MEMO TO BOB:

This is a brief memo to you, Bob, as you mentioned that this was your case and you found it difficult. This case has a 14-year history, from which it is clear that the Alabama State Department of Public Safety (the Department) "egregiously discriminated" against Blacks in both employment and promotion for many years. The case is complicated by the prolonged litigation, including particularly the entry by the DC of two "consent decrees" that are complicated both as to their meaning and as to the extent of violations. If I understand the promotion procedure included in the consent decree of 1981, when it was followed by the Department (as I believe it was, but am not sure), no blacks would have been promoted even to the rank of corporal. In an order entered October 28, 1983, the DC agreed that the 1981 promotion procedure was unacceptable because it had an "adverse impact" on black applicants. On December 15, 1983, the case now before us, the DC granted Paradise's motion to enforce the consent decrees (I assume, except with respect to the promotion
procedure that had failed to attain its purpose). The DC imposed a fixed quota requiring the Department:

"To promote from this day forward, for each white trooper promoted to a higher rank, one black trooper to the same rank, if there is a black trooper objectively qualified to be promoted to that rank."

The court found that this quota was necessary to cure "racial imbalances in the upper rank". It is to be noted that the earlier dissent decrees had been limited, as I recall, to promotions to corporal. The DC's latest order applies to promotions to all ranks. The Court of Appeals first rejected the contention that the DC, in ordering the "one - black - for one - white promotion quota" had "modified, rather than enforce, the 1979 and 1981 dissent decrees. The DC reached this conclusion by construing the consent decrees to bar any "adverse impact" only against blacks, and not against whites, who sought promotion. After agreeing that there was no improper modification of the consent decrees, CA11 held that the promotion quota violated neither Title VII (a question not before us on this appeal), nor the Equal Protection Clause. The Court of Appeals sustained the quota because of "the long history of discrimination in the Department, and because
the "relief was designed to remedy the present effects of past discrimination". Moreover, and of considerable importance at least for me, is the fact that CAll concluded that the quota did not require promotion of unqualified black troopers, did not absolutely bar qualified white troopers "from advancement through the ranks", and did not "require the discharge or demotion of a white trooper or the replacement of a white trooper with a black trooper."

As the SG argues in its well-written brief, neither of the courts below considered whether there were any "less intrusive or more narrowly tailored means of enforcing the Department's compliance with its obligations under the consent decrees." I note here that the SG's brief, P. 13, n. 6, states that the one on one promotion quota has been applied in actual practice only once, that 8 blacks have been promoted since the DC's decree, and that the constitutionality now has "limited retrospective importance since its invalidation could not lead to demotion of the 8 blacks promoted under it." Of course the quota could have significant future effects if it should be strictly followed. The principle adverse effect on whites would be that less well-qualified blacks would
be promoted over better-qualified whites. I would assume this would have an adverse effect on the morale of the white officers, and also could have an adverse effect on recruitment by the State Department.

As would be expected, petitioners - and particularly the SG - rely on Justice O'Connor's and my opinions in Wygand. Respondents understandably prefer to rely primarily on our decisions last Term in Local 93 and Local 28, particularly the latter. To be sure, both of those were Title VII cases, but it can be argued that the rationale is relevant particularly in view here - as was true in Local 28 - of a decade or more of grossly discriminatory conduct by the State.

I have spent relevantly little time on the briefs, and certainly am not at rest. This is a more difficult case for me than the three cases we decided last Term. I will adhere to the reasoning of my Wygand opinion unless I am persuaded to compromise to some extent on the facts of this case by Justice O'Connor's views. My guess is that we will decide this case if we are together, although I did not understand Justice White's reasoning last Term. Nor, of course, do I know how Justice Scalia may think
about the extremely perplexing questions that arise under affirmative action programs.

I therefore will welcome particularly your views, Bob, and please feel free to express them with candor. I add only that I am sympathetic to the grave problem of blacks seeking upward mobility in competition with whites. This is a problem that is experienced in education and particularly in the professional schools. For example, in the several hundred law clerks here since I became a Justice I can recall only three who were black and one of these was from one of the African countries. Despite sympathy, I think it is essential to have principled decision making.

