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Race and the Rehnquist Court

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RACE AND THE REHNQUIST COURT

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I. INTRODUCTION

Robert Bork, while he was Solicitor General, once told the Supreme Court:

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> Race has been the political issue in this nation since it was founded. And we may regret that that is a political reality, but it is a reality. That's what the Fifteenth Amendment is about, what the Civil War was about. It's what the Constitution was in part about, and it is a subject we struggle with politically today.[1]

Mr. Bork could have added that race has been among the principal issues confronting the Supreme Court since *Dred Scott v. Sandford*.[2] It is no surprise, therefore, that race has occupied a central position on the docket of the Rehnquist Court during its first five years.

The rhetoric and issues of today's cases continue a dialectic that began in the latter half of the nineteenth century. Two cases from that era, the *Civil Rights Cases*[3] and *Plessy v. Ferguson*,[4] cast a shadow that reaches to the present. Several commentators have expressed fear that the Rehnquist Court will return race discrimination law to its condition during that period.[5] It is time to develop an understanding of the race decisions of the Rehnquist Court, even though a definitive chapter cannot yet be written. To begin, let us review the legacy that faced the Court when Justice Rehnquist was elevated to Chief Justice in 1986.

During the first half of the twentieth century, race discrimination law very slowly escaped the legacies of the *Civil Rights Cases*,[6] *Plessy v. Ferguson*,[7] and the retreat of legislative and

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1. Oral Argument of Solicitor General Robert Bork, United Jewish Orgs. v. Carey, 430 U.S. 144 (1977), *in* 92 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 845-46 (Philip B. Kurland & Gerhard Casper eds., 1978).

2. 60 U.S. (19 How.) 393 (1857).

3. 109 U.S. 3 (1883).

4. 163 U.S. 537 (1896).

5. *See, e.g.*, *Nomination of Justice William Hubbs Rehnquist to Be Chief Justice of the United States: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 770 (1986); SUE DAVIS, JUSTICE REHNQUIST AND THE CONSTITUTION 207-08 (1989) (quoting Gary Orfield's warning that confirming Justice Rehnquist as Chief Justice " 'would risk repeating . . . the Supreme Court's emasculation of the laws and constitutional amendments of the Reconstruction which culminated in the 1896 *Plessy* decision' "); Derrick Bell, *Foreword: The Final Civil Rights Act*, 79 CAL. L. REV. 597, 598 (1991) ("[M]ore reason for consternation than surprise, if, in the next few years, an unsympathetic Supreme Court declares the 1964 Civil Rights Act . . . unconstitutional as applied to racial discrimination."); D. Marvin Jones, *Unrightable Wrongs: The Rehnquist Court, Civil Rights, and an Elegy for Dreams*, 25 U.S.F. L. REV. 1, 64 (1990) ("The Rehnquist Court . . . seeks to achieve the contemporary equivalent of a reversal of the basic Reconstruction assumptions about the scope of the discrimination and the equality ideal.").

6. 109 U.S. 3, 9 (1883) (finding a federal ban on private discrimination in public accomodations unconstitutional).

executive enforcement of the Reconstruction amendments. Both the holdings and the tone of these two cases endorsed a philosophy of white supremacy. In the *Civil Rights Cases*, the Court threw out a public accommodations law so that the black person would cease "to be the special favorite of the law."[8] The Court also concluded, in *Plessy*, that if "the enforced separation of the two races stamps the colored race with a badge of inferiority. . . it is . . . solely because the colored race chooses to put that construction upon it."[9]

The Warren Court (1953-69),[10] along with the other branches of the federal government, formulated a broad antidiscrimination principle in cases like *Brown v. Board of Education*,[11] *Jones v. Alfred H. Mayer Co.*,[12] and *South Carolina v. Katzenbach*.[13] These cases wiped out the restrictions and accompanying philosophy of the nineteenth-century cases.[14] It fell to the Burger Court (1969-86) to refine the meaning and mechanics of the antidiscrimination principle.[15] The Burger

7. 163 U.S. at 537 (finding the separate-but-equal doctrine constitutional). As Justice Kennedy recently noted, *Plessy* "distorted the law for six decades before the Court announced its apparent demise in *Brown v. Board of Education*." Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3044 (1990) (Kennedy, J., dissenting) (citations omitted); *see also* Board of Educ. v. Dowell, 111 S. Ct. 630, 642 (1991) (Marshall, J., dissenting) (*Brown* "finally liberated the Equal Protection Clause from the doctrinal tethers of *Plessy*.").

8. *The Civil Rights Cases*, 109 U.S. at 25.

9. *Plessy*, 163 U.S. at 551.

10. Naming a period in the Court's history after the Chief Justice who presided is an artificial but helpful device. While membership is fluid, the Warren Court had a core of seven members for most of Earl Warren's chieftancy (Earl Warren, Hugo Black, William Brennan, William O. Douglas, Thomas Clark, Potter Stewart, and John Harlan); the Burger Court had a core of nine members for most of Warren Burger's chieftancy (Warren Burger, Lewis Powell, Harry Blackmun, William Brennan, John Paul Stevens, Thurgood Marshall, Byron White, Potter Stewart, and William Rehnquist); the Rehnquist Court had three changes of membership during its first five years. Justice Kennedy replaced Justice Powell after the first year of the Rehnquist Court. Justice Brennan resigned in July 1990, at the end of the fourth year of the Rehnquist Court. Justice Souter replaced him. Justice Marshall resigned in July 1991, at the end of the Rehnquist Court's fifth year, and Justice Thomas has succeeded him. Justices Brennan, White, and Marshall served under all three Chief Justices.

11. 347 U.S. 483, 495 (1954) (holding state enforced school segregation to be unconstitutional).

12. 392 U.S. 409, 413-17, 437 (1968) (finding a federal ban on housing discrimination applicable to private action and constitutional).

13. 383 U.S. 301, 326-27 (1966) (finding Voting Rights Act of 1965 to be constitutional).

14. *See* ARCHIBALD COX, THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM 51-70 (1968).

15. Paul Brest defines the antidiscrimination principle as "the general principle disfavoring classifications and other decisions and practices that depend on the race (or ethnic

Court fashioned remedial rules that recognized the inadequacy of prohibitory relief and therefore emphasized corrective and prophylactic measures in cases such as *Swann v. Charlotte-Mecklenburg Board of Education*,[16] *Albemarle Paper Co. v. Moody*,[17] *City of Rome v. United States*,[18] and *Fullilove v. Klutznick*.[19] With less certainty, the Burger Court began the task of defining the boundaries of unlawful race discrimination in cases such as *Griggs v. Duke Power Co.*,[20] *Washington v. Davis*,[21] *Regents of the University of California v. Bakke*,[22] *City of Mobile v. Bolden*,[23] and *McDonnell Douglas Corp. v. Green*.[24]

A study of the twenty-nine race discrimination cases that the Rehnquist Court has decided in the past five years reveals a mixed picture. As will be shown, the Court may be approaching a crossroad. While outlines of the Rehnquist Court's approach to discrimination law are emerging, crucial elements remain to be filled in. In a broad sense, the Court has solidified the place of an antidiscrimination principle in the constitutional pantheon. No compromise such as the one that followed the 1876 election[25] seems conceivable today, and the fears that history will literally repeat itself seem hyperbolic. While the rhetoric of the Rehnquist Court fully embraces the Warren Court's major antidiscrimination decisions, the Court is split into two well-defined wings on race issues.[26] The power of the two wings was balanced until Justice Brennan left the Court in 1990. The Brennan

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origin) of the parties affected." Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 1 (1976). Professor Brest provides a general analysis of the Burger Court's race discrimination decisions in Paul Brest, *Race Discrimination*, *in* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 113 (Vincent Blasi ed., 1983).

16. 402 U.S. 1, 30 (1971) (bussing).

17. 422 U.S. 405, 417 (1975) (backpay).

18. 446 U.S. 156, 177 (1980) (Voting Rights Act rule against unintentional retrogression).

19. 448 U.S. 448, 482 (1980) (10% minority set-aside for public works contracts).

20. 401 U.S. 424, 431 (1971) (disparate impact test applies in employment discrimination suits under Title VII of Civil Rights Act of 1964).

21. 426 U.S. 229, 246 (1976) (disparate impact alone does not prove an equal protection violation).

22. 438 U.S. 265, 320 (1978) (medical school admissions quota is unlawful).

23. 446 U.S. 53, 78 (1980) (electing commissioners at large, with the effect of minimizing black political power, upheld).

24. 411 U.S. 792, 800-06 (1973) (rules for establishing prima facie case of disparate treatment under Title VII).

25. *See* Brian Landsberg, *The Desegregated School System and the Retrogression Plan*, 48 LA. L. REV. 789, 831 n.199 (1988).

26. I describe the membership and voting records of the wings *infra* note 41.

wing, which has shrunk from four to two Justices since 1986, would build on the foundations left by the Burger Court. The Rehnquist wing, now ascendant, is dissatisfied with the details of the Burger Court legacy, viewing that legacy as having weighted the balance unduly in favor of minority rights.[27] The Rehnquist wing argues that it is seeking to arrive at a more equitable balance. These Justices perceive imbalance in the standards set for proof of discrimination and in the corrective and prophylactic principle.[28] The practical result of this dissatisfaction is a search for balance between nondiscrimination and other values, suggesting for the first time since *Korematsu v. United States*[29] that state interests may occasionally outweigh the value of nondiscrimination.

The Brennan wing, in contrast, places the rights of minority group members above other values. While both wings espouse the central value of nondiscrimination, each employs rhetoric and analysis that largely ignores the arguments of the other.[30] This absence of a common ground, this failure to reason together, causes uncertainty about the future development of the law. The battle over doctrinal development evokes the images of war. The Brennan wing, in a tactical sense, occupies the high ground of reliance on a large body of precedent. The Rehnquist wing possesses the strategic advantages of the Reagan-Bush electoral dominance and the assured attrition of its opponents.[31]

The emerging Rehnquist wing would pursue its goals

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27. For example, Justice Kennedy, in a dissent joined by the Chief Justice and Justices O'Connor and Scalia, recently protested: "In pursuing the demand of justice for racial equality, I fear that the Court today loses sight of other basic political liberties guaranteed by our constitutional system, liberties that can coexist with a proper exercise of judicial remedial powers adequate to correct constitutional violations." Missouri v. Jenkins, 495 U.S. 33, 81 (1990) (Kennedy, J., dissenting).

28. *But see* Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1578 (1989) (noting that plaintiff success rates of civil rights and employment discrimination cases that go to trial are far below reported trial success rates for most other litigation).

29. 323 U.S. 214 (1944) (upholding exclusion of Americans of Japanese descent from a "military area" of California).

30. This point has been noted in the context of the Justices' general agreement on the factors relevant to consideration of race-conscious preferences: "Such abstract and open-ended requirements have elicited broad support only because they mean different things to different justices . . . ." George Rutherglen & Daniel R. Ortiz, *Affirmative Action Under the Constitution and Title VII: From Confusion to Convergence*, 35 UCLA L. REV. 467, 469 (1988).

31. The power shift is well recognized. Justice Brennan is reported to have said: "Look, I had my way for twenty-five years, now it's their turn." Nina Totenberg, *A Tribute to Justice William Brennan*, 104 HARV. L. REV. 33, 39 (1990).

through several significant doctrinal shifts. One shift would elevate the proof burdens for minorities seeking relief from alleged discrimination by recasting the burden of persuasion in disparate impact cases, applying "atomistic" analysis of disparate treatment claims, and discounting the continuing importance of the history of societal discrimination. A related shift would ease the burdens on whites seeking to show that race-conscious decisions discriminate against them by applying strict scrutiny to all such decisions and allowing collateral challenges of judicial remedies for discrimination against minorities. We see in recent cases the reciprocal relation between the disparate impact test and race-conscious affirmative action. The Rehnquist wing has narrowed the reach of the disparate impact test because of the concern that it would lead to the use of quotas. At the same time, the Rehnquist wing has denied the relevance of disparate impact as a justification for such race-conscious measures. The hallmark of these shifts is increased deference to facially neutral choices of decisionmakers and decreased deference to race-conscious choices designed to promote minority interests. These shifts rest upon the belief that the neutral market place will deal fairly with minority groups.[32]

Measured quantitatively, most of the Rehnquist Court's race decisions to date fall well within the formal path established by its predecessors. That path leads to an expansive definition of protected groups, unease with the expansive coverage of reconstruction legislation that has been construed as targeting badges and incidents of slavery, strong protections against intentional discrimination, continued acceptance of reparative relief, and close scrutiny of race-conscious affirmative action. The tone of the Rehnquist Court's opinions unfailingly embraces nondiscrimination as an ideal. On the other hand, the Court has sharply deviated from the beaten path in its new-found hostility to disparate impact claims under Title VII. The opinions in disparate impact and affirmative action cases display all the hallmarks of a Court that has lost its bearings and has yet to chart out a new course.

At this early stage in the development of the Rehnquist

32. One critical legal scholar comments that "[t]he 1989 cases can best be understood . . . as reaffirming the myths that justify inequality as the outcome of impersonal, neutral forces." Alan Freeman, *Antidiscrimination Law: The View from 1989*, 64 TUL. L. REV. 1407, 1439 (1990); *cf.* Richard A. Posner, *The Efficiency and Efficacy of Title VII*, 136 U. PA. L. REV. 513 (1987) (discussing the economic efficiency of Title VII).

Court's position on race discrimination law, perhaps it is not too late to suggest that the Court consider foundational questions. First, what evidence exists that the Burger Court rulings struck an improper balance? Second, to what extent does the Court rely on assumptions regarding the relationship between race and the behavior of both minority group members and alleged discriminators? Absent empirical evidence, what assumptions should the Court adopt in formulating legal rules? Third, is the Court's real concern with the way in which lower courts and other addressees of the nondiscrimination laws have responded or will respond to those rulings? Is that concern well placed, and if so, has the Rehnquist Court prescribed the correct cure? These three questions raise one final set of questions: Should the Court or the Congress be deciding the factual and policy issues on which these questions turn? Thus far, the Rehnquist Court has failed to devote adequate attention to these questions.

This Article provides an overview of the twenty-nine race discrimination cases that the Rehnquist Court has decided between the 1986 and 1990 terms. The overview begins with a statistical analysis of how the minority groups fared and how individual Justices voted. Part III then turns to nine major cases, which fall into two categories: six revolving around concepts of racial neutrality and three involving remedial issues. The racial neutrality cases include three in which the validity of race-conscious preferences was at issue and three concerning facially neutral practices that caused disparate adverse effects on members of minority groups. Next, the major themes of the racial neutrality and remedy cases are explored. It is argued that the Justices proceed from different assumptions regarding behavior and race and regarding remedial principles formulated by the Burger Court. In addition, the Article submits that the Rehnquist Court has engaged in selective activism, both in basing decisions on policy assumptions and in its treatment of precedent. The Article then observes some other themes animating Rehnquist Court decisions on race discrimination; it is here that the Rehnquist wing shows the greatest likelihood of developing schisms. After describing the scholarly reaction to the Rehnquist Court's record on race discrimination, this Article concludes that the Court is poised at a crossroad. One path leads to a relatively wholesale dismantling of the edifice erected by the Burger Court; the other leads to a remodeling of the edifice with the essential elements still in place.

II. THE STATISTICS

Drawing conclusions from statistics about the results of Supreme Court cases can be risky for several reasons. Supreme Court decisions are not fungible. A string of victories for one side may stem from the factual details in which particular issues are embedded, reflecting a substantial element of chance, the nature of the cases available for review, or a genuine doctrinal trend. In the area of race, the changing nature of the issues presented precludes statistical comparison of the Rehnquist Court with previous Courts. Just as one swallow does not make a spring, a year such as the 1988 term, when minorities lost every case, does not necessarily make a trend. It is perfectly plausible that a group of litigants might in any given year take "nonmeritorious" positions in all its cases pending in the Supreme Court, while taking "meritorious" positions some other year. Minorities won eight out of the nine race discrimination cases the Rehnquist Court heard during its first two terms.[33] Finally, the composition of the Rehnquist Court itself has changed over time.[34] With these caveats in mind, the statistics regarding race discrimination cases under Chief Justice Rehnquist are nonetheless revealing.

The Author has reviewed the twenty-nine race discrimination cases that the Rehnquist Court decided during its first five terms (1986-90). The statistical review is summarized in tables in the Appendix to this Article. Those tables recount the ruling in each case and analyze the voting records of the Justices to determine the extent of their agreement with the position of minority group parties and with one another. The statistical tables paint a useful backdrop for the substantive portions of this Article, confirm the existence of two, often opposed voting groups, and reflect possible points of schism within the group generally identified with Chief Justice Rehnquist.

The twenty-nine race discrimination cases that the Court

33. One euphoric proponent of affirmative action, Herman O. Schwartz, was prompted to write an article entitled *The 1986 and 1987 Affirmative Action Cases: It's All Over But the Shouting*. *See* 86 MICH. L. REV. 524 (1987).

34. Indeed, one author marks the beginning of the Rehnquist Court with the retirement of Justice Powell and his replacement in February 1988 by Justice Kennedy. Jones, *supra* note 5, at 9 n.30; *see also* James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1072 (1989) ("The Supreme Court appointment of Justice Kennedy . . . suggests that the Rehnquist Court may, as a revisionist forum, reverse many civil rights advances of the past generation." (footnote omitted)).

has decided on the merits constitute about four percent of the Court's merits decisions. Prior to the Rehnquist Court, claims by whites had been heard, but not in large numbers.[35] However, whites were asserting claims in thirty-four percent (ten) of the race discrimination cases decided in the Rehnquist Court's first five years.[36] Not all of these claims were adverse to, and some were congruent with, minority interests.[37] Nonetheless, this is a startling shift. In part, it reflects increasing white awareness of the possibility of using the Constitution and the civil rights laws as a litigative tool,[38] and in part, it may reflect minority reluctance to press close cases in light of the present composition of the Supreme Court. No doubt it also stems from the climate of political opposition to affirmative action and from the perception that the current Court is friendly to challenges to affirmative action. Indeed, it may represent a new willingness of the current Court to grant review of such cases.

Despite this perception, the Rehnquist Court has by no means solidly opposed minority rights. Minority group losses accounted for forty-one percent (twelve) of the twenty-nine race

35. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (challenging an affirmative action plan); United Steelworkers v. Weber, 443 U.S. 193 (1979) (same); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (same); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) (applying 42 U.S.C. §§ 1981, 2000e to whites); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) (standing of whites to challenge exclusion of blacks from apartment complex); Loving v. Virginia, 388 U.S. 1 (1967) (interracial married couple challenged antimiscegenation law).

36. *See* Powers v. Ohio, 111 S. Ct. 1364 (1991) (Fourteenth Amendment challenge to prosecutor's peremptory exclusion of black jurors in prosecution of white defendant); Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2977 (1990) (dealing with preferential treatment of minorities in the award and sale of broadcast licenses); Holland v. Illinois, 493 U.S. 474 (1990) (allowing Sixth Amendment challenge to prosecutor's peremptory exclusion of black jurors in prosecution of white defendant); Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989) (respondeat superior liability under 42 U.S.C. § 1981); Martin v. Wilks, 490 U.S. 755 (1989) (allowing collateral attack on affirmative action consent decree); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (challenging minority set-aside program); New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988) (right of white male organizations to exclude nonwhites and women); Marino v. Ortiz, 484 U.S. 301 (1988) (allowing collateral attack on affirmative action consent decree); Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987); Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987) (applying 42 U.S.C. §§ 1981, 1982 to Arabs and Jews).

37. Minority interests were advanced by a white litigant in *Jett*, *Holland*, and *Powers*. They were consistent with the position of a white litigant in *Al-Khazraji* and *Shaare Tefila*.

38. One study finds a 2166% growth in employment discrimination litigation in the lower federal courts between fiscal year 1970 and fiscal year 1983, compared with a 125% growth in the general federal case load. The study concludes that "reverse discrimination" cases account for 5.6% of this growth. John J. Donohue & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 997 n.53 (1991).

discrimination cases,[39] five during the 1988 term of the Court, which was the only term in which minority groups lost more cases than they won. Minorities won several notable victories.[40]

An understanding of the Rehnquist Court's record on race starts with a review of where the individual Justices stand. On race issues there appear to have been two gangs of four. The polar positions of Justices Rehnquist, O'Connor, Scalia, and Kennedy (whom I will call the Rehnquist wing), on the one hand and those of Justices Brennan, Marshall, Blackmun, and

39. Hernandez v. New York, 111 S. Ct. 1859 (1991) (exercise of peremptory challenges based on bilingual language ability); EEOC v. Arabian Am. Oil Co., 111 S. Ct. 1364 (1991) (extraterritorial application of Title VII of Civil Rights Act of 1964); Board of Educ. v. Dowell, 111 S. Ct. 630 (1991) (standard for determining whether desegregated school system may adopt a student assignment plan that causes resegregation); Holland v. Illinois, 493 U.S. 474 (1990) (holding white defendant's Sixth Amendment rights to a fair cross-section jury were not violated by the prosecutor's racially discriminatory exercise of peremptory challenges to strike blacks from the jury); Spallone v. United States, 493 U.S. 265 (1990) (contempt of court in fair housing case); Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989) (respondeat superior liability under 42 U.S.C. § 1981); Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (application of 42 U.S.C. § 1981 to racial harassment of employee); Martin v. Wilks, 490 U.S. 755 (1989) (collateral attack on an affirmative action consent decree); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (standards for proof of disparate impact case under Title VII); Teague v. Lane, 489 U.S. 288 (1989) (retroactive application of Batson v. Kentucky, 476 U.S. 79 (1986)); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (challenging a minority set-aside program); McCleskey v. Kemp, 481 U.S. 279 (1987) (discriminatory imposition of death penalty).

40. *See* Chisom v. Roemer, 111 S. Ct. 2354, 2368 (1991) (holding judicial elections covered by § 2 of Voting Rights Act); Houston Lawyers' Ass'n v. Attorney Gen., 111 S. Ct. 2376, 2380 (1991); Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2080 (1991) (finding race-based peremptory challenges in civil cases violate Equal Protection Clause); Powers v. Ohio, 111 S. Ct. 1364, 1373 (1991) (holding white defendants may challenge as a violation of the Equal Protection Clause the prosecutor's racially discriminatory use of peremptory challenges to exclude blacks); Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3027-28 (1990) (holding preferential treatment of minorities in award and sale of broadcast licenses did not violate equal protection principle); Lytle v. Household Mfg., Inc., 110 S. Ct. 1331, 1336-37 (1990) (holding collateral estoppel does not deny jury trial of discrimination claim under 42 U.S.C. § 1981 when court has resolved issues raised by equitable claim); University of Pa. v. EEOC, 493 U.S. 182, 201 (1990) (finding that tenure records were not protected from subpoena in fair employment suit); Missouri v. Jenkins, 495 U.S. 33, 50-51 (1990) (remedy in school desegregation case); Huntington v. NAACP, 488 U.S. 15, 18 (1988) (use of zoning to exclude low cost housing from predominantly white section of town); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 978 (1988) (application of disparate impact test to subjective employment selection devices); New York State Club Ass'n v. City of New York, 487 U.S. 1, 13-14 (1988) (right of white male organization to exclude nonwhites and women); United States v. Paradise, 480 U.S. 149, 182-83 (1987) (plurality) (one-black-for-one-white promotion requirement does not violate the Equal Protection Clause); Goodman v. Lukens Steel Co., 482 U.S. 656, 667 (1987) (standards governing union liability under Title VII of the Civil Rights Act of 1964); City of Pleasant Grove v. United States, 479 U.S. 462, 467-69 (1987) (application of Voting Rights Act to annexation of land projected to become a white subdivision); Griffith v. Kentucky, 479 U.S. 314, 322 (1987) (retroactive application of *Batson* to direct appeal).

Stevens (the Brennan wing), on the other, have been stable and predictable.[41] Justice White, however, is much more difficult to chart.[42] If there is such a phenomenon as a "swing Justice," Justice White has been that person in race cases. With the departure of Justices Brennan and Marshall, one "swing Justice" is no longer enough to determine the outcome of a case. In split decisions in race discrimination cases during the 1990 term of Court, Justice Souter combined with Justice Kennedy or Justice O'Connor to provide the swing votes that placed the Chief Justice and Justice Scalia in dissent four times.[43]

The Court has been much more likely to be closely divided in race cases than in other cases. During its first four terms, the Court decided 57.1% of race cases and 18.9% of nonrace cases

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41. I have named the wings for the Chief Justice and Justice Brennan both because they are the Justices who would normally assign opinion writing for the wing and because of the leading role each has played as a consistent voice on race discrimination issues over the years. Upon Justice Brennan's departure, Justice Marshall became the senior Justice of the Brennan wing, but only for one year.

