Dear Sandra:

I have thought a good deal about your suggestion that I return to the earlier version of my Wygant opinion that did not specifically mention strict scrutiny. Let me explain briefly why I am inclined to stay with the latest draft of the opinion.

The difference between the third draft (strict scrutiny not specifically mentioned) and the fourth draft is not really a change in the overall analysis. The third draft was strict scrutiny in every thing but name. The fourth draft in reality represents a more accurate statement of what the opinion was holding all along, and thus it also "fits" into the general body of equal protection cases. It also conforms with what I have written in prior cases.

If I thought there were a chance to obtain a Court for a standard of scrutiny - something that has eluded us - I would gladly go along unless it were the WJB/TM standard in race cases. But as Byron has declined to join either your or my opinion, I see no real benefit to be gained going back to language that, as Thurgood's dissent pointed out, does not have a solid reference point in our earlier opinions.

In my view, the first prong of equal protection scrutiny - the strength of the state's interest - is of minor importance in affirmative action cases. We both believe that the state interest in remedying established prior discrimination can satisfy even the strict scrutiny standard. Most of these cases will be won or lost on the "narrowly tailored" prong. See footnote seven of my fourth draft (commentators agreeing that the "means" prong of equal protection analysis is more important than the "state interest" prong). Every draft of our opinions has required that the means chosen to accomplish a valid state interest be narrowly framed. The fourth draft does not change the
standard of analysis on this crucial aspect of this case and of future affirmative action cases.

Thank you again for your help with this case. I am sure that my opinion is better because of our conversations.

Sincerely

Justice O'Connor

lfp/ss
This is an affirmative action case that comes to us from the Court of Appeals for the Sixth Circuit. An affirmative action plan was adopted in 1972 as a part of a collective bargaining agreement between the school board and its union. The agreement has been renewed from time to time, and remains in effect.

Its stated purpose was to employ and preserve enough minority faculty members to equal the percentage of minority students in the student body. It also provided for preferential treatment of minority teachers when layoffs became necessary.

Over the decade following adoption of the plan, there was litigation in both federal and state courts. Although neither court found the existence of past discriminatory conduct by the board, the state court approved the layoff preference as justified by societal discrimination.

Petitioner Wendy Wygant and other non-minority teachers subsequently were laid-off while minority teachers with less seniority were retained. The non-minority teachers/petitioners here brought this suit.
in federal District court, alleging violation of the Equal Protection Clause. Both the District Court and the Court of Appeals upheld the minority preference, finding it valid as a means of remediating societal discrimination.

Today, we reverse the judgment of the Court of Appeals. There is, however, no majority opinion for the standard of analysis. The opinion, joined by the Chief Justice and Justice Rehnquist, applies the customary equal protection standard pursuant to which governmental distinctions based on race are inherently suspect. This standard also calls for strict scrutiny.

Such a racial classification may be justified by a compelling governmental purpose, provided the means chosen to accomplish this purpose are narrowly tailored.

Justice O'Connor, in a separate opinion, concurs in my opinion except for Part IV thereof, and joins in the judgment of reversal. Justice White, also in a separate opinion, concurs in the judgment.

The plan involved in this case is to be distinguished from the more customary type of voluntary affirmative action plans - plans adopted to serve a compelling or substantial...
compelling or substantial/governmental interest, and that do not directly penalize non-minority employees.

Justice Marshall has written a dissenting opinion, joined by Justices Brennan, Blackmun, and Stevens.
NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lands Co., 200 U. S. 321, 477.

SUPREME COURT OF THE UNITED STATES

SYLLABUS

WYGANT ET AL. v. JACKSON BOARD OF EDUCATION ET AL.

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

No. 84–1340. Argued November 6, 1985—Decided May 19, 1986

The collective-bargaining agreement between respondent Board of Education (Board) and a teachers' union provided that if it became necessary to lay off teachers, those with the most seniority would be retained, except that at no time would there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff. After this layoff provision was upheld in litigation arising from the Board's noncompliance with the provision, the Board adhered to it, with the result that, during certain school years, nonminority teachers were laid off, while minority teachers with less seniority were retained. Petitioners, displaced nonminority teachers, brought suit in Federal District Court, alleging violations of the Equal Protection Clause and certain federal and state statutes. Dismissing the suit on cross-motions for summary judgment, the District Court held the constitutionality of the layoff provision, holding that the racial preferences granted by the Board need not be grounded on a finding of prior discrimination but were permissible under the Equal Protection Clause as an attempt to remedy societal discrimination by providing "role models" for minority schoolchildren. The Court of Appeals affirmed.

Held: The judgment is reversed.

