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Constitutional Law - Race-Conscious Relief after Paradise: Reconciling Strict Scrutiny with a District Court's Equitable Disrection - United States v. Paradise

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CASE NOTES

CONSTITUTIONAL LAW — Race-Conscious Relief after *Paradise*: Reconciling Strict Scrutiny with a District Court's Equitable Discretion. *United States v. Paradise*, 107 S. Ct. 1053 (1987).

In 1972, a federal district court found that the Alabama Department of Public Safety (Department) had "engaged in a blatant and continuous pattern and practice of discrimination [which was] . . . unquestionably a violation of the Fourteenth Amendment."[1] Relying on its equitable remedy power, the district court ordered the Department to hire one black trooper for every white trooper hired until 25% of the state trooper force was black.[2] The district court also enjoined the Department from discriminating in promotion.[3] After ruling in 1975 that the Department had artificially restricted the size of the trooper force, the district court enjoined it from further efforts to delay or frustrate full compliance with the 1972 order.[4] Since then, the Department has complied with that order, and blacks now make up roughly 25% of the trooper force.[5]

In 1977, the plaintiffs in the earlier action, including the Justice Department and Phillip Paradise, Jr., challenged the Department's promotion procedures.[6] At that time, none of the 232 troopers at the rank of corporal or above was black.[7] In a 1979 Consent Decree, the Department pledged to develop within one year a promotion procedure that would have "little or no adverse impact upon blacks seeking promotion to corporal."[8] The Department agreed that the parties would measure adverse impact by applying the "four-fifths rule" of the 1978 Uniform Guidelines on Employee Selection Procedures.[9] Under that rule, the percentage of blacks selected for promotion under a given procedure must equal four-fifths of the percentage of whites selected.[10]

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1. NAACP v. Allen, 340 F. Supp. 703, 705 (M.D. Ala. 1972), *aff'd*, 493 F.2d 614 (5th Cir. 1974) (The National Association for the Advancement of Colored People brought the original suit; the United States was joined as a party plaintiff, and Phillip Paradise, Jr. intervened on behalf of a class of black plaintiffs).

2. Blacks made up 25 percent of the relevant labor force. United States v. Paradise, 107 S. Ct. 1053, 1071 (1987) (citing Paradise v. Prescott, 585 F. Supp. 72, 75 n.2 (M.D. Ala. 1983)).

3. *Allen*, 340 F. Supp. at 706.

4. *Paradise*, 107 S. Ct. at 1060 (citing Paradise v. Dothard, Civ. Action No. 3561-N (M.D. Ala. Aug. 5, 1975)).

5. Brief for Petitioner at 3, United States v. Paradise, 107 S. Ct. 1053 (1987) (No. 85-999).

6. *Paradise*, 107 S. Ct. at 1059. The 1972 order applied not only to entry-level positions, but to all trooper ranks. *Id.* at 1060 (citing Paradise v. Shoemaker, 470 F. Supp. 439, 440 (M.D. Ala. 1979)).

7. *Id.* at 1060 (citing *Shoemaker*, 470 F. Supp. at 442)).

8. *Id.* Under a separate agreement, the Department agreed to promote at least three blacks to corporal in the interim. *Id.* n.9.

9. *Id.* at 1060 (citing 28 C.F.R. § 50.14, pt. 1, § 4 (1978)).

10. For example, if 10 of 20 white applicants (or 50%) are promoted under a given procedure, 4 of 10 black applicants (or 40%) must be promoted to avoid adverse impact. *See Paradise*, 107 S. Ct. at 1061 n.10.

The Consent Decree also provided that the plaintiffs could later apply to the court either to enforce the decree's terms or for other appropriate relief.[11]

In 1981, the Department sought approval of a promotion procedure consisting mainly of a written test.[12] Under a second consent decree, the parties agreed to administer and then review the procedure to determine whether it adversely impacted black applicants.[13] The Department administered the test to 262 applicants, 60 of whom were black. Only five blacks were listed in the top half, the highest being 80th. Thus, whites would have received the first seventy-nine promotions under the test.[14] In April 1983, the plaintiff class moved the district court to review the test for adverse impact and to enforce the terms of the two consent decrees.[15]

In October 1983, the district court held the procedure had an adverse impact on blacks.[16] The court then asked the parties to present alternatives.[17] The plaintiff class sought an order requiring the Department to promote one black for each white promoted to corporal until it implemented a valid promotion procedure.[18] The Department, while requesting more time to develop a nondiscriminatory procedure, proposed an immediate promotion of four blacks and eleven whites to corporal.[19]

In December 1983, the district court ordered the Department to promote, as long as qualified blacks were available, one black for each white promoted. The order was to last until either the Department had developed and implemented an acceptable promotion plan or blacks made up 25% of each rank (matching the percentage of blacks in the labor force).[20] The order has been applied once, in February 1984 when the Department promoted eight blacks and eight whites to corporal.[21] The district court suspended it four months later after the Department submitted an acceptable promotion procedure for that rank.[22] The Court of Appeals for the Eleventh Circuit affirmed the order in 1985.[23]

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11. *Id.* at 1060.