Justices Brennan and Marshall voted in every case for the position which minority groups tended to favor, and Justice Blackmun did so in twenty-eight out of twenty-nine cases and Justice Stevens in twenty-seven of twenty-nine cases. Thus, those four Justices almost always agreed with one another. The only significant exception is Justice Stevens's concurrence in *Croson*, 488 U.S. at 469 (Stevens, J., concurring). In nonrace cases, Justice Stevens is as likely to agree with one group of Justices as with another. William D. Popkin, *A Common Law Lawyer on the Supreme Court: The Opinions of Justice Stevens*, 1989 DUKE L.J. 1088, 1089 n.6. His position is much more predictable in race cases.

Justices Rehnquist, O'Connor, Scalia, and Kennedy voted against the minority group position in a majority of cases and agreed with one another in all the race cases involving disparate impact and affirmative action. *But see* Johnson v. Transportation Agency, 480 U.S. 616, 648 (1987) (O'Connor, J., concurring) (upholding affirmative action based on gender). In the twenty-nine cases, Justice Rehnquist voted for the minority group position eight times, Justice Scalia nine, and Justice O'Connor nine. Justice Kennedy participated in twenty-one cases, voting for the minority group position in six of them. Justice Souter has not firmly aligned with either group on race discrimination issues; he has supported the minority group position in five of the seven cases in which he has participated. One author, who divides the Rehnquist wing into "extreme and more moderate conservative" groups, points out that Justice Souter voted with the moderate conservatives in race cases. Elliot Mincberg, *The Newest Justice: Stealth Unsheathed*, LEGAL TIMES, July 22, 1991, at S21.

It is interesting to note that the Justices of the Brennan wing were each appointed by a different President (Justice Brennan by Eisenhower; Justice Marshall by Johnson; Justice Blackmun by Nixon; and Justice Stevens by Ford); the Rehnquist wing Justices all owe their current position to President Reagan. Justice White is a Kennedy appointee, and Justices Souter and Thomas were appointed by President Bush.

42. Justice White voted for the minority group position in fifteen cases and against it in fourteen. His position prevailed in all but two cases, *Griffith v. Kentucky* and *United States v. Paradise*. Those cases date from the 1986 term, the first under Chief Justice Rehnquist.

43. *See* Appendix, Table III-E.

by a five to four margin.[44] This fact heightened the importance of a swing Justice during the first four terms and will bring increased attention to the possibility of schisms within the Rehnquist wing in the future.

One might expect to see a close relationship between the position of the United States and the Court's decision. The United States or one of its agencies appeared as a party or amicus curiae in fifteen of the twenty-nine race cases that the Court heard on the merits.[45] The United States typically wins over seventy-five percent of the cases in which it appears as a party or amicus curiae before the Supreme Court.[46] Four members of the Rehnquist Court were alumni of the Department of Justice.[47] A majority of the members of the Court owe their positions to Presidents Reagan and Bush, whose views the Solicitor General was advocating before the Court. Nonetheless, of the fifteen race discrimination cases in which the United States or an agency of the United States appeared as a party or amicus curiae, the Court agreed with the government in a bare majority.[48]

III. THE MAJOR CASES

Before embarking on an analysis of the Rehnquist Court's race discrimination decisions, it is necessary to understand the legal setting in which the cases were decided, as well as their holdings. From the large body of race cases, nine cases that merit special attention have been selected because they go to the

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44. *See* Appendix, Table V. With the departure of Justice Brennan, only one case in the 1990 term was decided by a five to four margin, while five were decided by a six to three or five to three margin. *See* Appendix, Table I. Unanimity evaded the Court in 81% of race cases and 74.4% of nonrace cases during its first four terms. *See* Appendix, Table VI.

45. These twenty-nine cases constitute 52% of the race cases. In cases overall, the government participation rate is about 60%. *See* Brian Landsberg, Book Review, 6 CONST. COMMENTARY 165, 167 (1989) (reviewing LINCOLN CAPLAN, THE TENTH JUSTICE (1987)).

46. CAPLAN, *supra* note 45, at 251.

47. Chief Justice Rehnquist and Justice Scalia served as Assistant Attorney General; Justice Marshall served as Solicitor General; Justice White served as Deputy Attorney General.

48. *See* Appendix, Table I. The Court agreed with the Government in eight (53%) of the cases. If one adds Patterson v. McLean Credit Union, 491 U.S. 164 (1989), where the Government won on one issue and lost on another, the agreement rate is 60%, still far below the overall Government win rate. *See generally* Drew S. Days, *The Courts' Response to the Reagan Civil Rights Agenda*, 42 VAND. L. REV. 1003 (1989) (proposing that the Reagan Administration was unsuccessful in its effort to reintroduce traditional theories in the civil rights area).

heart of the current issues of violation and remedy. This section describes the legacy of the Warren and Burger Courts and the rulings of the Rehnquist Court with respect to race conscious preferences, statistical disparity, and remedy. Sections IV and V then provide analysis.

A. Racial Neutrality

The primary issue dividing the Rehnquist Court is racial neutrality. Does the Constitution forbid race-conscious affirmative action? Do the civil rights laws? What are permissible uses of race? Would a racially neutral practice lead to racially neutral results, or, conversely, does the lack of racial diversity among employees, government contractors, or other beneficiaries of public or private action suggest racial discrimination?

The Warren Court touched on these issues only lightly and not until its last year. *Green v. County School Board* introduced the notion that racially disparate effects (disparate impact)—use of a device that is facially neutral but has a disproportionate adverse effect on minorities—might reflect unlawful racial discrimination.[49] The Court held that a freedom of choice desegregation plan under which formerly de jure segregated public schools remained predominantly of one race failed to discharge the school board's obligation to remedy the effects of past discrimination.[50] Thus, a disparate impact test was applied to determine compliance with a remedial obligation. If the desegregation plan failed to provide racial desegregation, another plan, calculated to succeed, must be implemented.[51] *Green* thus demanded a race-conscious remedy—one calculated to provide a certain racial configuration of the schools.

The Burger Court confronted the race neutrality issue in a large number of contexts. First, that Court distinguished between two types of discrimination, disparate treatment and disparate impact. Disparate treatment—intentional discrimination based on race—violates both the constitutional ban on discriminatory state action[52] and the civil rights statutes.[53] Practices causing a disparate impact violate section two of the Voting Rights Act where they cause "black voters . . . to have

49. 391 U.S. 430, 441-42 (1968).
50. *Id.*
51. *Id.* at 439-41.
52. Strauder v. West Virginia, 100 U.S. 303, 308 (1879).
53. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973).

less opportunity than white voters to elect representatives of their choice";[54] such practices violate Title VII of the Civil Rights Act of 1964 unless justified by business necessity.[55] Disparate impact may be relevant proof of intentional discrimination, but does not, standing alone, violate the Constitution.[56] Whites, as well as minorities, are protected by the disparate treatment doctrine.[57]

Second, the Burger Court adopted the tailoring principle of relief, requiring that judicial relief be tailored to fit the violation. A closely related doctrine, building on *Green v. County School Board*, holds that discriminators must take affirmative steps to eradicate the effects of their past discrimination. A further corollary allows, indeed requires, courts to order race-conscious remedies where needed to end discrimination and eradicate its effects.[58]

Third, the Burger Court provided mixed guidance as to race-conscious measures not designed to remedy the actor's past discrimination. It held that Title VII does not bar private employers from adopting such measures, so long as they do not unduly trammel the rights of whites.[59] The Constitution, however, forbids states from adopting racial quotas of unlimited duration intended to compensate for general societal discrimination.[60] On the other hand, the federal government may adopt a

54. Thornburg v. Gingles, 478 U.S. 30, 80 (1986).

55. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). Unjustified disparate impact does not violate Title VI of the Civil Rights Act of 1964, but does violate the regulations under Title VI. Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 584 (1983). The Court has not addressed the question whether it violates the Fair Housing Act. *See, e.g.*, Huntington v. NAACP, 488 U.S. 15, 18 (1988) (per curiam) (failing to reach the issue of whether the disparate impact test is the appropriate one, but agreeing that disparate impact was shown and not adequately rebutted). However, disparate impact without purposeful discrimination does not violate 42 U.S.C. § 1981. General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 391 (1982). The reasoning of *General Building Contractors* would lead to the same ruling as to 42 U.S.C. § 1982.

56. Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977); Washington v. Davis, 426 U.S. 229, 239 (1976).

57. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279 (1976).

58. All three points are established by Swann v. Charlotte-Mecklenburg Board of Educ., 402 U.S. 1, 16 (1971) (holding that district courts have broad power to assure school integration), and Davis v. Board of Sch. Comm'rs, 402 U.S. 33, 37 (1971) (reversing lower court's failure to "achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation").

59. United Steelworkers v. Weber, 443 U.S. 193, 208 (1979).

60. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986) (plurality opinion); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 284 (1978) (plurality opinion). No Burger Court opinion on this issue commanded a majority of the Justices.

minority set-aside program of limited duration in order to ensure that minority contractors are not discriminatorily excluded from federal construction contracts.[61] The Burger Court's general approach provided nearly absolute protection to incumbents but less protection to persons with no strong expectation of the job or benefit.[62]

Missing from the Burger Court's opinions was a clear explanation of the theory underlying disparate impact law.[63] Was the theory bottomed on the existence of past or present discrimination against minorities?[64] Did the theory—as suggested by the reliance on "the fabled offer of milk to the stork and the fox"[65]—assume that prerequisites for employment might validly test the qualifications of persons of one race while excluding qualified members of another race? Was the disparate impact test designed to provide equality of results rather than equality of opportunity?[66] Was the test to erode or promote merit systems of employment?[67]

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61. Fullilove v. Klutznick, 448 U.S. 448, 475 (1980).

62. *Compare, e.g., Wygant*, 476 U.S. at 283-84 (disapproving race-based layoff plan); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 565 (1984) (reversing a court order that caused senior white workers to be laid off before less senior minorities) *and* International Bd. of Teamsters v. United States, 431 U.S. 324, 347-48 (1977) (refusing to apply disparate impact test to seniority system) *with Weber*, 433 U.S. at 193 (allowing some affirmative action if private and voluntary) *and Fullilove*, 448 U.S. at 448 (upholding a minority business set aside).

63. *See, e.g.*, Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758. Peller states:

> [T]he demand for an impact standard can be understood to ensure more rigorously and cautiously that irrationality and bias have been eradicated. The racially identifiable results of a purportedly neutral selection procedure are simply taken as more reliable evidence of racial bias than the vague and subjective inquiry into intent.

Id. at 817. *See generally* Robert Belton, *The Dismantling of the* Griggs *Disparate Impact Theory and the Future of Title VII: The Need for a Third Reconstruction*, 8 YALE L. & POL'Y REV. 223 (1990) (discussing the tension between "equal achievement" and "equal treatment" theories).

64. *See* Shelly J. Lundberg, *Equality and Efficiency: Antidiscrimination Policies in the Labor Market*, 7 CONTEMP. POL'Y ISSUES 75, 93 (1989) ("It is easier to regulate directly things one can observe (such as the outcome of employment and compensation decisions) rather than things one cannot observe (such as the role of sex or race in such decisions).").

65. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). The stork is unable to drink from the fox's shallow bowl; the fox is unable to drink from the stork's narrow jar.

66. Peller, *supra* note 63, at 817. Peller notes that "[t]he impact perspective . . . [could] signify not the possibility of 'bias,' but rather that qualitatively different view that 'civil rights' means a transfer of opportunities and resources on a group basis." *Id.*

67. For example, in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Court noted that one of the purposes of Title VII is "to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *Id.* at 800. Later in the same opinion the Court stated:

Also missing was a clear consensus as to the values affected by race-conscious actions. Is antidiscrimination law aimed at protecting only discrete, insular minorities? Is it aimed at producing a color-blind government? A color-blind society? Is it permissible or necessary to use race to get beyond race?[68] Does antidiscrimination law protect groups or individuals? Will racial neutrality freeze in place institutional racism? The Burger Court failed to agree on a standard for reviewing equal protection challenges to race-conscious measures.[69]

It comes as no surprise that these questions would continue to bedevil the Rehnquist Court, especially in three cases regarding race-conscious preferences and in three others where disparate impact was a central issue. In five of those six cases, the Rehnquist wing voted against the minority group position; the Brennan wing voted for it in all six cases.[70]

1. Race-Conscious Preferences and the Rehnquist Court

The Rehnquist Court upheld race-conscious preferences in two cases and invalidated them in a third. The permissible preferences were imposed in one case by a federal court and in the other by rule of the FCC, arguably approved by Congress. The impermissible preference was imposed by municipal ordinance.

> [*Griggs*] dealt with standardized testing devices which, however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired positions. *Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives.

Id. at 806. These statements, in one opinion, arguably refer to intent ("discriminatory practices"), racial parity ("racially stratified job environments"), past discrimination ("childhood deficiencies . . . resulting from forces beyond their control"), and a search for merit ("capable of performing effectively in the desired positions"). *Id.*

68. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring) ("In order to get beyond racism, we must first take account of race.").

69. *See* Fullilove v. Klutznick, 448 U.S. 448, 448 (1979); *Bakke*, 438 U.S. at 265. No opinion in either case commanded a majority of the Court.

70. The one case in which the Rehnquist wing voted for the minority position was Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988), which held that subjective employee selection devices are subject to the disparate impact test. *Id.* at 989-91. However, dicta in Justice O'Connor's opinion tempered the win by suggesting that the employee's initial burden of proof is high and that the employer bears only a modest burden of going forward, while the employee retains the burden of persuasion. *Id.* at 993-99. The Court adopted O'Connor's dicta the following year in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

In one case, Justice Stevens voted against the Brennan wing. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 511-18 (1989) (Stevens, J., concurring); *see* Appendix, Table II.

In its first term, the Rehnquist Court, in *United States v. Paradise*, upheld a trial court order imposing "a one-black-for-one-white promotion requirement to be applied as an interim measure to state trooper promotions in the Alabama Department of Public Safety."[71] As with every prior challenge to the constitutionality of race quotas, no opinion commanded a majority of the Court. Justices Brennan, Marshall, Blackmun, and Powell held that, whatever the level of constitutional scrutiny, the order was justified as a prophylactic measure to ensure that the Alabama Department of Public Safety would remedy its past and continuing discrimination in promotions. Justice Powell, concurring, argued that the Constitution required "that all government-imposed, affirmative action plans must be closely scrutinized."[72] He agreed with Justice Brennan that the facts justified the quota, even under that exacting standard of review. Justice Stevens's concurrence argued that the federal court had broad remedial discretion once it had found that the defendants had engaged in racial discrimination. Justice Stewart concluded that the quota order was well within the bounds of that discretion.[73] Justice White, in dissent, would have held that the order exceeded the trial court's equitable discretion, but he did not spell out his reasoning.[74] Justice O'Connor, joined by the Chief Justice and Justice Scalia, would have reversed the order by applying the strict scrutiny test applicable to other race discrimination cases under the Fifth or Fourteenth Amendments.[75] The outcome of the case was not surprising, since a similarly divided Burger Court had reached a parallel result the prior year in a suit involving discrimination by a union.[76]

The significance of *Paradise* is two-fold. First, it foreshadows the continuing debates as to the standard of review to be applied to affirmative action plans challenged under the Equal

71. 480 U.S. 149, 153 (1987) (plurality opinion).

72. *Id.* at 187 n.2.

73. *Id.* at 190.

74. *Id.* at 196.

75. *Id.*

76. Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421 (1986). Most of the discussion in *Sheet Metal Workers* concerns the permissibility of race-conscious relief under the remedial provision of Title VII, 42 U.S.C. § 2000e-5(g). *Id.* at 444-79. However, the Court also held that a federal court could order such relief without offending the equal protection component of the Due Process Clause of the Fifth Amendment. *Id.* at 479-81. The dissenters did not address the equal protection issue. *See also* International Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 528 (1986) (holding that Title VII does not preclude entry of consent decree providing for race-based promotions of firefighters).

Protection Clause and as to the significance of statistical disparities in employment. However, it also reflects general agreement among all of the Justices that, in some circumstances, federal courts may order race-conscious affirmative action where it is necessary to remedy the effects of past discrimination. As Justice O'Connor wrote, "[b]ecause the Federal Government has a compelling interest in remedying past and present discrimination by the Department, the District Court unquestionably had the authority to fashion a remedy designed to end the Department's egregious history of discrimination."[77] Justice O'Connor, citing her dissent in *Sheet Metal Workers*, agreed that racially preferential treatment of nonvictims could be ordered " 'where such remedies are truly necessary.' "[78]

While *Paradise* revealed the continuing division on the Court as to the standard of constitutional review of affirmative action programs, the Justices did not discuss that general issue at any length. The Justices engaged in no dialogue concerning the significance of statistical disparities, but simply talked past one another. Thus, Justice Brennan argued that the quota, which was to stay in effect until either the Department adopted a selection device with no adverse impact on blacks or twenty-five percent of the corporals were black, was necessary to eliminate the effects of past discrimination. Had the Department's promotion proposal been adopted, the corporal ranks would have been 9.2% black, while the work force was twenty-five percent black. Justice Brennan assumed that the disparity between the ratio of blacks in the work force and in the corporals' ranks was an effect of past discrimination. Justice O'Connor, however, said:

> In *Sheet Metal Workers*, I observed that "it is completely unrealistic to assume that individuals of each race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination." Thus, a rigid quota is impermissible because it adopts "an unjustified conclusion about the precise extent to which past discrimination has lingering effects, or . . . an unjustified prediction about what would happen in the future in the absence of continuing discrimination."[79]

This theme was to animate much of the Rehnquist wing's analy-

77. *Paradise*, 480 U.S. at 196.

78. *Id.* at 197 (quoting *Sheet Metal Workers*, 478 U.S. at 496 (O'Connor J., dissenting)).

79. *Id.* (O'Connor, J., dissenting) (citations omitted) (quoting *Sheet Metal Workers*, 478 U.S. at 494-95).

sis of subsequent cases.[80] Neither opinion explained why the assumptions of the opposing opinion were incorrect.

The Court, two terms later, revisited affirmative action in *City of Richmond v. J.A. Croson Co.*[81] That case held unconstitutional a minority set-aside program adopted by the City of Richmond, Virginia.[82] The Burger Court in *Fullilove v. Klutznick* had charted a detailed road map for governmental entities wishing to employ such programs to remedy past discrimination and discourage the future exclusion of minorities from public contracts.[83] As Professor Drew Days warned in the leading article on the decision, however, entities that failed to follow that road map invited a holding that their program offended the Equal Protection Clause.[84] In *Croson*, a six to three majority (the Rehnquist wing plus Justices White and Stevens) believed the Richmond program had steered off the *Fullilove* map, primarily by failing to show that the minority set-asides were narrowly tailored to remedy the effects of past discrimination. A majority of the Court held that, whatever standard might govern federal affirmative action programs adopted under section five of the Fourteenth Amendment, state race-conscious programs must satisfy the compelling state interest test, strict scrutiny. Thus, as Professor Rosenfeld has noted, "[i]n *Croson*, a majority on the Court for the first time has settled on a single standard—the strict scrutiny test—to determine the constitutionality of affirmative action based on race."[85] A different majority would agree that a set-aside program, which is narrowly tailored to

80. During that same term, the Court upheld a voluntarily adopted affirmative action plan, challenged as resulting in sex discrimination in violation of Title VII. Johnson v. Transportation Agency, 480 U.S. 616, 641-42 (1987). Justice Brennan's opinion for the Court applied United Steelworkers v. Weber, 443 U.S. 193 (1979), and held that the existing imbalances in the gender composition of traditionally segregated job categories warranted the employer's adoption of its affirmative action plan. *Johnson*, 480 U.S. at 627, 641-42. Justice O'Connor, concurring, disagreed with the majority's interpretation of *Weber*; she would have upheld the plan because the employer "had a firm basis for believing that remedial action was required." *Id.* at 649 (O'Connor, J., concurring). The employer here had such a basis; it could "point to a statistical disparity sufficient to support a prima facie claim under Title VII by the employee beneficiaries of the affirmative action plan of a pattern or practice claim of discrimination." *Id.* The Chief Justice and Justices White and Scalia dissented; they would have overruled *Weber*. *Id.* at 657 (Rehnquist, C.J., Scalia, J., and White, J., dissenting).

81. 488 U.S. 469 (1989).

82. *Id.* at 472.

83. 448 U.S. 448, 480-92 (1986).

84. Drew S. Days III, *Fullilove*, 96 YALE L.J. 453, 476-78 (1987).

85. Michel Rosenfeld, *Decoding* Richmond: *Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1731 (1989).

remedy past discrimination by the governmental unit or by private contractors who contract with the governmental unit, is constitutional. Thus, the Court reaffirms the compelling interest in remedying the effects of past discrimination.

The majority opinion, as Professor Rosenfeld has shown, adopts an "atomistic" analysis of the facts, "relying on the disconnection of facts from the context in which they are embedded, and on the recombination of such disconnected facts into mechanistic causal chains made up of direct and linear links."[86] One striking aspect of the Court's reasoning is the treatment of statistics showing that in a fifty percent black city, black contractors received a very small proportion of the city's contract business. The city relied on those statistics to show that a minority set-aside program was needed to overcome past discrimination. The statistics were, as the opinion shows, seriously flawed.[87] Had the Court stopped there, its analysis would have been unexceptional. However, it continued by suggesting that the possibility that "[b]lacks may be disproportionately attracted to industries other than construction" might explain the low minority business enterprise membership in local contractors associations.[88] Later in this Article it is argued that this hypothesis lies at the core of the Rehnquist wing's emerging approach to race discrimination cases.

In its most recent affirmative action case, *Metro Broadcasting, Inc. v. FCC*,[89] the Court held:

> [B]enign race-conscious measures mandated by Congress—even if those measures are not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.[90]

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86. *Id.* at 1761.

87. They compared minority businesses receiving prime contracts (.67%) with the black population. However, it appeared that minority businesses received a much higher proportion of subcontract dollars (7%-8% of all city contracts and 17%-22% of Community Block Development Grant construction projects). Moreover, the city provided no statistics as to the existing pool of minority contractors. As the Court noted, it is well settled that "where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task." *Croson*, 488 U.S. at 501-02.

88. *Id.* at 503.

89. 110 S. Ct. 2997 (1990).

90. *Id.* at 3008-09 (footnote omitted).

The majority accepted the pursuit of a racial integration objective (here, diversity of radio and television programming) through race-conscious means where the Congress and an administrative agency have concluded that the ends are desirable and the means appropriate. Because Congress may legitimately require diversity of programming, it may require additional steps, even race-conscious ones, where lesser measures have failed. The Court justified the application of mid-level scrutiny by reference to *Fullilove*, rather than attempting an analysis of the underlying reasons for choosing that level of scrutiny. The dissenters would have applied strict scrutiny, arguing that the grounds that justified searching for state action in *Croson* applied equally to Congress' action.[91] The dissenters stated that integration was not an objective important enough to warrant race-conscious government action. They argued that Congress could not legitimately assume that particular racial groups want or need particular kinds of programming, or that minority broadcasters are better able to provide appropriate programming for minorities.[92]

In *Metro Broadcasting*, Justice O'Connor argued "[t]he policies impermissibly value individuals because they presume that persons think in a manner associated with their race."[93] In her view, "the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think."[94] She was concerned that "[s]uch policies may embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution."[95] Yet it is important to note that Justice O'Connor's quarrel is with the standard of review and the proffered justification, not with all race-conscious measures. She agreed that "[t]he FCC or Congress may yet conclude after suitable examination that narrowly tailored race-conscious measures are required to remedy discrimination that may be

91. *Id.* at 3004.

92. *Id.* at 3037-38 (O'Connor, J., dissenting). The dissenters also argue that the policies at issue were the product of the FCC rather than Congress, and that the FCC's determinations were not due the same deference that is accorded congressional findings. *Id.* at 3030 (O'Connor, J., dissenting).

93. *Id.* at 3037 (O'Connor, J., dissenting).

94. *Id.* at 3029 (O'Connor, J., dissenting).

