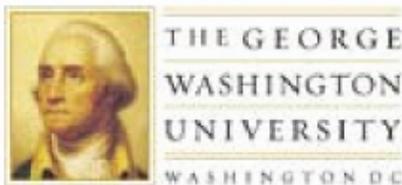


# The Burger Court Opinion Writing Database

*Wygant v. Jackson Board of Education*  
476 U.S. 267 (1986)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543



CHAMBERS OF  
THE CHIEF JUSTICE

December 19, 1985

PERSONAL AND CONFIDENTIAL

Re: 84-1340 Wygant v. Jackson Board of Education

Dear Lewis:

I have reviewed your thorough and well-crafted draft in this case and find myself generally in agreement with your reasoning. I agree that Swann v. Charlotte-Mecklenburg Board of Education, which you quoted from at Slip op. 6, undermines the Board's "role model" justification for maintaining a racial balance of minority teachers directly proportional to minority students. But isn't other language in Swann even more directly on point, such as the following passage?

If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole. 402 U.S., at 24.

Regards,

Justice Powell

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

January 8, 1986

Re: No. 84-1340 - Wygant v. Jackson Board of  
Education

Dear Lewis:

I join.

Regards,



Justice Powell

Copies to the Conference

22 10:00 AM - 82

RECEIVED  
JAN 10 1986  
U.S. SUPREME COURT

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

November 20, 1985

No. 84-1340

Wygant v. Jackson Board of Education

Dear Thurgood, Harry and John,

I notice on my return that the Chief has assigned the opinion for the Court in the above to Lewis. I thought the vote at Conference was four to reverse (the Chief, Lewis, Byron and Bill), and we four to affirm, with Sandra voting to vacate. I must assume that since the Conference Sandra has joined the Chief, et al., or they have come around to her vote to vacate. In any event, I take it there will have to be a dissent to whatever Lewis circulates. May I ask, Thurgood, if you will take the dissent?

Sincerely,

Bill

Justice Marshall  
Justice Blackmun  
Justice Stevens

*WJ  
I would be happy  
to take the dissent  
if you want*

NOV 20 1985  
HAB  
JPS

②

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

Supreme Court of the United States  
Washington, D. C. 20543

December 17, 1985

No. 84-1340

Wygant v. Jackson Board  
of Education

Dear Lewis,

I'll await the dissent.

Sincerely,



Justice Powell

Copies to the Conference

DEC 17 1985

20543  
MANUSCRIPT DIVISION  
LIBRARY OF CONGRESS

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

February 6, 1986

No. 84-1340

Wygant, et al. v. Jackson Board  
of Education, etc., et al.

Dear Thurgood,

Please join me in your superb  
dissent in the above. It is really a  
great job and ought to change some  
votes.

Sincerely,

A handwritten signature in cursive script that reads "Bill".

Justice Marshall



CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

Supreme Court of the United States  
Washington, D. C. 20543

February 6, 1986

No. 84-1340

Wygant, et al. v. Jackson Board  
of Education, etc., et al.

Dear Thurgood,

Please join me in your dissent in  
the above.

Sincerely,

*Bill*

Justice Marshall

Copies to the Conference

JR MB -R 6553

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

April 17, 1986

Re: No. 84-1340-Wygant v. Jackson Board of Education

Dear Lewis:

I will shortly be circulating a revised version of  
my dissent.

Sincerely,

*Jm.*

T.M.

Justice Powell

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20540

CHAMBERS OF  
JUSTICE BYRON R. WHITE

December 10, 1971

84-1340 -

Wygant v. Jackson Board of Education

Dear Lewis,

I doubt that I shall join your proposed opinion in its present form and as of now intend to write separately concurring in the judgment. Meanwhile, I await the dissent.

Sincerely yours,



Justice Powell

Copies to the Conference

22 DEC 10 1971

200

To: The Chief Justice  
Justice Brennan  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice White

Circulated: APR 17 1986

Recirculated: \_\_\_\_\_

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-1340

WENDY WYGANT, ET AL., PETITIONERS *v.* JACKSON  
BOARD OF EDUCATION, ETC., ET AL.

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

[April —, 1986]

JUSTICE WHITE, concurring in the judgment.

The school board's policy when layoffs are necessary is to maintain a certain proportion of minority teachers. This policy requires laying off non-minority teachers solely on the basis of their race, including teachers with seniority, and retaining other teachers solely because they are black, even though some of them are in probationary status. None of the interests asserted by the board, singly or together, justify this racially discriminatory layoff policy and save it from the strictures of the Equal Protection Clause. Whatever the legitimacy of hiring goals or quotas may be, the discharge of white teachers to make room for blacks, none of whom has been shown to be a victim of any racial discrimination, is quite a different matter. I cannot believe that in order to integrate a work force, it would be permissible to discharge whites and hire blacks until the latter comprised a suitable percentage of the work force. None of our cases suggest that this would be permissible under the Equal Protection Clause. Indeed, our cases look quite the other way. The layoff policy in this case—laying off whites who would otherwise be retained in order to keep blacks on the job—has the same effect and is equally violative of the Equal Protection Clause. I agree with the Court that this official policy is unconstitutional and hence concur in its judgment.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

November 20, 1985

Re: No. 84-1340-Wygant v. Jackson Board of Education

Dear Bill:

I will be happy to do the dissent in this one.

Sincerely,



T.M.

Justice Brennan  
Justice Blackmun  
Justice Stevens

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

December 13, 1985

Re: No. 84-1340-Wygant v. Jackson Bd. of Education

Dear Lewis:

In due course I shall circulate a dissent in  
this one.

Sincerely,

*J.M.*  
T.M.

Justice Powell

cc: The Conference

Justice White  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

From: **Justice Marshall**

Circulated: **FEB 5 1986**

Recirculated: \_\_\_\_\_

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-1340

WENDY WYGANT, ET AL., PETITIONERS *v.* JACKSON  
 BOARD OF EDUCATION, ETC., ET AL.

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

[February —, 1986]

JUSTICE MARSHALL, dissenting.

Especially when this Court seeks to resolve far-ranging constitutional issues, it must ground its analysis firmly in the facts of the particular controversy before it. Yet in this significant case, we are hindered by a record that is informal and incomplete. Both parties now appear to realize that the record is inadequate to inform the Court's decision. Both have lodged with the Court voluminous "submissions" containing factual material that was not considered by the District Court or the Court of Appeals. Petitioners have submitted 21 separate items, predominantly statistical charts, which they assert are relevant to their claim of discrimination. Respondents have submitted public documents that tend to substantiate the facts alleged in the brief accompanying their motion for summary judgment in the District Court. These include transcripts and exhibits from two prior proceedings, in which certain questions of discrimination in the Jackson schools were litigated, *Jackson Education Association v. Board of Education*, No. 4-72340 (ED Mich. 1976) (*Jackson I*) and *Jackson Education Association v. Board of Education*, No. 77-011484CZ (Jackson Cty. Cir. Ct. 1979) (*Jackson II*).