12. *Id.* at 1061. The procedure consisted of four factors, weighted as follows: written test, 60%; supervisory evaluation, 20%; length of service, 10%; service ratings, 10%. Differences in seniority could only account for a three percent difference between applicant scores. Brief for Respondent at 9, United States v. Paradise, 107 S. Ct. 1053 (1987) (No. 85-999).

13. *Paradise*, 107 S. Ct. at 1061.

14. *Id.*

15. Paradise v. Prescott, 585 F. Supp. 72, 74 (M.D. Ala. 1983).

16. Paradise v. Prescott, 580 F. Supp. 171, 174 (M.D. Ala. 1983).

17. Brief for Respondent at 29, United States v. Paradise, 107 S. Ct. 1053 (1987) (No. 85-999).

18. *Paradise*, 107 S. Ct. at 1061.

19. *Id.* at 1062.

20. *Id.* (citing Paradise v. Prescott, 585 F. Supp. 72, 75 (M.D. Ala. 1983)).

21. *Id.* at 1063.

22. *Id.* The district court later suspended the order when the Department timely submitted promotion procedures for the rank of sergeant which did not appear to have adverse impact. *Id.* at 1063-64. The district court also allowed the Department to promote only whites to lieutenant and captain because no blacks qualified for those positions. *Id.* at 1064 n.14.

23. *Id.* at 1064 (citing Paradise v. Prescott, 767 F.2d 1514 (11th Cir. 1985)).

The United States Department of Justice challenged this order as a violation of the equal protection clause of the fourteenth amendment.[24] The United States argued that the Constitution required the district court either to fine the Department for non-compliance or to adopt the Department's own proposal before it ordered the one-for-one promotion quota.[25] *United States v. Paradise*[26] thus presented the issue of under what circumstances a district court could order race-conscious relief without denying equal protection to non-minority employees.[27] The Supreme Court affirmed the order as narrowly tailored to serve a compelling governmental purpose.[28] However, by failing to reconcile strict scrutiny with a district court's equitable discretion, the plurality left open the question of whether a district court may order race-conscious relief only as a last resort.[29] This casenote will examine the Court's contradictory signals on this issue and suggest a solution to the conflict.[30]

BACKGROUND

The Supreme Court first recognized that district courts have broad discretion to fashion race-conscious relief.[31] However, with *Regents of the University of California v. Bakke*,[32] the Court began narrowing the circumstances in which other parties, such as universities or school boards, can conduct race-conscious affirmative action. The Court later restricted the district courts' ability to order such remedies as well.[33]

In *Swann v. Charlotte-Mecklenburg Board of Education*,[34] the United States Supreme Court held that the equal protection clause permits district courts wide discretion in enforcing the school desegregation deci-

24. *Paradise*, 107 S. Ct. at 1064. The United States was a party plaintiff throughout the litigation. *See supra* note 1. It did not oppose the plaintiff class until the latter proposed a one-to-one promotion quota. *Paradise*, 107 S. Ct. at 1061.

25. Brief for Appellant at 20, United States v. Paradise, 107 S. Ct. 1053 (1987) (No. 85-999).

26. 107 S. Ct. 1053 (1987).

27. *Id.* at 1057.

28. *Id.* at 1064.

29. In *Paradise*, the plurality noted that the Court had not always required race-conscious remedies to be the least restrictive means of implementation. *Id.* at 1073. However, it also considered whether the order was necessary and held that the district court had no other effective remedy. *Id.* at 1070. Thus, the plurality's analysis undercuts their suggestion that a district court need not wait until the last resort.

30. Several recent cases involve purely statutory (Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e) challenges to race-conscious remedies. *See, e.g.*, United Steelworkers of America v. Weber, 443 U.S. 193, 208 (1979). The Supreme Court has also heard several mixed statutory and constitutional challenges to race-conscious remedies. *See, e.g.*, Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 106 S. Ct. 3019 (1986). This casenote will focus on the equal protection cases and the equal protection portions of hybrid cases because Title VII analysis, while similar, is not identical to equal protection analysis. *Paradise*, 107 S. Ct. at 1075 n.1 (Powell, J., concurring).

31. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

32. 438 U.S. 265 (1978) (5-4 decision) (With only Justice Powell in both majorities, the Court invalidated the affirmative action program at issue, but also held that universities may consider race in admitting candidates to medical school).

33. *Sheet Metal Workers*, 106 S. Ct. at 3019.

34. 402 U.S. 1 (1971).

sions.[35] The Court stated that: "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."[36] In that case, the board of education administered a dual school system[37] and failed to present a desegregation plan. The district court ordered the board to seek a 71%-29% ratio of whites and blacks in its schools.[38] The Court held the use of mathematical ratios was within the equitable remedial discretion of the district court.[39]

However, *Regents of University of California v. Bakke*[40] yielded two distinct but more rigorous standards of constitutional review for race-conscious remedies. In that case, the Court invalidated an affirmative action program initiated by the University of California which each year reserved to Negro, Chicano, and Asian applicants sixteen of one hundred seats in medical school.[41] Five justices reached the equal protection issue.[42] Justice Powell treated the program as a suspect classification and thus required the remedy to be a necessary means of advancing a compelling governmental purpose.[43] In contrast, four justices concluded race-conscious remedies were valid if substantially related to important governmental objectives.[44] Emphasizing that the program totally excluded non-minorities from a certain percentage of seats, Justice Powell concluded the quote was unnecessary to the school's compelling interest in a diverse student body.[45] However, the Court also held that the equal protection clause allows schools to consider race as part of the admissions process.[46]

In *Fullilove v. Klutznick*,[47] the Court upheld the "minority business enterprise" provision of the Public Works Employment Act of 1977.[48] Unless waived, that provision required that at least 10% of federal funds

35. *Id.* at 25. In Brown v. Board of Education, 347 U.S. 483, 495 (1954) (Brown I), the Court held public school segregation unconstitutional. In Brown v. Board of Education, 349 U.S. 294, 299-300 (1955) (Brown II), the Court authorized district courts to use their traditional equity powers in eliminating segregated public schools.

36. *Swann*, 402 U.S. at 15.

37. In a "dual school system," the student assignment patterns, the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities reveals the existence of "white schools" and "Negro schools." *Id.* at 19.

38. *Id.* at 9 n.4.

39. *Id.* at 25. The Court also suggested a possible standard of review in concluding the relief ordered was reasonable, feasible, and workable. *Id.* at 31.

40. 438 U.S. 265 (1978).

41. *Id.* at 275-76. These applicants could also compete for the balance of seats. *Id.*

42. Chief Justice Burger and Justices Stewart, Rehnquist, and Stevens concluded Title VI of the Civil Rights Act prohibited the affirmative action program. *Id.* at 409 (Stevens, J., concurring in the judgment in part and dissenting in part).

43. *Id.* at 305.

44. *Id.* at 359 (Brennan, J., concurring in the judgment in part and dissenting in part). Justices Brennan, Marshall, and Blackmun support such a standard today. Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842, 1853 (O'Connor, J., concurring).

45. *Bakke*, 438 U.S. at 319-20. Justice Powell assumed the university had a compelling interest in improving the delivery of health care services to minorities. However, he found little evidence the quota served this goal. *Id.* at 311.

46. *Id.* at 320. Similarly, the Supreme Court has held that Title VII does not prohibit all private, voluntary, race-conscious affirmative action. *Weber*, 443 U.S. at 208.

47. 448 U.S. 448 (1980).

48. *Id.* at 492 (citing Public Works Employment Act, 42 U.S.C. § 6705(f)(2) (1982)).

granted for local public works projects be used to procure services or supplies from minority businesses.[49] The plurality suggested that Congress had broader discretion than the federal courts to create race-conscious remedies.[50] The plurality did not adopt either of the strict scrutiny standards but noted the legislation would survive either.[51] It merely upheld the provision as a valid means to the accomplishment of Congress' constitutional objectives.[52]

In concurring, Justice Powell first analyzed a district court's discretion to choose race-conscious remedies. He noted: "[T]his Court has not required remedial plans to be limited to the least restrictive means of implementation. We have recognized that the choice of remedies to redress racial discrimination is 'a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court.' "[53] Justice Powell then concluded that the thirteenth and fourteenth amendments granted Congress similar discretion.[54]

In contrast, *Wygant v. Jackson Board of Education*[55] signalled a further narrowing of the circumstances in which other governmental bodies can conduct race-conscious relief. In that case, the Court invalidated a collective bargaining agreement on equal protection grounds.[56] The Jackson Board of Education had agreed not to lay off a greater percentage of minority teachers than the percentage of minority teachers employed at the time of any layoff. The agreement resulted in the disproportionate layoff of white teachers with greater seniority.[57]

Four justices settled on the *Wygant* strict scrutiny standard, holding that a remedial racial classification must be narrowly tailored to achieve a compelling governmental purpose.[58] Significantly, the plurality also sug-

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49. 42 U.S.C. § 6705(f)(2) (1982).

