FEATURES

THE SUPREME COURT: A BULWARK IN THE STRUGGLE FOR CIVIL RIGHTS

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I. INTRODUCTION

The struggle for equal rights in this country is as old as the Nation itself. Our Founding Fathers faltered badly at the outset when they acceded to Southern slaveholders and wrote into the Constitution that Black Americans were to be regarded as but three-fifths of a person.[1] That this was explicitly recognized as an interim measure[2] made it no less odious to the ideals on which the new Republic was founded; and yet, it took the Civil War to remove from the Constitution the open endorsement of second-class citizenship.

With passage of the thirteenth, fourteenth, and fifteenth amendments almost 100 years after the Nation's founding, Blacks, on paper at least, were finally released from bondage,[3] promised equal treatment under law,[4] and guaranteed the right to vote.[5] But within two short decades, the Supreme Court, in the noted case of *Plessy v. Ferguson*,[6] invented the "separate but equal" doctrine to ensure that America would remain in law and in fact racially stratified for another fifty-plus years.[7]

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1. U.S. Const. art. I, § 2, cl. 3.
2. U.S. Const. art. I, § 9, cl. 1.
3. U.S. Const. amend. XIII.
4. U.S. Const. amend. XIV.
5. U.S. Const. amend. XV.
6. 163 U.S. 537 (1896). The case involved a suit by Plessy, petitioner, a "resident of the State of Louisiana, of mixed descent, in the proportion of seven-eighths Caucasian and one-eighth African blood," against the Honorable John H. Ferguson, judge of the criminal district court of the Parish of Orleans. *Id.* at 538. While seated in the "white race" section of an East Louisiana Railway passenger train, Plessy was required by the conductor to vacate the seat and find another in a section of the train "for persons not of the white race." *Id.* Upon his refusal to move, Plessy was ejected, arrested, and charged with a criminal violation. *Id.* Plessy was convicted and thereafter appealed the constitutionality of the Louisiana law "providing for separate railway carriages for white and colored races." *Id.* at 539. In its now landmark opinion, delivered by Justice Brown, the Court affirmed the conviction, ruling the law was within the bounds of the fourteenth amendment. *Id.* at 540. Laws providing for "separate but equal" public accommodations were thereby given the stamp of constitutionality. *Id.* at 550.
7. *Id.* at 544. The court conceded that the "object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law . . . . ," yet it was unconvinced that the amendment was intended to force "a commingling of the two races on terms unsatisfactory to either." *Id. But see id.* at 555 (Harlan, J. dissenting)("Our Constitution is color-blind, and neither

For men and women of less resolve, more flagging courage, and weaker heart, the struggle would likely have ended in the aftermath of *Plessy*. But Black Americans refused to succumb to the indignities heaped upon them by the separationists, and after more than a half century of battling for basic civil rights — *ie.*, for the right to enjoy equally with others the full range of society's available opportunities, without disadvantage or demerit because of skin color — the Supreme Court delivered a major breakthrough in its 1954 landmark decision in *Brown v. Board of Education*.[8]

The *Brown* decision may well have been the Court's finest hour. In one bold stroke, it declared, without dissent, that the Constitution is blind to color differences and cannot be read to favor or disfavor any individual because of race.[9] *Brown* unleashed in this country all the pent-up emotions that had for so many decades paid homage to an oxymoronic policy that pretended equality could come by treating the races separately. In the next ten years, we experienced dramatic, even breathtaking, changes in our understanding of civil rights, as demonstrations, confrontations, and marches in state capitals and Washington, D.C., ultimately brought passage of the historic Civil Rights Act of 1964,[10] the Voting Rights Act of 1965,[11] and the Fair Housing Act of 1968.[12]

As America moved through the 1960s and into the 1970s, the physical and visible barriers that had been designed to, and did in fact, keep Blacks on the outside looking in began, one by one, to fall away. Water fountains, rest rooms, trolley cars, lunch counters, movie theaters, hotel rooms, department stores—and the list goes on—were opened and made accessible to Blacks and whites alike. It was an understandably heady and exhilarating experience for civil rights leaders and politicians who were able to point regularly to tangible accomplishments.

By the early 1970's evidence of progress slowed. No longer were there "whites only" signs to tear down; lunch counters served all comers. Laws against employment discrimination based on race had introduced Blacks into occupations earlier populated only by white employees. Courts began issuing orders, with increasing regularity, that white-only schools open their doors to Black students.

Suddenly, those in the forefront of the civil rights movement found themselves without a daily, or even a weekly, "success story." The perception that the momentum had peaked and was sliding backward grew as the clamor mounted for more tangible evidence of progress. The policymakers could have pointed out that educational and economic disparities among Blacks and whites due to the long history of segregation made inevitable the sort of slow-

knows nor tolerates classes among citizens. . . . The law regards man as man, and takes no account of his surroundings or of his color . . . .")

8. 347 U.S. 483 (1954). The case consolidated four suits in which black minors sought a declaration allowing their attendance at public schools on a non-segregated basis. *Id.* at 487. Each had been denied attendance under laws permitting racial segregation. *Id.* at 488. Plaintiffs alleged that the laws deprived them of equal protection under the fourteenth amendment. *Id.*

9. *Id.* at 483. The court concluded that "separate educational facilities are inherently unequal." *Id.* at 495. Thus, the court ruled that the legalized segregation challenged by petitioners deprived them of the equal protection guaranteed by the fourteenth amendment. *Id.*

10. 42 U.S.C. §§ 2000a-20000h (West 1981).

11. 42 U.S.C. §§ 1971a-1971.

12. 42 U.S.C. §§ 3601-3619.

down that followed the first-wave breakthrough. It was obvious that many Blacks forced into segregated classrooms in the South had been denied a quality education, some having received almost no education at all. Blacks could hardly have been expected to compete effectively with better-educated whites for employment.

To confront this system-wide failing was seen by many as an effort too prolonged to satisfy the political demands of the time. What was regarded as necessary was a "quick fix" without much thought for long-term ramifications or implications. Therefore, America moved in the mid-1970s to the racial quota, forced busing, and the minority business set-aside. Each measure was adopted for the "best" of reasons, but has over time proved to be counterproductive. The force of the measures has too often served to impede, and even defeat, the overarching objective of securing racially free access to educational and marketing opportunities.

Blacks therefore entered the decade of the 1980s far less confident than we were ten years earlier of realizing Dr. Martin Luther King, Jr.'s dream of a Nation ready to judge its citizens by their character and abilities, not their skin pigmentation. Having extracted itself from the insidious policy of "separate but equal" with the *Brown* decision, the country sadly ushered in the 1980s drifting steadily toward the equally obnoxious policy of "separate but proportional." Separate school buses, separate employment lines, separate contract bid procedures, all were racially inspired and had the nearsighted objective of achieving color-coded proportional representation in the classroom, in the workforce, and on the jobsite.

It seemed to matter little—if at all—that the dollars spent on racial transportation drained needed funds from quality education or that the "white flight" response left many public school systems, especially in the larger metropolitan areas such as Chicago, Boston, Atlanta, Philadelphia, and Washington, D.C., more resegregated than desegregated.[13]

Nor did those on the racial-proportionality bandwagon heed clear warning signals that the quota remedy was operated more regularly as an employment ceiling than as a floor, allowing a token few Blacks into the workforce to meet statistical requirements but slamming the door on all others. The reality is that the overwhelming majority of American Blacks, including many who were well qualified, derived no benefit whatsoever from these racially inspired programs, cynically labeled "affirmative action." Even those chosen because of their skin color were denied the satisfaction of knowing that they made it on their ability and merit; too often they found themselves carrying the stigma of being "affirmative action" employees.[14]

The minority set-aside program, in practical terms, fared no better. New and emerging Black, Brown, or Hispanic businesses found it virtually impossible to obtain start-up funding or to meet bonding requirements needed to compete for contracts. These financial hurdles — curiously never addressed under the various legislative set-aside programs — opened the door for the more established and well financed non-minority contractors to effectively corner

13. *See generally* Reynolds, *Individualism vs. Group Rights: The Legacy of Brown*, 93 YALE L.J. 995 (1984)(discussing the impact of mandatory busing).