LFP, JR.
To: Justice Powell
From: Bob

October 25, 1986

No. 85-999, United States v. Paradise

Cert. to Call (Fay, Anderson, Gibson) (per curiam)
Wednesday, November 12, 1986 (1st case)

Question Presented

Does the Equal Protection Clause forbid imposition of a one-black-for-one-white promotion quota as a remedy for past discrimination against blacks?
I. BACKGROUND

The history of this litigation is a long, sad story. This class action began in 1972, when the NAACP sued the Alabama Department of Public Safety (Department) for discriminating against blacks in hiring. The United States joined the action as a plaintiff, and Phillip Paradise, Jr. intervened on behalf of a class of black plaintiffs. In 1972, Judge Frank Johnson, then a District Judge, held that the Department had "engaged in a blatant and continuous pattern of discrimination in hiring." NAACP v. Allen, 340 F. Supp. 703, 705 (MD Ala.), J.A. 25. Judge Johnson based his holding on the "unexplained and unexplainable" fact that "[i]n the thirty-seven year history of the patrol there has never been a black trooper." Id. The DC ordered the Department to adopt a one-black-for-one-white hiring quota until such time as blacks made up approximately 25 percent of the state trooper force.

In 1975, the DC found that the Department, "for the purpose of frustrating or delaying full relief to the plaintiff class, artificially restricted the size of the trooper force and the number of new troopers hired." J.A. 34. The DC enjoined the Department's conduct and ordered the Department to file progress reports with the DC.

In 1979, the Department returned to the DC to determine whether the 25 percent goal applied to the entire trooper force (i.e., sergeants, lieutenants, etc.) or only to entry-level troopers. Because the Department promotes only from its own ranks, the Department argued, blacks would make up 25 percent of
the entire force only if they filled 37.5 percent of the entry-level positions. The DC, held that the 25 percent figure applies to the entire force. "[A]s of November 1, 1978," the DC noted, "out of 232 state troopers at the rank of corporal or above, there still is not one black. . . . To focus only on entry-level positions would be to ignore that past discrimination by the Department was pervasive, that its effects persist, and that they are manifest." Paradise v. Shoemaker, 470 F. Supp. 439, 442 (MD Ala. 1979), J.A. 63.

Also in 1979, the parties entered into the first of two consent agreements. The Department agreed to "have as an objective . . . [a] promotion system that is racially neutral," and "to have as an objective the utilization of a promotion procedure which is fair to all applicants and which promotion procedure when used either for screening or ranking will have little or no adverse impact upon blacks seeking promotion to corporal." J.A. 37, 40. The Department further agreed "to utilize a promotion procedure which is in conformity with the 1978 Uniform Guidelines [on Employee] Selection Procedures, J.A. 40. (The Uniform Guidelines, 29 C.F.R. 1607, are a joint product of the EEOC, the Departments of Justice and Labor, and the Civil Service Commission.) The Department agreed to submit a procedure for promoting entry-level troopers to corporal by February 16, 1980. J.S. 40, 45. Once the procedure for making promotions to corporal was approved, the Department agreed to develop and validate procedures for making promotions to the ranks of sergeant, lieutenant, captain, and major. In the interim, the
parties agreed to use the state merit system to make promotions to corporal. In February, 1980, four blacks and six whites were promoted to corporal under the interim agreement.

In April, 1981, more than a year late, the Department submitted to the Department a procedure for promoting troopers to the rank of corporal. The Department proposed to weigh four factors: a written examination (60 percent); a supervisor's evaluation (20 percent); length of service (10 percent); and service ratings (10 percent). The United States and Paradise initially objected to the proposal because the written examination had not been validated as job-related in accordance with the Uniform Guidelines. The parties entered into a second consent decree, however, under which the Department administered the written examination, evaluated the results in conjunction with the other three factors, and ranked the applicants for corporal on a promotion register. The parties agreed that the procedure would be considered to have an adverse impact if it failed the "four-fifths" test set out in the Uniform Guidelines (that is, if the selection rate for black applicants was less than 80 percent of the selection rate for white applicants). If the procedure did have an adverse impact, the Department agreed to propose an alternative procedure. If the parties were unable to agree on an alternative procedure, the matter would be "submitted to the [DC] for resolution." J.A. 53. No further promotions to corporal were to be made until a satisfactory procedure was in place. Id.

