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Case Comments

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BANKRUPTCY LAW—THE STANDARD FOR REJECTING COLLECTIVE BARGAINING AGREEMENTS IN BANKRUPTCY: LABOR DISCOVERS IT AIN'T "NECESSARILY" SO

Since July 10, 1984, 11 U.S.C. § 1113[1] has governed the rejection of collective bargaining agreements in bankruptcy.[2] Section 1113 provides debtors with an expedited negotiation process for modifying a burdensome organized labor contract.[3] In the event that this negotiation process fails, section 1113 allows for a judicial evaluation of a petition for

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1 11 U.S.C. § 1113 (Supp. III 1985).

2 Bankruptcy law has two alternative goals: reorganization and liquidation. Kennedy, *Creative Bankruptcy: Use and Abuse of the Bankruptcy Law—Reflections on Some Recent Cases*, 71 IOWA L. REV. 199, 201 (1985). Reorganization, the rehabilitation of a debtor through a collective agreement of its creditors, is the preferred goal of bankruptcy law. It intends to prevent economic waste, since "assets that are used for production in the industry for which they were designed are more valuable than those same assets sold for scrap." H.R. REP. No. 595, 95th Cong., 1st Sess. 220 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6179. Congress enacted § 1113 to provide a special standard for rejection of collective bargaining agreements. The drafters envisioned that its pre-rejection negotiation procedure would prevent economic waste associated either with liquidation or renegotiation of collective bargaining agreements and would properly balance bankruptcy's goal of reorganization against labor's interests in stable contractual relations reached through collective bargaining. T. HAGGARD & M. PULLIAM, CONFLICTS BETWEEN LABOR LEGISLATION AND BANKRUPTCY LAW 3-6 (1987).

3 11 U.S.C. § 1113 (Supp. III 1985) provides in relevant part:

> (a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter . . . may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.
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> (b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section 'trustee' shall include a debtor in possession), shall
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> (A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employee benefits and protections that are necessary to permit reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and
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> (B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.
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> (2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.
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> (c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that
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> (1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);
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> (2) the authorized representative of the employees has refused to accept such proposal without good cause; and
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> (3) the balance of the equities clearly favors rejection of such agreement. . . .
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> (e) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be

rejection of the collective bargaining agreement.[4] However, pursuant to section 1113(b)(1), the modifications proposed during negotiations must be "necessary to permit reorganization" in order to warrant later judicial rejection.[5] The Second Circuit's recent decision in *Truck Drivers Local 807 v. Carey Transportation, Inc.*[6] has divided the circuits by formulating a more lenient standard for "necessary modifications" than that adopted in *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of America*.[7] In particular, the *Carey* court held that "necessary modifications" mean not only those absolutely minimal changes intended to forestall liquidation, as in the *Wheeling* standard,[8] but also any modifications that promote the long-term reorganization of the debtor.[9]

Part I of this case comment briefly sketches the development of the controversy surrounding the interpretation of section 1113. Part II outlines the decision of the Third Circuit in *Wheeling*, in terms of the court's

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scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

(f) No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

4 The mechanics of the § 1113 process were addressed in an early decision interpreting the section, *In re* American Provision Co., 44 Bankr. 907 (Bankr. D. Minn. 1984), which set forth a nine-part test for rejection of collective bargaining agreements pursuant to § 1113. The test is as follows:

1) The debtor in possession must make a proposal to the Union to modify the collective bargaining agreement;

2) The proposal must be based on the most complete and reliable information available at the time of the proposal;

3) The proposed modifications must be necessary to permit the reorganization of the debtor;

4) The proposed modifications must assure that all creditors, the debtor and all of the affected parties are treated fairly and equitably;

5) The debtor must provide to the Union such relevant information as is necessary to evaluate the proposal;

6) Between the time of the making of the proposal and the time of the hearing on approval of the rejection of the existing collective bargaining agreement, the debtor must meet at reasonable times with the Union;

7) At the meetings the debtor must confer in good faith in attempting to reach mutually satisfactory modifications of the collective bargaining agreement;

8) The Union must have refused to accept the proposal without good cause;

9) The balance of the equities must clearly favor rejection of the collective bargaining agreement.

44 Bankr. at 909.

5 Several courts have interpreted the phrase "necessary modifications." *See* Truck Drivers Local 807 v. Carey Transportation, Inc., 816 F.2d 82, 88-90 (2d Cir. 1987); *In re* Century Brass Products, Inc., 795 F.2d 265, 273-76 (2d Cir.) *cert. denied*, 107 S. Ct. 433 (1986); Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of America, 791 F.2d 1074, 1084-91 (3d Cir. 1986); *In re* Royal Composing Room, Inc., 62 Bankr. 403, 412, 417-18 (Bankr. S.D.N.Y. 1986) *aff'd* — Bankr.— (S.D.N.Y Sept. 29, 1987) (No. 86 Civ. 4849 (JFK)); *In re* Amherst Sparkle Market, Inc., 75 Bankr. 847, 851 (Bankr. N.D. Ohio 1987); *In re* Walway Co., 69 Bankr. 967, 973-75 (Bankr. E.D. Mich. 1987); *In re* Mile Hi Metal Systems, Inc., 67 Bankr. 114, 117-19 (D. Colo. 1986); *In re* William Brogna, Inc., 64 Bankr. 390, 392-93 (Bankr. E.D. Pa. 1986); *In re* Kentucky Truck Sale, Inc., 52 Bankr. 797, 800-02 (Bankr. W.D. Ky. 1985); *In re* Valley Kitchens, Inc., 52 Bankr. 493, 495-97 (Bankr. S.D. Ohio 1985); *In re* Cook United, Inc., 50 Bankr. 561, 563-65 (Bankr. N.D. Ohio 1985); *In re* Allied Delivery System Co., 49 Bankr. 700, 701-02 (Bankr. N.D. Ohio 1985); *In re* Salt Creek Freightways, 47 Bankr. 835, 837-38 (Bankr. D. Wyo. 1985); *In re* American Provision Co., 44 Bankr. 907, 909-11 (Bankr. D. Minn. 1984).

6 816 F.2d 82 (2d Cir. 1987).

7 791 F.2d 1074 (3d Cir. 1986).

8 *Id.* at 1088-89.

9 816 F.2d at 90.

two-part analysis that asks, under section 1113, "how necessary" modifications must be, and "necessary to what."[10] Part III then describes how the *Carey* court uses the *Wheeling* two-part analysis to arrive at a more lenient understanding of the "necessary" modifications requirement. Part IV proceeds to examine the *Carey* and *Wheeling* holdings in terms of the legal authorities they rely upon and the precision of the standards they proffer. In so doing, it suggests that courts should limit proposals which are "necessary to permit reorganization" under section 1113 to those that significantly increase the likelihood of reorganization of the debtor despite the cumulative effect of other cost-saving measures. Finally, Part V supports this reading of section 1113 by noting that the repetitive use of the word "necessary" in the statute confines section 1113 proposals to those types of modifications that result in direct savings to the debtors.

I. Development of the Controversy Surrounding the Necessary Modification Issue

A. *Rejection of Collective Bargaining Agreements as Executory Contracts*

To facilitate reorganization in a Chapter 11 proceeding,[11] section 365(a) of the Bankruptcy Code provides for the rejection of executory contracts by a reorganizing debtor.[12] Prior to the enactment of section 1113 in 1984, courts generally considered collective bargaining agreements to be executory contracts which could be rejected under section 365(a) or its predecessor, section 313.[13] However, before the Supreme

10 791 F.2d at 1088.

11 The Chapter 11 remedy allows a debtor to file a petition for relief with a United States Bankruptcy Court and thereby obtain an automatic stay free of creditor litigation in order to permit the debtor to reorganize by selling assets, borrowing money, or changing methods of operation. 11 U.S.C. § 362 (1982 & Supp. III 1985). The debtor also prepares a plan of reorganization which must promise creditors at least as much payment as they would receive upon a company liquidation. *Id.* at § 1123. If the reorganization plan meets statutory standards, the court will confirm it and it will become binding upon all company creditors. *Id.* at § 1129. For additional discussion of the Chapter 11 process, see COWANS, BANKRUPTCY LAW AND PRACTICE, § 20.1 at 246-249 (1986 ed.).

12 11 U.S.C. § 365(a) (Supp. III 1985) states that "[e]xcept as provided in Sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." For bankruptcy purposes, an executory contract has been defined as a contract "on which performance remains due to some extent on both sides." H.R. REP. No. 595, 95th Cong., 1st Sess. 347 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963. The significance of § 365 is this: by rejecting an unfavorable contract, the debtor is able to transform a full contractual obligation into a judgment obligation for damages. Such a judgment obligation must then compete with the claims of other unsecured creditors and will in all likelihood receive only partial payment. Thus, through rejection, the debtor is able to decrease its liabilities and increase its worth, thereby benefiting its creditors and bettering its chances for a successful reorganization. For additional discussion, *see* T. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 108, 108-110 (1986); Note, *Bankruptcy and the Union's Bargain: Equitable Treatment of Collective Bargaining Agreements,* 39 STAN. L. REV. 1015, 1029-30 (1987).

13 *See, e.g., In re* Bildisco, 682 F.2d 72, 78 (3d Cir. 1982), *aff'd sub nom.* N.L.R.B. v. Bildisco & Bildisco, 465 U.S. 513 (1984); Borman's Inc. v. Allied Supermarkets, Inc., 706 F.2d 187, 190 n.8 (6th Cir.), *cert. denied,* 464 U.S. 908 (1983); Local Joint Executive Board, AFL-CIO v. Hotel Circle, Inc., 613 F.2d 210, 212-14 (9th Cir. 1980); Shopmen's Local Union No. 455 v. Kevin Steel Products, Inc., 519 F.2d 698, 706 (2d Cir. 1975); *In re* Klaber Brothers, Inc., 173 F. Supp. 83, 85 (S.D.N.Y. 1959). The statutory framework regarding employer-union labor relations is contained in the National Labor Relations Act, 29 U.S.C. § 151-169 (1982 & Supp. III 1985).

Court's guidance in *National Labor Relations Board (N.L.R.B.) v. Bildisco & Bildisco*,[14] there was a split in the circuits as to what standard courts should apply when considering the possible rejection of an executory collective bargaining agreement.[15] This split resulted from the tension between the bankruptcy law policy of protecting company assets and the labor law policy of encouraging collective bargaining agreements.

Prior to *Bildisco* and the adoption of section 1113, bankruptcy courts faced potential conflict between section 365 of the Bankruptcy Code and section 8(d) of the National Labor Relations Act (NLRA) when considering the rejection of a collective bargaining agreement.[16] Whereas section 365 allows a debtor to unilaterally reject the terms of executory contracts, subject to court approval,[17] section 8(d) of the NLRA prohibits unilateral rejection of collective bargaining agreements and provides specific guidelines for negotiating agreement changes.[18] The tension between the provisions became manifest when the National Labor Relations Board (NLRB) sought to enforce judgments for unfair labor practices against debtors that had rejected collective bargaining agreements with the approval of the bankruptcy court.[19]

In an attempt to resolve the labor-bankruptcy conflict, several federal circuit courts found that the Bankruptcy Code took priority over the

14 465 U.S. 513, 525 (1984). *See infra* notes 34-41 and accompanying text.

15 *See infra* notes 24-28 and accompanying text and notes 35-39 and accompanying text. *See also In re* Bildisco, 682 F.2d at 81; Local Union 20 v. Brada Miller Freight System, Inc., 702 F.2d 890, 899-900 (11th Cir. 1983).

16 *See infra* notes 34-41 and accompanying text.

17 11 U.S.C. § 365; *see supra* note 12.

18 Section 8(d) of the NLRA provides a detailed, four-step process for the modification of a collective bargaining agreement. In relevant part, it provides:

> (d) [W]here there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—
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> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;
>
> (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;
>
> (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies the State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and
>
> (4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

29 U.S.C. § 158 (1982). The remainder of § 8(d), along with § 8(a)(5) of the NLRA (29 U.S.C. § 158(c)(5) (1982)), provides that the failure of an employer or labor organization to comply with these conditions will constitute an unfair labor practice.

19 *See, e.g., In re* Bildisco, 682 F.2d at 84 (holding that a NLRB order in response to a complaint of an unfair labor practice failed to recognize the bankruptcy court order permitting rejection of the collective bargaining agreement in reorganization and thus would not be enforced by the Court of Appeals); *Kevin Steel*, 519 F.2d at 704 (holding that until the debtor in bankruptcy assumes the old agreement or makes a new one, it is not subject to the termination restriction imposed by § 8(d) of the NLRA); and *REA Express*, 523 F.2d at 167-68 (citing *Kevin Steel* that absent a clear Congressional mandate to the contrary, the enforcement of a collective bargaining agreement must yield to the bankruptcy court's power to provide relief for the debtor in bankruptcy).

NLRA.[20] But, rather than render the NLRA meaningless in this context, these courts tried to balance the labor law and bankruptcy policies.[21] As a result, different judicial standards for the rejection of collective bargaining agreements emerged, although all federal circuit courts agreed that the standard should be more stringent than the business judgment test that governed other contract rejections.[22] The courts eventually came to apply an elaborate "balance of equities" test that weighed non-economic as well as traditional business judgment factors to determine if a collective bargaining agreement could be rejected.[23]

1. *Shopmen's Local Union No. 455 v. Kevin Steel Products, Inc.*

The Second Circuit Court of Appeals was the first to address this conflict between the Bankruptcy Code and the NLRA. In *Shopmen's Local Union No. 455 v. Kevin Steel Products, Inc.*,[24] the Second Circuit, in permitting rejection of the collective bargaining agreement, discussed the proper standard for evaluating whether a collective bargaining agreement should be rejected.[25] It ultimately adopted a standard first enunciated in *In Re Overseas National Airways*,[26] which required "thorough scrutiny, and a careful balancing of the equities on both sides" in determining whether an executory collective bargaining agreement could be rejected in bankruptcy.[27] The Second Circuit stressed that "[t]he deci-

20 *See, e.g.*, N.L.R.B. v. Bildisco & Bildisco, 465 U.S. 513, 522-23 (1984); *Brada Miller*, 702 F.2d at 896-97 (11th Cir. 1983); *See also* Note, *supra* note 12, at 1030.

21 *See, e.g., Bildisco*, 465 U.S. at 524-27 (stressing that the natural labor policies of avoiding labor strife and encouraging collective bargaining require that employers and unions reach their own agreements on terms and conditions of employment free from governmental interference, but that the policy of Chapter 11 is to permit successful rehabilitation of debtors, and hence rejection of collective bargaining agreements may be permitted if that policy would be served by such action).

22 The business judgment test provided that a debtor could reject the agreement when in the business judgment of the trustee or management, the estate would be burdened to the extent that assets could not be conserved. *See, e.g., In re* Gray Truck Line Co., 34 Bankr. 174 (Bankr. M.D. Fla. 1983). *See also* Ritchey, *Rejection of Collective Bargaining Agreements: Section 1113*, 4 BANKR. DEV. J. 171, 171 (1987). In the collective bargaining context, such a rule was thought to grant management too much power by allowing companies to use bankruptcy law as a means of evading their collective bargaining obligations; hence, a stricter standard was deemed necessary. *See, e.g., Bildisco*, 465 U.S. at 523 ("Although there is no indication in § 365 . . . that rejection of collective bargaining agreements should be governed by a standard different from that governing other executory contracts, all of the Courts of Appeals which have considered the matter have concluded that the standard should be a stricter one.") (citing *Brada-Miller*, 702 F.2d 890 (11th Cir. 1983); *In re* Bildisco, 682 F.2d 72 (3d Cir. 1982); *Hotel Circle*, 613 F.2d 210 (9th Cir. 1980); *Kevin Steel*, 519 F.2d 698 (2d Cir. 1975)).

23 *See infra* notes 24-28 and accompanying text.

24 519 F.2d 698 (2d Cir. 1975).

25 The union had filed unfair labor practice charges with the NLRB against Kevin Steel for violating § 8(a)(1) of the NLRA by, among other things, allegedly refusing to sign a new collective bargaining agreement. Shortly thereafter, the company filed for reorganization under Chapter 11 of the Bankruptcy Act. The NLRB found Kevin Steel guilty of unfair labor practices and ordered it to sign the collective bargaining agreement. The company successfully moved to reject the agreement in bankruptcy court, but the district court held § 313(1) of the Bankruptcy Act (the forerunner of § 365(a)) inapplicable to such agreements and thus denied the rejection. *Id.* at 700-01. Kevin Steel then appealed the rejection issue to the Second Circuit.

26 238 F. Supp. 359 (E.D.N.Y. 1965).

27 *Id.* at 361. The rationale for the *Overseas* standard which the Second Circuit adopted in *Kevin Steel* was described as follows:

> . . . [I]n relieving a debtor from its obligations under a collective bargaining agreement, it may be depriving the employees affected of their seniority, welfare and pension rights, as well as other valuable benefits which are incapable of forming the basis of a provable claim

sion to allow rejection should not be based solely on whether it will improve the financial status of the debtor. Such a narrow approach totally ignores the policies of the Labor Act and makes no attempt to accommodate them."[28]

2. Tightening the *Kevin Steel* Standard in *Brotherhood of Railway, Airline and Steamship Clerks v. REA Express, Inc.*

The Second Circuit modified its *Kevin Steel* approach in *Brotherhood of Railway, Airline and Steamship Clerks v. REA Express, Inc.*[29] Whereas *Kevin Steel* allowed rejection of a collective bargaining agreement based on a balancing of the equities, the *REA Express* standard permitted rejection only where the executory collective bargaining agreement would "thwart efforts to save a failing [company] in bankruptcy from collapse . . . ."[30] Thus, *REA Express* required a showing that the rejection of the agreement was necessary to prevent the debtor's immediate liquidation.[31]

Courts which subsequently relied on *REA Express* applied a two-step analysis: first, the collective bargaining agreement must be burdensome to the extent that failure to reject it would make a successful reorganization impossible; and second, the equities must favor the debtor.[32] However, a number of courts refused to adopt the stringent *REA Express* standard,[33] and as a result the *Kevin Steel* and *REA Express* conflict over the appropriate standard for rejection still existed in the circuits until the Supreme Court considered the issue.

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for money damages. That would leave the employees without compensation for their losses, at the same time enabling the debtor, at the expense of the employees, to consummate what may be a more favorable plan or arrangement with its other creditors.

Id. at 361-62.

28 *Kevin Steel*, 519 F.2d at 707.

29 523 F.2d 164 (2d Cir. 1975).

