No. 84-1340

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WENDY WYGANT, SUSAN LAMM, JOHN KRENKEL, KAREN SMITH, SUSAN DIEBOLD, DEBORAH BREZEZINSKI, CHERYL ZASKI, and MARY ODELL,

Petitioners,

v.

JACKSON BOARD OF EDUCATION, Jackson, Michigan, RICHARD SURBROOK, President, DON PENSON, ROBERT MOLES, MELVIN HARRIS, CECELIA FIERY, SADIE BARHAM, and ROBERT F. COLE,

Respondents.

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

BRIEF OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, AMICUS CURIAE, IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

In 1972, the Jackson, Michigan School Board decided that the racial composition of the faculty in each of its elementary and secondary schools ought to be the same as the racial composition of the student body as a whole. In order to achieve this goal, the School Board negotiated a collective bargaining agreement with the teachers' union under which minority applicants were to be preferred for new positions until the percentage of black teachers increased from its 1972 level of approximately 8% to the level of black student enrollment (approximately 16% in 1972). The agreement also provided that layoffs would be according to seniority, except that more senior white teachers would be laid off out of turn whenever that was necessary to prevent the percentage of minority teachers from declining.

In 1981, almost a decade after the adoption of this plan, ten white teachers were laid off out of turn so that less senior black teachers could be retained. The courts below held that these layoffs did not violate the plaintiff teachers' Fourteenth Amendment rights to equal protection.

The question presented is whether a school board may voluntarily adopt a racially segregated layoff system which abrogates the seniority rights of innocent employees when

a) the record is devoid of any evidence that there had been racial discrimination in hiring at any relevant time in the past; and therefore

b) the plan was not tailored to ensure that only actual victims of past discrimination in hiring were given preferential seniority rights.

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CONSENT OF THE PARTIES

Petitioners and Respondents have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The Anti-Defamation League of B'nai B'rith was organized in 1913 as a section of B'nai B'rith, the oldest civic service organization of American Jews, to advance good will and mutual understanding among Americans of all creeds and

races and to combat racial and religious prejudice in the United States. The Anti-Defamation League is vitally interested in protecting the civil rights of all persons, be they members of a minority or the majority, and in assuring that every individual receives equal treatment under the law regardless of his or her race or religion.

Among its many other activities directed to these ends, the Anti-Defamation League has in the past filed amicus briefs in this Court urging the unconstitutionality or illegality of racially discriminatory laws or practices in cases such as *Shelley* v. *Kraemer,* 334 U.S. 1 (1948); *Sweatt* v. *Painter,* 339 U.S. 629 (1950); *Brown* v. *Board of Education,* 347 U.S. 483 (1954); *Colorado Anti-Discrimination Commission* v. *Continental Air Lines, Inc.* 372 U.S. 714 (1963); *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409 (1968); *Sullivan* v. *Little Hunting Park,* 396 U.S. 229 (1969); *San Antonio Ind. School Dist.* v. *Rodriguez,* 411 U.S. 1 (1973); *De Funis* v. *Odegaard,* 416 U.S. 312 (1974); *Runyon* v. *McCrary,* 427 U.S. 160 (1976); *McDonald* v. *Santa Fe Trail Transport Co.,* 427 U.S. 273 (1976); *University of California Regents* v. *Bakke,* 438 U.S. 265 (1978); *County of Los Angeles* v. *Davis,* 440 U.S. 625 (1979); *United Steelworkers of America* v. *Weber,* 443 U.S. 193 (1979); *Fullilove* v. *Klutznick,* 448 U.S. 448 (1980); *Boston Police Patrolmen's Ass'n, Inc.* v. *Castro,* 461 U.S. 477 (1983); *Palmore* v. *Sidoti,* 104 S. Ct. 1879 (1984); and *Memphis Fire Department* v. *Stotts,* 104 S.Ct. 2576 (1984).

In all of these cases, the Anti-Defamation League has taken the position that each person has a constitutional right to be judged on his or her individual merits, rather than as part of a particular racial or ethnic group. A necessary corollary of this view is that employment preferences can never be accorded to all members of a particular minority on a class-wide basis even as a remedy for employment discrimination; instead, any such preferences must be carefully limited to those who have in fact been the victims of discrimination in employment.

The Anti-Defamation League shares the concern of the courts below that school boards be permitted to build racially diverse faculties responsive to the needs of all their students. Alternatives supported by the Anti-Defamation League to achieve this result include outreach programs to identifiable underrepresented minorities, special training and educational assistance for deprived applicants, and the consideration of merit-based alternatives to strict seniority systems. However, the Anti-Defamation League urges this Court to reject the concept adopted in the decision below that a school board is entitled to employ permanent quotas in order to create and maintain racial proportionality between teachers and students.

Such a concept is wholly contrary to the basic constitutional principles that all persons are entitled to be free from discrimination on grounds of race, religion, creed, sex or national origin, and that each person has a right to be judged on the basis of his or her own individual merit — not on the basis of the ethnic or racial group to which he or she happens to belong. It is these fundamental principles that form the basis for our argument for reversal of the decision below.