14. *See* Reynolds, *Toward Freedom and Dignity: Understanding the Misunderstandings About Affirmative Action*, National Legal Center for the Public Interest.

the set-aside market simply by placing in ownership or front-office positions token Blacks to "qualify" for the programs.[15] Meanwhile, *bona fide* minority business remained on the sidelines. The stories of this sort of fraud and corruption are legion, but that seems not to have noticeably slowed the social engineers driving the "separate but proportional" train.

Once again the Supreme Court enters to provide the necessary mid-course correction.

II. THE SUPREME COURT SPEAKS

Not insignificantly, the Court has brought us back from the brink of racial proportionality not by a single decision, as with *Brown* some 35 years ago, but in a series of decisions over the last several terms. The explanation comes largely from the fact that the Supreme Court has not itself strayed too far from its constitutional command for race neutrality expounded in *Brown*.

A. *The Decade of the Seventies*

There were, to be sure, invitations to the Court in the 1970s to endorse a "separate but proportional" doctrine under both the Constitution and the civil rights statutes. In *Regents of the University of California v. Bakke*,[16] the issue was presented in the context of an admission quota based on race at the University of California Medical School at Davis. Allan Bakke, a white applicant, challenged his denial of admission to the 1973 and 1974 entering classes despite the fact that he had higher test scores than several minority group members admitted under the "special candidates" program.[17] The Supreme Court, in a sharply divided decision, sided with Mr. Bakke, with a majority of its members reaffirming the Constitution's blindness to color differences under the equal protection clause except in the most compelling of circumstances. As Justice Powell, whose swing vote determined the outcome of the case, stated: "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."[18]

Nothing that the Court said in its subsequent decision of *Fullilove v. Klutznick*[19] contradicts this basic understanding. *Fullilove* involved a facial attack on a federal statute, the Public Works Employment Act of 1977, that required contractors bidding for federal contracts to set aside ten percent of their subcontracts to firms predominantly owned by members of particular

15. *See Heartland Policy Study No. 26*, "Disadvantaged Business Set-Aside Programs: An Evaluation" pp. 11-15, published by Heartland Institute.

16. 438 U.S. 265 (1978).

17. The trial court declared that the program operated as a racial quota and was therefore in violation of the state and federal constitutions and Title VI. *Id.* at 279 (describing trial court decision). The state supreme court affirmed. Bakke v. Regents of University of California, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976).

18. 438 U.S. at 289-90. Setting forth the analytical framework that had been applied consistently to all state-imposed classifications based upon race, Justice Powell declared that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Id.* at 291. He explained that "[i]t is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group . . . ." *Id.* at 299.

19. 448 U.S. 448 (1980).

racial and ethnic groups.[20] In upholding the constitutionality of the statute, the Court was careful to point out that Congress had found persistent and pervasive discrimination industry-wide.[21]

Having established a "compelling" predicate, the Court looked to whether the remedial response in the legislation was satisfactorily tailored. Because the statute was for only two years duration and, under the prescribed waiver provisions, limited those eligible to benefit from the set-aside program to minority businesses able to demonstrate administratively that they had been excluded from contracting opportunities in the past; the statutory program — which was seen as pressing "the outer limits" of constitutionality[22] — survived the facial attack. At the same time, then Chief Justice Burger noted that the legislation might well be vulnerable to a later "as applied" constitutional challenge if minority contracts were awarded on racial grounds rather than in terms of victim-specificity.[23]

The majority's reasoning in *Fullilove* is particularly interesting when juxtaposed with the rationale offered by the Court in upholding a similar kind of program in a non-constitutional context. In *United Steelworkers v. Weber*[24] the contest centered on a racial preference adopted by Kaiser Aluminum Company which reserved for Black employees fifty percent of the openings for an in-plant craft training program. Brian Weber, the white plaintiff, was denied entrance to the training program even though he had more seniority than most senior Black candidates who were admitted. He argued that the program violated Title VII of the Civil Rights Act of 1964 which, he insisted, outlawed color-conscious discrimination whether it operated in forward gear or reverse.[25]

The Court's majority disagreed, holding that Title VII, notwithstanding language and legislative history to the contrary,[26] could indeed tolerate a racial preference. However, these preferences were acceptable only in the most

20. 42 U.S.C. §§ 6701, 6705-6710. To uphold the facial constitutionality of a statute, the Court only needed to determine that nothing on the face of the statute itself precluded the possibility that it might be constitutionally applied in certain specific situations. *Fullilove*, 448 U.S. at 480.

21. 448 U.S. at 478 (Burger, C. J., joined by White and Powell). "Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination." *Id.*

22. *Id.* at 490.

23. *Id.* at 489. If there was doubt about the proper flow of benefits, the MBE program could be termed a pilot program, subject to reassessment by Congress at a later date. *Id.*

24. 443 U.S. 193 (1979).

25. *See* McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976). There, petitioners, two white employees of respondent company, were discharged for cause, while a Black employee charged with the same offense was not discharged. Petitioners filed suit alleging racial discrimination in violation of Title VII. The district court dismissed petitioners claims on the ground that Title VII was unavailable to white people. *Id.* at 275. The Supreme Court reversed. *Id.* at 296. Justice Marshall, writing the opinion for the Court, stated that "[w]e therefore hold today that Title VII prohibits racial discrimination against white petitioners in this case upon the same standards as would be were they Negroes and Jackson white." *Id.* at 280.

26. Title VII was intended to remove forever race as a factor in employment decisions covered by the Act. *See* 110 CONG. REC. 6548 (1964) (statement of Sen. Humphrey). Senator Thomas Kuchel, a co-sponsor of the law, emphasized that "the bill . . . is colorblind." *Id.* at 6564. Senator Humphrey, the law's principal sponsor, explained that Title VII "does not limit the employer's freedom to hire, fire, promote, or demote for any reasons — or for no reasons — so long as his action is not based on race." *Id.* at 5423. Indeed, the sponsors explicitly considered racial quotas and uniformly rejected them since, in the words of Senator Clark, such quotas are themselves discriminatory." *Id.* at 7218. As Senator Harrison Williams asked rhetorically, "how can the language of

limited circumstances: Where it is adopted to correct persistent racial exclusion from the workforce, is of limited duration, and is tailored to remedy the identified exclusionary practices - not to maintain racial balance or skin color proportionality.[27]

Notwithstanding the articulation of these ground rules by the Court, a number of lower federal courts took it upon themselves to go beyond the Supreme Court's pronouncements that signalled only restrained and limited approval of modest race-conscious programs where "compelled" by the circumstances. By interpreting *Fullilove* and *Weber* expansively and assigning undeserved weight to dictum by Justice Powell in *Bakke*,[28] these lower court decisions gave troublesome life to the racial quota.[29]

B. *The Decade of the Eighties*

The issue of racial preferences in hiring took several years to return to the Supreme Court, but it arrived in 1984 in *Firefighters Local Union No. 1784 v. Stotts*.[30] At issue was a district court "modification" of an earlier consent decree entered into by Memphis Fire Department in order to remedy alleged racial discrimination in hiring and promotion.[31] Under the modification, the fire department was enjoined from using a seniority based layoff system (*i.e.*, last in, first out) during a budget crunch; the district court found that the

equality favor one race . . . over another? . . . Those who say that equality means favoritism do violence to common sense." *Id.* at 8921.

27. 443 U.S. at 208. The Court did not elaborate on how the persistent racial exclusion was to be proved, or on how the tailoring and duration of the remedy must be fashioned in relation to the proof of prior exclusion.

28. Justice Powell suggested that in light of the "countervailing constitutional interest . . . of the First Amendment," 438 U.S. at 313, a university could permissibly exercise its academic freedom to consider race as one factor in promoting a diverse student body. *Id.* at 311-15. Whatever force such a reading of the fourteenth amendment may have to accommodate first amendment freedoms when the two come into direct conflict, there is no countervailing first amendment interest implicated in the usual employer-employee relationship. *See generally* Reynolds, *The Justice Department's Enforcement of Title VII*, 34 LAB. L.J. 259 (1983) (stating the Justice Department's view of Title VII enforcement activities in the area of equal employment opportunity).

