Major U.S. Supreme Court Civil Rights and Affirmative Action Decisions: January-June 1989

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I. INTRODUCTION

Of all the civil rights issues which the United States Supreme Court has grappled with in recent years, none has been as divisive as employment discrimination and affirmative action. Hence, it is not surprising that the Court has often failed to send clear signals to the country as to the proper limits of affirmative action remedies in employment discrimination cases. For example, in the leading case of *Griggs v. Duke Power Co.*, decided in 1971, the Court ruled unanimously that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed" in title VII of the Civil Rights Act of 1964. The Court in *Griggs* also ruled that job qualification standards must be related to job performance and placed on employers the burden of proving, as an affirmative defense, that practices shown to have a discriminatory or disparate impact on racial minorities are actually justified by business necessity.

In *Furnco Construction Corp. v. Waters*, decided in 1978, the Court stated that "[i]t is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force."
Yet, just one year later, in *United Steelworkers of America, AFL-CIO v. Weber*,\(^8\) the Court ruled that it is lawful, under title VII, for a private employer (Kaiser Aluminum & Chemical Company in Louisiana) to voluntarily establish quotas or preferences for black workers in order to eliminate racial imbalance in traditionally white-only job categories, provided that these quotas do not "unnecessarily trammel" the interests of white employees.\(^9\) And, in 1980, in *Fullilove v. Klutznick*,\(^10\) the Court upheld a 10% minority set-aside in a federal public works law enacted by Congress.\(^11\) On the other hand, in *Firefighters Local Union No. 1784 v. Stotts*,\(^12\) decided in 1984, the Court held that title VII bars a court from ordering an employer to lay off employees with greater seniority in favor of those with lesser seniority, in order to preserve a certain percentage of blacks in the work force.\(^13\)

In 1986, in *Local 28 of the Sheet Metal Workers' International Association v. Equal Employment Opportunity Commission*,\(^14\) where there existed egregious union discrimination for many years, coupled with defiance of numerous injunctions to cease discrimination,\(^15\) the Court approved a lower court order that imposed on the union a race-conscious numerical remedy; a goal of 29% black and Hispanic membership.\(^16\) The following year, in *United States v. Paradise*,\(^17\) the Court upheld a

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Brennan, J. *Id.* at 568.
9. *Id.* at 208.
11. *Id.* at 492. The Court decided this case five to three with Burger, C.J., announcing the plurality opinion in which White and Powell, J.J., joined. Powell, J., also filed a concurring opinion. Marshall, J., filed a concurring opinion which was joined by Brennan and Blackmun, J.J. Stewart, J., filed a dissenting opinion which was joined by Rehnquist, J., Stevens, J., filed a separate dissenting opinion. *Id.* at 452.
15. *Id.* at 433.
16. *Id.* at 440-41. This case was narrowly decided five to four. Brennan, J., announced the Court's judgment and wrote an opinion in which Marshall, Blackmun, Powell, Stevens and O'Connor, J.J., joined in part. Powell, J., also filed an opinion concurring in part and concurring in judgment. O'Connor, J., filed an opinion concurring in part and dissenting in part. White, J., filed a dissenting opinion. Rehnquist, J., filed a dissenting opinion as well, which Burger, C.J., joined. *Id.* at 424.
promotion quota imposed by a lower court after a finding of persistent discrimination against blacks by the state of Alabama in hiring and promoting highway patrol officers. The plan required the state to promote one black trooper for each white from a pool of qualified candidates, even if the whites scored higher on tests. Also in 1987, in *Johnson v. Transportation Agency, Santa Clara County, California*, the Court rejected a challenge by a white male to a voluntary affirmative action plan implemented by a public agency to redress underrepresentation of women and minorities in skilled job classifications. This plan gave a road dispatcher job to a white woman who had scored slightly less than the man on an oral examination.

These are a few of the many possible illustrations of how the Supreme Court has been divided in affirmative action cases, depending on the facts of the cases and the perceptions at the time of the Justices who heard them. It should be stressed that employment discrimination cases are complicated ones and their facts differ widely. The law regarding these cases is by no means crystal clear. Further, the Justices have always been

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18. *Id.* at 185-86. This case was also a narrow five to four decision. Brennan, J., announced the Court's decision and wrote an opinion in which Marshall, Blackmun and Powell, JJ., joined. Powell and Stevens, JJ. filed concurring opinions. O'Connor and White, JJ., filed dissenting opinions; Rehnquist, C.J., and Scalia, J., joined Justice O'Connor's dissent. *Id.* at 152.

19. *Id.* at 154-57.


21. *Id.* This case was decided six to three with Brennan, J., writing the majority opinion in which Marshall, Blackmun, Powell and Stevens, JJ., joined. Stevens and O'Connor, JJ., filed concurring opinions. Scalia and White, JJ., wrote dissenting opinions with Rehnquist, C.J., and White, J., joining Justice Scalia's dissent in part. *Id.* at 618. The plan was instated by the agency involved in response to a general directive by the county to take such initiatives. *Id.* at 620.

22. *Id.* at 623-25. The white male began in 1967 as a road clerk and in 1974 unsuccessfully applied for a road dispatcher position. In 1977 his clerical position was downgraded. *Id.* at 623.

23. See also Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989) (§ 1981 of the Civil Rights Act prohibits racial discrimination in connection with making and enforcing private contracts and the challenger of an employer's action need only show, by a preponderance of the evidence, that he or she is qualified for the position in question, not that he or she is more qualified than the person who received the position); Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989) (employer has the burden of showing, by a preponderance of evidence, that the employer would have made the same decision regardless of the employee's gender even when a prima facie case of sexual discrimination exists); Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) (unions involved had violated § 1981 of the Civil Rights Act of 1866 and title VII of the Civil Rights Act of 1964 by deliberately refusing to assert claims of racial discrimination against an employer on behalf of a union member-employee).
sharply split and at least some of them have been deeply ambivalent about the wisdom and proper scope of preferential remedies based on race or sex that were designed to cure historic discrimination.  

II. CITY OF RICHMOND v. J.A. CROSON Co.

In this ruling, handed down on January 23, 1989, the Supreme Court invalidated a Richmond law that channeled 30% of public works funds to minority-owned construction companies. In so doing, the Court considered serious constitutional questions about a variety of governmental contract and hiring programs designed to aid racial minorities.

In six separate opinions the Court ruled that the Richmond ordinance, similar to minority set-aside programs in 36 states and nearly 200 local governments, violated the constitutional right of white contractors to equal protection of the laws under the fourteenth amendment. The opinion announcing the decision of the Court, written by Justice Sandra Day O'Connor, stated that such programs could be justified only if they served the "compelling state interest" of redressing "identified discrimination," whether by the government itself or by private parties. "Societal" discrimination alone will not suffice to justify affirmative action.