746 F. 2d 1152, reversed.

JUSTICE POWELL, joined by THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR, concluded that the layoff provision violates the Equal Protection Clause. Pp. 4–12.

(a) In the context of affirmative action, racial classifications must be justified by a compelling state purpose, and the means chosen by the state to effectuate that purpose must be narrowly tailored. Pp. 4–5.

Must be subjected to strict scrutiny.
WYGANT ET AL. v. JACKSON BOARD OF EDUCATION ET AL.

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(a) In the context of affirmative action, racial classifications must be justified by a compelling state purpose, and the means chosen by the state to effectuate that purpose must be narrowly tailored. Pp. 4-5.

(b) The Board's asserted purpose—"to help close the academic achievement gap between minority and nonminority students by providing 'role models' for minority schoolchildren"—falls far short of meeting the compelling state purpose standard. Pp. 6-9.

(c) The Board's stated purpose of correcting "long-standing, unacceptable and deplorable" achievement gap does not meet the compelling state purpose standard. Pp. 9-11.

(d) Most significantly, the Board's stated purpose is not sufficiently related to its asserted means. The Board appears to have adopted its layoff provision at the behest of a special counsel hired to help it comply with the consent decree entered in an earlier suit pending against it. Pp. 10-12.

SUPREME COURT OF THE UNITED STATES
Board's asserted purposes is that of laying off nonminority teachers with greater seniority in order to retain minority teachers with less seniority. We have previously expressed concern over the burden that a preferential layoffs scheme imposes on innocent parties. See Firefighters v. Stotts, 467 U. S. 561, 574-576, 578-579 (1984); see also Weber, n. 9, supra this page, at 208 ("The plan does not require the discharge of white workers and their replacement with new black hires"). In cases involving valid hiring goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job.

Many of our cases involve union seniority plans with employees who are typically heavily dependent on wages for their day-to-day living. Even a temporary layoff may have adverse financial as well as psychological effects. A worker may invest many productive years in one job and one city with the expectation of earning the stability and security of seniority. "At that point, the rights and expectations surrounding seniority make up what is probably the most valuable capital asset that the worker 'owns,' worth even more than the current equity in his home." Fallon & Weiler, Conflicting Models of Racial Justice, 1984 S. Ct. Rev. 1, 58. Layoffs disrupt these settled expectations in a way that general hiring goals do not.

While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the

*Industrial District Lodge 787 v. Campbell, 397 U. S. 581 (1969)*, but they do not involve the critical element here—layoffs based on race. The Constitution does not require layoffs to be based on strict seniority. But it does require the state to meet a heavy burden of justification when it implements a layoff plan based on race.

"The "school admission" cases, which involve the same basic concepts as cases involving hiring goals, illustrate this principle. For example, in DeFunis v. Odegaard, 416 U. S. 312 (1974), while petitioner's complaint alleged that he had been denied admission to the University of Washington Law School because of his race, he also had been accepted at the Oregon, Idaho, Gonzaga, and Willamette Law Schools. *DeFunis v. Odegaard, 82 Wash. 2d 11, 30, n. 11, 507 P. 2d 1169, 1181, n. 11 (1973).* The injury to Defunis was not of the same kind or degree as the injury that he would have suffered had he been removed from law school in his third year. Even this analogy may not rise to the level of harm suffered by a union member who is laid off.

"We have recognized, however, that in order to provide make-whole relief to the actual, identified victims of individual discrimination, a court may in an appropriate case award competitive seniority. See Franks v. Bowman Transportation Co., 424 U. S. 747 (1976).

"The Board's definition of minority to include blacks, Orientals, American Indians, and persons of Spanish descent, n. 2, supra, further illustrates the undifferentiated nature of the plan. There is no explanation of why the Board chose to favor these particular minorities or how in fact members of some of the categories can be identified. Moreover, respondents have never suggested—much less formally found—that they have engaged in prior, purposeful discrimination against members of each of these minority groups.
LFP for the Court 1/16/85
1st draft 12/13/85
3rd draft 4/14/86
4th draft 4/30/86

Joined by WHR 12/16/85
CJ 1/8/86
SOC joints Parts I, II, IIIA, IIIB and V 4/15/86

TM dissenting
1st draft 2/5/86
2nd draft 2/12/86
3rd draft 4/22/86
4th draft 5/1/86

Joined by WJB 2/6/86
HAB 2/10/86

JPS dissenting
1st draft 3/4/86
2nd draft 3/10/86
3rd draft 4/23/86
4th draft 5/8/86

SOC concurring in part and concurring in the judgment
1st draft 4/15/86
2nd draft 4/23/86
3rd draft 5/14/86

BRW concurring in the judgment
1st draft 4/17/86

TM will dissent 12/13/85
JPS will await dissent 12/13/85
WJB will await dissent 12/17/85
BRW awaiting dissent 12/19/85
HAB awaiting dissent 12/20/85
JPS will write separately 2/27/86
Common Sense in Court

The U.S. Supreme Court, reviewing the tricky little case of the Jackson, Mich., schoolboard, decided Monday that it sometimes makes sense to do a little race-specific hiring when it comes to layoffs. That is not how the court put it, of course. The majority opinion described the case before the court as "whether a school board, consistent with the equal protection clause, may extend preferential protection against layoffs to some of its employees because of their race or national origin."

