No. 85-999

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

PHILLIP PARADISE, JR., ET AL.

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

REPLY BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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It is not hard to see why respondents and their amici should devote so many words and such lofty rhetoric to questions of law not properly before this Court and to questions of fact not raised by the record below. Respondents and amici have much to say about the propriety as a general and abstract matter of numerical race-conscious relief, about the desirability of having black officers in the upper ranks of a police force to satisfy "operational needs," and about the lamentable role of the Alabama State Troopers in the civil rights struggles of the sixties. But respondents and amici have remarkably little to say about the precise and narrow issue on which this Court granted certiorari: whether in the particular context of this case—a context that included an alternative proportional promotion schedule offered by the defendants and acquiesced in by the United States—the district court's order of a one-for-one quota was sufficiently "narrowly tailored" to satisfy the demands of strict scrutiny under the Equal Protection Clause.

1. Before all it is imperative to keep in sight the fact that the district court ordered the one-for-one promotion quota in the face of an offer by the Department of Public Safety to effect the next batch of promotions by promoting four blacks and eleven whites. This offer was made in response to the district court's order—the order that furnished the occasion for this phase of the litigation—that the Department submit "a plan to promote to corporal, from qualified candidates, at least 15 persons in a manner that will not have an adverse racial impact" (J.A. 123). The district court not only rejected the Department's offer, but stated that, had the moving plaintiffs argued "that all 15 of the new corporals should be black," it would have been inclined to grant that request too (Pet. App. 61a n.1). Now on another day in another case there may be occasion to inquire whether a promotion schedule like that offered by the Department is necessary and appropriate to comply with a consent decree requiring that an employer maintain a promotion system that "will have little or no adverse impact upon blacks" (J.A. 40). But in the instant case the question is not whether resort to race-conscious relief is permissible as a general matter; the consent decrees, whose validity is unquestioned here, by their terms "mandated race-conscious promotion procedures" (Resp. Br. 22). The district court was thus confronted with *alternative* race-conscious promotion proposals, and the question in this case is whether the one that it adopted was "narrowly tailored" within the meaning of this Court's decisions.

When all the smoke generated by our opponents' rhetoric clears, one is surprised to conclude that they seem in large measure to agree with our basic position. Respondents effectively concede that the one-for-one quota should be tested under "strict scrutiny" (Br. 17-18); they seem to agree that the quota cannot be defended as a mere effort to promote "racial balance" (*id.* at 25); and they

appear to concede that the quota's legitimacy must be gauged by analyzing it as a measure designed to "enforc[e] the Department's consent decree commitments" (*id.* at 18, 20, 25, 26). Against this backdrop of consensus, our contention is a simple one—that the district court's imposition of a one-for-one quota was not an appropriate method (indeed, was scarcely even a rational method) of enforcing the Department's consent decree commitments, and hence it served no legitimate function; when compared with the Department's own proposal, the one-for-one quota thus stands revealed as a harsh and ill-considered gesture of impatience rather than a remedy carefully tailored to avoid unnecessarily trammelling the rights of innocent white candidates.

One might say that respondents in a sense agree even with this latter contention of ours because they seem to concede that the one-for-one quota imposed at the time of February 1984 promotions had no intrinsic appropriateness. Respondents seek to justify that quota principally on the grounds that it was "temporary" and "conditional" (Br. 27). So one is moved to ask: temporary until *when,* and conditional upon *what*? And the astonishing answer that comes from those who oppose us is that the time is July 27, 1984, and that the promotions carried out on that date were quite sufficient to satisfy the condition. But that set of promotions, which advanced three blacks and ten whites to the rank of corporal (Pet. App. 47a; J.A. 160, 163-164), was no more favorable to blacks—indeed, it was marginally less favorable to blacks—than the four-for-eleven promotion schedule originally offered by the Department, acquiesced in by the United States, and rejected by the district court in favor of the one-for-one quota that we challenge today. Respondents thus defend the quota, not intrinsically, but as a device to get the Department to do what it had already declared itself ready and willing to do.