26. Id. at 730.
27. Id. at 718. "[F]irst, were the objectives of the legislation within the power of Congress? Second, was the limited use of racial and ethnic criteria a permissible means for Congress to carry out its objectives within the constraints of the Due Process Clause?" Id. (citing Fullilove v. Klutznick, 448 U.S. 448, 473 (1980)).
28. The Court reached its decision in a six to three vote. O'Connor, J., delivered the opinion of the Court with respect to Parts I, III-B, and IV, in which Rehnquist, C.J., and White, Stevens and Kennedy, JJ., joined, an opinion with respect to Part II, in which Rehnquist, C.J., and White, J., joined, and an opinion with respect to Parts III-A and V, in which Rehnquist, C.J., and White and Kennedy, JJ., joined. Stevens and Kennedy, JJ., filed opinions concurring in part and concurring in the judgment. Scalia, J., filed an opinion concurring in the judgment. Marshall, J., filed a dissenting opinion in which Brennan and Blackmun, JJ., joined. Blackmun, J., filed a dissenting opinion in which Justice Brennan joined. Id. at 712.
29. Id. at 730.
30. Id. at 727 ("We, therefore, hold that the city has failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race.").
31. Id. "[T]here is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." Id. at 721.
32. Id. at 724.
programs.\textsuperscript{33} Justice O'Connor held that all racial quotas need to be justified by more than the general goal of attempting to remedy past discrimination.\textsuperscript{34} She also stated that the statistical disparities in \textit{Croson} fell far short of proving that specific acts of discrimination had occurred.\textsuperscript{35} In her words, "an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota."\textsuperscript{36} Yet, in the five years before the set-aside ordinance took effect, fewer than 1\% of Richmond's construction contracts went to minority businesses.\textsuperscript{37} After that, it rose to the mandated 30\%.\textsuperscript{38} Then, in 1987 when a lower court invalidated the set-aside, contracts awarded to blacks fell to 2\%.\textsuperscript{39}

In distinguishing the Court's decision in the earlier case of \textit{Fullilove v. Klutznick},\textsuperscript{40} Justice O'Connor noted in the \textit{Croson} case that the actions by Congress to redress racial discrimination rested on a solid constitutional base which is not available to states and localities.\textsuperscript{41} Section 5 of the fourteenth amendment gave Congress alone broad discretion to decide what is necessary to promote racial equality.\textsuperscript{42} Justice O'Connor found not a shred of evidence of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo or Aleut persons in any part of Richmond's construction industry.\textsuperscript{43} Hence, she declared that Richmond's random inclusion of those minority groups strongly impugns the city's claim of remedial motivation.\textsuperscript{44} Moreover, in her view, the plan was not narrowly tailored to remedy the effects of prior discrimination because it entitled racial minority entrepreneurs from anywhere in the country to an absolute preference over other citizens,

\begin{itemize}
  \item 33. \textit{Id.} at 725.
  \item 34. \textit{Id.} at 723-24.
  \item 35. \textit{Id.} at 725.
  \item 36. \textit{Id.} at 724.
  \item 37. \textit{Id.} at 714.
  \item 38. \textit{Id.}
  \item 40. 448 U.S. 448 (1980). See also supra notes 10-11 and accompanying text.
  \item 41. \textit{Croson}, 109 S. Ct. at 719.
  \item 42. \textit{Id.}; see also U.S. CONST. amend. XIV, § 5.
  \item 44. \textit{Id.} at 728. Justice O'Connor stated that "[t]he dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs." \textit{Id.} at 727.
\end{itemize}
based solely on their race.\textsuperscript{45}

Justice O'Connor concluded that if the city could identify past discrimination in the local construction industry with the particularity required by the equal protection clause, the city would have the power to adopt race-based legislation designed to eradicate the effects of that discrimination.\textsuperscript{46} She also stated that "where special qualifications [for employment] are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task."\textsuperscript{47} In light of this rationale, the most pressing question would seem to be the nature and content of the evidence a local government would have to amass to meet the Court's stringent criteria.

Justice Thurgood Marshall wrote a scathing dissent, joined by Justices William J. Brennan, Jr., and Harry A. Blackmun, which stated:

Cynical of one municipality's attempt to redress the effects of past racial discrimination in a particular industry, the majority launches a grapeshot attack on race-conscious remedies in general. The majority's unnecessary pronouncements will inevitably discourage or prevent governmental entities, particularly States and localities, from acting to rectify the scourge of past discrimination. This is the harsh reality of the majority's decision, but it is not the Constitution's command.\textsuperscript{48}

Although there is language in the majority and concurring opinions that understandably is disquieting to supporters of far-reaching affirmative action, the Supreme Court certainly did not invalidate all government-sponsored affirmative action programs. Nor did the Justices completely bar minority set-asides; the kind of affirmative action that was directly at issue in this case. The Court did say, however, that all racial classifications are equally suspect and will be subjected to "strict scrutiny."\textsuperscript{49} Thus, any

\textsuperscript{45} Id.
\textsuperscript{46} Id. at 726-27. Justice O'Connor stated that "[w]hile the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief." Id. at 727.
\textsuperscript{47} Id. at 725 (citing Hazelwood School Dist. v. United States, 433 U.S. 299, 308 (1977); Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 651-52 (1987) (O'Connor, J., concurring)).
\textsuperscript{48} Id. at 740 (Marshall, J., dissenting).
\textsuperscript{49} Id. at 721.
law that gives members of one race a preference must be tailored as narrowly as possible to meet the "compelling state interest" of curing identified discrimination in order to survive a constitutional challenge.\textsuperscript{50} The problem, however, is that the thrust of the \textit{Croson} decision, and at least some of the language of the majority and concurring opinions, may well have a detrimental effect on affirmative action programs in general.

III. \textit{PRICE WATERHOUSE v. HOPKINS}\textsuperscript{51}

On May 1, 1989, the Supreme Court, in a technical and complicated case of alleged intentional discrimination, ruled that an employer has the burden of proving that its refusal to hire or promote a person is based on non-discriminatory grounds.\textsuperscript{52} Price Waterhouse claimed that a female employee who was refused partnership in the accounting firm had the burden of proving that the employer's discriminatory practices cost her that position, rather than legitimate prior judgments proving her capabilities.\textsuperscript{53}

The Court, in an opinion by Justice Brennan rejecting the accounting firm's argument, held that evidence that Ms. Hopkins was evaluated by her male supervisors on the basis of stereotyped views of appropriate female appearance and behavior can establish the existence of unlawful sex-discrimination.\textsuperscript{54} Once the plaintiff proved that her gender played a part in the employment decision, the defendant may avoid liability by proving, by a preponderance of the evidence, that it would have made the same decision even if it had not taken plaintiff's gender into account.\textsuperscript{55}