29. *See e.g.*, H. K. Porter Co., Inc. v. Metropolitan Dade County, 825 F.2d 324 (11th Cir. 1987), vacated and remanded, 489 U.S. 1062 (1989); Higgins v. City of Vallejo, 823 F.2d 351 (9th Cir. 1987) (rejecting constitutional and Title VII challenge to award of firefighter/engineer position to third-ranked black candidate over first-ranked white candidate); Smith v. Harvey, 831 F.2d 1068 (11th Cir. 1987), *aff'g*, 648 F. Supp. 1103 (M.D. Fla. 1986) (upholding a one-for-one policy adopted by city's firefighter department over constitutional and Title VII challenge; Kromnick v. School Dist. of Philadelphia, 739 F.2d 894 (3d Cir. 1984) (upholding teacher reassignment program); South Florida Chapter, of the Associated General Contractors of America, Inc. v. Metropolitan Dade County, Fla. 723 F.2d 846 (11th Cir. 1984), *cert. denied*, 469 U.S. 871 (1984) (upholding local set-aside program); Bratton v. City of Detroit, 704 F.2d 878 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984) (upholding voluntary police quota); Ohio Contractors Ass'n v. Keip, 713 F.2d 167 (6th Cir. 1983) (upholding state set-aside); Schmidt v. Oakland Unified Sch. Dist., 662 F.2d 550 (9th Cir. 1981), (upholding local set-aside), *vacated on other grounds*, 457 U.S. 594 (1982); Grier v. Alexander, 593 F. Supp. 1263 (M.D. Tenn. 1984), *aff'd*, 801 F.2d 799 (6th Cir. 1986) (approving special tracking of 75 black sophomores to state professional schools); M. C. West, Inc. v. Lewis, 522 F. Supp. 338 (M.D. Tenn. 1981) (upholding U.S. Department of Transportation set-aside regulations on the basis of *Fullilove*).

30. 467 U.S. 561 (1984).

31. Stotts v. Memphis Fire Dep't., 679 F.2d 541 (6th Cir. 1982)(explaining district court ruling). Respondent Stotts, a Black fireman in Memphis, Tennessee, filed a class action in federal district court charging the Memphis Fire Department with race discrimination in its hiring and promotion practices. A consent decree calling for increased hiring and promoting of black applicants resolved the lawsuit. *Id.* at 547.

seniority layoff program adversely affected the newly hired Blacks. Accordingly, Black employees were retained in favor of more senior white firefighters.[32]

The Supreme Court, by a 5-4 vote, declared the lower court's race-conscious "modification" to be in violation of Title VII, specifically Section 706(g).[33] As Justice White explained: That section limits the trial court's ability to disregard *bona fide* seniority systems in fashioning a remedy for discrimination and embodies a firm policy to provide make-whole relief, and make-whole relief *only*, to actual victims of discrimination.[34] The *Stotts* "modification" failed on both counts: it provided relief to non-victims in an attempt to preserve racial balance, and it impermissibly disturbed the fire department's seniority system.

Since *Stotts* involved both a court ordered modification to a consent decree and interference with a *bona fide* seniority system, unlike *Weber*, there is reason for caution in any attempt to extract some larger principle from the two decisions. Both, however, are Title VII cases. It seems at least fair to say that the Court's grudging approval of the *Weber*'s *purely voluntary* in-plant preference training program, which combatted wholesale racial exclusion instead of attempting to maintain racial balance, indicates the extent of the Court's willingness to stretch Title VII's tolerance for the racial preference.[35]

No similar inclination, however, appears likely to be forthcoming from a majority of the Court where a government entity or a court is involved. This signal was sent clearly in the Court's 1986 decision in *Wygant v. Jackson Board of Education*.[36] At issue was the constitutionality of a collective bargaining agreement, adopted by a school board and teachers' union, which maintained the same percentage of Black teachers during a layoff.[37] The stated goal of the agreement was to redress societal discrimination and to ensure sufficient role models for minority students.[38]

The Court's majority rejected both rationales for the school board's so-called "remedial" use of race. The Court observed that the rights guaranteed under the fourteenth amendment are individual rights, not group rights.[39] Moreover, the discrimination necessary to trigger remedial action is immedi-

32. *Id.* at 549-551. In some cases whites were laid off; in others they were demoted.

33. *Stotts*, 467 U.S. at 583. Justice White, joined by Chief Justice Burger and Justices Powell, Rehnquist and O'Connor, concluded that the district court's injunction constituted neither an enforcement nor a valid modification of the consent decree.

34. *Id.* at 578, 580. Justice White quoted Senator Humphrey's assurance that Title VII had no tolerance for racial quotas in the context of layoffs:

> [C]ontrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require . . . firing . . . of employees in order to meet a racial 'quota' or to achieve a certain racial balance. That bugaboo has been brought up a dozen times; but it is nonexistent.

Id. at 580-81 (quoting 110 CONG. REC. 6549 (1964)).

35. *See* discussion *infra* at 32-33.

36. 476 U.S. 267 (1986).

37. *Id.* at 270-73. Non-minority school teachers brought suit against the school board and its members alleging that a provision in the collective bargaining agreement extending preferential layoff protection to minority employees was unconstitutional. The agreement provided that "at no time would there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of layoff." *Id.* at 270.

38. *Id.* at 276.

39. *Id.* at 273. *See also id.* at 285-86 (O'Connor, J. concurring).

ate and actual, not historical and societal,[40] The Court then held that the justification for the racial layoff program was not sufficiently compelling to meet strict constitutional scrutiny.[41] In so doing, it reaffirmed a refrain heard in its earlier decisions: Those engaged in racial balancing, or striving for racial proportionality, do so at their constitutional peril.[42]

This is not to suggest that the judicial door was closed altogether on the use of race as a remedial response to discriminatory practices. The "color-blind" Constitution to which the elder Justice Harlan paid homage in his lone dissent in *Plessy*,[43] and a unanimous Supreme Court embraced some 50 years later in *Brown*, is still perceived as blind to color differences by a majority of the present Supreme Court — almost without exception. The Court has, however, found on two recent occasions what has been characterized as a "flexible goal" that can survive the Court's and the Constitution's steady gaze under the applicable "strict scrutiny" standard.

One case, *Local 28, Sheet Metal Workers v. EEOC*,[44] involved a court-ordered non-white membership goal of 29.23% for the sheet metal workers' union in New York City that had discriminated in recruitment, selection, training, and admissions. The other, *United States v. Paradise*,[45] focused on a one-for-one promotions quota imposed by a district court on the Alabama State Troopers because of systematic exclusion of Blacks at all levels of the workforce.

Justice Brennan wrote for the majority in both cases. In upholding the racially preferential programs, he emphasized that these cases marked the rare exception to the traditional colorblind ideal. In each, the Court majority pointed out that the discrimination was long-standing, had persisted despite efforts to bring it to an end, and had remained largely unaffected by other remedial efforts.[46] In such circumstances, a racial preference, as a last resort

40. *Id.* at 273. *See also id.* at 288-89 (O'Connor, J. concurring).

41. *Id.* at 274. *See also id.* at 285 (O'Connor, J. concurring).

42. *See also*, Bazemore v. Friday, 478 U.S. 385 (1986). *Bazemore* involved voluntary 4-H Clubs operated by the North Carolina Agriculture Extension Service. Having eliminated racially discriminatory membership barriers, the clubs faced the question of whether they were also required to use racially preferential selection procedures to achieve racial balance. The Court answered "no", ruling that where discriminatory barriers had been eliminated racial balance was not constitutionally mandated. *Id.* at 407-08.

43. *See supra* note 6, at 555 (Harlan, J. dissenting).