95. *Id.*

identified in the allocation of broadcasting licenses. Such measures are clearly within the Government's power."[96] Justice Kennedy's separate dissent would apply strict scrutiny, under which the Constitution would not permit "the Government to discriminate among its citizens on the basis of race in order to serve interests so trivial as 'broadcast diversity.' "[97] The case highlights, as no prior case, the difficulty in deciding whether a government interest is compelling, important, or simply legitimate. None of the opinions provide a test for answering that question, yet all agree that the substantiality of the government interest is a central issue. Justice O'Connor's opinion also betrays some tension between her willingness in prior cases to assume that minorities are under represented in some occupations by choice, and her argument that the FCC policies "impermissibly value individuals because they presume that persons think in a manner associated with their race."[98]

Supporters of affirmative action may find encouragement in the outcomes of these three cases on race-conscious preferences, which preserve the Burger Court's position that a government may grant race-conscious preferences, albeit only in narrowly circumscribed circumstances. The Rehnquist wing's consistent position in these cases, however, forebodes an eventual rethinking of the case law.[99]

2. Statistical Disparity and the Rehnquist Court

The Rehnquist Court addressed statistical disparity between the treatment of whites and nonwhites in three cases, one under the Fourteenth Amendment and two under Title VII of the Civil Rights Act of 1964. The Burger Court had established that statistical disparity alone would generally not violate the Equal Protection Clause,[100] but could be an element of proof

96. *Id.* at 3033.

97. *Id.* at 3045 (Kennedy, J., dissenting).

98. *Id.* at 3037 (O'Connor, J., dissenting).

99. *See generally* David T. Croall, *Affirmative Action in the Late 1980s*, 39 LAB. L.J. 519 (1988) (discussing the effect of recent affirmative action cases on labor relations); Thomas R. Haggard, *Mugwump, Mediator, Machiavellian, or Majority? The Role of Justice O'Connor in the Affirmative Action Cases*, 24 AKRON L. REV. 47 (1990) (predicting that Justice O'Connor will be the center of a new majority in race discrimination cases); Kathleen M. Sullivan, City of Richmond v. J.A. Croson Co.: *The Backlash Against Affirmative Action*, 64 TUL. L. REV. 1609 (1990) (examining *Croson*'s effect on affirmative action litigation).

100. Washington v. Davis, 426 U.S. 229, 239 (1976).

of such a violation,[101] and in some circumstances could shift to the alleged discriminator the burden of going forward.[102] The Burger Court's adoption of the disparate impact test in Title VII cases[103] had received Congress' knowing acquiescence in the course of passage of the 1972 amendments to Title VII.[104] The Rehnquist Court rejected the constitutional significance of racial disparities in the imposition of the death sentence,[105] applied the disparate impact test to subjective employment practices,[106] and substantially weakened the test.[107]

McCleskey v. Kemp upheld Georgia's death penalty statute against a convicted murderer's evidence that "even after taking account of 39 nonracial variables, defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks."[108] The Court rejected McCleskey's Equal Protection Clause challenge because it found that the statistics alone were not sufficient to show purposeful discrimination in the adoption, maintenance, or administration of the death penalty statute.[109] The Court rejected McCleskey's Eighth Amendment challenge because "[a]t most, the [statistics indicate] a discrepancy that appears to correlate with race."[110] The Court's analysis must assume that some factor other than race discrimination explains the disparity in sentences. McCleskey produced a study whose statistical validity the Court assumed, while adding that "[o]ur assumption that the Baldus study is statistically valid does not include the assumption that the study shows that racial considerations actually enter into any sentencing decisions in Georgia."[111] Yet the

101. Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

102. Batson v. Kentucky, 476 U.S. 79, 97 (1986); Castaneda v. Partida, 430 U.S. 482, 494-96 (1977).

103. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

104. *See* Connecticut v. Teal, 457 U.S. 440, 447 n.8 (1982). When the Court rejected application of a disparate impact test under § 2 of the Voting Rights Act, 42 U.S.C. § 1973, Congress effectively overruled the decision. City of Mobile v. Bolden, 446 U.S. 55, 62 (1980). In 1982, Congress amended § 2 to apply a "results" test closely akin to the disparate impact test. Thornburg v. Gingles, 478 U.S. 30, 79 (1986).

105. McCleskey v. Kemp, 481 U.S. 279, 308 (1987).

106. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 991 (1988).

107. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 655 (1989).

108. *McCleskey*, 481 U.S. at 287. The raw figures show that "[w]hite-victim cases are nearly 11 times more likely to yield a death sentence than are black-victim cases." *Id.* at 353 (Blackmun, J., dissenting).

109. *Id.* at 293.

110. *Id.* at 312.

111. *Id.* at 291 n.7.

notion that chance alone would explain such a disparity is implausible. Other than race discrimination or chance, the other possible explanations would be that whites are more likely than blacks to be the victims in cases where aggravating circumstances outweigh mitigating circumstances,[112] or that the evidence tends to be stronger in cases with white victims than in cases with black victims. The majority is unwilling to assume that, all things being equal, whites and blacks would be similarly affected by the facially neutral selection device, the criminal justice system. The Court is guided in part by instrumental concerns that:

> [I]f we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. Moreover, the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender.[113]

McCleskey rejected a claim that racial disparities in sentencing reflected intentional racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. The next two cases involved disparate impact claims under Title VII of the Civil Rights Act of 1964, but reflected similar concern over undue reliance on racial statistics.

In *Watson v. Fort Worth Bank & Trust*, the Court ruled that disparate impact analysis applied to subjective selection devices.[114] The Rehnquist wing, joined by Justice White, was sufficiently moved by arguments of the employer and the United States[115] to include in the opinion dicta designed to ameliorate

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112. *But see id.* at 360 (Stevens, J., dissenting) (McCleskey proved "that the racial disparities in the system were not the result of the differences in the average aggravation levels between white-victim and black-victim cases.").

113. *Id.* at 315-17 (footnote omitted). Another consequence of the contrary hypothesis (that discrimination is the most likely explanation for the statistics) would be to label state judges, prosecutors, or juries as racially prejudiced. It has been suggested that the Court's "very keen concern for the sensitivities of those—mainly whites—subject to being labeled 'racist' " may influence the Court's rejection of that hypothesis. Randall L. Kennedy, McCleskey v. Kemp: *Race, Capital Punishment and the Supreme Court*, 101 HARV. L. REV. 1388, 1418 (1988).

114. 487 U.S. 977, 991 (1988).

115. The history of *Watson* reveals that the federal government is taking a leading role in developing the concerns regarding the relation between disparate impact and quotas. In 1986, the United States petitioned for certiorari, seeking review of a Seventh Circuit decision allowing a Title VII plaintiff to state a cause of action based on an alleged disparate impact arising from a subjective decision-making process. The Government argued

the burdens that the disparate impact test imposes on employers in the opinion. Because Justice Kennedy, who had only recently taken office, did not participate, these dicta did not yet command a majority.

Justice O'Connor's opinion for the Court attempted to explain the disparate impact test by stating that "the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination."[116] The opinion, however, did not explain what that functional equivalent was.[117] The Court applied the *Griggs* test to subjective selection devices for two reasons. First, the test "could largely be nullified if disparate impact analysis were applied only to standardized selection practices."[118] Sec-

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that, while objective selection devices "arguably can be validated" empirically, subjective selection devices "are not susceptible to such rigorous validation and, practically speaking, may not be susceptible to validation at all." United States Petition For Certiorari at 17 (No. 86-468); *see* Tisch v. Shidaker, 782 F.2d 746 (7th Cir. 1986), *cert. granted, cert. vacated & remanded*, 481 U.S. 1001 (1987). The Government concluded that employers using subjective selection devices would be driven to use quotas to avoid disparate impact, and that this would be contrary to the policies of Title VII. *Id.* The Court granted the petition and remanded the case for further consideration in light of Johnson v. Transportation Agency, 480 U.S. 616 (1987), which had been decided two weeks earlier. *Shidaker*, 481 U.S. at 1001. Apparently the remand concerned the other issue presented by the Government, concerning the proper statistical base for comparison in a disparate impact case.

Two weeks later, the Court invited the Solicitor General to file a brief expressing the views of the United States on Question 1 presented by the petition in Watson v. Fort Worth Bank & Trust, 481 U.S. 1012 (1987). Question 1 was: "Is the racially adverse impact of an employer's practice of simply committing employment decisions to the unchecked discretion of a white supervisory corps subject to the test of *Griggs v. Duke Power Co.*?" *Id.* at 1011 (Stevens, J., concurring in the judgment). The Court heard *Watson* during the following term. The Government's brief on the merits refined and expanded its position in *Shidaker*, arguing again that it was virtually impossible to validate subjective selection devices and that

> [r]uling that the disparate impact theory is applicable to decisions resulting from subjective selection processes would, therefore, create an irresistible incentive for employers to abandon subjective selection processes in favor of objective ones or, where such replacement is too difficult or expensive, to eliminate the statistical disparity by superimposing quotas upon them. Neither result would be consistent with the intent of the 1964 Congress.

Amicus Curiae Brief of United States for Fort Worth Bank & Trust at 23, Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) (No. 86-6139) (footnote omitted).

116. *Watson*, 487 U.S. at 987.

117. The classic explanation appears in Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 299 (1971). A criterion which has an adverse differential impact on blacks is discriminatory if "the two attributes of race that make it an inappropriate basis for allocating jobs—unrelatedness to productivity and absence of individual control—also [are] attributes of the criteron in question." *Id.*

118. *Watson*, 487 U.S. at 989.

ond, the logic of *Griggs* allowed no distinction between objective and subjective selection devices.[119]

Justice O'Connor, joined by the Chief Justice and Justices White and Scalia, then added two sections of ameliorative dicta. She agreed with the bank and the Government "that the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures."[120] She portrayed a parade of horribles, under which employers would be presented with a Hobson's choice. Justice O'Connor, without citation, speculated that

> [i]f quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met. Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' clearly expressed intent, and it should not be the effect of our decision today.[121]

She therefore expressed the view that evidentiary standards should safeguard against the Hobson's choice in cases involving subjective selection devices. She adopted a rigorous view of the plaintiff's initial burden, requiring a showing of a causal relation between a specific selection device and the disparate impact. More importantly, she argued that the plaintiff's prima facie showing does not shift the burden of proof to the defendant and that the employer's business necessity defense does not require formal validation of subjective selection devices.[122] Justice Blackmun's concurring opinion, joined by Justices Brennan and Marshall, argued that Justice O'Connor's standards would unduly relax the employer's burden.[123] Justice Stevens, also concurring, said the Court should not reach this issue, which was

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119. *Id.* at 990.

120. *Id.* at 992.

121. *Id.* at 993.

122. Formal validation is achieved by conducting a study which shows, by professionally acceptable methods, that the selection device is " 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job.' " Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975) (quoting EEOC Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(c) (1978)). Justice Blackmun's concurrence in *Watson* quotes *Albemarle Paper*'s reliance on the EEOC Uniform Guidelines. *Watson*, 487 U.S. at 1005 (Blackmun, J., concurring).

123. *Watson*, 487 U.S. at 1009-11.

not presented by the question on which certiorari was granted.[124]

Justice O'Connor's opinion in *Watson* signaled a significant shift in the Court's treatment of disparate impact cases, a shift that materialized in *Wards Cove Packing Co. v. Atonio*.[125] In *Wards Cove*, those Justices who fully subscribed to Justice O'Connor's *Watson* opinion were joined by Justice Kennedy in holding that the plaintiffs had failed to make out a proper statistical case of disparate impact. The Court pointed out that basing a disparate impact finding on gross population statistics, divorced from qualified work force and from particular selection devices, would have the practical effect of requiring racial balance in employment in violation of 42 U.S.C. § 2000e-2(j). The Court, however, did not rest with this conclusion, but added a section of dicta regarding the proper test for determining when the plaintiffs have successfully demonstrated disparate impact.

In its dicta, the Court substituted a weak version of the disparate impact test. Once the plaintiff shows that the employer uses a selection device that causes an adverse disparate impact on minority group applicants, the employer has the burden of production (rather than the burden of persuasion) to show that the practice "serves, in a significant way, the legitimate employment goals of the employer"[126] (rather than business necessity). The burden of proving the existence vel non of alternative selection devices without a similar disparate impact now rests on the plaintiff (rather than the employer). The Court thus eviscerated much precedent[127] with no discussion except to predict that imposing on the employer burdens attending the traditional strong version "would result in a host of evils we have identified above. *See supra* at 652."[128] The host of evils referred to in that citation is that "[t]he only practicable option for many employers will be to adopt racial quotas, insuring that no portion of his

124. *Id.* at 1011.

125. 490 U.S. 642 (1989). Charles Fried, the Solicitor General who briefed both cases for the United States, says that "*Watson* had been crucial in preparing the Court for what we would ask it to do now [in *Wards Cove*]. . . . [Justice O'Connor's opinion] gave us our signal to press for a more thorough re-examination of what the lower courts had been doing in *Griggs*-type cases." CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 226 n.64 (1991).

126. *Wards Cove*, 490 U.S. at 659.

127. *See infra* note 232.

128. *Wards Cove*, 490 U.S. at 659. As to the burden of proof, Justice White's opinion acknowledges "that some of our earlier decisions can be read as suggesting otherwise." *Id.* at 660. However, he does not explain why "they should have been understood to mean an employer's production—but not persuasion—burden." *Id.*

work force deviates in racial composition from the other portions thereof; this is a result that Congress expressly rejected in drafting Title VII. See 42 U.S.C. § 2000e-2(j); see also *Watson v. Fort Worth Bank & Trust Co.*, 487 U.S. at 977 and n.2 (Opinion of O'Connor, J.)."[129]

Wards Cove's otherwise unexplained rules regarding the burden of rebutting a showing of disparate impact are based on three arguments of four Justices in *Watson*:

(1) The greater difficulty of justifying subjective employment practices requires an across-the-board relaxation of the employer's burden of proof where the plaintiff has shown disparate impact. This is the argument for uniform standards of proof.

(2) The strong version of disparate impact analysis tends (or might tend) to push employers to adopt quotas, while Title

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129. *Id.* at 652 The *Watson* citation transports us to further dicta, this time by four Justices (Justice Kennedy joined the Court too late to participate in *Watson*). There, Justice O'Connor argued that § 2000e-2(j) "requires in our view that a decision to extend the reach of disparate impact theory be accompanied by safeguards against the result that Congress clearly said it did not intend." Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 n.2 (1987). 42 U.S.C. § 2000e-2(j) provides, in relevant part:

> Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . employed by any employer . . . in comparison with the total number or percentage of persons of such race . . . in . . . the available work force . . . .

42 U.S.C. § 2000e-2(j) (1988).

Justice O'Connor's argument rested on the premise that "the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures. It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance." *Watson*, 487 U.S. at 992 (citations omitted). In the cited portion of *Sheet Metal Workers*, Justice O'Connor had stated:

> Reference to benchmarks such as the percentage of minority workers in the relevant labor pool will often be entirely proper in order to *estimate* how an employer's work force would be composed absent past discrimination. But it is completely unrealistic to assume that individuals of each race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination. That, of course, is why there must be a substantial statistical disparity between the composition of an employer's work force and the relevant labor pool, or the general population, before an intent to discriminate may be inferred from such a disparity. . . . Thus, the use of a rigid quota turns a sensible rule of thumb into an unjustified conclusion about the precise extent to which past discrimination has lingering effects, or into an unjustified prediction about what would happen in the future in the absence of continuing discrimination.

Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421, 494-95 (1986) (O'Connor, J., concurring in part and dissenting in part). It is not clear that Justice O'Connor still regards reference to such benchmarks as "a sensible rule of thumb."

VII is not to be construed to require quotas. This is the instrumental argument,[130] or the argument flowing from slippage.

(3) There is no basis for the courts to assume that people of equal qualifications will gravitate to jobs in accord with the laws of chance, without regard to race. This argument assumes—incorrectly, in my view—that such gravitation is a factual hypothesis of the disparate impact test, and it challenges that hypothesis. It seems to substitute a new hypothesis that people may well gravitate to jobs based on race. This is the behavioral argument.[131]

The first prong appears a make-weight whose logical frailty would not alone support the Court's decision.[132] The second and third prong are major themes of the Rehnquist wing, as discussed later in this Article.

Another author suggests that *Wards Cove* and *Watson* show that "a majority of the Court now apparently views impact theory through fault-colored eyeglasses. The Justices have, in short, shifted the focus of impact cases to the covert intentions and motives of the employer, the same focus as treatment cases, and thus carrying the same substantial difficulties of proof."[133]

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130. Instrumental judges "test the formulation and application of each rule by its purpose or policy. Where the reason for the rule stops there stops the rule. . . . The consequences of a rule are all important. Instrumentalist judges thus tend to be result-oriented." R. RANDALL KELSO & CHARLES O. KELSO, STUDYING LAW: AN INTRODUCTION 113-14 (1984).

131. *Watson*, 487 U.S. at 991-99 (O'Connor, J.). Justice O'Connor was joined by Chief Justice Rehnquist and Justices White and Scalia.

132. The argument for uniform standards of proof must confront two objections. First, it is not clear that it is difficult to justify valid subjective selection devices. Of course, if the devices are not valid, it should be impossible to justify them, but that is no criticism of the disparate impact test. Second, if the considerations regarding subjective selection devices differ from those regarding objective devices, it would seem to follow that different standards of justification should govern. Difficulties regarding justification of subjective devices do not require or warrant watering down the standard of justifying objective devices.

133. Mark S. Brodin, *Reflections on the Supreme Court's 1988 Term: The Employment Discrimination Decisions and the Abandonment of the Second Reconstruction*, 31 B.C. L. REV. 1, 10-11 (1989). Professor Brodin reaches this conclusion largely on the strength of two points in the Court's confusing opinion in *Wards Cove*. First, the Court said that if the plaintiff could show that a less discriminatory selection device would satisfactorily serve the employer's needs, the employer's failure to adopt such a device "would prove that '[petitioners were] using [their] tests merely as a "pretext" for discrimination.' " Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 660 (1989) (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)). The citation of *Albemarle Paper Co.* reflects the ambiguity of pre-*Wards Cove* doctrine regarding disparate impact. *Albemarle Paper Co.* held that if an employer rebutted the initial inference that a selection device was discriminatory, the plaintiff could then prove "that other tests or selection devices, without a similarly undesirable

Whether the three decisions on statistical disparities reflect a trend toward merging the disparate impact and disparate treatment theories remains to be seen. The decisions suggest that the Court may have embarked on a project of rethinking the rationale and content of the disparate impact test, an issue revisited later in this Article.[134]

B. Remedy

The remedial legacy of the Burger Court consists primarily of two rules, the tailoring principle and the restorative principle.[135] Remedies must be tailored to the past violation and they must restore the parties to the position they would have occupied but for the effects of the past violation. Taken together, these principles led to structural reform of school systems, the work place, and electoral systems. Various corollaries of these rules placed limits on the duration and scope of judicial remedies. The Court also translated remedial obligation into an affirmative duty, on the part of those who had unlawfully dis-

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racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' Such a showing would be evidence that the employer was using its tests merely as a 'pretext' for discrimination." 422 U.S. at 425 (citations omitted). *Albemarle Paper Co.* relied on McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), for this proposition; that case, of course, established the standards for disparate treatment cases, and the "pretext" language is recited in the context of disparate treatment. *McDonnell Douglas*, 411 U.S. at 804. Brodin relies for his conclusion, secondly, on the Court's statement in *Wards Cove* that "[i]f the absence of minorities holding such skilled positions is due to a dearth of qualified nonwhite applicants (for reasons that are not petitioners' fault), petitioners' selection methods or employment practices cannot be said to have had a 'disparate impact' on nonwhites." *Wards Cove*, 490 U.S. at 651-52 (footnote omitted). But it is unclear whether the Court uses the word "fault" here in the usual sense. A footnote to that sentence explains that "[o]bviously, the analysis would be different if it were found that the dearth of qualified nonwhite applicants was due to practices on petitioners' part which—expressly or implicitly—deterred minority group members from applying for noncannery positions." *Id.* at 651 n.7 (citing Teamsters v. United States, 431 U.S. 324, 365 (1971)). The cited portion of *Teamsters* does discuss intentional discrimination which deters nonwhites from applying, but the phrase "expressly or implicitly" may mean intentionally or unwittingly.

134. *See* Robert Belton, *Causation and Burden-Shifting Doctrines in Employment Discrimination Law Revisited: Some Thoughts on* Hopkins *and* Wards Cove, 64 TUL. L. REV. 1359, 1364 (1990) ("[T]he conservative majority of the Court is, in these cases, attempting to redefine the *Griggs* concept of disparate-impact discrimination through manipulation of evidentiary and burden-shifting rules."). *See generally* Michael K. Braswell et al., *Disparate Impact Theory in the Aftermath of* Wards Cove Packing Co. v. Atonio: *Burdens of Proof, Statistical Evidence, and Affirmative Action*, 54 ALB. L. REV. 1 (1989) (considering the impact of *Wards Cove*); Candace S. Kovacic-Fleischer, *Proving Discrimination After* Price Waterhouse *and* Wards Cove: Semantics as Substance, 39 AM. U. L. REV. 615 (1990) (discussing the burden of proof in racial discrimination cases).

135. *See generally* Landsberg, *supra* note 25.

criminated in the past, to remedy the effects of their own past discrimination. Failure to do so was an independent constitutional violation. The Court, however, was badly divided on the extent to which race-conscious measures should be available as a remedy. It also failed to provide detailed guidance as to the duration of the remedy and of the affirmative duty of reformed discriminators.

The Rehnquist Court has decided four major cases regarding the application of these principles. The first, *United States v. Paradise*, is described above.[136] A closely divided Court upheld a racial quota for state trooper promotions as a remedy for a continued and recalcitrant pattern of race discrimination and a failure to comply with less onerous court orders.

In *Spallone v. United States*,[137] the Court, in a five to four decision, overturned the federal contempt of court conviction of a city council member who had refused to vote in favor of legislation implementing a court-approved consent decree in a housing discrimination case. The majority consisted of Justice White and the Rehnquist wing. Justice Rehnquist's opinion for the Court acknowledged that "[w]hen a district court's order is necessary to remedy past discrimination, the court has an additional basis for the exercise of broad equitable powers."[138] The Court, however, noted the countervailing interest of state and local authorities to manage their own affairs and concluded that the district court abused its equitable discretion in failing to use less intrusive means before considering contempt against individual members of the city council. Justice Brennan's dissent accepted the appropriateness of imposing the least intrusive sanctions to achieve compliance with the order, but deferred to the district court's judgment that lesser measures would not work.[139]

The same general themes recur in the opinions in *Missouri v. Jenkins*,[140] where Justice White's swing vote allowed the Brennan wing to prevail. The Court unanimously disapproved a district court order imposing on Kansas City property owners a property tax increase to help fund a school desegregation remedy. Justice White, for the Court, concluded that "the tax increase contravened the principles of comity that must govern

136. *See supra* notes 71-80 and accompanying text.
137. 493 U.S. 265 (1990).
138. *Id.* at 276.
139. *Id.* at 305-06 (Brennan, J., dissenting).
140. 495 U.S. 33 (1990).

the exercise of the District Court's equitable discretion in this area."[141] Without once citing *Spallone*, Justice White said that the "proper respect for the integrity and function of local government institutions"[142] and the availability of a less intrusive remedy precluded such direct imposition of a tax increase. However, the district court could order the school board to levy such taxes as were needed to fund the remedy, and state laws imposing tax limits could not "hinder the process by preventing a local government from implementing that remedy."[143] Justice White declined to review the validity of the underlying remedy because the Court had denied certiorari on that question, which had been presented by the State's petition.

Justice Kennedy's opinion, for the Rehnquist wing, concurred in part and concurred in the judgment. The concurring opinion, however, took strong issue with the Court's conclusion that the district court could do indirectly what it could not do directly. Justice Kennedy argued that the prudence that *Spallone* had required precluded what he viewed as the taxation order, which the majority approved.[144] He perceived such an order as inconsistent with the judicial function, supporting this conclusion by arguing that the underlying remedial order, even if constitutionally permissible, was not constitutionally required; other possible remedies might cost less and thus not necessitate increased taxation. Where several possible remedies exist, the district court is obliged to choose the one that is least intrusive on local governance. Justice Kennedy believed that the denial of certiorari on the validity of the desegregation remedy did not foreclose the Court from considering this argument.

Finally, in 1991, the Court decided *Board of Education v. Dowell*[145] by a five to three margin.[146] The Oklahoma City schools had desegregated pursuant to a federal court order in 1972 and had operated under the desegregation plan until 1985, when the schools reverted to a neighborhood school system of student assignment. The new system caused eleven integrated schools to become virtually all black. The plaintiffs' challenge to

141. *Id.* at 50.

142. *Id.* at 51.

143. *Id.* at 57-58 (citing North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 45 (1971)).

144. *Id.* at 71 (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy did not discuss *Swann*.

145. 111 S. Ct. 630, 630 (1991).