The District of Columbia Circuit Court of Appeals had ruled that Price Waterhouse was required to submit "clear and convincing" proof that its reasons for denying a partnership to Ms. Hopkins were non-discriminatory.\textsuperscript{56} However, the Supreme Court lowered the firm's burden of proof by ruling that it should have been held to the lesser standard of "a preponderance of the evidence" in supporting its claim that it had

\begin{itemize}
\item \textsuperscript{50} \textit{Id.}
\item \textsuperscript{51} 109 S. Ct. 1775 (1989).
\item \textsuperscript{52} \textit{Id.} at 1790 (Brennan, J., plurality opinion) (6-3 decision).
\item \textsuperscript{53} See \textit{id.} at 1784.
\item \textsuperscript{54} \textit{Id.} at 1791. One partner described her as "macho," another advised her to take "a course at charm school," several criticized her use of profanity. \textit{Id.} at 1782.
\item \textsuperscript{55} \textit{Id.} at 1791-92.
\item \textsuperscript{56} Hopkins v. Price Waterhouse, 825 F.2d 458, 471 (D.C. Cir. 1987) (relying on Toney v. Block, 705 F.2d 1364 (D.C. Cir. 1983)).
\end{itemize}
legitimate reasons to deny her a partnership.\textsuperscript{57} The case was remanded to the lower court for reconsideration under the less rigorous standard.\textsuperscript{58}

It should be stressed that this case involves an allegation of intentional discrimination, rather than a case of disparate treatment or impact without direct evidence of the intent to discriminate.\textsuperscript{59} The nature of the case is important because it relates to the critical question of who has the burden of proof. In this case there was evidence that the employer's denial of a partnership to the female plaintiff may have been based on both legitimate and discriminatory reasons.\textsuperscript{60} In such a "mixed motive" case, the burden of proof may be almost insurmountable to a plaintiff who has some evidence of discrimination, but who lacks sufficient information to show that discrimination was the crucial factor. Hence, the Court's ruling is significant in that an employer now has the burden of proving that its refusal to promote was based on legitimate reasons rather than any discriminatory reasons. The Court, therefore, made it easier for a plaintiff to prevail upon a charge of intentional discrimination or disparate treatment in employment based upon sex, race or age.

There was no single majority opinion in the case. Justice Brennan's opinion, representing a plurality, was joined by Justices Marshall, Blackmun and Stevens.\textsuperscript{61} Justice White wrote a separate concurring opinion,\textsuperscript{62} as did Justice O'Connor.\textsuperscript{63} The chief difference between these concurring opinions, and that of Justice Brennan's plurality, was that the concurring Justices would require a plaintiff to initially show that discrimination was at least a "substantial" factor in the employer's decision adverse to the plaintiff.\textsuperscript{64} The employer would then have to prove that the adverse decision would have been made anyway.\textsuperscript{65} In contrast, Justice Brennan's opinion requires the plaintiff to initially show only that discrimination was a "motivating" factor in the adverse decision.\textsuperscript{66}

\textsuperscript{57} Price Waterhouse, 109 S. Ct. at 1792 (Brennan, J., plurality opinion).
\textsuperscript{58} Id. at 1793.
\textsuperscript{60} Price Waterhouse, 109 S. Ct. at 1791-92 (Brennan, J., plurality opinion).
\textsuperscript{61} Id. at 1781.
\textsuperscript{62} Id. at 1795 (White, J., concurring).
\textsuperscript{63} Id. at 1796 (O'Connor, J., concurring).
\textsuperscript{64} Id. at 1795 (White, J., concurring); id. at 1804 (O'Connor, J., concurring).
\textsuperscript{65} Id. at 1795 (White, J., concurring); id. at 1796 (O'Connor, J., concurring).
\textsuperscript{66} Id. at 1787 (Brennan, J., plurality opinion).
Justice Kennedy dissented, in an opinion joined by Chief Justice Rehnquist and Justice Scalia. In the view of these Justices, the plaintiff had failed to meet the requisite standard of proof of discrimination. The dissenters also contended that the Court's approach to the complex rules for judging employment discrimination cases is "certain to result in confusion." Justice Kennedy stated:

The ultimate question in every individual disparate treatment case is whether discrimination caused the particular decision at issue.

... That decision was for the finder of fact, however, and the District Court made plain that sex discrimination was not a but-for cause of the decision to place Hopkins' partnership candidacy on hold.

... Hopkins thus failed to meet the requisite standard of proof after a full trial.

IV. WARDS COVE PACKING CO. v. ATONIO

The issue considered by the Supreme Court is whether employers who are sued under title VII have the burden of justifying, on grounds of "business necessity," practices that are shown to have a discriminatory impact on minorities or women. On June 5, 1989, the Supreme Court narrowly said "no." The Court ruled that when a title VII plaintiff uses statistics to establish a prima facie case of unlawful discrimination, the employer must provide evidence only of a legitimate reason for the challenged practice. Further, the Court held that the burden of proving that such a practice is not a form of unlawful discrimination does not shift to the employer. Justice White, who delivered the opinion of the Court, declared that "the plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely

67. Id. at 1806 (Kennedy, J., dissenting).
68. Id. at 1814.
69. Id. at 1806.
70. Id. at 1813-14.
72. Id. at 2119.
73. This case was decided five to four. Id. at 2118.
74. Id. at 2125-26.
75. Id. at 2126.
on a legitimate neutral consideration.\textsuperscript{76}

The decision also limited the type of statistical evidence that minorities can use to prove discrimination.\textsuperscript{77} In this regard, Justice White stated that a lack of minority group members in skilled jobs is not valid evidence if that statistic merely reflects "a dearth of qualified non-white applicants (for reasons that are not [an employer's] fault) . . . ."\textsuperscript{78}

The case arose when nonwhite workers at the company's Alaskan salmon canneries charged that the company's hiring and promotion practices caused racial stratification in the workforce.\textsuperscript{79} Eskimo and Filipino workers on the factory lines allegedly were denied access to the better-paid skilled jobs, which were filled predominantly by white workers.\textsuperscript{80} The Court ruled that a comparison of the percentage of nonwhite cannery workers with the percentage of nonwhite non-cannery workers does not in itself establish a prima facie "disparate impact" case.\textsuperscript{81} Rather, said the Court, "[t]he proper comparison [is] between the racial composition of [the jobs in question] and the racial composition of the qualified . . . population in the relevant labor market."\textsuperscript{82} A mere showing that nonwhites are underrepresented in the skilled jobs will not suffice.\textsuperscript{83} The Court stated that the lower courts must require proof that the statistical disparity complained of is the result of the employment practices that are being attacked, specifically showing that each challenged practice has a significant "disparate impact" on employment opportunities for nonwhites.\textsuperscript{84}