30 *Id.* at 169. Although the facts of *REA Express* were distinguishable from *Kevin Steel* in that *REA Express* involved an agreement under the Railway Labor Act, which is expressly excepted under § 365(a) of the Bankruptcy Code, the Second Circuit did not limit application of the *REA Express* rejection standard on this basis. *Id.* at 168. *See also* Comment, *From Legislation to Consternation: Has Section 1113 Really Changed* Bildisco?, 12 DEL. J. CORP. L. 167, 174 (1987).

31 *REA Express*, 523 F.2d at 167-69; *See also* 5 COLLIER ON BANKRUPTCY, 1113.01(3)(d) at 1113-7 (15th ed. 1987); Ritchey, *supra* note 22 at 171.

32 *See, e.g., In re* Allen Wood Steel Co., 449 F. Supp. 165, 169 (E.D. Pa. 1978), *appeal dismissed*, 595 F.2d 1211 (3d Cir. 1979); *In re* Connecticut Celery Co., 106 L.R.R.M. (BNA) 2847, 2851-53 (Bankr. D. Conn. 1980); *In re* Penn Fruit Co., 92 L.R.R.M. (BNA) 3548 (E.D. Pa. 1976); *In re* Studio Eight Lighting, Inc., 91 L.R.R.M. (BNA) 2429, 2430 (E.D.N.Y. 1976).

33 *See e.g., Brada Miller*, 702 F.2d at 899 (stressing that the test of *REA Express* imposes an excessive burden on the debtor-in-possession); *In re* Gray Truck Line Co., 34 Bankr. 174, 178 (Bankr. M.D. Fla. 1983) (rejecting the *REA Express* standard because it fails to consider the potential consequences of a debtor-in-possession's inability to reject a collective bargaining agreement—the "very real likelihood of a total destruction of the debtor's chances to reorganize . . . ."); *In re* Southern Electronics Co., 23 Bankr. 348, 358-59 (Bankr. E.D. Tenn. 1982) (arguing that the *Kevin Steel* standard, rather than the more stringent standard expressed in *REA Express*, represents the appropriate compromise between the competing statutory labor and bankruptcy policies); *In re* Yellow Limousine Service, Inc., 22 Bankr. 807, 809 (Bankr. E.D. Pa. 1982) (adopting the *Kevin Steel* standard as applied in *In re* Bildisco, thereby refusing to follow *REA Express*). The Third Circuit in *In re* Bildisco explained its deviation from *REA Express*, "[F]irst, for the pragmatic reason that it may be impossible to predict the success *vel non* of a reorganization until very late in the arrangement proceedings; and second, for the prudential consideration that the imposition of such a test unduly exalts the perpetuation of the collective bargaining agreement over the more pragmatic consideration of whether the employees will continue to have jobs at all." 682 F.2d at 80.

B. N.L.R.B. v. Bildisco & Bildisco: *The Supreme Court Enunciates an "Equitable" Standard for Rejection*

The Supreme Court resolved the conflict in the circuits when it endorsed a balancing standard more favorable to a debtor in bankruptcy. In *N.L.R.B. v. Bildisco & Bildisco*,[34] the Court set forth both the proper substantive standard to be used by bankruptcy courts asked to approve rejections of collective bargaining agreements and the procedural prerequisites to rejection under section 365(a).

In defining the substantive standard for rejection, the Court refused to apply the Second Circuit's *REA Express* standard[35] and instead adopted the less stringent *Kevin Steel* balancing test, holding that the debtor need only prove "that the collective-bargaining agreement burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract."[36] Although Justice Rehnquist, writing for the majority, did not elaborate on how the interests of the affected parties should be balanced,[37] he did indicate that although not every conceivable equity should be considered, any equity which related to the success of reorganization was relevant.[38]

The Court also resolved the conflict between section 365(a) of the Bankruptcy Act and section 8(d) of the NLRA in its *Bildisco* decision through its treatment of the procedural aspect of the rejection question. The Court held that a debtor in Chapter 11 reorganization proceedings did not have to engage in collective bargaining before modifying or rejecting provisions of the labor agreement, and that such unilateral action by a debtor prior to formal rejection of the collective bargaining agreement did not constitute an unfair labor practice by virtue of the debtor's violation of section 8(d) of the NLRA.[39] Thus, under *Bildisco*, a debtor

34 465 U.S. 513 (1984). Bildisco & Bildisco, a partnership, had filed for reorganization under Chapter 11. Bildisco, authorized to act as the debtor-in-possession, had negotiated a three-year collective bargaining agreement with the union, which represented 40-45 percent of the firm's labor force. Bildisco & Bildisco failed to meet its obligation under the agreement and subsequently requested to reject the agreement under § 365(a). The bankruptcy court granted permission to reject the agreement, noting that rejection of the agreement would save the company $100,000. 465 U.S. at 518. The district court upheld the rejection. *Id.* The Third Circuit Court of Appeals affirmed. *In re* Bildisco, 682 F.2d 72 (3d Cir. 1982).

35 465 U.S. at 525. *See supra* notes 29-33 and accompanying text for a discussion of the *REA Express* standard. The Court in *Bildisco* indicated that the more stringent *REA Express* standard was "fundamentally at odds with the policies of flexibility and equity built into Chapter 11;" that it would subordinate the multiple, competing considerations of Chapter 11 reorganization to only one issue—whether rejection is necessary to prevent the debtor's liquidation; and that the evidentiary burden necessary to such standard would present difficulties which would interfere with the reorganization process. *Id.*

36 *Id.* at 526. The Court also imposed on the employer a duty to make "reasonable efforts" to renegotiate the collective bargaining agreement with the union, stating that before allowing an employer to reject the collective bargaining agreement, the bankruptcy court "should be persuaded that reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution." *Id.*

37 *Id.*

38 *Id.* at 527. Justice Rehnquist's opinion also suggested that the bankruptcy court should make a reasoned finding on the record which includes the likelihood and consequences of liquidation, the reduced value of creditors' claims and subsequent hardships on them, and the impact of rejection on the employees. *Id.*

39 *Id.* at 534. The Court noted, however, that the debtor-in-possession is not relieved of all obligations under the NLRA simply by filing a petition for bankruptcy. For example, the Court

was permitted to unilaterally reject labor contract terms prior to a court-authorized rejection pursuant to section 365.[40] Not surprisingly, the *Bildisco* decision immediately received strong criticism for its purported failure to fully consider national labor policies.[41]

C. *The Enactment of Section 1113*

The day after the *Bildisco* decision was announced, an amendment to a then-pending bankruptcy reform bill was proposed that would overturn *Bildisco's* rejection standard.[42] Although Congress initially reached a deadlock in its efforts to enact legislation that would better balance the competing goals of labor and bankruptcy law,[43] both houses ultimately passed an emergency bankruptcy court restructuring bill that included a

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stated that "[a] debtor-in-possession is an 'employer' within the terms of the NLRA, 29 U.S.C. §§ 152(1) and (2), and is obligated to bargain collectively with the employees' certified representative over the terms of a new contract pending rejection of the existing contract or following formal approval of rejection by the Bankruptcy Court." *Id. See also* N.L.R.B. v. Burns International Security Services, Inc., 406 U.S. 272, 281 (1972).

40 The Court found that once a bankruptcy petition was filed, the collective bargaining agreement was no longer an enforceable contract within the meaning of § 8(d) of the NLRA. 465 U.S. at 532.

41 *See, e.g., Bildisco*, 465 U.S. at 553 (Brennan, J., dissenting). *See also* 130 CONG. REC. H1831 (daily ed. Mar. 21, 1984) (decision creates "a new and dangerous imbalance in the collective bargaining process") (statement of Rep. Vento); *id.* at H1943 (daily ed. Mar. 26, 1984) (arguing that the *Bildisco* balancing test is "no test at all," since it only asks whether the contract's rejection would help the debtor's reorganization, rather than whether rejection was necessary to the reorganization's success) (statement of Rep. Rodino).

42 The amendment, proposed by Representative Rodino who was then Chairman of the House Judiciary Committee, was drafted as an amendment to a bill that was pending to revise the bankruptcy court system in light of the Supreme Court's earlier decision in Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982). In that case, the Supreme Court held that the bankruptcy court system had been given excessive powers (through the 1978 Reform Act) which went beyond the scope of the Constitution. For a discussion of the broader bankruptcy system bill, see Rosenberg, *Bankruptcy and the Collective Bargaining Agreement—A Brief Lesson in the Use of The Constitutional System of Checks and Balances,* 58 AM. BANKR. L.J. 293, 315 (1984).

43 The Senate initially voted down all proposed alterations of the *Bildisco* standard. *See* Pulliam, *The Collision of Labor and Bankruptcy Law:* Bildisco *and the Legislative Response,* 36 LAB. L.J. 390, 396 & 396 n. 26 (1985); *see also* Rosenberg, *supra* note 42, at 308-321. The House, on the other hand, passed legislation to restrict further the ability of debtors to reject a collective bargaining agreement. The Rodino Bill, H.R. 5174, Title II(C), 98th Cong., 2d Sess. (1984) emerged from the House as part of the larger bankruptcy reform legislation. This provision would have disallowed rejection unless a debtor could show that reorganization would fail without rejection of the contract. 130 CONG. REC. H1942 (daily ed. Mar. 21, 1984). The Rodino standard was similar to that adopted by the Second Circuit in *REA Express*, *supra* notes 29-33 and accompanying text.

The Rodino Bill received intense criticism in the Senate, where Senator Strom Thurmond and Senator Robert Packwood offered alternative amendments. Senator Thurmond, then Chairman of the Senate Judiciary Committee, proposed an amendment that purported to preserve the *Bildisco* test provided that "reasonable efforts" to negotiate changes in the contract had been made. 130 CONG. REC. S6082 (daily ed. May 21, 1984). Senator Packwood developed an additional amendment for the Senate's consideration with the cooperation of labor leaders. The Packwood amendment required a debtor to show that it had proposed "minimum [contract] modifications . . . that would permit the reorganization." 130 CONG. REC. S6181-82, 6192 (daily ed. May 22, 1984). Ultimately, both the Thurmond and Packwood amendments were withdrawn out of fear that a filibuster on the provisions might endanger a larger bill restructuring the bankruptcy court system which was pending in the Senate. *See id.* at 6186.

response to *Bildisco*.[44] The wording of the labor provision was left to a conference committee,[45] and section 1113 resulted.[46]

Section 1113 requires a debtor-employer to obtain court approval before unilaterally modifying a collective bargaining agreement. In addition, it establishes substantive and procedural requirements for rejection which encourage the parties to renegotiate contracts voluntarily.[47] To satisfy section 1113, the debtor must propose modifications to the collective bargaining agreement, give the union all financial information necessary to evaluate them, and then bargain in good faith over the proposed modifications.[48] If the debtor fails to reach an agreement with the union after complying with these requirements, it can reject its labor contract despite union objections provided that the bankruptcy court finds that the debtor's modifications are "necessary" to permit reorganization.[49]

The Bankruptcy Amendments and Federal Judgeship Act of 1984, which includes section 1113, was passed by a conference committee without the customary committee report.[50] Thus, the only record of the congressional intent behind section 1113 consists of statements made on the floor during general debate. Such statements generally do not constitute authoritative legislative history;[51] still, courts have turned to selective legislative comments, as well as to national bankruptcy and labor poli-

44 Pressure was on Congress to pass a bill restructuring the federal bankruptcy court system in the wake of the *Marathon Pipeline* case, *supra* note 42. Although Congress had enacted a series of extensions of the bankruptcy system, the last of the extensions had expired on June 28, 1984, creating chaos as bankruptcy courts closed down, thereby engendering a backlog of cases. Thus, Senator Robert Dole urged that the Senate pass the emergency restructuring bill without any "labor provision" and instead let the conference committee "hammer out" something that would be fair to both business and labor. *See* 130 CONG. REC. S6186 (daily ed. May 21, 1984) (statements of Sen. Dole). A comprehensive reform bill ultimately passed both houses.

45 *See Overview: History of the Bankruptcy Code and Prior Bankruptcy Laws*, 1 BANKRUPTCY, PRACTICE & PROCEDURE 34 (Practicing Law Institute ed. 1984).

46 *See supra* note 3 for the text of 11 U.S.C. § 1113 as adopted by Congress.

47 Such requirements include providing the union with relevant information necessary to evaluate the proposed modifications and conferring with the union in good faith to reach "mutually satisfactory modifications" of the existing collective bargaining agreement. 11 U.S.C. § 1113(b). In addition, authorization will be granted only where the union has refused to accept the proposed modifications "without good cause" and where the balance of the equities favor rejection. 11 U.S.C. § 1113(c).

48 *Id.* § 1113(b). *See supra* note 3 and *infra* notes 93-96 and accompanying text.

49 *Id.* § 1113(b)(1)(A). The bankruptcy court also must find that the union refused to accept the debtor's proposal without good cause and that the balance of the equities favor rejection of the agreement, pursuant to § 1113(c)(2), (3).

50 *See In re* Carey Transportation Co., 50 Bankr. 203, 206 (Bankr. S.D.N.Y. 1985) ("Congress did not agree on a Committee Report to accompany this section; there are only statements read into the Congressional Record by various members of Congress on the date [§ 1113] was enacted.") and 1984 U.S. CODE CONG. & ADMIN. NEWS 576. (For a discussion of *Carey* at the appellate level, *see infra* notes 78-102 and accompanying text.) *See also* Wheeling-Pittsburgh Steel Corp. v. United Steelworkers, 791 F.2d 1074, 1086 (3d Cir. 1986).

51 *See, e.g.*, Garcia v. United States, 469 U.S. 70, 76 (1984) (stressing that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represent "the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation," *id.* (citing Zuber v. Allen, 396 U.S. 168, 186 (1969)), and that reliance should not be placed on the passing comments of one member of Congress (citing Weinberger v. Rossi, 456 U.S. 25, 35 (1982)), nor on casual statements from the floor debates (citing United States v. O'Brien, 391 U.S. 367, 385 (1968))).

cies[52] to determine the meaning of section 1113. Subsequent judicial interpretation of the "necessary modifications" requirement of section 1113 has been varied, resulting in yet another split in the circuits regarding the applicable standard for rejection.[53]

II. Interpreting the "Necessary" Language in Section 1113: *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of America*

The Third Circuit's decision in *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of America*[54] was the first appellate interpretation of section 1113's standard for rejecting collective bargaining agreements. In examining the "necessary modifications" language of section 1113, the court divided its inquiry into two prongs: (1) the necessity of the proposed modifications, and (2) the objective of the modifications.[55] The Third Circuit dealt with the necessity prong by holding that a bankruptcy court should permit only essential, minimum modifications to collective bargaining agreements.[56] The court addressed the second prong by holding that the objective of the modifications should be the short-term goal of preventing the debtor's liquidation, as opposed to Chapter 11's overall long-term goal of restoring the debtor to financial health.[57]

A. *The Facts of* Wheeling

Wheeling-Pittsburgh is a large United States steel manufacturer. The 1982 recession and increased foreign competition crippled the company, prompting it to seek concessions from its union, lenders, and shareholders.[58] When negotiations failed, Wheeling-Pittsburgh filed a Chapter 11 petition for bankruptcy.[59]

52 The policy behind bankruptcy law is "to preserve the funds of the debtor for distribution to creditors and to give the debtor a new start," while the basic policy of the labor law is "to encourage creation and enforcement of collective bargaining agreements." Comment, *Collective Bargaining and Bankruptcy*, 42 S. CAL. L. REV. 477, 477 (1969). *See also supra* note 21 (discussing the balancing of the labor law policies behind the NLRA with the bankruptcy policies behind the Bankruptcy Code).

53 *See* Truck Drivers Local 807 v. Carey Transportation, Inc., 816 F.2d 82 (2d Cir. 1987) (holding that § 1113 allows modifications which are not absolutely minimal but rather which are merely necessary for the long-term financial viability of the debtor); Wheeling-Pittsburgh Steel Corp. v. United Steelworkers, 791 F.2d 1074 (3d Cir. 1986) (holding that only essential, minimum modifications to the collective bargaining agreement which prevent the debtor's actual liquidation should be permitted under § 1113). *See also infra* notes 90-102 and accompanying text (discussion of *Carey*); *infra* notes 64-77 and acccompanying text (discussion of *Wheeling*).

54 791 F.2d 1074 (3d Cir. 1986).

55 *Id.* at 1088. The Third Circuit referred to these two prongs as the "how necessary" and the "necessary to what" prongs. *Id.*

56 *Id.*

57 *Id.* at 1088-89. *See supra* note 2 for discussion of the goals of bankruptcy law.

58 *Id.* at 1076-77. The union workers, represented by United Steelworkers of America, had already agreed to concessions three times in the early 1980's. These concessions reduced the average labor cost per employee from $25.00 per hour to a low of $18.60 per hour. After restorations had increased the average labor cost back to $21.40, Wheeling-Pittsburgh requested a labor cost of approximately $19.00 for three years. *Id.*

59 *Id.* at 1077. After filing for bankruptcy, Wheeling-Pittsburgh proposed a five-year labor contract with an average labor cost of $15.20 per hour. The company based its proposal on forecasts which were far more pessimistic than earlier company forecasts. *Id.* at 1077-78. This proposal was not accompanied by a snap-back clause which would have automatically increased wages if the company performed better than anticipated. *Id.* at 1089-90. Under its proposal, Wheeling-Pittsburgh also wanted to reduce insurance benefits and eliminate supplemental unemployment guarantees, its

After further negotiating problems,[60] the company filed an application with the bankruptcy court to reject its collective bargaining agreement under section 1113;[61] the petition was granted.[62] After the District Court for the Western District of Pennsylvania affirmed the bankruptcy court's decision,[63] the matter came before the United States Court of Appeals for the Third Circuit.

B. *The* Wheeling *Court's Adoption of an Essential, Short-Term Standard*

In interpreting section 1113's "necessary modifications" language, the Third Circuit in *Wheeling* placed major emphasis on the section's legislative history, despite the absence of committee reports. The court recognized that comments made during floor debate lacked persuasive authority but justified its reliance upon them on the ground that the statute itself did not define "necessary."[64] The court believed that the legislative history shed light upon the necessity and object of the proposed modifications.[65] The Third Circuit used these questions as a two-pronged inquiry, stating that the questions of "how necessary" and "necessary to what" illuminated the proper standard in section 1113 for proposals to reject collective bargaining agreements.