50. *Fullilove*, 448 U.S. at 483. Justice Stewart suggested the opposite. *Id.* at 527 (Stewart, J., dissenting). Justice Powell stated Congress and the federal courts have a "similar measure of discretion." *Id.* at 508. (Powell, J., concurring).

51. *Id.* at 492.

52. *Id.* at 478, 492. Justice Powell joined the plurality but separately upheld the provision as a necessary means to the accomplishment of a compelling governmental interest in redressing discrimination against minority contractors. *Id.* at 496 (Powell, Jr., concurring). Justices Brennan, Marshall, and Blackmun upheld the provision as substantially related to the important governmental objective of remedying past discrimination. *Id.* at 519 (Brennan, J., concurring in the judgment).

53. *Id.* at 508 (Powell, J. concurring) (quoting Franks v. Bowman Transp. Co., 424 U.S. 747, 794 (Powell, J., concurring in part and dissenting in part)). The plurality quoted this language in *Paradise*, 107 S. Ct. at 1073.

54. *Fullilove*, 448 U.S. at 510 (Powell, J., concurring).

55. 106 S. Ct. 1842 (1986) (5-4 decision).

56. *Id.* at 1846. The Supreme Court has held that under Title VII "a nonminority employee with seniority under the contractually established seniority system [may not be displaced] absent either a finding that the seniority system was adopted with discriminatory intent or a determination that such a remedy was necessary to make whole a proven victim of discrimination." Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 576 n.9 (1984).

57. *Wygant*, 106 S. Ct. at 1845.

58. *Id.* at 1846. Chief Justice Burger and Justices Rehnquist, Powell, and O'Connor adopted this test. *Id.* Justice Scalia subscribed to it in *Paradise*, 107 U.S. at 1080 (O'Connor, J., dissenting).

gested that to be narrowly tailored, a remedy must be the least restrictive means of accomplishing the objective.[59] The plurality doubted whether a compelling interest existed in *Wygant*.[60] However, emphasizing how seriously layoffs burden particular individuals,[61] it invalidated the agreement because the Board could have accomplished its objectives through less intrusive means, such as hiring goals.[62]

In *Local 28 of Sheet Metal Workers' International Association v. EEOC*,[63] a case quite similar to *Paradise*,[64] the plurality for the first time applied *Wygant* strict scrutiny where a district court ordered race-conscious relief.[65] In that case, a district court found Local 28 had violated Title VII by discriminating against nonwhite workers in recruitment, selection, training, and admission to the union.[66] The local systematically disobeyed district court orders to remedy its violations.[67] The district court twice cited the local for contempt and finally required it to indenture one black apprentice for each white apprentice indentured.[68]

The plurality did not resolve the dispute between *Wygant* strict scrutiny and the *Bakke* alternative (substantial relation to important governmental objective test). Instead, it held that even under the more rigorous *Wygant* standard, the order did not violate the equal protection component of the due process clause of the fifth amendment.[69] The plurality found the government had a compelling interest in remedying past discrimination. The plurality then concluded that the order was narrowly tailored to fit that compelling interest since the district court had considered the efficacy of alternative remedies and the order marginally impacted the interests of white workers.[70]

In *Paradise*, the Court addressed a district court order of race-conscious relief to remedy a constitutional and not a statutory violation.[71] In *Swann*, the Court had concluded that the district courts have broad discretion to order race-conscious relief. However, the Court later restricted the ability of other governmental bodies to conduct affirmative action.

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59. *Wygant*, 106 S. Ct. at 1850 n.6.

60. It rejected the lower court's holding that alleviating societal discrimination was a compelling interest. *Id.* at 1848. Further, while the Board asserted an interest in remedying prior discrimination, the record lacked convincing evidence such discrimination had existed. The plurality required such evidence before accepting the interest as compelling. *Id.*

61. *Id.* at 1851.

62. *Id.* at 1852.

63. 106 S. Ct. 3019 (1986) (5-4 decision).

64. *Paradise*, 107 S. Ct. at 1074 (Powell, J., concurring).

65. *Sheet Metal Workers*, 106 S. Ct. at 3053.

66. *Id.* at 3026 (citing EEOC v. Local 28 of Sheet Metal Workers Int'l Ass'n, 401 F. Supp. 467 (S.D.N.Y., 1975)).

67. *Id.* at 3028-30.

68. *Id.* at 3030.