We should not acquiesce in the parties' attempt to try their case before this Court. Yet it would be just as serious a mistake simply to ignore altogether, as the majority has done,

Justice White  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

**STYLISTIC CHANGES THROUGHOUT**

*and pp. 1, 7*

From: **Justice Marshall**

Circulated: \_\_\_\_\_

Recirculated: **FEB 12 1986**

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 84-1340

WENDY WYGANT, ET AL., PETITIONERS *v.* JACKSON  
 BOARD OF EDUCATION, ETC., ET AL.

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

[February —, 1986]

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and  
 JUSTICE BLACKMUN join, dissenting.

When this Court seeks to resolve far-ranging constitutional issues, it must be especially careful to ground its analysis firmly in the facts of the particular controversy before it. Yet in this significant case, we are hindered by a record that is informal and incomplete. Both parties now appear to realize that the record is inadequate to inform the Court's decision. Both have lodged with the Court voluminous "submissions" containing factual material that was not considered by the District Court or the Court of Appeals. Petitioners have submitted 21 separate items, predominantly statistical charts, which they assert are relevant to their claim of discrimination. Respondents have submitted public documents that tend to substantiate the facts alleged in the brief accompanying their motion for summary judgment in the District Court. These include transcripts and exhibits from two prior proceedings, in which certain questions of discrimination in the Jackson schools were litigated, *Jackson Education Association v. Board of Education*, No. 4-72340 (ED Mich. 1976) (*Jackson I*) and *Jackson Education Association v. Board of Education*, No. 77-011484CZ (Jackson Cty. Cir. Ct. 1979) (*Jackson II*).

We should not acquiesce in the parties' attempt to try their case before this Court. Yet it would be just as serious a mis-

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

April 17, 1986

Re: No. 84-1340-Wygant v. Jackson Board of Education

Dear Lewis:

I will shortly be circulating a revised version of  
my dissent.

Sincerely,

*Jm.*

T.M.

Justice Powell

cc: The Conference

STYLISTIC CHANGES AND  
pp. 2, 4, 6-16, 18

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Marshall

Circulated: \_\_\_\_\_

Recirculated: APR 22 1986

3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-1340

WENDY WYGANT, ET AL., PETITIONERS *v.* JACKSON  
BOARD OF EDUCATION, ETC., ET AL.

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

[April —, 1986]

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and  
JUSTICE BLACKMUN join, dissenting.

When this Court seeks to resolve far-ranging constitutional issues, it must be especially careful to ground its analysis firmly in the facts of the particular controversy before it. Yet in this significant case, we are hindered by a record that is informal and incomplete. Both parties now appear to realize that the record is inadequate to inform the Court's decision. Both have lodged with the Court voluminous "submissions" containing factual material that was not considered by the District Court or the Court of Appeals. Petitioners have submitted 21 separate items, predominantly statistical charts, which they assert are relevant to their claim of discrimination. Respondents have submitted public documents that tend to substantiate the facts alleged in the brief accompanying their motion for summary judgment in the District Court. These include transcripts and exhibits from two prior proceedings, in which certain questions of discrimination in the Jackson schools were litigated, *Jackson Education Association v. Board of Education*, No. 4-72340 (ED Mich. 1976) (*Jackson I*), and *Jackson Education Association v. Board of Education*, No. 77-011484CZ (Jackson Cty. Cir. Ct. 1979) (*Jackson II*).

We should not acquiesce in the parties' attempt to try their case before this Court. Yet it would be just as serious a mis-

**STYLISTIC CHANGES THROUGHOUT**

+ PP. 7, 8, 12

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Marshall**

Circulated: \_\_\_\_\_

Recirculated: **MAY 1 1986**

4th DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 84-1340

**WENDY WYGANT, ET AL., PETITIONERS v. JACKSON  
BOARD OF EDUCATION, ETC., ET AL.**

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

[May —, 1986]

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, dissenting.

When this Court seeks to resolve far-ranging constitutional issues, it must be especially careful to ground its analysis firmly in the facts of the particular controversy before it. Yet in this significant case, we are hindered by a record that is informal and incomplete. Both parties now appear to realize that the record is inadequate to inform the Court's decision. Both have lodged with the Court voluminous "submissions" containing factual material that was not considered by the District Court or the Court of Appeals. Petitioners have submitted 21 separate items, predominantly statistical charts, which they assert are relevant to their claim of discrimination. Respondents have submitted public documents that tend to substantiate the facts alleged in the brief accompanying their motion for summary judgment in the District Court. These include transcripts and exhibits from two prior proceedings, in which certain questions of discrimination in the Jackson schools were litigated, *Jackson Education Association v. Board of Education*, No. 4-72340 (ED Mich. 1976) (*Jackson I*), and *Jackson Education Association v. Board of Education*, No. 77-011484CZ (Jackson Cty. Cir. Ct. 1979) (*Jackson II*).

We should not acquiesce in the parties' attempt to try their case before this Court. Yet it would be just as serious a mis-

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

December 20, 1985

Re: No. 84-1340, Wygant v. Jackson Board of Education

Dear Lewis:

I shall, of course, await the dissent in this case.

Sincerely,



Justice Powell

cc: The Conference

DE DEC 30 10 23

2000

②

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

February 10, 1986

Re: No. 84-1340, Wygant v. Jackson Board of Education

Dear Thurgood:

Please join me in your dissent.

Sincerely,



Justice Marshall

cc: The Conference

OR FEB 10 1986

November 19, 1985

84-1340 Wygant v. Jackson Board of Education

Dear Sandra:

The Chief has assigned this case to me to write. My notes show that the Chief, Bill Rehnquist and I voted simply to reverse; Byron's vote was to "remand or reverse"; and you expressed a preference to vacate and remand to permit the School Board to make more specific findings.

I would prefer simply to reverse outright, as I think the courts below were dead wrong in every respect. I would be content, however, in order to obtain a clear majority to reverse, to add the language we frequently use to the effect that the case is remanded for further proceedings consistent with our opinion. I see no reason expressly to give the School Board a second opportunity to adopt resolutions that would change its position. Indeed, in none of the four cases involving the validity of the Board's action, has there been any finding that the Board had discriminated. In the 1976 District Court litigation the Board expressly denied that there had been any past discrimination. Moreover, in this case the Board again had a clear chance to establish a finding of prior discrimination. Instead, it chose to justify its discrimination against white teachers by (i) the need for "role models" (as to which there is no support in the record), and (ii) "societal discrimination". This case was argued and decided by both courts below on these nebulous justifications.