1. The Degree or "How Necessary" Prong

The *Wheeling* court first discussed how necessary any proposed modifications must be in order to comply with section 1113(b)(1)(A).[66] The court indicated that a "necessary" modification should not be one which was merely *desirable* for the debtor to impose; it believed Congress wanted to afford a higher degree of protection to labor contracts than to other executory contracts.[67] Therefore, "necessary" modifications impose a more stringent standard than one of mere desirability. The court ruled that "necessary" as used in section 1113(b)(1)(A) means the same as "essential" in section 1113(e),[68] and rejected as too technical the ar-

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profit-sharing plan, cash dividends on preferred stock, and its payments to the pension plan and redemption fund. *Id.* at 1077-78.

60 The union had requested financial information from Wheeling-Pittsburgh; the company provided some, but not all of the requested information. After Wheeling-Pittsburgh announced that it would not provide the union with any more information on the company's finances, the union refused to respond to the restructuring proposal. Wheeling-Pittsburgh then filed its application to reject the collective-bargaining agreement. *Id.* at 1078.

61 *Id.* Wheeling-Pittsburgh bypassed § 1113(e) which permits interim changes in a collective bargaining agreement when essential to the continuation of the debtor's business during the time the debtor is seeking rejection. *See infra* note 68. Instead, the company allowed the existing collective bargaining agreement to remain in force while it sought rejection of the agreement under § 1113(b)-(d).

62 *In re* Wheeling-Pittsburgh Steel Corp., 50 Bankr. 969, 972 (Bankr. W.D. Pa. 1985).

63 *In re* Wheeling-Pittsburgh Steel Corp., 52 Bankr. 997, 1007 (W.D. Pa. 1985).

64 791 F.2d at 1086.

65 *Id.* at 1088.

66 *See supra* note 3 for the text of the statute.

67 791 F.2d at 1088. *See also In re* Mile Hi Metal Systems, Inc., 67 Bankr. 114, 118 (D. Colo. 1986) ("Congress did not intend, and the statute does not permit, the rejection of labor agreements on a simplistic presentation of a need to reduce labor costs to become more competitive.")

68 791 F.2d at 1088. Section (e) permits interim changes in a collective bargaining agreement before the bankruptcy court rules on rejection of the agreement. A bankruptcy court may permit

gument that "essential" and "necessary" had different meanings because they were in different subsections of section 1113.[69]

The court based this ruling on legislative history, stating that the congressional consensus was that the "necessary" language was the equivalent of the "minimum modification" standard expressed in an amendment proposed by Senator Robert Packwood. The amendment, although not adopted by the Senate, was considered by the conference committee that drafted the final language of section 1113.[70] Therefore, the *Wheeling* court found that the "how necessary" prong should be "construed strictly to signify only modifications that the [debtor] is constrained to accept" since this was the standard that the Packwood amendment sought to establish.[71]

2. The Objective or "Necessary to What" Prong

Next, the *Wheeling* court turned to the question of what should be the objective of the modifications. The court found that the plain language of the statute alone did not sufficiently answer the question with its "necessary to permit the reorganization of the debtor" language.[72] Thus, the court looked to the congressional intent behind section 1113 and ruled that the somewhat shorter-term goal of preventing the debtor's liquidation was the objective behind those words.[73]

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interim changes when "essential" to the "continuation of the debtor's business" or "to avoid irreparable damage to the estate." 11 U.S.C. § 1113(e) (Supp. III 1985).

69 791 F.2d at 1088.

70 *Id.* On the Senate floor, Senator Strom Thurmond stated that the "procedures and standard [of the bill as it had come out of the conference committee] are essentially the same as those of the Packwood amendment." 130 CONG. REC. S8888 (daily ed. June 29, 1984). *But see id.* at S8890 ("The conference compromise evenly splits the difference between *Bildisco* and Packwood") (remarks of Sen. Dole); *id.* at S8892 ("The conference's compromise adheres to the spirit of this unanimous Supreme Court decision [*Bildisco*].") (remarks of Sen. Hatch).

The relevant portion of the Packwood proposal read as follows:

> (b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the trustee shall—
>
> (A) make a proposal, based on the most complete and reliable information available, to the authorized representative of the employees covered by such agreement, providing for the minimum modifications in such employees benefits and protections that would permit the reorganization, taking into account the best estimate of the sacrifices expected to be made by all classes of creditors and other affected parties to the reorganization; . . .
>
> (C) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that—
>
> (1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);
>
> (2) the authorized representative has refused to accept such proposal and under the circumstances such refusal was unjustified; and
>
> (3) the balance of the equities clearly favors rejection of such agreement. . . .
>
> (e) No provision of this title shall be construed to permit a debtor in possession or a trustee to unilaterally terminate or alter any provision of a collective bargaining agreement before approval or rejection of such contract under this section.

130 CONG. REC. S6181-82 (daily ed. May 22, 1984).

71 791 F.2d at 1088. The court overruled the district court, since the district court had stated that "necessary" does not mean "absolutely essential." *In re* Wheeling-Pittsburgh Steel Corp., 52 Bankr. 997, 1003 (W.D. Pa. 1985).

72 791 F.2d at 1088.

73 *Id.* at 1089. *See also In re* William Brogna, Inc., 64 Bankr. 390, 392 (Bankr. E.D. Pa. 1986) (following the *Wheeling* decision that modifications must be limited to those necessary to prevent liquidation).

The court argued that its interpretation was also supported by the statutory language that limits modifications to those necessary to permit the reorganization of the debtor.[74] The *Wheeling* court asserted that the word "permit" was more in harmony with the short-term goal of avoiding liquidation than with the longer-term goal of promoting financial health.[75]

After its two-pronged inquiry, the court held that section 1113 limited modifications to a collective bargaining agreement to those essential to prevent the debtor's immediate liquidation.[76] The court ruled that bankruptcy courts should not interpret section 1113 to permit modifications which are necessary merely to achieve the Chapter 11 goal of returning the debtor to financial health. The Third Circuit's standard remained the only interpretation of the "necessary" language of section 1113 among the circuits for nearly a year, until the Second Circuit decided *Truck Drivers Local 807 v. Carey Transportation, Inc.*[77]

III. The *Carey* Response to *Wheeling*: Splitting the Circuits as to the Definition of "Necessary"

In contrast to the *Wheeling* court, the Second Circuit in *Truck Drivers Local 807 v. Carey Transportation, Inc.* interpreted section 1113 to give management greater latitude in proposing labor contract modifications.[78] The *Carey* court held that modifications need not be restricted to those which are absolutely minimal, and that "reorganization" refers to the long-term financial viability of the debtor rather than to short-term economic health.[79]

74 791 F.2d at 1089.

75 *Id.* Apparently, had Congress chosen a word such as "encourage" or "promote" so that the statute would allow modifications which "encouraged" or "promoted" the reorganization of the debtor, the language would then be more in harmony with the long-term Chapter 11 goal of restoring the debtor to financial health. The stronger language would be more liberal in allowing modifications than the word "permit." The Third Circuit remanded the *Wheeling* case for further proceedings, finding that the lower courts had applied the wrong standard of "necessity" to the case.

76 *Id.* at 1088-1089. The court's decision on whether the "necessary modification" standard should take into consideration the extra cash made available to the debtor by the automatic stay provision of Chapter 11 of the Bankruptcy Code is also noteworthy. The union had argued that because Wheeling-Pittsburgh could abide by the terms of the collective bargaining agreement for the remaining thirteen months and still emerge with enough cash on hand to meet its current operating expenses, rejection was not necessary to avoid liquidation. *Id.* at 1089. The bankruptcy court had noted that the only reason Wheeling-Pittsburgh would have this cash available was because bankruptcy proceedings had frozen the status of creditors who would otherwise have required payment. *In re* Wheeling-Pittsburgh Steel Corp., 50 Bankr. 969, 977 (Bankr. W.D. Pa. 1985). *See* 11 U.S.C. § 362 (Supp. III 1985) (automatic stay provision that freezes the status of creditors). The Third Circuit agreed that determining the necessity of modifications in light of the additional cash created by the reorganization proceeding would be inequitable. 791 F.2d at 1089. One commentator has suggested that the *Wheeling* court failed to apply its own short-term liquidation standard to this case because that standard would have required the court to accept the union's argument that no modifications were essential to avoid liquidation. Note, *Statutory Protection for Union Contracts in Chapter 11 Reorganization Proceedings*, 19 CONN. L. REV. 401, 430-31 (1987). But this is inaccurate since the Third Circuit remanded this case partially because the bankruptcy court failed to apply a short-term standard. *See* 791 F.2d at 1090-91. The *Wheeling* court did apply its short-term standard, but held that in the examination of whether modifications were necessary to avoid liquidation the cash made available by the automatic stay provision of Chapter 11 should be disregarded. *Id.* at 1089.

77 816 F.2d 82 (2d Cir. 1987).

78 *Id.* at 90.

79 *Id.*

A. *The Facts of* Carey

Carey Transportation Inc., a bus company providing shuttle service from New York airports, reported large annual losses from 1982 to 1985.[80] Attempting to remedy its situation, Carey negotiated for wage cuts with its union, Truck Drivers Local 807.[81] Nevertheless, Carey projected losses for the 1986 fiscal year of up to $950,000.[82]

After the collapse of further negotiations concerning pay and benefit reductions,[83] Carey filed for reorganization under Chapter 11 and submitted proposals to the union for modification of its collective bargaining agreement.[84] Carey justified the cutbacks as necessary in order to counteract projected losses, ameliorate its debt-ridden condition, and generate capital to repair and modernize its buses. The union immediately rejected the modification proposals,[85] and Carey filed for formal rejection of the union contract under section 1113. The bankruptcy court held that Carey had complied with section 1113 and granted its petition for rejection of the collective bargaining agreement;[86] on appeal, the Southern District of New York affirmed without opinion the bankruptcy court's holding.[87]

The Second Circuit Court of Appeals also upheld the bankruptcy court's analysis and thereby departed from the Third Circuit's holding in *Wheeling*.[88] While the Second Circuit accepted the two-prong method of inquiry set forth in *Wheeling*, it rejected the *Wheeling* court's answers to the questions of "how necessary" and "necessary to what." The court summarized its holding: "[T]he necessary requirement [of section 1113] places on the debtor the burden of proving that its proposal . . . contains necessary, but not absolutely minimal, changes that will enable the debtor to complete the reorganization process successfully."[89]

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80 *Id.* at 85. Carey lost $750,000 in fiscal 1983, $1,500,000 in 1984, and $2,500,000 in 1985.

81 *Id.* The negotiations resulted in an agreement which cut Carey's operating costs by paying newly-hired drivers reduced wages and benefits. Carey also cut expenses in 1984 and 1985 by streamlining management, permanently laying off forty drivers and obtaining a deferral of interest payments on loans from a major creditor. *Id.* at 85, 91.

82 *Id.* at 85.

83 *Id.* Negotiations in January 1985 concerned "lunch periods, booking and checkout time, driver rotation rules, holidays, vacation days, sick days, fringe benefits contributions, supplemental unemployment compensation, and supplemental disability insurance . . . ." *Id.* Carey's January proposals, if implemented, would have saved the company $750,000 a year. In March, however, Carey further requested that the collective bargaining agreement be extended for two years, during which wages and fringe benefits would remain the same. *Id.*

84 *Id.* at 86. The formal proposals included:

> (1) freezing all wages for second-tier drivers and reducing wages for first-tier drivers (those on the payroll prior to July 1, 1984) by $1.00 per hour; (2) reducing health and pension benefit contributions by approximately $1.50 per hour; (3) replacing daily overtime with weekly overtime; (4) eliminating all sick days and reducing the number of paid holidays; (5) eliminating supplemental workers' compensation and supplemental disability payments; (6) eliminating premium payments and reducing commissions paid to charter drivers; and (7) changing numerous scheduling and assignment rules. All terms were to be frozen for three years under this post-petition proposal.

Id.

85 *Id.*

86 *In re* Carey Transportation, Inc., 50 Bankr. 203, 209 (Bankr. S.D.N.Y. 1985).

87 816 F.2d at 87 (referring to unreported order of district court).

88 *Id.* at 90.

89 *Id.*

B. Carey's *Emphasis on Non-Essential Long-Term Reorganization*

1. The Degree or "How Necessary" Prong

The legislative history and the statutory requirement that the debtor negotiate in good faith constituted two bases for the *Carey* court's answer to the first inquiry: how "necessary" must the modifications be?[90] First, the court looked to the legislative history of section 1113. The court recognized the similarity between the "necessary" language of section 1113 and the "minimum modifications" language proposed by Senator Packwood, but noted that Congress had chosen not to adopt the Packwood amendment.[91] The Second Circuit reasoned that had the committee meant to accept Senator Packwood's bare-minimum level of modifications, they would not have substituted the alternative language of "necessary" modifications.[92]

The court further analyzed the meaning of "necessary" in relation to the debtor's concurrent obligation to bargain in good faith after submitting the proposed modifications to the collective bargaining agreement.[93] The court argued that the bare-minimum standard of *Wheeling* would put the debtor in a "catch-22" situation. If the debtor submitted only minimum changes, it would have no room to make concessions when bargaining with the union, as required by statute.[94] The court also observed that if the debtor provided room in its proposed changes to dicker, any concession would show that the original proposal had violated the bare-minimum standard.[95] Therefore, the court concluded that Congress intended "necessary" to allow a greater degree of changes than minimal modifications, but only those modifications that the debtor could propose in good faith.[96]

2. The Objective or "Necessary to What" Prong

The *Carey* court continued its analysis of "necessary" through the second aspect of inquiry, "necessary to what." Based upon the requirements of section 1113(e)[97] and section 1129(a)(11)[98] of the Bankruptcy

90 *Id.* at 89.

91 *Id.* at 89. *See also supra* note 70 for language of the Packwood amendment.

92 *Id.*

93 *Id.*

94 *Id.* at 90. The *Carey* court seemed to base this requirement to bargain in good faith upon the language of § 1113(b)(2). *See supra* note 3 for statutory language.

95 The *Carey* court borrowed this argument from *In re* Allied Delivery Co., 49 Bankr. 700, 702 (Bankr. N.D. Ohio 1985) stating that, "[t]his court finds that in the context of this statute 'necessary' must be read as a term of lesser degree than 'essential.' To find otherwise would be to render the subsequent requirement of good faith negotiation, . . . meaningless . . . ."

96 816 F.2d at 89.

97 *See supra* note 95.

98 11 U.S.C. § 1129 (Supp. III 1985) provides in relevant part:

> The court shall confirm a plan only if all of the following conditions are met:
>
> . . .
>
> (11) Confirmation of the plan is not likely to be followed by liquidation, or the need for further financial reorganization by the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

Id.

The plan referred to in § 1129 is the vehicle for rehabilitation of the debtor under Chapter 11. In general, the plan is a deal struck between the parties in interest and the proponent (debtor or

Code, the court rejected the *Wheeling* court's contention that section 1113(b)(1)(A) applied to short-term reorganization of the debtor and concluded that the object of the proposed changes was the long-term financial health of the debtor.[99]

In essence, the *Carey* court approached its task of defining "necessary modifications" from a practical as well as an academic standpoint.[100] It explained that the "minimum modifications" standard of *Wheeling* was inconsistent with the debtor's obligations to bargain in good faith with the union,[101] and that if the debtor needs only short-term, interim relief to prevent its liquidation, section 1113(e) was the applicable provision of the Bankruptcy Code.[102]

IV. Assessing *Wheeling* and *Carey* in Terms of Legal Substance and Precision

To evaluate the courts' decisions, it is essential to assess both the quality of the authorities upon which the decisions were based, and the

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trustee). COWANS, BANKRUPTCY LAW AND PRACTICE, § 20.17 at 297 (1986 ed.). Since the plan impairs some obligations of creditors, they must agree to it (except where the cram-down provision of § 1129(b) applies). Chapter 11 envisions that they will do so in exchange for a greater return on their investments in the form of either ownership rights in the reorganized company or fuller repayment over an extended period of time. But, under the § 1129(a)(11) requirement, a court will not, despite the intention of creditors, approve a reorganization likely to end in liquidation except where orderly liquidation is the explicit purpose of the plan. *Id.* § 20.25 at 333-34. *See also infra* note 99.

99 For the *Wheeling* standard, see 791 F.2d at 1088-89. *See also supra* notes 72-77 and accompanying text. For the *Carey* standard, see *supra* notes 79 and 89 and accompanying text.

The court pointed to § 1113(e) as the appropriate provision for short-term relief designed to allow the continuation of the debtor's business or prevent irreparable damage to the estate. 816 F.2d at 89. Only in this interim relief context, the court explained, are a debtor's proposed changes restricted to the bare-minimum modifications required for short-term survival. *Id.* Thereby, the court implied that it was incorrect for the *Wheeling* court to interpret the language of § 1113(b)(1) as providing short-term relief.

The court further relied on § 1129(a)(11) to substantiate its conclusion that the "necessary to what" prong concerned the successful reorganization of the debtor, rather than merely preventing the debtor's liquidation. *Id.* at 89. Section 1129 requires a court to confirm a reorganization plan only if it is not likely to be followed by liquidation or further financial reorganization. The court then argued that inherent in the concept of reorganization is the long-term economic health of the debtor. This argument has particular weight in light of cases interpreting the § 1129(a)(11) requirement: *In re* Belco Vending, Inc., 67 Bankr. 234, 237 (Bankr. D. Mass. 1986) (holding that a court will oppose a plan for reorganization approved by the debtor's creditors where the debtor's capital structure, earning powers, the economic conditions and the abilities of management make likely future liquidation or need for further reorganization); *In re* Pizza of Hawaii, Inc., 761 F.2d 1374, 1382 (9th Cir. 1985) (holding that the "bankruptcy court's finding of feasibility [under § 1129(a)(11)] was clearly erroneous because the plan failed to provide for the possibility that Shakey's would recover a large judgment [against the debtor] in the civil case"); *In re* Great Northern Protective Services, Inc., 19 Bankr. 802, 803 (Bankr. W.D. Wash. 1982) (" '[n]either the Code nor its predecessor statutes were intended to prolong a hopeless situation and to postpone inevitable liquidation. If the facts indicate that the plan cannot be performed, it is not feasible and cannot be confirmed . . . .' " (quoting 5 COLLIER ON BANKRUPTCY 1129.02(11) at 1129-35 (15th ed. 1981))). Hence, such long-term financial health was the appropriate object of the debtor's proposed changes.

100 816 F.2d at 89-90. For instance, the *Carey* court writes:

> [t]hus, in virtually every case, it becomes impossible to weigh necessity as to reorganization without looking into the debtor's ultimate future and estimate what the debtor needs to obtain financial health. As the *Royal Composing Room* court phrased it, '[a] debtor can live on water alone for a short time but over the long haul it needs food to sustain itself and retain its vigor . . . .'

Id. (quoting *In re* Royal Composing Room, Inc., 62 Bankr. 403, 418 (Bankr. S.D.N.Y. 1986)).