69. *Id.* at 3053. The plurality first held section 706(g) of Title VII does not prohibit a district court from ordering affirmative race-conscious relief to remedy the effects of past discrimination. *Id.* at 3035.

70. *Id.* at 3053.

71. *See Paradise*, 107 S. Ct. at 1075 n.1 (Powell, J., concurring).

At issue in *Paradise* was to what extent these restrictions limited the broad discretion recognized in *Swann*.[72]

THE PRINCIPAL CASE

At the outset, the Supreme Court recognized that district courts may use racial classifications to remedy unlawful discrimination.[73] However, a majority of the Court again failed to agree on the proper constitutional standard for such race-conscious remedies.[74] Instead, as in *Sheet Metal Workers*,[75] the plurality held that the order was narrowly tailored to achieve a compelling governmental purpose and thus survived even *Wygant* strict scrutiny.[76] Satisfying the first prong of that test, the plurality held that the remedying of past and present discrimination was a compelling interest.[77]

While it did not adopt them as a test,[78] the plurality then considered four factors to determine whether the order was narrowly tailored.[79] These included the necessity for relief and efficacy of alternative remedies, the flexibility and duration of the relief, the relationship of the numerical goals to the relevant labor market, and the impact of the relief on the rights of third parties. In this regard, the plurality found that the order was flexible and temporary,[80] imposed an acceptable burden on white troopers,[81]

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72. In *Paradise*, Justice Powell distinguished the appropriate standard of review in *Swann* and other school desegregation cases from that appropriate in *Paradise* and other affirmative action cases. In his view, a lesser standard is proper in the school desegregation context because the busing of schoolchildren is less burdensome than the denial of hiring or promotion. *Id.* at 1075 n.2 (Powell, J., concurring). In contrast, Justice Stevens adopted *Swann* as the applicable standard, stating that the school desegregation cases do not differ fundamentally from the affirmative action cases. For him, the standard of review derives from the defendant's status as a proven violator of the Constitution. *Id.* at 1079 n.4 (Stevens, J., concurring in the judgment). He determined the district court had not abused its wide discretion in ordering the race-conscious relief, and thus concurred in the judgment. *Id.* at 1079 (Stevens, J., concurring in the judgment).

73. *Id.* at 1064.

74. *Id.*

75. 106 S. Ct. at 3053.

76. *Paradise*, 107 S. Ct. at 1064. Justice Stevens disagreed, arguing that since the order was neither underinclusive nor overinclusive, the "metaphor of narrow tailoring" did not apply to the facts of the case. *Id.* at 1077 n.1 (Stevens, J., concurring in the judgment).

77. *Id.* at 1065. Also compelling was the "societal interest in compliance with the judgments of federal courts." *Id.* at 1066.

78. The Court "look[s] to several factors" including these four in determining whether an order is narrowly-tailored. Although the order in *Paradise* satisfied all four factors, the Court went on to consider whether the order was within the district court's discretion. The Court's analysis does not reveal whether a five-factor test, including abuse of discretion, now exists for narrow tailoring. *Id.* at 1067.

79. Justice Powell first described these factors in *Fullilove*, 448 U.S. at 510-11 (Powell, J., concurring).

80. *Paradise*, 107 S. Ct. at 1071. The order could be waived if no qualified blacks were available and was in effect only until the Department adopted a valid promotion procedure. *Id.* at 1070-71.

81. *Id.* at 1073. The order, since it did not involve layoffs and did not absolutely bar whites from being promoted, was less burdensome than a hiring quota. *Cf. Wygant*, 106 S. Ct. at 1851 (opinion of Powell, J.).

and that the quota was properly related to the percentage of blacks in the workforce.[82]

Necessity for Relief

The plurality carefully reviewed the district court's objectives and alternatives to determine whether the order was necessary.[83] Unlike the dissenters,[84] the plurality found that the order was intended to eliminate the effects of the Department's discrimination and delay as well as to compel the Department to develop a valid promotion procedure.[85] After examining the available alternatives in light of these objectives, the Court concluded the order was necessary.[86]

The plurality held that the Department's one-time offer to immediately promote four blacks and eleven whites would not have achieved the district court's objectives. That alternative did not ensure that the Department would adopt a valid promotion procedure or vitiate the effects of the Department's delayed compliance.[87]

The plurality also held that fining the Department would have served none of the Court's objectives.[88] The district court had assessed fees against the Department before without effect. Further, fines did not address the Department's need to promote fifteen troopers to corporal or compensate black troopers for the Department's past discrimination.[89] In sum, the Court concluded: " '[I]t is doubtful, given [the Department's] history in this litigation, that the District Court had available to it any other effective remedy.' "[90] The district court's order thus satisfied four of the relevant factors in determining whether race-conscious relief is narrowly tailored.