The promotion register compiled on the basis of the written examination and the other factors ranked 260 applicants,
of whom 60 (23 percent) were black. Only five blacks were listed in the top half of the register; the highest-ranking black was ranked eightieth. The Department proposed to make no more than 20 promotions from the list. Thus, no blacks would have been promoted to corporal under the Department's proposed procedure. The Department submitted no alternative proposal, and made no promotions, for the following nine months.

In April 1983, Paradise asked the DC to enforce the consent decrees by imposing a one-black-to-one-white quota for promotions to corporal "until such time as the defendants implement a valid promotional procedure." J.A. 62. The United States agreed that the DC should order promotion of some blacks, but opposed a one-for-one quota. The DC agreed that the Department's 1981 procedures would have an adverse impact on blacks, and that the Department "needs additional corporals and ... needs at least 15 of them as soon as possible." Paradise v. Prescott, 580 F. Supp. 171 (M. D. Ala.), J.A. 119. The DC ordered the Department to submit, by November 10, 1983, a plan to promote at least fifteen troopers to corporal that would not have an adverse impact on blacks.

On November 10, the Department submitted a proposal to promote 11 whites and 4 blacks to corporal. This proposal met the four-fifths test because 27 percent of the new corporals would have been black, while only 23 percent of the applicants were black. The Department promised to develop a permanent procedure for promotion to corporal "as soon as possible." J.A. 126. The United States did not oppose the proposal, but Paradise
continued to insist on a one-to-one quota. On December 15, the DC imposed a one-black-to-one-white promotion quota for each rank above the entry level rank, "if there is a black trooper objectively qualified to be promoted to the rank," "until either approximately 25 percent of the rank is black or the [Department has] developed and implemented a [valid] promotion plan for the rank." J.A. 128. The DC ordered the Department to submit "a schedule for the development of promotion procedures for all ranks" within 35 days. J.A. 129. In February, 1984, the Department promoted 8 blacks and 8 whites to the rank of corporal.

On June 19, the Department submitted a new proposal for making promotions to corporal. On July 27, the DC suspended the one-for-one promotion quota and ruled that the Department could promote up to 13 troopers to corporal under its proposed procedure. The DC ordered the parties to proceed with determining whether the procedure could be validated under the Uniform Guidelines. Under the new procedure, ten white troopers and three black troopers were promoted to corporal. The Department has also proposed procedures for making promotions to sergeant. Because no blacks are yet eligible for promotion to ranks above sergeant, the one-to-one quota is not effect for those ranks either.

CA II consolidated the various appeals from the DC's orders and affirmed in all respects. CA II rejected the argument that the one-for-one quota was an improper modification of the 1979 and 1981 Consent Decrees. Those decrees barred procedures having
an adverse impact on blacks, but did not bar procedures having an adverse impact on whites. CALI held that the one-for-one promotion quota was constitutional in light of "the long history of discrimination in the Department" and because the quota "was designed to remedy the present effects of past discrimination."

II. DISCUSSION

A. Standing. Although the issue is not raised by any of the parties, some of the law clerks have questioned whether the United States has standing to litigate the equal protection claim. You will recall that the United States, the only party to petition for cert., asked the Court to consider whether the one-for-one quota violates Title VII. The United States clearly has standing to raise the Title VII question. The Court, however, granted review only on the constitutional question.

The government was a party below, and so was entitled to petition for cert. under 28 U.S.C. §1254(1). Under Supreme Court Rule 19.6, "[a]ll parties other than petitioners shall be respondents . . . ." The Department and the white troopers thus are "respondents supporting the petitioner." Although the government may not have Article III standing to litigate the constitutional claim, the Department and the white troopers clearly do have Article III standing. In an identical situation, the Court held that the presence of a respondent with constitutional standing "assures that an admittedly justiciable controversy is now before the Court." Director, OWCP v. Perini North River Associates, 459 U.S. 297, 305 (1983). There now
seems to be general agreement, among the clerks at least, that

Perini disposes of the standing problem.