2. Respondents seek to extricate themselves from this dilemma by raising the spectre of the Department's "history of recalcitrance" (Br. 13) and "history of obstructionism" (*id.* at 33), asserting that extreme measures were needed to overcome such resistance. We are quick to acknowledge that the Department's history—including some events long past—lends surface appeal to this argumentative tack. The Alabama Department of Public Safety unquestionably behaved shamefully during the civil rights struggles of the sixties; it was properly found guilty of racial discrimination in 1972; and it was properly reprimanded for foot-dragging in remedying that discrimination in 1975. But the propriety of the one-for-one promotion quota must be assessed as of the date on which it was imposed, and we do not think that the Department in December 1983 could fairly be charged with recalcitrance or with operating what amicus calls a "regime of racism" (Lawyers' Comm. Amicus Br. 7, 12).

As of December 1983, the Department had faithfully complied with the one-for-one hiring quota for eight years, to the point where the overall trooper force was "approximately 22%-23% black" (J.A. 62).[1] The Department signed a consent decree respecting promotions in 1979, and the record shows that during the ensuing four years the Department was continuously engaged in efforts to satisfy the dual requirements—concerning "validation" and "no adverse impact"—that the consent decree imposed. Consistently with the 1979 "Agreement of Counsel" (J.A. 46-48), the Department promoted four blacks and

[1] The Lawyers' Committee as amicus asserts (Br. 6) that "[t]he Department has continuously frustrated [the district court's 1972] order." While the Department concededly sought to frustrate the district court's 1972 order until 1975, there is absolutely no evidence in the record that it did so after 1975. Indeed, it appears that the percentage of blacks in the overall trooper force has now reached parity (25%), so that the specific objective of the district court's 1972 order has now been accomplished. See U.S. Br. 4 n.1.

six whites as an interim measure (J.A. 62) and proceeded to develop a new corporal's examination that was submitted for approval in April 1981 (Pet. App. 12a & n.8). The parties disagreed about the examination's validity, as the 1979 decree had contemplated that they might do (see *id.* at 69a), and the parties accordingly signed a second consent decree in 1981. As required by the latter decree, the Department administered and scored the corporal's examination, then analyzed its results to ascertain whether it had an "adverse impact." When Paradise and the United States protested that it did, the Department offered to rectify the imbalance by promoting blacks at a 20% rate commensurate with their availability (J.A. 61). When Paradise rejected this offer (*ibid.*) and moved for enforcement of the decrees, the Department promptly responded with a proposal to promote four blacks and eleven whites, a proposal that squarely satisfied the district court's order that it submit a plan to promote "at least 15 persons in a manner that will not have an adverse racial impact" (J.A. 123). And after the district court rejected *that* offer and instead imposed the one-for-one quota that we challenge, the Department promptly submitted procedures for promotions first to corporal and then to sergeant, procedures that the district court has provisionally approved. See U.S. Br. 12-13 & n.5.

This history does not smack of recalcitrance or obstructionism. The chief fault that may be laid at the Department's door after 1979 was its failure to submit, within the promised one-year period, a procedure for corporal promotions that complied with the 1979 decree. See U.S. Br. 5-6; Resp. Br. 22-23. But this tardiness cannot be thought to evidence "recalcitrance" given the difficulty of the task that the Department had undertaken. The 1979 decree required that the promotion procedure both be validated as job-related under the *Uniform Guidelines* and "in addition, * * * have little or no adverse impact on blacks"

(J.A. 40). As the district court itself recognized in declining to require validation of the Department's hiring procedures in 1972, the validation process alone can "take several years." *NAACP* v. *Allen,* 340 F. Supp. 703, 706 (M.D. Ala. 1972). And as the parties recognized below (Pet. App. 66a), the existence of an "adverse impact" cannot be determined until a promotion procedure, once developed, has actually been administered and its results scrutinized. The Department's pledge to accomplish this within a year might well be thought ambitious, and there is nothing in the record to suggest that its failure to meet that deadline evidenced bad faith.[2]

Whatever construction is put on the Department's failure to meet its deadline, respondents still do not explain why a one-for-one quota should have been imposed instead of the four-for-eleven schedule that the Department proffered. Respondents suggest by their rhetoric that