My Conference notes make clear that you would not accept societal discrimination as a justification for reverse discrimination. I also understood you to say that the Court should articulate a standard of analysis in "affirmative action" cases. Moreover, I believe you stated that the "means" adopted by the Board--discrimination against innocent teachers--was impermissible under equal protection analysis. I agree with everything you said at Conference with the sole exception that it may be desirable to give the School Board a fifth chance to make findings of discrimination.

The difficult question is the standard of analysis, as I do not believe five Justices have ever agreed. In Bakke, Bill Brennan, Thurgood and Harry apparently relied on some intermediate level of equal protection analysis adequate to justify reverse discrimination. Byron joined that view in Bakke, but it is not clear that he would adhere to it in a case like this where--in effect--societal discrimination is the only justification. Byron did vote to reverse. My understanding from what John said at Conference is that he would accept the "reasonableness" standard relied on by the Court of Appeals.

In Bakke, I applied the "strict scrutiny" standard that consistently has been applied by the Court in equal protection cases involving alleged discrimination against minorities. I see no principled basis for a different standard under the Equal Protection Clause when there is reverse discrimination.

I nevertheless would welcome your views as to a proper articulation of a standard, and whether we should try for it in this case. It may be possible, I suppose, to write it so narrowly that we would do no more than reject the reasoning of the courts below. This would merely delay the "day of reckoning" as we have the more difficult affirmative action cases that lie ahead.

Perhaps we could discuss this at a convenient time.

Sincerely,

Justice O'Connor

lfp/ss

12/13

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Powell**

Circulated: DEC 18 1985

Recirculated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 84-1340

**WENDY WYGANT, ET AL., PETITIONERS v. JACKSON  
BOARD OF EDUCATION, ETC., ET AL.**

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

[December —, 1985]

JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether a school board may extend preferential protection against layoffs to some of its employees because of their race or national origin.

I

In 1972 the Jackson School Board, because of racial tension in the community that extended to its schools, considered adding a layoff provision to the Collective Bargaining Agreement (CBA) between the Board and the Jackson Education Association (the Union) that would protect employees who were members of certain minorities against layoffs.<sup>1</sup> The Board and the Union eventually approved a new provision, Article XII of the CBA, covering layoffs. It stated:

“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 dis-

<sup>1</sup> Prior to bargaining on this subject, the Minority Affairs Office of the Jackson Public Schools sent a questionnaire to all teachers, soliciting their views as to a layoff policy. The questionnaire proposed two alternatives: continuation of the existing straight seniority system, or a freeze of minority layoffs to ensure retention of minority teachers in exact proportion to the minority student population. Ninety-six percent of the teachers who responded to the questionnaire expressed a preference for the straight seniority system.

December 20, 1985

84-1340 Wygant v. Jackson Board of Education

Dear Chief:

Thank you for your note, and suggestion.

I am finding it difficult to put a Court together in this case, as could have been anticipated from the Conference discussion. You have seen Byron's note saying he will await the dissent. There is no possibility of a Court without him.

Also, I have had extended discussions, and an exchange of letters, with Sandra. Even she and I are not yet together. But I am still working on the case, as I think it is of vital importance for this Court to afford some guidance with respect to affirmative action programs.

I will keep you advised.

Sincerely,

The Chief Justice

lfp/ss

December 30, 1985

84-1340 Wygant v. Jackson Board

Dear Sandra:

Your letter of December 19 - though disquieting when I first received it - is in fact quite helpful. This is to supplement our telephone talk in which I think some of the points were clarified.

The first paragraph of your letter identifies areas of agreement, and it seems to me that these are at the heart of a proper analysis in an affirmative action case. I write now to comment on specific concerns that you identified. I agree that faculty diversity (mentioned in Section III-B) well may be a legitimate state interest. In this particular case the type of diversity approved in the 1972 agreement makes little sense. The diversity argument apparently was not raised below, and was not considered by the DC or CA6. Accordingly, I think we need not address it, and I will omit discussion of it.

You express concern about some of what I said in Section III-C in which I considered respondent's argument that the layoffs were part of a plan to remedy prior discrimination by the Board. As I noted in Section III-A, remedying prior discrimination by the Board could be a sufficiently important government interest to justify a proper affirmative action plan.

Confusion arises because there are many different types of plans for increasing the number of minority employees in a work force, whether of a private or public employer. All of these tend to be called "affirmative action plans". [See enclosed Post editorial of 8/16/85]. It is entirely appropriate - and I so advised clients - to adopt a goal that in effect would give prior consideration to minorities in filling vacancies or as new positions open up. Adoption of a "goal" or purpose of attaining a more balanced workforce should not invariably exclude whites. Special skills may be needed or other reasons may properly require deviation from the plan. I have reservations about arbitrary "fixed quotas" - even when there are no forced layoffs. But we need not get into this. The central point - as you have observed - is that under a "goal" type plan no one

is laid off to provide jobs for minorities or is otherwise directly discriminated against.

Where a plan is adopted that does penalize existing employees or that requires that they be laid off, as in this case, the plan must be justified as a means of remedying prior discrimination by the employer - not merely general societal discrimination. When such a plan is challenged in court it is necessary that such discrimination be proved unless it has been found to exist in some other authoritative way.

Where there is a determination of prior discrimination, the question then becomes whether the remedy adopted is legitimate. As we have discussed, the language in prior equal protection cases (usually cases not involving affirmative action plans) has been framed in terms of "narrowly tailored." This language is not as descriptively accurate in this case as in some others. But the term has acquired a "secondary meaning," and I would hesitate to abandon its use entirely. What we really intend is that the means employed in this case are impermissible even to accomplish a legitimate state interest.

What I have said above does not specifically address each of the points made in your letter. I have focused on my understanding of your primary concerns. I enclose a revised draft that I believe will accord with your views. The draft has a number of errors that I have marked. The Atex system is partially down.

Although you sent copies of your letter of the 19th to Byron and Bill, I am inclined to make the clarifying changes in my opinion before going directly to either of them. It is particularly important to have Byron with us, as his "join" is essential to the Court opinion that is so highly desirable.

If you have further suggestions I will be glad to consider them. I will not recirculate until I hear from you.

Sincerely,

Justice O'Connor

lfp/ss

January 3, 1986

84-1340 Wygant v. Jackson Board of Education

Dear Sandra,

Thank you for your letter of the 2d of January. I have made certain changes that more accurately state that the findings necessary to justify remedial action can be of a statutory or constitutional violation. I also have tried to make clearer that these findings do not have to be contemporaneous with the instigation of an affirmative action program. As you agree that societal discrimination is not a legitimate basis for remedial action, there must be a finding of discrimination by the state agency.

Also, as I have said, the typical "affirmative action plan" so prevalent today is what I have described as the adoption of a "goal"--a plan to make employment decisions [as vacancies occur or as the work force increases] with the purpose of attaining a work force more representative of the community. No finding of prior discrimination is required where enlightened management adopts and implements such a plan. (See opinion p. 8)

Sincerely,

L.F.P., Jr.