44. 478 U.S. 421 (1986). Petitioners, a union and apprenticeship committee, violated Title VII of the Civil Rights Act of 1964, when they discriminated against non-white workers in recruitment, selection, training, and admission to the union. *Id.* at 427-28. The district court ordered cessation of the discriminatory practices and established a 29% non-white membership goal, to be attained by July 1981. *Id.* at 431-32 (describing district court action). On appeal, the court of appeals affirmed and extended the time for compliance. *Id.* at 433. In 1982 and 1983, the district court held petitioners in contempt for failure to obey the court's earlier orders. *Id.* at 434. The district court imposed a fine to be used to establish a fund to assist in increasing non-white membership. *Id.* at 435. Ultimately, the district court entered an amended affirmative action program establishing a 29.23% non-white membership goal to be attained by August 1987. *Id.* at 437. The court of appeals and Supreme Court subsequently affirmed. *Id.* at 438-40.

45. 480 U.S. 149 (1987). The United States District Court had ordered that 50% of promotions go to blacks, until either 25% of the force was comprised of black troopers or an adequate promotional plan, complying with prior decrees, was implemented. Paradise v. Prescott, 585 F. Supp. 72 (M.D. Ala. 1983), *aff'd*, 767 F.2d 1514 (11th Cir. 1985).

46. *Local 28 Sheet Metal Workers*, 478 U.S. at 448-49.

> Where an employer or union has engaged in particularly longstanding or egregious discrimination . . . requiring recalcitrant employers or unions to hire and to admit qualified minori-

remedial measure to combat persistent, flagrant and egregious discrimination can withstand challenge under both the Constitution and Title VII.[47]

This exception, as indicated, is an exceedingly narrow one, and, in practical terms, would appear not to have much of a lifeline. Even so, as a last resort, the Supreme Court has told us that the color preference lies in waiting.[48]

In what is a heartening turnaround, most lower federal courts seem to have taken the Court at its word. No longer is the racial quota, the goal-and-timetable, or the minority set-aside being routinely or even irregularly ordered into place or approved by consent decree.[49] Most district courts have returned to the traditional "affirmative action" measures of the 1960s when (without resort to racial preferences) outreach, active recruitment, and meaningful training programs brought large numbers of qualified minorities into the workforce and helped accelerate their promotions.[50]

The race-neutral "affirmative action" regime appears the likely course for the 1990s. Whatever doubts existed in this regard prior to the Court's 1988 term, they have likely now been laid to rest by the most recent set of civil rights decisions. The case most directly on point was the first in the series to be decided, *City of Richmond v. J. A. Croson Co.*[51] At issue was the city's Minority Business Utilization Plan requiring prime contractors awarded city construction contracts to subcontract at least 30 percent of the dollar amount

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ties roughly in proportion to the number of qualified minorities in the work force may be the only effective way to ensure the full enjoyment of the rights protected by Title VII.

Id.; United States v. Paradise, 480 U.S. 149, 171-72 (promotion quota was justified by a compelling governmental interest in remedying " 'long-term, open and pervasive' discrimination, including absolute exclusion of blacks from its upper ranks.")

47. *Local 28 Sheet Metal Workers*, 478 U.S. at 476; *Paradise*, 480 U.S. at 183-86.

48. In Local 93, International Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986), the Supreme Court suggested that a race-conscious promotions program approved as part of a *consent decree* (in a Title VII discrimination suit brought by Black and Hispanic firefighters) could perhaps survive legal challenge even though the same program might fail if entered as part of a court order. Justice Brennan, writing for the majority, read Section 706(g) of Title VII as preventing preferential relief by court order, but concluded that "a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after trial." *Id.* at 525. Most notably, however, the Court emphasized the narrowness of its decision by observing that a consent decree may not impose duties or obligations on third parties, and that third parties can challenge a consent decree under the substantive provisions of Title VII. *Id.* at 529. While this dictum in *Local 93* escaped notice in 1987, a majority of the Court made it the holding two years later in Martin v. Wilks, 490 U.S. 755 (1989). *See infra* at 25-29.

49. *See, e.g.*, Hammon v. Barry, 813 F.2d 412 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1036 (1988); J. A. Croson Co. v. City of Richmond, 822 F.2d 1355 (4th Cir. 1987), *aff'd*, 488 U.S. 469 (1989); Britton v. South Bend Community School Corp., 819 F.2d 766 (7th Cir. 1987) (*en banc*), *cert. denied*, 484 U.S. 925 (1987); Associated Gen. Contractors v. City of San Francisco, 813 F.2d 922 (9th Cir. 1987); San Francisco Police Officers' Ass'n v. City of San Francisco, 812 F.2d 1125 (9th Cir. 1987); United States v. Starrett City Assocs., 660 F. Supp. 668 (E.D.N.Y. 1987), *aff'd*, 840 F.2d 1096 (2nd Cir. 1988), *cert. denied*, 488 U.S. 946 (1989), S. J. Groves & Sons Co. v. Fulton County, 696 F. Supp. 1480 (N.D. Ga. 1987).

50. Throughout the 1980s, the Justice Department concluded numerous employment cases by consent decree. In every instance, affirmative action measures (*e.g.*, recruitment, outreach programs, training) were used and preferential hiring and promotions were explicitly forbidden. Under this regime, large numbers of minorities and women entered the workforce and moved up the promotion ladder much more so than would have occurred if the Department had continued with the quota program of the 1970s. *See* Reynolds, *The Reagan Administration and Civil Rights: Winning the War Against Discrimination*, 1986 U. ILL. L. REV. 1001, 1020-21 (1986).

51. 488 U.S. 469 (1989).

of such contracts to Minority Business Enterprises (MBEs). The ordinance defined MBEs to include those businesses located of which at least 51 percent is owned and controlled by "[c]itizens of the United States who are Black, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts."[52] J.A. Croson Co., the low-bidder on a plumbing fixtures contract, was rejected by the city for failing to satisfy the subcontract minority-percentage. Croson challenged the set-aside requirement on constitutional grounds, and, after a twisted journey through the lower federal courts,[53] won in the Supreme Court.

The *Croson* decision is significant for a number of reasons. First, a solid majority of the Justices declared in unmistakable terms that, at the state and local levels, racially inspired legislative set-aside programs aimed at achieving some statistical balance or degree of proportionality cannot easily survive constitutional attack, and are presumptively invalid.[54] Second, the Court identified the hurdles to be cleared: (i) a clear legislative finding of actual and continuing (not historical or societal) discriminatory behavior in the geographic and commercial markets subject to the legislation,[55] (ii) a demonstration that alternative race-neutral remedial measures had been tried and failed (or that none were availing),[56] and even then, (iii) a showing that resort in the final analysis to a race-conscious response to persistent discrimination has been "narrowly tailored" in its scope, application and duration to minimize as fully as possible the impact on innocent third parties.[57] Third, a clear majority of the Justices announced that any such last resort remedial program would be subjected to the strictest constitutional scrutiny to ensure that it was indeed "compelled."[58] The basic underlying principle is the Court's decision that racial discrimination against non-minorities is constitutionally indistinguishable from racial discrimination against minorities — the Constitution protects all persons equally.

It is generally accepted that the impact of *Croson* is considerable.[59] There is, for example, little difference in the *Croson* decision and the Court's earlier

52. *Id.* at 478.

53. The district upheld the City set-aside ordinance, and the Fourth Circuit initially affirmed, 779 F.2d 181 (1985). On certiorari, the Supreme Court granted the writ, vacated the initial appellate court decision and remanded for reconsideration in light of *Wygant*. 478 U.S. 1016 (1986). *See infra* notes 36-42 and accompanying text. On remand, the Fourth Circuit invalidated the ordinance on constitutional grounds. 822 F.2d 1355 (4th Cir. 1987), *cert. granted*, 484 U.S. 1058 (1988).

54. Justice O'Connor, writing for the majority, held that the standard of review for assessing the constitutionality of state and local set-aside programs under the fourteenth amendment is one of "strict scrutiny." *Croson*, 488 U.S. at 494-95 (Rehnquist, C.J., White & Kennedy, JJ., concurring). Justice Scalia emphasized that in his view racially inspired programs adopted by state and local governments should undergo the strictest constitutional scrutiny. *See Id.* at 520 (Scalia, J., concurring). *But see id.* at 528 (Marshall, J., dissenting).

55. *Id.* at 496-99; *cf.* Wygant v. Jackson Bd. of Educ., 476 U.S. 261, 273, 288-90 (1986).

