No. 84-1340

In the Supreme Court of the United States

OCTOBER TERM, 1984

WENDY WYGANT, ET AL., PETITIONERS

v.

JACKSON BOARD OF EDUCATION, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Equal Protection Clause of the Fourteenth Amendment permits a public entity to grant certain public employees preferential protection against layoffs solely on the basis of their race or national origin, when there is neither a finding nor even evidence that these (or any) employees have been discriminated against by that entity.

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INTEREST OF THE UNITED STATES

The government has the responsibility for enforcing numerous statutes prohibiting discrimination on account of race or national origin [1] and, accordingly, has frequently participated in this Court, both as a party and as *amicus curiae*, in cases presenting constitutional and statutory claims of racial discrimination.[2]

STATEMENT

Before the 1972-1973 school year, the collective bargaining agreement between the board of education and teachers association of Jackson, Michigan, called for lay-

[1] See, *e.g.*, 42 U.S.C. 2000h-2; 42 U.S.C. 2000e-5(f)(1); and Exec. Order No. 12250, 45 Fed. Reg. 72995 (1980).

[2] *E.g.*, *Firefighters Local Union No. 1784* v. *Stotts*, No. 82-206 (June 12, 1984); *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980); *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979); *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978).

offs on a strict seniority basis (Pet. App. 21a).[3] In 1972, however, the board signed a new pact requiring lay-offs on a racial and ethnic basis. Specifically, it agreed that "at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff" (*id.* at 3a, 23a). The goal of this system was "to have at least the same percentage of minority racial representation on each individual staff as is represented by the student population of the Jackson Public Schools" (*id.* at 13a, 22a, 32a). The agreement defined "minority group personnel" as those "who are Black, American Indian, Oriental, or of Spanish descendancy" (Pet. App. 1a).

Petitioners are Jackson teachers who were laid off in accordance with this provision while "minority" teachers with less seniority were retained. Petitioners brought suit in the United States District Court for the Eastern District of Michigan, claiming that the lay-offs violated the Equal Protection Clause; Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*; other federal civil rights statutes (42 U.S.C. 1981, 1983, and 1985); and various state laws. On cross-motions for summary judgment, the court dismissed all of petitioners' claims.

Addressing the teachers' Fourteenth Amendment claim, the court first held that a finding of discrimination was not a prerequisite for the racial and ethnic preferences granted by the collective bargaining agreement (Pet. App. 25a-27a). Instead, the court held (*id.* at 28a-31a) that the Equal Protection Clause was satisfied if (1) " 'there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access [and promotion] of minorities' " and (2) the affirmative action plan meets a test of "reasonableness," *i.e.*, is " 'substantially related' to the objectives of remedying past discrimination and correcting 'substantial' and 'chronic' underrepresentation" (*id.* at 28a, 31a, quoting *Detroit Police Officers' Association* v. *Young*, 608 F.2d 671, 694, 696 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981)).

[3] A poll of the teachers revealed that 96% favored retention of this system and opposed a freeze offering special protection against layoffs to minority group members (Pet. App. 21a).

Applying this test, the court found "substantial and chronic underrepresentation" solely because the percentage of minority students exceeded the percentage of minority teachers (Pet. App. 29a). The court reasoned (*ibid.*) that "minority teachers are role-models for minority students." The court then held (*id.* at 31a-34a) that the lay-off quota met the test of "reasonableness" (*id.* at 31a).

The court ruled that petitioners' claims under 42 U.S.C. 1981, 1983, and 1985 failed because the lay-off provision was constitutional[4] (Pet. App. 34a-35a); that petitioners had not satisfied the administrative prerequisites for suit under Title VII[5] (Pet. App. 34a), and that dismissal of all the federal claims necessitated dismissal of the pendent state claims as well (*id.* at 36a).

The court of appeals affirmed (Pet. App. 2a-19a) in an opinion that adopted the district court's reasoning and extensively quoted from the district court's opinion (*id.* at 4a-10a).[6]

[4] The court also held (Pet. App. 36a) that the claim under 42 U.S.C. 1985(3) was defective for failure to allege a conspiracy.

[5] Petitioners were barred from suing under Title VII because they had not filed administrative claims with the Equal Employment Opportunity Commission. 42 U.S.C. 2000e-5(f)(1). Petitioners did not appeal the district court's dismissal of their Title VII claims. Moreover, at the time of dismissal, the statute of limitations for filing administrative claims (42 U.S.C. 2000e-5(e)) had already run. Accordingly, petitioners are now relegated to those claims grounded upon the Fourteenth Amendment.

[6] Judge Wellford concurred, but expressed disagreement with the majority's view that underrepresentation of minorities could be established by comparing the proportion of minority teachers to minority students rather than to minority representation in the relevant labor market (Pet. App. 15a-19a). He believed, however, that petitioners, as plaintiffs below, bore the burden of proving "the

INTRODUCTION AND SUMMARY OF ARGUMENT

As amicus curiae in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), the United States argued that the Fourteenth Amendment "established the broad constitutional principle of full and complete equality of all persons under the law, and that it forbade all legal distinctions based on race or color." [7] The schoolchildren and their parents and guardians took the same position, contending that "the Fourteenth Amendment prohibits a state from making racial distinctions in the exercise of governmental power." [8] We make the same argument in the present case.

In this case, petitioners were laid off from their jobs as school teachers for the sole reason that they are white and the respondent school board, a governmental agency subject to the Fourteenth Amendment, had bound itself in a collective bargaining agreement to an absolute layoff preference for "employees who are Black, American Indian, Oriental, or of Spanish descendancy" (Pet. App. 1a). There was no finding by the school board, the courts below, or anyone else, that members of some or all of these groups had been the victims of discrimination by the school board, by the City of Jackson, or by the State of Michigan. There was no inquiry into the reasons for whatever disparities existed between the representation of these groups in the teaching and the student bodies. All there is by way of justification for the racially based misfortune visited upon petitioners are references by the district court and the court of appeals to a history of "societal discrimination" (Pet. App. 4a, 25a), "underrepresentation" of minority teachers (*id.* at 6a-9a, 28a-31a), and the need to supply "role-models"

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percentage of qualified minority teachers in the relevant labor market" (Pet. App. 17a).

[7] U.S. Supp. Br. on Reargument at 115; see also *id.* at 22, 65 (Equal Protection Clause requires government to be color blind.).

[8] Br. for Appellants in Nos. 1, 2, and 4 and Resp. in No. 10 on Reargument at 21.

for minority students (*id.* at 8a, 29a-30a). So casual a waving aside of the fundamental Fourteenth Amendment principle of equal treatment for all persons regardless of race and of our republic's basic moral vision of the unity of all mankind cannot be countenanced.