146. Justice Souter took no part in the case.

the new plan ultimately led to a court of appeals decision that the board had failed to justify abandoning the prior court order.[147] The court of appeals applied the standard of an old antitrust case, *United States v. Swift & Co.*, which said an antitrust decree should not be dissolved unless it results in "grievous wrong evoked by new and unforeseen conditions."[148] The Supreme Court unanimously disapproved the court of appeals' standard for dissolution of a school desegregation decree, because prior school desegregation cases had held that desegregation decrees were temporary measures. Again, the Court considered judicial respect for local governance of school systems an important value. The majority, echoing the amicus brief of the United States, failed to give clear guidance as to the standard to be applied on remand. The Court took the unusual step of reversing the decision of the court of appeals, but remanding the case directly to the district court. That court is to "address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable."[149] If so, the injunction should be dissolved and the new student assignment plan should be judged by "appropriate equal protection principles."[150] The Court did hint that, to the extent that present residential segregation is a vestige of former school segregation, continuation of the desegregation plan might be required.[151] The Court did not address the issue of whether location and capacity of schools might be considered an effect of past discrimination, nor did it address the dissent's argument that the stigma which attaches to one-race schools is a cognizable effect of past discrimination.[152] The dissent would have affirmed because racially identifiable schools are vestiges of past discrimination that perpetuate "the message of racial inferiority inherent in the policy of state-sponsored segregation."[153]

147. *Dowell*, 111 S. Ct. at 634.

148. 286 U.S. 106, 119 (1932).

149. *Dowell*, 111 S. Ct. at 638; *cf.* Amicus Curiae Brief of the United States for the Board of Education at 14, Board of Educ. v. Dowell, 111 S. Ct. 630 (1991) (No. 89-1080). The court should ask "(1) whether the district has continuously complied with the desegregation decree in good faith; (2) whether the school district has abandoned any and all acts of intentional discrimination; and (3) whether the school district has eliminated, as far as practicable, the 'vestiges' of prior discriminatory conduct." *Dowell*, 111 S. Ct. at 638.

150. *Dowell*, 111 S. Ct. at 638.

151. *Id.* at 638 n.2.

152. *Id.* at 642 (Marshall, J., dissenting).

153. *Id.* at 648.

As with the cases regarding race-conscious preferences, the remedy cases preserve the legacy of the Burger Court. As is shown in Part IV, however, here too the Rehnquist wing's opinions foreshadow a rethinking of the tailoring and restorative principles.

IV. MAJOR THEMES

A. The Substructure of Antidiscrimination Law

The Rehnquist wing, while showing no outward sign of abandoning the foundation of antidiscrimination law, shows growing unease with its substructure. Antidiscrimination law has come to rest on assumptions regarding behavior and race, and on remedial principles regarding effects of past discrimination and insurance against future discrimination. If these assumptions and principles erode, the structure of antidiscrimination law will lose its supports. Thus, while eschewing any design to alter radically antidiscrimination law, the Rehnquist wing may be embarking on a path that will lead to just that effect.

1. Assumptions Regarding Behavior and Race

Where whites, as a group, receive proportionately more rewards (*e.g.*, jobs, contracts, political power, housing) than minorities,[154] several hypotheses might explain the disparity. The disparity might stem from deliberate discrimination by the bestower of rewards.[155] Or the bestower of rewards might have created a structure for their bestowal that unintentionally results in disparity,[156] stemming either from "cultural" differences

154. The depressed economic condition of black Americans is well documented. *See, e.g.*, Francine Blau & John W. Graham, *Black-White Differences in Wealth and Asset Composition*, 105 Q.J. ECON. 321 (1990); Jeremiah Cotton, *The Declining Economic Status of Black Families*, REV. BLACK POL. ECON., Summer 1989, at 84; Melvin L. Oliver & Thomas M. Shapiro, *Race and Wealth*, REV. BLACK POL. ECON., Spring 1989, at 5; Finis Welch, *The Employment of Black Men*, J. LAB. ECON., Jan. 1990, at S26.

155. CLINT BOLICK, UNFINISHED BUSINESS: A CIVIL RIGHTS STRATEGY FOR AMERICA'S THIRD CENTURY 115 (1990). A related cause might be "the empirical reality of unconscious racism." Sheri L. Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1017 (1988). As Professor Johnson points out, the Court has not recognized that possibility. *Id.* Such an "empirical reality" would seem to be a matter of proof, to be tendered by the party alleging racial discrimination.

156. Ronald Dworkin summarizes this "structural discrimination" as "the intractable social and economic patterns of American society, created by generations of injustice, through which poorer education, lower expectations, and instinctive and unacknowledged prejudice insure that race continues to be a dominant, pervasive factor affecting the lifetime

between whites and minorities or from differences in "merit."[157] Either past discrimination[158] or inherent group differences could cause the differences in merit. Finally, the disparity could result from chance. All but the last of these possible causes are group based. The Court has not read the Constitution as embracing any view of the causes of disparate impact. Therefore, the Court can find no basis in the Constitution for adopting any particular view, absent some definitive empirical evidence. Normally the Court would treat the question as a legislative one and defer to Congress or to the states. Difficulty arises only if the legislature's resolution of the question leads to the adoption of race-conscious measures, for such measures have traditionally triggered close judicial scrutiny.

The Rehnquist wing has firmly rejected any supposition that, all things being equal, minority representation in various jobs would likely mirror the qualified pool. These Justices believe that it is equally plausible that occupational choices are heavily determined by race.[159] In none of the cases does the

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prospects of individual citizens." Ronald Dworkin, *The Reagan Revolution and the Supreme Court*, N.Y. REV., July 18, 1991, at 23, 25 (reviewing CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN ADMINISTRATION—A FIRSTHAND ACCOUNT (1991)). Professor Fiss points out that where the discriminatory impact flows from a nonmerit criterion, it is particularly unfair to judge minorities on the basis of that criterion. Fiss, *supra* note 117, at 296. Former Solicitor General Fried, who filed the Government's brief in *Wards Cove*, agrees. *See Civil Rights Act of 1990: Hearing Before the Senate Comm. on Labor and Human Resources, on S. 2104*, 101st Cong., 1st Sess. 72 (1989) (statement of Charles Fried) ("[I]f you have an employment requirement . . . which operates as a barrier to minority opportunity, and there is no real reason to maintain that barrier, you should remove it and open the way to opportunity.") [hereinafter *Civil Rights Act Hearings*].

157. I enclose merit in quotation marks to point out that the definition of merit itself may contribute to disproportionality of rewards. Normally it is the bestower of benefits who defines merit.

158. The Civil Rights Commission says that Justice Clarence Thomas, when he was Chairman of the EEOC, noted that "[s]tatistical disparities in employment may indicate 'inadequate job preparation' rather than discrimination." UNITED STATES COMM'N ON CIVIL RIGHTS, FEDERAL ENFORCEMENT OF EQUAL EMPLOYMENT REQUIREMENTS 24 n.119 (Clearinghouse Publication No. 93, 1987).

159. *Cf.* City of Pleasant Grove v. United States, 479 U.S. 462, 472-80 (1987) (Powell, J., dissenting). Justice Powell was joined by the Chief Justice and Justice O'Connor. The majority opinion, written by Justice White, had upheld a district court finding that the annexation of largely vacant land was part of a pattern of activity purposefully designed to increase white voting strength and minimize black voting strength in a virtually all-white city, in violation of § 5 of the Voting Rights Act of 1965. 42 U.S.C. § 1973(c) (1988). The district court had found, and the majority affirmed, that the annexed area was "likely to be developed for use by white persons only." *City of Pleasant Grove*, 479 U.S. at 466. Justice Powell pointed out that the Fair Housing Act forbids discrimination in housing and argued that the district court's finding was therefore "sheer speculation." *Id.* at 478. He suggested that "an equally logical, if not more compelling, assumption is that the annexation of the

Court discuss evidence bearing on such racial characteristics. There is a slim body of literature in the social sciences which speculates that race and ethnicity influence occupational choice,[160] but the Court does not point to those writings or claim that there is consensus as to their validity. The Justices who adhere to the old view, that one would not expect race to influence occupational choice, point to no empirical evidence either. Instead, they appear to believe that the Equal Protection Clause and Title VII embrace the American melting pot ideal, that racial imbalances are aberrational and racial integration is the norm.

The Court will need to come to grips more directly than it has with these two competing pictures. Probably neither is completely accurate. Indeed, each contains internal inconsistencies. The Brennan wing assumes that, all else being equal, persons of one race will be just as qualified as persons of another race; yet, the same Justices assume that race brings unique qualifications to the electronic media. The Rehnquist wing assumes that formal equal opportunity has led (or can lead) to a society in which the race of others does not affect our treatment of them, but may well affect their own conduct.[161] The Chief Justice and Justice Scalia have also argued "that all groups tend to have particular sympathies and hostilities—most notably, sympathies towards their own group members."[162] Elsewhere, they seem to assume that the needs of individuals are fungible, without regard to race.

Several consequences flow from the Rehnquist wing's assumptions about race. First, these assumptions have a direct bearing on evidentiary burdens. A city wishing to adopt a minority set-aside program faces the heavy burden of showing that present racial disparities in contracting are the result of past intentional discrimination. An employee challenging an employment practice with a disparate impact may not rest with

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Western Addition will *increase* the black voting strength in the city." *Id.* at 478 n.3. The thrust of this assumption is that, absent discrimination, blacks would likely settle in previously all-white neighborhoods.

160. *See, e.g.*, Sowell, *"Affirmative Action": A Worldwide Disaster*, COMMENTARY, Dec. 1989, at 21. Professor Loury presents a variant on this approach. He argues that "[g]ross statistical disparities are inadequate to identify the presence of discrimination because individuals differ in many ways likely to affect their earnings capacities which are usually not measured and controlled for when group outcomes are compared." *Civil Rights Act Hearings, supra* note 156, at 77 (statement of Glenn C. Loury).

161. *But see* Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2128-32 (1989).

162. Powers v. Ohio, 111 S. Ct. 1364, 1378 (1991) (Scalia, J., dissenting).

showing that impact, but must also show that the employment practice is not job-related. A defendant sentenced to death for killing a white person may not escape that penalty by showing a pattern of higher penalties for killing whites than for killing blacks; the defendant must show that the prosecutor, judge, or jury imposed that sentence because of race, or that the state adopted its death penalty standards or procedures with the intent to discriminate based on race.

A closely related consequence is the shift away from recognizing structural discrimination claims. McCleskey's equal protection claim arguably ran afoul of the Burger Court's rulings in *Personnel Administrator v. Feeney*[163] and *City of Mobile v. Bolden*,[164] which required that the plaintiff prove intentional discrimination by a particular actor. His Eighth Amendment claim, however, was arguably in the mainstream of the Court's rulings that, as Justice Brennan's dissent points out, have "been concerned with the *risk* of the imposition of an arbitrary sentence, rather than the proven fact of one."[165] The Court was unwilling to import a racial claim into that structural framework. The Rehnquist wing would ordinarily disallow governmental programs designed to rectify structural exclusions of minorities from jobs, contracts, or broadcast licenses; it would require a showing of intentional discrimination to justify race-conscious measures. Some members of the Rehnquist wing would also extend this limit on affirmative action to include private employers, by either overruling or recasting the *Weber* holding.[166] The Rehnquist wing's revision of the traditional understanding of congressional intent regarding proof of structural discrimination in employment in *Wards Cove*, noted

163. 442 U.S. 256, 280-81 (1979) (holding that proof that veteran's preference for state employment had disparate impact on women is insufficient to show violation of Equal Protection Clause).

164. 446 U.S. 55, 61-65 (1980) (showing that black voting strength is minimized by at-large election of commissioners does not make out a violation of the Equal Protection Clause).

165. McCleskey v. Kemp, 481 U.S. 279, 322 (1987) (Brennan, J., dissenting).

166. The restrictions on government affirmative action are based on the Equal Protection Clauses of the Fourteenth (explicit) and Fifth (implicit) Amendments to the Constitution. The restrictions on employer affirmative action would be based on Title VII. Professor Fried argues that the two sets of entities should be treated differently: "The government, unlike private actors, is a monopolist whose regime we cannot escape, and therefore it makes sense to discipline the government far more tightly—particularly in an area like racial preferences, which can so easily degenerate into stifling political entrepreneurship and rent-seeking." FRIED, *supra* note 125, at 130.

above,[167] can be viewed as an attack on the very notion of structural discrimination.

A third consequence of the Rehnquist wing's assumptions regarding race is the variable use of generality and specificity in its treatment of race issues. On the one hand, the Justices treat race discrimination on a very general level, so that affirmative action is treated the same as discrimination against blacks. On the other hand, they require that proof of discrimination and proof of justifications for affirmative action proceed on a very specific level, thus placing a heavier burden on black plaintiffs and on defendants seeking to support affirmative action.

Perhaps of most consequence is that the logic of the Rehnquist wing's position in these cases could take the Court beyond challenging prior interpretations of statutory intent and beyond challenging the proposition that the Constitution bars structural discrimination. One could infer from the Rehnquist wing's opinions that Congress may not constitutionally enact laws barring structural discrimination. If the disparate impact test promotes race-conscious actions, and if the Constitution forbids race-conscious actions, may Congress forbid practices with a racially disparate impact?[168] If a municipality may not base its race-conscious contracting program on structural discrimination, may the federal government? The issue of the constitutionality of the disparate impact test has not been raised in the Supreme Court, but no one may doubt that the Justices are aware of it. Indeed, in a completely gratuitous opinion joining Justice Scalia's dissent in a case under section two of the Voting Rights Act, Justice Kennedy wrote "to add only that the issue before the Court is one of statutory construction, not constitutional validity."[169] To make his meaning unmistakable, he continued: "Nothing in today's decision addresses the question whether § 2 of the Voting Rights Act of 1965, as interpreted in *Thornburg v. Gingles* [applying the results test] . . ., is consistent with the requirements of the United States Constitution."[170]

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167. *See supra* notes 125-28 and accompanying text.

168. The Department of Justice has argued that under the disparate impact test, "[f]ar from making race and other proscribed criteria irrelevant in public and private decision-making, such proscribed criteria necessarily assume paramount importance in the determination of the treatment of individuals." OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL, REDEFINING DISCRIMINATION: DISPARATE IMPACT AND THE INSTITUTIONALIZATION OF AFFIRMATIVE ACTION 14 (1987).

169. Chisom v. Roemer, 111 S. Ct. 2354, 2376 (1991) (Kennedy, J., dissenting).

170. *Id.* (citation omitted). One possible constitutional challenge goes to Congress'

It is also revealing to note the relationship between these assumptions and the ideology of race discrimination law. Typically, the Justices[171] and scholars[172] draw two competing ideological pictures—an individual-based versus a group-based model. Those who follow the individual-based model tend to oppose, and those who embrace the group-based model tend to support, race-conscious affirmative action and the disparate impact test. Yet, the proponents of the individual-based model often explain statistical disparities by pointing to differences in group behavior, while the proponents of the group-based model tend to stress the impact of past discrimination on individuals. The putative dichotomy between individual and group-based models fails to take account of the nature of discrimination. Discrimination is group based, yet it falls on individuals.[173] Antidiscrimination measures must address both the group and the individual.

The approach of the majority in these cases, and of the four Reagan appointees in the *Metro Broadcasting* case, is that statistical imbalances in a workforce, or among government contractors or broadcasters, provide an insufficient basis for corrective steps; only a strong showing of past discrimination warrants race-conscious preferences (and even that showing might not suffice for Justice Scalia). Although giving lip service to *Griggs* and the disparate impact test under Title VII, these opinions undermine *Griggs* and, if carried to their logical conclusion, would lead to its eventual overruling, the gist of the opinions being that statistics are meaningful only as part of a case of intentional discrimination. The Court in *Wards Cove* provides no explanation of the reasons Congress adopted both an intent

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power under the Fourteenth and Fifteenth Amendments to forbid the states to adopt voting practices which, while they have a discriminatory effect, are not motivated by invidious intent. Katzenbach v. Morgan, 384 U.S. 641 (1966), and Oregon v. Mitchell, 400 U.S. 112 (1970), upheld such laws. The other (however remotely) conceivable argument rests on the Fifth Amendment's equal protection limitation on Congress' power. If the Court found that the disparate impact test was facially discriminatory or was motivated by a desire to favor minorities and disfavor nonminorities, the test would deny equal protection of the laws.

171. *See, e.g.*, Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3010-11 (1990).

172. *See, e.g.*, Alfred W. Blumrosen, *The Group Interest Concept, Employment Discrimination, and Legislative Intent: The Fallacy of* Connecticut v. Teal, 20 HARV. J. ON LEGIS. 99, 105 (1983); Haggard, *supra* note 99 at 82; Geoffrey Hazard, Jr., *Permissive Affirmative Action for the Benefit of Blacks*, 1987 U. ILL. L. REV. 379, 398.

173. *See, e.g.*, Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing*, 104 HARV. L. REV. 1157, 1195-96, 1240-43 (1991).

standard and a disparate impact standard in Title VII, as well as in the Voting Rights Act. The approach of the Reagan appointees rejects the traditional assumption "that minorities were no less interested than whites in higher-paying, more challenging work."[174] The Rehnquist wing provides no explanation why blacks might be less interested in certain occupations than others.[175] If the assumption is true, the skewed interest most likely stems from social position, which was determined by history. The history is one of slavery and discrimination. Unlike sex discrimination cases, employers have rarely, if ever, sought to show that particular jobs are more appealing to whites than to blacks.[176]

2. Remedial Principles

a. Effects of Past Discrimination

Race neutrality has been an overarching concern of the Rehnquist wing. These Justices have agreed, however, that at

174. Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1798 (1990). Professor Schultz explains that lower courts have often rejected such an assumption about women because they have accepted the argument that women were less interested than men in traditionally male jobs. Judges have often "accepted the dominant societal view of women as marginal workers. This view is linked to the cultural image of women as beings formed in and for the private domestic sphere, rather than actors shaped like their male counterparts by and for the public world of wage work." *Id.* at 1771. While that image contradicts the assumptions of Title VII, at least it provides an explanation, however suspect, for the disparities between women in the labor force and women in particular jobs.

175. A study of employers in Chicago "found that employers consistently relate race to inferior education, lack of job skills, and unreliable job performance." Kirschenman & Neckerman, *"We'd Love to Hire Them But . . .": The Meaning of Race for Employers, The Urban Underclass, noted in* MARGERY TURNER ET AL., OPPORTUNITIES DENIED, OPPORTUNITIES DIMINISHED: DISCRIMINATION IN HIRING 2 (C. Jencks & P. Peterson eds., 1991). Most employers "associated negative images with inner-city workers, and particularly with black men." *Id.* These employer attitudes mirror the attitudes of a majority of whites, who "still believe that both blacks and Hispanics are not only more inclined than whites to prefer welfare, but are also lazier, more prone to violence, less intelligent and less patriotic." *Id.* (citing a survey conducted by the National Opinion Research Center, University of Chicago, in January 1991). Another survey reflects that while whites recognize that discrimination is one cause of the unfavorable status of blacks, 60% of whites "hold that blacks lack the motivation or will power to overcome it." R. Farley, Neighborhood Preferences and Aspirations Among Blacks and Whites 10-11 (May 1991) (unpublished paper presented at the Urban Institute Urban Opportunity Program, Conference on Housing Markets and Residential Mobility, May 20 and 21, 1991, Airlie House, Virginia). Whites give blacks a more negative ranking than all other groups as to violence, self-sufficiency, and diligent working. *Id.* at 16.

176. *Cf.* Schultz, *supra* note 174, at 1778-79 (showing that employers often argue that women lack interest in particular jobs).

times race neutrality may paradoxically require a discriminator to take race into account in order to overcome the effects of past discrimination. While espousing the reparative and tailoring doctrines, the Rehnquist wing has in practice subordinated them to other values in each of the remedy cases decided by the Rehnquist Court. The Brennan wing, on the other hand, has placed those principles on the same level as the antidiscrimination principle itself.

All four remedial decisions involve state or local government defendants who engaged in a lengthy pattern of intentional racial discrimination. In *Paradise*[177] and *Spallone*[178] the defendants had continued that pattern, in the form of a refusal to take reparative steps, even after the district court entered its remedial order. In *Paradise*, the Alabama Highway Patrol continued its use of racially exclusionary selection devices for more than ten years after being ordered not to discriminate, in spite of repeated subsequent enforcement proceedings. In *Spallone*, city council members openly refused to comply with a consent decree. In both cases the district courts, concluding that less intrusive measures had failed to work, adopted strong prophylactic measures to bring about compliance. The Rehnquist wing agreed that in extreme cases such measures might be warranted, but disagreed with the trial courts' assessments of need. In *Paradise*, the Rehnquist wing unsuccessfully maintained that the preference for race neutral remedies should prevail;[179] in *Spallone*, deference to local governance prevailed.[180]

In *Missouri v. Jenkins*, the Rehnquist wing again placed deference to values of local governance above the trial court's judgment that an extraordinary remedy was required in order to overcome the effects of past discrimination.[181] Justice Kennedy's opinion acknowledged the Equal Protection Clause's "mandate to eliminate the cause and effects of racial discrimination in the schools."[182] He believed, however, that the majority had lost "sight of other basic political liberties guaranteed by our constitutional system, liberties that can coexist with a proper exercise of judicial remedial powers adequate to correct constitu-

177. United States v. Paradise, 480 U.S. 149, 170-71 (1987).
178. Spallone v. United States, 493 U.S. 265, 271-72 (1990).
179. *Paradise*, 480 U.S. at 196-201.
180. *Spallone*, 493 U.S. at 273-80.
181. 495 U.S. 33, 50-58 (1990).
182. *Id.* at 81 (Kennedy, J., concurring).

tional violations."[183]

Finally, in *Board of Education v. Dowell*, the full Court agreed that the *Swift & Co.* rule, which makes terminating a federal injunction very difficult, should not apply to desegregation cases because it is inconsistent with our tradition of local control of education.[184] The Rehnquist wing, which commanded the majority vote in the case, avoided the hard question in the case regarding the appropriate standard to apply in deciding whether to terminate the injunction and whether the school authorities should bear any continuing duty to avoid reinstating the effects of past discrimination. Justice Marshall, for the Brennanless Brennan wing, argued that the issue should be whether the new one-race schools imparted a racial stigma.[185] This was a new tack, reflecting a recognition that, after over a decade of desegregation, it becomes difficult to identify concrete effects of past discrimination. Justice Marshall maintained that the Court should assume that racial stigma attached to one-race schools is a continuing effect of the prior segregated system.[186] The Court may address these issues in the October 1991 term in *Freeman v. Pitts*[187] (standards for deciding unitariness of school system) and *United States v. Mabus*[188] (duty of formerly dual system of higher education).

At issue in *Dowell* on remand and in *Freeman* and *Mabus* is the continued vitality of the Burger Court's tailoring and restorative principles. If a formerly segregated school system that has desegregated for a period of years may adopt a retrogression plan without scrutiny of possible reinstitution of effects of past discrimination, then *Swann* itself will have lost its underpinnings.[189] On the other hand, Justice Marshall's stigma approach would lead to a virtually permanent ban on one-race schools. It should be possible to preserve the tailoring and reparative doctrines without unduly impairing the ability of local school systems to structure student assignments, or imposing some permanent racial balance formula. The Court could achieve this result by allowing school systems that have been declared unitary to freely adopt new assignment systems subject to challenge

183. *Id.*
184. 111 S. Ct. 630, 636-38 (1991).
185. *Id.* at 639.
186. *Id.* at 639-40.
187. 111 S. Ct. 949 (1991), *granting cert. to* 887 F.2d 1438 (11th Cir. 1989).
188. 111 S. Ct. 1579 (1991), *granting cert. to* 914 F.2d 676 (5th Cir. 1990).
189. Landsberg, *supra* note 25, at 832, 838.

that the system either acted with discriminatory intent or reinstated effects of past discrimination.[190]

b. Prophylactic Relief

The reparative doctrine is not the only possible basis for voluntary or court ordered, race-conscious affirmative action, or other remedial steps. The other basis that the Burger Court recognized was the prophylactic doctrine—that it may be appropriate to fashion remedial rules of sufficient clarity and specificity to ensure compliance with the antidiscrimination principle.[191] Such rules require the actor to engage in activity that is not required by the substantive law.[192] An employer, concerned that the personnel department may be insufficiently sensitive to the need for nondiscrimination, may put in place prophylactic mechanisms to ensure against discrimination. Even if its personnel department is committed to nondiscrimination, the employer may be concerned about possible "aversive" discrimination, buried prejudices that some scholars believe are endemic among white Americans.[193] A judge, concerned that prior decrees forbidding racial discrimination have been ineffective, may deem it necessary to constrict further the defendant's freedom of action. A municipality, concerned that nondiscrimination rules have not opened to minorities a fair opportunity to participate in public contracts, may decide to adopt a race-conscious system for ensuring such an opportunity.

