are laid off or denied promotion.

Id. at __ n.2, 107 S. Ct. at 1075 n.2, 94 L. Ed. 2d at 233-34 n.2. Justice Powell stated that "court ordered busing does not deprive students of any race of an equal opportunity for an education." *Id.*

84. *See id.* at __, 107 S. Ct. at 1064, 94 L. Ed. 2d at 220. The Court recognized that some elevated scrutiny is required for a benign racial classification; however, the Court failed to "reach a consensus on the appropriate standard for analysis" because it believed that the challenged policy would survive "strict scrutiny," the court's most rigorous standard of review. *Id.*

85. *See id.* at __, 107 S. Ct. at 1076, 94 L. Ed. 2d at 235 (Stevens, J., concurring). Justice Stevens reasoned that the central theme reflected in *Swann v. Charlotte-Mecklenburg* was "that race-conscious remedies are obviously required to remedy racially discriminatory action by the State that violate the Fourteenth Amendment." *Id.*

86. *See id.* at __, 107 S. Ct. at 1077, 94 L. Ed. 2d at 235-36. Justice Stevens rejected the theory that a district court "judge's discretion is constricted by a narrowly tailored test." *Id.* Consequently, Justice Stevens rejected the dissent's theory that a test appropriate to determine the constitutionality of a state actor should also be applied when reviewing federal judicial decrees. *See id.* at __ n.1, 107 S. Ct. at 1077 n.1, 94 L. Ed. 2d at 236 n.1. Justice Stevens concluded that because the district court's decree was "neither 'overinclusive' nor 'underinclusive' " the use of a narrowly tailored test, often used in determining the merits of an equal protection challenge, was inapplicable to the issue involved in the instant case. *Id.*

87. *See id.* at __, 107 S. Ct. at 1076, 94 L. Ed. 2d at 235. Justice Stevens argued that *Swann* delineated the appropriate standard for review for race-conscious remedies and should govern the instant case, *see id.*, rejecting Justice Powell's argument that the *Swann* analysis was only broadly relevant to the instant case, *see id.* at __ n.4, 107 S. Ct. at 1079 n.4, 94 L. Ed. 2d at 238-39 n.4. Justice Stevens argued that the *Swann* rationale should be used to determine the validity of all decrees issued by district courts. *See id.* at __ n.4, 107 S. Ct. at 1079 n.4, 94 L. Ed. 2d at 239 n.4. Justice Stevens concluded by stating that "a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right." *Id.* (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15-16 (1971)).

88. *Id.* at __, 107 S. Ct. at 1078, 94 L. Ed. 2d at 237. Justice Stevens described the district court's remedial power as being limited by a reasonableness standard. *See id.* (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31 (1971)). Therefore, Justice Stevens believed it was the Department's burden to show the unreasonableness of the district court's order. *See id.* at __, 107 S. Ct. at 1078-79, 94 L. Ed. 2d at 237-38. Justice Stevens distinguished this burden from the *Wygant* and *Fullilove* cases by stating that those cases did not involve proven violations of law. *See id.* at __, 107 S. Ct. at 1078, 94 L. Ed. 2d at 237. Conse-

Finally, Justice Stevens stated that district court judges will unavoidably consider race in fashioning remedies for discrimination, and that to prohibit the use of this consideration would eliminate the one "tool" essential for rectifying discrimination.[89]

Justice O'Connor, joined by Chief Justice Rehnquist and Justice Scalia, dissented, arguing that the level of scrutiny applicable to the district court's order in *Paradise* should not be lowered from the strict scrutiny standard simply because the challenged racial classification applies to whites, a class historically not subjected to governmental discrimination.[90] Therefore, Justice O'Connor argued that the strict scrutiny analysis adopted in *Wygant* should be applied to the instant case.[91] Justice O'Connor agreed with the plurality's determination that the government had a compelling interest in eradicating the Department's pervasive and systematic discriminatory conduct.[92] Justice O'Connor, however, did not agree with the plurality's decision to adopt a review "of 'narrowly tailored' far less stringent than that required by strict scrutiny."[93] Justice O'Connor argued that it is impermissible to use racial quotas because they presume that individuals gravitate to certain employment positions within predictable percentages.[94] In addition, Justice O'Connor argued that because: (1) the district court failed to address