B. Mootness and Ripeness. It seems quite possible that a
decision by this Court will have no practical effect in this
case. The one-for-one quota has been suspended as to all ranks,
and will not be re-imposed unless the current procedures are
shown to have an adverse effect on blacks. The eight blacks
promoted to corporal while the quota was in effect apparently
would not be demoted even if the quota were held
unconstitutional. Memphis Firefighters v. Stotts, 467 U.S. 561,
579 n. 11 (1984) ("Lower courts have uniformly held that relief
for actual victims does not extend to bumping employees
previously occupying jobs.") The SG concedes that the Court's
ruling will have "limited retrospective importance." SG brf., at
13 n. 5. At oral argument, the Court should ask the SG to
concede that a decision in this case will have no retrospective
effect, or, in the alternative, to specify the "limited"
retrospective effects that a decision will have.

The SG argues that the one-for-one promotion requirement
"has continuing prospective effects," because the quota may be
re-imposed for promotions to corporal and sergeant if the
selection procedures now in use are shown to have an adverse
effect on blacks, and because the quota will be imposed for
higher ranks if the Department fails to develop acceptable
promotion criteria at those levels. Id. The fact remains that
the one-for-one requirement may never be re-imposed. The SG also
views the one-for-one requirement as an unconstitutional "in
terrorem threat. SG brf. 24. I am far from certain that a mere "threat" by a DC to re-impose the quota makes the constitutionality of the quota ripe for review. The DC might, after all, alter its order at any time in response to changed circumstances. Moreover, the DC is not trying to "coerce" the Department into doing anything more than is constitutionally required—that is, to eliminate the continuing effects of the Department's past racial discrimination.

In short, I am inclined to think that a challenge to the promotion of the 8 blacks is moot, and that the challenge to the continuing effects of the one-for-one quota is unripe. The issue is not well briefed, however, and discussion at oral argument may alter my view.

C. The Merits. Although this is by no means an easy case, your prior opinions establish a framework for analysis. "Racial . . . distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." Regents of University of California v. Bakke, 438 U.S. 265, 291 (opinion of POWELL, J., joined by WHITE, J.). "[T]he level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination." Wygant v. Jackson Board of Education, slip op. at 5 (May 19, 1986) (plurality opinion). Any classification based on race is subject to a two-pronged examination. "First, any racial classification 'must be justified by a compelling governmental interest.'" Id., quoting Palmore v. Sidoti, 466 U.S. 429, 432 (1984). "Second, the means
chosen . . . to effectuate [the] purpose must must be 'narrowly tailored to the achievement of that goal.'" Wygant, slip op. at 5, quoting Fullilove v. Klutznick, 448 U.S. 448, 480 (1980).

1. Compelling interest. The parties agree that the government has a compelling interest in remedying past discrimination by a public employer. The DC found a pattern of racial discrimination in hiring and promotion, and there is overwhelming evidence to support those findings. In this respect the case is unlike Wygant, slip op. at 8-10, and similar to Local 28 of the Sheet Metal Workers' International Association v. EEOC (July 2, 1986). In Sheet Metal Workers, you wrote:

The finding by the District Court and the Court of Appeals that petitioners have engaged in egregious violations of Title VII establishes, without doubt, a compelling governmental interest sufficient to justify the imposition of a racially classified remedy. It would be difficult to find defendants more determined to discriminate against minorities. My inquiry, therefore, focuses on whether the District Court's remedy is 'narrowly tailored' to the goal of eradicating the discrimination engaged in by petitioners.'

Slip op. at 3 (citation omitted). To be sure, the 50 percent quota is a court-ordered remedy rather than a voluntary program of affirmative action. Call, however, held that the quota is within the terms of the consent decrees, and the Court declined to grant cert. on this issue. As in Sheet Metal Workers, moreover, the Department's appalling record of obstructionism raises a second compelling interest, "the societal interest in compliance with the judgments of federal courts." Slip op. at 3. I thus have no difficulty concluding that the order is supported by a compelling government interest.
2. Narrowly-tailored remedy. In evaluating the 29 percent non-white membership goal in Sheet Metal Workers, and the 10 percent minority business set-aside in Fullilove, you considered five factors: the efficacy of alternative remedies; the planned duration of the remedy; the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population; the availability of waiver provisions if the hiring plan could not be met; and the effect of the remedy upon innocent third parties.