Justice O'Connor

Justice Brennan  
 Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

Justice O'Connor - Throughout  
 2, 5, 6, 7, 8, 9, 11, 12

From: **Justice Powell**

Circulated: \_\_\_\_\_

Recirculated: JAN 7 1986

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-1340

WENDY WYGANT, ET AL., PETITIONERS *v.* JACKSON  
 BOARD OF EDUCATION, ETC., ET AL.

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

[January —, 1986]

JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether a school board may extend preferential protection against layoffs to some of its employees because of their race or national origin.

### I

In 1972 the Jackson School Board, because of racial tension in the community that extended to its schools, considered adding a layoff provision to the Collective Bargaining Agreement (CBA) between the Board and the Jackson Education Association (the Union) that would protect employees who were members of certain minorities against layoffs.<sup>1</sup> The Board and the Union eventually approved a new provision, Article XII of the CBA, covering layoffs. It stated:

“In the event that it becomes necessary to reduce the number of teachers through layoff from employment by

<sup>1</sup>Prior to bargaining on this subject, the Minority Affairs Office of the Jackson Public Schools sent a questionnaire to all teachers, soliciting their views as to a layoff policy. The questionnaire proposed two alternatives: continuation of the existing straight seniority system, or a freeze of minority layoffs to ensure retention of minority teachers in exact proportion to the minority student population. Ninety-six percent of the teachers who responded to the questionnaire expressed a preference for the straight seniority system.

January 8, 1986

84-1340 Wygant v. Jackson Board

Dear Byron:

My notes at Conference, and recollection of what you said, caused me to think that we were in accord as to how this case should be written. I recall particularly your statement that you would not foreclose reliance upon "societal discrimination" in all instances, but that it could not justify a race-based classification that required the lay-off of innocent employees such as occurred in this case.

A majority of this Court never has agreed upon the exact formulation of a standard of equal protection analysis in an "affirmative action" case. Apart from affirmative action cases, equal protection analysis of race based classifications has been fairly consistent: the state must show a "compelling" interest and the means employed must be "narrowly tailored". Moreover, the showing of the requisite state interest requires a determination by an appropriate body of prior purposeful discrimination. (E.g., Congress in Fullilove).

The Chief Justice in his Fullilove opinion - that you and I joined - used somewhat less specific language, and I have tried to follow it. Moreover, in Fullilove - and also in Weber - the means employed did not require the depriving of innocent employees of their jobs. In Bowman there had been discrimination against particular job applicants.

It is certainly desirable - in view of the uncertainty that now exists as to where this Court stands on affirmative action - that we try to put a majority together.

I have made a number of changes in my 2nd draft, circulated on the 7th. My purpose is to write as narrowly as possible, and yet articulate a general framework of equal protection analysis for affirmative action plans adopted by public agencies or bodies.

As I have discussed this case with Sandra, I am sending a copy of this letter to her. I am open to suggestions.

Sincerely,

Justice White  
lfp/ss  
cc: Justice O'Connor

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

February 12, 1986

84-1340 Wygant v. Jackson Board of Education

Dear Thurgood:

Yesterday was my first opportunity to read your draft of a dissenting opinion. It is well written, but in due time I will certainly reply to your basic position as well as to a number of your points.

Sincerely,

*Lewis*

Justice Marshall

lfp/ss

cc: The Conference

82 FEB 15 65:01

2025 FEB 15 10:01 AM

March 19, 1986

PERSONAL

84-1340 Wygant v. Jackson Board of Education

Dear Sandra:

After a long interlude, in which we focused on Local 28 and Local 93, I am taking another look at my opinion in Wygant. As there has been no response of any kind from Byron, it is obvious that I need your vote rather badly. I therefore would welcome any suggestions you may care to make.

My guess is that Byron, with his quite positive view about Title VII, will write separately in this equal protection case - despite his apparent agreement with us at Conference. My hope is that we can at least come out of this case with a plurality for a judgment.

Sincerely,

Justice O'Connor

lfp/ss

March 28, 1986

84-1340 Wygant

Dear Sandra:

Here are two copies of a proposed third draft of my opinion in this case.

For the most part, the changes are footnotes that respond to Thurgood's dissent. I do think, however, that his dissent afforded me the opportunity to clarify some of the basic analysis of my opinion.

I will not circulate this until you have had an opportunity to take a look at it. As this case presently is "dead in the water", please feel free to put this draft on the back of your desk until we get through next week.

Sincerely,

Justice O'Connor

lfp/ss

03/27

To: The Chief Justice  
 Justice Brennan  
 Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

*L. T. J.*  
*Draft as*  
*sent to*  
*50'C*  
*on 3/28/86*  
*prior to*  
*circulation*  
*L. T. J.*

From: Justice Powell

Circulated: \_\_\_\_\_

Recirculated: \_\_\_\_\_

*pp. 8, 9, 11, 12*

*Make*  
 1. *See suggested changes.*  
 2. *5 as expressly*  
*that is an E/P case*  
*- not Title VII*  
 3. *Involves*  
*aff action*  
*plans of public*  
*employers*

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1340

WENDY WYGANT, ET AL., PETITIONERS *v.* JACKSON BOARD OF EDUCATION, ETC., ET AL.

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

[March —, 1986]

JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether a school board may extend preferential protection against layoffs to some of its employees because of their race or national origin.

I

In 1972 the Jackson School Board, because of racial tension in the community that extended to its schools, considered adding a layoff provision to the Collective Bargaining Agreement (CBA) between the Board and the Jackson Education Association (the Union) that would protect employees who were members of certain minorities against layoffs.<sup>1</sup> The Board and the Union eventually approved a new provision, Article XII of the CBA, covering layoffs. It stated:

“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 dis-

<sup>1</sup>Prior to bargaining on this subject, the Minority Affairs Office of the Jackson Public Schools sent a questionnaire to all teachers, soliciting their views as to a layoff policy. The questionnaire proposed two alternatives: continuation of the existing straight seniority system, or a freeze of minority layoffs to ensure retention of minority teachers in exact proportion to the minority student population. Ninety-six percent of the teachers who responded to the questionnaire expressed a preference for the straight seniority system.

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

April 7, 1986

84-1340 Wygant v. Jackson Board of Education

MEMORANDUM TO JUSTICE O'CONNOR

From: Lewis F. Powell, Jr.

Now that I have had an opportunity to read the draft of your opinion (delivered privately to me several days ago), I say first that it is exceptionally well written. I particularly appreciate your willingness to join in Parts I, II, III-A and V of my opinion, and concur in the judgment. As you suggest, there may be shades of difference - though not enough to make your "join" inappropriate.