101 816 F.2d at 89.

102 *See supra* note 95 and accompanying text.

clarity of the holdings in terms of resolving the issues and preventing future litigation. Regarding the strength of authority that formed the foundation of each decision, the *Carey* analysis appears to be generally superior to the *Wheeling* analysis. However, in terms of utility, the *Wheeling* decision dictates a definite standard while the *Carey* decision does not.

A. *Nature of the Supporting Authorities*

The *Carey* court based its analysis of "necessary" on the legislative history of section 1113, which included the Packwood proposal, the concurrent obligation of good faith imposed by section 1113(b)(1)(A), the available short-term relief of section 1113(e), and the section 1129 restrictions governing judicial approval of a reorganization plan. The *Wheeling* court, however, based its decision primarily upon section 1113's legislative history, which in itself is inconsistent. The weakness of the legislative history as a basis for the *Wheeling* decision is apparent upon careful scrutiny of its content.[103]

The *Wheeling* decision is also weak because the court did not fully discuss whether a short-term liquidation standard could be harmonized with the statute's conjunctive requirement that all affected parties be treated fairly and equitably. The court noted that the "fair and equitable" requirement prevents a court from rejecting a labor contract solely because it is equitable to the creditors. But it did not explain how other parties could be considered to have been treated fairly and equitably if those parties had to make deeper sacrifices to meet the long-term Chapter 11 goal of restoring the debtor to financial health while the union had to make only bare minimum cutbacks necessary to avoid liquidation. Nonunion workers and creditors faced with such sacrifices would not likely consider such a situation fair and equitable.[104] Had the court con-

103 The legislative history of § 1113 does not clearly show that Congress intended a short-term goal of preventing liquidation as the *Wheeling* court maintained. The statements of the Congressmen quoted in *Wheeling* consistently cite the objective of proposed modifications to collective bargaining agreements in terms of "reorganization of the debtor" or "successful reorganization." 791 F.2d at 1087-88. Among those statements which the Third Circuit relied upon in arguing for a short-term standard were Congressman Morrison's remark that "the trustee must limit his proposal . . . to only those modifications that must be accomplished *if the reorganization is the succeed*," *Id.* at 1087 (quoting 130 CONG. REC. H7496 (daily ed. June 29, 1984)) (emphasis added), and Senator Packwood's remark that "only modifications which are necessary to a *successful reorganization* may be proposed." *Id.* at 1088 (quoting 130 CONG. REC. S8898 (daily ed. June 29, 1984)) (emphasis added).

However, the words "successful reorganization" do not clearly establish a short-term goal since those words could just as easily refer to the long-term goal of restoring the debtor to financial health. The Third Circuit recognized that the words "successful reorganization" could refer to either a short-term or a long-term goal. First, the court noted that Senator Orrin Hatch viewed the statutory language as a codification of the *Bildisco* decision which had permitted rejection based on "the likelihood of *successful reorganization*," which in *Bildisco* had referred to the long-term goal of returning the debtor to financial health. *Id.* (quoting 130 CONG. REC. S8892 (daily ed. June 29, 1984)) (emphasis added). Second, the Third Circuit chastened the bankruptcy court for interpreting the § 1113 standard in terms of "successful reorganization," an interpretation the Third Circuit recognized as referring to the long-term health of the debtor. *Id.* at 1090 (citing *In re* Wheeling-Pittsburgh Steel Corp., 50 Bankr. 969, 978 (Bankr. W.D. Pa. 1985)). The court's subtle divination of when "successful reorganization" points to a short-term goal and when it points to a long-term goal weakens its decision.

104 791 F.2d at 1089. The statute states that modifications must assure that "all creditors, the debtor and all of the affected parties are treated fairly and equitably." 11 U.S.C. § 1113(b)(1)(A) (Supp. III 1985). Both of the federal circuits which have interpreted § 1113's language have recog-

sidered the additional authorities analyzed in *Carey*, its interpretation of section 1113 might have been more compatible with the intent and purpose of the Bankruptcy Code.

B. *The Effectiveness of the Courts' Standards*

While the *Wheeling* court's analysis of the relevant sources may have been less than thorough, its holding was clear: a court can permit only those modifications that are essential to the short-term goal of preventing the debtor's liquidation. The *Carey* court's holding was weaker in that it did not state exactly how necessary the "more than bare-minimum" proposed changes to a collective bargaining agreement must be.[105] By failing to establish a definite standard, the *Carey* test hampers the purpose of section 1113: that is, to create a means of modifying collective bargaining agreements rather than completely rejecting them or forcing the debtor into liquidation. Since *Carey* failed to provide debtors and creditors with precise judicial standards, such parties will be unsure about what they must concede in section 1113 bargaining and therefore cannot effectively negotiate.[106] A more precise definition of the degree

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nized that non-union workers fall within the "affected parties" class. *Wheeling*, 791 F.2d at 1092 (noting that all parties who might be asked to make concessions are affected parties); Truck Drivers Local 807 v. Carey Transportation, Inc., 816 F.2d 82, 90-91 (2d Cir. 1987) (indicating that management and non-union employees are affected parties). The legislative history also sheds light on the "affected parties" classification. Senator Strom Thurmond, in referring to the compromise language, stated, "The phrase 'all of the affected parties' is obviously not meant to include any party which might conceivably be affected in any minor way, but is intended to encompass those parties *directly* affected. This phrase clearly includes, however, all nonunion employees of the debtor, whose interests should be as carefuly considered by the court as those of any union employees." 130 CONG. REC. S8888 (daily ed. June 29, 1984) (emphasis added). Therefore, Senator Thurmond concluded the union workers, the nonunion workers, and the creditors must all be treated fairly and equitably.

Even though § 1113 does create a preference for labor contracts, a court should recognize that the "fair and equitable" requirement places a boundary on how great that preference is. If a court grants such a high degree of preference to a labor contract that nonunion workers and creditors are forced to make much greater concessions than union workers, the court has gone beyond that boundary to the point that all of the affected parties are no longer treated fairly and equitably. A court should weigh the "fair and equitable" requirement when it interprets the "necessary" language of § 1113. When that language is interpreted in such a way that nonunion workers and creditors bear the burden of making the concessions necessary for Chapter 11's long-term goal of restoring the debtor to financial health while union workers only have to make bare minimum concessions necessary to avoid liquidation, the court has interpreted "necessary" in such a way that is not in harmony with the rest of the statute. *See* Gibson, *The New Law on Rejection of Collective Bargaining Agreements in Chapter 11: An Analysis of 11 U.S.C. § 1113*, 58 AM. BANKR. L.J. 325, 340 (1984) ("[A] proposal is not 'fair and equitable' unless it requires all affected parties, management and nonunion employees as well as the unionized workers, to sacrifice to a similar degree"). *But see* Note, *supra* note 12, at 1052 ("The general bankruptcy principle of assigning unequal priority to different classes of creditors instead requires that the magnitude of the creditors' sacrifices in bankruptcy be gauged by the strength of their preexisting rights. . . . The debtor's nonunion employees are not protected by the NLRA in the pre-bankruptcy world; therefore, they do not deserve the same protection in bankruptcy as union employees receive.").

105 *See supra* text accompanying notes 79, 89.

106 *See, e.g., In re* Carey Transportation, Inc., 50 Bankr. 203, 209 (Bankr. S.D.N.Y. 1985) ("[T]he § 1113 process is designed to encourage selective, necessary contract modifications rather than a total elimination of all provisions in the collective bargaining agreement. Complete *de novo* negotiation would be wasteful and counterproductive.").

of necessity would better inform potential litigants and facilitate section 1113 negotiations.[107]

Other federal bankruptcy courts have provided some guidance toward such a standard. In *In re Cook United, Inc.*,[108] the court held that modifications were necessary for reorganization if "[t]he adoption of the modifications would result in a significantly greater probability of the debtor successfully reorganizing than would result if the debtor were required to continue the collective bargaining agreement sought to be rejected."[109] Similarly, the court in *In re Walway Co.*,[110] held that "necessary modifications" concern "giving the debtor a better opportunity to reorganize and become profitable again. . . . The evidence is persuasive that if the contract is modified that [the company's] chances of reorganization and return to profitability are far greater."[111]

Such holdings give substance to the "necessary modifications" analysis by focusing on the extent to which a reduction in operating costs resulting from modifications will make a Chapter 11 reorganization more likely. At the same time an interpretation of section 1113 that is true to the primary policy underlying labor law, the maintenance of stable contractual relations through group bargaining, must adopt the converse of the *Cook* and *Walway* standards. Under such a standard, when the final dollar savings resulting from all cost cutting measures does not significantly increase the likelihood of reorganization, the proposed modifications are not "necessary."[112] Incorporating this observation into a section 1113 standard, a court should find that proposed modifications are "necessary" only if the modifications significantly increase the likelihood of reorganization and do so despite the effect of other cost cutting measures.[113] This standard would exclude *de minimus* proposals, since taken together they would not significantly increase the chance of reorganization.[114] In addition, it would exclude superfluous proposals because when cost savings from other measures are high, modifications to

107 *See* 130 CONG. REC. S8888 (daily ed. June 19, 1984) (statement of Sen. Thurmond) ("[L]egitimate concerns have been raised regarding the broadness and vagueness of [the § 1113] language. I would hope that courts will interpret both provisions in the most practical, workable manner possible."). *See also*, HAGGARD & PULLIAM, *supra* note 2, at 81-82 (1987).

108 50 Bankr. 561 (Bankr. N.D. Ohio 1985).

109 *Id.* at 563 (quoting *In re* Wright Airlines, Inc., No. 84-02493 (Bankr. N.D. Ohio 1985)).

110 69 Bankr. 967 (Bankr. E.D. Mich. 1987).

111 *Id.* at 973 (citations omitted).

112 The ratio of management cost reductions to labor cost reductions is governed by the § 1113(b)(1)(A) "fair and equitable" requirement. *See supra* note 3.

113 For example, Corporation A files a petition to reject its collective bargaining agreement with Union B. A's overall plans to reduce overhead costs include: (1) reduction in management salaries; (2) reductions in health and dental insurance benefits for B workers; and (3) reductions in the average hourly wage paid to B workers by $1.00 per hour. Expert testimony shows that the measures will make successful reorganization over a three year period 90 percent likely, but that any additional cuts will only increase that percentage to 93 percent. The expert testifies that without item (2), the chances of successful reorganization are only 50 percent, and that without item (3), the chances are only 25 percent. On these facts, proposed modifications (2) and (3) are necessary, but the court should allow no further modifications.

114 *See, e.g., In re* American Provision Co., 44 Bankr. 907, 910-11 (Bankr. D. Minn. 1984), in which the court would not allow rejection of a collective bargaining agreement because the proposed modifications would result in an only two percent reduction of labor costs. The court concluded that the debtor was using the petition for rejection primarily to force early renegotiation.

the labor contract would not significantly increase the likelihood of reorganization.[115] In so doing, the proposed standard fulfills the dual intent of section 1113—to facilitate reorganization of the debtor, while according a special status to union contracts.[116]

V. An Alternative Reading of Section 1113(b)(1)(A)

Section 1113(b)(1)(A) requires the debtor to make a proposal that "provides for those *necessary* modifications in the employees benefits and protections that are *necessary* to permit the reorganization of the debtor,"[117] before the debtor can reject a collective bargaining agreement. Clearly, the drafting committee was not seeking to be redundant in its repeated use of the word "necessary."[118] Therefore, as recognized by the *Wheeling* and *Carey* courts, "necessary" must be interpreted as defining different aspects of the allowable changes.[119]

The *Wheeling* and *Carey* courts concluded that both of the two aspects of inquiry are concerned with defining only the degree of modifications permitted. The first inquiry of necessity, "how necessary," corresponds with section 1113's requirement that the proposal include "those necessary modifications in the employee's benefits and protections."[120] The two courts considered different degrees of necessity, ranging from minimal to desirable.[121] The courts further defined the amount of permissible changes through the second inquiry: "necessary to what." This aspect of necessity corresponds to the language of the statute requiring modifications to be "necessary to permit the reorganization of the debtor."[122] The courts correctly concluded that the purpose of the modifications can determine the degree of modifications allowable. However, both courts missed a crucial aspect of "necessity" as used in section 1113.

While it is likely that Congress included "necessary" in the first part of section 1113(b)(1)(A) ("necessary modifications in the employees benefits and protections") to define the degree of modifications allowable, the committee probably did not repeat the word to further define the permissible degree in the second part of the provision. A more plausible explanation for the committee's inclusion of "necessary" a second time in section 1113(b)(1)(A) ("necessary to permit reorganization of the debtor") is that Congress sought to define the types of benefits and pro-

115 *See supra* note 112.

116 *See supra* note 2.

117 11 U.S.C. § 1113(b)(1)(A) (Supp. III 1985) (emphasis added).

118 Each word of a statute must be construed to have a particular meaning. *See, e.g.*, Mountain States Tel. & Tel. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985) (recognizing the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative).

119 *Carey*, 816 F.2d at 88 (recognizing that the provision raises questions of "how necessary" and "necessary to what"); *Wheeling*, 791 F.2d at 1088 (arguing that legislative history illuminates two aspects of the court's inquiry into necessity).

120 11 U.S.C. § 1113(b)(1)(A) (Supp. III 1985).

121 The court in *Wheeling* stated that the degree of necessity required by the statute was more than mere desirability. *Wheeling*, 791 F.2d at 1088. The *Carey* court concluded that the required degree was more than minimum modifications. *Carey*, 816 F.2d at 89.

122 11 U.S.C. § 1113(b)(1)(A) (Supp. III 1985).

tections which may be changed.[123] However, neither *Wheeling* nor *Carey* explicitly recognized this alternative.

The *Wheeling* and *Carey* courts turned to the legislative history and the language of the proposed amendments for guidance to define "necessary" as it is used in section 1113.[124] The *Wheeling* court noted Senator Packwood's statement that:

> [O]nly modifications which are necessary to a successful reorganization may be proposed. Therefore, the debtor will not be able to exploit the bankruptcy procedure to rid itself of unwanted features of the labor agreement that have no relation to its financial condition and its reorganization and which earlier were agreed to by the debtor. The word "necessary" inserted twice into this provision clearly emphasizes this required aspect of the proposal which the debtor must offer and guarantees the sincerity of the debtor's good faith in seeking contract changes.[125]

Further, the *Wheeling* court stated that necessity must be "construed strictly to signify only modifications that the trustee is constrained to accept because they are directly related to the company's financial condition and its reorganization."[126] However, while it noted Senator Packwood's comment that "necessary" was included to limit the *type* of contract changes to those with a financial impact, the court nevertheless interpreted "necessary" in terms of the degree of allowable changes. The *Carey* court did not criticize this conclusion, but only disagreed with *Wheeling's* definition of the permissible degree.

Senator Packwood's comments illustrate the motivating force behind organized labor's move to persuade Congress to statutorily overrule *Bildisco*: namely, the fear that companies were using Chapter 11 to circumvent labor statutes and rid themselves of unwanted collective bargaining agreements.[127] This fear was not unfounded in light of the bankruptcy filings by several major corporations.[128] Furthermore, Congress expressly recognized this concern.[129] While both the *Wheeling* and *Carey* courts noted this,[130] neither considered the types of modifications fundamental to the definition of "necessary." However, subsequent courts seized upon *Wheeling* and *Carey's* tangential recognition of these types of concerns as authority to consider the type of change as a deter-

123 *See infra* note 131.

124 *Carey*, 816 F.2d at 89 and *supra* notes 91-92 and accompanying text; *Wheeling*, 791 F.2d at 1088 and *supra* notes 64-65, 70 and accompanying text.

125 *Wheeling*, 791 F.2d at 1088 (citing 130 CONG. REC. S8898 (daily ed. June 29, 1984)).

126 *Wheeling*, 791 F.2d at 1088.

127 *See* Rosenberg, *supra* note 42, at 312 (citing DAILY LAB. REP. (BNA) No. 152 at A-6 (October 5, 1983)).

128 For example, union representatives have charged that Johns Manville Corporation, which filed Chapter 11 bankruptcy in 1982, was using bankruptcy to reduce its financial responsibilities to its employees. *See* Rosenberg, *supra* note 42, at 304 (citing R. Belous, *Corporate Bankruptcy and Labor Contracts in Light of the Supreme Court Decision (N.L.R.B. v. Bildisco)*, CONGRESSIONAL RESEARCH ISSUE BRIEF 1B 84072. 69 at 2-3 (March 2, 1984). Also, after Continental Airlines filed for bankruptcy and rejected its collective bargaining agreement, the unions moved to dismiss the proceeding on the ground that Continental had filed in bad faith. *In re* Continental Airlines, 38 Bankr. 67, 69 (Bankr. S.D. Tex. 1984).

129 DAILY LAB. REP. (BNA) No. 194 at A-6 (October 5, 1983).

130 *Carey*, 816 F.2d at 87; *Wheeling*, 791 F.2d at 1082.

mining factor in analyzing the propriety of a debtor's proposed modifications to the collective bargaining agreement.[131]

VI. Conclusion

Congress enacted section 1113 in response to the fears of organized labor that if rejection of collective bargaining agreements was permitted under the "fair and equitable" standard of *Bildisco*, management would eviscerate such agreements through the use of Chapter 11 proceedings. Section 1113 provides a negotiation mechanism for modifying labor contracts by specifying that only "necessary modifications" may be proposed during section 1113 negotiations if the union's failure to accept the proposals is to serve as the basis for a judicial order for rejection.

With the *Carey* decision, the circuits are now split as to the sort of modifications a debtor must first propose in order to be justified in petitioning for rejection. While the *Carey* court did well to reject the *Wheeling* court's selective reading of legislative history, the *Carey* decision itself imperils litigants by leaving them without judicially manageable standards for assessing "necessary modifications" under section 1113(b)(1)(A). A more effective analysis of section 1113 defines "necessary modifications" as those modifications which significantly increase the likelihood of reorganization, and which do so despite the cumulative effects of other cost-saving measures. The text of section 1113 supports this analysis since its repetition of the word "necessary" confines section 1113 proposals to those *types* of modification which result in direct savings to the debtor. Courts should apply this more manageable standard in future instances where a debtor seeks to set aside a collective bargaining agreement incident to bankruptcy proceedings. Such an application will better balance the interests of labor and management, while remaining consistent with

131 For instance, the United States Bankruptcy Court for the Eastern District of Pennsylvania, in *In re* Brogna, 64 Bankr. 390 (Bankr. E.D. Pa. 1986), while purporting to be bound to apply § 1113 in the "precise manner enunciated in the *Wheeling* decision," *id.* at 392, implicitly expanded *Wheeling's* two aspects of inquiry through its analysis of the types of modifications allowed. The *Brogna* court found that many of the debtor's proposed modifications had no financial impact and thus no direct bearing on preventing a debtor's liquidation. The court pointed to changes in the grievance procedure, union security, and apprentice ratios as illustrative of inappropriate proposals. *Id.* It concluded that the debtor had failed to satisfy the necessity requirement of § 1113 and therefore refused to allow rejection of the collective bargaining agreement.