First, the courts below drew a wholly unwarranted connection between the general history of racial discrimination in this country, and the statistical underrepresentation of minority group members in the teaching corps relative to the student body—without even the semblance of an attempt to relate that disparity to some pattern or practice of conduct by the school board. Second, there is the further step of using this suppositious discrimination to justify a remedy which further undoes the connection between wrongdoer and victim to allow a person, say of Asian descent whose ancestors suffered discrimination in the early history of California, to attain for that reason a concrete advantage over petitioners in Jackson, Michigan, in 1982.

The third and final step in the shambling logic of this enterprise would justify the explicitly racially based layoff of petitioners on the ground that this is necessary to provide "role-models" for minority group students. Stripped of its veneer of unsupported psychological and sociological conjecture, this justification can only mean one of two things. It may mean that black, Hispanic or Asian students learn better if they are taught by black, Hispanic or Asian teachers. Or it may mean that such students, conscious of the injustices done to the groups of which they are members, will draw encouragement and a practical moral lesson from seeing members of their own (or some other) minority group in positions of authority and respect. As to the first of these justifications, no evidence for such an empirical effect was ever suggested, let alone examined and subjected to criticism and refutation. As to the second, the moral conclusions it teaches beg the question at issue. For one must assume that these students will be aware of the very system of racial preference which delivers role models in sup-

posedly sufficient numbers. But what is the moral lesson that such a system teaches? Surely not that ours is a society in which each person can succeed as a result of his or her own work and talent. On the contrary, one may likelier suppose that such a system (its actual working laid bare) will teach a different and more sinister lesson: that one hundred and twenty years after the end of slavery government may still advance some and suppress others not as individuals but because of the color of their skin.

In this brief the United States shall argue, first, that the Fourteenth Amendment was intended to assure the equality before the law of all persons, of whatever race or group; second, that therefore any governmental action based on race or national origin bears the heaviest possible burden of justification; third, that racial quotas cannot lighten much less discharge this burden of justification by claiming to favor blacks or other disadvantaged groups and therefore claiming to be benign; and fourth, that compensating the victims of discrimination is consistent with these principles, as the compensation is directed to those who have actually suffered discrimination. Adherence to these constitutional principles is perfectly consistent with a benevolent social policy designed to provide fair opportunity and a sense of real equality to all persons.

ARGUMENT

THE JACKSON LAY-OFF QUOTA VIOLATES EQUAL PROTECTION

I. EQUALITY BEFORE THE LAW IS A FOUNDATIONAL PRINCIPLE OF AMERICAN GOVERNMENT

The United States' population is the most diverse in the world—indeed, probably in the history of the world. If present trends of immigration and population growth continue, racial and ethnic diversity will significantly increase in the remaining years of this century.

This diversity, potentially divisive and enervating, has proved to be a source of strength and cultural richness,

a concrete manifestation of the universality of the principles on which this country was founded. Central among those principles is the equality of all persons before the law, regardless of race, religion, or ethnic background. The Declaration of Independence proclaimed that America was different from other countries because: "We hold these truths to be self-evident, that all men are created equal * * *." The inscription on the front of this Court reads: "Equal Justice Under Law." This is the principle that as a matter of historical fact has unified the many minorities that make up our population. See N. Glazer, *Affirmative Discrimination: Ethnic Inequality and Public Policy* 3-32 (1975).

This concept finds binding legal expression in the Equal Protection Clause of the Fourteenth Amendment: no state shall "deny to any person within its jurisdiction the equal protection of the laws." The Equal Protection Clause does not mention any of the characteristics that divide, such as race, religion, or national origin. It sees only "person[s]" and guarantees to every "person" the "equal" protection of the laws.

Equality before the law, so magnificent in principle, is often a difficult and uncomfortable concept in practice. There have always been and perhaps will always be voices seeking to carve out special exceptions to this principle based on history, prevailing social conditions, temporary need, or expediency. After the era of Reconstruction, such voices prevailed, and the true meaning of the Equal Protection Clause was long suppressed. In 1896, this Court approved the concept of "separate but equal" facilities for blacks and whites and thus upheld the arrest of Homer A. Plessy for occupying a railroad coach reserved for whites. *Plessy* v. *Ferguson*, 163 U.S. 537 (1896). According to his petition, Plessy was seven-eighths white and one-eighth black, and "the mixture of colored blood was not discernible in him" (*id.* at 541). Under Louisiana law, he was black, although in other states he apparently would have been white (see *id.* at 552). Whether, if living today, he would be regarded as

black or white by the Jackson Board of Education is unclear. What is clear is that his Fourteenth Amendment rights as a person were violated. In one of the most famous and prescient dissents in the history of this Court, the first Justice Harlan wrote (163 U.S. at 559):

> [o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

This vision became the creed of the Civil Rights Movement[9] and eventually the nation.[10] It has informed and found expression in numerous decisions of this Court. See, *e.g.*, *Loving* v. *Virginia*, 388 U.S. 1 (1967); *McLaughlin* v. *Florida*, 379 U.S. 184, 191-192 (1964); *Bolling* v. *Sharpe*, 347 U.S. 497, 498 (1954). Under those cases, the status of most laws that discriminate on the basis of race or ethnic origin is perfectly clear. They are "constitutionally suspect" and subject to the "most rigid scrutiny." *McLaughlin* v. *Florida*, 379 U.S. at 191-193. As the Court affirmed only last Term, "to pass constitutional muster, [a racial classification] must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of its legitimate purpose." *Palmore* v. *Sidoti*, No. 82-1734 (Apr. 25, 1984), slip op. 4. Furthermore, a suspect classification must be precisely tailored. *Dunn* v. *Blumstein*, 405 U.S. 330, 343 (1972); *Kramer* v. *Union Free School District*, 395 U.S. 621, 627 (1969); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969).

Beginning with the case of *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974), this Court opened a new chapter in

[9] See page 4 & note 8, *supra*.

[10] See, *e.g.*, *Special Message to Congress on Civil Rights*, 1963 Pub. Papers of President Kennedy 221; *Radio and Television Remarks Upon Signing the Civil Rights Bill*, 1964 Pub. Papers of President Johnson 842, 843.

the constitutional history of racial and ethnic discrimination. What purportedly distinguished *DeFunis* from previous discrimination cases was that the victim, Marco DeFunis, Jr., was not a member of a "minority" group, at least as defined by the University of Washington Law School, *i.e.*, he was not "black, Chicano, American Indian, or Filipino" (*id.* at 320). Thus, discrimination against DeFunis, a Sephardic Jew from a relatively poor background,[11] was claimed to be "benign" and, in the judgment of the University, DeFunis could justly be called upon to sacrifice his aspirations for a legal career to serve the greater public good.