In the analysis that follows, it seemed most useful to break the DC's order into two parts: (1) the one-time order to hire 15 corporals; and (2) the "continuing" order to hire one black for one white until acceptable promotion procedures are put in place.

a. alternative remedies. As to the one-time order, the Department concedes that it had an "immediate" need for at least fifteen new corporals. The Department's record of inactivity strongly suggests that no remedy short of a direct order to make some promotions would have resolved the short-term crisis. Indeed, the United States agreed "that the consent decrees should be enforced by ordering some promotions." SG brt. 9.

The availability of alternative remedies in the longer term is somewhat more problematic. As in Sheet Metal Workers, the DC had the parties before it for a considerable time, and was in the best position to judge whether an alternative remedy, such as a simple injunction, would have been effective. The DC, unlike the DC in Sheet Metal Workers, did not resort to contempt sanctions. In light of the Department's record of intransigence,
however, contempt sanctions may not have worked. The SG argues that the DC should have appointed a trustee to manage trooper promotions, or awarded competitive seniority to blacks once they were promoted. But the first remedy would have been highly intrusive, and the second would not have addressed the Department's inexcusable delay, the root of the problem. I am inclined to think that "the District Court may have been powerless to provide an effective remedy" short of some form of promotion goal.

b. **planned duration.** The one-time promotion order was an immediate response to an immediate crisis. The quota was to remain in effect only until the Department adopted promotion procedures that did not have an adverse impact on blacks, or until the percentage of corporals reached about 25 percent. Like the goal in *Sheet Metal Workers*, therefore, the quota was of limited duration.

c. **relationship to relevant population.** The ultimate 25 percent "incumbency" goal is based on the percentage of blacks in the general population in Alabama. No one suggests that this goal is inappropriate. The debate is over the rate at which the Department should approach the 25 percent goal. I have found it difficult to consider this question within the framework of whether the remedy is "narrowly tailored." My best effort follows.

It seems clear that extremely low or extremely high rates of promotion would be unacceptable. For example, if fewer than 25 percent of the new corporals were black, the total percentage
of black corporals never would reach 25 percent. At the other extreme, requiring all new corporals to be black would reach the 25 percent goal quickly, but at great cost to innocent white troopers. (An even more extreme "remedy," of course, would be to demote or lay off some white corporals and replace them with black troopers.) Between these extremes, however, I see no obvious criterion for determining whether a particular promotion ratio is constitutional.

The SG argues that the DC should have adopted the Department's plan to promote 11 whites and 4 blacks, rather than requiring that half of the new corporals be blacks. There is a trade-off between the two plans: the 11-4 plan takes longer to remedy the harm, but causes more harm to whites, while the 8-8 plan remedies the harm to blacks in less time, but at greater cost to whites. Under the Department's plan, 26 percent of the new corporals would have been black. If the Department continued promoting blacks at this rate, it would not achieve the overall 25 percent goal until all the current corporals were promoted or retired. The Department's proposal thus is near the "low end" of the range of effective plans. In this sense, the 11-4 promotion order is more, "narrowly tailored" than an 8-8 promotion order. The SG seems to argue that the Constitution requires the DC to choose the 11-4 plan for this reason. I think this line of reasoning proves too much. Any affirmative action plan imposes greater costs on whites than no affirmative action plan at all.

To be sure, some blacks may not be able to escape the present effects of past discrimination without some affirmative action on
the part of government or private employers. Yet, in the long run, most of the effects of past discrimination are likely to disappear. The SG's argument, if accepted, would undermine the constitutionality of all affirmative action plans. The better approach, it seems to me, is to balance the costs to whites of a faster remedy against the costs to blacks of a slower one. The Court seemed to approve this type of approach in Sheet Metal Workers, where the union had a 29.23 percent minority membership goal but was voluntarily inducting new minority members at a 45 percent rate. (In Sheet Metal Workers, the CA set aside as unnecessary a mandatory 50 percent induction quota. In this case, however, the Department's only "voluntary" plan, the 11-4 plan, would have taken a much longer time to remedy the past discrimination.)

d. flexibility. The order to fill the 15 immediate vacancies with at least 8 blacks is inflexible of necessity. The vacancies had to be filled at once, either with blacks or whites. Thus, the distinction between a goal and a quota breaks down when the court is required to order a fixed number of promotions immediately.