In view of your invitation, I make the following comments for your consideration:

1. You accept Thurgood's framing of the question (p. 1). I do not think his statement is accurate. The "affirmative hiring policy" before us is challenged. Could you not frame the question in your own words, or accept a revision of my question as follows:

"This case presents the question whether a school board, pursuant to an affirmative action plan adopted by the board and its union, may extend - consistently with the Equal Protection Clause - preferential protection against layoff to some of its employees solely because of their race or national origin?"

2. In describing the various ways in which a standard of analysis has been framed, I have these suggestions: (i) After quoting my "standard", you could cite the Fullilove standard that can be viewed as being substantially in accord with mine. Possibly at this point you also could quote John Stevens to the effect that "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification", Stevens, J., Fullilove, at 537. (ii) Since we hope (faintly!) that Byron will join at least some part of my opinion, is it necessary to describe Justice Marshall's position in a way that identifies Byron with the Bakke language, especially since he subsequently joined Fullilove? I note, however, that you subscribe to my formulation, and perhaps I should not ask for more. I like your quote from Mississippi University for Women, an opinion I probably should have joined.

3. On p. 3, you rephrase Thurgood's position that there must be a legitimate "remedial purpose" and the means must not impose "unnecessary hardships on affected persons". In doing so, you speak of persons "not benefited." Would it not be more consistent with the facts of this case to say that the rights of innocent persons are directly and adversely affected?

4. The last sentence in your footnote 1 refers to the "apparent prior employment discrimination by the school

district". I do not think we fairly can say, on the record before us, that prior discrimination is "apparent." One point of your discussion--and mine--on "findings" is that this Court cannot make a determination for itself whether there has been prior discrimination. Moreover, the state court in Jackson II expressly found there had been no prior employment discrimination during the relevant period.

5. This brings us to your discussion of findings, beginning on p. 5. If I understand your position correctly, I find it persuasive. It is a thoughtful refinement on the need for some kind of evidentiary record to justify remedial race-conscious state action. I do not think that it is, at bottom, inconsistent with my views. If I understand your position correctly, I could perhaps adopt your reasoning on the subject.

As I read it, your opinion recognizes (i) the need for remedial race-conscious state action to be premised on prior discrimination, and (ii) the need for some determination by the trial court of the legitimacy of that premise if it is challenged by nonminorities. You are rightly concerned, however, that a requirement that the trial court actually make an express finding of prior discrimination would inhibit voluntary compliance with public employers' civil rights obligations. In order to initiate an affirmative action program, you reason that public employers need only have "information which gives them a sufficient basis

for concluding that remedial action is necessary," slip op. at 9, or, rephrased slightly, "a firm basis for determining that affirmative action is warranted." Slip op. at 10. I have no trouble agreeing with that as a sufficient basis for initiating an affirmative action program.

Implicit in your statement of the burdens of proof and production at trial is the recognition that the trial court will have to make some determination whether the employer had a sufficient basis for concluding that remedial action is necessary (unless the plan fails for some other reason). I read your opinion as stating that the trial court must determine that the employer had sufficient evidence to support an inference of prior discrimination, or, as you state elsewhere in the opinion, "a firm basis for determining that affirmative action is warranted." Slip op. at 10. If I am correct in describing your position in this way, I will include similar language in my opinion.

6. You agree that the courts below failed to identify a sufficiently important governmental purpose, and also that the "layoff provision" in its operation is not "narrowly tailored" to achieve its asserted remedial purpose because "it is keyed to an impermissible hiring goal." With these views, of course, I am very much in agreement.

\* \* \*

I am not unaware that I am imposing a burden on you (when we already are overburdened) to consider the foregoing

comments. I am grateful for your thoughtful contributions to my own views in this case.

L.F.P., Jr.

SS

April 12, 1986

84-1340 Wygant

Dear Sandra:

Here is a revised 3rd draft that contains changes made - in significant part - as a result of your proposed concurring opinion.

I will not circulate this until you have had an opportunity to look at it. Your comments are welcome. I think the circulation of your opinion will be quite helpful.

Sincerely,

Justice O'Connor

lfp/ss  
Enc.

Stylistic Changes Throughout

4, 6, 8, 9, 10, 12, 13, 14

Justice White  
 Justice Marshall ✓  
 Justice Blackmun  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

From: Justice Powell

Circulated: \_\_\_\_\_

Recirculated: APR 14 1986

3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-1340

WENDY WYGANT, ET AL., PETITIONERS *v.* JACKSON  
BOARD OF EDUCATION, ETC., ET AL.ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT

[April —, 1986]

JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether a school board, consistently with the Equal Protection Clause, may extend preferential protection against layoffs to some of its employees because of their race or national origin.

## I

In 1972 the Jackson Board of Education, because of racial tension in the community that extended to its schools, considered adding a layoff provision to the Collective Bargaining Agreement (CBA) between the Board and the Jackson Education Association (the Union) that would protect employees who were members of certain minorities against layoffs.<sup>1</sup> The Board and the Union eventually approved a new provision, Article XII of the CBA, covering layoffs. It stated:

“In the event that it becomes necessary to reduce the number of teachers through layoff from employment by

<sup>1</sup> Prior to bargaining on this subject, the Minority Affairs Office of the Jackson Public Schools sent a questionnaire to all teachers, soliciting their views as to a layoff policy. The questionnaire proposed two alternatives: continuation of the existing straight seniority system, or a freeze of minority layoffs to ensure retention of minority teachers in exact proportion to the minority student population. Ninety-six percent of the teachers who responded to the questionnaire expressed a preference for the straight seniority system.

To: The Chief Justice  
 Justice Brennan  
 Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

Stylistic Changes Throughout

see pp. 4-5, 9, 10, 11

From: Justice Powell

Circulated: \_\_\_\_\_

Recirculated: **APR 29 1986**

4th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-1340

WENDY WYGANT, ET AL., PETITIONERS *v.* JACKSON  
 BOARD OF EDUCATION, ETC., ET AL.

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

[April —, 1986]

JUSTICE POWELL announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE, and JUSTICE REHNQUIST joined, and which JUSTICE O'CONNOR joined in parts I, II, III-A, III-B, and V of the opinion.

This case presents the question whether a school board, consistent with the Equal Protection Clause, may extend preferential protection against layoffs to some of its employees because of their race or national origin.

### I

In 1972 the Jackson Board of Education, because of racial tension in the community that extended to its schools, considered adding a layoff provision to the Collective Bargaining Agreement (CBA) between the Board and the Jackson Education Association (the Union) that would protect employees who were members of certain minorities against layoffs.<sup>1</sup> The Board and the Union eventually approved a new provision, Article XII of the CBA, covering layoffs. It stated:

<sup>1</sup>Prior to bargaining on this subject, the Minority Affairs Office of the Jackson Public Schools sent a questionnaire to all teachers, soliciting their views as to a layoff policy. The questionnaire proposed two alternatives: continuation of the existing straight seniority system, or a freeze of minority layoffs to ensure retention of minority teachers in exact proportion to the minority student population. Ninety-six percent of the teachers who responded to the questionnaire expressed a preference for the straight seniority system.