STATEMENT OF THE CASE

Jackson is a community of about 150,000 in south-central Michigan. The district judge found that prior to 1953, there were no black teachers employed by the Jackson public school system. *Wygant* v. *Jackson Board of Education,* 546 F. Supp. 1195, 1197 (E.D. Mich. 1982). By 1969, 15.2% of the student population and 3.9% of the faculty was black. At that point, the School Board began considering increasing its hiring of minority teachers. Over the next two years, its efforts to hire minorities increased the representation of minorities on the faculty to between 8.3% and 8.5%; during that time the black student population remained fairly constant. 546 F.Supp. at 1201. Although no evidence concerning work-force statistics

was introduced below, United States census figures show that in 1970 blacks comprised only 3.94% of the labor force in the Jackson, Michigan standard metropolitan statistical area, 2.01% of persons in that area with four years or more of college education and 2.64% of the area's elementary and secondary school teachers.[1]

In 1972, racial tensions led to violence at Jackson High School. A few months later, the School Board proposed a collective bargaining agreement under which racial preferences in hiring would be used to increase the percentage of black teachers in each of its schools to match the percentage of minority students in the Jackson school system as a whole. To protect these new minority hirees from layoffs, the Board proposed a change in the "last hired-first fired" provision of the collective bargaining agreement, requiring white teachers to be laid off out of turn when layoffs based on seniority would reduce the percentage of minority teachers. Despite the opposition of 96% of its members to such a provision, the teachers' union finally agreed to this proposal and the collective bargaining agreement was amended to provide as follows:

> "Article XII.B.1 In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, *except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff*. . . . Each teacher so affected will be called back in reverse order for positions for which he is

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[1] ~~See Appendix A (chart with census figures)~~. Census figures are a proper subject for judicial notice. See *Rose* v. *Mitchell,* 443 U.S. 545, 571 n. 11 (1979); *Castaneda* v. *Partida,* 430 U.S. 482, 486 n. 6 (1977); *Hernandez* v. *Texas,* 347 U.S. 475, 480 n. 12 (1954); *Goins* v. *Allgood,* 391 F.2d 692, 697 (5th Cir. 1968) ("the courts take judicial notice of the census figures"). See also *United Steelworkers of America* v. *Weber,* 443 U.S. 193, 198 n. 1, 204 n. 4 (1979) (taking judicial notice of exclusion of blacks from craft unions and of unemployment statistics).

certificated *maintaining the above minority balance.*" (Emphasis supplied.)

This provision remained in the collective bargaining agreement throughout the 1970's. Although it is not entirely clear what statistics are in the record, it appears that the percentage of minority teachers had increased to approximately 13.4% by the 1981-1982 school year. By 1982, the minority student population had increased to approximately 26%.[2] The 1980 census figures indicate that blacks were still a relatively small percentage of the relevant work force—4.2% of elementary and secondary school teachers—and an even smaller percentage of college educated workers (2.96%) and of the workforce as a whole (3.98%) in the Jackson area.

In 1981, ten white teachers were laid off out of turn solely because of their race under the terms of the collective bargaining agreement. They brought suit in the United States District Court for the Eastern District of Michigan challenging their layoffs as violative of the Constitution and the federal civil rights laws.

The district court granted the School Board's motion for summary judgment, dismissing plaintiffs' Title VII claims on the ground that they had failed to exhaust their administrative remedies and holding that the affirmative action plan did not violate the Equal Protection Clause of the Fourteenth Amendment.[3] In ruling on plaintiffs' equal protection claim, the court applied the standard set forth in *United Steelworkers of America* v. *Weber,* 443 U.S. 193 (1979), for judging the legality of privately negotiated affirmative action plans under Title VII, holding that the School Board need only demonstrate that its use of a racially segregated seniority system was " 'substantially

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[2] See Sixth Circuit Joint Appendix at 15; Table A to Petitioners' Brief.

[3] Plaintiffs also challenged their layoffs as violative of the Civil Rights Act of 1866, 42 U.S.C. § 1981; the district court held that the statute incorporated the constitutional standard and therefore dismissed that claim as well.

related' to the objectives of remedying past discrimination and correcting 'substantial' and 'chronic' underrepresentation" of minorities. *Id.* at 1202. In determining that there was "substantial and chronic underrepresentation" of minorities on the Jackson faculty, the court compared the percentage of minority teachers to the percentage of minority students. It did so on the ground that

> ". . . teaching is more than just a job. Teachers are role-models for their students. More specifically, minority teachers are role-models for minority students. This is vitally important because societal discrimination has often deprived minority children of other role models." 546 F. Supp. at 1201.

On appeal, the United States Court of Appeals for the Sixth Circuit affirmed, reasoning that the discriminatory layoff policy was "a voluntary affirmative action plan designed to remedy past obvious race discrimination and to meet the practical problems posed by racial tensions engendered by that history." *Wygant v. Jackson Board of Education,* 746 F.2d 1152, 1159 (6th Cir. 1984). One judge concurred, noting that under decisions of this Court and the Sixth Circuit itself, the student population was the wrong yardstick by which to measure discrimination in the hiring of teachers. Although acknowledging that the trial judge should have instead compared the percentage of black teachers to the percentage of blacks in the relevant labor force, the concurring judge voted to affirm because there was no evidence in the record that there was *not* a conspicuous disparity if this comparison were taken into account.

