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AFFIRMATIVE ACTION: A DIVIDED SUPREME COURT

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"The extent to which the equal protection clause of the fourteenth amendment . . . permits government to use racial classifications to remedy prior racial discrimination is one of the most significant and controversial constitutional issues of our time."[1]

INTRODUCTION

This article will deal with the state of our law in regard to affirmative action[2] which contains an element of a preference that is used to increase, maintain or rearrange an identified group's number or status. Because of the philosophical debate over the justice of affirmative action and the legal questions left unanswered, it is difficult to avoid creating an impression that the subject rises above the realm of political passion.[3] The term affirmative action is equated by some with the concept of preferential treatment which translates to goals, timetables or even quotas.[4]

While affirmative action plans pose danger of improper motivation, they are usually motivated in overcoming historical and contemporary racial discrimination. Opponents of affirmation action generally argue for a "color-blind" theory of the Constitution and that this is required by the equal protection clause.[5] The term "Our Constitution is color blind" comes from the first Justice Harlan's

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1. Choper, *Continued Uncertainty as to the Constitutionality of Remedial Racial Classifications: Identifying the Pieces of the Puzzle*, 72 IOWA L. REV. 255 (1987).

2. The term seems to have originated in labor relations law. *See* Labor Management Relations Act, 29 U.S.C. § 160(c) (1978); BLACK'S LAW DICTIONARY 55 (5th ed. 1979) which defines affirmative action programs as "[e]mployment programs required by federal statutes and regulations designed to remedy discriminatory practices in hiring minority group members."

3. Rosenfeld, *Affirmative Action, Justice, and Equalities: A Philosophical and Constitutional Appraisal*, 46 OHIO ST. L.J. 845, 847 (1985).

4. Karnes, *The Legality of Preferential Treatment After Weber, in OFFCP and Federal Contract Compliance 169* (D. Copus & L. Rosenzweig ed. 1981) (Practicing Law Institute).

5. *See* Wright, *Color-Blind Theories and Color-Conscious Remedies*, 57 U. CHI. L. REV. 213, 220 (1979).

dissent in *Plessy v. Ferguson*.[6] The Supreme Court has never held that racial classifications are unconstitutional per se[7] or that the Constitution is color-blind. The Court has held, however, that the state may use racial criteria in districting and apportionment,[8] and has acknowledged that implementation of desegregation plans will normally require assignment of students on account of race.[9] The Court has rejected the argument that the Constitution requires that teachers be assigned on a "color-blind" basis[10] and has used equitable relief using racial factors to deal with violations of anti-discrimination laws.[11] Racial accountability on the part of both private and government employers is necessary and this requires them to have an effective affirmative action plan. Mr. Justice Blackmun once stated: "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot - we dare not - let the equal protection clause perpetrate racial supremacy."[12]

The Court has failed to reach a consensus about affirmative action programs and has been unable to agree on the constitutional standards governing affirmative action efforts. While the Justices have agreed that remedies may extend to persons beyond the actual victims of discrimination and may place burdens on innocent persons,[13] they have not agreed on how great a burden such innocent persons must bear. The affirmative action cases are as notable for what they do not say, and illustrate Justice Brandeis' point that "the most important thing we do is not doing."[14]

I do not intend to add to the great volume of analyses about the consitutional questions and how they should be resolved,[15] but

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6. 163 U.S. 537, 559 (1896) (Harlan, J. dissenting). The context of the sentences preceding this quote seem appropriate:

> The white race deems itself to be the dominant race in this country. *And so it is*, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of consitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind.

Id. (emphasis added).

7. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSITUTIONAL LAW 605 (3d ed. 1986).

8. United Jewish Org. v. Carey, 430 U.S. 144, 161 (1977).

9. McDaniel v. Barresi, 402 U.S. 39, 41 (1971).

10. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 19 (1971).

11. International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

12. Regents of the Univ. of California v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J. concurring).

13. Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

14. *See generally* A. BICKEL, THE LEAST DANGEROUS BRANCH 71 (1962); Lamber, *Observations on the Supreme Court's Recent Affirmative Action Cases*, 62 IND. L.J. 243, 244 (1987).

15. *See generally* Friedman, *Consitutional Equality and Affirmative Action In*

rather to examine the recent cases and discover what we can learn about the current state of the law. We are in an area where the Court engages in ad hoc case-by-case analysis in deciding what is constitutionally permitted similar to the regulatory taking cases.[16] We have not reached what Justice O'Connor has declared: "the diverse formulations and the number of separate writings put forth by various members of the Court in these difficult cases do not necessarily reflect an intractable fragmentation in opinion with respect to certain core principles."[17] We have established certain principles that govern these cases.