The Rehnquist wing, as we will see, bases some of its race discrimination doctrine on a perceived need for prophylactic modification of Burger Court jurisprudence, to avoid anticipated straying by defendants and lower courts. Indeed, it has been argued that strict scrutiny of race-conscious measures is itself a

190. *See id.* at 800-07.

191. *See id.* at 804.

192. *See* David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 203-04 (1988).

193. *See, e.g.*, Mark A. Fossett & K. Jill Kiecolt, *The Relative Size of Minority Populations and White Racial Attitudes*, 70 SOC. SCI. Q. 820 (1989); Samuel L. Gaertner & John F. Dovidio, *The Subtlety of White Racism, Arousal, and Helping Behavior*, 35 J. PERSONALITY & SOC. PSYCHOL. 691 (1977); Gregory D. Squires & William Velez, *Insurance Redlining and the Process of Discrimination*, REV. BLACK POL. ECON., Winter 1988, at 63. Farley shows that while whites favor fair housing legislation, one quarter of surveyed whites would feel uncomfortable in a neighborhood in which one of fifteen homes was occupied by black residents; indeed a 1991 survey reflected that 40% of whites preferred neighborhoods which were 100% white and 25% preferred 90% white neighborhoods. Farley, *supra* note 175, at 6-7.

prophylactic rule.[194] Nonetheless, the Rehnquist wing is hostile to prophylactic relief. For example, in *Paradise*, the majority approved a race-conscious remedy because the defendants had thwarted race-neutral remedies that might otherwise have been effective. The Rehnquist wing dissented. In *Spallone*, the Rehnquist wing disapproved a remedy the district court thought necessary to compensate for the proven recalcitrance of individual defendants. The Court will have to resolve this seeming incongruity under which unproven hypotheses become the basis for doctrine, while proven need is held insufficient to justify a tailored remedy.

B. Selective Activism

If the Court, or at least the Rehnquist wing, is questioning the substructure of antidiscrimination law and possibly dismantling it, one would expect the Justices to proceed carefully and with great restraint. To the contrary, however, several opinions reach out, addressing issues not presented, applying nondeferential standards to legislative action, slighting precedent, and relying on instrumental concerns[195] in revising doctrine.

1. Slippage

The Supreme Court sits near the apex of the judicial hierarchy, answering only to the Constitution (metaphorically) on issues of constitutional law and to the Congress as to issues of statutory law. It bases its decisions on facts filtered through several lower court layers. In turn, its decisions pass through filters on their path toward implementation. As Karl Llewellyn so vividly painted the picture:

> What warrant have we for assuming that even the judicial system alone . . . works with any unity? We look at our highest courts and find their *words* a long way from their *doing*. In their own work we find that we can trust their rules part way, but part way only. In their own work the drive-belt slips between rules and results. Must we not then assume a further slipping as the distance grows, and as we move down the line? At each stage less exalted judges, at each stage more of them: are we not to guess that the average of ability is lower, too? Are we not to guess that other factors join in giving the wheels their drive, as the factor of high court rules slips more and

194. Strauss, *supra* note 192, at 205.

195. *See supra* note 130.

> more into ineffectiveness; that the interplay of belt and gearing turns the machine in strange, unsuspected ways? Ignorance, prejudice, accidents of experience, favor, indolence, even corruption: how much, how often, when, and where? How far, too, does the set-up of the procedural system stand between the rules and the result? Yet *by their fruits shall ye know them.* Law *is*, to the community, what law *does*.[196]

In the law of race discrimination, where the Court's accepted ultimate objective is racial neutrality, the Court faces a daunting task if it wishes to calibrate the law to defeat slippage. A simple nondiscrimination rule may lead to widespread evasion, as occurred during the period between *Brown v. Board of Education* and *Alexander v. Holmes County Board of Education*.[197] A rule requiring affirmative action could lead to a racial spoils system. Moreover, it is unlikely that a case that reaches the Supreme Court will provide a factual record permitting the Court to reach factual conclusions as to the general adherence to rules in other cases. *Alexander* came only at the end of a long history of lower court decisions that revealed the extent of official foot-dragging to avoid compliance with *Brown*.

The Supreme Court is undoubtedly aware of the possibility of slippage. In many instances it corrects lower court slippage by reversing erroneous interpretations of its precedents.[198] The Court might also seek to avoid slippage by writing clear opinions that state the law unambiguously.[199] Where there is a history of lower court error or intransigence, the Court may resort to detailed instructions to minimize future slippage. The Rehn-

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196. K.N. LLEWELLYN, THE BRAMBLE BUSH 90-91 (1951).

197. 396 U.S. 19 (1969) (per curiam). *Compare id. with* Brown v. Board of Educ., 347 U.S. 483 (1954). *Alexander* ended the era of all deliberate speed and commanded that desegregation proceed "at once." *Id.* at 20. As Justice Black noted, in an opinion in chambers, " '[a]ll deliberate speed' has turned out to be only a soft euphemism for delay." Alexander v. Holmes County Bd. of Educ., 396 U.S. 1218, 1219 (1969) (considering motion to vacate suspension of order of court of appeals).

198. For example, *Fullilove* could be read on two levels. It could be read, as many governmental entities preferred, as validating minority set-aside programs. Or it could, more accurately, be read as mapping the boundaries between permissible and impermissible programs. *Croson*, and the reaction to it, reflect that government entities tended to stretch, in harmony with their preferred reading, rather than to tailor as the proper reading of *Fullilove* commanded. *See infra* notes 199-201.

199. Justice Kennedy's opinion in *Croson* noted the benefits of a bright-line test. He argued that the rule Justice Scalia suggested

> would strike down all preferences which are not necessary remedies to victims of unlawful discrimination, would serve important structural goals, as it would eliminate the necessity for courts to pass upon each racial preference that is enacted. Structural protections may be necessities if moral imperatives are to be obeyed.

quist wing, however, seems to be acting on the basis of anticipatory or hypothetical slippage in race discrimination law. It does so based not on evidence but on predictions, primarily from the executive branch, that the disparate impact test and relaxed scrutiny of affirmative action programs will lead to invidious discrimination against whites. Moreover, the Rehnquist wing's remedy for this anticipated slippage is not simply corrective, but prophylactic. Rather than strike down invidious discrimination when it occurs, the thrust of the *Wards Cove* decision is to alter Title VII interpretations in an effort to remove the perceived danger that employers (and, perhaps, lower courts) will respond to them by resorting to discrimination.[200] In short, the Rehnquist wing is concerned that the disparate impact test may lead to unintended consequences, even to possible violations of the law. Thus, to prevent employers from overcompensating in one direction, it appears that the Court may be adjusting its doctrine toward the opposite direction.[201]

This instrumental argument in *Wards Cove*, that the strong version of disparate impact doctrine leads to quotas, must overcome four logical flaws. First, even if the premises of the argument are correct, it does not follow that a weak version of the disparate impact test should be substituted for the strong version. That is an argument more properly addressed to Congress than to the Court, because it calls for a change in the law based on policy concerns. Second, the *Wards Cove* opinion, and prior opinions on which it relies, fails to establish the correctness of either premise of the argument. The notion that disparate impact analysis tends to push employers to adopt quotas has no

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> His opinion would make it crystal clear to the political branches, at least those of the States, that legislation must be based on criteria other than race.
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> . . . [But] I am not convinced we need adopt it at this point.

City of Richmond v. J.A. Croson Co., 488 U.S. 469, 518-19 (1989) (Kennedy, J., concurring).

200. A variation on this theme appears in Justice Scalia's opinion urging the Court to overrule United Steelworkers v. Weber, 443 U.S. 193 (1979). He argued that *Griggs* created an incentive for employers to engage in reverse discrimination and therefore the combination of the *Griggs* rule with the *Weber* rule (allowing employers to engage in race-conscious affirmative action) converted Title VII "into a powerful engine of racism and sexism, not merely *permitting* intentional race- and sex-based discrimination, but often making it, through operation of the legal system, practically compelled." Johnson v. Transportation Agency, 480 U.S. 616, 677 (1987) (Scalia, J., dissenting).

201. This is at odds with the normal role of courts. "Courts usually judge statutes by the way in which they are actually enforced, not by imagining horrible events that have never happened, never will happen, and could be stopped by courts if they ever seemed about to happen." ROBERT H. BORK, THE TEMPTING OF AMERICA 97 (1990).

empirical support. The evidence, instead, reflects that discrimination is still much more likely to be directed at blacks than at whites.[202] The sentiment that Title VII frowns on all voluntary quotas was rejected by the Court in *United Steelworkers v. Weber*.[203] Third, the premise simplistically ignores other possible influences on employer conduct and also ignores the possible effects of alternate rules. For example, it has been noted that Title VII litigation, which was once dominated by hiring discrimination cases, has shifted to a regime in which discriminatory firing suits predominate. Therefore,

> [w]ith the enormous increase in discharge cases, the probability that a worker will bring a discriminatory firing suit is now substantially higher than the probability that a worker will bring a failure to hire suit. Consequently, antidiscrimination laws may actually provide employers a (small) net disincentive to hire women and minorities.[204]

The Court is ill-equipped, and has in any event failed to try, to resolve the legislative facts bearing on these premises. The Court does not know that *Griggs* has encouraged improper discrimination against white males; nor does it know what discrimination against minorities and women the new *Wards Cove* rule will encourage. Finally, it is equally plausible that the ban on *intentional* discrimination might encourage employers to adopt quotas in order to escape liability.[205] This could hardly be a

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202. *See* TURNER ET AL., *supra* note 175, at 32. The Urban Institute conducted an "audit" of hiring opportunities, by sending similarly qualified black and white persons to apply for jobs. The resulting report concluded that "if equally qualified black and white candidates are in competition for a job, when differential treatment occurs, it is three times more likely to favor the white applicant than to favor the black." *Id.* While "unfavorable treatment of young black men is widespread and pervasive across firms offering entry level jobs in the Washington, D.C. and Chicago metropolitan areas . . . reverse discrimination . . . is far less common." *Id.*

203. 443 U.S. 193, 204-08 (1979). The Court upheld a race-conscious affirmative action plan contained in the collective bargaining agreement between Kaiser Aluminum Co. and the United Steelworkers of America. *Id.* at 209. The plan established a training program for skilled trades jobs, to be filled from the ranks of unskilled employees. For every white employee placed in the program, a black employee was placed. *Id.* at 198-99. The Court held that the plan did not unduly trammel the rights of white employees and therefore did not violate Title VII. *Id.* at 208.

204. Donohue & Siegelman, *supra* note 38, at 1024.

205. *See* Clarence Thomas, *Affirmative Action Goals and Timetables: Too Tough? Not Enough!*, 5 YALE L. & POL'Y REV. 402, 406-07 (1987). Justice Thomas, when he was Chairman of the EEOC, argued that affirmative action provides a discriminatory employer a way to transfer the costs of its discrimination to past victims and "to the qualified persons who will be deprived of an employment opportunity because someone else was given a preference under the remedial plan." *Id.*

ground for failing to forbid intentional discrimination.

Within *Wards Cove*'s instrumental argument lay the seeds of a future rejection of the *Weber* case, which approved race-conscious voluntary affirmative action plans of private employers so long as they do not unduly trammel the rights of others. Indeed, in *Johnson*, the Rehnquist wing and Justice White foreshadowed such a rethinking of *Weber*.[206] On the other hand, *Johnson*, though not a race discrimination case, is a Rehnquist Court decision that does reaffirm the vitality of *Weber*. If one could rely on stare decisis, one might think *Weber*'s position was secure.[207]

Congress has explicitly stated that nothing in Title VII requires quotas. What the Rehnquist wing complains of is simply that some employers, to avoid violating the disparate impact test of Title VII, might be tempted to turn to an affirmative action plan consciously designed to guard against disparate impact; a quota would be the easiest of such plans to administer.[208] A quota, however, would not necessarily cure disparate

206. Johnson v. Transportation Agency, 480 U.S. 616 (1987). Justice O'Connor, concurring in the judgment upholding the affirmative action plan, would recast *Weber* to allow such plans only where there is "[e]vidence sufficient for a prima facie Title VII pattern or practice claim against the employer itself." *Id.* at 653 (O'Connor, J., concurring). Justice White, dissenting, would overrule *Weber*, as construed by the majority; he apparently would accept *Weber* only if it were interpreted to approve only affirmative action plans "designed to remedy the intentional and systematic exclusion of blacks by the employer and the unions from certain job categories." *Id.* at 657 (White, J., dissenting). Justice Scalia's dissent, joined by the Chief Justice on this point, engaged in a spirited attack on the *Weber* decision, and would overrule it. *Id.* at 657-77 (Scalia, J., dissenting).

207. As discussed, *infra* notes 224-28 and accompanying text, the Rehnquist wing has weakened the hold of stare decisis.

208. Justice O'Connor relied in part on Justice Blackmun's early concurring opinion in the *Albemarle Paper* case, where he voiced concern that rigid adherence to the EEOC's guidelines for validating employment selection devices "will leave the employer little choice, save an impossibly expensive and complex validation study, but to engage in a subjective quota system of employment selection. This, of course, is far from the intent of Title VII." Albemarle Paper Co. v. Moody, 422 U.S. 405, 449 (1975) (Blackmun, J., concurring). Justice Blackmun, however, adhered to the main components of the disparate impact test. Indeed, in his concurring opinion in United Steelworkers v. Weber, 443 U.S. 193, 209-16 (1979), he argued that employers should be able to adopt race-conscious affirmative action programs based on past "arguable violations" of Title VII. *Id.* at 212. He believed that an arguable violation could be established based on "a mere disparity between the racial composition of the employer's work force and the composition of the qualified local labor force." *Id.* at 214. So his view of the intent of Title VII changed during the four years between *Albemarle Paper* and *Weber*. Moreover, he joined in the Court's opinion in Connecticut v. Teal, 457 U.S. 440 (1982), which goes far to cut off the use of quotas as a cure for disparate impact.

The Court did have before it some anecdotal evidence from prior cases suggesting that employers adopt affirmative action plans to ward off discrimination suits. *See, e.g.*, Furnco

impact, since the Court has held that disparate impact is measured by the effect of each practice on minority selection and not by the bottom line.[209] Ironically, then-Justice Rehnquist and Justice O'Connor joined in Justice Powell's dissent in *Teal*, which argued that the "likely consequences of [the Court's] decision" are to "force employers either to eliminate tests or rely on expensive, job-related, testing procedures, the validity of which may or may not be sustained if challenged."[210] Finally, this instrumental concern with the consequences of the disparate impact test seems inconsistent with the Court's ruling in *Furnco* regarding proof in disparate treatment cases.[211] There the Court held that, to rebut plaintiff's prima facie case, the employer should be entitled to present evidence "that his work force was racially balanced or that it contained a disproportionately high percentage of minority employees."[212] Therefore, "the District Court was entitled to *consider* the racial mix of the work force when trying to make the determination as to motivation."[213] Thus, the incentive remains for an employer to adopt what Pro-

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Constr. Corp. v. Waters, 438 U.S. 567, 572 (1978). In *Furnco*, the Court noted that Furnco had instructed its job superintendent "to employ, as far as possible, at least 16% black bricklayers, a policy due to Furnco's self-imposed affirmative-action plan to insure that black bricklayers were employed by Furnco in Cook County in numbers substantially in excess of their percentage in the local union." *Id.* Notably, however, the 16% figure was not achieved; blacks worked 13.3% of the person-days. *Id.* at 570.

209. *Teal*, 457 U.S. at 445-51.

210. *Id.* at 463 (Powell, J., dissenting). Justice Powell did add, in an early foreshadowing of the Rehnquist group's current approach, that "[f]or state and local governmental employers with limited funds, the practical effect of today's decision may well be the adoption of simple quota hiring." *Id.* This suggestion seems far-fetched, since it assumes that state and local governments might return to the standardless selection system which the merit system replaced. Indeed, Justice Powell's opinion concluded by quoting favorably then-District Judge Newman's argument in another case that the bottom line defense was consistent with the cases allowing private employers to adopt affirmative action plans. *Id.* at 464 (quoting Brown v. New Haven Civil Serv. Bd., 474 F. Supp. 1256, 1263 (D. Conn. 1979)). Although Connecticut "denied that specific affirmative action had been taken," it seems clear that in *Teal* the employer attained a racially balanced bottom line by use of race-conscious preferences among those who passed the discriminatory test. Alfred W. Blumrosen, *The "Bottom Line" After* Connecticut v. Teal, 8 EMPLOYEE REL. L.J. 572, 575 (1983). "In choosing persons from [the] list, . . . [p]etitioners . . . applied what the Court of Appeals characterized as an affirmative action program in order to ensure a significant number of minority supervisors." *Teal*, 457 U.S. at 444. Thus, *Teal* renders less likely, not more likely, the use of quotas to compensate for disparate impact. Professor Blumrosen argues that "*Teal* was wrongly decided because it did not support affirmative action to compensate for the effect of tests that screen out a higher proportion of minorities than whites." Blumrosen, *supra*, at 583.

211. 438 U.S. at 575-80.

212. *Id.* at 580.

213. *Id.*

fessor Fiss calls "insurance [that] would minimize the risk of having to defend against a claim of discrimination and facilitate the defense against any such claim."[214] As he notes, "[o]ne form of insurance consists of racial hiring."[215]

More importantly, the instrumental concerns depend on essentially political arguments. These arguments were developed by the Justice Department under the Reagan administration.[216] They have served as the basis of the government's litigating positions[217] and the administration's legislative arguments. It may have been perfectly proper for the executive branch to take litigative and legislative positions based on political preference, but there is general agreement that the political preference of the Justices, without regard to congressional intent, does not provide a proper basis for Supreme Court decision-making, especially in statutory cases.[218] Of course, Congress may always correct the Court's errors; that is one reason for the normally strict adherence to stare decisis in statutory cases. The Reagan and Bush Administrations opposed the disparate impact test, but must have known that it would be futile to seek legislative revision of the test. Rather than seek legislative change, they asked the Supreme Court to revise the test. The Court's validation of unsubstantiated fears that led it to water down the *Griggs* test has taken new life in the political arena, confirming President Bush's opposition to legislatively restoring the test. The President vetoed the 1990 Civil Rights Act because, "[p]rimarily through provisions governing cases in which employment practices are alleged to have unintentionally caused the disproportionate exclusion of members of certain

214. Fiss, *supra* note 117, at 256.

215. *Id.*

216. While *Watson* was pending, the Department of Justice published its 158-page study of the disparate impact test. The Department of Justice argued that the test validated group rights and undermined individual rights, that it would lead to "politicalization of private activity" and "social balkanization," and that it would return us "back to the future." OFFICE OF LEGAL POLICY, *supra* note 168, at 18-19. The Department of Justice argued that employers would inevitably be led to adopt quotas to avoid liability under the disparate impact test; it cited no empirical evidence that this had happened. *Id.*; *see also* NORMAN C. AMAKER, CIVIL RIGHTS AND THE REAGAN ADMINISTRATION 33-59 (1988).

217. Charles Fried, the Solicitor General at the time, referred to *Wards Cove* as "[o]ur opportunity to tame *Griggs*." FRIED, *supra* note 125, at 121.

218. As Professor William Eskridge has noted: "Like previous Courts, the Rehnquist Court has substituted its policy preferences for those of the enacting Congress. But it has also 'reneged' on the historical tradition by which the Court has long attended to the preferences of Congress." William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 684 (1991).

groups, § 2104 creates powerful incentives for employers to adopt hiring and promotion quotas."[219] The Court's opinions constitute the main body of empirical support for the President's position, even though the opinions themselves lack empirical support.[220] Thus, a bootstrap operation, from Solicitor General brief, to Supreme Court opinion, to Presidential veto message, has embroiled the Court in politics in a way we have not seen for many years.[221]

2. Treatment of Precedent

Judicial activism and judicial restraint are defined in part by the Court's respect for stare decisis, the binding authority of precedent.[222] Traditionally, that doctrine applies with its fullest force to statutory interpretation, especially to long standing constructions. Because it is easier for Congress to change the law than for the nation to amend the Constitution, the Court may honor the values of stare decisis in statutory cases without worrying that error cannot be otherwise corrected.[223] While it might be argued that the Court has the right or even the duty to reach out to correct constitutional error,[224] no such argument

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219. President's Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1632, 1633 (Oct. 22, 1990).

220. Compare the findings of a recent *Los Angeles Times* survey of America's ten largest industrial corporations, that the legislation then being proposed to overturn *Wards Cove* "is not likely to require them to replace existing employment policies with rigid numerical formulas for hiring and promoting women and racial minorities." Sam Fulwood, *Despite Bush Rhetoric, Firms Find No Quotas in Rights Bill*, SACRAMENTO BEE, June 30, 1991, at A6. A modified version of this legislation has become law. 42 U.S.C. §§ 1981-2000h-b, *amended by* 102 Pub. L. 166, 105 Stat. 1071 (1991).

221. Professor Eskridge has written a thorough analysis showing how the activism of the Rehnquist Court on legislative issues differs from the activism of the Warren and Burger Courts. He argues that the Warren and Burger Courts may have slighted the original intent of legislators, but tried to render decisions consistent with current legislative thought; by contrast, the Rehnquist Court follows neither the original nor the current intent of Congress. Eskridge, *supra* note 218, at 680. Thus, the Court "clog[s] the legislative agenda with issues settled yesterday, . . . [and] distract[s] Congress from understanding and addressing the tough civil rights issues of today and tomorrow." *Id.*

222. *See generally* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988) (stating that stare decisis, although significant, is not dispositive of an issue).

223. *But see* BORK, *supra* note 201, at 102 (stating that Congress is often not free to correct a judicial misinterpretation of a statute).

224. *See* Webster v. Reproductive Health Servs., 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part and concurring in the judgment) (urging that the Court should reach out beyond the narrow issues of the case and overrule Roe v. Wade, 410 U.S. 113 (1973)). Justice Scalia analogized to City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), where "despite the fact that we had already held a racially based set-aside unconstitutional

has been advanced as to long-standing statutory rulings that might have been wrong when decided. The ordinary deference to prior statutory rulings has been enhanced where Congress has subsequently taken action that indicates ratification of the ruling.[225] This is not to say, however, that the Court will never overturn a statutory ruling. For example, in *Jones v. Alfred H. Mayer Corp.*,[226] the Warren Court overruled statutory decisions founded on the discredited constitutional rulings in the *Civil Rights Cases*.[227]

The Rehnquist Court has been faced with pre-existing statutory decisions at odds with its views on race discrimination law. It first determined to confront a Burger Court statutory race discrimination ruling in *Patterson v. McLean Credit Union*.[228] In *Patterson*, the Court, without prompting from the parties or amici, ordered reargument on "[w]hether or not the interpretation of 42 U.S.C. § 1981 adopted by this Court in *Runyon v. McCrary* should be reconsidered?"[229] *Runyon*, which

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because unsupported by evidence of identified discrimination, which was all that was needed to decide the case, we went on to outline the criteria for properly tailoring race-based remedies in cases where such evidence is present." *Webster*, 492 U.S. at 533 (Scalia, J., concurring). Justice Scalia took up the argument again in his plurality opinion in Harmelin v. Michigan, 111 S. Ct. 2680 (1991), stressing that "the doctrine of *stare decisis* is less rigid in its application to constitutional precedents." *Id.* at 2686. Justices Kennedy, O'Connor, and Souter, who concurred in the five to four decision, took pains to avoid overruling precedent, however. *But see* Payne v. Tennessee, 111 S. Ct. 2597 (1991) (a six to three majority overruled Eighth Amendment decisions from 1987 and 1989). Justices Souter and Kennedy agreed that the decisions should be overruled, because "when this Court has confronted a wrongly decided, unworkable precedent calling for some further action by the Court, we have chosen not to compound the original error, but to overrule the precedent." *Id.* at 2618 (Souter, J., concurring). One perceives nuanced differences of approach to stare decisis among the Rehnquist-wing Justices.

225. For example, in Johnson v. Transportation Agency, 480 U.S. 616 (1987), the Court relied in part on "the absence of congressional efforts to amend the statute to nullify *Weber*," in declining to overrule *Weber*. *Id.* at 629 n.7. *But see Webster*, 492 U.S. at 532 (Scalia, J., dissenting).

226. 392 U.S. 409, 436 (1968) (holding that 42 U.S.C. § 1982 forbids racial discrimination in private real estate transactions).

227. 109 U.S. 3 (1883).