District Court Discretion

The plurality finished its analysis by discussing the "respect owed a District Judge's judgment that specified relief is essential to cure a violation of the Fourteenth Amendment."[91] The plurality noted that remedial plans must not always be the least restrictive means of implementation.[92] The plurality also recognized the district court's first-hand experience with the parties[93] and broad equitable powers. The Court then

82. *Paradise*, 107 S. Ct. at 1071. Since the order could last only until blacks made up 25% of the trooper force, the plurality concluded the 50% quota merely accelerated the speed at which that permissible goal would be achieved. *Id.*

83. *Id.* at 1067-70.

84. *Id.* at 1080.

85. *Id.* at 1067.

86. *Id.* at 1070.

87. *Id.* at 1068.

88. This alternative was never presented to the district court. *Id.* at 1069.

89. *Id.*

90. *Id.* at 1070 (quoting *Sheet Metal Workers*, 106 S. Ct. at 3056 (Powell, J., concurring in part and concurring in judgment)).

91. *Id.* at 1073.

92. *Id.*

93. *See Swann*, 402 U.S. at 6.

concluded that *Wygant* strict scrutiny does not eliminate a district court's discretion in constructing remedies.[94]

The Court held the one-for-one promotion order was narrowly tailored because it was necessary, flexible, and temporary; acceptably burdened white troopers; and was produced by the "considered judgment of the District Court."[95] Since it served the compelling objective of remedying past discrimination, the order was thus valid under the fourteenth amendment. [96]

ANALYSIS

Paradise left certain matters settled where district courts order race-conscious remedies to constitutional violations. First, the Court reaffirmed that district courts may order race-conscious relief.[97] Second, the Supreme Court will apply the more rigorous "narrowly tailored to compelling governmental interest" test to such orders.[98] Third, remedying past and present discrimination is a compelling governmental interest.[99] Fourth, four factors provide some guidance to the existence of narrow tailoring.[100] Finally, the district courts retain some discretion in framing relief even under *Wygant* strict scrutiny.[101]

However, the tension between *Wygant* strict scrutiny and such equitable discretion remains. The different routes Justices Powell and Stevens took to affirm the one-for-one promotion order exemplify the difference between the two concepts. Justice Powell stressed the district court was justified because it had no other effective remedy.[102] Further, Justice Powell joined the plurality because it "most carefully scrutinized the order."[103]

In contrast, Justice Stevens likely did not join the plurality because of this careful scrutiny.[104] Justice Stevens considered unprecedented the suggestion that the Court should apply *Wygant* strict scrutiny to district court orders.[105] He did not discuss any alternatives available in the district court but found simply that the court had not abused its broad discretion "to repair the denial of a constitutional right."[106]

The Court's use of *Wygant* strict scrutiny is unnatural because it was developed to restrict *non-judicial* bodies from conducting race-conscious

94. *Paradise*, 107 S. Ct. at 1074.
95. *Id.*
96. *Id.*
97. *Id.* at 1064.
98. In both *Sheet Metal Workers* and *Paradise*, supporters of the substantial relation test applied the more rigorous *Wygant* test to district court orders. *See supra* notes 75, 76.
99. Eight justices agree with this; Justice Stevens did not reach the question. *Paradise*, 107 S. Ct. at 1057, 1065, 1080 (O'Connor, J., dissenting) (White, J., dissenting).
100. *Id.* at 1067, 1075; *see Fullilove*, 448 U.S. at 510-11 (Powell, J., concurring).
101. *Paradise*, 107 S. Ct. at 1074.
102. *Id.* at 1075, 1076 (Powell, J., concurring).
103. *Id.* at 1076.
104. *See supra* note 76.
105. *Paradise*, 107 S. Ct. at 1077 (Stevens, J., concurring in the judgment).
106. *Id.* at 1079. *See supra* note 72.

affirmative action. District courts are in a much better position than regents or school boards to create race-conscious remedies. They are both authorized to order race-conscious relief and required to find discrimination before acting.[107] Thus, district court orders are more likely to be justified by a compelling interest.[108] Further, the regents in *Bakke* and the school board in *Wygant* failed to narrowly tailor programs to their interests. District courts, because of their flexibility, objectivity, and experience with the parties are much more likely to do so.[109]

Nevertheless, the plurality alternated between strict scrutiny and equitable discretion. On one hand, it stated district courts were not always required to implement the least restrictive remedies[110] and paid ample homage to the district court's discretion and experience with the parties.[111] For example, the plurality deferred to the district court's choice of a 50% quota, noting that court knew best what would work and that the Constitution requires the district court to order the necessary relief.[112]

On the other hand, the plurality thoroughly reviewed all of the district court's options and simply disagreed with the dissent over whether any of them could be effective.[113] *Paradise* does not resolve whether the Court would uphold an order of race-conscious relief where fines or a one-time promotion *would be* effective. Only in that instance may a district judge exercise the discretion that *Paradise* recognized. The plurality held a district court must not always use the least restrictive means.[114] Nevertheless, by requiring race-conscious remedies to be necessary, and holding the quota was necessary because no other alternative was effective,[115] the plurality suggested the district courts' discretion is limited to ordering remedy after remedy until all fail and it reaches the last resort.