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[2] Respondents suggest (Br. 31 n.31) that recalcitrance may be inferred from the fact that, "[a]fter having failed for almost five years to develop a promotion procedure that conformed to its consent decree commitments, the Department developed what it claimed was an acceptable procedure within seven months" after the one-for-one quota was imposed. This suggestion borders on the disingenuous. In approving in July 1984 the Department's proposal to promote three blacks and ten whites, the district court concluded that that selection procedure satisfied *one* of the Department's consent decree commitments, *viz.*, the requirement that promotions be made with no adverse impact on blacks. Of course, the Department's earlier proposal to promote four blacks and eleven whites would have satisfied that requirement just as well. The district court, however, did *not* conclude that the July 1984 procedure satisfied the *second* of the Department's consent decree commitments, *viz.*, the requirement that the procedure be validated as job-related. To the contrary, the court directed the parties to "proceed with discovery on the issue whether the selection procedure * * * can be validated as job-related pursuant to *The Uniform Guidelines* * * * and thus shown to be in compliance with the 1979 and 1981 consent decrees" (J.A. 164). As noted in the text and in our opening brief (at 24-25 n.13), the validation process is extremely time-consuming.

the quota was needed to goad the Department into making the concededly satisfactory responses that it has made since the one-for-one quota entered the picture. But if that is respondents' argument, it falls of its own weight. The concededly satisfactory responses that the Department has since made consist of promoting three blacks and ten whites to corporal and promoting two blacks and eleven whites to sergeant. See U.S. Br. 12-13 & n.5. But those responses were no more consistent with the consent decree's no-adverse-impact standard than was the Department's original proposal to promote four blacks and eleven whites, an offer that the district court rejected. If the district court saw fit to suspend the one-for-one quota for the July and August promotions, it is hard to see why the quota had to be applied to the February promotions either—except perhaps as a symbolic gesture to show that the district court really meant business. We think that this Court's decisions requiring that race-conscious remedies be tested by "strict scrutiny" require something more than this.

3. Even if respondents had demonstrated a need for a remedy with *in terrorem* aspects, the one-for-one promotion quota would nonetheless be impermissible. In judging whether race-conscious remedies are "narrowly tailored," a court must consider "whether lawful alternative and less restrictive means could have been used." *Wygant* v. *Jackson Board of Education,* No. 84-1340 (May 19, 1986), slip op. 11 & n.6 (opinion of Powell, J.). In our opening brief (at 23-30), we emphasized that less restrictive alternatives were plainly available to the district court: it could have accepted the Department's offer to promote four blacks and eleven whites, solving the immediate need to promote 15 corporals "within the spirit of * * * the parties' consent decrees" (J.A. 59); and, if an *in terrorem* message were also judged necessary, it could have imposed fines or other sanctions (such as the appointment of an ad-

ministrator) pending the Department's development of an acceptable long-term promotion plan. We noted also that race-neutral devices could have been used to expedite the progress of blacks into the Department's upper ranks, such as modification of the Department's time-in-grade or promotion-from-within rules. See U.S. Br. 35 n.17.

Respondents and amici make no serious effort to demonstrate the inefficacy of these alternatives. Respondents assert that adoption of the Department's four-for-eleven proposal, standing alone, "would have done nothing to prevent continued recalcitrance," and that the imposition of sanctions, standing alone, "would not have allowed the Department to meet its immediate need of at least 15 new corporals" (Resp. Br. 32). This statement is quite beside the point, for we suggested that these remedies be invoked, not in isolation, but in conjunction. Respondents (Br. 32), joined by amicus Lawyers' Committee (Br. 8, 20, 25, 26-27), assert that appointment of an administrator or modification of time-in-grade rules would have been constitutionally objectionable because "more intrusive on the Department." But this Court's decisions mandating consideration of less intrusive alternatives to racial quotas plainly require a focus on alternatives that are less *racially* intrusive; "intrusiveness" must be judged by impact upon the disadvantaged racial group, not upon the employer as an institution. And we know of no support whatsoever for the idea that racial quotas are to be preferred to fines as a means of enforcing consent decrees, on the theory that "[m]oney sanctions would harm only [the state's] taxpayers" (Lawyers' Comm. Amicus Br. 25).[3]