The United States Bankruptcy Court for the Southern District of Ohio, in *In re* Valley Kitchens, 52 Bankr. 493 (Bankr. S.D. Ohio 1985), similarly refused to authorize a debtor's proposed modifications which included changes that would have resulted in no savings to the debtor. Subjects dealt with in the proposal to which no saving was assigned included overtime, shut downs, job classification, promotion and transfer, and absenteeism and tardiness. *Id.* at 495. The court explained that the thrust of organized labor's lobbying effort was to overturn *Bildisco* through a statute that would limit a bankruptcy court's discretion to permit a debtor's rejection of a collective bargaining agreement, and instead would emphasize negotiation between the parties. *Id.* at 496. Therefore, the court held that a proposal must deal only with changes which would result in direct savings for the debtor. *Id.* at 495.

This position finds further support in *In re* K & B Mounting, Inc., 50 Bankr. 460 (Bankr. N.D. Ind. 1985), in which the court explained that § 1113 "created an expedited form of collective bargaining with a number of safeguards designed to insure that the employers cannot use Chapter 11 solely to rid themselves of their union, but only [may propose] modifications that are truly necessary for the firm's survival." Id. at 462-63 n.3 (citing Gibson, *The New Law on Rejection of Collective Bargaining Agreements in Chapter 11: An Analysis of 11 U.S.C. § 1113*, 58 AM. BANKR. L.J. 325, 327 (1984)).

the purposes underlying the Bankruptcy Code and the National Labor Relations Act.

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CONSTITUTIONAL LAW—*BRITTON V. SOUTH BEND COMMUNITY SCHOOL CORPORATION*: DO AFFIRMATIVE ACTION LAYOFF PLANS THAT CREATE AN ABSOLUTE RACIAL PREFERENCE VIOLATE EQUAL PROTECTION PER SE?

The development of affirmative action plans appears to contradict the equal protection clause of the fourteenth amendment[1] by promoting government sanctioned favoritism on the basis of race. On a literal reading of the equal protection clause, it would appear that such favoritism would be unconstitutional in any circumstance. However, because of the deep-seated discrimination prevalent in many areas of American society, the Supreme Court in numerous cases has upheld the preferential employment treatment of minorities.[2]

In December, 1978, the South Bend, Indiana, School Board, in anticipation of possible layoffs and in fear of losing the possible gains made through recent minority hirings, adopted a contractual provision to prevent the layoff of minorities.[3] A number of nonminority teachers who were subsequently laid off challenged this "no minority layoff provision" as denying them equal protection under the law.[4]

In *Britton v. South Bend Community School Corp.*,[5] the Seventh Circuit held, en banc,[6] that the "no minority layoff" clause was a per se violation of the equal protection clause of the fourteenth amendment, and also held that an absolute preference in any affirmative action plan would be unconstitutional.[7] This comment will analyze this decision and its implications for the future of equal protection law and affirmative action programs. Part I discusses the facts of *Britton*, and surveys the opinions it produced. Part II examines the judicial treatment of affirmative action plans before *Britton* with emphasis on the different tests used by the courts when analyzing affirmative action plans. Part III analyzes the opinions in *Britton* and discusses an alternative avenue for courts to take when deciding the future of affirmative action programs. Part IV concludes that the *Britton* court's broad per se rule as to absolute preferences added little clarity to the affirmative action area, and argues that the

1 The fourteenth amendment provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

2 *See infra* notes 48-99, 102-116 and accompanying text for a discussion of the treatment of affirmative action plans by the Supreme Court.

3 The provision was part of a collective bargaining agreement adopted on May 16, 1980. In this provision the term "minorities" referred strictly to blacks. Britton v. South Bend Community School Corp., 593 F. Supp. 1223, 1226 (1984).

4 *Britton*, 593 F. Supp. at 1223, 1224.

5 819 F.2d 766 (7th Cir.) (en banc), *cert. denied*, 108 S. Ct. 288 (1987).

6 The court of appeals originally affirmed the district court's approval of the clause. Britton v. South Bend Community School Corp., 775 F.2d 794 (7th Cir. 1985). After several subsequent Supreme Court decisions concerning this issue, the appellate court granted a re-hearing en banc. Britton v. South Bend Community School Corp., 783 F.2d 105 (7th Cir. 1986).

7 *Britton*, 819 F.2d at 772. *See infra* notes 40-46 and accompanying text.

court instead should have limited the applicability of its per se rule to layoffs.

I. Britton v. South Bend Community School Corporation

In October, 1969, the Office of Civil Rights (OCR) of the Department of Health, Education and Welfare (HEW) issued a letter listing five areas where the OCR found evidence of discrimination by the South Bend Community School Corporation (the "Corporation").[8] After a second on-site review of the South Bend School District discovered no improvement, the OCR determined that the school corporation had not complied with Title VI of the Civil Rights Act of 1964.[9] In July, 1976, the District of Columbia District Court granted an injunction directing HEW to commence enforcement proceedings against the administrators of several school districts not in compliance with Title VI, including the South Bend Community School Corporation.[10]

Under pressure from HEW, the Corporation adopted Resolution 1020 in December, 1978, to alleviate the disparity between the percentage of black students attending its schools and the percentage of black teachers it employed. At school board meetings prior to adopting the resolution, the disparity between black students and teachers was said to reflect past employment discrimination by the Corporation.[11] When the Corporation adopted the resolution, the distribution of blacks in the community and of black students in the student body was twenty-two percent while the percentage of black teachers was only ten percent.[12] The resolution provided for an increase in the percentage of black teachers until it roughly equalled the percentage of black students. The school board reasoned that proportional minority teacher representation was necessary because teachers are important role models for students.[13] As a result of this resolution, the percentage of black teachers employed by the Corporation rose to thirteen percent of the teaching work force by the 1981-82 academic year.[14]

8 The two areas of concern relevant to the case were recruitment of minority teachers and promotions for black and female teachers. *Britton*, 819 F.2d at 798.

9 *Id.* at 799. Title VI of the Civil Rights Act, 42 U.S.C. § 2000d (1982) provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

10 Brown v. Weinberger, 417 F. Supp. 1215, 1222 (D.D.C. 1976). Public school students brought this action through their parents against HEW for ignoring their statutory duty to enforce equal rights in the area of public school education by continuing to actively supply segregated schools with federal funds.

11 *Britton*, 775 F.2d at 800.

12 *Id.*

13 The resolution provided that "[t]o provide in-depth education, the schools need to provide in the learning environment an opportunity for children to experience highly qualified representatives of all ethnic groups and cultures as part of their education since they need to learn to function in a pluralistic world." Resolution 1020 of the South Bend Community School Corporation, part I (1978). The Seventh Circuit interpreted this to mean that " '[t]he Board specifically resolved to increase the percentage of minority pupils [sic-the court meant "teachers"] because it deemed it essential that the student population, both black and white, have a sufficient number of minority teachers to act as role models.' " *Britton*, 819 F.2d at 767 (quoting *Britton*, 593 F. Supp. at 1225).

14 *Britton*, 593 F. Supp. at 1225.

The teachers' union and the Corporation entered into a three year collective bargaining agreement in May, 1980. The agreement stated that, in the event of possible layoffs, "[n]o minority bargaining unit employee shall be laid off."[15] The Corporation adopted this provision to prevent the loss of gains made through its affirmative action plans in the event of a possible reduction in the work force.[16] As a result, minority teachers effectively had a higher level of seniority than nonminority teachers. When layoffs occurred, in June, 1982, the Corporation released 188 teachers, all of them nonminorities, pursuant to the agreement.[17]

Several teachers affected by the no minority layoff provision filed suit against the Corporation alleging violations of the fourteenth amendment.[18] The district court held that the layoff provision did not violate the equal protection clause[19] because there were adequate findings of past discrimination to substantiate a claim of state interest and the Corporation's plan was substantially related to achieving that interest.[20] The Seventh Circuit upheld the district court in a 2-1 decision.[21] In its evaluation of the case, the district court had joined the equal protection claim and the Title VII claim. In contrast, the Seventh Circuit evaluated the two claims separately. Looking at the Title VII claim, the court applied the rule set forth by the Supreme Court in *United Steelworkers of America v. Weber*[22] in determining that the corporation was a competent body to find evidence of past discrimination and that the interests of the white employees were not unnecessarily trammelled by the plan.[23]

In evaluating the equal protection claim,[24] the court determined that remedying past discrimination is a substantial and important state inter-

15 *Britton*, 775 F.2d at 796 (quoting Article XXIII, Section 9 of the 1980-83 Agreement).

16 *Id.* at 796.

17 *Id.* at 797. The St. Joseph Circuit Court subsequently reduced the number of teachers laid off to 146 under a consent order in South Bend Community School Corp. v. National Educ. Ass'n-South Bend, No. N-7015 (St. Joseph Cir. Ct., approved Sept. 29, 1982). *Id.* (*citing Britton*, 593 F. Supp. at 1227 n.2).

18 *Britton*, 593 F. Supp. 1223 (1984). The teachers also claimed violations of 42 U.S.C. §§ 1981, 1983 and Title VII of the 1964 Civil Rights Act, *as amended*, 42 U.S.C. § 2000e (1982), the Indiana Constitution and the Indiana Teacher Tenure Act, I.C. § 20-6.1-4-1, *et seq.* (1982). *Id.* The court refused to hear the state claims. *Britton*, 593 F.2d at 1233.

19 *Britton*, 593 F.2d at 1232. The court determined that if the provision did not violate the equal protection clause then it would not violate the federal statutes listed in the claim. *Id.* at 1229.

20 *Id.* at 1231, 1232. The court followed a two-prong test which had developed from earlier opinions in Detroit Police Officers Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979) *cert. denied*, 452 U.S. 938 (1981) and Bratton v. City of Detroit, 704 F.2d 878 (6th Cir.), *modified in other respects*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984). *Britton*, 593 F.2d at 1230. First, whether there was some showing of past discrimination or underrepresentation which the state has an interest in remedying. Second, whether the plan was substantially related to that interest. *Id.* at 1231.

21 Britton v. South Bend Community School Corp., 775 F.2d 794 (7th Cir. 1985).

22 443 U.S. 193 (1979). The court had already applied *Weber* to public employers in Janowiak v. City of South Bend, 750 F.2d 557, 562-63 (7th Cir. 1984), *cert. granted, judgment vacated*, 107 S. Ct. 1620 (1987).

23 *Britton*, 775 F.2d at 803-807. The court said the plan was temporary, did not create an absolute bar to nonminorities and was designed only to maintain hiring gains. *Id.* at 806, 807.

24 In evaluating the equal protection claim, the court recognized that the Supreme Court has not provided any guidance in this area. The court did find two criteria that have been a foundation in this area. First, the program must serve some governmental interest. Second, it must be somehow directed toward reaching that objective. *Britton*, 775 F.2d at 809 (citation omitted). *See also infra* notes 65-73 and accompanying text for a discussion of the lack of guidance in this area.

est and that the findings of OCR were more than enough to establish evidence of past discrimination.[25] In addition, the court viewed the plan as not only "somehow directed" toward achieving that interest, but "essential and crucial to the achievement of the affirmative action policies of Resolution 1020," thereby satisfying scrutiny under any standard.[26]

Due to several intervening Supreme Court decisions affecting the South Bend controversy,[27] the Seventh Circuit granted the teachers' motion for a re-hearing en banc.[28] The court reversed and remanded the case to the district court for a determination of the plaintiffs' damages.[29] The plurality based its reversal on the Supreme Court's decision in *Wygant v. Jackson Board of Education*.[30] Because *Wygant* did not produce a majority opinion,[31] the plurality employed Justice O'Connor's opinion, which had been decided on the narrowest grounds.[32] According to Justice O'Connor, the *Wygant* affirmative action layoff plan failed because it was not narrowly tailored to achieve its asserted remedial purpose since the provision was tied to an improper hiring goal.[33] The *Britton* plurality similarly argued that the South Bend layoff plan was not narrowly tailored because it was tied to the same improper hiring goal as in *Wygant*.[34]

The plurality further argued that the *Britton* plan was unconstitutional because it did not involve a compelling governmental interest. The plurality found that the only purpose of the plan was to equalize the percentage of minority teachers to the percentage of minority students in order to supply role models.[35] The *Wygant* plurality rejected the use of the role model justification as a compelling governmental interest.[36]

While concluding that remedying the effects of past discrimination would have been a compelling governmental interest, Judge Posner, writing for the plurality in *Britton*, found no evidence of past discrimina-

25 *Id.* at 809-11.

26 *Id.* at 812. In addition, the court found that the provision did not stigmatize any of the white teachers who were laid off, did not require the retention of unqualified teachers, did not inviduously trammel the interests of white teachers, and was a temporary measure. *Id.* at 812-13.

27 The Supreme Court decided five cases in the affirmative action area after the first appellate decision: Johnson v. Transp. Agency, 107 S. Ct. 1442 (1987); United States v. Paradise, 107 S.Ct. 1053 (1987); Local Number 93, International Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland, 106 S. Ct. 3063 (1986); Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 106 S. Ct. 3019 (1986); Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842 (1986).

28 Britton v. South Bend Community School Corp., 783 F.2d 105 (7th Cir. 1986).

29 *Britton*, 819 F.2d at 772.

30 106 S. Ct. 1842 (1986).

31 The court issued a plurality opinion with two justices joining and one joining in part with two justices joining, and concurrences by Justice O'Connor and Justice White. Justice Marshall, and Justice Stevens all filed dissenting opinions. *See infra* note 71 for a discussion of the *Wygant* decision.

32 The court stated: " 'When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." ' " *Britton*, 819 F.2d at 768 (quoting Marks v. United States, 430 U.S. 188, 193 (1977)).

33 *Wygant*, 106 S. Ct at 1857. *Wygant*'s hiring goal was improper because it was tied to the percentage of minority students in the school distict, not to the percentage of minority teachers in the labor pool and therefore bore no relation to the remedying of discrimination. *Id.*

34 *Britton*, 819 F.2d at 772.

35 *Id.* at 770-771.

36 *Wygant*, 106 S. Ct. at 1847, 1848.

tion by the Corporation.[37]Although Judge Posner found no history of past discrimination by the Corporation to justify the remedial plan, six other judges for the Seventh Circuit en banc panel agreed with the lower courts in finding a history of past discrimination by the Corporation.[38] However, two of those six judges found the plan not narrowly tailored and hence unconstitutional.[39]

A majority of the court agreed that the Corporation's plan was not narrowly tailored and hence unconstitutional because the plan created an "absolute preference."[40] By creating an absolute preference (the plan required the layoff of *all* nonminorities before *any* minority could be laid off) the plan unnecessarily trammelled the interests of nonminorities. Judge Flaum, in his concurring opinion, hinted that if the Corporation had adopted a proportional plan (a plan which divided layoffs of minorities and nonminorities on a percentage basis) it would have passed judicial scrutiny.[41] According to Judge Flaum, the "fatal flaw" of the South

37 *Britton*, 819 F.2d at 771. In his analysis, Judge Posner differentiated between separation and discrimination. The school corporation assigned blacks and whites to different schools. Judge Posner claimed this did not involve discrimintion in hiring but rather simply separated the blacks and whites. In fact, Judge Posner claimed that because the schools were separated, more blacks were hired to teach in the segregated schools. Therefore, he argued that instead of there being discrimination against blacks in hiring the result was to increase the number of blacks hired. *Id.* In addition, Judge Posner stated that even if there was past hiring discrimination by the Corporation, that remedial purpose was never asserted by the Corporaton and therefore could be considered waived. *Id.* at 771.

38 *Id.* at 772. (Flaum, J., joined by Chief Judge Bauer, concurring in part; Cummings, J., joined by Judges Wood Jr., Cudahy, and Fairchild in dissent). Additionally, all of these judges argued that there need not be a finding of past discrimination by the employer to justify an affirmative action plan. Instead the question should be "whether the employer, giving due consideration to the rights of all employees, had 'a firm basis for determining that affirmative action [was] warranted' (quoting *Wygant* 106 S. Ct. at 1856 (O'Connor, J., concurring in part)), and whether it acted based on that belief." *Id.* at 773. The concurring opinion and the dissenting opinions all expressed the view that the Corporation did have a firm basis for determining that the affirmative action was warranted, thus establishing a compelling remedial purpose. Judge Flaum hinted that other interests, such as providing faculty diversity, may also be compelling enough to justify affirmative action plans. *Id.* at 773 n.1. A determination that racial diversity among the faculty is a compelling state interest would further undercut the part of Judge Posner's argument that the plan did not invove a compelling state interest. While Posner did not address that issue, Judge Flaum's position is tenable. In *Wygant*, Justice O'Connor did not preclude the possibility that a diverse faculty might be a compelling state interest. She states:

> The goal of providing "role-models" . . . should not be confused with the very different goal of promoting racial diversity among the faculty. Because this latter goal was not urged as such in support of the layoff provision before the Distict Court and the Court of Appeals, however, I do not believe it necessary to discuss the magnitude of the interest or its applicability in this case.

Wygant, 106 S. Ct. at 1854 n.*.

Further, Justice Marshall's dissent in *Wygant* espouses the view that the enhanced educational quality resulting from a diverse faculty could supply the "[e]videntiary support for the conclusion that remedial action is warranted." *Id.* at 1863 (citation omitted). Justice Stevens' dissent also follows this position where he concludes that special efforts to recruit and retain minorities have a legitimate basis and are a sound educational purpose because an integrated faculty will be able to provide benefits to the student body that could not be provided by an all white, or nearly all white, faculty. *Id.* at 1868.

39 Judges Flaum and Bauer. *See infra* note 40 and accompanying text.

40 *Britton*, 819 F.2d at 772 (emphasis in original) (plurality opinion). *See also id.* at 773 (Flaum, J., concurring in part). Judges Flaum and Bauer joined with the plurality opinion on this ground only. *See infra* note 124 and accompanying text.

41 *Id.* at 773 (Flaum, J., concurring in part).