Justice White stated that the plaintiffs must show not only that specific policies created the disparities, but that the employer had no legitimate business justification for the practices in question.\textsuperscript{85} In his view, this "burden of persuasion" fell naturally on title VII plaintiffs, rather than on the employer, because it is the plaintiffs who must prove that they

\textsuperscript{76} Id. (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256-58 (1981)).
\textsuperscript{77} Id. at 2121-23.
\textsuperscript{78} Id. at 2122 (footnote omitted).
\textsuperscript{79} Id. at 2119-20.
\textsuperscript{80} Id. at 2119.
\textsuperscript{81} Id. at 2123.
\textsuperscript{82} Id. at 2121 (quoting Hazelwood School Dist. v. United States, 433 U.S. 299, 308 (1977)).
\textsuperscript{83} Id. at 2122.
\textsuperscript{84} Id. at 2125.
\textsuperscript{85} Id. at 2126. Justice White's opinion was joined by Rehnquist, C.J., and O'Connor, Scalia and Kennedy, JJ. Stevens, J., filed a dissenting opinion, as did Blackmun, J. Brennan and Marshall, JJ., joined both dissenting opinions. Id. at 2118.
were discriminated against. The Court remanded the case to the lower court with instructions to permit the plaintiffs to show, on some other basis, that the underrepresentation of minority groups in the skilled jobs violated title VII. In sum, the Court made it significantly easier for employers to defend hiring and promotion practices that may have a discriminatory impact on members of racial minorities and women.

The dissenters accused the Court of rejecting its own previous rulings in title VII cases and of turning its back on the nation's long history of racial discrimination. In the words of Justice Blackmun's brief dissent: "One wonders whether the majority still believes that race discrimination -- or, more accurately, race discrimination against nonwhites -- is a problem in our society, or even remembers that it ever was." In Justice Steven's lengthy dissent, he stated:

"Fully 18 years ago, this Court unanimously held that Title VII of the Civil Rights Act of 1964 prohibits employment practices that have discriminatory effects as well as those that are intended to discriminate.

Decisions of this Court and other federal courts repeatedly have recognized that while the employer's burden in a disparate treatment case is simply one of coming forward with evidence of legitimate business purpose, its burden in a disparate impact case is proof of an affirmative defense of business necessity."

Although this decision does not explicitly overrule the Court's decision in Griggs, implicitly at least, it comes very close to having done so, and thus represents a measurable setback to the cause of equal employment opportunity for racial minorities and women.

86. Id. at 2126.
87. Id. at 2126-27.
88. Id. at 2127 (Stevens, J., dissenting); id. at 2136 (Blackmun, J., dissenting). Brennan and Marshall, JJ., joined in both dissenting opinions. Id. at 2118.
89. Id. at 2136 (Blackmun, J., dissenting).
90. Id. (citation omitted).
91. Id. at 2127-30 (Stevens, J., dissenting) (footnotes omitted) (citing in part Griggs v. Duke Power Co., 401 U.S. 424 (1971)).
92. While this decision appears at first glance to contradict the Court's ruling in Price Waterhouse, where the Court ruled that the employer has the burden of proving that a refusal to promote is based on nondiscriminatory grounds, the two cases are reconcilable. Unlike Wards Cove, the plaintiff in Price Waterhouse charged intentional discrimination
The issue in this case was whether white men who were not involved in litigation leading to a court-approved affirmative action plan, which gave preferences to minorities or women, could subsequently challenge such a plan as violating title VII. The Supreme Court held that they could do so and that such suits may be filed even years after the affirmative action plan took effect. Interpreting the Federal Rules of Civil Procedure, Chief Justice Rehnquist wrote for the Court: "A voluntary settlement in the form of a consent decree between one group of employees and their employer cannot possibly 'settle,' voluntarily or otherwise, the conflicting claims of another group of employees who do not join in the agreement."

This decision permitted white firefighters in Birmingham, Alabama, to attack an eight-year old, court-approved settlement which was intended to increase the number of blacks hired and promoted by the fire department. Consent decrees that have settled many racial discrimination suits, and which have long been regarded as immune to subsequent legal challenge by outside parties, may now be only the opening round in a new phase of ongoing litigation. The Court thus rejected a doctrine known as "impermissible collateral attack," which would protect parties to a consent decree from charges of discrimination by nonparties based on actions mandated by the decree. The ruling, because it involves the interpretation of the Federal Rules of Civil Procedure, also applies to all types of decrees including those that resolve sex in a case where the evidence as to the employer's motivation was ambiguous. Compare Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989) (discriminatory practices as a result of a "business necessity" does not shift the burden of proof to the employer) with Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989) (prima facie showing of intentional discrimination shifts the burden of proof to the employer).

94. Id. at 2181.
95. Id. at 2180-82. Rehnquist, C.J., wrote the five to four majority opinion which was joined by White, O'Connor, Scalia and Kennedy, JJ. Stevens, J., dissented and was joined by Brennan, Marshall and Blackmun, JJ. Id. at 2182.
96. Id. at 2188.
97. Id. at 2182-83.
98. See id. at 2184. The Court decided that the strong public policy in favor of voluntary affirmative action plans "must yield to the policy against requiring third parties to submit to bargains in which their interests were either ignored or sacrificed." Id. (quoting In re Birmingham Reverse Discrimination Employment Litig., 833 F.2d 1492, 1498 (1987)).
99. Id. at 2185.
The Court did not indicate whether any time limits would be placed on such subsequent actions, which Chief Justice Rehnquist characterized as "reverse discrimination" suits. In his opinion, the Chief Justice acknowledged the prevailing judicial view that if individuals choose not to intervene in a suit that might ultimately affect them, "they should not be permitted to later litigate the issues in a new action." The Chief Justice stated that "[t]he position has sufficient appeal to have commanded the approval of the great majority of the federal courts of appeals, but we agree with the contrary view expressed by the Court of Appeals for the Eleventh Circuit in this case." In the majority's view, "[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." Based on this broad language, the decision opens to subsequent dispute not merely court-approved settlements but also judgments resulting from full trials.

The Birmingham firefighters' case began in the early 1970's when the local chapter of the NAACP Legal Defense and Education Fund, Inc., supported by the United States government, sued the city of Birmingham in Jefferson County, Alabama, claiming racially discriminatory hiring and promotion practices by the fire department. After several years of litigation a settlement was reached, but the union that represented the department's almost completely white workforce objected to it. The district court approved the settlement and entered a consent decree under which blacks and whites would be hired and promoted in equal numbers until the number of black firefighters approximated the proportion of blacks in the civilian labor force. Several months later a group of white firefighters sued the city, arguing that the consent decree illegally discriminated against them. The district court dismissed this suit on the ground that the city could not be guilty of discrimination if it was

100. Id. The Court stated its analysis in general and broadly applicable terms. "[A] party seeking a judgment binding on another cannot obligate that person to intervene; he must be joined." Id. (citing Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 110 (1969)).
101. See id. at 2187.
102. Id. at 2185 (the Chief Justice's opinion was joined by White, O'Connor, Scalia and Kennedy, JJ.).
103. Id. (footnote omitted).
104. Id. at 2184 (footnote omitted).
105. Id. at 2183.
106. Id.
107. Id.
108. Id.
complying with the mandate of a consent decree. In 1987, the Eleventh Circuit Court of Appeals reversed the district court's dismissal and reinstated the white firefighters' discrimination suit. The city, along with a group of black firefighters, then appealed to the Supreme Court.