The continuing tension between strict scrutiny and equitable discretion is revealed by the Court's disagreement about "the degree to which the means employed must 'fit' the ends pursued to meet constitutional standards."[116] Two statements from *Paradise* reveal this disagreement. The plaintiff class argued that: "In any event, the district court surely was not required to employ remedy after remedy before it reasonably could

107. In both *Bakke* and *Wygant* school officials failed to find discrimination before beginning affirmative action programs. *Bakke*, 438 U.S. at 309; *Wygant*, 106 S. Ct. at 1848.

108. *See Fullilove*, 448 U.S. at 499 (Powell, J., concurring).

109. *See Id.* at 527 (Stewart, J., dissenting), 508 (Powell, J., concurring).

110. *Paradise*, 107 S. Ct. at 1073.

111. *Id.* at 1072-73.

112. *Id.* at 1072 n.32.

113. The plurality and the dissenters also disagreed over the validity of the one-for-one promotion quota. The dissenters argued such quotas must more closely relate to the percentage of blacks in the work force. *Id.* at 1081. The plurality held that since the ultimate goal equalled the relevant labor force, the 50% quota permissibly represented the speed at which that goal would be achieved. *Id.* at 1071. The dissenters feared such reasoning could validate 100% quotas. *Id.* at 1081. However, the Court's hostility toward quotas which absolutely barred whites from a position, stated in *Bakke* and reaffirmed in *Paradise*, would prevent such a result. *Bakke*, 438 U.S. at 320; *Paradise*, 107 S. Ct. at 1073.

114. *Paradise*, 107 S. Ct. at 1073.

115. *Id.* at 1070.

116. *Wygant*, 106 S. Ct. at 1853 (O'Connor, J., concurring).

conclude that race-conscious relief was warranted."[117] The dissent countered: "There is simply no justification for the use of racial preferences if the purpose of the order could be achieved without their use."[118] Since the *Paradise* plurality accepted both arguments, their effect on affirmative action must be examined.

The dissent exemplifies a wide scope of review which chills race-conscious remedies.[119] The dissenters would have reversed because the district court did not consider alternatives that were not presented to it and because "[s]urely, some combination of penalties could have been designed that would have compelled compliance with the consent decrees."[120] Such a result would discourage plans which "promise[] realistically to work, and promise[] realistically to work *now*."[121]

First, the prospect of reversal, because some unknown and unpresented less restrictive means was available, would cause district courts to hesitate before ordering race-conscious remedies. This is particularly true since in reviewing the district court's purposes, the dissenters concluded that court sought only to compel compliance with the consent decrees. Thus, while the dissenters required the district court to expressly consider alternatives not presented to it,[122] it ignored two objectives expressly stated in the district court's opinion.[123]

Second, this approach would have required the district court to fine the Department and settle "for yet another promise that [a valid] procedure would be forthcoming 'as soon as possible.' "[124] The Department had already sacrificed a great deal of money to avoid the district court's orders.[125] Further, the Department had failed for over three years to abide by the consent decrees. In contrast, it presented a valid promotion procedure six months after the district court's order.[126] Thus, this requirement would slow the initiation of a workable plan since it would force the district court to rely on remedies which had not worked in the past.[127]

Further, district courts generally frame equitable remedies because they are familiar with the parties and the situation[128] and are thus better

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117. Brief for Respondent at 33, United States v. Paradise, 107 S. Ct. 1053 (1987) (No. 85-999).

118. *Paradise*, 107 S. Ct. at 1081 (O'Connor, J., dissenting).

119. *Id.* at 1080 (O'Connor, J., dissenting). Justice White separately dissented having found the district court exceeded its discretion. *Id.*

120. *Id.* at 1082.

121. *Id.* at 1072 n.31 (quoting Green v. County School Bd., 391 U.S. 430, 439 (1968) (emphasis in original)).

122. *Id.* at 1082.

123. *Id.* at 1080. The district court also sought to eliminate the effects of the Department's past discrimination and delay in compliance. Paradise v. Prescott, 585 F. Supp. 72, 74-75 (1983).

124. *Paradise*, 107 S. Ct. at 1068.