56. 488 U.S. at 507; *cf. Wygant*, 476 U.S. at 274; United States v. Paradise, 480 U.S. 149, 171 (1987).

57. 488 U.S. at 507-08; *cf. Wygant*, 476 U.S. at 283-84.

58. 488 U.S. at 509 (it is only "[i]n the extreme case [that] some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.").

59. As noted in one early post-*Croson* comment: "[A]lthough *Croson* is an unsurprising decision in the context of recent affirmative action jurisprudence, the case will nonetheless have far-reaching implications for the nation's municipalities and minority contractors." Hoogland and McGlothlen, *City of Richmond v. Croson: A Setback for Minority Set-Aside Programs*, 15 Employer Relations L.J. 5, 14 (1989). "[S]et-aside programs may ultimately become outmoded and employed only in the extreme case when a municipality can prove both that race-neutral remedies have failed and that discrimination continues." *Id.* at 19.

constitutional ruling in the employment context in *Wygant*. One can safely assume that *public* employers inclined to impose a racial preference program for either new hires or promotions—whether voluntarily, by consent decree, or by court order—will henceforth be required to clear the same high hurdles that stand in the way of state and local legislatures contemplating minority business set-aside programs. Their plans will be subjected to the watchful eye of a suspicious federal judiciary intent on subjecting any such program to the strictest scrutiny.[60]

Whether the same prediction can be made quite so confidently regarding federal set-aside programs that operate to prefer small socially and economically disadvantaged businesses because of race remains an open question — but barely. Justice O'Connor, in her plurality opinion in *Croson*, suggested that perhaps Congress could more easily justify a minority set-aside program than could state and local authorities because Congress alone was charged under section 5 of the fourteenth amendment with the power to take affirmative legislative steps to enforce the equal protection mandate.[61]

It is doubtful that this passing reference in dictum was intended to signal a view toward creating two separate and independent constitutional standards — one for congressional action, the other for all other governmental action — under the fourteenth amendment.[62] Surely, race-based preference programs outlawed under *Croson* can hardly expect less severe treatment from the courts if they are put in place by federal legislation.[63] The more likely reading of Justice O'Connor's dictum is that some greater degree of latitude than one can expect at the state and local levels is available in reviewing Congress' predicate findings of discrimination. In other words, Congress could find extensive discriminatory conduct in many (but not all) of the 50 states and thereby, under one scenario, meet its threshold "findings" requirement. States and localities, on the other hand, must after *Croson*, be more precise and pinpointed about the geographic and commercial markets they target.

Even under this interpretation, as I read Justice O'Connor, the "narrow tailoring" requirement remains a constitutional imperative.[64] Accordingly,

60. Not to be overlooked is that *Croson* was before the Court when *Wygant* was decided and was remanded to the Fourth Circuit for reconsideration in light of *Wygant*. *See supra* note 53. Also to be noted is the Court's additional civil rights decision last term in Jett v. Dallas Independent School District, 109 S. Ct. 2702 (1989). A white football coach brought suit against the Dallas Independent School District, (DISD) under 42 U.S.C. §§ 1981, 1983, claiming that he was relieved of his coaching responsibilities and transferred to a teaching position by his black principal because of race. The Court held that the claim, because it was directed against the municipality on a *respondeat superior* theory, could not be maintained under 1981 and 1983. It noted, however, that such a discrimination suit could properly be brought against a municipality under those provisions if the action challenged was part of a municipal custom or policy. *Id.* at 2722 (citing Monell v. New York City Dept. of Social Services, 436 U.S. 658, 691 (1978). An example would be a municipal "affirmative action" program — whether a minority quota, goal or set-aside — that preferred some applicants or members of the workforce, but not others, because of race.

61. 488 U.S. at 490-91.

62. *See id.* at 518-19 (Kennedy, J. concurring).

63. Since section 5 of the fourteenth amendment authorizes Congress to take legislative action "to enforce" the equal protection mandate in Section 1, i is a constitutional absurdity to suggest, as some have, that this enforcement authority provides Congress with power to enact legislation that undermines the very equality principle Congress is charged with upholding. Such an interpretation of Justice O'Connor's reference to Congress' Section 5 power badly distorts her point.

64. *See* 488 U.S. at 507-08. Justice O'Connor placed principal reliance on Fullilove v. Klutznick, 448 U.S. 448, 490-92 (1979), for the proposition that Congress might have more latitude than

Congress must respond legislatively to its discriminatory findings by first pursuing viable, race-neutral remedial measures, and only after failing in that effort, by considering the racial set-aside in terms that are carefully limited in scope, coverage, and duration to the particular discriminatory practices identified.

In this latter regard, Justice O'Connor found *Fullilove* most instructive. In particular the saving feature of *Fullilove* set-aside program required that the beneficiaries be only those minority businesses able to show a prior racial exclusion from a contract or subcontract opportunity in the relevant market.[65] Since *Fullilove* pressed the very "outer limits" of constitutionality, its formulation can hardly be ignored.

Nor can Congress afford constitutionally to be imprecise about the geographic reach of any such remedial MBE program. If, as conjectured, a national set-aside program can properly be passed by Congress to combat established industry discrimination in one or another industry, even though the necessary congressional findings do not identify wrongdoing in every state, it then follows that, to avoid unconstitutional overinclusiveness, the "tailored" remedy can legitimately apply only where the prior discrimination exists.[66] Congress could either specifically except from a federal set-aside program states where no evidence of industry discrimination was found, or it could include in the relevant statute a waiver procedure releasing from coverage any state, or subpart thereof, not shown to have experienced any discrimination against minority businesses in the relevant industry. Certainly, if a state or locality cannot satisfy the constitutional predicate needed to fashion its own minority preference program, Congress has no "remedial" basis to impose its racial set-aside requirements on that state or locality under federal legislation.[67]

Moreover, where Congress does not enact a federal set-aside statute,[68] it would appear that *Croson* applies also to the executive branch. Federal fund-

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the states to adopt such a program in response to discriminatory practices. *Fullilove*, which pressed "the outer limits" of constitutionality, survived scrutiny precisely because its remedial set-aside program was narrowly tailored.

65. *See Croson*, 488 U.S. at 508.

66. Justice O'Connor had occasion to discuss overinclusiveness in a different context in *Croson*. *See id.* But the same concern was expressed as well in response to the dissent's suggestion regarding the possible "shared" use of findings of discrimination. As Justice O'Connor noted: "We have never approved the extrapolation of discrimination in one jurisdiction from the experience of another." *Id.* at 505. *See also* Days, *Fullilove*, 96 YALE L.J. 453, 480-81 (1987)(arguing that "it is essential that state and local agencies also establish the presence of discrimination in their own bailiwicks . . . .").

67. The Court indirectly signalled agreement with this position by remanding to the Eleventh Circuit, shortly after *Croson* was decided, the decision in H. K. Porter Co., Inc. v. Metropolitan Dade County 489 U.S. 1062 (1989), with instructions to apply the principles of *Croson*. The issue involved in *H. K. Porter* is whether a county government may constitutionally set aside 5 percent of work on a federally funded transportation contract for women and persons of certain races if it does so in order to satisfy federal requirements attached to the funding. By vacating the court of appeals' decision upholding the county's position, and directing the lower court to follow *Croson* on remand, the Supreme Court has indicated that what it ruled in *Croson* has equal application to federally-mandated programs. Also implicit in this remand order is that a set-aside program cannot escape *Croson*'s requirements on an argument that it is merely the state's effort to comply with federal law.

68. To the best of my knowledge, there are currently five explicit set-aside programs in the Federal Code: 10 U.S.C.A. § 2301(c) (West Supp. 1989)(Department of Defense); 22 U.S.C.A. § 2151 (Department of State); 22 U.S.C.A. § 2204(d) U.S.C. (Department of Transportation); 15 U.S.C.A. § 637(a) (Small Business Association); 47 U.S.C. § 309(i) (Federal Communications Commission).

ing cannot constitutionally be conditioned on state or local adoption of minority preference goals, quotas or set-asides. The executive branch must first demonstrate the predicate findings of existing discrimination and that the remedial response is "compelled" and narrowly tailored as a last resort measure. Only Congress has implementing authority under section 5 of the fourteenth amendment. Whatever impact that may have on the ability of the legislative branch to fashion federal legislation of the sort under discussion, it provides no spill-over authority to the Executive.