BACKGROUND DECISIONS

The first affirmative action case, *De Funis v. Odegaard*,[18] involved a law school preferential admissions program for members of certain ethnic and racial minorities. This action was not aimed at prior deliberate discrimination by the law school, but rather an attempt to increase the number of minority students. The Court held, by a five to four vote, that the case was moot with only one of the dissenters addressing the merits.[19] Justice Douglas in his dissent found that a laws school's use of explicit racial classifications violated the equal protection clause.[20]

In *University of California Board of Regents v. Bakke*,[21] the Court struck down a special admissions program of the University of California at Davis Medical School as invalid.[22] Four members of the plurality[23] did not reach constitutional issues, but found that this program was forbidden by Title VII of the Civil Rights Act of 1967, while the other five members did address the question of constitutionality. The opinion of Justices Brennan, White, Marshall, and Blackmun found that the special admissions program did not violate the fourteenth amendment of the Constitution nor did it violate Title VII of the Civil Rights Act of 1964. Justice Powell, the swing vote writing for himself but announcing the judgment of the Court, held that the racial classification could be constitutional but

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Employment: A Search for Standards, 4 DET. C.L. REV. 1113 (1986).

16. The last major breakthrough in the regulatory taking area occurred in Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922), where the Court held that if regulatory taking goes too far then it will violate the Constitution. *See generally* Lee, *Missing Pieces: A Commentary on Choper*, 72 IOWA L. REV. 275, 278 (1987).

17. *Wygant*, 476 U.S. at 287 (O'Connor, J., concurring).

18. 416 U.S. 312 (1974).

19. *Id.* at 317.

20. *Id.* at 341-44 (Douglas, J., dissenting).

21. 438 U.S. 265 (1978).

22. *Id.* at 320.

23. *Id.* at 325-26. Chief Justice Burger and Justices Stewart, Rehnquist and Stevens were the four members of the court not reaching constitutional issues.

was not in this case. The Court held that race could be a factor or a plus in the admissions process in order to achieve diversity in the student body.[24]

In *United Steelworkers of America v. Weber*,[25] the Court upheld an existing collective bargaining agreement which provided for a craft training program where fifty percent of the spaces were reserved for black workers in the in-plant training program until the percentage of black craftworkers equaled the percentage of blacks in the local labor force. Brian Weber, one of the white production workers, was rejected for the training program because under the affirmative action program provided in the collective bargaining agreement, black employees with less seniority than Weber received training. The Court determined that Title VII was not violated because of the private, voluntary nature of this affirmative action program which did not trammel the interests of any group, and did not result in any discharges of employees. The Court stressed the temporary nature of the craft program which provided for training for white as well as black employees. Justice Brennan stated: "We need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans. It suffices to hold that the challenged . . . plan falls on the permissible side of the line."[26]

In *Fullilove v. Klutznick*,[27] the Court considered the constitutionality of the Public Works Employment Act of 1977. The Act required that ordinarily at least ten percent of the funds be expended for minority business enterprises (those having at least half ownership by minority members).[28] The court needed two opinions to form the six justice majority to uphold the statute.[29] Chief Justice Burger wrote an opinion joined by Justices Powell and White stating that Congress may enact legislation containing racial classification if the legislation is narrowly tailored to remedy past effects of discrimination. Justice Marshall's opinion, in which Justices Brennan and Blackmun jointed, repeated the views of *Bakke*. Justices Rehnquist, Stevens, and Stewart voted against the classification's constitutionality.[30] It is clear that the set-aside in *Fullilove*, was per-

24. *Id.* at 311-14.
25. 443 U.S. 193 (1979).
26. *Id.* at 208. Justice Brennan authored the opinion in which Justices White, Marshall, and Stewart joined with Blackmun concurring in the Court's opinion and judgment. *See generally* Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and* Weber, 59 N.C.L. REV. 531 (1981).
27. 448 U.S. 448 (1980).
28. *Id.* at 454.
29. *Id.* at 517 (Marshall, J., concurring).
30. *Id.* at 527, 552-53 (Stevens, J. dissenting); *id.* at 522-32 (Stewart, J. dissenting).

mitted because the amount of business lost by white-dominated firms was "widely dispersed" and not heavy.[31]

These cases, *Bakke*, *Weber*, and *Fullilove*, all involved voluntary affirmative plans undertaken by either governmental bodies or private parties rather than affirmative action imposed by courts in cases where violations of laws against race discrimination occurred. The Court in each case also considered the rights of innocent third parties[32] such as those set-aside in *Weber* which emphasized that half of the new opportunities in the training program were available to white workers.[33]