Justice Stevens filed a dissenting opinion, warning that the decision would serve to discourage voluntary settlements of discrimination complaints. Justice Stevens stated:

In a case such as this... in which there has been no showing that the decree was collusive, fraudulent, transparently invalid, or entered without jurisdiction, it would be "unconscionable" to conclude that obedience to an order remedying a Title VII violation could subject a defendant to additional liability.... Any other conclusion would subject large employers who seek to comply with the law by remedying past discrimination to a never-ending stream of litigation and potential liability. It is unfathomable that either Title VII or the Equal Protection Clause demands such a counter-productive result.

This decision is most unsettling. By enabling interested parties, such as white males, to reopen discrimination cases long believed to have been closed due to court-approved consent decrees, it may have the effect of unraveling significant gains in employment by racial minorities and women that had been thought secure.

VI. Lorance v. AT & T Technologies, Inc.

Before 1979, collective-bargaining agreements between AT & T Technologies, Inc., and Local 1942, International Brotherhood of Electrical

109. Id. at 2183-84.
110. See In re Birmingham Reverse Discrimination Employment Litig., 833 F.2d 1492 (11th Cir. 1987). The court of appeals stated that "[b]ecause... [the Wilks respondents] were neither parties nor privies to the consent decrees, their independent claims of unlawful discrimination are not precluded." Id. at 1498.
112. Martin, 109 S. Ct. at 2188 (Stevens, J., dissenting).
113. Id. at 2199-200.
Workers, AFL-CIO, had determined a worker's seniority on the basis of years of plantwide service, and such seniority was transferable upon promotion to a more skilled tester position. A new agreement executed by AT & T in 1979 changed this by making seniority in tester jobs dependent upon the amount of time spent as a tester. During an economic downturn in 1982, three women employees who were promoted to tester positions between 1978 and 1980 received demotions that would not have occurred had the former seniority system remained in place.

The women filed charges with the Equal Employment Opportunity Commission in 1983 and, after receiving right-to-sue letters, filed an action in United States district court. They alleged that the newly adopted seniority system, which protected incumbent and predominately male testers from female employees who had greater plantwide seniority, violated their rights under title VII of the Civil Rights Act of 1964. The district court rejected their claims on the ground that they had not been filed within the required period "after the alleged unlawful employment practice occurred." The Seventh Circuit Court of Appeals affirmed that ruling.

On June 12, 1989, the United States Supreme Court affirmed the court of appeals' judgment, thereby imposing stringent time limitations on the filing of law suits challenging allegedly discriminatory seniority systems. In the opinion, Justice Scalia ruled that such challenges must be brought within 300 days of the adoption of the seniority system that is

115. Id. at 2263.
116. Id.
117. Id. at 2264.
118. Id. (the action was filed in 1983 in the District Court for the Northern District of Illinois).
119. Id. (women were becoming testers in increasing numbers). See also 42 U.S.C. §§ 2000e to 2000e-17 (1988).
120. Lorance, 109 S. Ct. at 2264. The Supreme Court granted certiorari to resolve a circuit conflict on when the limitations period begins to run. Lorance v. AT & T Technologies, Inc., 109 S. Ct. 217 (1988) (mem.). For an example of the circuit court conflict, compare Lorance v. AT & T Technologies, Inc., 827 F.2d 163 (7th Cir. 1987) (statute of limitations begins to run at the time an employee becomes subject to a system that that employee knew, or should have known, was discriminatory) with Cook v. Pan Am. World Airways, Inc., 771 F.2d 635 (2d Cir. 1985) (statute of limitations begins to run upon the employer's last discriminatory act), cert. denied, 447 U.S. 1109 (1986).
121. Lorance, 827 F.2d at 167.
122. Lorance, 109 S. Ct. at 2269. Scalia, J., delivered the five to three opinion of the Court in which Rehnquist, C.J., and White, Stevens and Kennedy, JJ., joined. Stevens, J., filed a concurring opinion. Marshall, J., filed a dissenting opinion in which Brennan and Blackmun, JJ., joined. O'Connor, J., took no part in the decision. Id. at 2263.
alleged to be discriminatory.\textsuperscript{123}

In the opinion for the majority, Justice Scalia stated that the Court's precedents concerning discriminatory seniority systems made it clear that it is the adoption of the system, and not its consequences, that is the "discriminatory act" under title VII.\textsuperscript{124} In his words by "allowing a facially neutral system to be challenged, and entitlements under it to be altered, many years after its adoption would disrupt" the legitimate interests of other employees who relied on the changes.\textsuperscript{125}

In a dissenting opinion, joined by Justices Brennan and Blackmun, Justice Marshall stated that "[n]othing in the text of Title VII compels this result."\textsuperscript{126} He went on to state:

The majority today continues the process of immunizing seniority systems from the requirements of Title VII. In addition to the other hurdles previously put in place by the Court, employees must now anticipate, and initiate suit to prevent, future adverse applications of a seniority system, no matter how speculative or unlikely these applications may be.\textsuperscript{127}

In the view of the dissenting Justices, Congress, in enacting title VII, never intended to confer "absolute immunity on discriminatorily adopted seniority systems that survive their first 300 days."\textsuperscript{128} They accused the majority of a "severe interpretation" of the law, which in effect is not fair to an employee who subsequently challenges a system which, at the time of its adoption, the employee could not reasonably have expected to be detrimental to her or him.\textsuperscript{129}

\section*{VII. \textit{PATTERSON v. MCLEAN CREDIT UNION}}\textsuperscript{130}

The Supreme Court, in an unusual action, decided to reconsider the rights of minorities to sue private parties for racial discrimination

\begin{itemize}
\item 123. \textit{Id.} at 2268-69. The Court pointed out that 42 U.S.C. § 2000e-5(e) requires title VII suits to be filed within 300 days of the alleged discrimination. \textit{Id.} at 2264 n.2 (citing 42 U.S.C. § 2000e-5(e) (1964)).
\item 124. \textit{Id.} at 2269.
\item 125. \textit{Id.}
\item 126. \textit{Id.} at 2270 (Marshall, J., dissenting).
\item 127. \textit{Id.} at 2273.
\item 128. \textit{Id.} at 2270 (footnote omitted).
\item 129. \textit{Id.}
\item 130. 109 S. Ct. 2363 (1989).
\end{itemize}
under the Civil Rights Act of 1866.\textsuperscript{131} Five Justices, over strenuous dissents by the other four,\textsuperscript{132} agreed to consider overruling the Court’s prior decision of \textit{Runyon v. McCrary},\textsuperscript{133} which had expanded minorities’ rights. The Court took this action on its own initiative; the parties in \textit{Patterson} had not sought it.\textsuperscript{134} The Court’s action sent shock waves through the civil rights community.