The present case falls into the same pattern. Here, petitioners lost their jobs as teachers because they are not "Black, American Indian, Oriental, or of Spanish descendancy" (Pet. App. 1a). Those seeking to justify this discrimination must show either (1) that so-called "benign" quotas should not be governed by the same constitutional standards that govern other forms of racial and ethnic discrimination or (2) that measures like the Jackson lay-off quota can satisfy those tests. We will address these points in turn.

II. LAWS THAT DISCRIMINATE IN FAVOR OF SOME MINORITY GROUPS MUST SATISFY THE SAME CONSTITUTIONAL STANDARDS AS OTHER FORMS OF STATE-SPONSORED RACIAL AND ETHNIC DISCRIMINATION

A. This Court has rendered two decisions concerning the constitutionality of racial classifications adopted by governmental entities for the purpose of benefitting members of specified minority groups: *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978); and *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980). While neither case produced a majority opinion, a plurality of the Court appears to have concluded that state action grant-

[11] J. Fishkin, *Justice, Equal Opportunity, and the Family* 90 (1983).

ing preferences to minorities must satisfy strict scrutiny like all other state-sponsored racial classifications.[12]

We fully endorse this conclusion because we see no valid justification for more lenient judicial scrutiny of laws that discriminate in favor of some minorities and against a residual category of "whites." The right to the equal protection of the laws is an "individual," "personal" right. *Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948). See also, *e.g.*, *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337 (1938). Accordingly, this right applies equally to all persons "without regard to any differences of race, of color, or of nationality." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886); see also *Buchanan* v. *Warley*, 245 U.S. 60, 76 (1917). This right "cannot mean one thing when applied to one individual and something else when applied to a person of another color." *Bakke*, 438 U.S. at 289-290 (opinion of Powell, J.); see also *DeFunis* v. *Odegaard*, 416 U.S. at 337 (Douglas, J., dissenting).

[12] This standard of review was stated by Justice Powell in *Bakke*, 438 U.S. at 290-291. Justice White joined this portion of Justice Powell's opinion (*id.* at 387 n.7). In *Fullilove*, Justice Stewart, joined by Justice Rehnquist, declared that racial and ethnic classifications are "inherently suspect and presumptively invalid." 448 U.S. at 523. Justice Powell agreed (*id.* at 496-497 n.1), and Justice Stevens declared (*id.* at 551) that strict scrutiny would have applied if a state legislature had enacted the *Fullilove* program.

Neither the Chief Justice nor Justice O'Connor has commented on the applicable standard of review in this kind of case. In *Bakke*, the Chief Justice joined Justices Stevens, Stewart, and Rehnquist in an opinion that did not reach the constitutional question (438 U.S. at 408-421). In *Fullilove*, his opinion relied on Congress's unique power to enforce the Fourteenth Amendment (448 U.S. at 472-473, 483).

Several members of the Court have advocated a somewhat less exacting standard, but they have nevertheless insisted on a "strict and searching" judicial inquiry (see *Bakke*, 438 U.S. at 362) (opinion of Brennan, White, Marshall, and Blackmun, JJ.); *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring in judgment). See pages 18-19 & note 30, *infra*. Even this standard is stricter than the "reasonableness" test applied by the courts below (see Pet. App. 10a, 31a).

Equal Protection is a matter of "fundamental principle" and not simply "a matter of whose ox is gored." A. Bickel, *The Morality of Consent* 133 (1975).

B. The history of the Fourteenth Amendment does not support the constitutionality of measures discriminating against "whites." The Civil Rights Act of 1866, ch. 31, 14 Stat. 27 *et seq.*, which was enacted by the 39th Congress shortly before it proposed ratification of the Fourteenth Amendment, sheds initial light on the meaning of the Equal Protection Clause in view of the common roots and purposes of these two measures.[13] Congress's unequivocal objective in pasing the 1866 Act was to prohibit official racial discrimination against blacks *or* whites. Section 1 of the Act (14 Stat. 27) guaranteed that "citizens, of every race and color, * * * shall have the same right * * * to full and equal benefit of all laws and proceedings for the security of person and property." Senator Trumbull, the Act's sponsor, declared that its object was to "break down all discrimination between black men and white men" and that it applied "to white men as well as black men." Cong. Globe, 39th Cong., 1st Sess. 599 (1866). As Senator Howard, later a framer of the Fourteenth Amendment, commented, "[i]n respect to all civil rights, * * * there is to be hereafter no distinction between the white race and the black race." *Id.* at 504.

The purpose and effect of the Equal Protection Clause were the same. As proposed in the Reconstruction Com-

[13] The 39th Congress considered the two measures simultaneously and enacted the Civil Rights Bill approximately two months before proposing ratification of the Fourteenth Amendment. One of the primary purposes of the Fourteenth Amendment was "to incorporate the guaranties of the Civil Rights Act of 1866 in the organic law of the land" and thus insulate them from repeal or invalidation. *Hurd* v. *Hodge*, 334 U.S. 24, 32-33 (1948); see also, *e.g.*, *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 436 (1968). In addition, Section 1 of the Act (14 Stat. 27) was a model for the Equal Protection Clause. Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 Col. Rev. 131, 140 (1950).

mittee,[14] Section 1 of the Fourteenth Amendment prohibited all governmental discrimination "as to the civil rights of persons because of race, color, or previous condition of servitude." [15] Although the committee changed this language, it is apparent that it did not intend to alter the principle of racial equality before the law.[16]

This was confirmed in the opening speech by the House floor leader, Representative Stevens. Section 1, he explained, guaranteed individuals of both races exactly the same treatment by the states (Cong. Globe, 39th Cong., 1st Sess. 2459 (1866)):

[14] Before Section 1 of the Fourteenth Amendment was cast in its present form, the 39th Congress considered several proposed Amendments that expressly and unqualifiedly proscribed racial discrimination. See B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction* 50 (1914); Cong. Globe, 39th Cong., 1st Sess. 1906 (1866).

[15] B. Kendrick, *supra*, at 83-84.