In *Firefighters Local Union Number 1784 v. Stotts*,[34] the Court held that the district court's order to revise a voluntary affirmative action plan conflicted with section 703(h) of Title VII[35] which "permits the routine application of a seniority system absent proof of any intention to discriminate."[36] Justice White wrote the opinion in which Chief Justice Burger and Justices Rehnquist, O'Connor, and Powell joined. Justice Stevens concurred in the judgment only and held the district court had abused its discretion in modifying the consent decree that settled a law suit against a city fire department that had been sued for race discrimination by black firefighters.[37] The consent decree had provided affirmative steps to increase the proportion of minority employees in its fire department. When city-wide cutbacks forced layoffs one year later, application of the ordinary seniority system of "last hired-first fired" would have greatly reduced the ranks of the recently hired black firefighters. The consent decree did not deal with layoffs, but the district court enjoined the application of the seniority system insofar as it would decrease the proportional number of blacks in the fire department. The fire department, obeying the injunction of the court, laid off white firefighters with more seniority than black firefighters.

The *Stotts* holding was quite narrowly based in upholding the concept of seniority[38] and commented that "our ruling in *Teamsters* that a court can award competitive seniority only when the beneficiary of the award has actually been a victim of illegal discrimination is consistent with the policy behind section 706(g)."[39] The

31. *Id.* at 484, 515.
32. *See Fullilove*, 448 U.S. at 514; *Bakke*, 438 U.S. at 298, 307-08, 310.
33. United Steelworkers v. Weber, 443 U.S. 193, 208 (1979).
34. 467 U.S. 561 (1984).
35. 42 U.S.C. § 2000e-2(h) (Supp. 1986).
36. *Stotts*, 467 U.S. at 577.
37. *Id.* at 592 (Stevens, J., concurring).
38. *Id.* at 579-80.
39. § 706(g) is the remedial provision of Title VII. "The provisions of [§ 706(g)] are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible . . . . [This] section . . . is intended to

Court rejected, based on *Teamsters*, the argument that had the plaintiffs prevailed at trial without a consent decree the court could have discarded the city's seniority system as justification for the order. The consent decree contained no admission of wrongdoing and the Court found that the policy behind Title VII was to award make-whole relief only to actual victims of discrimination. The district court had exceeded its statutory authority under section 706(g) by awarding constructive seniority to the black firefighters.

Despite the limited application of the *Stotts* case to general affirmative action, the Department of Justice read the case broadly and developed a general principle that no racially preferential treatment could ever be given to "nonvictims" of past discrimination. The Solicitor General's office urged this limited application to affirmative action in subsequent cases. The argument is that only an identified living victim of discrimination can be made whole and given a race-based advantage.[40]

Search for Standards

The legality of affirmative action programs depend upon the necessity for affirmative action including findings of past discrimination, the distribution of affirmative action burdens and the consequences to persons who did not discriminate.[41] Where private employers, such as in *Weber*,[42] institute affirmation action programs, questions are raised only under Title VII since governmental action is not involved. However, the constitutionality of affirmative action arises where a governmental employer adopts such a program or when a court orders race-based affirmative action. The Court in *Wygant v. Jackson Board of Education*[43] held that the equal protection clause[44] prohibited voluntary collective bargained agreements under which racial classifications were used to determine layoffs from employment. The collective bargained contract between the School Board of Jackson, Michigan, and the union arose because of racial tensions in the community and a threatened lawsuit from the

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make the victims of unlawful discrimination whole . . . and, . . . so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." H.R. Res. 1748, 92d Cong., 2d Sess., 188 Cong. Rec. 7168 (1972).

40. *See Stotts*, 467 U.S. at 580. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Petitioners at 6, 27-29, 36 Wygant v. Jackson Bd. of Educ., 467 U.S. 561 (1984) (No. 84-1340).

41. *See generally* Marris, *New Light on Racial Affirmative Action*, 20 U. C. Davis L. Rev. 219, 222 (1987).

42. *See supra* note 25 and accompanying text.

43. 476 U.S. 267.

44. "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1. This amendment was proposed by Congress in 1866 and was ratified in 1868. J. Nowak, R. Rotunda & J. Young Constitutional Law 616 (2d ed. 1983).