125. *Id.* at 1069 n.24.

126. *Id.* at 1063. *See also* United States v. Dothard, 373 F.Supp. 504, 506-07 (M.D. Ala. 1973), *aff'd sub nom.* NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974).

127. *Paradise*, 107 S. Ct. at 1069.

128. International Salt Co. v. United States, 332 U.S. 392, 400-01 (1947).

able to judge the parties' good faith.[129] For instance, in *Paradise* the district court had 12 years' experience with the parties before it ordered the one-to-one promotion quota. It had also noted that race-conscious relief was more effective than other remedies in dealing with the Alabama Department of Personnel.[130] Thus, while the dissenters assumed otherwise, the Alabama District Court probably knew better than the Supreme Court whether a given remedy would work.

In short, requiring a district court to wait until the last resort postpones the remedying of past discrimination. Further, it eliminates a district court's discretion over when to order race-conscious relief. Since it is experienced with constitutional analysis, the Supreme Court must discover whether such relief is available (whether a compelling interest is involved). However, because of its day-to-day experience, both with the parties and with race-conscious remedies, a district court should choose when such a remedy is appropriate.

The Court should instead focus on the *form* of a race-conscious remedy. In reviewing such remedies, the Court should now adopt a four-factor test based on the factors it has found relevant in several recent cases.[131] Since a district court should determine whether a race-conscious remedy is appropriate, the Court should not consider the necessity for relief or efficacy of alternative remedies. Nonetheless, this test will prohibit remedies which the Court disdains, such as those which merely reflect a racial preference,[132] impose a racial balance,[133] require the firing of white workers,[134] absolutely bar whites from a position,[135] stigmatize minorities by suggesting they are unable to compete equally,[136] or require the disproportionate layoff of white workers.[137]

The Court should review the following four factors: First, is a remedy temporary? A temporary quota is much less likely to impose a racial balance or absolutely bar some whites from a position. Further, conditioning such relief on the development of nondiscriminatory procedures encourages violators to obey judicial decrees. Second, is a remedy flexible? A violator will not fire whites to hire minorities if a remedy includes a waiver in case of bad economic conditions. No stigma of inferiority will attach to minorities if a district court does not require the hiring of unqualified minorities.

Third, does the district court's ultimate goal match the percentage of minorities in the labor force? Such a requirement ensures that race-conscious relief does not merely reflect a racial preference. Finally, does the remedy acceptably burden nonminority workers? This separate inquiry

129. *Brown II*, 349 U.S. at 299.
130. *Paradise*, 107 S. Ct. at 1059 n.4.
131. *Id.* at 1073.
132. *Bakke*, 438 U.S. at 307.
133. *Swann*, 402 U.S. at 16.
134. *Wygant*, 106 U.S. at 1860 (Marshall, J., dissenting).
135. *Bakke*, 438 U.S. at 319.
136. *Id.* at 298.
137. *Wygant*, 106 S. Ct. at 1851.

requires a district court to be sensitive to nonminority interests and to avoid more burdensome remedies, such as layoff quotas, in favor of less burdensome remedies, such as hiring goals.

Thus, this four-factor test will enable the Supreme Court to invalidate and the district courts to identify unconstitutional race-conscious remedies. At the same time, the test will allow district courts to use their discretion to determine when race-conscious relief is appropriate. In short, this four-factor test will assure that district courts both "*refrain* from ordering relief that violates the Constitution, [and] *order* the relief necessary to cure past violations and to obtain compliance with its mandate" (emphasis in original).[138]

CONCLUSION

In the last few years, the Supreme Court has striven to build a constitutional foundation for district court orders of race-conscious remedies to constitutional violations. In *Paradise* the Court reaffirmed the validity of such remedies and suggested that district courts have broad discretion to order them. Unfortunately, the Court failed to reconcile strict scrutiny with this broad discretion, and thus the foundation remains incomplete.

The Court should reject the suggestion that a district court may order race-conscious relief only as a last resort. The Court must also provide a specific test to guide the district courts. Under the proper test, the Court should first discover whether a compelling state interest is involved. Once the Court has found a compelling interest, it should allow the district courts to decide when a remedy is appropriate. The Court should instead focus on the *form* of a remedy. It should review a remedy to determine whether it is flexible, is temporary, has ultimate numerical goals which mirror the relevant labor force, and acceptably burdens the interests of nonminority workers. Such a test will adequately protect nonminority interests. Moreover, by applying this test, the Supreme Court will better guide the district courts in this difficult area, will reconcile strict scrutiny with equitable discretion, and will ensure equal protection for all persons.

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138. *Paradise*, 107 S. Ct. at 1072 n.32.