SUMMARY OF ARGUMENT

As set forth in the Statement of Interest, the Anti-Defamation League has always opposed the use of quotas and other types of class-wide racial preferences as remedies for past

discrimination because such remedies ignore the rights of individuals, treating them only as components of a particular racial or ethnic group. The race preferential practices instituted in the Jackson School System are particularly disturbing because they illustrate the inevitable abuses which arise from the group rights concepts; these practices bear no relation to legitimate affirmative action.

It is beyond question that the racial preference at issue here was not and was not intended to be a remedy for past discrimination in hiring. There was no evidence in the record below of any discrimination in the hiring of minority teachers at any relevant point in time. On the contrary, when the proper comparison is made between black teachers in the school system and blacks in the workforce, there was not even a statistical disparity in 1972 when the plan was adopted. Nor was there any disparity in 1981 when the plaintiffs were laid off. A fair inference from the opinions below is that the affirmative action plan was adopted not to remedy discrimination in hiring but rather to cool racial tensions in 1972.

The use of racial preferences cannot be justified by the fear of student unrest. Nor can preferences designed to match the percentage of black teachers to the percentage of black students be sustained on the ground that black children need black teachers as role models. At best, this is another form of the argument that each racial group has a right to some type of proportional representation in public employment. At worst, it is a rejection of the concept of equality in education that lies at the heart of this Court's desegregation cases.

The preference at issue here also cannot be justified on the theory that the Fourteenth Amendment protects only racial minorities or that the white teachers as a group waived their rights by agreeing to the collective bargaining agreement. The Equal Protection Clause protects all individuals, regardless of race, from state-sponsored racial discrimination. The rights conferred by the Amendment are personal and cannot be

waived by others simply because they belong to the same racial group.

Finally, even assuming that there had been some type of past discrimination in employment for the School Board to remedy in this case, the use of the class-wide preference at issue here cannot be justified. *Memphis Fire Department* v. *Stotts*, 104 S.Ct. 2576 (1984), held that a court could not order the use of a racially-segregated seniority system in order to protect gains in minority hiring achieved under a consent decree. We urge the Court to apply the same principle to "voluntary" affirmative action plans, allowing a public employer to extend super-seniority only to those employees that it has appropriately determined to have been victims of past employment discrimination.

ARGUMENT

I. THE JACKSON SCHOOL BOARD'S DISCRIMINATORY LAYOFF POLICY WAS NOT REMEDIAL AND HENCE VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The Jackson School Board's layoff policy discriminated against white teachers solely because of their race. It is beyond dispute that such "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States,* 320 U.S. 81, 100 (1943). As a result, this Court has declined to uphold racial preferences in employment absent a clear demonstration that they are appropriately tailored to remedy past discrimination in the workforce in question and do not unduly trammel the rights of individual members of the race disfavored by the classification.

Where the employer is a governmental entity and equal protection principles therefore apply, this Court has required the employer to bear a particularly heavy burden of justification. As this Court has held, "A core purpose of the Fourteenth Amendment was to do away with all governmentally-imposed discrimination based on race . . . . Such classifications are subject to the most exacting scrutiny; to pass constitutional muster they must be justified by a compelling governmental interest and must be necessary . . . to the accomplishment' of its legitimate purpose." *Palmore v. Sidoti,* 104 S.Ct. 1879, 1881-1882 (1984) (citations omitted and footnote omitted.)

It is not enough in such cases for the employer to show that its plan tended to have a remedial effect; the plan must also be based on findings by a competent body that discrimination did in fact exist. As Justice Powell stated in *University of California Regents v. Bakke,* 438 U.S. 265, 307 (1978), this Court has

"never approved a [government] 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 or statutory violations."[4]

Very few racial classifications can survive the scrutiny required by the Fourteenth Amendment. In fact, since approving the detention of Japanese-Americans during World War II, this Court has approved only one law which discriminated on the basis of race. In *Fullilove v. Klutznick,* 448 U.S. 448 (1980), this Court upheld a federal law that set aside 10% of the federal funds granted for local public works projects for minority contractors. This federal program, however, was based on congressional findings that past *intentional* discrimination against minorities had caused a "marked disparity in the percentage of public contracts awarded to minority business enterprises." *Id.* at 478. (Opinion of Burger, C. J.)[5]

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[4] See also *Valentine v. Smith,* 654 F.2d 503, 508 (8th Cir.), *cert. denied,* 454 U.S. 1124 (1981), where the court stated that:

> "Because the justification for race-conscious affirmative action is remedying the effects of past discrimination, a predicate for the remedy is that qualified persons make findings of past discrimination before the plan is implemented. *Absent findings of past discrimination, courts cannot ascertain that the purpose of the affirmative action program is legitimate.* Such findings enable courts to ensure that new forms of invidious discrimination are not approved in the guise of remedial affirmative action." (Emphasis supplied.)

[5] In his concurring opinion, Justice Powell agreed that "purposeful discrimination contributed significantly to the small percentage of federal contracting funds that minority business enterprises have received." *Id.* at 506. He concluded that "enactment of the set-aside is designed to serve the compelling governmental interest in redressing racial discrimination." *Id.* at 508.

A. The School Board's Racial Preference Was Not Designed To Eliminate A Conspicuous Racial Imbalance Caused By Past Intentional Discrimination.