The majority ordered the lawyers in \textit{Patterson}, a case the Court had already heard, to present new arguments on whether to overturn the earlier ruling.\textsuperscript{135} The issue was whether the Court had erred in its ruling in \textit{Runyon} that the post-Civil War statute, which guaranteed the rights of the newly freed slaves, was intended to bar racial discrimination by private schools, employers and other parties in deciding with whom they will contract or do business.\textsuperscript{136} The statute provides, in pertinent part, that all persons shall have the same right “to make and enforce contracts . . . as is enjoyed by white citizens . . .”\textsuperscript{137}

Until the 1960’s, this statute was used to attack state and local laws that interfered with the business and contractual rights of minorities.\textsuperscript{138} Later, in the 1960’s and 1970’s, civil rights lawyers began using it successfully to attack private discrimination, including private

\textsuperscript{131} Id. at 2369. \textit{See also} Civil Rights Act of 1866, Act of April 9, 1866, ch. 31, 14 Stat. 27 (reenacted as amended pursuant to the ratification of the fourteenth amendment at Enforcement Act of May 31, 1870, ch. 114, 16 Stat. 140 (codified as amended at 42 U.S.C. § 1981 (1988))).

\textsuperscript{132} Kennedy, J., delivered the opinion of the Court in which Rehnquist, C.J., and White, O’Connor and Scalia, JJ., joined. Brennan, J., filed an opinion concurring in the judgment in part and dissenting in part, in which Marshall and Blackmun, JJ., joined and in which Stevens, J., joined in part. Stevens, J., also filed an opinion concurring and dissenting in part. \textit{Id.} at 2368.

\textsuperscript{133} 427 U.S. 160 (1976) (where the Court held seven to two that § 1981 prohibits private schools from excluding children who are qualified for admission, solely on the basis of race).

\textsuperscript{134} \textit{Patterson}, 109 S. Ct. at 2369. After oral argument on certain issues the Court requested the parties to brief and argue an additional question: “Whether or not the interpretation of 42 U.S.C. § 1981 adopted by this Court in \textit{Runyon v. McCrary} should be reconsidered.” \textit{Id.} (citations omitted) (the American Jewish Committee joined in an \textit{amicus} brief with many other civil rights groups urging the Court not to overrule \textit{Runyon}).

\textsuperscript{135} \textit{Id.}

\textsuperscript{136} \textit{Id.} at 2370.

\textsuperscript{137} 42 U.S.C. § 1981.

\textsuperscript{138} \textit{See}, e.g., Johnson v. Yeilding, 165 F. Supp. 76 (N.D. Ala. 1958) (the Personnel Board of Jefferson County, Alabama was challenged for failure to allow minorities to take the examination for the position of police patrolman); Browder v. City of Montgomery, Ala., 146 F. Supp. 127 (M.D. Ala. 1956) (action to restrain city from interfering with the operation of an automobile pool by minorities).
employment discrimination, leading to Runyon.\textsuperscript{139}

The immediate ruling in Runyon was that black people could sue private schools for denying them admission on racial grounds.\textsuperscript{140} The Court's broad reasoning also applied generally in allowing suits by minorities for racial discrimination in private transactions.\textsuperscript{141} One major effect was to give victims of job discrimination broader protections and more potent remedies than are provided by the Civil Rights Act of 1964.\textsuperscript{142} Originally, in Patterson, the Court agreed simply to consider the question of whether a black woman teller at a North Carolina credit union, who said she was harassed and discriminated against by her employer on account of her race, could sue her employer for damages under § 1981.\textsuperscript{143}

On June 15, 1989, the Supreme Court unanimously decided not to overrule Runyon.\textsuperscript{144} Simultaneously, however, the high Court ruled that § 1981 cannot serve as the basis for a lawsuit alleging racial harassment in the workplace.\textsuperscript{145} Justice Kennedy, writing for the Court, stated that while § 1981 did prohibit discrimination at the initial hiring stage, it did not prohibit discriminatory treatment on the job.\textsuperscript{146} In the majority's view, Congress never intended that the Civil Rights Act of 1866 should go any further.\textsuperscript{147} Justice Kennedy wrote that "the right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions."\textsuperscript{148}

Having held as he did, Justice Kennedy nonetheless declared that "[t]he law now reflects society's consensus that discrimination based on the color of one's skin is a profound wrong of tragic dimension."\textsuperscript{149} He stated, moreover, that neither the Court's words nor its decisions "should be interpreted as signaling one inch of retreat from Congress' policy to

\begin{itemize}
\item 140. Id. at 172.
\item 141. Id. at 168-72.
\item 142. Id. at 184-85 (e.g., the ability to sue for punitive damages). See also 42 U.S.C. § 2000e-5(g) (1988).
\item 143. Patterson, 109 S. Ct. at 2369.
\item 144. Id.
\item 145. Id. (5-4 decision).
\item 146. Id. at 2372-73 (Justice Kennedy's opinion was joined by Rehnquist, C.J., and White, O'Connor and Scalia, JJ.).
\item 147. Id. at 2372.
\item 148. Id. at 2373.
\item 149. Id. at 2379.
\end{itemize}
forbid discrimination in the private, as well as the public, sphere."  
Justice Brennan, in his dissent, charged that "[w]hat the Court declines to snatch away with one hand, it takes with the other." He went on to accuse the majority of giving "this landmark civil rights statute a needlessly cramped interpretation." Moreover, Justice Brennan stated that "[w]hen it comes to deciding whether a civil rights statute should be construed to further our Nation's commitment to the eradication of racial discrimination, the Court adopts a formalistic method of interpretation antithetical to Congress' vision of a society in which contractual opportunities are equal."  

After observing that "[s]ome Members of this Court believe that Runyon was decided incorrectly," Justice Kennedy stated that there was no need for the Court to decide whether the Runyon decision was either right or wrong, because it is not "inconsistent with the prevailing sense of justice in this country." Justice Brennan, however, insisted that the Runyon decision was correct at the time it was decided.  