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quently, Justice Stevens reasoned that the obligation of a governmental decision maker to overcome a presumption against a race-conscious decision should not apply to federal district judges who make orders to remedy proven discriminatory conduct by a governmental unit. *See id.* at __, 107 S. Ct. at 1078-79, 94 L. Ed. 2d at 237-38.

89. *See id.* at __, 107 S. Ct. at 1079, 94 L. Ed. 2d at 238 (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 45-46 (1971)).

90. *See id.* at __, 107 S. Ct. at 1080, 94 L. Ed. 2d at 239 (O'Connor, J., dissenting). Justice O'Connor believed "that the level of Fourteenth Amendment scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination." *Id.*

91. *See id.* Justice O'Connor outlined the two-part requirement as: (1) the order must be substantiated with a compelling governmental purpose, and (2) the means chosen for the remedy must be narrowly tailored to its purpose. *See id.*

92. *See id.*

93. *Id.* at __, 107 S. Ct. at 1080, 94 L. Ed. 2d at 240. Justice O'Connor maintained that the plurality purported to use strict scrutiny on the basis that the remedy was narrowly tailored to its remedial purpose. However, because the plurality did not adopt a particular standard of review and required a far less stringent interpretation of "narrowly tailored," Justice O'Connor dissented. *See id.*

94. *See id.* The rigid quotas were impermissible, Justice O'Connor contended, since they adhered to an unjustified conclusion "that individuals of each race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination." *Id.* Therefore, a rigid quota cannot be implemented because it adopts an untenable conclusion concerning what would happen to future minorities absent continuing discrimination. Even more flexible goals, Justice O'Connor argued, "also may trammel unnecessarily the rights of nonminorities." *Id.* Therefore, Justice O'Connor contended, the plurality's use of racial preferences must be utilized "sparingly and only when manifestly necessary." *Id.*

whether less restrictive alternative remedies existed,[95] and (2) the district court provided no other adequate justification that the classification was narrowly tailored,[96] the standard imposed by the plurality did not satisfy the strict scrutiny standard.[97]

The impact of the plurality's holding in *Paradise* does not lie simply in its validation of the challenged racial quota, but rather in the Supreme Court's

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95. *See id.* at __, 107 S. Ct. at 1081-82, 94 L. Ed. 2d at 241-42. Justice O'Connor stated that there is no justification for using racial preferences if the ultimate purpose of the remedy could be accomplished without their use. *See id.* at __, 107 S. Ct. at 1081-82, 94 L. Ed. 2d at 241. Racial classifications, Justice O'Connor concluded, are too pernicious to allow "any but the most exact connection between justification and classification." *See id.* (citing Fullilove v. Klutznick, 448 U.S. 448, 537 (1980)). Therefore, Justice O'Connor maintained that to be valid under strict scrutiny, the remedy chosen must fit more precisely than any other alternative remedy. *See id.* at __, 107 S. Ct. at 1080-81, 94 L. Ed. 2d at 241. Justice O'Connor outlined two alternative remedies she believed would have achieved compliance with the district court's orders without trammelling the rights of nonminorities: (1) appointment of a trustee who would develop a procedure that would accomplish compliance with the district court's order, and (2) holding the Department in contempt of the court's orders and imposing "stiff fines and other penalties." *Id.* at __, 107 S. Ct. at 1082, 94 L. Ed. 2d at 241-42. Because the district court did not discuss these or any other alternatives, Justice O'Connor concluded that the remedy imposed would not survive the narrowly tailored prong of traditional strict scrutiny. *See id.* at __, 107 S. Ct. at 1082, 94 L. Ed. 2d at 242.