[3] Other amici make equally inaccurate statements about the availability of alternative remedies. The City of Birmingham asserts that the district court in 1983 was "faced with the two unacceptable alternatives" of "an outright ban on * * * promotions, or continued use of a discriminatory selection procedure" (Br. 26 (original quotations omitted)). That statement is doubly flawed: none of the Department's selection procedures for promotion has ever been found to be

4. In our opening brief (at 30-35), anticipating a possible argument of respondents, we urged that the one-for-one quota could not be independently justified as a measure designed to achieve "racial balance." Although respondents and amici speak of the desirability of racial balance as a long-term societal goal, we do not understand them at the end of the day to rely on racial balance to justify the district court's application of the one-for-one promotion quota. As we have said, respondents praise the quota as strictly "temporary" an ! "conditional" and emphasize that it "has been used for only one set of promotions" (Br. 27). The irrelevancy of the quota's efficacy in achieving racial balance is thus effectively conceded, and we see no need to reiterate our arguments on this score.[4]

"discriminatory," and the district court in any event was faced with other lawful alternatives, most notably the Department's four-for-eleven proposal. The NAACP Legal Defense Fund asserts (Br. 11-12) that "[p]lainly the court below considered the availability and efficacy of other remedies." The court below plainly did not; at least it did not consider them in its written opinion.

[4] Although respondents seem to agree that the furthering of racial balance is not a compelling governmental interest, they suggest at one point that the "racial imbalances" in the Department's upper ranks are "obvious effects" of past discriminatory practices, and that the one-for-one quota is justifiable as an attempt to eliminate such alleged "effects" (Resp. Br. 25-26). Apart from the fact that the consent decrees themselves, in mandating the implementation of a proportional promotion procedure, already contained a mechanism to expedite blacks' progress into the Department's upper ranks, respondents' argument in any event is incorrect. As we discussed in our opening brief (at 30-35), this Court made clear last Term that race-conscious remedial efforts are appropriate only to remove continuing barriers, such as "informal mechanisms [that] obstruct equal employment opportunities" (*Sheet Metal Workers* v. *EEOC*, No. 84-1656 (July 2, 1986), slip op. 24 (plurality opinion)), rather than to bring about some ideal racial balance that would theoretically have existed if the employer had never discriminated at all. See, *e.g.*, *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 587-588 (1984) (O'Connor, J., concurring) ("[A] court may use its remedial powers * * * only to prevent

5. Whereas respondents seek to justify the one-for-one quota as a mode of "enforc[ing] the Department's consent decree commitments" (Br. 25), amici proffer various alternative rationales. The Lawyers' Committee urges that the quota satisfies strict scrutiny because it was designed to eradicate a supposed "institutional bias" against black candidates for promotion (Br. 7, 8, 12, 16, 18, 20, 24, 25). This argument aims to capitalize on this Court's observation in *Sheet Metal Workers* v. *EEOC,* No. 84-1656 (July 2, 1986), that "the lingering effects" of past discrimination may include "informal mechanisms [that] obstruct equal employment opportunities," such as an old-boy network that frustrates black applicants (slip op. 24, 51-52 (plurality opinion), cited in Lawyers' Comm. Amicus Br. 11). Amicus would have this Court believe that the district judge made findings of fact concerning the existence of "institutional bias," then carefully tailored a remedy in the form of a one-for-one quota specifically to address that problem. Indeed, amicus asserts that "[t]he district court's choice of this ratio * * * [was] based on its conclusion that institutional bias persists" (Br. 21) and "was based on its determination * * * that lesser measures could not adequately and expeditiously dismantle the Department's institutional bias" (*id.* at 8).