The Jackson layoff policy stands in marked contrast to the affirmative action plan this Court approved in *Fullilove*. When the Jackson racial quota was adopted, apparently in response to student unrest, there were no findings by either the School Board or anyone else that past intentional discrimination against minorities had caused a manifest racial imbalance in the Jackson teaching staff. Although they clearly bore the burden of justification, the defendants also did not present evidence on this issue in their motion for summary judgment.[6]

Furthermore, there was no conspicuous racial imbalance on the faculty in any relevant year. The courts below concluded that there was "obvious race discrimination" in hiring because there was a significant disparity between the percentage of blacks on the Jackson teaching staff and the percentage of blacks in the Jackson student body. *Wygant v. Jackson Board of Education,* 746 F.2d 1152, 1159 (6th Cir. 1984). There is no reason, however, to infer discrimination in the hiring of teachers from a difference between the percentage of minorities on the faculty and minorities in the student population. Statistics are considered relevant, although not dispositive, in employment discrimination cases on the assumption articulated in *International Brotherhood of Teamsters* v. *United States,* 431 U.S.

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[6] As movants for summary judgment, the defendants bore the burden of showing the "absence of a genuine issue as to any material fact. . . ." *Adickes v. Kress & Co.,* 398 U.S. 144, 157 (1970). Thus, defendants' failure to tender employment statistics proving past discrimination required the denial of their motion even though plaintiffs also failed to provide the court with the appropriate statistics. *Id.* at 160 ("[W]here the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied *even if no opposing evidentiary matter is presented.*") (emphasis in original, citation omitted)

324, 340-341 n.20 (1977), that even-handed hiring and promotion will eventually produce a workforce that has approximately the same racial composition as the workforce at large. Because teachers are selected from the relevant local labor force, and not from the student population, it is to that population that any comparison must be drawn.

In *Hazelwood School District v. United States,* 433 U.S. 299 (1977), this Court specifically rejected an attempt to use the student population as a basis for comparison in an employment discrimination case, holding that the workforce was the only relevant indicator:

> "There can be no doubt . . . that the District Court's comparison of Hazelwood's teacher work force to its student population fundamentally misconceived the role of statistics in employment discrimination cases. The Court of Appeals was correct in the view that *a proper comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market.*" *Id.* at 308. (Emphasis supplied.)

See also *Oliver v. Kalamazoo Bd. of Educ.,* 706 F.2d 757, 762 (6th Cir. 1983), where the Sixth Circuit applied *Hazelwood* to reverse the very district court decision on which the district court in this case had relied as authority for the proposition that the student population could be used to measure discrimination.

In the instant case, according to United States Census figures, in 1970 the percentage of blacks in the "qualified public school teacher population in the relevant labor market" was between 2% and 3%. The percentage of blacks in the local labor force as a whole was a little less than 4% in 1970. In 1969, however, 3.9% of the total Jackson teaching staff was black; by 1972 the percentage of minorities on the Jackson teaching staff had increased to between 8.3% and 8.5%. These statistics do not evidence "obvious race discrimination" against blacks. If anything, they suggest the opposite. Thus, there was

no evidence of prior discrimination to justify the imposition of a "remedial" quota.[7]

Because there was no "conspicuous racial imbalance" on the Jackson faculty, there was no remedial basis for a racial preference under the analysis adopted in *Fullilove.* The same is true even if this Court were to follow the lower courts and apply the arguably more lenient standard set forth in *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979), in ruling on plaintiffs' claims under the Fourteenth Amendment.[8] In *Weber*

[7] Even if there had been discrimination prior to 1969, the adoption of the quota used in this case would be inappropriate. This Court has held that a remedy must be designed "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken v. Bradley,* 418 U.S. 717, 746 (1974). Given that the percentage of blacks in the relevant local labor force was somewhere between 2% and 4%, it is plain that, even if there had been findings of discrimination prior to 1969, the remedial quota of 15.9% far overshot the mark. See *Williams v. City of New Orleans,* 729 F.2d 1554, 1562 (5th Cir. 1984) (en banc) ("quota's target of 50% blacks in all [police] ranks was unsupported by the record . . ." where "even if hiring and promotions on the [New Orleans Police Department] had been conducted free of racial considerations, by 1980 blacks would have comprised only 40.7% of all sergeants, 39.4% of all lieutenants, 37.4% of all captains, and 30% of all majors.")

[8] This Court has discretion to resolve this case on the basis of the federal civil rights laws even though the statutory questions decided below under Title VII and § 1981 were not included in the petition for certiorari. See, *e.g., Capital Cities Cable, Inc. v. Crisp,* 104 S.Ct. 2694, 2699-700 (1984); *Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 255-57 (1981); *Peters v. Kiff,* 407 U.S. 493, 495 (1972); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313, 319-21 (1971); R. Stern & E. Gressman, Supreme Court Practice 458-61 (5th ed. 1978).

That discretion has been exercised in circumstances very similar to those presented here. For example, in *University of California Regents v. Bakke,* 438 U.S. 265 (1978), this Court decided a racial

(Footnote continued on following page.)

this Court held that a private employer subject to Title VII could voluntarily adopt an affirmative action plan that used racial classifications if the plan was "designed to eliminate conspicuous racial imbalance in traditionally segregated job categories." *Id.* at 209. Courts interpreting *Weber* have made it clear that under Title VII, as under the Fourteenth Amendment, the employer must first demonstrate the remedial nature of its plan. Thus, in *Setser v. Novack Inv. Co.*, 657 F.2d 962, 968 (8th Cir. 1981), the court noted that:

> "The first burden on the employer in a reverse discrimination suit is to produce some evidence that its affirmative action program was a response to a conspicuous racial imbalance in its work force and is remedial. Some indication that the employer has identified a racial imbalance in its work force is necessary *to ensure that new forms of invidious discrimination are not approved in the guise of remedial affirmative action.*" (Emphasis supplied.)