[16] Representative Bingham first sought unsuccessfully to add to this provision the present language of the Equal Protection Clause (B. Kendrick, *supra*, at 85), and Section 1 was adopted as it stood (by a vote of 10 to 2) (B. Kendrick, *supra*, at 86-87). Bingham later succeeded in adding as a new Section 5 all of what is now the second sentence of Section 1 (again by a vote of 10 to 2) (B. Kendrick, *supra*, at 87), but this was later deleted (B. Kendrick, *supra*, at 98-99). Finally, he convinced the committee to substitute this Section 5 for what was then Section 1. (This time the vote was 10 to 3) (B. Kendrick, *supra*, at 106). This history—with the committee voting at various times to adopt the original and ultimate versions of Section 1 separately and together—strongly suggests that the express meaning of the original version banning all "discrimination" by government "because of race [or] color" was regarded as incorporated within the version finally reported. For accounts of the committee proceedings, see 6 C. Fairman, *History of the Supreme Court of the United States—Reconstruction and Reunion* Pt. 1, at 1270-1274, 1281-1283 (1971); J. James, *The Framing of the Fourteenth Amendment* 103-116 (1956); H. Flack, *The Adoption of the Fourteenth Amendment* 65-69 (1965); H. Meyer, *The History and Meaning of the Fourteenth Amendment* 71-74 (1977); Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 40-45 (1955).

> Whatever law punishes a white man for crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford "equal" protection to the black man. Whatever means of redress is afforded to one shall be afforded to all.

Later, he added (*id.* at 2766) that the Equal Protection Clause "abolishes all class legislation in the States" and "protects the black man in his fundamental rights with the same shield which it throws over the white man." In the Senate, the floor leader, Senator Howard, provided the same unequivocal explanation (Cong. Globe, 39th Cong., 1st Sess. 2766 (1866)).

The deliberations on the Fourteenth Amendment also show that Congress specifically intended to protect two groups of whites who were in real danger of deprivation of civil rights. First, the term "person," rather than "citizen," was used in the Equal Protection Clause to encompass aliens. Although the earliest draft of Section 1 of the Fourteenth Amendment, introduced in December 1865 by Representative Stevens, applied only to "citizen[s]" (Cong. Globe, 39th Cong., 1st Sess. 14 (1865)), by February 1866 the Reconstruction Committee had approved a different version, offered by Representative Bingham, that guaranteed equal protection to all "person[s]." [17] Defending this amendment on the House floor, Bingham asked on February 28 (Cong. Globe, 39th Cong., 1st Sess. 1090 (1866)): "Is it not essential to the unity of the Government and the unity of the people that all persons, whether citizens or strangers, within this land, shall have equal protection in every State in this Union in the rights of life and liberty and property?" Nine days later, commenting on the use of the term "citizen" in Section 1 of the Civil Rights Act, he stated (Cong. Globe, 39th Cong., 1st Sess, 1292 (1866)) that discrimination against aliens was "as unjust as the unjust State legislation" against blacks.[18]

[17] B. Kendrick, *supra*, at 62.

[18] Earlier, Representative Stevens, the floor manager of the Fourteenth Amendment, and Representative Conkling, another

In 1866, the overwhelming majority of aliens were white,[19] since the first sentence of Section 1 of the Fourteenth Amendment had confirmed that virtually all freed slaves were citizens.[20]

The other group of whites that Congress specifically wanted to protect were white Unionists in the South. When asked if the Amendment's sole purpose was to protect black freedmen, Bingham responded (Cong. Globe, 39th Cong., 1st Sess. 1088 (1866)) that it was intended "as well to protect the thousands and tens of thousands and hundreds of thousands of loyal white citizens of the United States whose property, by State legislation, has been rested from them under confiscation, and protect them also from banishment." See also *id.* at 1090-1091.

Those who argue that the history of the Reconstruction era supports the constitutionality of preferences for blacks rely chiefly on laws relating to the Freedmen's Bureau.[21] But whatever light these statutes shed on the intended meaning of the Equal Protection Clause, they do not support current measures containing racial and ethnic preferences. Rather, they are examples of compensation for actual, identified victims of discrimination. See Cong. Globe, 39th Cong., 1st Sess. 940 (1866) (remarks of Sen. Trumbull). They provided assistance, not to blacks generally, but to "freedmen," individuals

member of the Reconstruction Committee, had made the same point. Cong. Globe, 39th Cong., 1st Sess. 359 (1866) (remarks of Rep. Conkling); *id.* at 537 (remarks of Rep. Stevens).

[19] See Bureau of the Census, U.S. Dep't of Commerce, *Historical Statistics of the United States* Pt. 1, at 99, 106, 108 (1975).

[20] That provision states that all persons born or naturalized in the United States and subject to its jurisdiction are citizens. This applied to virtually all former slaves, since importation of slaves ended in 1808 (Art. I, § 9, Cl. 1).

[21] See Br. of NAACP Legal Defense and Education Fund, Inc. as Amicus Curiae at 10-53 in *Regents of the University of California* v. *Bakke,* No. 76-811.

who were the victims of slavery.[22] Moreover, these laws also provided substantial assistance for white refugees; in fact, figures provided to Congress showed that two-thirds as many whites as blacks had received rations from the Bureau. Cong. Globe, 39th Cong., 1st Sess. 940 (1866).[23] It is thus difficult to discern in these laws any support for the constitutionality of current measures granting preferences, regardless of individual circum-

[22] Supporters emphasized that newly freed slaves had special needs resulting directly from years of bondage. See Cong. Globe, 39th Cong., 1st Sess. 939 (1866) (remarks of Sen. Trumbull); *id.* at 630 (remarks of Rep. Hubbard).

[23] The initial act (Act of Mar. 3, 1865, ch. 90, 13 Stat. 507 *et seq.*) established for one year a "bureau of refugees, freedmen, and abandoned lands" (§ 1, 13 Stat. 507), authorized the Secretary of War to provide aid to "destitute and suffering refugees and freedmen and their wives and children" (§ 2, 13 Stat. 508), and permitted abandoned and confiscated lands in the Confederate states to be set aside for the use of "loyal refugees and freedmen" (§ 4, 13 Stat. 508).

The second act (Act of July 16, 1866, ch. 200, 14 Stat. 173 *et seq.*) extended the life of the bureau for two years (§ 1, 14 Stat. 173), continued aid to needy refugees and freedmen (§§ 2, 5, 14 Stat. 174), addressed various administrative matters (§§ 3, 4, 14 Stat. 174; § 15, 14 Stat. 177), confirmed tax sales of certain lands to blacks (§ 6, 14 Stat. 174), provided for the disposition and administration of other confiscated and abandoned land (§§ 7-10, 11, 14 Stat. 175-176), allowed freedmen to continue occupying certain land under an Army field order until after the harvest and receipt by them of compensation for any improvements (§ 12, 14 Stat. 176), and instructed the commissioner to cooperate with benevolent societies for the aid of freedmen (§ 13, 14 Stat. 176). Finally, Section 14 of the Act (14 Stat. 176), far from granting a racial preference, guaranteed the rights and immunities of "all citizens" in the Confederate states "without respect to race or color, or previous condition of slavery," and authorized military tribunals to enforce these rights.