But after laying out an acceptable constitutional basis for hearing the case, the justices proceeded to deal with it as human beings: on the basis of simple fairness and what, to their minds, makes sense.

Their conclusion—that hiring is one thing, layoffs another—is probably as good as you could hope for, unless you’re one of those "strict constructionists" who believe that if the Framers didn’t mention television or computers or affirmative action, then the court shouldn’t read those things into the Constitution.

In 1972, the Jackson school board, reacting to racial tension in the community, hammered out an agreement with the local education association that called for bringing the percentage of minority teachers in line with the percentage of minority students. In order to protect the newly instituted faculty integration against layoffs, it added a provision calling for proportional layoffs, rather than a simple seniority system, in case staff reductions became necessary.

A few years later, it became necessary to lay off some teachers. In keeping with the carefully constructed agreement, some black teachers were retained while some whites with more seniority were laid off. Some of the whites sued, and on Monday they won.

The Supreme Court majority, writing like lawyers but reasoning like wise human beings, determined that it makes sense for a governmental unit to practice some degree of race preference in order to correct earlier racial discrimination by that same unit, but that generalized "societal" discrimination is "too amorphous a basis" for awarding race preference. There had been no showing that the Jackson Board of Education had ever discriminated on the basis of race.

But, no doubt to the dismay of the Reagan Justice Department, the court made clear that it would countenance preferential hiring to correct past discrimination, even without the necessity of proving that individual applicants had been discriminated against.

The majority opinion went on to say, however, that while race-conscious hiring can sometimes be appropriate, "race-conscious layoffs are another matter. "Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job," Powell wrote.

The minority opinions were equally fostered in common sense. Justice Sandra Day O’Connor, concurring, noted that the school board was "trapped between the competing hazards of liability to minorities if affirmative action is not taken to remedy apparent employment discrimination and liability to nonminorities if affirmative action is taken."

Justice Thurgood Marshall, dissenting, acknowledged that the layoffs were unfair, but said "unfairness ought not be concluded with constitutional injury." He noted, quite pragmatically, that the court would "nullify years of negotiation and compromise designed to solve serious educational problems of the public schools of Jackson, Mich."

Justice John Paul Stevens, also in dissent, noted the value of "rule models" as one means to maintain staff integration. "It is one thing for a white child to be taught by a white teacher of that color, like beauty, is only 'skin deep'; it is far more convincing to experience that truth in a day-to-day basis during the routine, everyday learning process."

In short, the justices, in ways that would horrify Ed Meese, refused to be bound by what the Framers of the Constitution may or may not have had in mind, choosing instead to view the case before them in the context of what makes sense in the real world. Their conclusion—that affirmative action remains a valid approach but one that ought to be used judiciously, and with a view to fundamental fairness—makes sense to me.
HE VARIETY of headlines across the country Tuesday morning concerning the latest Supreme Court decision on affirmative action reflected the fact that the court is still working its way through this issue and is not yet prepared to come up with general guidelines on when this
affirmative action can be applied. The justices invali-
dated an affirmative action plan in Jackson, Mich.
that called for laying off white teachers with tenure in order to preserve the jobs of nonwhites who were still on probation. But in doing so, it issued five separate opinions, in which writers went beyond the facts of the Jackson case to discuss other aspects of
affirmative action. Reading the opinions like tea leaves, lawyers sought to discern the position of various justices on future cases, with special weight being given to Justice O'Connor's concurring opinion, since she is viewed as a critical swing vote on this
question. As a result, those who oppose numerical
goals in employment focused on their victory in the
Jackson case, while civil rights forces, reading the
more general language of the opinion, quickly
drawn that in losing a battle they had won the war.

This much is clear: The court held that there must be convincing evidence of prior discrimination by a
corporate employer, such as the Jackson school board, before any kind of racial classification can be used to
remedy that discrimination. Four justices agree that
racially based layoffs, as opposed to firings, are in
general too burdensome on a small group of innocent
workers to be justifiable—a view that makes sense and seems right to us. Justice O'Connor limited her agreement to the facts in the Jackson case.