In this case, the School Board has utterly failed to meet its burden to establish the remedial nature of its racial classification.

B. The School Board's Racial Preference Cannot Be Upheld On The Basis Of Minority Students' Need for Minority Role Models.

The opinions below suggest that, even if there had not been past discrimination in the hiring of minority teachers, the School Board acted lawfully in laying off white teachers out of turn because it had another "remedial" goal: to ensure that

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(Footnote continued from preceding page.)

preference case on the basis of Title VI of the Civil Rights Act of 1964, even though the California Supreme Court "focused exclusively upon the validity of the special admissions program under the Equal Protection Clause," *id.* at 281, and "the parties neither briefed nor argued the applicability of Title VI of the Civil Rights Act of 1964. . . [until this Court] requested supplementary briefing on the statutory issue." *Id.* at 281.

disadvantaged black students had an appropriate number of black teachers to serve as "role models." As the district court put it, "teaching is more than just a job. Teachers are role-models for their students. More specifically, minority teachers are role-models for minority students." *Wygant v. Jackson Board of Education,* 546 F.Supp. 1195, 1201 (E.D. Mich. 1982). Therefore, in order to assure students racially compatible teachers, "the 'faculty ought to begin to approximate the percentage of minority students in the district.' " *Id.* at 1201.

It is beyond dispute that a school board may strive to create an integrated faculty that reflects, to a certain extent, the racial make-up of the community it serves. An integrated faculty is important not only for minority children, but also to give children of all races teachers of different racial and ethnic backgrounds they can look up to and admire. In this case, however, the School Board was not trying simply to create and preserve an integrated faculty. Rather, it was attempting to create and preserve a situation where the percentage of minority teachers would match the percentage of minority students.

It is difficult to imagine how respondents can demonstrate a compelling state interest in having the percentage of black teachers correspond exactly to the racial make-up of the student body. Certainly, black students do not have a right to have a black teacher.[9] On the contrary, this Court has held that students have an affirmative right to *non*-discriminatory selection of their teachers because "racial allocation of faculty denies [students] equality of educational opportunity. . . ." *Rogers v. Paul,* 382 U.S. 198, 200 (1965) (per curiam) (matching

[9] Under Title VII the courts below have made it clear that customer preference is no defense to a charge of racial discrimination: "it is clearly forbidden by Title VII, to refuse on racial grounds to hire someone because your customers or clientele do not like his race." *Rucker v. Higher Educational Aids Bd.,* 669 F.2d 1179, 1181 (7th Cir. 1982) (unlawful to discriminate against white female counselor in order to cater to the alleged preferences of black clientele for a counselor of the same race.)

students and teachers on the basis of race violates constitutional rights of students.)[10]

The theory that the racial makeup of a faculty should reflect the racial makeup of the student body is yet another example of the assumption in many of the quota cases that have come before this Court that each racial group has a right to its proportionate share of public jobs. As Justice Douglas pointed out in *DeFunis* v. *Odegaard,* this type of racial balance is simply not an acceptable goal:

> "The purpose of the University of Washington cannot be to produce black lawyers for blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be to produce good lawyers for Americans . . . ." 416 U.S. 312, 342 (Douglas, J., dissenting from dismissal of case on mootness grounds).

The district court's justification of the need for racial balance in the context of teachers and students is particularly disturbing, however. Despite the obviously benign intent of the role model theory, its basic assumption—that black students are better off being taught by black teachers—bears an uncomfortable resemblance to the logic of *Plessy* v. *Ferguson,* 163 U.S. 537, 544 (1896), that segregated classrooms were desirable from the point of view of blacks as well as whites. Taken to its

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[10] See also *Oliver* v. *Kalamazoo Board of Ed.,* 706 F.2d 757, 762-763 (6th Cir. 1983), where the court refused to sustain a court-ordered minority faculty quota based on approximate black student percentage, ruling that "[A]ll the remedy to which the students were entitled [was the] 'sustained good faith effort to recruit minority faculty members so as to remedy the effects of any past discriminatory practices' "; *Fort Bend Indep. School Dist. v. City of Stafford,* 651 F.2d 1133, 1137-1138, 1140 (5th Cir. 1981) (In determining whether a school has achieved "unitary" status, a court should not compare the racial composition of the school's teaching staff to the racial composition of the student body. The proper test is whether there has been "sustained good faith effort to recruit minority faculty members so as to remedy the effects of any past discrimina[tion]. . . .").

extreme, the role model theory could be used to justify the alignment of faculty along racial lines and the concentration of black students in particular classes for the purpose of ensuring appropriate role models.

It should also be noted that the role model theory is of doubtful validity as a matter of educational theory. The 1966 Coleman Report on Equality of Educational Opportunity found a positive correlation between minority student achievement and the teacher's verbal skills and level of experience. The Coleman Report also found that, even when controlling for such factors as teacher experience and teacher verbal skills, there was either no correlation or a slightly negative correlation between minority student achievement and the proportion of black teachers. *Id.* at 316-319.