Bend plan was that it "placed the *entire* burden [of alleviating past discrimination] on the white teachers."[42]

The dissents focused on two major issues. Judge Cummings directed his attention to the absolute preference problem. He termed the majority's distinction to be a *per se* approach, and argued that knocking down a plan because it creates an absolute preference allows too much manipulation by the court in order to reach the desired result.[43] He stated: "[T]he validity of an affirmitive action program will then depend on how one chooses to define the benefits bestowed by that program."[44] For example, if in *Britton* the plan was analyzed in light of the opportunity for nonminorities to teach in South Bend schools it would not have created an absolute preference for minorities because white teachers were still allowed to teach in those schools.[45] However, when analyzed in light of who would be laid off, the plan created an absolute preference for retaining minorities. Judge Cummings stated that instead of finding a per se violation, the court should "weigh the extent of the public employer's interest, the precise burdens imposed on innocent non-minorities, and the adequacy of less onerous alternatives."[46]

Judge Cudahy's dissent focused on the need for a remand for further findings of fact. He felt that because recent Supreme Court affirmative action decisions have changed affirmative action analysis, the Corporation could not have prepared a sufficient case. Judge Cudahy argued that guidance on what type of plan would pass a constitutional challenge had shifted constantly during the litigation period and had unfairly handicapped the corporation in its effort to adduce relevant evidence.[47] Therefore, Judge Cudahy argued the interests of justice required that the Corporation have an opportunity to present its case properly.

II. The Judicial Treatment of Public Affirmative Action Plans

Since their inception, public affirmative action programs have been the subject of heated debate in both political and judicial contexts.[48] Although the Reagan administration has made the dismantling of public affirmative action programs a priority,[49] many argue that such programs are necessary to realistically integrate fields previously closed to minorities.[50] Courts have wrestled with the constitutionality of state affirmative action programs in light of the equal protection clause of the fourteenth

42 *Id.* (emphasis in original).

43 *Id.* at 777 (Cummings, J., dissenting).

44 *Id.* at 776, 777.

45 *Id.* at 777.

46 *Id.* at 777. Judge Cummings suggested a remand to determine whether these factors were met.

47 *Id.* at 785 (Cudahy, J., dissenting).

48 *See infra* notes 49-50.

49 *See, e.g.*, Proceedings of the Forty-Seventh Annual Judicial Conference of the D.C. Circuit, 114 F.R.D. 419 (1986). At the conference, William Bradford Reynolds, Assistant Attorney General in charge of the Division of Civil Rights, asserted that "the Reagan Justice Department has stood firm in the fight against quotas, numerical goals, set-asides, and similar arrangements that count by race, sex, religion, or ethnic origin. They offend law and mock human dignity; they affirm nothing while negating the most fundamental of constitutional principles: equal opportunity for all." *Id.* at 451.

50 As one scholar put it:

amendment.[51] Although the Supreme Court has held that the fourteenth amendment should function to eliminate racial distinctions,[52] it has also held that a governmental body may under some circumstances take race into account as a factor in certain of its decisions,[53] including the hiring, promoting, and possibly even the laying off of its employees. Still, the Court has ruled that any race-conscious decision must receive close examination to ensure that the fourteenth amendment's equal protection guarantees remain unimpaired.[54]

> Imagine a hundred-yard dash in which one of the two runners has his legs shackled together. He has progressed ten yards, while the unshackled runner has gone fifty yards. At that point the judges decide that the race is unfair. How do they rectify the situation? Do they merely remove the shackles and allow the race to proceed? Then they could say that 'equal opportunity' now prevailed. But one of the runners would still be forty yards ahead of the other. Would it not be the better part of justice to allow the previously shackled runner to make up the forty yard gap, or to start the race all over again? That would be affirmative action toward equality.

J. FOSTER & M. SEGERS, ELUSIVE EQUALITY: LIBERALISM, AFFIRMATIVE ACTION, AND SOCIAL CHANGE IN AMERICA 78 (1983) (quoting Rabb, *Quotas by Any Other Name*, COMMENTARY, Jan. 1972, at 4). *See also* Fullilove v. Klutznick, 448 U.S. 448, 516 (1980) (Powell, J., concurring) ("The time cannot come too soon when no governmental decision will be based upon immutable characteristics of pigmentation or origin. But in our quest to achieve a society free from racial classification, we cannot ignore the claims of those who still suffer from the effects of identifiable discrimination."); United States v. Sheriden, 614 F. Supp. 387, 388 (D.N.J. 1985) (" 'Affirmative action plans, with all of their imperfections, deficiencies and weaknesses, are a symbol of this country's willingness to correct the inequities of the past and to express a commitment to their elimination in the future.' ") (quoting Vulcan Pioneers, Inc. v. New Jersey Dept. of Civil Service, 588 F. Supp. 716, 727 (D.N.J. 1984)).

51 Affirmative action programs have also been challenged under various federal and state civil rights statutes, particularly Title VII of the Civil Rights Act of 1964 (Title VII). Title VII provides:

> It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(a)(1982). In Johnson v. Transp. Agency, Santa Clara County, California, 107 S. Ct. 1442 (1987), the Court advised that the analyses under Title VII and the equal protection clause are different since Title VII was enacted pursuant to the commerce clause, not the equal protection clause. *Id.* at 1449-1450 n.5. However, Justice O'Connor advocated in *Johnson* that judicial examination of a public employer's affirmative action program under Title VII should be the same as that required under the equal protection clause. *Id.* at 1461 (O'Connor, J., concurring). While the Court has not clearly defined the analysis of affirmative action programs in light of the equal protection clause, it has agreed on the factors to use in a Title VII analysis. In United Steelworkers of America v. Weber, 443 U.S. 193, 208 (1979), the Court accepted an affirmative action plan in light of Title VII because:

> [T]he plan does not unnecessarily trammel the interests of white employees. The plan does not require the discharge of white workers and their replacement with new black hirees . . . . Nor does the plan create an absolute bar to the advancement of white employees . . . . Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance.

The Court has adopted this reasoning in analyzing all Title VII challenges to affirmative action programs. *See, e.g., Johnson*, 107 S. Ct. at 1451-1452.

52 Palmore v. Sidoti, 466 U.S. 429, 432 (1984) (citing Strauder v. West Virginia, 100 U.S. 303, 307-308, 310 (1880)).

53 *See, e.g.*, Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842, 1850 (1986) (recognizing that it is sometimes necessary to consider race to effectively eliminate the effects of prior discrimination); Fullilove v. Klutznick, 448 U.S. 448, 482 (1980) (In addressing a challenge to a race conscious Congressional spending program, the Court held: "As a threshold matter, we reject the contention that in the remedial context the Congress must act in a wholly 'color blind' fashion.").

54 *Fullilove*, 448 U.S. at 491.

Traditionally, the Supreme Court has used varying degrees of scrutiny in equal protection challenges to governmental decisions in areas other than affirmative action. Prior to the Burger Court, the Court had a two-tiered standard of review for equal protection challenges posed to governmental classifications. When a classification was based on economic grounds or some other non-suspect[55] category, the Court showed great deference to the governmental body[56] and applied a rational relationship test, rejecting the decision only if the classification could not conceivably bear a rational relationship to a legitimate governmental purpose.[57] When the classification was based on some "suspect"[58] basis, such as race, or infringed upon some fundamental right,[59] the Court subjected it to much more rigorous examination, often referred to as "strict scrutiny."[60] Under strict scrutiny, the government needed to show that the classification was necessary to achieve a compelling government in-

55 *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (per curiam) (Holding that age is not a suspect criteria, the Court found the State Police's mandatory retirement plan constitutional.); *see also infra* note 58 (describing suspect categories).

56 New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting); Mathews v. De Castro, 429 U.S. 181, 185 (1976) (under this test, a court finds a governmental decision contrary to the fourteenth amendment when it is " 'clearly wrong, a display of arbitrary power, not an exercise of judgment.' ") (quoting Helvering v. Davis, 301 U.S. 619, 640 (1937); L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 16-2, at 995 (1978).

57 *See, e.g.*, New Orleans v. Dukes, 427 U.S. 297 (1976), where a pushcart vendor challenged a New Orleans ordinance prohibiting pushcart sales in the French Quarter, but exempting those who had operated there for more than eight years. The vendor bringing the suit had operated there for only two years and argued that the exemption denied her equal protection. *Id.* at 298-299. The Supreme Court upheld the ordinance, saying that the classification need only be "rationally related to a legitimate state interest" because it was an economic regulation not involving a fundamental right or a suspect criteria. *Id.* at 303. It found a legitimate state interest in the ordinance's goal of enhancing the charm of the French Quarter. *Id.* Further, the Court said that "[S]tates are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude." *Id.*

In Dandridge v. Williams, 397 U.S. 471 (1970), welfare recipients challenged Maryland's administration of a welfare program because, though the state computed need based on family size, it said the maximum amount a family of any size could receive was $250 a month. *Id.* at 474-475. The recipients bringing the challenge were large families who argued that the program denied them equal protection. *Id.* at 475. Since the case concerned "economics and social welfare," the Court applied the rational relationsip test. *Id.* at 485. The Court said the plan need not be the wisest or the most just, but merely rationally related to the legitimate goal of allocating limited resources among a large group of potential recipients. *Id.* at 487. The Court found the plan constitutional. *Id.*

58 In San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973), the Court advised that a suspect class is typically one which is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." Typically, inherently suspect classifications are those based on race, religion, or alienage. New Orleans v. Dukes, 427 U.S. at 303.

59 *See, e.g.* Shapiro v. Thompson, 394 U.S. 618, 629-631 (1969) (the right to travel interstate is a fundamental right) (citations omitted). *But see* Haig v. Agee, 453 U.S. 280, 306 (1981) (the freedom to travel abroad is not a fundamental right) (citations omitted). *See also* Loving v. Virginia, 388 U.S. 1, 12 (1967) (the right to marry is a fundamental right) (citations omitted); Griswold v. Connecticut, 381 U.S. 479, 481-486 (1969) (the right to marital privacy is a fundamental right) (citations omitted); Reynolds v. Sims, 377 U.S. 533, 554-555 (1964) (the right to vote is a fundamental right) (citations omitted).

60 *See, e.g.*, J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW, § 14.3, at 530-531 (3d ed. 1986).

terest.[61] Unsatisfied with the two-tiered approach,[62] the Court added a middle tier, an intermediate test, initially to analyze gender classifications.[63] Under this intermediate test, the Court requires that the classification be "substantially related" to an "important government interest."[64]

However, in the affirmative action area, the Court has not yet defined the appropriate standard of review. The Court first addressed the constitutionality of affirmative action programs in *Regents of University of California v. Bakke*.[65] Although a majority of the Justices in *Bakke* agreed that affirmative action programs can be constitutional,[66] they did not agree on a standard of review. Justice Powell advocated strict scrutiny,[67] saying that the racial classification must be necessary to achieve a sub-

61 For example, in Palmore v. Sidoti, 466 U.S. 429 (1984) the Court reversed a state court's decision to deny a white mother custody of her daughter because of her remarriage to a black man. The state court believed that if the child were to remain in the interracial household, she would suffer because of societal discrimination against such living arrangements. *Id.* at 431 (citations omitted). The Supreme Court applied strict scrutiny to the decision, since the classification was based on race. *Id.* at 432 (citations omitted). The Court found that looking after the best interests of a child in a custody dispute is a substantial governmental interest. *Id.* at 433. But, the Court concluded that the possible effect of private biases on a child does not justify taking the child away from her natural mother. *Id.* at 433.

In Loving v. Virginia, 388 U.S. 1 (1967), the Court addressed the constitutionality of a Virginia statute which prohibited interracial marriage. The Court subjected the racial classification to strict scrutiny. *Id.* at 11. The Court found the statute unconstitutional since it did not involve a legitimate governmental purpose as it was intended to "maintain White Supremacy." *Id.* at 11-12.

62 Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting) (when strict scrutiny is applied, the statute is almost always found unconstitutional; when the rational relationship test is applied, the statute is always upheld.); R. Fox, *Equal Protection Analysis: Laurence Tribe, The Middle Tier and the Role of the Court*, 14 U.S.F. L. Rev. 525, 526 (1980) (arguing that the two-tiered approach was too rigid).

63 *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976). An intermediate test has since been applied to classifications based on illegitimacy as well. In Lalli v. Lalli, 439 U.S. 259 (1978), the Court held that while illegitimate children are not a suspect class and thus not subject to strict scrutiny, any classification based on illegitimacy must be "substantially related to permissible state interests." *Id.* at 265. The Court found a state statute requiring illegitimate children to provide a form proving paternity if they are to inherit from their fathers by intestate succession constitutional. *Id.* at 275-276. The Court found that the procedural requirement placed only on illegitimate children involved a legitimate state interest in providing "for the just and orderly disposition of property at death," *id.* at 268, and that the classification was substanially related to that goal. *Id.* at 275-276.

64 *Id.* at 197. In *Craig*, the Court addressed the constitutionality of an Oklahoma law which provided that males could not purchase beer until they reached the age of 21, while females could purchase beer once they reached the age of 18. *Id.* at 192. In finding the statute unconstitutional, the Court found the state's interest in promoting traffic safety important, but that the gender based classification did not clearly serve that interest. *Id.* at 199-200.

65 438 U.S. 265, 359 (1978). Prior to *Bakke*, the Court had agreed to hear a constitutional challenge to an affirmative action plan, and then dismissed it without passing on the merits. DeFunis v. Odegaard, 416 U.S. 312 (1974) (dismissed as moot).

Although constitutional claims were made, the *Bakke* Court found that the plan violated § 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, which provides, *inter alia*, that no person shall be excluded from participating in any program receiving federal financial assistance because of race. But a majority of the Court did agree that the standards under Title VI and the fourteenth amendments are the same. *Id.* at 287 (Powell, J.); *id.* at 328 (Brennan, White, Marshall and Blackmun, JJ., concurring in the judgment in part and dissenting in part). The four other justices did not reach the issue of constitutionality, and instead decided the case solely on the basis of Title VI. *Id.* at 408-421 (Stevens, J., joined by Burger, C.J. and Stewart and Rehnquist, JJ., concurring in the judgment in part and dissenting in part).

66 438 U.S. at 307-315 (Powell, J.); *id.* at 328 (Brennan, White, Marshall and Blackmun, JJ., concurring in the judgment in part and dissenting in part).

67 *Id.* at 291.

stantial government interest.[68] Justices Brennan, Marshall, White and Blackmun advocated an intermediate standard, though not by name, and said that the racial classification must be substantially related to achieving an important government interest.[69]

Since *Bakke*, the Court has addressed the constitutionality of affirmative action programs, on the merits, on three separate occasions: in *Fullilove v. Klutznick*,[70] *Wygant v. Jackson Bd. of Education*,[71] and *United States v. Paradise*.[72] The Court has come no closer than it did in *Bakke*, over ten years ago, to reaching agreement on the appropriate standard of review,[73] although strict scrutiny itself has been revised slightly by its advocates.[74] Furthermore, although some members of the Court have recognized that hiring, promotional and layoff plans entail different degrees of intrusiveness to nonminorities, the Court has yet to decide whether race conscious layoff plans are ever constitutional.[75]

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68 *Id.* at 305.

69 *Id.* at 359. However, Justice White's position on the standard of review is unclear, as he also wrote a separate opinion, primarily to argue that Title VI does not provide for a private cause of action. *Id.* at 379-387. Although Justice White wrote that "my views with respect to the equal protection issue, are included in the joint opinion that my Brothers Brennan, Marshall and Blackman and I have filed," *id.* at 387, he wrote in a footnote that "I also join Parts I, III-A and V-C of Mr. Justice Powell's opinion." *Id.* at 387 n.7. Part III-A of Justice Powell's opinion contains part, though not all, of his discussion of the standard of review. Furthermore, in subsequent decisions, Justice White has not joined either the intermediate standard advocates nor the strict scrutiny advocates and has instead decided on a case by case basis without applying a specific standard of review. Fullilove v. Klutznick, 448 U.S. 448, 453-492 (1980) (joining in opinion of Burger, C.J.); Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842, 1857 (1986) (concurring); United States v. Paradise, 107 S. Ct. 1053, 1080 (1987) (dissenting).

70 448 U.S. 448 (1980) (upholding the constitutionality of a congressional spending program requiring that grantees of federal funds for work projects spend at least 10% of the funds on minority business enterprises)

71 106 S. Ct. 1842 (1986). The Court, by a vote of 5-4, found that a provision of a collective bargaining agreement extending preferential protection against layoffs to minority school teachers violated the fourteenth amendment. But the Court promulgated three opinions in support of the judgment, and two dissenting opinions. Justice Powell's opinion, in which Chief Justice Rehnquist joined and Justice O'Connor joined in part, advocated using strict scrutiny to determine the constitutionality of an affirmative action program. *Id.* at 1849. Justice Powell wrote that this plan failed because the "role model theory" is not a compelling government interest, *id.* at 1847, and because race-conscious layoffs are never constitional. *Id.* at 1849-1850. Justice O'Connor's concurring opinion accepted Justice Powell's use of strict scrutiny, but she refrained from deciding whether race-conscious layoffs are always unconstitional. *Id.* at 1857. Justice O'Connor argued that the plan was not narrowly tailored because it was tied to an improper hiring goal. *Id.* Justice White filed a concurring opinion in which he refrained from articulating any standards, but he agreed with Justice Powell that race conscious layoff plans are never appropriate. *Id.* Justice Marshall filed a dissenting opinion in which Justices Brennan and Blackmun joined. He wrote in favor of an intermediate test, but argued that the layoff plan passed muster under any standard. *Id.* at 1861. Justice Stevens filed a dissenting opinion, not setting forth any standard of review, but arguing that the layoff plan was constitutional. *Id.* at 1867-71.

72 107 S. Ct. 1053 (1987) (upholding an order that 50% of the promotions to Alabama State Trooper Corporal go to blacks until 25% of the rank was composed of blacks).

73 *See generally* Friedman, *Constitutional Equality and Affirmative Action in Employment: A Search for Standards*, 4 DET. C.L. REV. 1113 (1986) (discussing the Court's disagreement over the appropriate standard of review).

74 Strict scrutiny advocates now argue that a plan should be narrowly tailored to achieve a compelling governmental interest. *Wygant*, 106 S. Ct. at 1846.

75 *See supra* note 71 *(Wygant* is the only Supreme Court case to have addressed the constitutionality of affirmative action layoff plans).