96. *See id.* at __, 107 S. Ct. at 1080-81, 94 L. Ed. 2d at 240-41. Justice O'Connor believed that the district court's remedy was not "manifestly necessary" in order to accomplish compliance with the court's previous orders. *See id.* at __, 107 S. Ct. at 1080, 94 L. Ed. 2d at 240. Justice O'Connor maintained that the sole purpose of the district court's promotional remedy was to compel the Department to formulate promotional procedures which would not adversely affect blacks. *See id.* Justice O'Connor argued that if the district court's order was truly designed to eliminate the effects of delays in the Department's compliance, the one-for-one quota would have extended "after the Department complied with the consent decrees." *Id.* at __, 107 S. Ct. at 1081, 94 L. Ed. 2d at 240. In addition, Justice O'Connor stated that the district court's approved promotion procedure for the rank of corporal required that only three of the thirteen promotions (23.1 %) be given to blacks. The Justice concluded that the result of the district court's procedure was that "a lower percentage of blacks" was required than the twenty-five percent goal originally proposed by the district court. *See id.* Thus, because the district court's quota was suspended when or if the Department complied with the order or twenty-five percent of the rank was black, the order's ultimate effect was not to remedy the prior effects of the delays by the Department. *See id.* at __, 107 S. Ct. at 1081, 94 L. Ed. 2d at 240-41. Moreover, even if the purpose of the one-for-one quota was to eradicate the effects of delays by the Department, Justice O'Connor concluded that this would not justify the imposition of a quota. *See id.* at __, 107 S. Ct. at 1081, 94 L. Ed. 2d at 241. Justice O'Connor disputed the plurality's characterization of the promotional quota as simply altering the speed at which the remedy would be given. *See id.* This, Justice O'Connor argued, "necessarily eviscerates any notion of 'narrowly tailored' because it has no stopping point; even a 100 % quota could be defended on the ground that it merely 'determined how quickly the Department progressed toward' some ultimate goal." *Id.*

97. *See id.* at __, 107 S. Ct. at 1080, 94 L. Ed. 2d at 239-40. Justice O'Connor dissented because the plurality "adopt[ed] a standardless view of 'narrowly tailored' far less stringent than that required by strict scrutiny. . . ." *Id.* at __, 107 S. Ct. at 1080, 94 L. Ed. 2d at 240.

continued failure to definitively provide a standard of review for use in future affirmative action challenges.[98] First, the plurality, despite its previous recognition "that the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination," altered the level of scrutiny by incorporating a standard lower than strict scrutiny review.[99] Second, the plurality's purported application of both strict scrutiny[100] and a *Swann* analysis,[101] without reaching a clear consensus on either, provides little guidance as to which standard to apply to racially benign classifications, but instead appears to create a hybrid of equal protection standards.[102]

The plurality's application of strict scrutiny combined with a lower standard of review under the *Swann* rationale stands in direct opposition to the principle that strict scrutiny should be applied in unaltered form to all racial classifications.[103] Initially, the plurality purported to apply strict scrutiny to

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98. *See* United States v. Paradise, __ U.S. __, __, 107 S. Ct. 1053, 1064, 94 L. Ed. 2d 203, 220 (1987). The plurality stated that although the Court has consistently held an elevated level of scrutiny to be applicable in benign racial classifications, it has not yet reached a consensus on which constitutional analysis to apply. *See id.*