228. 491 U.S. 164 (1989). During the Rehnquist Court's first term, however, the Court considered a sex discrimination case in which a minority of the Court (Justice Scalia, joined by the Chief Justice, and, in a separate opinion, Justice White) would have overruled United Steelworkers v. Weber, 443 U.S. 193 (1979), in Johnson v. Transportation Agency, 480 U.S. 616 (1987), even though, as Justice O'Connor pointed out, the question had not been "raised, briefed, or argued in this Court or in the courts below." *Johnson*, 480 U.S. at 648 (O'Connor, J., concurring). Justice Scalia argued, *inter alia*, that "this Court has applied the doctrine of *stare decisis* to civil rights statutes less rigorously than to other laws." *Id.* at 672-73 (Scalia, J., dissenting).

229. Patterson v. McLean Credit Union, 485 U.S. 617, 617 (1987) (citation omitted).

extended the ruling of *Jones* to forbid race discrimination in all contractual matters, was an open-ended decision and led to much greater protection against race discrimination than the modern Civil Rights Acts provided. The question evoked a storm of protest.[230] The following term the Court decided that the values of stare decisis outweighed any possible interpretive error in *Runyon* and reaffirmed that case (while at the same time severely limiting its scope). Justice Kennedy's opinion for the Court recognized three possible reasons for overruling a statutory precedent. First, changes in judicial doctrine or congressional action may remove, weaken, or even contradict the conceptual underpinnings of the precedent. Second, a precedent may prove in practice to be unworkable. Finally, "it has sometimes been said that a precedent becomes more vulnerable as it becomes outdated and after being 'tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare.' "[231] The Court said statutory precedent should be overruled only upon a showing of special justification, and it found no such justification for overruling *Runyon*.

Despite the reasoning of *Patterson*, that same term saw the Court decide *Wards Cove*, in which the Court gratuitously reached out and, without reasoned discussion, rejected prior decisions applying the disparate impact standard.[232] Even when the Court overrules constitutional rulings it ordinarily reviews in detail its reasons for doing so. Indeed, the institutional strength of the Court depends in large measure on its tradition of explaining the grounds for its decisions. The *Wards Cove* opinion has been much criticized both for reaching out and for failing to

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230. *See* FRIED, *supra* note 125, at 125.

231. *Patterson*, 491 U.S. at 174 (quoting Runyon v. McCrary, 427 U.S. 160, 191 (1976) (Stevens, J., concurring) (quoting BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921))).

232. One of the principal architects of the Department of Justice's campaign against the disparate impact test, former Assistant Attorney General Charles Cooper, approvingly noted that "[i]n *Wards Cove* . . . the Supreme Court abandoned the 'business necessity' test as it has been applied since *Griggs* and redefined the employee's burden in proving disparate impact." Charles J. Cooper, Wards Cove Packing Co. v. Atonio: *A Step Toward Eliminating Quotas in the American Workplace*, 14 HARV. J.L. & PUB. POL'Y 84, 90 (1991); *see also* William B. Gould, *The Supreme Court and Employment Discrimination Law in 1989: Judicial Retreat and Congressional Response*, 64 TUL. L. REV. 1485, 1488-99 (1990) (arguing that *Wards Cove* reverses *Griggs* sub silentio). *But see* Mack A. Player, *Is* Griggs *Dead? Reflecting (Fearfully) on* Wards Cove Packing Co. v. Atonio, 17 FLA. ST. U. L. REV. 2, 16, 34 (1989) (arguing that *Wards Cove* is inconsistent with lower court interpretations of *Griggs* but does not overrule any Supreme Court applications of *Griggs*).

explain why the Court was repudiating prior rulings.[233]

The Rehnquist wing has also been less than careful in its reliance on precedent. For example, the *Wards Cove* dicta rest on a misuse of the *Teamsters* case. To understand fully the *Wards Cove* Court's treatment of the burden of proof issue, one must begin by turning to Justice O'Connor's opinion in *Sheet Metal Workers* because, as shown above,[234] *Wards Cove* relies on *Watson*, which relies on *Sheet Metal Workers*. *Sheet Metal Workers* involved a court-ordered goal or quota. In the course of arguing that a court-ordered quota would violate two sections of Title VII,[235] Justice O'Connor reasoned that

> it is completely unrealistic to assume that individuals of each race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination. That, of course, is why there must be a substantial statistical disparity between the composition of an employer's work force and the relevant labor pool, or the general population, before an intent to discriminate may be inferred from such a disparity. Teamsters v. United States, 431 U.S. 324 339-40 & n.20 (1971).[236]

The Court's reasoning in *Wards Cove* thus incredibly traces back to *Teamsters*. That case's holding that statistical disparities *may* establish a prima facie case of intentional discrimination becomes authority for doubting the significance of those disparities in disparate impact cases. Moreover, the *Teamsters* note that Justice O'Connor cites proceeds on a premise diametrically opposed to hers:

> Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representa-

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233. *See, e.g.*, Belton, *supra* note 134, at 1403. Professor Spann traces the Court's "effortless vacillation between intent and effects principles" to the lack of any principled basis in the text of the Constitution or Title VII for deciding whether to apply a disparate impact test or a disparate treatment test. Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 1987-88 (1990). He characterizes *Wards Cove* as defying "all notions of consistency and constraint." *Id.* at 1988.

234. *See supra* note 70. A pre-Rehnquist Court study of Justice O'Connor concluded that close examination of her opinions on stare decisis "raises questions about how consistently" she adheres to "traditional limitations on judicial conduct." Richard A. Cordray & James T. Vradelis, Comment, *The Emerging Jurisprudence of Justice O'Connor*, 52 U. CHI. L. REV. 389, 393 (1985).

235. 42 U.S.C. §§ 2000e-2(j), 2000e-5(g) (1988).

236. Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 494 (1986).

> tive of the racial and ethnic composition of the population in the community from which employees are hired.[237]

Justices White and Rehnquist, who had registered no dissent from Justice Stewart's opinion in *Teamsters*, have reversed their view.[238]

The Rehnquist wing's carelessness with precedent is also illustrated by *Teague v. Lane*,[239] which rejected a criminal defendant's collateral attack on his state court conviction. The defendant claimed that the prosecutor had exercised peremptory challenges to prospective jurors in a racially discriminatory manner. The Court declined to give retroactive effect to *Batson v. Kentucky*,[240] found Teague's claim, under *Swain v. Alabama*,[241] procedurally barred, and declined to rule on a Sixth Amendment claim because it held that a ruling on the claim would not retroactively apply to Teague. The Court, thus, did not directly address race discrimination issues. However, the plurality opinion of Justice O'Connor (joined by Rehnquist, Scalia, and Kennedy) sounds a familiar theme, arguing that if Teague were to prevail, the Court would effectively be requiring proportional representation of blacks on petit juries.[242] Teague had argued that the standards of *Duren v. Missouri*[243] should govern his fair-cross-section claim. The plurality pointed to the showing necessary to meet *Duren*'s second prong: "demonstrating that the group is underrepresented in proportion to its position in the community as documented by census figures."[244] Demonstration of that prong, however, would not make out defendant's case, as he would still have to show "that the underrepresentation of the group 'is due to systematic exclusion of the group in the jury selection process.' "[245] Notably, Justice White, the author of *Duren*, joined in the *Teague* judgment but not in

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237. International Bd. of Teamsters v. United States, 431 U.S. 324, 340 n.20 (1977). Justice O'Connor does not reject that view of *Teamsters*. Her concurring opinion in Johnson v. Transportation Agency, 480 U.S. 616 (1987), agrees that properly computed statistical disparities, if sufficiently stark, make out a prima facie case of *intentional* discrimination. *Id.* at 651 (O'Connor, J., concurring).

238. They joined Justice Scalia's dissent in *Johnson*, which called *Teamsters*' assumption "dubious." *Johnson*, 480 U.S. at 659.

239. 489 U.S. 288 (1989).

240. 476 U.S. 79 (1986).

241. 380 U.S. 202 (1965).

242. *Teague*, 489 U.S. at 301 n.1.

243. 439 U.S. 357 (1979).

244. *Teague*, 489 U.S. at 301 n.1.

245. *Id.* (quoting *Duren*, 439 U.S. at 364).

part IV of Justice O'Connor's opinion, where this discussion of *Duren* occurs.

In sum, the Rehnquist Court has substantially loosened the restraints of stare decisis by ignoring, mischaracterizing, and giving short shrift to inconvenient precedents.[246]

3. Treatment of Constitutional Challenges to Legislation

Legislation challenged under the Equal Protection Clause is normally upheld if the legislature had any rational basis for enacting it. The Court, however, has applied strict scrutiny to classifications disfavoring minority group members and has held such legislation invalid unless necessary to achieve a compelling state interest. The Burger Court was unable to decide on the level of scrutiny that should apply to race-conscious affirmative action plans under which white persons were disfavored. The Rehnquist wing supports the application of strict scrutiny to such legislation and has succeeded in mustering a majority for that position as to state legislation.[247] It has failed, however, to prevail as to federal legislation and regulations.[248] As noted above,[249] a question of relative competence arises if the Court rests its decision on factual assumptions. On the other hand, judicial acceptance of legislative judgments can be a two-edged sword.[250]

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246. More carelessness occurs in the opening sentence of Justice O'Connor's dissent in *Metro Broadcasting*, where she says: "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as *individuals*, not 'as simply components of a racial, religious, sexual or national class.' " Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3028 (1990) (quoting Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1083 (1983)). *Norris* was not a constitutional case, but a statutory one. The quoted material did not begin with "the simple command that the Government must treat citizens 'as individuals.' " *Norris*, 463 U.S. at 1083. Rather, it said "Title VII requires employers to treat their employees as individuals." *Id.* One may argue that the statutory and constitutional commands concerning this point should be the same, even though in other respects they differ. But such an argument is a far cry from pretending that a statutory ruling was really a constitutional one.

247. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-98 (1989). The Brennan wing agrees that rational basis scrutiny is inappropriate; it would apply so-called midlevel scrutiny, under which "race-conscious classifications designed to further remedial goals 'must serve important governmental objectives and must be substantially related to achievement of those objectives' in order to withstand constitutional scrutiny." *Id.* at 535 (Marshall, J., dissenting) (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 359 (1978)).

248. *Metro Broadcasting*, 110 S. Ct. at 2997.

249. *See supra* notes 204-21 and accompanying text.

250. "[I]t seems less than clear that the Court's conclusion that racial distinctions are sometimes permissible will work in the long run to the benefit of those it was intended to

The decision to apply strict scrutiny stems from both factual assumptions and a view of the policies of the Equal Protection Clause. The Rehnquist wing assumes that race-conscious affirmative action stigmatizes the minority persons whom it is designed to help. The stigma is both internal (imbuing the purported beneficiary with a feeling of inferiority) and external (inculcating in whites who feel displaced by both a corresponding feeling that the beneficiary is inferior and resentment toward minorities). Recognizing that the purpose for adopting the Equal Protection Clause was to protect the newly freed slaves, these Justices believe that the most protective construction would allow few, if any, exceptions to a rule of color blindness. They point out that the Brennan wing formulation requires the Court to decide which classifications are benign in order to apply the correct standard of review. Finally, the Rehnquist wing points to *Plessy* as illustrative of the Court's inability to rise above or recognize the prejudices of the moment. This clash transcends the issue of standard of review because even the most stringent standard of review allows the legislative branch to exercise its competence to determine whether particular means are suited to pursuing the compelling state end. If that is so, the Court will have to decide whether it may substitute its own judgment for the legislative judgment with regard to the stigmatic and other effects of an affirmative action plan. Perhaps the answer will depend on the record underlying the legislative judgment.

V. OTHER THEMES

The nine cases described above have drawn much attention; those who discuss the Rehnquist Court's race discrimination decisions normally confine themselves to these cases.[251] Because

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help . . . . It may be that politically powerless minorities are most secure if racial classifications are forbidden entirely." DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 1888-1986, at 487-88 (1991).

251. The other cases that have drawn considerable attention are Martin v. Wilks, 490 U.S. 755 (1989), and Patterson v. McLean Credit Union, 491 U.S. 164 (1989). *Martin* held that white firefighters who had not been parties to a Title VII consent decree against the Birmingham fire department were not bound by the affirmative action provisions of the decree. 490 U.S. at 761-69. The Rehnquist wing and Justice White constituted the majority, and the Brennan wing dissented. While some have pointed to the case as placing unusual barriers in the way of settling Title VII cases, Professor Selig has convincingly demonstrated that the Court's application of well-settled due process concepts does nothing of the sort. Joel L. Selig, *Affirmative Action in Employment after* Croson *and* Martin: *The Legacy Remains Intact*, 63 TEMPLE L. REV. 1, 20-29 (1990). *Patterson* held that a claim of

these cases constitute less than a third of the Court's total decisions on the subject, however, a complete picture requires at least brief attention to the other, relatively less controversial, decisions. Those cases include several unanimous decisions. In many, the Rehnquist wing supported the position of minority group plaintiffs. In others, schisms within the Rehnquist wing resulted in victory for the minority group position.

A. Intentional Discrimination

The Rehnquist Court has fairly consistently provided stronger protection against intentional discrimination than against practices with an adverse disparate impact. *University of Pennsylvania v. EEOC* unanimously rejected a university's plea for a privilege against disclosure of peer review materials that are relevant to charges of race discrimination in tenure decisions.[252] While acknowledging "the costs that ensue from disclosure," the Court observed:

> [T]he costs associated with racial and sexual discrimination in institutions of higher learning are very substantial. Few would deny that ferreting out this kind of invidious discrimination is a great if not compelling governmental interest. Often . . . disclosure of peer review materials will be necessary in order for the Commission to determine whether illegal discrimination has taken place. Indeed, if there is a "smoking gun" to be found that demonstrates discrimination in tenure decisions, it is likely to be tucked away in peer review files.[253]

In *Lytle v. Household Manufacturing, Inc.*, the Court unanimously rejected an employer's invocation of collateral estoppel to avoid a jury trial in a race discrimination and retaliation claim under 42 U.S.C. § 1981, where the trial court had found against the plaintiff on parallel Title VII claims.[254] The Court disagreed with the court of appeals' view "that the judicial interest in econ-

racial harassment on the job was not actionable under 42 U.S.C. § 1981. *Patterson*, 491 U.S. at 175-85. Justice Kennedy's opinion for the Court painted the Court's role modestly: "our role is limited to interpreting what Congress may do and has done." *Id.* at 188. Nonetheless, he cited reluctance "to federalize" what should be a matter of state law as one reason for the Court's decision. *Id.* at 183. He also noted that Title VII of the Civil Rights Act of 1964 forbade racial harassment on the job; therefore, the primary consequence of *Patterson* is to limit the remedy for such discrimination, not to bar such suits altogether. *Id.* at 172. However, the limit on the remedy is substantial, since back pay is often not a significant remedy for harassment, while § 1981 remedies include money damages.

252. 493 U.S. 182, 188-95 (1990).

253. *Id.* at 192-94.

254. 110 S. Ct. 1331, 1335-37 (1990).

omy of resources overrode Lytle's interest in relitigating the issues before a jury."[255] The Court was also unwilling to assume that the trial court's dismissal of the discrimination claim under Rule 41(b) of the Federal Rules of Civil Procedure demonstrated that the trial court would have directed a verdict against the plaintiff on his similar § 1981 claim. While the decision is unremarkable, it does reinforce the Court's emphasis, in cases such as *Adickes v. S.H. Kress & Co.*[256] and *Curtis v. Loether*,[257] on the importance of allowing colorable discrimination claims at law to go to the jury.

A group of cases contesting peremptory challenges of jurors, allegedly based on race, reveals varied approaches by different members of the Rehnquist wing. The first of the group, *Holland v. Illinois*, unanimously held that a white defendant had standing to assert a Sixth Amendment challenge to the prosecution's race-conscious use of peremptory challenges to disqualify potential black jurors.[258] Four Justices dissented, however, from the further holding that the Sixth Amendment provides no protection against such challenges.[259] Justice Scalia's opinion for the Court is consistent with the Rehnquist wing's general approach to quotas. As we saw in *Teague v. Lane*, the Rehnquist wing believes that extending the fair cross-section requirement to selection of petit juries would suggest a right to a racially balanced jury.[260] However, a crack in the Rehnquist wing was manifested by Justice Kennedy's concurrence, stating that "if the claim here were based on the Fourteenth Amendment Equal Protection Clause, it would have merit."[261]

Justice Kennedy's view prevailed in *Powers v. Ohio*,[262] with only the Chief Justice and Justice Scalia dissenting. The Court had previously held, in *Batson v. Kentucky*, that a defendant could raise an equal protection challenge to the racially discriminatory use of peremptory challenges to exclude jurors of the

255. *Id.* at 1335.
256. 398 U.S. 144, 153-61 (1970).
257. 415 U.S. 189, 191-93 (1974).
258. 493 U.S. 474 (1990).
259. *Id.* at 475-77.
260. 489 U.S. 288, 314-16 (1989).
261. *Holland*, 493 U.S. at 487 (Kennedy, J., concurring); *see also id.* at 490-91 (Marshall, J., dissenting); *id.* at 504-05 (Stevens, J., dissenting).
262. 111 S. Ct. 1364, 1364 (1991).

defendant's race.[263] *Powers* applied *Batson* to a white defendant's objection to race-conscious exclusions of black persons from the petit jury. The Court held that individuals had an equal protection right not to be excluded from the petit jury based solely on race and that a defendant had standing to challenge such an exclusion, regardless of the defendant's race.[264] The dissenters would have held that the exercise of race-conscious peremptory challenges does not violate the equal protection rights of the prospective jurors and that, in any event, a defendant's standing to challenge a juror's race-conscious exclusion depends on the defendant sharing the same race as the prospective juror.[265]

The Court further extended *Batson* in *Edmonson v. Leesville Concrete Co.*, holding that the ban on race-based peremptory challenges applies to civil cases as well and that a party in a civil case has standing to object to the practice.[266] Again, Justice Kennedy wrote for the Court, with the Chief Justice and Justices O'Connor and Scalia dissenting. The primary issue was whether the discrimination should be imputed to the federal court so that it would be covered by the equal protection guarantees of the Due Process Clause of the Fifth Amendment.[267] Justice Kennedy concluded that "[t]o permit racial exclusion in this official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin."[268]

While agreeing that "[a]rbitrary discrimination based on

263. 476 U.S. 79, 88-89 (1986). Chief Justice Burger and Justice Rehnquist dissented from that decision. *Id.* at 112-17.

264. *Powers*, 111 S. Ct. at 1367-70.

265. *Id.* at 1374-82.

266. 111 S. Ct. 2077, 2087-89 (1991).

267. The Court mentioned 18 U.S.C. § 243, which makes it a crime for any person charged with any duty in the selection of jurors to disqualify any citizen from service on account of race. 18 U.S.C. § 243 (1988). It also mentioned 28 U.S.C. § 1862, which provides that "[n]o citizen shall be excluded from service as a . . . petit juror in the district courts of the United States . . . on account of race." 28 U.S.C. § 1862 (1988). However, the Court did not discuss whether either statute might provide a nonconstitutional ground of decision. Curiously, the Court also did not cite or seem to consider whether race-based peremptory challenges might violate 42 U.S.C. § 1981, which provides, in part: "All persons within the jurisdiction of the United States shall have the same right . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . ." 42 U.S.C. § 1981 (1988). Section 1981 applies to private action and thus might have provided a vehicle for avoiding the state action issue. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 171-75 (1989). *But see* Blyew v. United States, 80 U.S. (13 Wall.) 581, 590-95 (1872).

268. *Edmonson*, 111 S. Ct. at 2087.

race is particularly abhorrent when manifest in a courtroom,"[269] Justice O'Connor's dissent insisted that since the discriminatory peremptory challenge comes from the private attorney rather than from the judge, no state discrimination has occurred.[270] Justice Scalia's separate dissent argued that the majority decision would result in further litigation of side issues at the expense of the merits of civil cases.[271]

Another split of the Rehnquist wing occurred in *Hernandez v. New York*.[272] The Court, by a six to three margin, upheld a state court ruling that the prosecutor had presented a racially neutral basis for his peremptory challenges of Spanish-speaking jurors and that the challenges had not been based on race.[273] There was no majority opinion for the Court. Justice Kennedy, joined by the Chief Justice and Justices White and Souter, agreed that the prosecutor's justification for the challenges—fear that the challenged persons would be unable to rely solely on an interpreter's version of Spanish language testimony—resulted in a disparate impact on Latinos and that the disparate impact was evidence of possible racial discrimination.[274] The defendant lost because the trial judge's finding that the prosecutor's motives were race neutral was not clearly erroneous.[275] Justice Kennedy, however, noted, "[w]e would face a quite different case if the prosecutor had justified his peremptory challenges with the explanation that he did not want Spanish-speaking jurors."[276] Justice O'Connor, joined by Justice Scalia, generally agreed with Justice Kennedy, but seemed to disagree with this last point. She would rule that "[n]o matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause unless it is based on race."[277] Justice Stevens dissented,[278] arguing that the prosecutor's explanation was insufficient. It was a proxy for discriminatory exclusion of Latinos; the prosecutor's concerns could have been accommodated by

269. *Id.* at 2095 (O'Connor, J., dissenting).
270. *Id.*
271. *Id.* at 2096 (Scalia, J., dissenting).
272. 111 S. Ct. 1859, 1860 (1991).
273. *Id.* at 1866-68.
274. *Id.*
275. *Id.* at 1868-72.
276. *Id.* at 1872.
277. *Id.* at 1874 (O'Connor, J., concurring in judgment).
278. Justice Marshall joined the dissent; Justice Blackmun dissented for essentially the same reasons. *Id.*

less drastic means; and if individual jurors could not accept the interpreter's version of testimony, they could be challenged for cause.[279] The gap between the Kennedy opinion and the Stevens opinion is narrower than that between Justices Kennedy and O'Connor. Justices Kennedy and Stevens seem to agree that some traits are so closely related to race that state action based on those traits looks suspiciously like race discrimination. The seeds of future shifting alignments may have been sown by these opinions.

The jury cases show that the Rehnquist wing is not monolithic, at least when intentional race discrimination is concerned. Justices Kennedy and Souter elevate the elimination of race discrimination over the tradition of peremptory challenges and the generally restricted nature of third-party standing. They take an expansive view of state action where race discrimination in the courtroom is the issue. The Chief Justice and Justice Scalia would narrowly confine the Burger Court's *Batson* decision, believing that race may have a permissible role to play in the exercise of peremptory challenges. Justices O'Connor and Scalia would not require that the prosecutor's "justification be unrelated to race," only that it "not *be* the juror's race."[280] Justices Kennedy, Rehnquist, and Souter leave that issue to another day.

B. Coverage Issues

The Court has confronted several statutory cases, in addition to those already discussed, in which the two wings have displayed differing approaches. The Rehnquist wing, for the most part, has narrowly construed the coverage of civil rights statutes; the Brennan wing has found coverage in every case where that issue has been presented. During the first term of the Rehnquist Court, the Justices all agreed that persons of Arab or Jewish ancestry could invoke the protections of 42 U.S.C. § 1981 against persons who discriminated against them based on their ancestry.[281] But on every coverage issue decided since that time, the Court has split. Some Justices in the Rehnquist wing would have denied coverage in three Voting Rights Act cases in which the Court found coverage.[282] Conversely, the Brennan wing dis-

279. *Id.* at 1877.

280. *Id.* at 1875 (O'Connor, J., concurring).

281. Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617-18 (1987); Saint Francis College v. Al-Khazraji, 481 U.S. 604, 609-13 (1987).

282. Houston Lawyers' Ass'n v. Attorney Gen., 111 S. Ct. 2376, 2382 (1991) (hold-

sented from the Court's denial of coverage in two cases under 42 U.S.C. § 1981 and one case under Title VII of the Civil Rights Act of 1964.[283] As with the issue of peremptory challenges, the Rehnquist wing was not united on the Voting Rights Act coverage issue. It is difficult, however, to forecast any long-term schism based on these cases.

VI. REACTIONS TO THE REHNQUIST COURT

Reaction in the law journals predictably falls into three categories: extremely critical, balanced, and extremely supportive. Strangely, however, the extremely critical and extremely supportive reactions share the view that the Court has initiated a general reversal of the Burger Court approach to race discrimination. These two sets of reactions differ primarily on the desirability and consequences of the reversal.