The inflexibility of the "continuing" order is a much more serious problem. The DC did not provide for waiver of the promotion quota. Indeed, its choice of the word "quota" rather than "goal" indicates an absence of flexibility. The DC's order is not completely inflexible. First, the one-to-one ratio applies only if "qualified" blacks are available for promotion. Second, the quota remains in effect only until the Department
adopts acceptable promotion procedures, or until the percentage of troopers of a particular rank reaches about 25 percent. Although the DC's order thus has some flexibility, I have concluded, tentatively, that it is not flexible enough. If the Department changes its ways, and undertakes good faith efforts to adopt procedures that do not have an adverse effect on blacks, it is still possible that the procedures will be found wanting. If this situation should occur, reimposing the one-for-one quota without regard to the particular circumstances would be quite inflexible.

e. effect on innocent third parties. Denial or deferral of a promotion generally causes less harm to innocent employees than being laid off. At least the employee still has a job, and a chance of being promoted at a later date. The DC's order does not require that any whites be demoted or laid off. It also permits some whites to be promoted immediately. On the other hand, denial of a promotion probably causes more harm than to whites than not being hired in the first place. In this case, however, it is not obvious that any of the white applicants has a reasonable expectation of promotion to corporal. Apparently promotions had never been made exclusively on the basis of seniority, so no one reasonably counted on promotion simply on the basis of years of service. Those who did well on the written examination knew that they would be entitled to a promotion only if the procedure did not have an adverse effect on blacks. Therefore, I would conclude that the effects on innocent third parties are relatively small and diffuse.
III. CONCLUSION

Subject to additional enlightenment from the oral argument, I recommend that you dispose of this case on grounds of mootness and ripeness. If it is necessary to reach the merits, I recommend that you affirm the one-time promotion order, but vacate the "continuing" promotion quota on the ground that it is too inflexible.
MEMORANDUM

To: Justice Powell
From: Leslie

October 31, 1986

No. 85-1129, Johnson v. Transportation Agency

You asked for a supplemental memorandum suggesting a standard of review under the Equal Protection Clause for the affirmative action plan at issue that would be consistent with your previous writings in Bakke, Fullilove, and Wygant.

In Wygant, you stated that the test for examining a race-based affirmative action plan has two prongs. First, any racial classification must be justified by a compelling governmental interest. Second, the means chosen by the State to effectuate its purpose must be narrowly tailored to achievement of that goal.
The first important point is that the case at issue involved sex, not race, discrimination. In Wygant, you stated 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," 106 S. Ct. at 1846, and you cited Mississippi University for Women v. Hogan, 458 U.S. 718, 724 n. 9 (1982). The standard articulated in Hogan for sex-based classifications under the Equal Protection Clause is that "the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification." 458 U.S. at 724 (citing Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981); Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 273 (1979)). "The burden is met only by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" 458 U.S. at 724 (citing Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980)). This lesser scrutiny for sex-based classifications is consistent with your opinion in Bakke, 438 U.S. at 303 ("[T]he Court has never viewed such classification as inherently suspect or as comparable to racial or ethnic classifications for the purpose of equal protection analysis.").

Admittedly, applying the standard that has been articulated as to sex-based classifications to affirmative action plans will have the anomalous result that a State will find it more
difficult to justify a race-based affirmative action plan than to justify a sex-based plan. The anomaly is that the stricter scrutiny standard evolved for race because of the perception that individuals suffered greater discrimination because of race than because of sex. It then might be argued that the State should have greater latitude to remedy the greater past discrimination. The anomaly is lessened, however, if the standards of scrutiny are viewed in terms of classifications. This Court has articulated a strong constitutional policy of achieving a society that does not employ racial classifications. The constitutional policy regarding sex-based classifications is less strong. Viewed this way, it makes sense for the Court to treat all racial classifications and all sex-based classifications consistently. Moreover, it is unlikely in practice that the difference in semantics will lead to different evaluations of affirmative action plans based on the type of classification. The difference between "exceeding persuasive" and "compelling", and between "substantially related" and "narrowly tailored", does not appear substantial.