May 6, 1986

84-1340 Wygant

Dear Sandra:

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

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

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

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

standard of analysis on this crucial aspect of this case and of future affirmative action cases.

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

Sincerely

Justice O'Connor

lfp/ss

No changes from last draft (4<sup>th</sup> draft)  
except to correct printer's errors on pp 12, 13  
of 4<sup>th</sup> draft.

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

From: Justice Powell

Circulated: \_\_\_\_\_  
Recirculated: \_\_\_\_\_  
MAY 16 1986

## SUPREME COURT OF THE UNITED STATES

No. 84-1340

WENDY WYGANT, ET AL., PETITIONERS *v.* JACKSON  
BOARD OF EDUCATION, ETC., ET AL.

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

[May 19, 1986]

JUSTICE POWELL announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE and JUSTICE REHNQUIST joined, and which JUSTICE O'CONNOR joined in parts I, II, III-A, III-B, and V.

This case presents the question whether a school board, consistent with the Equal Protection Clause, may extend preferential protection against layoffs to some of its employees because of their race or national origin.

### I

In 1972 the Jackson Board of Education, because of racial tension in the community that extended to its schools, considered adding a layoff provision to the Collective Bargaining Agreement (CBA) between the Board and the Jackson Education Association (the Union) that would protect employees who were members of certain minority groups against layoffs.<sup>1</sup> The Board and the Union eventually approved a new

<sup>1</sup> Prior to bargaining on this subject, the Minority Affairs Office of the Jackson Public Schools sent a questionnaire to all teachers, soliciting their views as to a layoff policy. The questionnaire proposed two alternatives: continuation of the existing straight seniority system, or a freeze of minority layoffs to ensure retention of minority teachers in exact proportion to the minority student population. Ninety-six percent of the teachers who responded to the questionnaire expressed a preference for the straight seniority system.

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

May 21, 1986

Re: Hold for Wygant v. Jackson Board of Education, No. 84-1340

MEMORANDUM TO THE CONFERENCE

MS VOR  
Marsh v. Bd. of Ed. of Flint, et al., No. 84-1859 presents issues very similar to those presented in Wygant. Under the affirmative action program in the Flint School District, race is taken into account when teachers and counselors are laid off. Petr is a counselor. The percentage of minority counselors is targeted to reflect the percentage of minority members of the entire teaching staff, which in turn is targeted to reflect the percentage of minority students among the total student body. Layoffs are geared to reflect those targets, so that white counselors are more likely to lose their positions than black counselors. Because counselors generally have more seniority than teachers, however, the program allows for a form of "bumping down" whereby counselors take the position of a teacher, with--at least in the case of petr--no loss of salary or benefits, but with significant increase in workloads and other collateral consequences. The teachers replaced by counselors are actually laid off, but no teacher is a party to this case. Petr challenged the constitutionality of the plan in the E.D. Mich. The DC upheld the constitutionality of the plan under existing law of the circuit, Bratton v. City of Detroit, 704 F.2d 878 (CA6 1983), modified, 712 F.2d 222 (1983), cert denied, 104 S.Ct. 703 (1984). The CA6 aff'd. Although petr had been reinstated as a guidance counselor, both courts determined that the case was not moot. Also, like Wygant, the case only presents a constitutional challenge.

I recommend that we GVR this case in light of Wygant. There are distinctions between the "demotion" suffered by petr and the layoffs involved in Wygant. Whether those distinctions ought to make a difference is not a question the Court need resolve before remand. Further counseling against taking this case now is the fact that the affirmative action plan, according to petr, affects non-party teachers in a way that violates Wygant. If petr has correctly stated the facts, then presumably the agreement between the School Board and the teachers will be renegotiated (petr has the same counsel that argued Wygant and lives in the same state). Those renegotiations could affect the plan as it operates against counselors as well.

Sincerely,

L. F. P.  
L.F.P., Jr.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

May 21, 1986

Re: Hold for Wygant v. Jackson Board of Education, No. 84-1340

MEMORANDUM TO THE CONFERENCE

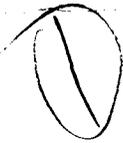
93 & 28  
Held for

City of South Bend, et al. v. Janowiak, No. 84-1936 involved an affirmative action program in the city Fire Department. The percentage of minorities in the dep't was 5.3%, while the percentage of minorities in the city was 14.1%. The Board of Public Safety (Board) appointed a task force with an eye to implementing an affirmative action plan. The task force concluded that the city's hiring procedures were not discriminatory, but nevertheless recommended a program whereby applicants were ranked and chosen from separate lists, one for minority applicants and another for nonminority applicants. Petr, who ranked second on the nonminority list but was not offered a job while four minority applicants were hired, brought this suit, raising both Fourteenth Amendment and Title VII challenges. The DC granted the city's motion for summary judgment, reasoning that neither Title VII nor the 14th Amendment prohibits a public employer from adopting an affirmative action plan based on statistical imbalances between the employment population and the population at large, even in the absence of prior discrimination by the public employer. The CA7 rev'd. It reasoned that a statistical imbalance was insufficient, and that the plan, to survive a Title VII challenge, had to be supported by a finding of prior discrimination. That reasoning on the use of statistical imbalances created a conflict with other circuits, see Johnson v. Transportation Agency of Santa Clara County, 748 F.2d 1308 (CA9 1984).

Wygant literally says nothing about Title VII. In addition, Wygant only speaks directly to the use of layoffs; its discussion of hiring preferences is dicta. While it squarely states the relevant statistical comparison for determining whether remedial action is justified, this case involves a proper statistical comparison. For these reasons, I do not think that a GVR in light of Wygant would be appropriate. The issue presented here--whether a statistical imbalance is sufficient, without more, to survive a Title VII challenge--is important. I think it would be best to deal with whatever remains of that issue following our disposition of Local No. 93 v. City of Cleveland, No. 84-1999 and Local No. 28 v. EEOC, No. 84-1656. I will vote to hold for Local 93 and Local 28.

Sincerely,

L. F. P. Jr.  
L. F. P., Jr.



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

December 16, 1985

Re: 84-1340 - Wygant v. Jackson Board of  
Education

Dear Lewis:

Please join me.

Sincerely,

Justice Powell

cc: The Conference

DEC 16 1985

RECEIVED  
20543

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

December 13, 1985

Re: 84-1340 - Wygant v. Jackson Board of  
Education

Dear Lewis:

I shall await Thurgood's dissent.