In 1868, the Bureau was continued for an additional year (Act of July 6, 1868, ch. 135, 15 Stat. 83). In sum, the Freedmen's Bureau measures provide no examples of race-conscious relief for non-victims.

stances, to any black person or, even more remotely, to any member of other minority groups.[24]

C. Permissive judicial scrutiny of "benign" discrimination is sometimes defended on the principle that the courts have a special duty to protect minorities lacking political power. In the words of Dean John Hart Ely, a leading proponent of this view:

> When the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for being unusually suspicious, and, consequently, employing a stringent brand of review, are lacking. A White majority is unlikely to disadvantage itself for reasons of racial prejudice * * *.

Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723, 735 (1974); see also J. Ely, *Democracy and Distrust* 170-172 (1980). This argument has at least three major defects.

First, it greatly oversimplifies and distorts the meaning of the Equal Protection Clause, making it nothing more than an enforcement mechanism for one particular theory of democratic government. There is no evidence that those who framed, proposed, and ratified the Fourteenth Amendment had this theory in mind. Instead, they believed for a variety of reasons—including the fact that immutable characteristics such as race and ethnicity are almost never relevant to a legitimate legislative purpose—that racial and ethnic classifications "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943).

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[24] Three other minor Reconstruction-era statutes have been cited as examples of race-conscious relief. One was a $15,000 appropriation "for the relief of freedmen or destitute colored people in the District of Columbia" (Res. 3, 15 Stat. 20). The others established special protective procedures to ensure that black servicemen in former slave states were not cheated of their pay by claims agents. It seems safe to assume that virtually everyone aided by these enactments was a direct victim of slavery or racial oppression.

Second, Ely's argument is an oversimplification because it unqualifiedly equates numerical majority with political power and assumes that minority groups are politically powerless. In reality, the distribution of political power in a democracy is considerably more complex. Governmental decisionmakers directly or indirectly answerable to the voters are not always responsive to the majority's wishes. In addition, interest groups representing small segments of the population are sometimes able to influence the enactment of measures favorable to the group's members but of doubtful benefit to the electoral majority.[25]

Third, this theory assumes the existence of a polity with a monolithic white majority and black minority. The United States, however, is a nation of many minorities [26] (many of which overlap) and many, many political jurisdictions—50 states and nearly 80,000 units of local government.[27] Racial and ethnic groups are unevenly distributed among these jurisdictions, causing the terms "majority" and "minority" to have varying meanings. In more than 75 counties, blacks exceed 50% of the population; in 37 counties, more than 50% of the population is Hispanic. In eight of the ten largest cities, blacks and Hispanics constitute a majority.[28] Asian-Americans substantially outnumber whites in Hawaii.[29] In many communities, individuals of other cohesive, traditionally disfavored groups constitute substantial voting blocs.

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[25] See Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 Col. L. Rev. 557, 573-574 (1975).

[26] See *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 185 (1977) (Burger, C.J., dissenting) ("the 'whites' category consists of a veritable galaxy of national origins, ethnic backgrounds, and religious denominations. It simply cannot be assumed that the * * * interests of all 'whites' are even substantially identical").

[27] Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States 1985*, at 261 (105th ed. 1985).

[28] *Id.* at 25-26.

[29] *Id.* at 31.

Because of these factors, different groups, whether alone or in coalition, are in the majority in different jurisdictions. If the standard for constitutional scrutiny were to depend upon whether a preference benefited a "minority" or the electoral majority, the meaning of equal protection would have to vary from place to place and time to time and would thus acquire an "accordion-like quality." *DeFunis*, 416 U.S. at 343 (Douglas, J., dissenting). The courts would also be compelled to make a sensitive and sophisticated assessment of the real distribution of political power in each community. This is an inquiry for which courts are ill-suited.

These problems can be illustrated by attempting to apply this same theory to gender classifications. Should measures disadvantaging women be leniently reviewed because female voters outnumber male voters? Should measures disadvantaging men be leniently scrutinized because men occupy most electoral posts? This Court does not draw such distinctions but instead applies precisely the same level of judicial review no matter which gender is disadvantaged. See, *e.g.*, *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 723-724 & n.9 (1982).

D. Less stringent judicial scrutiny of racial preferences for blacks and members of some other minority groups is sometimes defended on the ground that such measures compensate for past wrongs or for what is termed "societal" discrimination. But this approach assumes that a measure is compensatory and relaxes scrutiny before accurately assessing whether that is so. In our view, nothing less than strict scrutiny can be trusted to determine whether a measure is truly compensatory.

The problems inherent in any approach less exacting than strict scrutiny are illustrated by the intermediate scrutiny test advocated by several members of this Court as the appropriate standard for reviewing purportedly compensatory preferences.[30] Applying this test, propo-

[30] See *Fullilove*, 448 U.S. at 517-521 (Marshall, J., concurring); *Bakke*, 438 U.S. at 324-379 (opinion of Brennan, White, Marshall, and Blackmun, JJ). Under this test, a racial or ethnic classification "designed to further remedial purposes" must "serve important governmental objectives" and must be "substantially related to the achievement of those objectives." *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring). In addition, there must be some rational basis for concluding that the preferred groups are more deserving of compensation than the groups disfavored. (*Bakke*, 438 U.S. at 359 n.35 (opinion of Brennan, White, Marshall, and Blackmun, JJ.)).

nents have approved preferential benefits for individuals not shown to have suffered from any past discrimination;[31] preferential medical school admissions for members of minority groups that were already *overrepresented* in the student body;[32] and preferential treatment for minority businessmen whose economic resources and opportunities clearly exceeded those of the average citizen.[33] Indeed, this test has been found to allow both discrimination in favor of and discrimination against the very same minority groups—and all in the name of compensation.[34] These results dramatically illustrate the

[31] *Bakke*, 438 U.S. at 377-378 (opinion of Brennan, White, Marshall, and Blackmun, JJ.); *Fullilove*, 448 U.S. at 517-521 (Marshall, J., concurring).

[32] This was true of Chinese- and Japanese-American students in *Bakke*. See Posner, *The Bakke Case and the Future of "Affirmative Action,"* 67 Cal. L. Rev. 171, 185-186 (1979).

[33] Compare *Fullilove*, 448 U.S. at 520-521 (Marshall, J., concurring), with *id.* at 538-539 (Stevens, J., dissenting).

[34] The statute in *Fullilove*, which some Justices would have tested and sustained under intermediate scrutiny (448 U.S. at 517-521) (Marshall, J., concurring)), gave a preference to all Spanish-speaking citizens (see *id.* at 459). By contrast, the admissions program in *Bakke*, which was likewise found to pass intermediate scrutiny (438 U.S. at 355-379) (opinion of Brennan, White, Marshall, and Blackmun, JJ.)), favored only "Chicanos," *i.e.*, Mexican-Americans, while all other Hispanics, including such groups as Puerto Ricans, Cubans, and Central Americans, were required to shoulder part of the burden of providing compensation (see *id.* at 274).