99. *See id.* at __, 107 S. Ct. at 1080, 94 L. Ed. 2d at 239 (O'Connor, J., dissenting)(citing Wygant v. Jackson Bd. of Educ., __ U.S. __, __ 106 S. Ct. 1842, 1846, 90 L. Ed. 2d 260, 268 (1986)(level of scrutiny does not change because against group not historically discriminated against)); *accord* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 n.9 (1982). By adopting a standard other than strict scrutiny to address benign racial classifications, the plurality in *Paradise* has deviated from precedent because strict scrutiny has been the applicable standard of review for racial classifications. *See, e.g.*, Wygant v. Jackson Bd. of Educ., __ U.S. __, __, 106 S. Ct. 1842, 1846, 94 L. Ed. 2d 260, 268 (1986)(applies strict scrutiny to racial classifications). "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantee." *Id.* (citing Fullilove v. Klutznick, 448 U.S. 448, 491 (1979)); *see also* Palmore v. Sidoti, 466 U.S. 429, 432 (1984)(racial classifications necessitate use of most exacting scrutiny); Loving v. Virginia, 388 U.S. 1, 11 (1967)(racial classifications require most rigid scrutiny); Korematsu v. United States, 323 U.S. 214, 216 (1944)(courts must subject racial classifications to most rigid scrutiny).

100. *See* Paradise, __ U.S. at __, 107 S. Ct. at 1064, 94 L. Ed. 2d at 220. The plurality stated, in purporting to apply strict scrutiny, that a compelling governmental interest existed to justify the classification. In addition, the plurality also stated that the classification was "narrowly tailored." *Id.*

101. *See id.* at __, 107 S. Ct. at 1073, 94 L. Ed. 2d at 231. The plurality noted that when determining whether the racial quota was narrowly tailored the district court judge's broad and flexible powers must be incorporated into the analysis. *See id.* (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15, (1971)).

102. *See id.* at __, 107 S. Ct. at 1064, 94 L. Ed. 2d at 220 (court has not reached consensus on appropriate constitutional analysis).

103. *See* Wygant v. Jackson Bd. of Educ., __ U.S. __, __, 106 S. Ct. 1842, 1846, 90 L. Ed. 2d 260, 268 (1986). In *Wygant*, the Court refused to deviate from strict scrutiny analysis simply because the discrimination alleged was against whites. *See id.* Justice Powell, writing for the plurality in *Wygant*, stated the "the Court has recognized that the level of scrutiny does

the challenged racial quota, which directly conforms to previous Supreme Court decisions.[104] The plurality, however, concomitantly applied the rationale of *Swann*, which gives broad discretion to the district court to formulate remedies once a violation of discrimination is found.[105] The plurality's application of the *Swann* rationale to benign racial discrimination in *Paradise* directly contravenes strict scrutiny analysis, which requires that the district court address whether a classification used is narrowly tailored to its goal.[106] By upholding the racial quota in part under the rationale of *Swann*, the plurality has departed from precedent by applying a standard other then the traditional strict scrutiny analysis to racial classifications.[107]

In addition, the plurality, in applying two different levels of scrutiny, has

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not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination." *Id.* In *Bakke*, Justice Powell stated that the fact that black males are being discriminated against instead of white males has never been a prerequisite to applying strict scrutiny. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 290 (1978).

104. *See* United States v. Paradise, __ U.S.__, __, 107 S. Ct. 1053, 1064, 94 L. Ed. 2d 203, 220 (1987). The plurality concluded that "the relief ordered survives even strict scrutiny analysis [because] it is 'narrowly tailored' to serve a 'compelling governmental purpose.' " *Id.* (citing Wygant v. Jackson Bd. of Educ., __ U.S. __, __, 106 S. Ct. 1842, 1846, 90 L. Ed. 260, 268 (1986)). By initially adopting the strict scrutiny standard of review in *Paradise*, the plurality adhered to previous Supreme Court decisions addressing the issue. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429, 432 (1984)(classifications based on race subject to exacting scrutiny); Loving v. Virginia, 388 U.S. 1, 11 (1967)(classifications on basis of race necessitate most rigid scrutiny).

105. *See* Paradise, __ U.S. at __, 107 S. Ct. at 1073, 94 L. Ed. 2d at 231. In *Swann*, the Court held that when addressing racial segregation in schools, "the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Id.* (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971)).

106. *Compare id.* at __, 107 S. Ct. at 1064, 94 L. Ed. 2d at 220 (to survive strict scrutiny, classification must be narrowly tailored) *with* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971)(district court's powers are broad in formulating appropriate classification).

107. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 294-99 (1978). Justice Powell, in support of the proposition that the standard of review should not be altered from strict scrutiny, noted that the fourteenth amendment's prohibition against discrimination is not limited to blacks. *See id.* at 294-96. If preferences were made as to classes with historical discrimination over those who were not

> the courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny. As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary. The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence—even if they otherwise were politically feasible and socially desirable.

failed to provide any predictability for future affirmative action challenges.[108] All Justices joining in the plurality's adoption of combining strict scrutiny and the rationale of *Swann* have deviated from their prior opinions which stated either the applicability of the strict scrutiny standard or the intermediate scrutiny standard to benign racial classifications.[109] The unfortunate consequence of the deviations from the Justices' prior opinions is that the Court has created further confusion in an area in which the Supreme Court has traditionally provided little guidance to district courts struggling with the constitutional standards applicable to benign discrimination.[110]

Id. at 298.

The Court in *Bakke* determined that "nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups." *Id.* The *Bakke* court stated that "by hitching the meaning of the Equal Protection Clause to these transitory considerations, we would be holding, as a constitutional principle, that judicial scrutiny of classifications touching on racial and ethnic background may vary with the ebb and flow of political forces." *Id.*

108. *See* Paradise, __ U.S. at __, 107 S. Ct. at 1064, 94 L. Ed. 2d at 220. In failing to reach a consensus on which standard of review to apply to racially benign classifications, the *Paradise* Court has provided no majority opinion for lower courts to follow. *See id.*

109. *Compare id.* at __, 107 S. Ct. at 1064, 94 L. Ed. 2d at 220 (Brennan, joined by Marshall, Blackmun, Powell, JJ., concurring)(to satisfy strict scrutiny benign racial classification must have *compelling* government purpose narrowly tailored to satisfy purpose) *with* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 361 (1978)(Brennan, joined by White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part)(racially benign classification must have *important* purpose for its use). Justices Brennan, Marshall and Blackmun prior to *Paradise* advocated an "intermediate standard" of review for benign racial classifications. *See* Fullilove v. Klutznick, 448 U.S. 448, 519 (1980)(Marshall, joined by Brennan, Blackmun, J.J., concurring)(benign classification must have important governmental interest with means substantially related to achieving purpose); *see also* Ely, *Equal Protection and Affirmative Action in Job Promotions: A Prospective Analysis of* United States v. Paradise, 17 CUMB. L. REV. 205, 216-17 n.80 (1986). Yet these Justices deviated from their prior decisions by applying the strict scrutiny standard in *Paradise*. *See* Paradise, __ U.S. at __, 107 S. Ct. at 1064, 94 L. Ed. 2d at 220 (Brennan, joined by Marshall, Blackmun, Powell, JJ., concurring). Justice Powell prior to *Paradise* consistently held that strict scrutiny must be applied to racially benign classifications. *See* Wygant v. Jackson Bd. of Educ., __ U.S. __, __, 106 S. Ct. 1842, 1846, 90 L. Ed. 2d 260, 268 (1986); Fullilove v. Klutznick, 448 U.S. 448, 496 (1980)(Powell, J., concurring); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 294-99 (1978); *see also* Morris, *New Light On Racial Affirmative Action*, 20 U.C. DAVIS L. REV. 219, 236 (1987)(Justice Powell indicated use of strict scrutiny review for benign racial classifications). By joining the plurality opinion in *Paradise*, however, Justice Powell has adopted the *Swann* rationale which requires a less restrictive justification for benign racial classifications than does strict scrutiny alone. *See* Paradise, __ U.S. at __, 107 S. Ct. at 1073, 94 L. Ed. 2d at 231. Therefore, Justice Powell has also deviated from his prior decisions by adopting a standard lower than strict scrutiny. *See id.*