These findings were reconfirmed some six years later by Professor Eric Hanushek of the University of Rochester in *Education and Race* (Heath 1972). Professor Hanushek found positive correlations between teacher verbal ability and minority student achievement and between the teacher's level of experience and minority student achievement. *Id.* at 78-88. Professor Hanushek also found a negative correlation between minority student achievement and "the percentage of students with a nonwhite teacher" in the previous year. *Id.* at 88.

In 1981 Professor Hanushek reviewed some 130 studies that followed up on the Coleman Report. See Hanushek, *Throwing Money at Schools,* 1 Journal of Policy Analysis and Management 19 (1981). He found that the "only reasonably consistent finding seems to be that 'smarter' teachers do better in terms of student achievement." *Id.* at 29.

This literature indicates that minority students perform better academically when their teachers are chosen on the basis of merit or seniority than they do when their teachers are chosen on the basis of racial compatibility. Thus, far from

vindicating the rights of minority students, "racial allocation of faculty denies them equality of educational opportunity." *Rogers v. Paul,* 382 U.S. 198, 200 (1965).[11]

The district court's role model theory, unsupported by the record and limitless in its implications, cannot justify departure from accepted principles of equal opportunity in education and employment. Teachers, like parents and step-parents, may be important role models for children, but the state has no legitimate business assigning role models on the basis of race. See *Palmore v. Sidoti,* 104 S.Ct. 1879 (1984) (state may not consider race of step-parent in deciding custody of step-child). See also *Loving v. Virginia,* 388 U.S. 1 (1967) (state may not discriminate against interracial marriages).

C. The School Board's Racial Preference Cannot Be Justified As Necessary To Forestall Racial Unrest.

The courts below also attempted to justify the racial preference at issue here as a legitimate way to meet "the practical problems posed by racial tensions. . . ." *Wygant v. Jackson Board of Education,* 746 F.2d 1152, 1159 (6th Cir. 1984). The desire to avoid racial unrest is an inadequate justification both on factual and legal grounds. As a matter of fact, racial violence in 1972 can hardly be used to justify racial discrimination a decade later. More importantly, this Court has clearly rejected the notion that racial discrimination may be justified by a desire to avoid racial unrest.

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[11] Professor James Coleman agreed when he told a Senate Committee in 1970:

> "I don't think it is a service to a child to have him subject to the same homogeneous environment that he has experienced throughout his early childhood, and that he experiences when he leaves school every day." (Hearings before the Select Committee on Equal Educational Opportunity of the United States Senate, 91st Congress 1970, p. 108.)

The reasoning of the courts below on this issue once again bears a disturbing resemblance to the logic employed by the Court in *Plessy v. Ferguson,* 163 U.S. 537 (1896). As in the instant case, the Court in *Plessy* reasoned that racial classifications in the classroom would avoid racial tension and thereby promote "the preservation of the public peace and good order." *Id.* at 550. In subsequent cases this Court has consistently repudiated arguments based on the fear and speculation that racial violence may occur unless a racial classification is imposed. See, *e.g., Buchanan v. Warley,* 245 U.S. 60 (1917), where this Court invalidated a Kentucky law forbidding blacks from buying homes in white neighborhoods:

> "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." *Id.* at 81.

See also *Watson v. City of Memphis,* 373 U.S. 526, 535, 537 (1963); *Wright v. Georgia,* 373 U.S. 284, 293 (1963).[12]

Similarly, plaintiffs in this case cannot lawfully be laid off from their positions in the Jackson public school system on account of their race in order to avoid the speculative possibility of racially motivated disorder by others. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti,* 104 S.Ct. 1879, 1882 (1984). "Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypotheti-

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[12] The only modern exception to this line of authority is *Lee* v. *Washington,* 390 U.S. 333 (1968), which condemned racial segregation in prisons but implicitly authorized temporary racial classifications when necessary to prevent prison riots. Here, however, the temporary racial classifications have lasted for thirteen years beyond the last reported incident of unrest.

cal effects of private racial prejudice that they assume to be both widely and deeply held." *Palmer v. Thompson,* 403 U.S. 217, 260-261 (1971) (White, J. dissenting)

II. THE RACIALLY SEGREGATED SENIORITY SYSTEM UNDULY TRAMMELED THE RIGHTS OF INNOCENT THIRD PARTIES.

In addition to being remedial, a voluntary affirmative action plan that employs racial classifications must also avoid unnecessarily burdening the rights of innocent parties. As Justice Powell stated in his concurring opinion in *Fullilove:*

> "A race-conscious remedy should not be approved without consideration of an additional crucial factor—the effect of the set-aside upon innocent third parties." 448 U.S. at 514.

In the cases in which this Court approved race-conscious remedial programs, it determined that any injury to white employees' expectations of future benefits was offset by the need to counteract prior pervasive discrimination. The "expectations" that were frustrated involved an ability to compete for certain benefits such as new jobs, promotions, future contracts and the like. Thus, in *Fullilove,* Congress had foreclosed white contractors from bidding on only 10% of new federal contracts worth $4 billion, with waiver provisions in the event that qualified minority contractors could not be found. In his concurring opinion, Justice Powell concluded that any "marginal unfairness to innocent nonminority contractors is not sufficiently significant—or sufficiently identifiable—to outweigh the compelling governmental interest in redressing the [purposeful] discrimination that affects minority contractors." 448 U.S. at 515.