A. *The Debate Over the Standard of Review: Strict Scrutiny v. An Intermediate Test*

Strict scrutiny advocates argue that since affirmative action programs involve racial classifications which are always suspect, courts should analyze them under strict scrutiny.[76] Intermediate test advocates counter that courts should not use strict scrutiny in affirmative action cases because affirmative action programs, which benefit minorities to the detriment of nonminorities, do not involve a fundamental right and because whites are not a suspect class.[77] At the same time they acknowledge that, since a state can misuse any racial classification, the least critical rational relationship test is also inappropriate.[78] In compromising between strict scrutiny and the rational relationship test, they argue that the intermediate test is "strict — not 'strict in theory and fatal in fact,' because it is stigma that causes fatality — but strict and searching nonetheless."[79] In any case, because the two standards are vague and their differences unclear, close examination of each is necessary to understand the affirmative action controversy.

1. Governmental Purpose

Both strict scrutiny and the intermediate test require the government to have some purpose in using racial classifications. Strict scrutiny requires that purpose to be "compelling",[80] while the intermediate test requires it to be "important."[81] Although some have said the differences between the two are negligible,[82] requiring an important governmental

76 *See, e.g.*, *Wygant*, 106 S. Ct. at 1853 (O'Connor, J., concurring)(explaining that strict scrutiny "mirrors the standard we have consistently applied in examining racial classifications in other contexts."); Regents of Univ. of California v. Bakke, 438 U.S. 265, 291 (1978) (Powell, J.) ("Racial and ethnic distinctions of any sort are inherently suspect and call for the most exacting judicial examination."); Karst & Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955, 965 (1974).

77 *Bakke*, 438 U.S. at 357 (Brennan, White, Marshall and Blackmun, JJ., concurring in the judgment in part and dissenting in part). *But see id.* at 295-296 (Powell, J.) ("[T]he white 'majority' itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination . . . . There is no principled basis for deciding which groups would merit 'heightened judicial solicitude' and which would not."). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, at 91 (1979 Supplement); Ely, *The Constitutionality of Reverse Discrimination*, 41 U. CHI. L. REV. 723, 727 (1974) (" '[S]pecial scrutiny' is not appropriate when White people have decided to favor Black people at the expense of White people . . . . [I]t is not 'suspect' in a constitutional sense for a majority, any majority, to discriminate against itself."). *But see* Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 694 (1975) (In countering Ely, he argued: "American [political] majorities are rarely if ever monolithic. Typically, political majorities are coalitions of minorities which have varying interests in the issue presented for decision.") (citation omitted).

78 *Bakke*, 438 U.S. at 361.

79 *Id.* at 362 (quoting Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)). *See also* Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 578-579 (1975) (supporting an intermediate test for evaluating the constitutionality of "benign" racial classifications).

80 *See supra* note 74 and accompanying text.

81 *See supra* note 69 and accompanying text.

82 *Wygant*, 106 S. Ct. at 1853 (O'Connor, J., concurring); *accord* Jones v. Memphis Light, Gas & Water Div., 642 F. Supp. 644 (W.D. Tenn. 1986); Friedman, *supra* note 73, at 1116-1117. *But see* Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CALIF. L. REV. 87, 106-107 (1979) ("[I]n the lore of constititutional law in the last two decades, 'compelling' has come to mean an interest of such importance that when this requirement has been imposed few classifications have

purpose appears to be more lenient than requiring a compelling governmental purpose.

The most convincing governmental purpose for affirmative action is to remedy the present effects of prior discrimination by a governmental unit.[83] This purpose has survived under both strict scrutiny and an intermediate test.[84] Also, at least with regard to higher education, a desire to promote racial diversity among students has been accepted, even as a compelling purpose.[85]

Those who require a compelling governmental interest have also specified certain purposes which fall short of their standard. For example, neither curing the effects of societal discrimination[86] nor a "role model"[87] justification has been held to be compelling. However, curing the effects of societal discrimination has been considered important.[88] It is unclear whether a role model justification would be considered important.[89]

2. Means to Accomplish Purpose

Both strict scrutiny and the intermediate test require that the means used be sufficiently tailored to meet a particular governmental purpose. However, strict scrutiny now requires that those means be "narrowly tailored"[90] while the intermediate test requires that the means be "substantially related"[91] to the governmental purpose. The two standards of

survived. By asking only for 'important' interests, the Justices indicate that an interest of somewhat lesser magnitude will suffice.").

83 *See, e.g., Wygant*, 106 S. Ct. at 1853. ("[W]hatever the [standard of review] employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program."); Fullilove v. Klutznick, 448 U.S. 448, 497 (1980)(Powell, J., concurring) ("The Government does have a legitimate interest in ameliorating the disabling effects of identified discrimination.") (citing Regents of Univ. of California v. Bakke, 438 U.S. 265, 307 (1978)). The Court has also been in clear agreement that a recipient of the benefits of a remedial affirmative action program need not have actually been a victim of the discrimination. *Wygant*, 106 S. Ct at 1853 (O'Connor, J., concurring).

84 Kromnick v. School Dist. of Philadelphia, 739 F.2d 894 (3d Cir. 1984), *cert. denied*, 469 U.S. 1107 (1985); Valentine v. Smith, 654 F.2d 503 (8th Cir.), *cert. denied*, 454 U.S. 1124 (1981); Smith v. Harvey, 648 F. Supp. 1103 (M.D. Fla. 1986); Youngblood v. Dalzell, 625 F. Supp. 30 (S.D. Ohio 1985), *aff'd*, 804 F.2d 360 (6th Cir. 1986), *cert. denied sub nom.* Cincinnati Firefighters Union, Local No. 48 v. Youngblood, 107 S. Ct. 1576 (1987).

85 *Bakke*, 438 U.S. at 311-312 (Powell, J.).

86 *Wygant*, 106 S. Ct. at 1848 ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."); Higgins v. City of Vallejo, 823 F.2d 351, 358 (9th Cir. 1987); J.A. Croson Co. v. Richmond, 822 F.2d 1355 (4th Cir. 1987).

87 The Sixth Circuit applied the role model theory in Wygant v. Jackson Bd. of Educ., 746 F.2d 1152, 1156 (6th Cir. 1984), *rev'd*, 106 S. Ct. 1842 (1986). The court found there was a need for more minority faculty in order to mirror the percentage of minority students in the Jackson, Michigan schools. The school board considered minority faculty members as role models for the minority students. Reviewing the Sixth Circuit's opinion, Justice Powell, writing for the plurality, argued that providing role models is not a compelling state interest. 106 S. Ct. at 1847. *See also id.* at 1854 (O'Connor, J., concurring) (agreeing with Justice Powell that the role model theory is not a compelling state interest). *See supra* note 35-36 and accompanying text (role model theory in *Britton*).

88 *Bakke*, 438 U.S. at 328 (Brennan, White, Marshall and Blackmun, JJ.) (concurring in the judgment in part and dissenting in part).

89 In *Wygant*, rather than arguing that the "role model" theory is an important governmental interest, the dissent did not address this issue and argued that the plan was justified because of prior discrimination. 106 S. Ct. at 1862-63 (Marshall, J., dissenting).

90 *See supra* note 74 and accompanying text.

91 *See supra* note 69 and accompanying text.

review conflict more sharply under this prong than under the governmental purpose prong[92] because the Court construes "substantially related" more broadly than "narrowly tailored."[93]

Justice Powell, advocating the narrowly tailored standard, has suggested analyzing an affirmative action program in light of: (1) the availability of alternative remedies,[94] (2) the temporariness of the remedy,[95] (3) the relationship between the numeric goals of the program and the percentage of minority group members in the relevant population or work force,[96] (4) the plan's flexibility if the goals cannot be met,[97] and (5) the impact of the plan on third parties.[98] Justices Brennan, Marshall and Blackmun, who advocate the substantially related test, refrain from analyzing affirmative action programs in light of any such factors. Rather, they have argued that the only racial classifications which are unconstitutional are those that stigmatize certain racial groups.[99] These three Justices have never found an affirmative action program unconstitutional under this standard.

Because members of the Supreme Court advocate such differing standards for review of affirmative action programs, and are unable to reach majority agreement on one standard or the other, the lower courts have been in flux over what standard to apply and their decisions have reflected this uncertainty. Since *Wygant*, most district and circuit courts have adopted some form of strict scrutiny, apparently in rejection of the amorphousness of an intermediate test. But some of these courts have varied Justice Powell's guidelines.[100] Some circuits had adopted the in-

92 *See* Friedman, *supra* note 73, at 1117 ("[T]he determinative issue will be whether the particular form of affirmative action relief is adequately related to the accomplishment of that permissible objective.")(citation omitted).

93 *See infra* notes 94-99 and accompanying text.

94 Fullilove v. Klutznick, 448 U.S. 448, 510 (1980) (citing NAACP v. Allen, 493 F.2d 614, 619 (5th Cir. 1974); Vulcan Soc'y Inc. v. Civil Service Comm'n, 490 F.2d 387, 398 (2d Cir. 1973)).

95 *Id.* (citing Vulcan Soc'y Inc. v. Civil Service Comm'n, 490 F.2d 387, 399 (2d Cir. 1973); United States v. Wood, Wire & Metal Lathers Local 46, 471 F.2d 408, 414 n.12 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973)).

96 *Id.* (citing Association Against Discrimination v. Bridgeport, 594 F.2d 306, 311 (2d Cir. 1979); Boston Chapter NAACP v. Beecher, 504 F.2d 1017, 1026-27 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm'n, 482 F.2d 1333, 1341 (2d Cir. 1973), *cert denied*, 421 U.S. 991 (1975); Carter v. Gallagher, 452 F.2d 315, 331 (8th Cir.) (en banc), *cert. denied*, 406 U.S. 950 (1972)).

97 *Id.* at 511 (citing Associated Gen. Contractors, Inc. v. Altshuler, 490 F.2d 9, 18-19 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974)).

98 *Id.* at 514 (citing Teamsters v. United States, 431 U.S. 324, 374-375 (1977)).

99 *Bakke*, 438 U.S. at 361. However, some lower courts which have adopted the intermediate test have used factors to analyze affirmative action programs. *See infra* note 101.

100 The Ninth Circuit, in Associated Gen. Contractors of California v. City of San Francisco, 813 F.2d 922 (9th Cir. 1987) held that a city ordinance giving five percent bidding preference to minority business enterprises violated the equal protection clause. The court considered "whether the city had the authority to act . . . whether its findings [were] adequate . . . whether the means it selected [were] appropriate." *Id.* at 928. The court held "that state and local governments [can] act only to correct their own past wrongdoing . . . ." *Id.* at 930. It decided that the plan did not pass muster under the equal protection clause primarily because of a lack of findings of past discrimination. *Id.* at 931-932. With regard to the means, the court agreed that "[r]ace-conscious distinctions must be narrowly tailored to eliminate the consequences of past discrimination." *Id.* at 934 (citations omitted). The court defined narrowly tailored to mean that "the classification adopted must 'fit with greater precision than any alternative means.' " *Id.* at 935 (quoting *Wygant*, 106 S. Ct. at 1850 n.6 (plurality opinion) (citing Ely, *The Constitutionality of Reverse Discrimination*, 41 U. CHI. L. REV. 723, 727

termediate test prior to *Wygant*, and it is unclear what impact that case will have on future decisions in those circuits.[101]

n.26 (1974))). Additionally, "the remedial program must not impose a disproportionate burden upon few individuals." *Id.* at 935 (citing Ohio Contractors Ass'n v. Keip, 713 F.2d 167, 173 (6th Cir. 1983). The court, however, applied the intermediate test in analyzing gender based classifications, and upheld the constitutionality of a similar plan granting female-run business enterprises a bidding preference. *Id.* at 942.

The District of Columbia Circuit, in Ledoux v. District of Columbia, 820 F.2d 1293 (D.C. Cir. 1987), addressed charges of reverse discrimination in police department promotions. When the group promoted did not represent a racial mix reflective of the qualified racial mix in the relevant population, the department added more promotion slots rather than change the group. The plaintiff alleged discrimination when those slots went primarily to minorities. The court held that under both Title VII and the equal protection clause, it must judge an affirmative action plan by "whether there was an adequate factual predicate justifying the use of affirmative action . . . [and] whether the employer's plan unnecessarily trammels the legitimate interests of nonminority or male employees." *Id.* at 1301. In light of *Wygant*, the court held that the equal protection clause requires a greater "quantum of evidence [than Title VII] . . . to demonstrate that the plan was adopted for a remedial purpose." *Id.* at 1303. The court held that the plan at issue passed muster under Title VII, but remanded the case for further fact finding as to the adequacy of the Department's remedial justification since the trial court did not have the benefit of *Wygant*. *Id.* at 1306-1307. The court noted that since the narrowly tailored prong was the same for both a Title VII and constitutional analysis, the court on remand did not have to address whether the means were appropriate. The only question remanded was whether there was an adequate basis for believing that the situation needed affirmative action. *Id.* at 1306.

In Smith v. Harvey, 648 F. Supp. 1103 (M.D. Fla. 1986), the court stated that "the Supreme Court has required that affirmative action plans challenged on equal protection grounds pass strict scrutiny by showing that a plan is justified by a compelling governmental interest and that the means chosen are narrowly tailored . . . ." *Id.* at 1107 (citing *Fullilove*, 448 U.S. 448). *But see supra* notes 65-73 and accompanying text (explaining that the Court has not agreed on the appropriate standards). The court then correctly acknowledged that the Court has "not agreed on the specific inquiries that a court should make in determining the validity of such plans." *Id.* at 1107. It then adopted the following factors as appropriate in analyzing whether an affirmative action plan passes strict scrutiny:

1. Did [the] authority or governmental body that implemented the plan have the authority to do so?
2. Has there been a competent finding of past discrimination that presently affects the targeted work force?
3. Does the plan roughly approximate, but not unreasonably exceed, the minority balance that would have been achieved in the applicable work force without past discrimination?
4. Does the plan operate to hire or promote only qualified applicants?
5. Does the plan unnecessarily trammel the interests of [nonminorities] and is it otherwise narrowly tailored?
6. Is the plan temporary and will it terminate once the targeted imbalances have been eliminated?

Id. at 1109.

101 *See, e.g.*, Bratton v. City of Detroit, 704 F.2d 878, 885 (6th Cir.), *modified in other respects*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984). The court held in *Bratton* that "[a]bsent an opinion joined by a majority of the Supreme Court, or an en banc decision of this Court, we are unpersuaded that the [intermediate test] . . . is no longer the law of this Circuit." *Id.* at 886. *But see* Long v. City of Saginaw, No. 85-1352 (6th Cir. October 20, 1986) (WESTLAW, CTA 6 library). In addressing a collective bargaining agreement modification permitting the hiring of one minority police officer for every officer recalled from layoff status, the court remanded the case for a hearing in light of the *Wygant* decision. The court did not indicate that it had changed its standards in light of *Wygant*, but remanded because the district court had relied on the Sixth Circuit opinion in that case. It seems unlikely that the Sixth Circuit will change its standard because of *Wygant* since the *Wygant* Court did not reach majority agreement.

See also Valentine v. Smith, 654 F.2d 503 (8th Cir.), *cert. denied*, 454 U.S. 1124 (1981) where the court upheld the constitutionality of Arkansas State University's affirmative action hiring program which called for hiring 25% minorities over a four year period to achieve a five percent minority employment goal. The court held that for an affirmative action plan to be constitutional there must be a finding of past discrimination and the plan must be substantially related to remedying that discrimination. *Id.* at 508-510. But the court defined the substantially related standard more narrowly than Justices Marshall, Brennan and Blackmun, moving it closer to the narrowly tailored standard. *Id.* at 510.

B. *Employment Affirmative Action Plans: A Continuum*

Although the Supreme Court has not agreed to the appropriate standard of review in equal protection challenges to public affirmative action plans, various members of the Court and other legal scholars have recognized that different types of employment affirmative action plans infringe upon nonminorities' rights in different degrees. Generally the least intrusive plans involve hiring, the most intrusive involve layoffs, and those involving promotions lie somewhere in the middle, with the ultimate decision of the constitutionality of each dependent upon the circumstances of the case.[102]

1. Hiring Plans

Affirmative action hiring plans are favored in fields or positions which had previously been closed to minorities. Generally hiring plans do not impose as great a burden on nonminorities as promotion and layoff plans. Hiring plans merely deny the nonminority a future employment opportunity rather than take away an existing job.[103] At least theoretically, the nonminority should have other employment opportunities available.[104] Furthermore, the burden on nonminorities arising from such a plan is diffused among society as a whole instead of being placed on specific individuals or those already employed.[105]

2. Promotion Plans

While hiring plans enable minorities to enter fields previously closed to them, affirmative action promotion plans encourage employers to elevate minority employees to positions they had not before attained. At least one commentator has said promotion plans burden nonminorities slightly more than hiring plans because employees generally put more time and energy into earning a promotion than into getting the job in the first place.[106] Also, the burden is not diffused among society as a whole,

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102 *See supra* notes 103-116 and accompanying text.

103 Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842, 1851 (Powell, J., plurality). One article has said:

> The incumbent white in a layoff context seeks to enforce an explicit or implicit contractual right that he has earned with his labor. Having invested his energies and his aspirations in a firm, he feels . . . entitled to the security that seniority is designed to provide. Quite different is the situation of the first-time job applicant. He has no individual right to have the selection made in accordance with any particular set of criteria. . . . [T]he unsuccessful applicant for a new job suffers essentially the same loss as anyone else who fails to get a desired position . . . .

Fallon & Weiler, *Firefighters v. Stotts: Conflicting Models of Racial Justice*, 1984 SUP. CT. REV. 1, 66.

104 *Wygant* 106 S. Ct. at 1851.

105 *Id.*

106 Comment, *Equal Protection and Affirmative Action in Job Promotions: A Prospective Analysis of* United States v. Paradise, 17 CUMB. L. REV. 205, 236 (1986).

But see Higgins v. City of Vallejo, 823 F.2d 351 (9th Cir. 1987), which provided:

> [P]romotion guidelines visit a minor burden on nonminority employees. But unlike hiring goals, promotion guidelines do not require that an individual bear the burden of past discrimination to the extent that he or she is denied a livelihood. All of the City's employees who are denied promotion retain their existing jobs, salary, and seniority.

Id. at 360.

but instead is borne by the present employees denied promotions.[107] Furthermore, promotion plans, like layoff plans, upset seniority systems which are valued by employers and employees alike.[108] Still, promotion plans merely delay opportunity for nonminorities, rather than deny it entirely as is the case with layoffs.[109] Courts have upheld numerous public affirmative action promotional plans, particularly when the employers had discriminated in offering promotions in the past.[110]

3. Layoff Plans

Many public employers use race conscious layoff plans to maintain gains made through affirmative action hiring and promotion plans during economic downswings. But many argue that layoff plans burden nonminorities too much by actually taking jobs and seniority away from them.[111] The burden is not diffused among society as a whole, but is

107 In *Wygant*, 106 S. Ct. at 1851, Justice Powell wrote that "[w]hile hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals . . . ." The same comparison can be made between hiring and promotional goals, since those employees who are denied promotions, like those who are laid off, are specifically burdened by the plan.