110. *See* Paradise, __ U.S. at __, 107 S. Ct. at 1064, 94 L. Ed. 2d at 220 (Brennan, J., concurring)(strict scrutiny requires existence of a compelling governmental interest and narrowly tailored means in benign racial classification). *But see* Fullilove v. Klutznick, 448 U.S. 448, 519 (1979)(Marshall, J., concurring)(benign racial classification must serve important governmental interest coupled with means substantially related to purpose); *see also* Wygant,

The *Paradise* plurality also fails to satisfy one of its own stated factors which Justice Powell outlined as necessary for a plan to satisfy strict scrutiny review.[111] A lack of effective alternative remedies was one of several factors which the plurality regarded as necessary before a racial classification would be constitutionally valid, yet the district court did not address any alternatives.[112] In addition, the plurality attempted to justify the fifty-percent racial quota upon the basis that it increases the speed by which black trooper's were afforded relief.[113] As Justice O'Connor argues, the plurality's reasoning "necessarily eviscerates any notion of 'narrowly tailored' because it has no stopping point; even a 100% quota could be defended on the ground that it merely 'determines how quickly the Department progressed toward' some ultimate goal."[114]

Finally, it is arguable that by enlarging the role that a district court's discretion is to play in ascertaining whether a program is narrowly tailored, the *Paradise* plurality has effectively deviated from traditional strict scrutiny analysis and created a lower constitutional burden to apply to cases of benign racial discrimination.[115] The plurality's implementation of the first

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__ U.S. __, 106 S. Ct. at 1846, 90 L. Ed. 2d at 268 (any preference that is racially based must receive most searching examination including being narrowly tailored to purpose). *But see* Paradise, __ U.S. at __, 107 S. Ct. at 1073, 94 L. Ed. 2d at 231 (Justice Powell adopted *Swann* analysis which stated that if violation shown, district courts have broad powers to remedy discrimination).

111. *See* Paradise, __ U.S. at __, 107 S. Ct. at 1067, 94 L. Ed. 2d at 223. The plurality used five factors in their analysis to determine whether the benign classification was narrowly tailored. *See id.* They included "the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties." *Id.*

112. *See id.* (plurality required review of less restrictive alternative remedies to satisfy narrowly tailored prong of strict scrutiny). The district court, however, failed to address any less restrictive alternatives in its decision and therefore failed to satisfy the first requirement established by the plurality of reviewing the effectiveness of less restrictive alternatives. *See id.* Justice O'Connor outlined two less restrictive alternative remedies which could have been used to accomplish the district court's objective. *See id.* at __, 107 S. Ct. at 1082, 94 L. Ed. 2d at 241-42 (O'Connor, J., dissenting). The district court's first possible alternative was to appoint a "trustee to develop a promotion procedure that would satisfy the terms of the consent decrees." *Id.* In addition, "the District Court could have found the recalcitrant Department in contempt of court, and imposed stiff fines or other penalties for the contempt." *Id.* at __, 107 S. Ct. at 1082, 94 L. Ed. 2d at 242. Notwithstanding these viable alternatives, the plurality upheld the racial quota as narrowly tailored. *See id.* at __, 107 S. Ct. at 1074, 94 L. Ed. 2d at 232 (plurality opinion).

113. *See id.* at __, 107 S. Ct. at 1071, 94 L. Ed. 2d at 229 (plurality opinion)("fifty percent figure is not goal; rather it represents the speed at which the goal of twenty five percent will be achieved.").

114. *Id.* at __, 107 S. Ct. at 1081, 94 L. Ed. 2d at 241 (O'Connor, J., dissenting)(justification for quota does not comply with narrowly tailored prong of strict scrutiny).