That suggests, for example, that Executive Order 11246, and the regulations thereunder, are constitutionally suspect to the extent that they are being applied in a racially preferential manner.[69] Similarly, the many regulatory minority preference programs under federal funding statutes likely suffer constitutionally for lack of the requisite predicate and poor tailoring. Indeed, the vulnerability of such programs is especially pronounced since Congress has mandated *nondiscrimination* in the funding statutes, placing the regulatory programs, calling for "a little bit" of "benign" discrimination, on a collision course with the statutory mandate. Nonetheless, given the characteristic entrenchment of the federal bureaucracy — due to an instinctive resistance to change (most particularly to controversial change) rather than to any candid assessment of the correctness or incorrectness of the position being staunchly and too rigidly defended — it will in all probability take another Supreme Court decision to restore constitutional integrity to these programs.

Outside the public sector, the heyday of the racial goal, quota or set-aside is probably over. One big reason for stating the matter so boldly is the Court's 1989 decision in *Martin v. Wilks*.[70] The case presented the vexing question of when individuals could challenge an agreement between their employer, or prospective employer, and other co-workers that operated in a racially discriminatory manner. Wilks and other white firefighters in the Birmingham Fire Department contested a consent decree resolving an earlier discrimination lawsuit.[71] The challenged decree accorded preferential treatment in the promotion decisions to Black applicants. The white contestants complained

69. The Executive Order, on its face, requires no preferential treatment based on skin color, but states instead that affirmative action measures are to be employed to enhance employment opportunities in government contract projects. (*See* Exec. Order. No. 11246, 30 Fed. Reg. 12,319 (1965). Obviously, such neutral "affirmative action" efforts as were traditionally contemplated by the phrase (*i.e.*, outreach, recruitment and training) will fully satisfy the Order. To the extent that the Labor Department's Office of Contract Compliance Programs (OFCCP) has in its implementing regulations, or in its operation of the program, or both, insisted as a condition of contracting with the government that contractors agree to and meet specified racial "goals" in their employment or subcontracting decisions, such federal activity — unattached to any *congressional* mandate — has no legitimate constitutional basis in the absence of explicit findings of discrimination, a demonstrated need for such a racially inspired remedial response, and proof of adequate narrow tailoring of any such program so as to ensure minimal impact on nonminorities. Such a regulatory classification can expect to receive strict scrutiny by the courts and likely cannot survive probing judicial review.

70. 109 S. Ct. 2180 (1989).

71. In the early 1970s, a local chapter of the NAACP, supported by the federal government, sued the City of Birmingham, alleging that blacks were being discriminated against in hirings and promotions in the city's fire department, in violation of Title VII. A settlement was reached and consent decrees were offered to the district court for approval. The Birmingham Firefighters Association, as well as individual white firefighters, sought to intervene to register opposition to the quota provisions of the decrees, but interventions were denied and the decrees were approved. *See id.* at 2183.

that they were being racially denied promotions under a decree to which they were not parties, so they commenced a separate action.

The district court disallowed the collateral attack on the consent decree. The court held that the City of Birmingham was insulated from the white firefighters discrimination claims since it followed the dictates of the court-approved arrangement .[72] The Eleventh Circuit disagreed and reinstated the lawsuit,[73] concluding that the plaintiffs should not be required to submit to bargains "in which their interests were either ignored or sacrificed."[74]

Chief Justice Rehnquist agreed with the court of appeals that a consent decree could be binding only on parties to the agreement; it would not bind those who were not part of the original lawsuit nor willing participants in its resolution.[75] The Court thus rejected the view expressed by a number of lower federal courts that challenges of this sort were "impermissible collateral attacks" on judicially approved settlements which should not, as a matter of sound policy, be subject to constant reopening.[76] Outweighing the policy of stability of voluntary settlements, the Court concluded, is the stronger public policy—indeed constitutional imperative—of protecting and preserving individual rights of those left out of, and adversely affected by, the settlement.[77]

Wilks is fundamentally a due process case. It ensures that all those having claims of racial discrimination which have not been surrendered or bargained away shall gain access to the courts and be granted a hearing on their claims. As the Court made clear, there is no assurance the plaintiffs will prevail.[78] Indeed, in a case decided the same day as *Wilks*, *Lorance v. AT&T Technologies, Inc.*,[79] three women contesting a collective bargaining seniority provision on the ground that it allegedly discriminated against them were told their suit must fail because it was barred by the applicable limitations period in Title VII.[80] Nothing in *Wilks* removes the availability of these traditional

72. *Id.* at 2183-84 (describing the district court ruling).

73. In re Birmingham Reverse Discrimination Employment Litigation, 833 F.2d 1492 (11th Cir. 1987), *aff'd*, 109 S. Ct. 2180 (1989).

74. *Id.* at 1498.

75. Martin v. Wilks, 109 S. Ct. at 2184 (" 'One is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.' ")(quoting Hansberry v. Lee, 311 U.S. 32 (1940)).

76. The Court pointed to the Federal Rules of Civil Procedure Rule 19(a) — which provides for mandatory joinder of parties intended to be bound by a judgment—as the proper means of removing the substantial risk of incurring inconsistent obligations. It noted that the original parties to the litigation "presumably know better than anyone else the nature and scope of relief sought in the action, and at whose expense such relief might be granted." *Id.* at 2185-86.

77. Thus, the majority held that a voluntary agreement in the form of a consent decree between one group of employees and their employer cannot settle the conflicting claims of another group of employees who do not join in the agreement. *Id.* at 2187-88. And, this would be true even if the second group of employees had been a party to the litigation but not the settlement agreement. *Id.* at 2188. *See also supra* note 48.

78. *Id.* at 2188.

79. 490 U.S. 900 (1989).

80. The case arose as a result of a 1979 change in the collective bargaining agreement executed by the women's employer and the union. The change altered the manner of calculating tester seniority during the first five years of employment, basing it henceforth on the time spent as a tester rather than on the time spent in plant-wide service. Plaintiffs became testers between 1978 and 1980. In 1982, due to an economic downturn, they were selected for demotion under the new seniority procedure (they would not have been demoted under the pre-1979 procedure). They sued within 300 days of the demotions, but some four years after the change in calculating tester seniority, alleging that the change was adopted for the purpose of discriminating on the basis of sex. *Id.* at 2263-64. The

defenses.[81] Rather, the decision merely answers the important threshold question of "court access," and answers it well.

There will, as a consequence, almost certainly be fewer employers who enter voluntary arrangements which racially prefer one group of employees. The threat of interminable and costly *Wilks*-like litigation should persuade most employers to fashion these voluntary programs in neutral terms that apply evenhandedly to all elements of the workforce without regard to race or ethnicity.[82] This does not foreclose an in-plant training program modeled after the one that survived legal challenge in *Weber*, but it does counsel that such a plan stands the best chance of gaining judicial approval if it is adopted as a last resort *remedial* measure that has been narrowly tailored to redress wholesale racial exclusion while causing minimal disadvantage to all employees because of skin color.[83]

Of course, if an employee does sue, he or she must prove discrimination. In this connection, the Court provided needed guidance to litigants regarding their respective burdens of proof.

Price Waterhouse v. Hopkins,[84] involved a Title VII claim of discrimina-

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Supreme Court agreed with the Eleventh Circuit that "the relevant discriminatory act that triggers the period of limitations occurs at the time an employee becomes subject to a facially-neutral but discriminatory seniority system that the employee knows, or reasonably should know, is discriminatory." 827 F.2d 163, 167 (7th Cir. 1987).

81. The Court made it clear in *Wilks* that its procedural decision concerning "access" to the courts in no way commented on the merits of plaintiffs' claims or indicated a view as to how their discrimination claims should or should not be decided. *Wilks*, 109 S. Ct. at 2188. Thus, the case was remanded for resolution of plaintiffs, claims on the merits.