Respectfully,



Justice Powell

Copies to the Conference

DEC 19 10:35

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

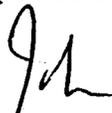
February 27, 1986

Re: 84-1340 - Wygant v. Jackson Board of  
Education

Dear Lewis:

Although I agree with much of Thurgood's  
dissent, I will be writing separately.

Respectfully,



Justice Powell

Copies to the Conference

82 FEB 28 10:40

2000  
2000

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

From: **Justice Stevens**

Circulated: MAR 4 1986

Recirculated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 84-1340

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BOARD OF EDUCATION, ETC., ET AL.

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

[March —, 1986]

JUSTICE STEVENS, dissenting.

In my opinion, it is not necessary to find that the School Board has been guilty of racial discrimination in the past to support the conclusion that it has a legitimate interest in employing more black teachers in the future. Rather than analyzing a case of this kind by asking whether minority teachers have some sort of special entitlement to jobs as a remedy for sins that were committed in the past, I believe that we should first ask whether the Board's action advances the public interest in educating children for the future. If so, I believe we should consider whether that public interest, and the manner in which it is pursued, justifies any adverse effects on the disadvantaged group.<sup>1</sup>

I

The Equal Protection Clause absolutely prohibits the use of race in many governmental contexts. To cite only a few: the government may not use race to decide who may serve on

<sup>1</sup>"In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a 'tradition of disfavor' by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment?"

*City of Cleburne v. Cleburne Living Center*, —U. S.—, — (1985) (STEVENS, J., concurring).

To: The Chief Justice  
 Justice Brennan  
 Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice O'Connor

From: **Justice Stevens**

Circulated: \_\_\_\_\_

Recirculated: \_\_\_\_\_

MAR 10 1986

REMOVED CHANGES THROUGHOUT  
 SEE INDEX

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 84-1340

WENDY WYGANT, ET AL., PETITIONERS *v.* JACKSON  
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
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[March —, 1986]

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*Cleburne v. Cleburne Living Center*, 473 U. S. —, — (1985) (STEVENS, J., concurring).



To: The Chief Justice  
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Justice Powell  
Justice Rehnquist  
Justice O'Connor

From: **Justice Stevens**

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Recirculated: APR 23 1986

2, 7

3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

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**WENDY WYGANT, ET AL., PETITIONERS v. JACKSON  
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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
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[April —, 1986]

**JUSTICE STEVENS, dissenting.**

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To: The Chief Justice  
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Justice Powell  
Justice Rehnquist  
Justice O'Connor

From: Justice Stevens

Circulated: \_\_\_\_\_

Recirculated: MAY 8 1986

2,7

4th DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 84-1340

WENDY WYGANT, ET AL., PETITIONERS *v.* JACKSON  
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*Cleburne v. Cleburne Living Center*, 473 U. S. —, — (1985) (STEVENS, J., concurring).

Supreme Court of the United States  
Washington, D. C. 20543



CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

December 19, 1985

Dear Lewis,

*good*

I have read your draft in Wygant with great interest. It is an important and challenging case. I am in agreement with you on a number of aspects of your opinion, although we may differ in some important respects. I agree with you that the strict standard of review set forth in Part II is the proper one for review of all types of race based action by the state, including affirmative action. I also agree that "societal" discrimination is a concept which is incapable of definition or limitation, and, thus, remediation. A state's interest in remedying such societal discrimination therefore cannot be deemed sufficiently important to pass constitutional muster under strict scrutiny. I also agree with you that the use of a role-model theory to justify a hiring goal based on the number of minority students in the school population was improper. Lastly, I agree that the layoff plan in this case imposes disproportionate harm on the rights and interests of some of the nonminority employees and fails to pass muster under the requirement that the employer's plan be narrowly tailored to effectuate its remedial purpose.

Let me now mention some areas of possible difficulty which I have with your approach. First is the diversity interest discussion in Part IIIB. I am not at rest on this but am inclined to think there is a legitimate state interest in promoting racial diversity in public school faculties. The point was raised belatedly by the respondents in this case and need not be addressed or resolved in this case, and I am not prepared to join an opinion which rejects that goal as not sufficiently important to meet the test you propose. Your draft states that this question is left open, but footnote 5 interprets Bakke in such a way that it may preclude reliance on such an interest.

*omit*

Second, and more importantly, Part IIIC concludes that if the Board's purpose in adopting the layoff provision was to remedy prior discrimination, "a factual determination

50's  
man  
understand  
view

must have been made, either by the Board or by a court, that the Board engaged in purposeful discrimination." I suppose that for the same reason you leave open the previous question, you could leave open the question of what findings are necessary. I do not think Hazelwood School District, which was concerned with the proper basis of comparison for purposes of statistical evaluation of a Title VII "pattern or practice" employment discrimination suit, embodies a holding that the Fourteenth Amendment requires that past discrimination be proven before a state employer may institute a "voluntary affirmative action program." Such a requirement may put us in the anomalous position of creating a severe disincentive to voluntary compliance by public employers with Title VII and the civil rights laws. Also, the Court would be saying that what private employers may do voluntarily to comply with Title VII, public employers are constitutionally forbidden to do.

Congress itself has made findings concerning the problem of employment discrimination in public employment to justify imposition of Title VII requirements on public employers. See H.R. Rep. No. 92-238 (1971). In enacting the 1972 amendments, Congress intended that the same Title VII principles be applied to public and private employers alike. Dothard v. Rawlinson, 433 U.S. 321, 331 n. 14 (1977) The Court has indicated in the past that the constitutional requirements congressional action must meet to pass muster under the Fourteenth Amendment are more tolerant than those controlling in cases where the actions of other governmental actors are at issue. Fullilove v. Klutznick, 448 U.S. 448 (1980). Perhaps, in light of Congress' findings and its enactment of the 1972 amendments to Title VII, it is appropriate to conclude that a public employer's voluntary undertaking to correct a racial disparity in its work force, which it has a substantial, demonstrable basis for believing constitutes a prima facie violation of Title VII, is in fact a remedial measure.

Problem

My inclination, then, is to believe that if a state employer has a substantial basis for believing that it is in prima facie violation of Title VII, either by virtue of its own investigation or that of some other public agency charged with enforcement of such laws, its efforts to remedy the problem will constitute an important state interest. Regardless of any differences of opinion we may have regarding the magnitude of the state's interest in this context, or regarding what findings must be made and by whom, I think we are in accord concerning the requirement that the state employer's plan be narrowly tailored to effectuate its remedial purpose. To pass muster, the plan must be a temporary measure clearly intended to eliminate

the violation, not to maintain racial balance. The plan also cannot impose disproportionate harm on the interests of, or unnecessarily trammel the rights of nonminority employees.

I'm not quite sure where this leaves us. I intend to continue to work on the problem and to try to articulate my views more fully if necessary. I can at least concur in the judgment and perhaps join parts of the opinion as well. Byron may have other ideas about all of this and I am sure we all want to reach as much common agreement as we can.