Justice Kennedy did not say what had motivated the Court to order reargument in this case. He did, however, list reasons why the Court had previously overturned precedents and then indicated why these did not apply to the Runyon decision. Justice Kennedy stated that the "primary reason" for the Court to overrule precedents interpreting federal statutes was an "intervening development," either in judicial doctrine or through an act of Congress that has "removed or weakened the conceptual underpinnings from the prior decision." In his opinion he stated that no intervening developments had occurred with respect to Runyon and that Runyon was neither "unworkable [nor] confusing." Justice Kennedy was careful to distinguish between cases interpreting federal law and those interpreting constitutional provisions, noting that considerations of stare decisis have special force in the area of statutory interpretation because

150. Id.  
151. Id. (Brennan, J., dissenting) (joined by Marshall, Blackmun, JJ., and in part, Stevens, J.).  
152. Id.  
153. Id.  
154. Id. at 2370 (majority opinion).  
155. Id. at 2371. Justice Kennedy found that Runyon is consistent with society's commitment to the eradication of discrimination based on a person's race or the color of his or her skin. Id.  
156. Id. at 2380 (Brennan, J., dissenting).  
157. Id. at 2370-71 (majority opinion).  
158. Id. at 2370.  
159. Id. at 2371.
Congress is free to interpret the statute itself if the Court has misinterpreted a congressional action. By contrast, since the Court is the ultimate interpreter of the Constitution, only the Court itself, absent a constitutional amendment, can correct an interpretation it later comes to view as erroneous.

Whatever one's view may be as to the correct interpretation of § 1981, there can be little doubt that the Court's restrictive interpretation severely weakens it as a weapon against discrimination in employment.

VIII. **Jett v. Dallas Independent School District**

This case concerns an interpretation of the same statute that was at issue in Patterson. On June 22, 1989, the Supreme Court ruled five to four that 42 U.S.C. § 1981 cannot be used to bring damage suits against state or local governments for acts of racial discrimination. In an opinion by Justice O'Connor, containing a lengthy exposition of the legislative histories of the civil rights laws of 1866 and 1871, the Court ruled that Congress had intended 42 U.S.C. § 1983 to provide the exclusive remedy for bringing such damage suits. Section 1983 gives individuals the right to challenge official actions that allegedly deprive them of constitutional or federal statutory rights. In the words of Justice O'Connor: "We think the history of the 1866 Act and the 1871 Act ... indicates that Congress intended that the explicit remedial provisions of § 1983 be controlling in the context of damages actions brought against state actors alleging violation of the rights declared in § 1981."

Significantly this ruling makes it more difficult for a plaintiff to prevail in such a suit because the plaintiff must prove that the discrimination in question was not a random act of an individual public employee, but rather resulted from an official "custom or policy." Because most governmental entities today have official policies against racial discrimination, it will be difficult for plaintiffs to sustain this burden.

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160. Id. at 2370.
161. See Marbury v. Madison, 1 Cranch 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").
162. See Patterson, 109 S. Ct. at 2379 (Brennan, J., dissenting).
164. See supra notes 131-65 and accompanying text.
169. Id. at 2722.
of proof.\textsuperscript{70}

Justice O'Connor's opinion was joined by Chief Justice Rehnquist and Justices White, Scalia and Kennedy, the same five justices who interpreted § 1981 narrowly in \textit{Patterson}.\textsuperscript{71} Justice Brennan, in his dissent, lamented that the underlying issue of whether § 1981 could be used at all in suits against governmental agencies was brought to the Court belatedly and was not fully briefed.\textsuperscript{72}

Because I would conclude that § 1981 itself affords a cause of action in damages on the basis of governmental conduct violating its terms, and because I would conclude that such an action may be predicated on a theory of \textit{respondeat superior}, I dissent.

\ldots

\ldots During the period when § 1 of the 1866 Act was enacted, and for over 100 years thereafter, the federal courts routinely concluded that a statute setting forth substantive rights without specifying a remedy contained an implied cause of action for damages incurred in violation of the statute's terms.\textsuperscript{73}

Until this ruling, lower federal courts had interpreted § 1981 to permit damage suits against state and local governments.\textsuperscript{174} Under these decisions, governmental bodies were held responsible for discriminatory acts of their employees, under a theory of "vicarious liability," without any need to show that the employee was carrying out an official policy.\textsuperscript{175} Consequently, § 1981, which guarantees to all persons the right to "make and enforce contracts" and the right to "full and equal benefit of all laws," was frequently invoked by civil rights plaintiffs, when suing government

\begin{itemize}
\item \textsuperscript{170} See, \textit{e.g.}, 32 C.F.R. §§ 51.1-6 (1989) (extending the goal of equal opportunity in employment to the Department of Defense).
\item \textsuperscript{171} See \textit{Patterson v. McLean Credit Union}, 109 S. Ct. 2363 (1989). \textit{See also supra} notes 131-65 and accompanying text.
\item \textsuperscript{172} \textit{Jett}, 109 S. Ct. at 2724-25 (Brennan, J., dissenting). Justice Brennan claimed that the Court improperly reviewed the question of whether one may bring a suit for damages under § 1981 itself on the basis of governmental conduct. \textit{Id.} Justice Brennan also pointed out that this issue was raised in the respondent's brief but was not raised as an issue in the appellate court or by the petitioner. \textit{Id.}
\item \textsuperscript{173} \textit{Id.} at 2725-26 (citations omitted).
\item \textsuperscript{174} \textit{Id.} at 2727-28.
\item \textsuperscript{175} \textit{Id.}
agencies.\textsuperscript{176}

The case arose when a white high school football coach, Norman Jett, employed by the Dallas Independent School District, was fired by a black principal, resulting in a lawsuit charging racial discrimination.\textsuperscript{177} In the trial court, the coach won a $650,000 award against the school district on the basis that the district was liable for the action of the principal.\textsuperscript{178} The Fifth Circuit Court of Appeals, however, reversed the decision.\textsuperscript{179} It ruled that the "vicarious liability" interpretation of § 1981 was wrong and that the official "policy or custom" approach of § 1983 should apply.\textsuperscript{180} Upon appeal, the Supreme Court affirmed in part the Fifth Circuit's decision, and held that § 1983 was the only law under which such a suit for damages can be brought.\textsuperscript{181} While the Civil Rights Act of 1964, which broadly bars discrimination in employment, can also be used to sue government employers, it permits plaintiffs to sue only for backpay and not for other types of damages.\textsuperscript{182}

\section*{IX. WHAT DOES IT ALL MEAN?}

What comes through with great force from these recent civil rights decisions is that where the language of a law and/or its legislative history is not clear, where judicial precedents provided by earlier cases are not definitive, where the issue is one of two rights in conflict both of which make a plausible claim for a favorable ruling in terms of justice, the Supreme Court Justices are likely to vote in accord with their underlying political and social philosophies. In this regard, the so-called "conservative-liberal" split in this Court is nothing new -- historically, it has always been so. Only the issues are different.