Such results are not a quirk of the particular test employed but are an inevitable consequence of attempting to provide compensation to groups rather than individual victims. Many groups have suffered substantial discrimination in this country. Putting aside the special case of past discrimination against blacks,

need for strict scrutiny to identify those measures that are truly remedial and compensatory.

E. A final argument for permissive scrutiny of measures discriminating in favor of certain minority groups would justify them in terms of their supposedly benign symbolism: such classifications, it is asserted, do not stigmatize or brand the victims as inferior.[35] This argument loses sight of the equal protection ideal that individuals should not be helped or hurt by government on the basis of race or ethnic background. Instead, this theory incorrectly suggests that the Equal Protection Clause is more concerned with the symbolism than the concrete effects of racial and ethnic discrimination—loss of money, a job, education, a place to live, etc.

This argument fails as well even on its own terms. A defense of racial preferences on "symbolic" grounds is perilously vague and subjective. See *Bakke*, 438 U.S. at 294-295 n.34 (opinion of Powell, J.). The symbolism of benign concern intended by the defenders of such schemes may not be the symbolism discerned by the schemes' beneficiaries and victims or the public at large. These may rather infer that in our society benefits and opportunities are not to be obtained by merit but by successful manipulation of the politics of racial and group patronage.

Nor does it seem possible to identify any significant generic differences between the potential symbolic effects of disabilities and preferences. A disability may be seen as a brand of inferiority, but a paternalistic preference

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it is very difficult to say with any assurance that any of the remaining groups suffered greater discrimination than the rest. A "rational" case can be made that each group is especially deserving; but it is doubtful that a substantially stronger argument can be made on behalf of any group. Accordingly, if there must simply be a rational basis for the choice of groups preferred in an affirmative action plan, governmental units are apparently free to pick and choose among minority groups as they wish. If anything more than a rational basis must be shown, it seems doubtful that any of the groups noted above can be preferred.

[35] See *Fullilove* v. *Klutznick*, 448 U.S. at 518 (Marshall, J., concurring).

may carry exactly the same symbolic meaning, as many members of this Court have noted.[36] A disability may single out a minority group and thereby endorse and even encourage public hostility towards its members. But, again, so may a preference; a preference may arouse sharp resentment among those who are not preferred.

F. In arguing for a unitary standard of review for all racial and ethnic classifications, we do not equate or confuse a measure like the Jackson lay-off quota with the vicious discrimination of the Jim Crow era. However, the Equal Protection Clause is not merely a protection against the most flagrant wrongs. It embodies a broad principle of equality that is subverted unless applied equally to all racial and ethnic classifications. A. Bickel, *The Morality of Consent* 132-133 (1975).

Laws granting preferences to members of enumerated minority groups are also far from benign in practical effect. Such preferences inevitably harm innocent individuals. Whether a Plessy is ejected from a railroad coach because he is one-eighth black or laid-off because he is seven-eighths white, the concrete wrong to him is much the same. Whether a DeFunis is excluded from law school because he is Jewish or because he is not "Black, American Indian, Oriental, or of Spanish descendancy," his personal aspirations are equally thwarted.

Preferences also perpetuate and foster racial and ethnic divisions. And in a pluralistic and democratic society such as ours, when preferences are granted to some groups, there is inevitable pressure for similar preferences to benefit every group that can mount a claim of past discrimination.

Racial and ethnic preferences necessarily mar the law with definitions of racial and ethnic types, laws that are disquietingly reminiscent of abhorrent measures enacted in other times and places.[37] And if preferences are sus-

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[36] See page 23, *infra*.

[37] See *Fullilove*, 448 U.S. at 534 n.5 (Stevens, J., dissenting).

tained, a ready-made legal framework is thereby created for racial and ethnic policies of more malevolent design.

III. THE JACKSON LAY-OFF QUOTA CANNOT SATISFY THE CONSTITUTIONAL STANDARDS APPLICABLE TO MEASURES CONTAINING RACIAL AND ETHNIC CLASSIFICATIONS

The lay-off quota adopted by the Jackson school board emphatically flunks the constitutional standards governing racial classifications.

A. The lower courts justified the Jackson measure in large part on the theory that it serves to provide "role models" for minority youths, but this superficially appealing justification is multiply flawed. In the first place, we believe that special wariness is appropriate whenever an attempt is made to justify a racial classification, not for the purpose of righting past wrongs, but simply because it is asserted that social institutions would work better or more smoothly. Variations of this argument prevailed in *Plessy* and *Hirabayashi*, with regrettable results. However, except for such wrong turns, the Court has consistently and soundly rejected calls that the equal-protection rights of individuals be sacrificed to serve some abstract societal good. See, *e.g.*, *Palmore* v. *Sidoti*, No. 82-1734 (Apr. 25, 1984); *Lee* v. *Washington*, 390 U.S. 333 (1968); *Cooper* v. *Aaron*, 358 U.S. 1, 16 (1958). For "[t]he Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized." *DeFunis* v. *Odegaard*, 416 U.S. at 342 (Douglas, J., dissenting).[38]

[38] The role model justification seems clearly inconsistent with *Palmore*, which held that a state court, in awarding custody of a child, could not rely upon the race of the divorced mother's new husband. Few would deny that a child's most important role models are usually his parents. Thus, if a state's interest in providing children with role models of the same race were sufficient to override the principle of racial equality contained in the Fourteenth Amendment, it would appear that a state court should at least be permitted to take the race of the new husband into account in awarding custody. But *Palmore* properly prohibited this practice.

In this case, the role-model justification adopted by the lower courts falls far short of sustaining the Jackson lay-off quota. We do not dispute the fact that young people benefit from positive role models. Nor do we dispute the fact that minority youths, disheartened by past and present discrimination, often need minority role-models. But it is most doubtful that the Jackson lay-off quota will serve or is needed to serve this goal.

The Jackson measure, like all racial preferences, may undermine, rather than foster, minority role models.[39] See *Fullilove* v. *Klutznick*, 448 U.S. at 545, 547 (Stevens, J., dissenting); *id.* at 531 (Stewart, J., dissenting); *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 173-174 (1977) (Brennan, J., concurring in part); *Regents of the University of California* v. *Bakke*, 438 U.S. at 298 (opinion of Powell, J.); *DeFunis* v. *Odegaard*, 416 U.S. at 343 (Douglas, J., dissenting); Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 Sup. Ct. Rev. 1, 17 & n.35. The most powerful role models are those who have succeeded without a hint of favoritism. For example, Henry Aaron would not be regarded as the all-time home run king, and he would not be a model for youth, if the fences had been moved in whenever he came to the plate.