108 *See infra* note 111 (discussing the importance of seniority systems).

109 *Wygant*, 106 S. Ct. at 1851 (Powell, J., plurality).

110 *See, e.g.*, United States v. Paradise, 107 S. Ct. 1053 (1987) (upholding an affirmative action promotion plan in light of particularly egregious past discrimination by the employer); Higgins v. City of Vallejo, 823 F.2d 351 (9th Cir. 1987); Bratton v. City of Detroit, 704 F.2d 878 (6th Cir.), *modified in other respects*, 712 F.2d 222 (1983), *cert. denied*, 464 U.S. 1040 (1984); Youngblood v. Dalzell, 625 F. Supp. 30 (S.D. Ohio 1985), *aff'd*, 804 F.2d 360 (6th Cir. 1986), *cert. denied sub nom.* Cincinnati Firefighters Union, Local No. 48 v. Youngblood, 107 S. Ct. 1576) (1987).

See also Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1605-06 (1969):

> An employee's seniority "expectation" of particular promotions is merely a hope . . . . Moreover, it is settled that seniority rights are not vested property rights and that seniority rules can be altered to the detriment of any employee or group of employees by a good faith agreement between the company and the union . . . . Furthermore, in the case of formerly white-only seniority units, the promotional expectancies of incumbent whites vis-a-vis new black employees are expectancies of future additional benefits from the past discrimination. . . . [E]ven where the workers have had no part in the discrimination, their accumulated expectancies are to some extent illegitimate. Were it not for the prior exclusion of black workers, an incumbent white employee might not even have obtained employment, much less acquired substantial promotional expectancies.

But see Franks v. Bowman Transp. Co., 424 U.S. 747 (1976) (Powell, J., concurring in part and dissenting in part). Justice Powell countered the above Coopers & Sobol quote:

> Such reasoning is badly flawed. Absent some showing of collusion, the incumbent employee was not a party to the discrimination by the employer. Acceptance of the job when offered hardly makes one an accessory to a discriminatory failure to hire someone else. Moreover, the incumbent's expectancy does not result from discrimination against others, but is based on his own efforts and satisfactory performance.

Id. at 789 n.7.

111 *See Wygant*, 106 S. Ct. at 1851 (Powell, J., plurality); Oliver v. Kalamazoo Bd. of Educ., 706 F.2d 757, 763 (6th Cir. 1983) (vacating a district court order which nullified the seniority rights of school teachers to prevent erasing the gains made in minority hiring. The court stressed the importance of seniority rights and the expectations employees have in them.). *See generally* Franks v. Bowman 424 U.S. 747, 766-67 (1976) (discussing the importance of seniority); Fallon & Weiler, *supra* note 103 (also stressing the importance of security):

> Senority is the glue that holds together this mutually beneficial arrangement for stable career employment. To the worker, seniority guarantees that his employer, having obtained the benefit of a higher performance/compensation ratio during the early years of employment, will not replace its older employees when that ratio becomes unfavorable. At the same time, a strong commitment to seniority serves the long-run interest of employers, by

instead borne by those particular individuals who must give up their jobs.[112] Some argue that although race conscious hiring and promotion plans are permissible under the appropriate circumstances, race conscious layoff plans are per se unconstitutional.[113] Others insist that without race conscious layoff plans, recessions would erase all gains made in minority employment through affirmative action hiring programs because minorities recently hired through such programs would be the first employees laid off.[114] Although the Supreme Court held a specific race conscious layoff plan unconstitutional in *Wygant*,[115] it left open the question of whether or not race conscious layoff plans are ever constitutional.[116]

III. Formulating A Guide For Future Affirmative Action Programs

It is clear that the Supreme Court has had difficulty articulating a clear standard of review in the affirmative action area. That *Wygant* has five diverse opinions[117] pointedly illustrates that "agreement upon a means for applying the equal protection clause to an affirmative-action program has eluded th[e] Court every time the issue has come before [it.]"[118] In *Britton*, Judge Posner applied strict scrutiny.[119] Strict scru-

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allowing them to make credible promises of de facto tenure to their newer employees in order to obtain their consent to an overall compensation package.

Id. at 57. *See also* Fischer, *Seniority is Healthy*, 27 LAB. L.J. 497 (1976) (stressing the importance of seniority and the dangers of disturbing seniority systems with racial quotas).

112 *Wygant*, 106 S. Ct at 1851 (Powell, J., plurality).

113 *Id.*; *see also id.* at 1857 (White, J., concurring) (while affirmative action hiring plans can be legitimate, race conscious layoff plans are unconstitutional); Chance v. Bd. of Examiners, 534 F.2d 993, 998 (1976), *cert. denied sub nom.* Council of Supervisors & Adm'rs v. Chance, 434 U.S. 881 (1977).

114 *Wygant*, 106 S. Ct. at 1858 (Marshall, J., dissenting) ("I, too, believe that layoffs are unfair. But unfairness ought not be confused with constitutional injury . . . . [A] public employer . . . should be permitted to preserve the benefits of a legitimate and constitutional affirmative-action hiring plan even while reducing its work force . . . ."); *see also* Tangren v. Wackenhut Services, Inc., 480 F. Supp. 539 (D. Nev. 1979) (upholding a seniority override provision in a collective bargaining agreement under Title VII in order to eliminate the remains of past discrimination), *aff'd*, 658 F.2d 705 (9th Cir. 1981), *cert. denied*, 456 U.S. 916 (1982); Behman, *The Affirmative Action Position*, 27 LAB. L.J. 490, 491 (1976) (seniority systems left intact will effectively prevent recently hired minorities from obtaining job security. Still, seniority systems are necessary to the work place and should be revised carefully.); Elkiss, *Modifying Seniority Systems Which Perpetuate Past Discrimination*, 31 LAB. L.J. 37 (1980) (employers and unions must revise seniority systems to preserve gains made in minority employment).

115 106 S. Ct. 1842 (1986).

116 *See supra* note 71 (by promulgating five opinions in *Wygant*, the Court did not reach a majority opinion as to the appropriate standard of review for such programs or whether race conscious layoff plans are always unconstitutional).

The Court also addressed an affirmative action layoff plan in Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984). But, in *Stotts*, the plan was challenged under Title VII, not under the equal protection clause. Therefore, *Stotts* provides no instruction on the constitutionality of race-conscious layoff plans. Furthermore, the plan in *Stotts* involved a court ordered plan in that the district court enjoined the Memphis Fire Department from using its seniority system to determine layoffs since doing so would result in many more blacks than whites being laid off. *Id.* at 567. The Court did not address the appropriateness of race-conscious remedies, and instead reasoned that the district court had exceeded its powers. *Id.* at 573-83.

117 *See supra* note 71.

118 *Wygant*, 106 S.Ct. at 1861 (Marshall, J., dissenting).

119 *See supra* notes 76-101 and accompanying text (discussing the debate over the appropriate standard of review).

tiny is a more appropriate standard of review than intermediate scrutiny in this area because it provides the most thoughtful examination of whether or not a nonminority's rights have been violated by an affirmative action plan. As Justice Marshall, an advocate of the intermediate test, has said, even a benign racial classification is subject to misuse.[120] Courts should analyze affirmative action programs to ensure that benign racial classifications do not disparage the interests of nonminorities. The intermediate test does not analyze a plan to see if it detracts from the interests of nonminorities.

In its application of strict scrutiny, the *Britton* plurality concluded that the plan's improper hiring goal violated the equal protection clause. The plurality found that the plan did not involve a compelling governmental interest because it was based on a role model theory rather than on past discrimination.[121]It is difficult to understand the plurality's characterization of the facts. Their insistence that the facts did not demonstrate remediable prejudice and that the plan was based solely on a role model theory appears to be an attempt to mold this case to *Wygant*. Actually, as the dissent pointed out, HEW, which conducted the on-site inspections of the South Bend School District, had determined that there was a history of recruitment, hiring, and promotion discrimination.[122] The *Britton* plurality ignored these findings. To require more extensive findings of discrimination before school districts can take voluntary actions to eliminate that discrimination unduly burdens local governments.[123]

The court further ruled that a plan that gives an absolute preference to every black over every white failed the "narrowly tailored" prong as a matter of law.[124] In so doing, the Seventh Circuit has created a per se rule for evaluating affirmative action plans under the equal protection clause. What other opinions have mentioned as one factor to weigh in determining whether a plan is narrowly tailored[125] can now be the determining factor that a court considers. With this standard the Seventh Circuit has set itself apart from other courts.[126] Such a standard may seem drastic when interpreted in light of particularly egregious past discrimination; however, affirmative action plans can make inroads toward remedying egregious situations without resorting to layoff provisions with absolute preferences and their inherent hardships.

120 *Bakke*, 438 U.S. at 361 (Marshall, J., dissenting).

121 *Britton*, 819 F.2d at 770.

122 *Id.* at 780 (Cudahy, J., dissenting).

123 *Wygant*, 106 S. Ct. at 1855.

124 If Judge Posner did not include this second ground for reversal, the case would have produced no majority opinion because Judge Flaum's concurrence agreed only with this second objection to the plan. 819 F.2d at 772. *See also supra* notes 40-41 and accompanying text.

125 Johnson v. Trans. Agency, Santa Clara County, Cal., 107 S. Ct. 1442, 1455 (1987) (upheld taking sex into account in promoting a female over a male with higher test scores); United States v. Paradise, 107 S. Ct. 1053, 1073 (1987) (approved a one to one promotion ratio); Local 28 of Sheet Metal Workers Int'l Ass'n v. EEOC, 106 S. Ct. 3019, 3052 (1986) (upheld a 29% nonwhite membership goal for the union); *Wygant*, 106 S. Ct. at 1865 (Marshall, J. dissenting); United Steelworkers v. Weber, 443 U.S. 193, 208 (1979) (approved one to one admittance to job training program).

126 *See supra* notes 100-101 and accompanying text for standards used in other courts.

The *Britton* court applied its per se rule too broadly. Although a per se approach may be desirable in certain limited situations, courts should use a totality of circumstances approach in evaluating most affirmative action plans. A court should apply a per se rule only in the presence of an absolute preference plan concerning layoffs.[127] As this Comment has discussed, layoff plans are fundamentally different from hiring and promotion plans.[128] Layoff plans which create an absolute preference place an extreme burden on nonminorities due to the inordinate hardship of layoff plans as opposed to hiring and promotion plans. Inevitably, this inherent hardship will lead to a violation of the equal protection clause.[129]

A plan that creates an absolute preference will severely burden the nonminorities involved. Such a burden plays an important role in analyzing hiring and firing plans, but applies most compellingly to layoff plans, where hardship is most acute. In *Britton* five judges recognized that the nature of an absolute preference plan makes it unconstitutional,[130] but left open the possibility that a proportional layoff plan

127 It has been suggested that layoffs should never be used in affirmative action. *See Wygant*, 106 S. Ct. at 1851-1852 (Powell, J.) (a layoff plan centers the burden on the nonminority, making them bear too intrusive of a burden and as long as hiring goals could make headway into alleviating perceived discrimination, layoffs are inappropriate); *id.* at 1857, 1858, (White, J., concurring) ("Whatever the legitimate hiring goals or quotas may be, the discharge of white teachers to make room for blacks, none of which have been a victim of any racial discrimination is" analogous to firing whites and replacing them with blacks); Liggett, *Recent Supreme Court Affirmative Action Decisions and a Re-examination of the Weber Case*, 38 LAB. L.J. 415 (July 1987) (courts should not interfere with seniority rights in order to protect new hires); Note, *Alternatives To Seniority Based Layoffs: Reconciling Teamsters, Weber, and The Goal Of Equal Employment Opportunity*, 15 U. MICH. J. L. REF. 523, 540-543 (1982) (the harshness of a layoff plan trammels interests of nonminority employees and replaces nonminorities with minorities); Burke and Chase, *Solving The SeniorityMinority Layoffs Conflict: An Employer-Targeted Approach*, 13 HARV. C.R.-C.L. L. REV. 81, 90-95 (1978) (layoff plans place the burden on the nonminority when it should be placed on the wrongdoer: the employer).

128 *See supra* notes 102-116 and accompanying text.

129 The Eighth Circuit has recognized that absolute preferences in hiring and promoting plans also place a great burden on nonminorities. In Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1972), the district court attempted to remedy discrimination in hiring at the Minneapolis Fire Department by ordering that the next twenty hires be minorities. *Id.* at 318. The court said this absolute preference "does appear to violate the constitutional right of Equal Protection of the Law to white persons who are superiorly qualified." *Id.* at 328. In order to accommodate the conflicting considerations of the rights of nonminorities and of remedying discrimination, the court changed the plan to a one to one hiring provision until the department attained the goal of twenty minority firefighters. *Id.* at 330. The Eighth Circuit again followed this reasoning in United States v. N. L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973), when it disregarded the government's request that the remedy for discrimination by an employer in promoting workers required that the first fifteen vacancies be filled by minorities. It adopted instead a plan of one to one promotions until the employer met its goal. *Id.* at 377. The consideration of infringement on nonminorities that makes absolute preference creation a negative factor in affirmative action hiring and promotion cases is all the more compelling for layoffs.

130 Judges Posner, Coffey, Easterbrook, Flaum, and Bauer recognized the per se unconstitutionality of an absolute preference plan. 819 F.2d at 772-773. *But see id.* at 777 (Cummings, J., dissenting). Judge Cummings there rejected per se unconstitutionality of absolute preference, because courts could manipulate this rule to produce any desired result by making any plan seem absolute. Yet, Judge Cummings here goes too far. While it may be difficult in general to characterize affirmative action plans, in most instances it is possible to determine if a plan creates an absolute preference. *See supra* notes 43-45 and accompanying text. Plans that say of the next twenty hires *none* can be white (Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1972)) or of the teachers to be laid off *all* must be white clearly show that whites have no chance of getting or maintaining the job. If the judge remains unsure whether the plan creates an absolute preference he can simply look to the totality of the circumstances, using the absolute nature of the plan as a factor. However, when a layoff plan clearly creates an absolute preference a per se violation is unavoidable.

might be constitutional.[131] While three justices rejected a proportional layoff plan in *Wygant*,[132] the majority felt either that the plan was narrowly tailored or refused to consider that aspect of the case and decided on other grounds.[133] Thus, it appears that courts might accept some layoff plans.

Courts should not accept affirmative action layoff plans that include an absolute preference. This bright line test is not an attempt to curb legitimate affirmative action plans, but is a recognition of the hardships inherent in layoff plans. This test is premised upon a basic observation of the discrimination against nonminority rights in *Britton* and other absolute preference cases: that layoff plans represent a separate class in affirmative action analysis and should be treated differently.

In all other affirmative action cases which do not involve an absolute preference layoff plan, a court should adopt strict scrutiny and analyze a public affirmative action program in light of the factors enumerated in *Fullilove v. Klutznick* [134] to see if the program is narrowly tailored to meet the governmental purposes. The court should examine the totality of the circumstances, letting no single factor control. The court should balance the burden of a given plan on minorities[135] against the temporariness of the plan,[136] the relationship of the numeric goals to the relevant labor market,[137] and whether the goals set forth in the plan can be waived if they cannot be met realistically.[138] Then the court should compare such plans to other available plans.[139] By doing so, the court insures that the plan " 'fit[s]' with greater precision" than any other plan.[140] Moreover, if courts would employ such factors, local governments would have clearer

131 Judge Flaum noted in his concurrence that "[i]f the board had reasonably believed that the only means to remedy its past discrimination was by continuing to increase the percentage of black teachers, it could conceivably have been permissible for it to adopt a proportional layoff plan." 819 F.2d at 773.

132 106 S. Ct. at 1852 (Powell, J., joined by Burger, C.J., and Rehnquist, J.).

133 *Id.* at 1865 (Marshall, J., dissenting joined by Brennan, J., and Blackmun, J.,); *Id.* at 1870 (Stevens, J., dissenting); *Id.* at 1857 (O'Connor, J., concurring in part, concurring in judgment). In Arthur v. Nyguist, 712 F.2d 816 (2d Cir. 1983), the court affirmed a proportional layoff plan to remedy adjudicated discrimination in the Buffalo school system and considered the plan narrowly tailored.

134 448 U.S. 448 (1980). *See supra* notes 94-98 and accompanying text.

135 The very nature of affirmative action programs is such that some burden will fall on nonminorities. The question, therefore, is not whether the plan imposes a burden, but to what degree. Justice Powell stated that "[a]s part of this Nation's dedication to eradicating racial discrimination, innocent parties may be called upon to bear some of the burden of the remedy." *Wygant*, 106 S. Ct. at 1850. The burden should not be "too intrusive." *Id.* at 1852. Furthermore, the burden should be "diffused to a considerable extent among society generally" rather than imposed on particular individuals only. *Id.* at 1851.

136 As stated in United States v. Wood, Wire and Metal Lathers Int'l Union, Local 46, 471 F.2d 408, 414 n.12 (2d Cir.), *cert. denied*, 412 U.S. 929 (1973), "[t]he limited duration . . . demonstrates that preference is to be used only as is necessary to remedy past discrimination."

137 *See supra* note 96.

138 *See, e.g. Fullilove*, 448 U.S. at 514 (waiver provision necessary to give a governmental body flexibility if, for example, there are not enough qualified minority members to meet a particular hiring goal).

139 For example, in *Wygant* Justice Powell considered the availability of hiring goals to meet the same purpose as layoffs. He argued that since hiring goals are "less intrusive," they are the better alternative to layoffs. 106 S. Ct. at 1852.

140 *Id.* at 1850 n. 6 (citing Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 727 n. 26 (1974)).

guidance in formulating affirmative action plans that would withstand judicial scrutiny and litigants would be able to effectively prepare and argue their cases.

V. Conclusion

Britton is the first case in the Seventh Circuit to interpret the Supreme Court's decision in *Wygant* concerning layoff plans. Although *Britton* helps to clarify the court's stance on affirmative action layoff plans, no clear guidance is offered. Similarly, the Supreme Court has yet to establish any clear analytical framework to give direction in this area. Without sufficient guidance the courts cannot expect litigants to argue their cases efficiently. In addition, public employers find it difficult to frame affirmative action layoff plans that they can be confident will pass judicial scrutiny.

In *Britton*, the Seventh Circuit bypassed an opportunity to provide concise guidance in the affirmative action area. An overly broad application of a per se rule presents many difficulties. A more appropriate analysis would limit the per se rule solely to affirmative action layoff plans involving absolute preferences. In all other instances, courts should examine the totality of the circumstances.

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