This can be inferred: A clear majority of justices
would, in some cases, support the use of goals and
quotas in hiring if this remedy were necessary to
correct past discrimination. And a majority would
reject the administration's position that affirmative
action can be used to help only the actual victims of
discrimination and not a class. These were not
questions before the court is the Jackson case, but are assumptions based on assertions made in the
opinions.

Two affirmative-action cases will be decided by
the court this term. One involves a union's failure to
adhere to a court-ordered hiring plan. The other
centers on the difficult issue of race-conscious pro-
motions. The pieces of this complicated puzzle are
slowly being put together in the court, and by July,
more of the picture will be completed. This week's
issue was settled wisely, we believe, for the distinc-
tion between layoffs and hiring goals is a valid one, in
human as well as legal terms.
Accent on the Affirmative

The Supreme Court says yes and no on racial preferences

In the eight years since the landmark Bakke case, the U.S. Supreme Court has asked back and forth surprisingly on the issue of affirmative-action action, prompting Reagan Administration lawyers and liberal civil rights activists alike to claim that the results really favored them. Last week, in what may prove to be a decisive course marker, the court struck of identified on a key rebuff to a much bruit- crass, the outcome meant victory for Wendy administration .

The Reagan Administra­ tion could, and did, take satis­ faction from the majority’s view that the mere act of discrimina­tion in American life is not in itself constitutionally suf­ ficient reason for remedying an affirmative-action remedy. “It is a sizable opinion in our judg­ ment,” said Justice Depart­ ment Spokesman Terry East­ land. But after reviewing the splintered opinions, most ex­ perts agreed with Justice Sandra Day O’Connor. She con­ cluded that the Justices have “forged a degree of quanti­ ty” on a key refusal to a much brat­ ed claim of the Reagan Administra­ tion. It has argued that af­ firmative action is appropriate only to remedy discrimination against specific in­ dividual victims. By O’Connor’s reasoning, however, the court could also approve “a carefully constructed affirmative-action program,” which need not be limit­ ed to the remedying of specific instances of identified discrimination. Whatever it means in the larger strug­ gle, the outcome means victory for Wendy Wygant and the other white teachers who brought the suit after being laid off in 1981.

The four dissenters were satisfied that the district’s actions were constitutionally acceptable. And while the majority was not prepared to go this far, the Justices across the board seemed jointly support­ ive of some race-based solutions. Powell wrote that “in order to remedy the effects of prior discrimination, it may be neces­ sary to take race into account.” That could mean, he added, that “innocent per­ sons may be called upon to bear some of the burden of the remedy.”

The sum of these positions, says Paul Bender, dean at the law school at Arizona State University in Tempe, “makes things better for affirmative action.” But for which plans? The next tests will come shortly. The Justices have two more major cases on the subject to decide by July, one involving fire-department promo­ tions in Cleveland, the other the impound­ ment of a minority-membership goal on a New York City union. Last week’s deci­ sion would seem to bode well for those and other affirmative-action schemes. But William Bradford Reynolds, the combative As­ sistant Attorney General for Civil Rights, insisted that he could still hear the Justices playing his tune. Because they had re­ quired a showing of prior discrimina­tion before the use of racial preferences, Reynolds now contends that a 1965 presi­ dential order authorizing mi­ nority-employment goals at Government contractors would be largely invalidated.

The court last week also okayed official spying in the sky. Dana Ciracito has his high double fences around his back­ yard in Santa Clara, Calif. Ever so, police acting on a tip were able to spot the 73 marijuana plants growing in the yard—by flying overhead in a chartered plane. Dow Chemical Co. had even more elaborate security precautions at its plant in Midland, Mich. So the Environmental Protection Agency also set up an airplane, to get pictures as part of an inspection of the site. In two 5-4 decisions, the Supreme Court ruled that neither search from the skies required a warrant.

Warren Burger, who wrote both major­ ity opinions, stated in the California case that although residential yards are ordinarily felt to be private, “a passing airplane, a police ‘stakeout’ at the public airways.” In the Dow case Burger went further, saying that a facility area was not comparable to a private yard, and that the $22,000 magnifying camera used by the EPA was not in the same league as high-tech snooping de­ vices that might require a search warrant. The majority’s course worried Lewis Powell, who spoke for the dissenters in both cases. The failure to protect privacy rights, he said in the Dow decision, “will permit their gradual decay as technology advances.”

—By Richard A. Kluger.

Reported by Jay Braman, Washington

Time June 2, 1986

Police search of Ciracito’s marijuana crop

Bird-eye viewing is O.K., Burger rules.