There are other, better ways for the schools to provide role models for minority youth. Any discrimination against minority teaching applicants can and should be stamped out. Minority group members who have achieved success in various walks of life can be invited and en-

The invalidity of the role-model justification in the present, weaker context would appear to follow *a fortiori*.

[39] As Professor Thomas Sowell has written (*Black Education, Myths and Tragedies* 292 (1972) (emphasis in original)):

> What all the arguments and campaigns for quotas are really saying, loud and clear, is that *black people just don't have it*, and that they will have to be *given* something in order to have something. The devastating impact of this message on black people—particularly black young people—will outweigh any few extra jobs that may result from this strategy.

couraged to visit the schools and to discuss their careers and the students' aspirations. Courses of study can be developed so as not to overlook the notable contributions of minorities. The schools can and should ensure that teachers, of whatever race, are sensitive to the special needs of minority students. In view of these alternatives, the Jackson lay-off quota is not necessary to provide minority role models, and it accordingly cannot be justified on this ground. *Palmore*, slip op. 4; *Bakke*, 438 U.S. at 314-315 (opinion of Powell, J.). At the very least, the board has failed to carry its burden of showing a compelling educational need for its particular program, which (a) treats all "minority" and nonminority teachers as fungible for role model purposes,[40] (b) aims for rigid statistical parity between the percentage of minority students and teachers and (c) in the meantime, prohibits any layoff that would decrease whatever percentage of minority teachers happens to have been achieved at the time when lay-offs become necessary.

The role-model justification also beckons down forbidden paths. It is an argument for quotas in every profession and occupation, for minority students properly aspire to careers in every walk of life. The logic of the role-model argument might also serve to justify segregated classrooms. If the educational development of minority students urgently demands the presence in their schools of minority teachers to serve as role models—indeed demands the presence of minority teachers in mathematical proportion to the racial composition of the student body—then it is not easy to see why minority students would not be served best if they were actually taught by minority teachers. These dangerous implications are underlined by the fact that the role-model argument or variants of it have frequently been advanced as a defense by school boards charged with illegally segregating minority teachers in predominantly minority schools.[41] For example, in *Smith* v. *Board of Education*, 365 F.2d 770 (8th Cir. 1966), the school board argued that it could legally prefer white teachers to instruct white pupils because "rapport between teacher and pupil * * * may be unattainable where they are of different races and this difference affects attitudes, personal philosophies and prejudices." *Id.* at 781. The court, in an opinion by then Judge Blackmun, rejected this argument in unequivocal terms (*id.* at 782).

[40] It is far from obvious that a teacher belonging to one of the preferred minority groups is necessarily any more capable of serving as a role model for students belonging to another preferred group than is a teacher belonging to a disfavored group. For example, is it clear that black students will be more inspired by a teacher of Chinese or Japanese ancestry than by a teacher of Jewish or Lebanese heritage?

B. The lower courts also justified the Jackson measure as a cure for "substantial and chronic underrepresentation" of minority teachers. But the use of racial classifications for the sole purpose of curing statistical underrepresentation (or, in plainer terms, imposing quotas) is proscribed by the Fourteenth Amendment. As Justice Powell concluded in *Bakke* (438 U.S. at 307): "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." [42]

[41] See, *e.g.*, *Reed* v. *Rhodes*, 607 F.2d 714 (6th Cir. 1979), cert. denied, 445 U.S. 935 (1980); *United States* v. *School District*, 521 F.2d 530 (8th Cir.), cert. denied, 423 U.S. 946 (1975); *Morgan* v. *Kerrigan*, 509 F.2d 580 (1st Cir. 1974), cert. denied, 421 U.S. 963 (1975); *Oliver* v. *Michigan State Board of Education*, 508 F.2d 178 (6th Cir. 1974), cert. denied, 421 U.S. 963 (1975); *Arthur* v. *Nyquist*, 415 F. Supp. 904 (W.D.N.Y. 1976), aff'd and rev'd in part, 573 F.2d 134 (2d Cir.), cert. denied, 439 U.S. 860 (1978).

[42] In relying upon what they viewed as chronic underrepresentation of minority teachers to justify the Jackson lay-off quota, the lower courts were apparently confused by *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979), in which the Court held that Title VII of the Civil Rights Act of 1964 was not violated by a provision in a private-sector collective bargaining agreement granting racial preferences in a craft-training program. *Weber*, however, has no application in the present case because it did not involve state action and thus did "not present an alleged violation of the Equal Protection Clause" (*id.* at 200). Moreover, even if ap-

C. 1. Finally, the lower courts justified the Jackson measure as a means to redress "societal discrimination." We readily agree that providing a remedy for individual victims of discrimination is a compelling interest, but measures granting preferences to all members of a few minority groups cannot be justified in the name of compensation for "societal discrimination."

In the first place, such measures are compensatory or remedial in name only. Because the Equal Protection Clause protects personal not group rights, a measure cannot be fairly characterized as a remedy for a violation of equal protection unless it provides relief to an individual who was personally victimized by discrimination. Nor can a measure be termed remedial if the benefit conferred is not in some way measured by the nature and extent of the prior violation. When benefits do not correspond to any identified prior wrong and are not directed to the victim of such a wrong, they cannot in any meaningful sense be termed compensatory or remedial.

For essentially the same reasons, categorical preferences can never be regarded as "precisely tailored" to remedy discrimination. Such measures are fatally underinclusive because the groups usually singled out for preferential treatment "are not the only groups that have been discriminated against in this country." Posner, *The Bakke Case and the Future of "Affirmative Action,"* 67 Cal. L. Rev. 171, 176 (1979). See also J. Fishkin, *Justice, Equal Opportunity, and the Family* 98-99 (1983); J. Wilkinson, *From Brown to Bakke* 278-279 (1979). Categorical preferences are also impermissibly overinclusive because "[i]n today's society, it constitutes far too gross an over-simplification to assume that every Negro, Spanish-speaking citizen, Oriental, [or] Indian * * * suffers

plicable, *Weber* would not support the lower courts' decisions in this case because the record does not show that the percentage of minority teachers in the work force exceeded the percentage on the Jackson faculty (compare *Weber*, 443 U.S. at 198-199). In addition, in this case, unlike *Weber*, the racial preference caused the discharge of innocent non-minority employees (compare *id.* at 208).

from the effects of past or present racial discrimination." *Fullilove*, 448 U.S. at 530 n.12 (Stewart, J., dissenting); see also *id.* at 537-538, 546 (Stevens, J., dissenting). Indeed, it is one of the ironies of racial preferences that those who benefit are seldom the most disadvantaged. Many minority group members and some minority groups as a whole have now surpassed the residual category of "whites" in income, education, and other measures of success.[43] Furthermore, many individuals given preference under affirmative action plans, while perhaps disadvantaged in some respects, are not even the indirect victims of discrimination in this country. This is often true of recent immigrants who happen to fall into one of the preferred groups.