Amicus has made all of this up out of whole cloth. The words "institutional bias" recur at least twenty times in amicus's brief; one searches the record in vain for that phrase. The truth is that this argument was not raised by

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future violations and to compensate identified victims of unlawful discrimination.") (citations omitted). Cf. *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 28 (1971) ("When school authorities present a district court with a 'loaded game board,' affirmative action in the form of remedial altering of attendance zones is proper to achieve truly nondiscriminatory assignments."); *Bazemore* v. *Friday,* No. 85-93 (July 1, 1986), slip op. 2-3 (White, J., for the Court).

any party below and was neither relied on nor mentioned by either court below. The issue of promotions has been addressed exclusively in consent decrees and never at trial, and no evidence has even been submitted about the existence of "informal mechanisms" or "institutional bias" that might impede blacks' access to the upper ranks of the Department. The pattern of promotions since 1979 surely suggests no inference of "institutional bias," for each set of promotions to corporal since 1979 has been at least proportional as between blacks and whites. Because the district court was faced with no allegations of "institutional bias," and because the Department *a fortiori* has had no opportunity to rebut such allegations, it is not possible here to assess whether the elimination of "institutional bias" would be a compelling governmental interest. Nor is it possible, in the absence of any factual predicate, to determine whether a one-for-one promotion quota would qualify as "narrowly tailored" to address such an objective.

Much the same can be said of the argument, advanced by several amici, that the one-for-one quota satisfies strict scrutiny because it was designed to meet the "operational needs" of the Alabama Department of Public Safety, such as the need to assure good community relations. See Lawyers' Comm. Amicus Br. 18; New York Amicus Br. 3, 8-9; Detroit Amicus Br. 5-16; NAACP Legal Defense Fund Amicus Br. 33-35. This argument apparently seeks to capitalize on Justice Stevens' dissent in *Wygant,* where he suggested that the exigencies of law enforcement may sometimes rationalize race-conscious classification. "To take the most obvious example," Justice Stevens wrote, "if an undercover agent is needed to infiltrate a group suspected of ongoing criminal behavior—and if the members of the group are all of the same race—it would seem perfectly rational to employ an agent of that race rather than a member of a different racial class" (slip op. 2-3). "Similarly," Justice Stevens continued, "in a city with

a recent history of racial unrest, the superintendent of police might reasonably conclude that an integrated police force could develop a better relationship with the community and thereby do a more effective job of maintaining law and order" (*id.* at 3).

The short answer to amici's argument is that this "operational needs" theory, like the "institutional bias" theory, was not advanced by any party and was not addressed by either court below. Even if there were a factual predicate for this argument, which there is not, the argument could not be presented, least of all by an amicus, for the first time in this Court. There is thus no occasion for the Court here to consider if and when the satisfaction of a law enforcement agency's operational needs might be a "compelling governmental interest" justifying race-conscious classification, or whether a one-for-one promotion quota could ever qualify as "narrowly tailored" to achieve such a goal.[5]

6. Respondents and amici seek to minimize the impact of the one-for-one quota on white competitors for promotions, and to assimilate that burden to the more diffuse burden found by this Court to be acceptable on occasion in the case of race-conscious remedies at the hiring stage. Respondents are far from appreciating the real harm that this quota inflicts. One must consider both "the *effect*

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[5] We note that, if a race-conscious promotion scheme could ever be defended on "operational needs" grounds, that scheme would have to be adopted in the first instance by the law enforcement agency itself, as necessary in its view to the successful discharge of its responsibilities. Moreover, because the "operational needs" theory seeks to justify race-conscious relief on grounds other than remedying prior discrimination and its effects, we have serious doubts whether that theory would ever authorize the imposition of a race-conscious promotion quota. Cf. *Wygant*, slip op. 7 (plurality opinion) (rejecting role model theory since it "does not necessarily bear a relationship to the harm caused by prior discriminatory hiring practices"); *id.* at 5 (O'Connor, J., concurring) (same).

* * * and the *diffuseness* of the burden imposed on innocent nonminorities." *Sheet Metal Workers,* slip op. 6 n.3 (Powell, J., concurring (emphasis added)).