82. Such voluntary programs would presumably track the model used by the Department of Justice over the past eight years in cases resolved by consent decree. *See supra*, note 50. That model calls for (a) extensive outreach programs to alert all population segments in the relevant labor market of job vacancies, (b) active recruitment so as to develop a complete applicant pool of all those interested in the positions advertised, (c) selection on a race-neutral basis that looks to individual qualifications and merit, not to skin color, and (d) comprehensive training programs available to all employees in the workforce to enhance opportunities for upward mobility. These various "affirmative action" measures were closely monitored by the Department. That they achieved the desired end was demonstrated not only in terms of the increased number of minorities entering workforce under such a regime, but also in terms of the increased number of job applicants for the first time in a position (having been told of the vacancy *before* it was filled and given the opportunity to apply and be considered) to independently review the selection process and meaningfully challenge the employer's hiring and promotion decisions if they were considered discriminatory.

No such individual review mechanism had been readily available under the regime of racial quotas or goals-and-timetables, since that "numbers game" required no affirmative outreach and recruitment activity that necessarily develops an applicant pool, every member of which is ready to second-guess an employer's selection of someone else. Rather, the preferential programs were, for the most part, driven by the numerical benchmarks, with racial quotas being quietly and quickly filled before word could get out about the vacancies. Too often, what was intended as a minimum requirement was used by employers as a quota-ceiling; thus once the racial "goal" was reached, the employment door was quickly closed on other minorities, fully qualified, who wanted (and often deserved) the job.

83. *See also* Johnson v. Transportation Agency, 480 U.S. 616 (1986). A suit was brought by a male employee under Title VII challenging an "affirmative action" preference program under which a female applicant for a dispatcher position was promoted over the plaintiff who was concededly more qualified for the position, albeit marginally so. Justice Brennan, writing for the majority, found the plan acceptable because it was established to redress wholesale exclusion of women in a traditionally segregated job category, operated to advantage female over male workers only at the margins (where qualification differences were minimal), and was not intended to maintain proportionality, but only to break down the impenetrable barriers that had long confronted women applicants interested in becoming dispatchers. *Id.* at 637-40.

84. 109 S. Ct. 1775 (1989).

tion against a female senior manager at Price Waterhouse who was nominated for but subsequently denied a partnership position. While the alleged ground for rejection was gender, not race, discrimination,[85] the Court's analysis has equal application in both contexts. As a preliminary matter, *Price Waterhouse* was a "mixed motive" case, meaning that the employer allegedly had a mix of discriminatory and nondiscriminatory reasons for its employment decision.[86] In such circumstances, a majority of the Court concluded, albeit in separate opinions,[87] that the plaintiff satisfied her *prima facie* burden upon showing that at least one of the several motives behind the partnership decision was illegitimate. The employer then had the burden to demonstrate, by a preponderance of the evidence, that, notwithstanding mixed motives, its decision to deny plaintiff the partnership position would have been the same for very legitimate reasons.[88]

The *Price Waterhouse* case is instructive for two essential reasons. It articulates the "preponderance of evidence" standard as the one an employer must satisfy to meet its production burden. In addition, it foreshadows that the ultimate burden of proof rests at all times with the plaintiff in a "mixed motive" context. This occurs even though the burden of production shifts to the employer on a *prima facie* showing by plaintiff of at least one discriminatory motive driving the employment decision.[89] This latter point was brought home even more emphatically in the Court's second Title VII decision addressing burdens of proof.

In *Wards Cove Packing Co. v. Atonio*,[90] a disparate impact suit[91] was brought by a class of non-white cannery workers against two companies operating salmon canneries in Alaska. Their claim focused on the racial disparity between the predominately non-white seasonal workers in the unskilled can-

85. Plaintiff, a senior manager at Price Waterhouse, was nominated for partnership after five years with the firm. A statement supporting her candidacy described her professional capabilities in glowing terms, but also noted that she lacked something in interpersonal skills and tended to be both aggressive and abrasive. Following her rejection for partnership, Hopkins filed suit under Title VII charging that the firm had discriminated against her on the basis of sex. *Id.* at 1781-83.

86. *Id.* at 1785-88.

87. Justice Brennan wrote the plurality opinion, for himself, Justices Marshall, Blackmun, and Stevens. Justice White concurred separately, *id.* at 1795-96, as did Justice O'Connor. *Id.* at 1796-1806. Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia dissented. *Id.* at 1806-14.

88. The lower court had imposed on the employer the burden of showing by "clear and convincing evidence" that the same decision would have been made even if gender-based stereotypical considerations had played no role. *Id.* at 1792. Justice Brennan concluded that the employer's burden in this regard was the lesser "preponderance of the evidence" rule. *Id.* at 1792-93.

89. Justice Brennan's plurality opinion states that *Hopkins* "casts no shadow" on the Court's prior ruling in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) (burden of persuasion remains with plaintiff throughout; only burden of production shifts to employer upon the establishment of a *prima facie* case). But other members of the Court saw the plurality's articulation of a "shifting burden" rule, *Price Waterhouse*, 109 S. Ct. at 1789-90, as doing just that. *Id.* at 1806. The proposition advanced by Justice Brennan did not, however, command support from a majority of the Court. Justice White, concurring, appeared more comfortable with the proposition that the ultimate burden of proof remained with plaintiff. *Id.* at 1796. Certainly that view was advanced by Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia. *Id.* at 1810-11. Justice O'Connor, while somewhere in between, was plainly well out from under Justice Brennan's "shadow." *See id.* at 1805-06.

90. 109 S. Ct. 2115 (1989).

91. *See generally* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (explaining disparate impact doctrine).

nery jobs and the predominantly white skilled workers who filled the non-cannery positions. The complaining employees alleged that the company's hiring practices were responsible for the racial stratification of the workforce. The district court rejected the cannery workers' claims,[92] but the Ninth Circuit, sitting *en banc*, reversed.[93]

The Supreme Court agreed with the district judge. Justice White, writing for the majority,[94] clarified the matter of using statistics in a disparate impact case. He took to task the appellate court's acceptance of a racial comparison between two separate and distinct components of the workforce, one comprised of skilled the other unskilled workers.[95] The proper comparison, the Court made clear, was between similarly situated employees in the job position in question and those prospective employees in the relevant labor force possessing the necessary qualifications to fill that position.[96]

Equally important, the Court's majority spoke directly to the standards of proof in employment discrimination cases grounded on a disparate impact theory.[97] Statistics alone, it reaffirmed, are insufficient to make out a *prima facie* case of impact discrimination;[98] in addition, the plaintiffs must come forward with evidence showing that the racial disparity being challenged was caused by "a specific or particular employment practice."[99]

Once a *prima facie* case has been established, the Court explained that the

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92. *See Wards Cove*, 109 S. Ct. at 2117 (describing the district court ruling).

93. The Ninth Circuit initially affirmed the district court, but that panel decision was vacated when the Court of Appeal agreed to hear the case *en banc*. The full court held that disparate impact analysis could be applied to subjective hiring practices and that once plaintiff has shown disparate impact caused by specific employment practices, the burden shifts to the employer to prove the business necessity of the challenged practices. Atonio v. Wards Cove Packing Co., 810 F.2d 1477, 1482, 1485 (9th Cir. 1987). The case was remanded to the panel, which ruled that the cannery workers had made out a *prima facie* case of disparate impact in hiring for both the skilled and unskilled positions. The panel thus reversed and remanded to the district court with instructions that it determine whether employer had met its burden of business necessity. 827 F.2d 439 (9th Cir. 1987).

94. Justice White was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia and Kennedy. Justice Stevens, joined by Justices Brennan, Marshall and Blackmun dissented. 109 S. Ct. at 2127; *see also id.* at 2136 (Blackmun, J., dissenting).

95. The lower court's theory, he observed,

> at the very least, would mean that any employer who had a segment of his work force that was — for some reason — racially imbalanced, could be haled into court and forced to engage in the expensive and time-consuming task of defending the 'business necessity' of the methods used to select the other members of his work force.