Precise tailoring requires that the remedy fit a proven violation of law. See, *e.g.*, *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 420 (1977); *Milliken* v. *Bradley*, 418 U.S. 717, 738, 746 (1974) (an equal protection remedy is "necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct"). This means, as Justice Stewart stated in *Fullilove* (448 U.S. at 530 n.12), that "[e]xcept to make whole the identified victims of racial discrimination, the guarantee of equal protection prohibits the government from taking detrimental action against innocent people on the basis of the sins of others of their own race." Justice Stevens recognized the same principle in *Fullilove* when he observed (*id.* at 541) that the statutory preference could not "be justified as a remedial measure" for firms that had not been "wrongfully excluded from the market for public contracts." [44]

[43] This is true, for example, of Chinese- and Japanese-Americans (see T. Sowell, *The Economics and Politics of Race* 49, 187 (1983)), groups that suffered severe de jure discrimination and are included among the minorities given preference in the Jackson lay-off quota.

[44] In *Fullilove*, neither the plurality opinion nor that of Justice Powell approved the award of benefits to non-victims at the expense of innocent third parties. In the plurality opinion, the Chief

No other remedial principle is compatible with the cardinal rule that government may neither favor nor disadvantage a person solely because of race or ethnicity. When government provides compensation to individual victims, government is not itself making or implementing a racial classification. The victims compensated may all be members of the same racial or ethnic group, but this is merely because the guilty party's unlawful behavior was defined by race.

Nor does any other remedial principle pay sufficient heed to the rights of innocent parties. Although a valid remedy for individual discrimination may require some sharing of the burden by innocent parties (*Fullilove*, 448 U.S. at 484 (plurality); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 777 (1976); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975)), such individuals will simply be placed in the situation that would have existed had the discrimination not occurred. But unless a remedy benefits an actual victim of discrimination, "the government has [no] greater interest in helping one

Justice stressed (448 U.S. at 486) that the Court was considering only a facial challenge to the minority set-aside provision and that equal protection claims arising out of specific awards that "cannot be justified * * * as a remedy for present effects of identified prior discrimination * * * must await future cases." The Chief Justice also emphasized Congress's intention that a preference should be given to only those firms "whose competitive position is impaired by the effects of disadvantage and discrimination" (*id.* at 471; see also *id.* at 464) and that the administrative process would prevent misapplications of Congress's goals (*id.* at 487-489). The *Fullilove* plurality did not suggest that the statute at issue in that case, which may have "pres[sed] the outer limits of congressional authority" (*id.* at 490), would have been upheld had it extended preferences to firms based solely on race rather than their "impaired * * * competitive position" resulting from the "present effects of past discrimination" in government construction contracts. None of these factors is present here. Petitioners were personally and substantially harmed by the lay-off quota, and no effort whatsoever was made to inquire whether those preferred at petitioners' expense were the actual victims of discrimination or disadvantage.

individual than in refraining from harming another" (*Bakke*, 438 U.S. at 309 (opinion of Powell, J)).[45]

2. The Jackson measure cannot be justified as a means of providing compensation for individual victims of discrimination. Neither the school board nor the courts below found that the board had ever engaged in discrimination. The absence of such a finding alone requires the invalidation of the lay-off quota. *Bakke*, 438 U.S. at 302-310 (opinion of Powell, J.); see also *Bushey* v. *New York State Civil Service Commission*, No. 84-336 (Jan. 7, 1985), slip op. 4 (opinion of Rehnquist, J., Burger, C.J., and White, J., dissenting from denial of certiorari).

Furthermore, the board does not have the constitutional competence to make a finding that justifies the use of a racial classification for remedial purposes. Like the Regents in *Bakke*, the Board's "mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality." *Bakke*, 438 U.S. at 309 (opinion of Powell, J.). Factfinding by a state or local entity also cannot be equated with that of Congress because, among other things, the states are not granted the enforcement power under Section 5 of the Fourteenth

[45] The same remedial principle guided the Court in its recent decision regarding the scope of a federal court's remedial authority under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* See *Firefighters Local Union No. 1784* v. *Stotts*, No. 82-206 (June 12, 1984). With much the same values and interests at stake, the Court ruled that the policy behind the remedial provision of Title VII, Section 706(g), 42 U.S.C. 2000e-5(g), is to "provide make-whole relief only to those who have been actual victims of illegal discrimination." *Stotts*, slip op. 16-17; see also *Teamsters* v. *United States*, 431 U.S. 324, 367-371 (1977). This holding is particularly instructive since Title VII has been held to allow greater leeway for racial preferences than would be permitted for an entity subject to the Fourteenth Amendment. See *United Steelworkers* v. *Weber*, *supra*. Justice O'Connor implicitly pointed out the breadth of this principle when she wrote in *Stotts* (concurring slip op. 5 (emphasis added)), citing both Title VII and Fourteenth Amendment precedent, that "[a] court may use its remedial powers * * * only to prevent future violations and *to compensate identified victims of unlawful discrimination.*"

Amendment that many members of the Court found important in upholding the Act of Congress challenged in *Fullilove*. See 448 U.S. at 476-478, 483, 490-491 (plurality opinion); *id.* at 499-502 (opinion of Powell, J.); see also *Hampton* v. *Mow Sun Wong*, 426 U.S. 88 (1976); *Bushey*, dissenting slip op. 4.

A court of equity may of course make a finding of racial discrimination, but no such finding could be made on the record in this case. The lower courts relied exclusively on statistics showing that there was a difference between the percentage of minority teachers and students during a brief span of years more than a decade ago. This difference, however, might have resulted from any of numerous innocent causes and unquestionably does not show the discriminatory intent needed to establish an Equal Protection Clause violation. *Hazelwood School District* v. *United States*, 433 U.S. 299, 308 (1977); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 270 (1977); *Washington* v. *Davis*, 426 U.S. 229, 243 (1976); *Janowiak* v. *City of South Bend*, 750 F.2d 557, 564 (7th Cir. 1985).

More fundamentally, as we have shown, even a finding that there had been past discrimination against *some* individuals would not support a *categorical* racial and ethnic preference such as that contained in the Jackson agreement. No findings, then, can justify the challenged Jackson measure. Even if the board or lower courts had found a constitutional violation (and they did not) and even if they were to find such a violation on remand (and they could not on the present record) the Jackson quota could not be supported.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted.

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