NAACP. The contract's preferential affirmative action plan had a hiring policy goal of "at least the same percentage of minority racial representation on each individual staff as is represented by the student population . . . of the Schools." It also contained a seniority system for layoffs which contained the following critical language: "that at no time will there by a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff."[45] During the 1981 school year Wendy Wygant and nine other non-minority school teachers were laid off while minority teachers with less seniority were retained. Wygant and the others sued in federal court alleging that the affirmative action plan violated the equal protection clause,[46] and Title VII.[47] The plaintiffs lost at both the district court[48] and court of appeals.[49] The court of appeals held that the Board's interest in providing role models for its students in order to remedy societal discrimination was sufficient to justify racial preferences in the layoff provisions.[50] The lower courts held that racial preferences embodied in the affirmative action plan did not require a finding of discrimination by the Board or a court. The Supreme Court reversed in a five to four vote without a majority opinion holding that there was a violation of equal protection.[51] Justice Powell, writing for a plurality,[52] rejected both the role model and the goal of remedying societal discrimination as a sufficient governmental interest to justify race-based affirmation action programs. Powell and the plurality would require strict scrutiny and noted that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."[53] The Court ruled that for all race-based affirmative action programs the "level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination."[54]

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45. 476 U.S. 267. Article VII of the Collective Bargain Agreement defined "minority group personnel" as "those employees who are Black, American Indian, Oriental, or of Spanish descendancy." *Id.* at n.2.

46. *See supra* note 44.

47. *See* 42 U.S.C. §§ 2000e1-17 (1982).

48. Wygant v. Jackson Bd. of Educ., 546 F. Supp. 1195 (E.D. Mich. 1982).

49. Wygant v. Jackson Bd. of Educ., 746 F.2d 1152 (6th Cir. 1984).

50. *Id.* at 1156.

51. 476 U.S. 267 (1986).

52. Chief Justice Burger and Justice Rehnquist joined in all of Justice Powell's opinion while Justice O'Connor agreed with the opinion except the part that disapproved of layoffs as an inappropriate means to achieving an important interest. *Id.* at 293 (O'Connor, J., concurring).

53. *Id.* at 273 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978)).

54. *Id.* (citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 n.9 (1982)).

Justices Brennan, Marshall, and Blackmun have consistently adhered in these cases to a standard of "near strict scrutiny" where the remedial racial classification must be substantially related to an important state interest.[55] Justice Stevens, separately dissenting, used a balancing approach to determine whether a "rational"[56] or "legitimate"[57] public interest was served, and required a further step to examine "an assessment of the procedures that were used to adopt and implement the race-conscious action."[58]

The Powell examination was two-pronged. A compelling government interest is the first prong, and, according to Justice Powell, this requires a showing of prior discrimination by the governmental unit.[59] Second, "the means chosen by the state to effectuate its purpose must be narrowly tailored to the achievement of that goal."[60] This language indicates that a "lawful alternative and less restrictive means could have been used."[61] The Court would require some showing of prior discrimination and this could be shown by examining and comparing "the racial composition of the teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market."[62] In addition to not finding evidentiary support of prior discrimination, Justice Powell finds that the layoff provision is not an appropriate means since it imposes a much too heavy burden upon the lives of those individuals adversely affected by layoff plans.[63] It is clear that Justice Powell and the Court may well treat hiring goals quite differently than layoffs: "In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally . . . . Denial of a future employment opportunity is not as intrusive as loss of an existing job."[64]

Since the Court rejected societal discrimination as a basis for a race-based program, the most important aspect of the case was the determination that a race-based program was implemented to remedy a prior illegality. A government employer that undertakes a race-based affirmative action program need not make a finding that it was responding to its own illegality. The Court stated that "the trial court must make a factual determination that the employer

55. *See Bakke*, 438 U.S. at 359-78 (Brennan, J., concurring in part and dissenting in part); *Fullilove*, 448 U.S. at 519-21 (Marshall, J., concurring).
56. *Wygant*, 476 U.S. at 315-16 (Stevens, J. dissenting).
57. *Id.* (Stevens, J. dissenting).
58. *Id.* at 317 (Stevens, J. dissenting).
59. *Id.* at 275.
60. *Id.* at 279.
61. *Id.* at 280.
62. *Id.* at 308.
63. *Id.* at 282.
64. *Id.* (emphasis in original).

had a strong [evidentiary basis] for its conclusion that remedial action was necessary."[65] The burden is on the challenger to demonstrate the unconstitutionality of an affirmative action plan.[66] One very significant unanswered question is whether a challenger must show that not only is there no prior illegal conduct, but also, as Justice O'Connor answers, that the governmental agency had no strong basis for believing that there was no illegal conduct. Justice Powell does indicate that affirmative action plans could be used if the public employer can show a statistical disparity between the racial composition of its work force and the relevant labor market.[67] All of the justices are concerned with the burden imposed on innocent persons by race-based affirmative action. Clearly, the plurality opinion notes that layoffs are too harsh a burden to impose on innocent people, even to remedy a prior consitutional violation.[68]

While the Supreme Court rejected this particular affirmative action plan, a public employer may undertake an affirmative action plan that is carefully crafted so as not to overly burden innocent parties which serves to overcome a violation or potential violation.