There can be no serious question that on civil rights issues, at least, the Supreme Court pendulum has swung to the "right." There is now

\begin{itemize}
\item \textsuperscript{176} See, e.g., Walls v. Mississippi State Dep't of Pub. Welfare, 542 F. Supp. 281 (N.D. Miss. 1982).
\item \textsuperscript{177} Jett, 109 S. Ct. at 2704.
\item \textsuperscript{178} Id. at 2708.
\item \textsuperscript{179} Id. at 2708-09.
\item \textsuperscript{180} Id. at 2709 (relying on Jett v. Dallas Indep. School Dist., 798 F.2d 748, 762 (5th Cir. 1986)).
\item \textsuperscript{181} Id. at 2704.
\end{itemize}
in place a solid "conservative" majority of five. Its recent watershed decisions, taken together, are likely to make discrimination suits more difficult to bring, more difficult to win and more vulnerable to challenge if, in fact, they are won. They will assuredly have a chilling effect on the aspirations of racial minorities and women.

The chief reason for this shift to the "right" is the new complexion of the bench resulting from former President Reagan's three appointments. In 1981, Justice O'Connor was appointed to replace retiring Justice Stewart. While Justice Stewart was considered to be moderately conservative, on balance he was less "conservative" than Justice O'Connor has proved to be on civil rights issues. Justice Stewart, for example, voted with the majority in 1979 in the pro-affirmative action decision in *United Steelworkers of America, AFL-CIO v. Weber.*

More recently, Justice Scalia, who took the seat vacated by Justice Rehnquist upon the accession of the latter to the post of Chief Justice when former Chief Justice Burger retired, has proved to be more "conservative" on civil rights issues than the Justice he replaced. Former Chief Justice Burger, for example, while certainly not the most liberal Justice of the Court, wrote the pro-affirmative action majority


184. See, e.g., Lorance v. AT & T Technologies, Inc., 109 S. Ct. 2261 (1989) (upholding the imposition of a stringent time limitation on civil rights claims); Martin v. Wilks, 109 S. Ct. 2180 (1989) (a challenge to a previously approved eight year old court settlement of an employment discrimination claim was allowed); Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989) (employer's burden of proof is lowered to the lesser preponderance of the evidence standard when demonstrating that its reasons for the challenged action are legitimate).


186. 443 U.S. 193, 195 (1979). *Weber* involved a challenge to a private employer's affirmative action program brought by white employees passed over for promotions in favor of black workers. Id. at 199. The Court upheld the program stating that "[t]he very statutory words . . . cannot be interpreted as an absolute prohibition against all private, voluntary race conscious efforts to abolish . . . racial segregation . . . ." Id. at 204.

opinion in *Fullilove v. Klutznick* in 1980.\(^{188}\) Justice Scalia, like Justice O'Connor, has voted on the same side as staunchly "conservative" Chief Justice Rehnquist in approximately 80% of the cases before the Court.\(^{189}\)

Based on his recent opinions, Justice Kennedy, who replaced retiring Justice Powell, is clearly more "conservative" than was his predecessor.\(^{190}\) Justice Powell tended to adopt a middle ground position with regard to affirmative action remedies. Although he rejected the quota remedy, in the 1978 case of *Regents of the University of California v. Bakke*,\(^{191}\) Justice Powell stressed that the equal protection clause guarantees protection to all individuals regardless of race, and held also that race and ethnicity may be taken into account in the admissions process of the state university because racial and ethnic diversity are valid educational objectives.\(^{192}\) And, in *Local 28 of the Sheet Metal Workers' International Association v. Equal Employment Opportunity Commission*,\(^{193}\) Justice Powell, once again, as he did in *Bakke*, provided the crucial fifth vote to make a majority, stating "the imposition of flexible goals as a remedy for past discrimination may be permissible under the Constitution . . . .\(^{194}\)

Finally, Justice White, who has served on the bench for twenty-seven years, quite simply has changed his mind on civil rights issues.\(^{195}\) While he, too, was part of the pro-affirmative action majority in *United Steelworkers of America, AFL-CIO v. Weber*,\(^{196}\) it seems clear from his recent opinions and votes that he now believes that *Weber* was wrongly

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188. *Fullilove*, 448 U.S. at 453.
192. *Id.* at 269.
194. *Sheet Metal Workers' Int'l Ass'n*, 478 U.S. at 488-89.
decided. Justice White wrote the opinion for the majority in *Firefighters Local Union No. 1784 v. Stotts,* decided in 1984, in which the Court refused to allow layoffs of more senior workers in order to preserve affirmative action gains.

Looking ahead to what may be in store during the years to come, especially in light of the sudden retirement of Justice Brennan and the appointment of Justice David Souter, the future of the Court seems undecided. The two remaining most "liberal" Justices, Marshall and Blackmun, are themselves more than 80 years old and close to retirement. As lawyers say, *res ipsa loquitur* -- the thing speaks for itself -- or so it would appear.

As of this writing, a comprehensive bill has been passed by both houses of Congress entitled the Civil Rights Act of 1990. This proposed Act would undo through legislation at least some of the effects of the Supreme Court's retreat on civil rights. However, President Bush has threatened to veto the bill as written, finding it unacceptable as

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197. *See infra* notes 201-02 and accompanying text.
199. *Stotts,* 467 U.S. at 575.

201. H.R. 4000, 101st Cong., 2d Sess. (1990); S. 2104, 101st Cong., 2d Sess. (1990) [hereinafter Civil Rights Act of 1990]. It is worthy to note that it took Congress four years to respond to the Supreme Court's limiting decision of *Grove City College v. Bell,* 465 U.S. 555 (1984), by enacting the Civil Rights Restoration Act, Pub. L. No. 100-259, 102 Stat. 28 (codified as amended at 20 U.S.C. § 1681) (the Act was passed on March 22, 1988). The Act reverses *Grove* by applying federal anti-discrimination laws to entire institutions that accept federal funds, rather than only to the specific programs in such institutions that are helped by such funds. *Id.*

202. *See Civil Rights Act of 1990,* *supra* note 201, § 2. The Court's ruling in *City of Richmond v. J.A. Croson Co.,* 109 S. Ct. 706 (1989), since it was based on constitutional grounds, is not susceptible to statutory correction. *Id.* at 730; *see supra* notes 25-52 and accompanying text. "Because the City of Richmond has failed to identify the need for remedial action in the awarding of its . . . contracts, its treatment of its citizens on a racial basis violates the dictates of the Equal Protection Clause." *Id.* at 730. The Court's ruling in *Martin v. Wilks,* 109 S. Ct. 2180 (1989), was not based on a particular statute but rather on an interpretation of the procedural rules that govern the federal courts. *Id.* at 2185. Perhaps the least difficult case to correct is *Patterson v. McLean Credit Union,* 109 S. Ct. 2363 (1989), because of a broad political consensus in support of expanding the scope of § 1981. It remains to be seen how successful this effort will be.
a promotion of racial quotas. In the face of a presidential veto, it remains to be seen how successful this effort will be.