Id. at 2122. Thus, [t)]e only practicable option for many employers will be to adopt racial quotas . . . .; this is a result that Congress expressly rejected in drafting Title VII." *Id.*

96. The Court, citing Hazelwood School District v. United States, 433 U.S. 299 (1977), held that a racial imbalance in one segment of an employer's workforce does not, without more, establish a *prima facie* case of disparate impact with respect to other positions. "If 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." 109 S. Ct. at 2122.

97. *See also* Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988).

98. Reliance on bottom-line statistical balance was held to be insufficient for purposes of establishing a *prima facie* case. In addition, the plaintiff is responsible for isolating and identifying the specific employment practices that are allegedly responsible for the disparity. *Wards Cove*, 109 S. Ct. at 2125.

99. *Id.* at 2124-25 (In addition to statistical disparity, plaintiff must also "demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack. Such a showing is an integral part of the plaintiff's *prima facie* case in a disparate impact suit under Title VII.")

burden of production—but not the ultimate burden of proof[100]—shifts to the employer, who must then present a business justification for the conduct said to have caused the disparity (*i.e.*, that the "challenged practice serves, in a significant way, the legitimate goals of the employer").[101] Even in such circumstances, plaintiffs can prevail if they can demonstrate that the business explanation is pretextual (*i.e.* a pretext for racial motives). Alternatively, plaintiffs can prevail if " 'other tests or selection devices, without similarly unadvisable racial affect' " are available without undue expense and would serve the employer's interest equally well.[102]

Wards Cove and *Price Waterhouse* broke no new ground,[103] but they did provide much needed clarification in an area of the law that had become badly muddled by the lower courts.[104] Plaintiffs with a claim of discrimination must now prove discrimination, whether their case proceeds on a theory of disparate treatment, disparate impact or mixed-motives. In light of *Wilks*, which reopens courthouse doors to all individuals with such claims, both minorities and nonminorities alike, it is particularly gratifying to have one set of legal rules applying to all claimants, whatever their race or skin color.

There is one final caveat to add from the Court's 1989 term. In *Patterson v. McLean Credit Union*,[105] a Black woman, Brenda Patterson, claiming racial harassment and promotion discrimination, brought a suit under 42 U.S.C. § 1981, an early civil rights statute enacted in 1866. After reaffirming that the referenced statutory prohibition against race discrimination in "the making and enforcing of contracts" applied to private as well as public contract arrangements,[106] the Court ruled that the employee's racial harassment complaint pertained neither to the "making" of her contract, nor to its "enforcement."[107] Consequently, § 1981 was the wrong statute for her to have used;[108] rather, the Court's majority noted, she should have pursued her harassment claim under Title VII.[109]

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100. *Id.* at 2126.

> We acknowledge that some of our earlier decisions can be read as suggesting [that the burden of proof shifted]. But to the extent that those cases speak of an employers' "burden of proof" with respect to a legitimate business justification defense, they should have been understood to mean an employer's production—but not persuasion—burden.

Id.

101. *Id.* at 2125-26.

102. *Id.* at 2126 (quoting Albemarle Paper Company v. Moody, 422 U.S. 405, 425 (1975)). An employer's refusal to adopt realistic alternatives would, the Court noted belie its claim that the "incumbent practices are being employed for non-discriminatory reasons." *Id.* The Court further admonished, however, that such alternatives must be at least as effective as the methods currently in use, must not be unduly expensive, and should be imposed by a court only sparingly, given that " '[c]ourts are generally less competent than employers to restructure business practices.' " *Id.* at 2127 (quoting Furnco Construction Corp. v. Waters, 438 U.S. 567, 578 (1978)).

103. *See supra* notes 89 and 97, and accompanying text.

104. *See supra* note 29.

105. 109 S. Ct. 2363 (1989).

106. *Id.* at 2369-72. *See also id.* at 2379-88 (Brennan, J., concurring in part, dissenting in part).

107. *Id.* at 2372-77.

108. The Court did find that plaintiff had a cognizable promotion discrimination claim under Section 1981. It held that the determining factor for discerning whether a promotion claim may be actionable under the early civil rights statute is whether the nature of the change in position is such that it involves the opportunity to enter into a "new contract" with the employer. The promotion must rise to the level of an opportunity for a new and distinct relationship between the employer and the employee to be actionable. *Id.* at 2377.

109. *Id.* at 2374.

The lesson to be learned from *Patterson* is to pick statutes carefully. There are many federal civil rights laws that ban discrimination on a number of grounds, including race, but all are not identical. Because Congress has prescribed different coverage under different statutes, it is important that plaintiffs come into court under the correct law in order to avoid the same fate that greeted Brenda Patterson's harassment charge. For the Court, in keeping with the basic separation-of-powers principle that legislatures make laws and courts merely enforce them, has shown that it will not stretch the law beyond its specific language to accommodate certain discrimination claims brought under the incorrect statute.

III. CONCLUSION

There has been much written and spoken about the Supreme Court's civil rights rulings over the past several years, not all of it complimentary.[110] When the political hyperbole is filtered out, however, and we are finally left with a dispassioned analysis of the several opinions, there is much for every American committed to racial equality to applaud. The principle of "equal rights under law" remains at the center of the civil rights galaxy and the fleeting flirtation with racial preferences as a means of achieving proportionality has just about run its unsuccessful course. Goals, quotas and set-asides based on group color distinctions are usable according to the Court, but only sparingly — as a last resort remedy to cure persistent and egregious discriminatory conduct that refuses to yield to neutral measures.

Once again, we have come through a "rights of passage" in this country's quest for racial equality. On each prior occasion, the emerging attitude is one of increasing tolerance for color and ethnic differences.[111] There is no reason to expect otherwise this time. The policies that once preserved second-class citizenship for minorities, that have told Blacks and other minorities they are incapable of competing with nonminorities on the same terms and conditions, have left a legacy of failure and inferiority among the very people in society who were intended to be most served. Affirmative action preferences have done next to nothing to reduce the long unemployment lines, overwhelmingly populated by minorities, or provide needed education to those minorities left ill-equipped by our public school systems to compete for available jobs.

The Supreme Court has opened the way to refocus the civil rights agenda

110. *See, e.g.*, N. SCHWARTZ, THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT 1969-1986 (1987); *But see* Reynolds, *The Burger Years: A Critical Look at the Critics' Intent*, 82 NW. U.L. REV. 818, 827-32 (1988); Daly, *Stotts' Denial of Hiring and Promotion Preferences for Nonvictims: Draining the "Spirit" from Title VII*, 14 FORDHAM URB. L.J. 17 (1986); Norton, *Equal Employment Law: Crisis in Interpretation — Survival Against the Odds*, 62 TUL. L. REV. 681 (1988); Days, *supra*, note 66; Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327 (1986); Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985); T. SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? (1984); Bohrer, *Bakke, Weber and Fullilove: Benign Discrimination and Congressional Power to Enforce the Fourteenth Amendment*, 56 IND. L.J. 473 (1981); Richards, *Equal Protection and Racial Quotas: Where Does Fullilove v. Klutznick Leave Us?*, 33 BAYLOR L. REV. 601 (1981); Jones, *Litigation Without Representation: The Need for Intervention to Affirm Affirmative Action*, 14 HARV. C.R.-C.L. L. REV. 31 (1979); Neuborne, *Observations on Weber*, 54 N.Y.U. L. REV. 546 (1979); Bell, *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 3 (1979); Bell, *Introduction: Awakening After Bakke*, 14 HARV. C.R.-C.L. L. REV. 1 (1979).

111. *See* Reynolds, *The Reagan Administration's Civil Rights Policy: The Challenge for the Future*, 42 VAND. L. REV. 993 (1989).

on meaningful policies that emphasize education above all else and provide helpful training programs to those untrained in the practicalities of the workforce. Access to jobs and business opportunities makes sense only for those who have been equipped with the knowledge and skills necessary to perform once they are selected. If Congress can be made to appreciate this fact of life, it will accord to those of its members who persist in advocating racially divisive goals, quotas and set-asides as a needed legislative "fix" the disrespect their proposals deserve. Congress should turn instead to conservative policies aimed not at artificial numerical solutions but at closing real educational and economic disparities between the races. Therein lies the challenge for the last decade of this century.