Sincerely,

A handwritten signature in cursive script, appearing to read "Sandra".

Justice Powell

cc: The Chief Justice  
Justice White  
Justice Rehnquist

*Mike: Go ahead & <sup>re-</sup>circulate. As of  
now at least, I can't satisfy  
Supreme Court of the United States  
Washington, D. C. 20543  
SOL.*

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

January 2, 1986

No. 84-1340 Wygant v. Jackson Board of Education

Dear Lewis,

Thank you for your letter and revised draft in this case. I think it is helpful to either omit the faculty diversity discussion, as you have done, or to point out it was not raised below.

The other changes you have made seem to me to be generally helpful. I continue to have <sup>(1)</sup>reservations concerning the proposed requirement that the Board or a court must have found "purposeful discrimination" (p. 8 of draft) in order to justify remedial action. And I am still <sup>(2)</sup>uncertain how a Title VII discriminatory effects case would fit under your analysis.

I am still hoping Byron will address his concerns in the hope a reconciliation is possible. If you want to circulate the revised draft it seems to me you should do so. I am not prepared yet to join quite all of it and think it could be useful to wait and see what Byron proposes.

Sincerely,

*Sandra*

Justice Powell

TO Mike to Note

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

March 21, 1986

*Mike - go ahead  
with changes  
- especially in  
response to T.M.  
I'd like a new  
draft to start  
to 30%*

Re: 84-1340 Wygant v. Jackson Board of Education

Dear Lewis,

Thanks for your letter. I fear I have fallen behind in getting out some of the writing I intend to do. I am presently trying to put my thoughts in this case in written form. I will give you a "preview" and we can talk about it to see whether there is anything you might want to incorporate in your draft. If all goes well, it will be ready next week.

Sincerely,

*Sandra*

Justice Powell

Supreme Court of the United States  
Washington, D. C. 20543

*File*

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

March 28, 1986

No. 84-1340 Wygant v. Jackson Board of Education

Dear Lewis,

I am enclosing an unpublished draft opinion concurring in part in your opinion in Wygant. I have shown it as joining Part I, II, III A, and V although I think what I say is not consistent with part of your Part III A. I want to join as much of your opinion as I possibly can. If you believe we can reach common ground to a greater extent, I will welcome your suggestions. These affirmative action cases are very difficult, at least for me. Please let me know if you would like to discuss any of this.

Sincerely,



Justice Powell

Enclosure

L.F.O

84-1340  
3/28/86

WYGANT v. JACKSON BOARD OF EDUCATION

JUSTICE O'CONNOR, concurring in part and concurring in the judgment.

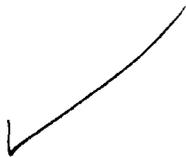
This case requires us to define and apply the standard required by the Equal Protection Clause when a governmental agency agrees to give preferences on the basis of race or national origin in making layoffs of employees. The specific question posed is, as JUSTICE MARSHALL puts it, "whether the Constitution prohibits a union and a local school board from developing a collective-bargaining agreement that apportions layoffs between two racially determined groups as a means of preserving the effects of an affirmative hiring policy, the constitutionality of which is unchallenged [in this litigation]." Post, at \_\_\_ - \_\_\_ [draft op. 5-6] (MARSHALL, J., dissenting). There is no issue here of the interpretation and application of Title VII of the Civil Rights Act; accordingly, we have only the constitutional issue to resolve.

can't deny const. rights of non-approving teacher

I should say this in my op.

The Equal Protection Clause standard applicable to racial classifications that work to the disadvantage of "nonminorities" has

Supreme Court of the United States  
Washington, D. C. 20543



CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

April 14, 1986

Re: 84-1340 Wygant v. Jackson Board of Education

Dear Lewis,

Your changes in Wygant are most welcome as far as I am concerned. I have sent my concurring opinion to the printer and will be ready to circulate it when you circulate your 3rd draft. Let's hope we see some useful action from the one remaining vote.

} Welcome

Sincerely,

*Sandra*

Justice Powell

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens

From: Justice O'Connor

Circulated: ~~APR~~ 15 1986

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1340

WENDY WYGANT, ET AL., PETITIONERS *v.* JACKSON  
BOARD OF EDUCATION, ETC., ET AL.

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

[April —, 1986]

JUSTICE O'CONNOR, concurring in part and concurring in  
the judgment.

This case requires us to define and apply the standard re-  
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agency agrees to give preferences on the basis of race or na-  
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There is no issue here of the interpretation and application of  
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The Equal Protection Clause standard applicable to racial  
classifications that work to the disadvantage of  
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TICE POWELL now would require that: (1) the racial classifica-  
tion be justified by a "sufficiently important" state purpose,  
and (2) the means chosen by the State to effectuate its pur-  
pose be "narrowly tailored." *Ante*, at —. This standard  
reflects the belief, apparently held by all members of this  
Court, that racial classifications of any sort must be sub-

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Stylistic Changes Throughout

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens

From: Justice O'Connor

Circulated: \_\_\_\_\_

Recirculated: **APR 21 1986**

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-1340

WENDY WYGANT, ET AL., PETITIONERS *v.* JACKSON  
BOARD OF EDUCATION, ETC., ET AL.

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

[April —, 1986]

JUSTICE O'CONNOR, concurring in part and concurring in  
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The Equal Protection Clause standard applicable to racial classifications that work to the disadvantage of "non-minorities" has been articulated in various ways. See, *e. g.*, *post*, at — — — (MARSHALL, J., dissenting). JUSTICE POWELL now would require that: (1) the racial classification be justified by a "sufficiently important" state purpose, and (2) the means chosen by the State to effectuate its purpose be "narrowly tailored." *Ante*, at —. This standard reflects the belief, apparently held by all members of this Court, that racial classifications of any sort must be subjected to "strict

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Justice Rehnquist  
Justice Stevens

From: Justice O'Connor

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4th DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 84-1340

WENDY WYGANT, ET AL., PETITIONERS *v.* JACKSON  
BOARD OF EDUCATION, ETC., ET AL.

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

[May —, 1986]

JUSTICE O'CONNOR, concurring in part and concurring in  
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question posed is, as JUSTICE MARSHALL puts it, "whether  
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classifications that work to the disadvantage of "non-  
minorities" has been articulated in various ways. See, *e. g.*,  
*post*, at — — — (MARSHALL, J., dissenting). JUSTICE  
POWELL now would require that: (1) the racial classification  
be justified by a "compelling governmental interest," and  
(2) the means chosen by the State to effectuate its purpose be  
"narrowly tailored." *Ante*, at —. This standard reflects  
the belief, apparently held by all members of this Court, that  
racial classifications of any sort must be subjected to "strict