In sum, to justify a sex-based affirmative action plan, a State must show that it has an "exceedingly persuasive" governmental objective, and that the means employed are "substantially related" to the achievement of the objective. Once the slightly different standard of scrutiny is articulated, then the standards in the race-based affirmative action cases are relevant to determine what constitutes a permissible governmental objective and what means are permissible to achieve that objective.
The governmental objective must be remedial and must be directly at past discrimination by the governmental entity. A purpose to remedy the effects of general societal discrimination is not sufficient. The primary unresolved question is what type of evidence a governmental entity must have to justify an affirmative action plan. You stated in Bakke and Fullilove that findings of past discrimination are required. Bakke, 438 U.S. at 307 ("We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional violations."); Fullilove, 448 U.S. at 498 ("[T]he governmental body must make findings that demonstrate the existence of illegal discrimination."). It appears in Wygant that a determination by a trial court that the state employer "had a strong basis in evidence for its conclusion that remedial action was necessary" is sufficient to meet the "findings" requirement. That is, the state employer itself need not make explicit findings that it had engaged in prior illegal discrimination. Justices Marshall, Brennan, and Blackmun in dissent read this to be the meaning of the Court opinion in Wygant, as does Justice O'Connor in her concurrence. 106 S. Ct. at 1853 (O'Connor, J., concurring) ("The remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required.").
Assuming that contemporaneous findings are not required, the next question is what type of evidence provides an employer with a "strong basis in evidence" or a "firm basis for believing" that remedial action is required. Under Equal Protection principles, statistics should be sufficient if they can lead to an inference of prior discrimination. Gross underrepresentation of a particular class in the work force should be enough. Other evidence of prior exclusion from the work force could support the statistics where the statistics alone might not lead to an inference of discrimination. Any statistics should be "meaningful" in that they represent a correlation between the population in the work force and the qualified working population of the relevant area.

Once the "exceedingly persuasive" justification of prior discrimination in the work force found, the next question is whether the means are "substantially related" to the remedial objective. In Wygant, you found that layoffs could never be considered narrowly tailored to meet a remedial objective. Presumably they also can never be "substantially related" to a remedial objective. In determining what other means can be "substantially related" to as remedial objective, the standards articulated in Fullilove regarding the scope of a race-conscious affirmative action plan are instructive. The relevant considerations are: (1) the efficacy of alternative remedies; (2) the planned duration of the remedy; (3) the relationship between the percentage of minority workers to be benefited and the percentage of minority group members in the relevant population or work force; and
(4) the availability of waiver provisions if the plan's objectives could not be met. 448 U.S. at 510. A fifth consideration articulated in Wygant is the relative burden on nonminority employees. The last two considerations can incorporate the principle that "goals" are permissible because they allow for variance to ameliorate the potentially harsh impact on innocent nonminorities in certain circumstances.

Applying the above considerations depends on the facts of the case. In this case, the affirmative action plan appears to be justified by a persuasive remedial objective. Its means also appear substantially related to the objectives. First, there do not appear to be alternatives that could meet the remedial need in a reasonable time frame. Second, the plan appears to be temporary and intended only to remedy past imbalances, not maintain a work force balance. Third, the goals set appear reasonable in light of the number of women in the work force and the population. Fourth, the plan employs "goals" as opposed to "quotas." Thus, all employees can compete for every available slot. Finally, the burden on nonminorities does not appear severe. Promotion goals, at least where promotions are based on merit, appear to be like hiring goals where their effect can be diffused among a wide range of workers.

As the above standards indicate, the inquiry under the Equal Protection Clause is not that much different from the Title VII standards for affirmative action plans articulated in Weber. The only real difference appears to be in the "fit" required between the ends and the means. Under Title VII, Congress has ex-
pressed a policy favoring voluntary employer action. Consequently, the Court may accord employers greater latitude in choosing the means to meet a remedial purpose whereas with public employers the Constitution requires rigorous scrutiny despite the statutory preference.