115. *See id.* at __, 107 S. Ct. at 1073, 94 L. Ed. 2d at 231 (plurality opinion). The plural-

prong of strict scrutiny in *Paradise* appears to create a standard which is more restrictive than "intermediate" scrutiny because the plurality in *Paradise* still requires more than the existence of an important governmental purpose.[116] However, the Court's purported use of the narrowly tailored prong of strict scrutiny combined with the rationale in *Swann* necessitates a level of restrictiveness above the rational relation standard but below the strict scrutiny standard.[117] Therefore, while the plurality maintains that it is adopting a combination of strict scrutiny and the rationale of *Swann*, the plurality's analysis creates a hybrid of several standards of review without providing any clarification on the limitations of the new standard's use.[118]

The Supreme Court's failure in *Paradise* to explicitly delineate the proper standard of review in analyzing the constitutionality of benign racial classifications only adds to the uncertainty of what steps a governmental entity may take to remedy the present effects of past discrimination. The plurality's concomitant application of the strict scrutiny analysis and *Swann* rationale to address benign racial discrimination is less restrictive than the standards of review used traditionally in racial classifications, thus undermining the logical precedent of prior decisions. In addition, the less restrictive standards imposed by *Paradise* are contrary to the basic ideal that racially motivated classifications are inherently suspect and should only be justified under the strictest of circumstances. By excising and applying fundamental princi-

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ity added the *Swann* analysis to their assessment of whether a benign racial classification is narrowly tailored. *See id.* The addition of the *Swann* rationale lowers the traditional restrictiveness of the strict scrutiny test. *Compare id.* (when determining whether racial quota is narrowly tailored, Court must acknowledge respect owed district judge's power to give relief) *with* Wygant v. Jackson Bd. of Educ., __ U.S. __, __, 106 S. Ct. 1842, 1846, 90 L. Ed. 2d 260, 268 (1986)(second prong of strict scrutiny requires that means chosen to accomplish purpose of classification be narrowly tailored). Thus, the strict scrutiny standard of review has been diluted by the plurality's addition of the *Swann* analysis. *See* Paradise, __ U.S. at __, 107 S. Ct. at 1073, 94 L. Ed. 2d at 231.

116. *See* Paradise, __ U.S. at __, 107 S. Ct. at 1064-67, 94 L. Ed. 2d at 220-23. The strict scrutiny standard, despite its dilution by the plurality's incorporation of the *Swann* rationale, requires more than an important governmental interest. *Compare* Wygant, __ U.S. at __, 106 S. Ct. at 1846, 90 L. Ed. 2d at 268 (strict scrutiny is defined as consisting of compelling governmental interest) *with* Craig v. Boren, 429 U.S. 190, 197 (1976)(classification based on gender must concern important governmental objectives).

117. *Compare* Paradise, __ U.S. at __, 107 S. Ct. at 1064, 94 L. Ed. 2d at 220 (Brennan, J., concurring)(benign racial classifications must have compelling governmental purpose with narrowly tailored means to satisfy purpose) *with* Schweiker v. Wilson, 450 U.S. 221, 230 (1981)(minimal level of scrutiny requires classification "rationally related to legitimate governmental objective").

118. *See* Paradise, __ U.S. at __, 107 S. Ct. at 1064, 94 L. Ed. 2d at 220 (plurality opinion)(benign racial classification must have compelling governmental purpose and be narrowly tailored to achieving purpose). *But see id.* at __, 107 S. Ct. at 1073, 94 L. Ed. 2d at 231 (district court judges have broad and flexible powers to provide remedies for violations of discrimination).

ples of both strict scrutiny and the *Swann* rationale to uphold the racial quota in *Paradise*, the plurality has taken a procrustean approach to addressing the constitutionality of benign racial classifications and in effect has created an entirely new standard of review positioned between intermediate and strict scrutiny analysis. The precedential value of *Paradise* is questionable because the plurality leaves open the issue of whether the same standards used would apply under facts less egregious than present in *Paradise*. The diverging opinions of the Justices in *Paradise* ensure that the role that affirmative action programs are to play in redressing racial discrimination will continue to be unsettled. Because the Court itself is unable to provide a majority opinion on the constitutional standard of review to apply to benign racial classifications, lower courts must continue to apply standards on the basis of confusing and inconsistent Supreme Court decisions.

Irl I. Nathan