Similarly, in *Weber,* white employees were foreclosed from applying for half of the openings in a new craft training program. Because the craft training program was new, it did "not involve an abrogation of pre-existing seniority rights." *Id.* at 215 (Blackmun, J. concurring). Furthermore, far from

requiring the "discharge of white workers and their replacement with new black hirees," the plan offered new opportunities to black as well as white workers. Under these circumstances and in light of its purpose to remedy a conspicuous racial imbalance in traditionally segregated job categories, this Court concluded that the plan did not "unnecessarily trammel the interests of the white employees." 443 U.S. at 208.

Defendants argue that in this case too there was no improper burden imposed on innocent third parties. They point out that, by the time this case was argued before the Court of Appeals, only one white teacher, Wendy Wygant, "remained unemployed as a result of" the discriminatory layoff policy. Respondents' Brief in Opposition to Certiorari at 6. Therefore, defendants assert, the discriminatory policy "has worked to protect a minority balance without doing harm to the white majority." *Id.* at 6. Defendants also assert that Wendy Wygant's right to be free from racial discrimination was waived by her fellow white employees when they agreed to the collective bargaining agreement. Defendants thus echo the district court's statement that "[i]t is difficult for the court to conceive how a plan which has been voluntarily adopted by members of the JEA can invidiously trammel the interests of white teachers, a majority of the JEA." *Wygant v. Jackson Board of Education,* 546 F.Supp. 1195, 1202 (E.D. Mich. 1982).

There are a number of flaws in defendants' theory of group waiver and group injury. First, it must be remembered that, when originally polled, "[n]inety-six (96) percent of the teachers expressed a preference for the straight seniority system and opposed a system that would freeze minority layoffs." *Id.* at 1197. The teachers' union accepted the policy only after an unsuccessful strike. *Id.* at 1198.[13] Thus, the decision to sacrifice the rights of the most junior white teachers can hardly be

[13] It is unclear from the record below whether the seniority provision was an issue in the strike.

described as a wholly voluntary act on the part of the teachers as a group.

Second, the district court was wrong to regard "white teachers" as if they were a single entity capable of suffering injury or waiving their rights. Wendy Wygant is the plaintiff here; not "white teachers" or the "white race." The question for decision is whether Wendy Wygant (and the other individual plaintiffs) were discriminated against on the basis of their race in violation of federal law, not whether whites as a group were disadvantaged. The federal civil rights laws, like the Constitution, protect individuals, not racial groups. As the Court held in *Shelley* v. *Kraemer,* 334 U.S. 1, 22 (1948), "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." See also *McCabe* v. *A., T. & S.F. Ry. Co.,* 235 U.S. 151, 161-162 (1914); *Los Angeles Dept. of Water & Power* v. *Manhart,* 435 U.S. 702, 708 (1978).

It would be a perilous course indeed for this Court to adopt defendants' logic and treat American citizens as if they were simply components of a racial majority that is not entitled to judicial protection because it is capable of protecting itself. This Court has always held that the civil rights laws apply to people of all races, protecting each individual's right to fair treatment. See *McDonald* v. *Santa Fe Trail Transport Co.,* 427 U.S. 273 (1976). Telling individuals that they have no personal rights and that to protect themselves from discrimination they must rely upon their political or economic power as a racial majority can only encourage them to ignore legal remedies and rely on the exercise of the group's power instead. The end result would necessarily be inimical to the goals of equal protection and individual liberty embodied in the Fourteenth Amendment.

When viewed from the perspective of the individual white teacher laid off out of turn, there is a drastic effect on the rights of that teacher. The burdening of individual white teachers on

account of their race was clearly not necessary to protect the rights of any individual who had been the victim of employment discrimination by the Jackson School Board. Even if such discrimination had existed prior to 1969, there is no evidence that any of the junior black teachers protected by the preference in 1981 were the victims of that discrimination. Instead, it is clear that the preference was created and drastic burdens imposed on innocent white teachers in order to maintain a certain type of racial balance.

Imposing burdens on public employees solely because of their race for the purpose of protecting one racial group's supposed share of public jobs is simply not permissible under our Constitution and civil rights laws.[14] Nor is it in the public interest. For even if the intent is benign, the allocation of benefits and burdens on a quota basis is inevitably destructive, postponing rather than hastening the day "when no governmental decision will be based upon immutable characteristics of pigmentation or origin." *Fullilove* v. *Klutznick, supra,* 448 U.S. at 516 (Opinion of Powell, J.).

III. THE REMEDY WAS NOT APPROPRIATELY TAILORED TO SERVE A REMEDIAL PURPOSE.

Where a court-ordered remedy is at issue, this Court has always required that the decree be narrowly tailored to fit "the nature and extent of the violation constitutionally" proved, *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406, 420

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[14] Title VII clearly prohibits the use of racially segregated seniority systems to maintain racial balance. As Senators Clark and Case, the bipartisan captains of Title VII, explained in their interpretative memorandum, under Title VII, even an employer who has discriminated before the effective date of the Act and as a result has an all-white working force "would not be obliged—*or indeed, permitted*—to fire whites in order to hire Negroes, . . . *or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.*" *Teamsters v. United States,* 431 U.S. 324, 350-351 (1977), quoting from 110 Cong. Rec. 7213 (1964) (emphasis added).