In *Local 28 of the Sheet Metal Workers' International Association v. EEOC*,[69] both the district court and court of appeals found the union's violations of Title VII "egregious."[70] The Supreme Court approved the district court's ordered goal for the admission of nonwhite workers. The membership goal would impose "only a marginal" burden on the white workers because it affected whites only at the entry level and did not displace existing workers. The Court ordered Local 28 to increase union membership of blacks and Hispanics to 29% by 1981.

The union, supported by the Solicitor General, urged the Court to reject the lower courts' orders because they extended race conscious remedies to individuals who were not identified victims of unlawful discrimination. The Court, by a five to four vote, upheld the right under 706(g) of Title VII[71] and also the broad discretion of lower courts to award equitable relief to remedy unlawful discrimination. The Court distinguished *Wygant* from the present case because both lower courts held there were formal findings of prior discrimination. Moreover, the Court did not find a violation of equal protection because the relief was narrowly tailored. Justice Powell

65. *Id.* at 277.
66. *Id.*
67. *Id.* at 275.
68. *Id.* at 282.
69. 478 U.S. 421 (1986).
70. *Id.* at 480 (plurality opinion); *id.* at 485 (Powell, J., concurring in part and concurring in the judgment).
71. 42 U.S.C. § 2000-5(g) (1982).

concurred in a separate opinion which gave emphasis to the fact that the goal was limited in duration and was directly related to the percentage of nonwhites in the relevant work force.[72] Justices O'Connor and White held the membership goals were impermissible under Title VII because they operated as racial quotas, not goals.[73] Justice Rehnquist and Chief Justice Burger held that "section 706(g) forbids a court from ordering racial preferences that effectively displaces non-minorities except to minority individuals who have been the actual victims of a particular employer's racial discrimination."[74]

Local Number 93, International Association of Firefighters v. City of Cleveland[75] is a narrow case where the court held limitations found in section 706(g) of Title VII do not apply to consent decrees.[76] Justice Brennan noted the voluntary nature of the compliance and that this is the preferred manner of achieving the objective of Title VII.[77] Brennan held that there was no reason that such a voluntary affirmative action plan should be illegal simply because it was in a consent decree.

In *United States v. Paradise*,[78] the Court affirmed a district court's use of a one-black for one-white requirement for promotion of state troopers to corporals within the Alabama Department of Public Safety. Justice Brennan wrote the plurality opinion holding that the district court's order survived a strict scrutiny analysis. The order served a compelling interest of remedying past and present discrimination. The Court found the order was sufficiently narrow because "it is doubtful, given [the Department's] history in this litigation, that the District Court had available to it any other remedy."[79] The Court found that the order was temporary because the quotas would be abandoned when procedures were available to provide promotion opportunities to minorities. The use of the fifty percent quota to achieve a twenty-five percent minority staff was described as "not itself the goal . . . (but) rather . . . the speed at which the goal of 25 percent will be achieved."[80] Justice O'Connor's dissent, which was joined in by Chief Justice Rehnquist and Justice Scalia, found the quota system violated the equal protection clause. The order did not fit "with greater precision than any alternative

72. *Local 28 of Sheet Metal Workers*, 478 U.S. at 487 (Powell J. concurring).
73. *Id.* at 489 (O'Connor, J. dissenting); *id.* at 499 (White, J. dissenting).
74. *Id.* at 500.
75. 478 U.S. 501 (1986).
76. *Id.* at 530 (the majority included Justices Brennan, Marshall, Blackmun, Stevens and Powell. Justice O'Connor filed a separate concurring opinion).
77. *Id.* at 521-22.
78. 480 U.S. 149 (1987).
79. *Id.* at 195.
80. *Id.* at 199.

remedy"[81] and did not employ other alternatives that "would have achieved full compliance with the consent decrees without trammeling on the rights of non-minority troopers."[82] One alternative remedy suggested by Justice O'Connor was the appointment of a trustee.

CONCLUSION

It is clear that there is no clarity in the affirmative action field. All the justices agree that a race-based remedy may be used to make the actual victims of prior illegal discrimination whole. It is essential to determine, under the Powell view of strict scrutiny, a strong basis that the employer needs to take remedial action. Moreover, the action must not place an undue burden on innocent persons. This is achieved by temporary, flexible, and narrowly tailored actions.

81. *Id.* at 226 (O'Connor, J., dissenting).
82. *Id.*