The one-for-one quota is objectionable in both respects. The effect of the quota is to frustrate innocent persons' legitimate promotional expectations; contrary to respondents' suggestion (Br. 9 & n.10, 41 & n.42), those expectations are not based on seniority alone, but are premised on the right to be considered for civil service promotion based on one's merit rather than on the color of one's skin. See *Regents of the University of California* v. *Bakke,* 438 U.S. 265, 319 n.53 (1978) (opinion of Powell, J.) ("Fairness in individual competition for opportunities, especially those provided by the State, is a widely cherished American ethic."). And the impact of the quota, while not focused uniquely upon a single individual, is plainly not diffused "among society generally," as may be true when hiring is involved (*Wygant,* slip op. 14-15 (opinion of Powell, J.)). The individuals passed over by operation of the instant quota were readily identifiable, particularly since the Department normally made promotions in rank order (subject to the "rule of three") based on competitive results.[6] And whereas an individual at the hiring stage typically has the option of applying for many jobs, a

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[6] Under the "rule of three," the Department considered "three ranking eligibles" for a promotion, "and, if more than one vacancy [was] to be filled, the name of one additional eligible for each additional vacancy." Ala. Code § 36-26-17 (1975), cited in Resp. Br. 12 n.13. Thus, if the Department sought to fill 15 vacancies, it would consider the 17 highest-ranked candidates. Although this of course means that a highly-ranked candidate under the Department's merit system has no absolute guarantee of promotion, that does not make the disruptive effect of the promotion quota "diffuse." The burden of a race-conscious layoff scheme would not be called "diffuse" merely because the 15 white workers to be fired were chosen by lot from a list of 17 names.

trooper-level employee hoping for promotion in the Alabama Department of Public Safety has only one job for which to apply, and that is the job of corporal.

7. Finally, respondents seem to suggest (Br. 27) that the district court was free to dispense with all measure of consideration and restraint because it was simply enforcing a consent decree to which the Department had previously agreed. To lend color to this suggestion, respondents stress the district court's closeness to the case and its familiarity with local conditions. Decisions to impose racial quotas, respondents say, should be reviewed under an abuse-of-discretion standard (Br. 28), like decisions about misjoinder of parties.

A district court's enforcement powers, alone or strengthened by a tincture of local expertise, cannot serve as a universal solvent, doing away with all constitutional limitations. A district court generally has wide latitude in declaring remedies; but when the remedy discriminates on the basis of race, the court's action must be closely examined. Strict scrutiny would not be strict if race-conscious remedies were scanned only to see if discretion had been abused.[7] Respondents rather cavalierly dismiss the rights of white applicants for promotion, suggesting that this case really comes down to numbers and that, when it comes to numbers, one can give or take a few

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[7] Respondents cite *Fullilove* v. *Klutznick,* 448 U.S. 448, 508 (1980) (Powell, J., concurring), for the proposition that a district court's remedial powers are somehow immune from the constitutional limitations that would otherwise apply. See Resp. Br. 27-28. But Justice Powell there cautioned that district courts must exercise their remedial powers "within appropriate constitutional or statutory limits" (*ibid.*). One of the basic constitutional limits on racial classifications is that they may not be used unless they are narrowly tailored to accomplish a compelling governmental purpose. This Court has never suggested that racially discriminatory devices are merely one of many options in a judge's remedial arsenal, to be employed or not as he sees fit in a simple exercise of discretion. If effective, non-racial alternatives are

without its much mattering. Whether a different array of numbers "would have served the purpose of the district court's one-for-one order equally well," respondents assert, "is not the question" before this Court (Br. 37). To the contrary, if strict security means what we believe it means, that emphatically *is* the question. Although respondents properly recognize that the dispute before this Court is a narrow one, they err in trivializing the importance of the constitutional principles at stake.

For these reasons and those set forth in our opening brief, the judgment of the court of appeals should be reversed with respect to the question presented.

Respectfully submitted.

CHARLES FRIED
Solicitor General

OCTOBER 1986

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available, racial discrimination is by definition unnecessary and thus under strict scrutiny constitutionally impermissible. Indeed, this Court reaffirmed just last Term that the same constitutional test applies to judicial action as to other state action. See *Sheet Metal Workers,* slip op. 50-51 (plurality opinion); *id.* at 4 (Powell, J., concurring). And the Chief Justice's opinion in *Fullilove* stressed that the "limited remedial powers of a federal court" are *more* constrained than those of Congress (448 U.S. at 480, 483).

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