As the citations throughout this Article reflect, most scholarly reaction to the Rehnquist Court has been hostile, and some has been apocalyptic. As to race discrimination, Professor Chemerinsky's description of the 1988-89 term is typical: "For conservatives, this is a year of rejoicing. The Reagan legacy of a conservative Court seems secure for many years to come. For liberals, it is a time of despair. The 1988-1989 Term was devastating for civil rights and civil liberties."[284]

A similar evaluation is implicit in the title of Professor Brodin's article: *Reflections on the Supreme Court's 1988 Term: The Employment Discrimination Decisions and the Abandonment of the Second Reconstruction*.[285] Professor Brodin carries his hyperbole into his analysis. For example, he complains that

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ing that § 2 of Voting Rights Act covers election of judges) (the Chief Justice, Justice Kennedy, and Justice Scalia dissented; Justices O'Connor and Souter voted with the majority); Chisom v. Roemer, 111 S. Ct. 2354, 2368 (1991) (holding that state judicial elections are covered in the Voting Rights Act); City of Pleasant Grove v. United States, 479 U.S. 462, 472 (1987) (coverage of city's annexation of unpopulated land) (the Chief Justice, Justice Powell, and Justice O'Connor dissented). This is one of two cases, both in his first term on the Court, where Justice Scalia supported the position of minority groups and the rest of the Rehnquist wing opposed it. *See* Appendix, Table II.

283. EEOC v. Arabian Am. Oil Co., 111 S. Ct. 1227, 1230-36 (1991) (finding no coverage of employment discrimination that an American employer commits against an American employee outside the United States); Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 731-36 (1989) (finding no respondeat superior liability under § 1981); Patterson v. McLean Credit Union, 491 U.S. 164, 189 (1989) (holding race-based retaliation against employee not actionable under § 1981).

284. Erwin Chemerinsky, *The Supreme Court, 1988 Term, Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 45 (1989) (footnote omitted).

285. *See* Brodin, *supra* note 133, at 1.

Martin v. Wilks "appears to be . . . a call for what in an earlier era of the civil rights struggle would be termed 'massive resistance' to the civil rights decrees of federal courts."[286]

Chemerinsky's description of the Rehnquist Court's "jurisprudential theme" does not fit the Court's race discrimination decisions. He says the theme "is the Court's search for judicial neutrality,"[287] and that "[t]he Court is animated not by an affirmative view of the Court's role or of constitutional values to be upheld, but rather by a vision of the bounds of judicial behavior."[288] Yet the Rehnquist wing expresses a strong view of the Court's role and vividly describes the constitutional values to be upheld. As far as race is concerned, these are activist Justices. Chemerinsky acknowledges as much:

> Ironically, the lack of a consistent theory of constitutional interpretation creates the appearance of arbitrarily imposed judicial values. For example, how can the Court's invalidation of Richmond's affirmative action program be reconciled with its insistence that the Court rule against the government only when guided by clear constitutional principles that exist external to the views of the Justices? By what theory is the requirement that the government be "color-blind" such a principle . . .?"[289]

This last question deserves further development, but too often

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286. *Id.* at 23. Brodin does not explain who is to engage in this massive resistance. The white employee who objects to a decree is powerless to resist massively; the objector may challenge the decree in a federal court action—a far cry from interposition, standing in the school-house door or calling out the national guard. The employer is in no position to massively resist, since violation of the court order will lead to a contempt citation, even if the court order is vulnerable to attack by the white employees. Walker v. City of Birmingham, 388 U.S. 307, 319 (1967). *Martin* may have set back the cause of affirmative action but it is no invitation to anything remotely resembling massive resistance. *But see* Selig, *supra* note 251, at 29 ("*Martin*, which probably could be altered by legislation carefully drafted to avoid due process problems, is a limited holding consistent with existing substantive and procedural law and also represents no retreat on the subject of affirmative action.").

287. Chemerinsky, *supra* note 284, at 48.

288. *Id.* at 49.

289. *Id.* at 59 (footnote omitted); *see also* Ronald Salley, Note, Croson—*The Cornerstone of Backlash Jurisprudence*, 7 HARV. BLACKLETTER J. 167, 171 (1990) ("*Croson* and its even more powerful progeny can indeed be seen as the culmination of twelve years of 'backlash' jurisprudence on the part of the Supreme Court, and one which has handed the opponents of affirmative action the necessary ammunition to strike down such legislation whenever proposed, in turn making a virtual mockery of the civil rights struggle of the past three decades."). A sampling of the many other critiques of this genre includes Freeman, *supra* note 32; Gould, *supra* note 232 (proposing that the Rehnquist Court's opinions are like those of the previous century); Jones, *supra* note 5; Kushner, *supra* note 34; Constance B. Motley, *The Supreme Court, Civil Rights Litigation, and Deja Vu*, 76 CORNELL L. REV.

the rhetoric of these articles fails to provide serious consideration of the Rehnquist wing's concerns.

The supporters of the Rehnquist Court are drawn largely from the ranks of the Reagan Justice Department. Having sought strict scrutiny of race-conscious preferences, they applaud *Croson* and side with the dissent in *Metro Broadcasting*.[290] Having sought to restrict the disparate impact test, they applaud *Wards Cove*.[291] Having espoused restraints on structural injunctions, they support *Spallone* and decry *Missouri v. Jenkins*.[292]

There is much in the Rehnquist Court's opinions to fuel these fires on the extremes, but the third group of writings, which I would characterize as balanced, finds that the Court has not abandoned the Warren and Burger Court rulings. Professor Selig is closer to the mark:

> In sum, the Brennan-Powell majority's legacy on affirmative action in employment remains fully intact. To conclude otherwise would be a form of "crying wolf" that squanders credibility and that, by attributing to the Court's decisions a scope far broader than what a fair reading would indicate, itself threatens to impair the very legacy it is so important to preserve.[293]

Professor Rosenfeld takes a different tack: All nine Justices in *Croson* "believe that the equal protection clause is designed to uphold the equal worth, dignity, and respect of every individual regardless of race. . . . [and] share the notion that the ultimate fulfillment of constitutional equality lies in the establishment of a truly color-blind society."[294] Professor Miller carries this analysis one step further, arguing that

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643 (1991) (arguing that the Supreme Court has gotten tired of race discrimination litigation).

290. *See, e.g.*, BOLICK, *supra* note 155, at 109-10; Charles Fried, Metro Broadcasting, Inc. v. FCC: *Two Concepts of Equality*, 104 HARV. L. REV. 107 (1990) (comparing the collectivist view with the individualist view). Professor Fried was Solicitor General during the latter part of the Reagan Administration; Mr. Bolick worked in the Civil Rights Division of the Department of Justice during that period.

291. *See, e.g.*, BOLICK, *supra* note 155, at 120-21; Cooper, *supra* note 232, at 92; Player, *supra* note 232, at 46-47. Mr. Cooper was an Assistant Attorney General in the Justice Department during Reagan's term, and Professor Player was a Scholar-in-Residence there in 1986-87.

292. William B. Reynolds, *Judicial Remedies: Braking the Power to Fix It*, 14 HARV. J.L. & PUB. POL'Y 120, 122, 123 n.14 (1991). Mr. Reynolds was Assistant Attorney General for Civil Rights throughout the Reagan Administration.

293. Selig, *supra* note 251, at 29.

294. Rosenfeld, *supra* note 85, at 1749 (footnote omitted); *see also* Days, *supra* note

> changes [from Warren Court and Burger Court decisions] have been surprisingly marginal. . . . The Rehnquist Court's commitment to this core agenda [of *Brown v. Board of Education* and *United States v. Carolene Products*] is not dramatically different than that of its predecessors, at least not when the broad sweep of constitutional law is taken into account.[295]

If the Court has not yet turned its back on the Burger Court's legacy, the question is whether that legacy can long survive the logic of the Rehnquist Court's decisions. What does the future hold? This question is addressed in Part VII below.

VII. CONCLUSION

The Rehnquist wing has been shaped by the appointments of the Reagan-Bush years, years of political controversy over race discrimination law. More than at any time since the late 1930s, the President has used the appointment power to further his political agenda, nominating judges only after intensive ideological screening.[296] Both President Roosevelt and President Reagan sought to change the direction of judicial decisions. President Roosevelt, however, sought to further judicial restraint in review of constitutional challenges to legislation.[297] By contrast, President Reagan's program was one neither of restraint nor of activism, but was based on a substantive agenda, focusing on the one hand on a relaxed review of anti-abortion laws while, on the other hand, seeking strict scrutiny of affirmative action laws and programs. Study of the emerging Rehnquist Court reveals that President Reagan has apparently succeeded in creating a remarkably cohesive wing with respect to race discrimination matters, at least in the short run.

One should nonetheless exercise caution in evaluating the Rehnquist Court on the strength of only five terms; indeed, Justice Kennedy's appointment, reinforcing the Rehnquist wing of the Court, occurred too late to affect two of those terms.[298] Justice Souter has not yet firmly revealed his views in race discrimination cases. All members of the Rehnquist Court embrace the

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48; Leland Ware, *A Remedy for the "Extreme Case": The Status of Affirmative Action After* Croson, 55 MO. L. REV. 631 (1990) (discussing recent affirmative action cases).

295. Geoffrey P. Miller, *Rights and Structure in Constitutional Theory*, 8 SOC. PHIL. & POL'Y 196, 196 (1991).

296. *See* BORK, *supra* note 201, at 271-93.

297. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 123 (12th ed. 1991).

298. *See* Chemerinsky, *supra* note 284, at 44 n.4.

nondiscrimination requirement,[299] and none espouses racial balance as an end-state requirement of the Constitution or antidiscrimination laws. The Justices are divided along instrumental lines, seemingly determined by behavioral assumptions.

The Warren Court, once it had imposed the nondiscrimination requirement, spent the rest of its days in a holding pattern. Post-*Brown* decisions extended and defended the application of the antidiscrimination principle but did little to define the principle or shape remedial rules. The Burger Court displayed an optimism that well-defined rules of liability and remedy would lead to compliance and end the need for frequent judicial intervention.[300] The Rehnquist Court implicitly distrusts government intervention and believes that the Burger Court's definitional project failed in two ways. First, the definitions struck the wrong balance between the rights of minorities and others (employers and nonminorities). Second, the definitions

299. Both wings frequently use the rhetorical device of raising the specter of Plessy v. Ferguson, 163 U.S. 537 (1896), when embracing the nondiscrimination ideal. The Rehnquist wing finds race-conscious affirmative action to be a throwback to *Plessy*. *See* Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3044 (1990) (Kennedy, J., dissenting) ("[T]he majority exhumes *Plessy*'s deferential approach to racial classifications . . . ."); *id.* at 3047 (Majority interprets "the Constitution to do no more than move us from 'separate but equal' to 'unequal but benign.' "); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 521 (1989) (Scalia, J., concurring). It also relies on the ghost of *Plessy* in other cases. *See* Powers v. Ohio, 111 S. Ct. 1364, 1370 (1991); Patterson v. McLean Credit Union, 491 U.S. 164, 174 (1989). The Brennan wing stresses *Plessy* as a fount of historical discrimination, whose effects unceasingly flow, McCleskey v. Kemp, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting), and as a manifestation of failure to recognize the stigmatic effect of state enforced segregation. Board of Educ. v. Dowell, 111 S. Ct. 630, 642 (1991) (Marshall, J., dissenting).

300. It is worth noting that both the Warren and Burger Courts decided many cases against blacks. While now generally viewed as favoring the rights of minorities, those Courts drew heavy criticism for such decisions. *See* PAUL M. BATOR ET AL., THE FEDERAL COURTS AND THE FEDERAL SYSTEM 661-62 (2d ed. 1976); DERRICK A. BELL, RACE, RACISM AND AMERICAN LAW § 5.15.2 (2d ed. 1980); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 16-20 (2d ed. 1988); Paul Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 99-102; Robert L. Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 243 (1968); *see also* Washington v. Davis, 426 U.S. 229, 246-48 (1976) (holding that the disparate impact test does not extend to claims of unconstitutional race discrimination); Milliken v. Bradley, 418 U.S. 717, 745 (1974) (finding that a federal court may not impose an interdistrict school desegregation remedy absent an interdistrict violation of the Constitution); Palmer v. Thompson, 403 U.S. 217, 224-26 (1971) (closing municipal swimming pools to avoid desegregation does not violate Equal Protection Clause); Swain v. Alabama, 380 U.S. 202, 221 (1965) (use of peremptory challenges to exclude blacks upheld, in absence of showing of long-term systematic exclusion); Naim v. Naim, 350 U.S. 891, 891 (1955) (failure of Supreme Court to exercise mandatory jurisdiction over appeal from annulment based on antimiscegenation statute); Brown v. Board of Educ., 349 U.S. 294, 301 (1955) (writing that desegregation is to proceed with "all deliberate speed").

are subject to manipulation and misunderstanding, further skewing the balance. The Rehnquist wing has undertaken to correct the perceived imbalance and to strip away definitional rules that it believes skew the balance.

The changing direction of the Rehnquist wing has prompted severe criticism from the traditional civil rights coalition.[301] Concern that the Court is departing from the Burger Court legacy is fueled by the cheering squad for recent decisions.[302] To accuse the Rehnquist wing of "callous racial insensitivity"[303] or "moral blindness,"[304] however, ignores the concerns that, rightly or wrongly, prompt revision. Yet the Rehnquist wing has fueled that hyperbole by failing to justify its revisionism and by adopting wooden formulas (*e.g.*, the *Wards Cove* rule and a virtually per se rule of invaliditating race-conscious affirmative action) that inadequately protect the legitimate interests of nonwhites.

The result of these shifts has not yet fully crystallized. The momentum seems to undermine the pillars of the Burger Court jurisprudence:

(1) the requirement of overcoming effects of past discrimination;
(2) the tailoring principle—which may be both empowering and limiting;
(3) the disparate impact test under Title VII and the Voting Rights Act;
(4) the rejection of any per se invalidity of race-conscious affirmative action.

The Rehnquist Court has not explicitly rejected these foundational rules. At times its rhetoric has even embraced them. The internal logic of some opinions and the explicit statements of individual Justices, however, portend further erosion and possible overturning of the Burger Court's race jurisprudence.

No doctrinal revolution has been completed. The Court is at a crossroad. One road leads to abandonment of most of the antidiscrimination law structure the Burger Court had erected. The other leads to careful narrowing of Burger Court prece-

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301. *See, e.g.*, Ralph G. Neas, *The Civil Rights Legacy of the Reagan Years*, USA TODAY MAG., Mar. 1990, at 16, 18 ("[T]he new five-person majority on the Supreme Court poses the gravest threat to civil rights and civil liberties in America today."). Mr. Neas is executive director of the Leadership Conference on Civil Rights.

302. *See, e.g.*, Cooper, *supra* note 232; Reynolds, *supra* note 292.

303. Freeman, *supra* note 32, at 1433.

304. Jones, *supra* note 5, at 47.

dents. If one believes that the Burger Court structure is essential to preserving *Brown*'s antidiscrimination principle, the former road would lead to yet another crossroad, and the future of *Brown* would be at stake. Abandonment of the Burger Court structure would require the creation of a new structure for enforcing the antidiscrimination principle. The narrowing of Burger Court precedents would be uncomfortable, but would leave *Brown* unchallenged. We still await the answer to the question whether "the counterrevolution that had been staved off during the Burger years might finally come to pass."[305]

Americans rally around the Constitution, while disputing its meaning; so too with the antidiscrimination principle. Although the public, the Congress, the President, and the Court have embraced nondiscrimination as an abstract principle, *Plessy* showed it was possible to pay lip service to nondiscrimination while sanctioning oppression of people because of their race. The stated fear of the Rehnquist wing is that race-conscious, group-based measures will revive *Plessy*. The stated fear of the Brennan wing is that the failure to follow such measures will revive the effects of *Plessy*. The search for a common definition of the antidiscrimination principle must address both these fears. The danger is that the ascendant wing will impose doctrine that recognizes only half the threat.

Some may say that the key to the future lies in the judicial nomination and confirmation process. It seems clear, however, that a Rehnquist wing will dominate the Court for many years to come. The key may lie elsewhere. One possibility is legislation providing more specific standards for the courts to apply, thus limiting the Court's ability to shape antidiscrimination law. Despite nearly unanimous supportive rhetoric from its members, however, Congress' effort to overturn *Wards Cove's* definition of business necessity ended in confusion—essentially returning the issue to the courts.[306] Moreover, legislative solutions that the

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305. CURRIE, *supra* note 250, at 601.

306. Congress overturned several Burger Court civil rights rulings. *See* Eskridge, *supra* note 218. However, its 1990 effort to overrule *Wards Cove*, *Patterson*, and several other cases was vetoed by President Bush. President's Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1632 (Oct. 22, 1990). A similar bill (H.R. 1) passed the House in 1991. A revised bill was enacted in November 1991. 42 U.S.C. § 1981 (1988), *amended by* 102 Pub. L. 166, 105 Stat. 1071. That statute contains no definition of "business necessity," but provides that the only authoritative legislative history as to the meaning of the term is an interpretive memorandum which simply refers the Court to its pre-*Wards Cove* decisions. *See* Sec. 105(b), refer-

Court believes lead to quotas may face constitutional challenge. The Rehnquist wing seems determined to assert the Court's preeminent competence and apply strict scrutiny to legislative solutions if they are race conscious.[307] So while future legislation may influence the path of antidiscrimination law, litigation will continue to play a major shaping role. Litigants would do well to concentrate on building factual records that address the behavioral assumptions of the two wings of the Court. The disparate impact test has provided a seductive incentive for plaintiffs to avoid the expense and delay attendant to developing an exhaustive factual record. Thus, while the test has provided a powerful litigation tool to minority group plaintiffs, an unanticipated side effect may have been a reduced judicial understanding of the structure of racial discrimination. Finally, the supporters of minority groups seeking to preserve the gains of prior decades will need to search for arguments and actions responsive to the concerns of the Rehnquist wing. They will need to recognize and address the individuality of the Justices who comprise that wing and to appeal to swing Justices such as Justice White and possibly Justice Souter. They will need to develop the theoretical underpinnings of the disparate impact test. They will need to exercise care in the formulation of affirmative action plans.

When both sides of the debate wrap themselves in the mantle of nondiscrimination, the rhetoric of nondiscrimination fails to resolve doctrinal debates. The future of antidiscrimination law may depend on the ability of advocates to rise above rhetoric and on the willingness of the Rehnquist wing to listen.

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ring to 137 Cong. Rec. 15276 (daily ed. Oct. 25, 1991), as the sole source of legislative history. However, President Bush, still concerned that the disparate impact rule could lead to quotas, has instructed federal officials to rely on an analysis submitted by Senator Dole and others. President Bush's Statement on Signing the Civil Rights Act of 1991, 27 WEEKLY COMP. PRES. DOC. 1701, 1702 (Nov. 21, 1991).

307. In this respect, the race cases depart from the normal Rehnquist wing position. "The Rehnquist Court . . . seems bent on minimizing rather than expanding its role. The Court recognizes that it is the third branch of government, rather than the first or second—and the only one that is not politically accountable in any direct way." Donald Ayer, *The Rehnquist Court Unbound*, LEGAL TIMES, July 22, 1991, at S20.

TABLE OF CONTENTS OF THE APPENDIX

METHODOLOGY

SELECTING THE DATABASE

This database contains the twenty-nine race discrimination cases decided on their merits during the 1986 through 1990 terms of the Supreme Court, where the existence of or remedy for racial discrimination was an issue presented.

Per curiam cases, namely *Town of Huntington v. NAACP*[1] and *Alvarado v. United States*[2] were excluded from the database because they do not provide an analysis of the issues. The remaining cases were reviewed to determine whether the racial issues controlled the decision or whether a nonracial issue was being addressed in a racial discrimination case. Cases in which the Court was reviewing only procedural error, such as *Owens v. Okure*,[3] dealing with the statute of limitations, or where the Court decided matters regarding the awarding of attorney's fees, *Blanchard v. Bergeron*,[4] are not included in this study.

The body of cases was developed initially by searches in online databases and in appropriate digests for key words, statutes, and acts (*e.g.*, 42 U.S.C. § 1981, The Fair Housing Act and key word searches including "rac!" and "discrimination"). To assure the complete representation of the race cases decided by the Rehnquist Court, all cases reported in the *Supreme Court Reporter* were scanned from the October 1986 term to the present.

READING THE STATISTICS

Table I presents a summary of the twenty-nine cases, including the author of the majority opinion and the vote. The fourth column of the table shows whether the position taken by the U.S. government in each case, either as an amicus curiae or as a party to the controversy, prevailed. This was determined by comparing the briefs filed with the published opinion of the Court for similarities in reasoning, citations, and argumentative structure. Column five sets out the same results for the nonwhite or minority position.

The minority group position in each case was determined by ascertaining from the *U.S. Reports* and briefs filed in the cases

1. 488 U.S. 15 (1990).
2. 110 S. Ct. 2995 (1990).
3. 488 U.S. 235 (1989).
4. 489 U.S. 87 (1989).

what position the mainstream, well-established minority group organizations had taken in the case, either as amici curiae or as attorneys for litigants. These organizations include, but are not limited to, the NAACP Legal Defense and Educational Fund, the NAACP, the Lawyers' Committee for Civil Rights Under the Law, and the Congressional Black Caucus.

Table II provides the voting behavior of each Justice in relation to whether the nonwhite position prevailed in the case. The chart identifies whether the Justice voted "for" (F) or "against" (A) the nonwhite position in each racial discrimination case reviewed in each term. An asterisk (*) marks which Justice wrote the majority opinion. After the list of cases and the Justices voting, the total decisions "for" or "against" the black/nonwhite position are given, for each term as well as the totals for all terms at the end. The chart was compiled by searching each case to determine how and with whom the Justice voted and whether the nonwhite position aligned with the Justice's views. This sometimes required a subjective decision as to whether the case represented a win or loss for the nonwhite position, especially given the debate over what a particular case decided. The standard for determining the prevailing party was to determine which party substantially prevailed in the case, using the criteria set out above for Table I.

Table III records the voting alignment of the Justices on race discrimination cases by tabulating the number of times one Justice voted with another. Tables III-A through III-E represent the voting alignment of the Justices for each Supreme Court Term. Table III-F is a summary of the voting alignment of the Rehnquist Court for race discrimination cases, through the October 1990 term. Table III follows the model of the statistical analysis found in each November's *Harvard Law Review*, which analyzes the Supreme Court's workload for the preceding term. We have also used the same abbreviations and definitions: "O" represents the number of times two Justices agreed in opinions or judgments of the Court; "S" represents the number of times two Justices agreed in a separate opinion, concurrence or dissent; "D" represents the number of decisions in which the two Justices agreed either in the majority, dissenting, or concurring opinion; and "N" stands for the number of decisions in which the Justices participated and thereby had the opportunity of agreeing in the case. "P" is the percentage of agreement of the Justices, computed by dividing "D" by "N."

Table IV summarizes the overall voting alignment of the Rehnquist Court, 1986-1990. The figures for the individual terms were retrieved from the *Harvard Law Review* charts.

Table V compares the ratio of five to four split decisions to total decisions in all cases from the 1986-90 terms, as reported in the *Harvard Law Review*, with the five to four split decision ratio in racial discrimination cases. Both figures are broken down by term.

Table VI provides a numerical and percentile breakdown of Supreme Court unanimity with respect to racial discrimination cases, compared with unanimity in all cases. The decision of the Court is unanimous if all the Justices agree with the Court's opinion and judgment. The "With Concurrence" column lists cases where one or more Justices concurred in the judgment but did not concur with the Court's opinion, and where there were no dissents. Any case with a dissent was placed in the "With Dissent" column.

Table VII is a breakdown of the race cases by interest group amicus filings. The five interest groups tracked are the National Association for the Advancement of Colored People, the NAACP Legal Defense and Education Fund, the American Civil Liberties Union, the Mexican-American Legal Fund, and the Lawyer's Commission for Civil Rights Under the Law. The table indicates which position the respective amicus was advocating, respondent or petitioner. If no brief was filed by that group for the case, the column is left blank. If the group joined with another interest group in filing a brief, this is treated as a distinct filing. For example, if the ACLU and the NAACP joined in co-signing the same brief for a particular case, this is counted under both the NAACP and ACLU columns.