(1977); see also *General Building Contractors Ass'n, Inc.* v. *Pennsylvania,* 458 U.S. 375 (1982). In *Fullilove* and *Weber,* however, the Court took the position that where a voluntary affirmative action plan was involved, a certain degree of imprecision in the means of remedying past discrimination could be tolerated. Nevertheless, even in the context of a voluntary plan, there must be a reasonable relationship between the plan and "the objective of remedying the present effects of past discrimination." *Id.* at 480. (Opinion of Burger, C.J.) In *Fullilove,* the Court found that the necessary connection existed because "[t]he percentage chosen for the set-aside is within the scope of congressional discretion. . . . The choice of a 10% set-aside . . . falls roughly halfway between the present percentage of minority contractors and the percentage of minority group members in the Nation." *Id.* at 513-514. (Opinion of Powell, J.) Moreover, the Court emphasized the temporary nature of the program: "As soon as the PWEA [public works] program concludes, this set-aside program ends. The temporary nature of this remedy ensures that a race-conscious program will not last longer than the discriminatory effects it is designed to eliminate." *Id.* at 513. (Opinion of Powell, J.)

Similarly, in *Weber,* the Court noted that the plan was "a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance. Preferential selection of craft trainees at the Gramercy plant will end as soon as the percentage of black skilled craftworkers in the Gramercy plant approximates the percentage of blacks in the local labor force." *Id.* at 208-209.

In this case, the racial preference is neither temporary nor tailored with an eye toward remedying the effects of past discrimination. Instead, despite the fact that the percentage of black teachers in the school already far exceeded the percentage of blacks in the local labor force, the School Board decreed that the percentage of blacks should be increased to

15.9% in every school building and that to reach this quota, not only should blacks be preferred for new vacancies, but more senior white teachers should be laid off out of turn in times of cutback. In light of the fact that it was incorporated into every collective bargaining agreement from 1972 on, one can only assume that this "remedy" was intended to become a permanent feature of the Jackson school system.

A permanent quota cannot be justified as "remedial." As this Court explained in *Pasadena City Bd. of Education v. Spangler,* 427 U.S. 424, 436 (1976), when it invalidated a similar attempt to maintain a permanent quota:

> "[T]he District Court was not entitled to require the [School District] to rearrange its attendance zones each year so as to ensure that the racial mix desired by the court was maintained in perpetuity."

See also *id.* at 444 n. 1 (Marshall, J. dissenting, disapproving permanent racial quota). So too in this case, the Jackson School Board was not entitled to impose a permanent quota disadvantaging white teachers in perpetuity under the guise of remedying a prior "disparity."

The "remedy" in this case was also not reasonably tailored to cure the effects of past discrimination. In *Memphis Fire Department* v. *Stotts,* 104 S.Ct. 2576 (1984), this Court struck down a racially segregated seniority system imposed by court order on the ground that under Title VII a court may award super-seniority only to the identifiable victims of discrimination. *Stotts* left open the question whether the City of Memphis, as a public employer, could have voluntarily instituted a racially segregated seniority system for the purpose of maintaining gains achieved through an affirmative action plan.

Although *Stotts* is thus not controlling here, it does suggest what effects of past discrimination are remediable. While a court may accord a public employer a certain amount of leeway, under the *Stotts* rationale there must at least be

evidence that the employer in question made a reasonable attempt to identify the victims of discrimination and to give only those victims special seniority rights. In this case, there was no attempt whatsoever to connect the remedy to any arguable discrimination in hiring. Furthermore, as noted above, it is highly unlikely that the racial preference that was invoked to lay off the plaintiffs out of turn in 1981 actually assisted any person who had been a victim of discrimination prior to 1969.

Because it has no discernible connection to any wrong committed by the School Board, the remedy in this case must be overturned. As Judge Higginbotham noted in his concurring opinion in *Williams v. City of New Orleans,* 729 F.2d 1554, 1569 (5th Cir. 1984) (en banc), the goal of equal opportunity is not served by remedies that simply create new wrongs:

> "When we lose sight of the need to tie remedy to wrong, we confound the very principles we are striving to vindicate, because we impose burdens and confer benefits along racial lines with no assurance that we are thereby undoing the injustices of the past; rather . . . we perpetrate new injustices in derogation of the right of those benefited and burdened alike to be treated as individuals."

CONCLUSION

Whatever the limits of legitimate affirmative action, it is plain that the Jackson quota plan and discriminatory layoff policy exceed the constitutional and legal boundaries set by this Court. Indeed, the scheme challenged here is not affirmative action at all. Rather, it is a naked racial preference designed to create and maintain a faculty whose racial make-up exactly reflects the racial composition of the student body. This Court has ruled it impermissible to use race as the determining factor in hiring, placement, or retention decisions. See *University of California Regents* v. *Bakke,* 438 U.S. 265 (1978); *Memphis Fire Department* v. *Stotts,* 104 S.Ct. 2576 (1984). This is true whether the intent is to discriminate against minorities or to discriminate in their favor.

To strike down this scheme would still leave ample room for appropriate remedial efforts. But to uphold it would open a Pandora's Box of racial preferences, under which individual rights would disappear in favor of theoretical "fairness" to racial or ethnic groups.

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

Respectfully submitted,

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