TABLE I
SUMMARY OF CASES AND OPINIONS

Case and Citation	Author	Vote	US Win	Nonwhites Win
1986 Term				
Griffith v. Kentucky, 479 U.S. 314 (retroactive application of *Batson* to direct appeal).	Blackmun	6-3	—	Yes
City of Pleasant Grove v. United States, 479 U.S. 462 (application of Voting Rights Act to annexation of land projected to become a white subdivision).	White	6-3	Yes	Yes
United States v. Paradise, 480 U.S. 149 (constitutionality of district court's imposition of one black for one white hiring and promotion in Georgia Dept. of Public Safety).	Brennan	5-4	No	Yes
McClesky v. Kemp, 481 U.S. 249 (discriminatory imposition of the death penalty).	Powell	5-4	—	No
Saint Francis College v. Al-Khazraji, 481 U.S. 604 (application of 42 U.S.C. §§ 1981 and 1982 to Arabs).	White	9-0	—	Yes
Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (application of 42 U.S.C. §§ 1981 and 1982 to Jews).	White	9-0	—	Yes
Goodman v. Lukens Steel Co., 482 U.S. 656 (standards governing union liability under Title VII of the Civil Rights Act of 1964).	White	5-4	No	Yes
1987 Term				
New York State Club Ass'n v. City of New York, 487 U.S. 1 (right of white male organizations to exclude nonwhites and women).	White	9-0 8-1 (IV)	—	Yes
Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (application of disparate impact test to subjective employment selection devices).	O'Connor	7-2	No	Yes

Case and Citation	Author	Vote	US Win	Nonwhites Win
1988 Term				
City of Richmond v. J.A. Croson Co., 488 U.S. 469 (challenge to minority set-aside program).	O'Connor	6-3	Yes	No
Teague v. Lane, 489 U.S. 288 (retroactive application of *Batson v. Kentucky*, which allows collateral attack of prosecutor's racially discriminatory use of peremptory challenges).	O'Connor	7-2 (II) 5-4 (I, III)	—	No
Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (standards for proof of disparate impact case under Title VII).	White	5-4	Yes	No
Martin v. Wilks, 490 U.S. 755 (collateral attack on affirmative action consent decree).	Rehnquist	5-4	Yes	No
Patterson v. McLean Federal Credit Union, 491 U.S. 164 (application of 42 U.S.C. § 1981 to racial harassment of employee).	Kennedy	5-4	Partial	No
Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (respondeat superior liability under 42 U.S.C. § 1981).	O'Connor	5-4 (I, IV)	—	No
1989 Term				
University of Pennsylvania v. EEOC, 493 U.S. 182 (availability of tenure records in Fair Employment suit).	Blackmun	9-0	Yes	Yes
Spallone v. United States, 493 U.S. 265 (contempt of court in Fair Housing case).	Rehnquist	5-4	No	No
Holland v. Illinois, 493 U.S. 474 (Sixth Amendment challenge to prosecutor's peremptory exclusion of black jurors in prosecution of white defendant).	Scalia	5-4	—	No
Lytle v. Household Mfg., Inc., 494 U.S. 545 (use of collateral estoppel to deny jury trial of discrimination claim under 42 U.S.C. § 1981).	Marshall	9-0	—	Yes
Missouri v. Jenkins, 495 U.S. 33 (remedy in school desegregation case).	White	9-0 (II) 5-4 (I, III, IV)	—	Yes
Metro Broadcasting v. FCC, 110 S. Ct. 2997 (preferential treatment of minorities in award and sale of broadcast licenses).	Brennan	5-4	No*	Yes

* The F.C.C. regulation was upheld, but the Justice Department position lost.

Case and Citation	Author	Vote	US Win	Nonwhites Win
1990 Term				
Board of Educ. v. Dowell, 111 S. Ct. 630 (standard for determining whether desegregated school system may adopt a student assignment plan which causes resegregation).	Rehnquist	5-3	Yes	No
EEOC v. Arabian American Oil Co., 111 S. Ct. 1227 (extraterritorial application of Title VII of Civil Rights Act of 1964).	Rehnquist	6-3	No	No
Powers v. Ohio, 111 S. Ct. 1364 (white defendants may challenge as a violation of the equal protection clause the prosecutor's racially discriminatory use of peremptory challenges to exclude blacks from a jury).	Kennedy	7-2	—	Yes
Hernandez v. New York, 111 S. Ct. 1859 (exercise of peremptory challenges based on bilingual ability).	Kennedy	6-3	—	No
Clark v. Roemer, 111 S. Ct. 2096 (enjoining election pending pre-clearance of voting change under § 5 of the Voting Rights Act).	Kennedy	9-0	Yes	Yes
Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (race-based peremptory challenges in civil cases violate equal protection clause).	Kenendy	5-4	—	Yes
Chisom v. Roemer, 111 S. Ct. 2354 (state judicial elections are covered by Section Two of Voting Rights Act).	Stevens	6-3	Yes	Yes
Houston Lawyers' Ass'n v. Attorney General, 111 S. Ct. 2376 (state judicial elections are covered by Section Two of Voting Rights Act).	Stevens	6-3	—	Yes

TABLE II
How the Justices Vote Concerning the Nonwhite Position

		Blackmun	Brennan	Kennedy	Marshall	O'Connor	Powell	Rehnquist	Scalia	Souter	Stevens	White
1986 Term												
Griffith v. Kentucky		*F	F		F	A	F	A	F		F	A
City of Pleasant Grove v. United States		F	F		F	A	A	A	F		F	*F
United States v. Paradise		F	*F		F	A	F	A	A		F	A
McClesky v. Kemp		F	F		F	A	*A	A	A		F	A
St. Francis College v. Al-Khazraji		F	F		F	F	F	F	F		F	*F
Shaare Tefila Congregation v. Cobb		F	F		F	F	F	F	F		F	*F
Goodman v. Lukens Steel Co.		F	F		F	A	A	F	A		F	*F
Total For	6	7	7		7	2	4	3	4		7	4
Total Against	1	0	0		0	5	3	4	3		0	3
1987 Term												
Watson v. Ft. Worth Bank & Trust		F	F	NS	F	*F		F	F		F	F
New York State Club Ass'n v. City of New York		F	F	F	F	F		F	F		F	*F
Total For	2	2	2	1	2	2		2	2		2	2
Total Against	0	0	0	0	0	0		0	0		0	0
1988 Term												
City of Richmond v. J.A. Croson & Co.		F	F	A	F	*A		A	A		A	A
Teague v. Lane		A	F	A	F	*A		A	A		A	A
Wards Cove Packing Co. v. Atonio		F	F	A	F	A		A	A		F	*A
Martin v. Wilks		F	F	A	F	A		*A	A		F	A
Patterson v. McLean Credit Union		F	F	*A	F	A		A	A		F	A
Jett v. Dallas Indep. Sch. Dist.		F	F	A	F	*A		A	A		F	A
Total For	0	5	6	0	6	0		0	0		4	0
Total Against	6	1	0	6	0	6		6	6		2	6

		Blackmun	Brennan	Kennedy	Marshall	O'Connor	Powell	Rehnquist	Scalia	Souter	Stevens	White
1989 Term												
University of Pennsylvania v. EEOC		*F	F	F	F	F		F	F		F	F
Spallone v. United States		F	F	A	F	A		*A	A		F	A
Holland v. Illinois		F	F	A	F	A		A	*A		F	A
Lytle v. Household Mfg.		F	F	F	*F	F		F	F		F	F
Missouri v. Jenkins		F	F	A	F	A		A	A		F	*F
Metro Broadcasting v. FCC		F	*F	A	F	A		A	A		F	F
Total For	4	6	6	2	6	2		2	2		6	4
Total Against	2	0	0	4	0	4		4	4		0	2
1990 Term												
Board of Educ. v. Dowell		F		A	F	A		*A	A	NS	F	A
EEOC v. Arabian Am. Oil Co.		F		A	F	A		*A	A	A	F	A
Powers v. Ohio		F		*F	F	F		A	A	F	F	F
Hernandez v. New York		F		*A	F	A		A	A	A	F	A
Clark v. Roemer		F		*F	F	F		F	F	F	F	F
Edmonson v. Leesville Concrete Co.		F		*F	F	A		A	A	F	F	F
Chisom v. Roemer		F		A	F	F		A	A	F	*F	F
Houston Lawyers' Ass'n v. Attny. General		F		A	F	F		A	A	F	*F	F
Total For	5	8		3	8	4		1	1	5	8	5
Total Against	3	0		5	0	4		7	7	2	0	3
Total for 1986 - 1990 Terms												
Total For		28	21	6	29	10	4	8	9	5	27	15
Total Against		1	0	15	0	19	3	21	20	2	2	14
Majority Opinions Written 1986 - 1990 Terms												
Total For	17	2	2	3	1	1	0	0	0	0	2	6
Total Against	12	0	0	2	0	3	1	4	1	0	0	1

TABLE III A
JUSTICE AGREEMENT IN RACE CASES-1986 TERM

		White	Stevens	Scalia	Rehnquist	Powell	O'Connor	Marshall	Brennan
Blackmun	O	4	5	5	3	4	2	6	6
	S	*	1	*	*	*	*	2	2
	D	4	6	5	3	4	2	7	7
	N	7	7	7	7	7	7	7	7
	P	57.1%	85.7%	71.4%	42.9%	57.1%	28.6%	100.0%	100.0%
Brennan	O	4	5	5	3	4	2	6	
	S	*	1	1	*	*	*	2	
	D	4	6	5	3	4	2	7	
	N	7	7	7	7	7	7	7	
	P	57.1%	85.7%	71.4%	42.9%	57.1%	28.6%	100.0%	
Marshall	O	4	5	4	3	4	2		
	S	*	1	*	*	*	*		
	D	4	6	4	3	4	2		
	N	7	7	7	7	7	7		
	P	57.1%	85.7%	57.1%	42.9%	57.1%	28.6%		
O'Connor	O	3	2	3	3	3			
	S	1	*	2	3	2			
	D	4	2	5	6	5			
	N	7	7	7	7	7			
	P	57.1%	28.6%	71.4%	85.7%	71.4%			
Powell	O	4	4	4	4				
	S	*	*	1	1				
	D	4	4	5	5				
	N	7	7	7	7				
	P	57.1%	57.1%	71.4%	71.4%				
Rehnquist	O	4	3	4					
	S	1	*	1					
	D	5	3	5					
	N	7	7	7					
	P	71.4%	42.9%	71.4%					
Scalia	O	5	5						
	S	*	*						
	D	5	5						
	N	7	7						
	P	71.4%	71.4%						
Stevens	O	4							
	S	*							
	D	4							
	N	7							
	P	57.1%							

TABLE III B
JUSTICE AGREEMENT IN RACE CASES-1987 TERM

		White	Stevens	Scalia	Rehnquist	O'Connor	Marshall	Kennedy	Brennan
Blackmun	O	2	1	2	2	2	2	1	2
	S	*	*	*	*	*	1	*	1
	D	2	1	2	2	2	2	1	2
	N	2	2	2	2	2	2	1	2
	P	100.0%	50.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
Brennan	O	2	1	2	2	2	2	1	
	S	*	*	*	*	*	1	*	
	D	2	1	2	2	2	2	1	
	N	2	2	2	2	2	2	1	
	P	100.0%	50.0%	100.0%	100.0%	100.0%	100.0%	100.0%	
Kennedy	O	1	1	1	1	1	1		
	S	*	*	*	*	1	*		
	D	1	1	1	1	1	1		
	N	1	1	1	1	1	1		
	P	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%		
Marshall	O	2	1	2	2	2			
	S	*	*	*	*	*			
	D	2	1	2	2	2			
	N	2	2	2	2	2			
	P	100.0%	50.0%	100.0%	100.0%	100.0%			
O'Connor	O	2	1	2	2				
	S	*	*	*	*				
	D	2	1	2	2				
	N	2	2	2	2				
	P	100.0%	50.0%	100.0%	100.0%				
Rehnquist	O	2	1	2					
	S	*	*	*					
	D	2	1	2					
	N	2	2	2					
	P	100.0%	50.0%	100.0%					
Scalia	O	2	1						
	S	*	*						
	D	2	1						
	N	2	2						
	P	100.0%	50.0%						
Stevens	O	1							
	S	*							
	D	1							
	N	2							
	P	50.0%							

TABLE III C
JUSTICE AGREEMENT IN RACE CASES-1988 TERM

		White	Stevens	Scalia	Rehnquist	O'Connor	Marshall	Kennedy	Brennan
Blackmun	O	1	1	1	1	1	*	1	*
	S	1	5	*	*	*	5	*	5
	D	1	6	1	1	1	5	1	5
	N	6	6	6	6	6	6	6	6
	P	16.7%	100.0%	16.7%	16.7%	16.7%	83.3%	16.7%	83.3%
Brennan	O	*	*	*	*	*	*	*	
	S	*	4	*	*	*	6	*	
	D		4				6		
	N	6	6	6	6	6	6	6	
	P		66.7%				100.0%		
Kennedy	O	6	2	5	6	6	*		
	S	*	*	*	*	*	*		
	D	6	2	5	6	6			
	N	6	6	6	6	6	6		
	P	100.0%	33.3%	83.3%	100.0%	100.0%			
Marshall	O	*	*	*	*	*			
	S	*	4	*	*	*			
	D		4						
	N	6	6	6	6	6			
	P		66.7%						
O'Connor	O	6	2	5	6				
	S	*	*	*	*				
	D	6	2	5	6				
	N	6	6	6	6				
	P	100.0%	33.3%	83.3%	100.0%				
Rehnquist	O	6	2	5					
	S	*	*	*					
	D	6	2	5					
	N	6	6	6					
	P	100.0%	33.3%	83.3%					
Scalia	O	5	1						
	S	*	*						
	D	5	1						
	N	6	6						
	P	83.3%	16.7%						
Stevens	O	2							
	S	*							
	D	2							
	N	6							
	P	33.3%							

TABLE III D
JUSTICE AGREEMENT IN RACE CASES-1989 TERM

		White	Stevens	Scalia	Rehnquist	O'Connor	Marshall	Kennedy	Brennan
Blackmun	O	4	4	2	2	2	4	2	4
	S	*	1	*	*	*	2	*	2
	D	4	5	2	2	2	6	2	6
	N	6	6	6	6	6	6	6	6
	P	66.7%	83.3%	33.3%	33.3%	33.3%	100.0%	33.3%	100.0%
Brennan	O	4	4	2	2	2	4	2	
	S	*	1	*	*	*	2	*	
	D	4	5	2	2	2	6	2	
	N	6	6	6	6	6	6	6	
	P	66.7%	83.3%	33.3%	33.3%	33.3%	100.0%	33.3%	
Kennedy	O	5	2	5	5	5	2		
	S	*	*	2	2	2	*		
	D	5	2	6	6	6	2		
	N	6	6	6	6	6	6		
	P	83.3%	33.3%	100.0%	100.0%	100.0%	33.3%		
Marshall	O	4	4	2	2	2			
	S	*	1	*	*	*			
	D	4	5	2	2	2			
	N	6	6	6	6	6			
	P	66.7%	83.3%	33.3%	33.3%	33.3%			
O'Connor	O	5	2	5	5				
	S	*	*	3	2				
	D	5	2	6	6				
	N	6	6	6	6				
	P	83.3%	33.3%	100.0%	100.0%				
Rehnquist	O	5	2	5					
	S	*	*	2					
	D	5	2	6					
	N	6	6	6					
	P	83.3%	33.3%	100.0%					
Scalia	O	5	2						
	S	*	*						
	D	5	2						
	N	6	6						
	P	83.3%	33.3%						
Stevens	O	4							
	S	*							
	D	4							
	N	6							
	P	66.7%							

TABLE III E
JUSTICE AGREEMENT IN RACE CASES-1990 TERM

		White	Stevens	Souter	Scalia	Rehnquist	O'Connor	Marshall	Kennedy
Blackmun	O	5	5	5	1	1	4	5	3
	S	*	2	*	*	*	*	2	*
	D	5	7	5	1	1	4	7	3
	N	8	8	7	8	8	8	8	8
	P	62.5%	87.5%	71.4%	12.5%	12.5%	50.0%	87.5%	37.5%
Kennedy	O	6	3	5	2	4	4	3	
	S	*	*	*	2	2	*	*	
	D	6	3	5	4	6	4	3	
	N	8	8	7	8	8	8	8	
	P	75.0%	37.5%	71.4%	50.0%	75.0%	50.0%	37.5%	
Marshall	O	5	5	5	1	1	5		
	S	*	3	*	*	*	*		
	D	5	8	5	1	1	5		
	N	8	8	7	8	8	8		
	P	62.5%	100.0%	71.4%	12.5%	12.5%	62.5%		
O'Connor	O	6	4	5	2	3			
	S	*	*	*	2	1			
	D	6	4	5	4	4			
	N	8	8	7	8	8			
	P	75.0%	50.0%	71.4%	50.0%	50.0%			
Rehnquist	O	4	1	3	2				
	S	*	*	*	4				
	D	4	1	3	6				
	N	8	8	7	8				
	P	50.0%	12.5%	42.9%	75.0%				
Scalia	O	2	1	1					
	S	*	*	*					
	D	2	1	1					
	N	8	8	7					
	P	25.0%	12.5%	14.3%					
Souter	O	7	5						
	S	*	*						
	D	7	5						
	N	7	7						
	P	100.0%	71.4%						
Stevens	O	5							
	S	*							
	D	5							
	N	8							
	P	62.5%							

TABLE III F
JUSTICE AGREEMENT IN RACE CASES-1986-1990 TERMS

		White	Stevens	Souter	Scalia	Rehnquist	Powell	O'Connor	Marshall	Kennedy	Brennan
Blackmun	O	15	15	5	9	8	4	10	17	7	12
	S	*	9	*	*	*	*	*	12	*	10
	D	15	24	5	9	8	4	10	27	7	20
	N	29	29	7	29	29	7	29	29	21	21
	P	51.7%	82.8%	71.4%	31.0%	27.6%	57.1%	34.5%	93.1%	33.3%	95.2%
Brennan	O	10	10	*	8	7	4	5	12	3	
	S	*	6	*	*	*	*	*	10	*	
	D	10	16	*	8	7	4	5	21	3	
	N	21	21	*	21	21	7	21	21	13	
	P	47.6%	76.2%		38.1%	33.3%	57.1%	23.8%	100.0%	23.1%	
Kennedy	O	17	8	5	13	16	*	16	5		
	S	*	*	*	4	3	*	3	*		
	D	17	8	5	16	19	*	17	5		
	N	21	21	7	21	21	*	21	21		
	P	81.0%	38.1%	71.4%	76.2%	90.5%		81.0%	23.8%		
Marshall	O	15	15	5	9	8	4	11			
	S	*	9	*	*	*	*	*			
	D	15	23	5	9	8	4	11			
	N	29	29	7	29	29	7	29			
	P	51.7%	79.3%	71.4%	31.0%	27.6%	57.1%	37.9%			
O'Connor	O	21	11	5	17	19	3				
	S	1	*	*	7	6	2				
	D	21	11	5	22	24	5				
	N	29	29	7	29	29	7				
	P	72.4%	37.9%	71.4%	75.9%	82.8%	71.4%				
Powell	O	4	4	*	5	4					
	S	*	*	*	1	1					
	D	4	4	*	5	5					
	N	7	7	*	7	7					
	P	57.1%	57.1%		71.4%	71.4%					
Rehnquist	O	20	9	3	18						
	S	1	*	*	6						
	D	21	9	3	24						
	N	29	29	7	29						
	P	72.4%	31.0%	42.9%	82.8%						
Scalia	O	18	10	1							
	S	*	*	*							
	D	18	10	1							
	N	29	29	7							
	P	62.1%	34.5%	14.3%							
Souter	O	7	5								
	S	*	*								
	D	7	5								
	N	7	7								
	P	100.0%	71.4%								
Stevens	O	16									
	S	*									
	D	16									
	N	29									
	P	55.2%									

TABLE IV
JUSTICE AGREEMENT IN ALL CASES 1986-1990 TERMS

		White	Stevens	Souter	Scalia	Rehnquist	Powell	O'Connor	Marshall	Kennedy	Brennan
Blackmun	O	413	388	63	355	386	99	384	386	260	328
	S	20	97	1	10	8	3	20	156	4	122
	D	432	483	64	364	392	102	401	531	264	440
	N	690	688	108	683	689	148	686	690	460	568
	P	62.6%	70.2%	59.3%	53.3%	56.9%	68.9%	58.5%	77.0%	57.4%	77.5%
Brennan	O	293	309	*	259	270	81	267	339	174	
	S	9	95	*	9	*	4	11	227	3	
	D	301	397	*	268	270	85	278	519	177	
	N	567	568	*	565	569	151	563	567	342	
	P	53.1%	69.9%		47.4%	47.5%	56.3%	49.4%	91.5%	51.8%	
Kennedy	O	348	253	83	33	358	*	349	223		
	S	12	4	7	50	39	*	37	5		
	D	358	257	88	379	393	*	387	228		
	N	460	459	105	459	460	*	452	430		
	P	77.8%	56.0%	83.8%	82.6%	85.4%		85.6%	53.0%		
Marshall	O	348	366	58	294	318	80	316			
	S	17	132	1	14	2	3	13			
	D	364	593	59	308	320	83	328			
	N	692	690	108	685	691	151	687			
	P	52.6%	85.9%	54.6%	45.0%	46.3%	55.0%	47.7%			
O'Connor	O	491	371	90	459	513	109				
	S	31	22	6	66	68	16				
	D	416	388	96	512	580	125				
	N	685	684	108	678	684	150				
	P	60.7%	56.7%	88.9%	75.5%	84.8%	83.3%				
Powell	O	113	84	*	103	117					
	S	3	1	*	5	13					
	D	116	85	*	108	130					
	N	150	150	*	147	151					
	P	77.3%	56.7%		73.5%	86.1%					
Rehnquist	O	528	375	85	488						
	S	51	11	4	75						
	D	579	386	88	557						
	N	691	689	108	685						
	P	83.8%	56.0%	81.5%	81.3%						
Scalia	O	471	360	71							
	S	31	12	5							
	D	498	372	76							
	N	685	688	107							
	P	72.7%	54.1%	71.0%							
Souter	O	81	59								
	S	3	1								
	D	84	60								
	N	108	108								
	P	77.8%	55.6%								
Stevens	O	401									
	S	23									
	D	423									
	N	690									
	P	61.3%									

TABLE V

5-4 DECISIONS

	1986	1987	1988	1989	1990	Total
Non-Race Cases	42 (145) 30.0%	12 (140) 8.6%	27 (137) 19.7%	36 (133) 28.1%	21 (112) 17.5%	105 (555) 18.9%
Race Cases	3 (7) 42.9%	0 (2) 0.0%	6 (6) 100.0%	3 (6) 50.0%	0 (8) 0.0%	12 (21) 57.1%

TABLE VI
UNANIMITY IN FULL OPINIONS[1]
1968-1990 Terms

	Unanimous	With Concurrence	With Dissent	Total
Race Cases	5 (19.0%)[2]	2 (9.5%)[3]	22 (75.9%)	29
Non-Race Cases	176 (26.4%)	55 (9.9%)	424 (63.6%)	667

[1] "A decision is considered unanimous only when all Justices hearing the case voted to concur in the Court's opinion as well as its judgment. When one or more Justices concurred in the result but not in the opinion, the case is not considered unanimous. A decision is [considered "with concurrence"] if one or more Justices concurred in the result but not in the Court's opinion, and there were no dissents." *Leading Cases* 105 HARV. L. REV. 117, 421 (1991).

[2] The unanimous decisions are Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987); Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987); University of Pennsylvania v. EEOC, 110 S. Ct. 577 (1990); and Lytle v. Household Mfg., 110 S. Ct. 1331 (1990).

[3] The two cases in this column are Watson v. Fort Worth Bank & Trust, 487 U.S. 1 (1988) and Missouri v. Jenkins, 495 U.S. 33 (1990).

TABLE VII

AMICUS BRIEFS FILED IN SUPPORT OF THE NONWHITE POSITION

	NAACP	NAACP L. D. & Ed. Fund	ACLU	Mex-Am Legal Fund	Lawyer's Comm. for C.R.
Griffith v. Kentucky		P			
City of Pleasant Grove v. United States					
United States v. Paradise	R	R	R	R	
McClesky v. Kemp					
St. Francis College v. Al-Khazraji	R		R	R	
Shaare Tefila Congregation v. Cobb	P		P		P
Goodman v. Lukens Steel Co.	P		P	P	P
Watson v. Ft. Worth Bank & Trust		P	P		P
New York State Club Ass'n v. City of New York			?		?
City of Richmond v. J.A. Croson & Co.	P	P	P	P	P
Teague v. Lane		P	P		P
Wards Cove Packing Co. v. Atonio	P	P	P	P	P
Martin v. Wilks		P	P		
Patterson v. McLean Credit Union	P		P	P	P
Jett v. Dallas Indep. Sch. Dist.		P	P		
University of Pennsylvania v. EEOC					
Spallone v. United States			R		
Holland v. Illinois		P	P		
Lytle v. Household Mfg.					
Missouri v. Jenkins					R
Metro Broadcasting v. FCC	R		R		R
Board of Educ. v. Dowell	R		R		R
EEOC v. Arabian American Oil Co.		P	P		P
Powers v. Ohio					
Hernandez v. New York				P	
Clark v. Roemer			P	P	
Edmonson v. Leesville Concrete Co.			P		
Chisom v. Roemer			P	P	P
Houston Lawyers' Ass'n v. Attorney General			P	P	P