Denver Law Review

Volume 67 | Issue 1 Article 3

January 1990

# Civil Rights in Employment: The New Generation

Linda L. Holdeman

Civil Rights in Employment: The New Generation

# CIVIL RIGHTS IN EMPLOYMENT: THE NEW GENERATION

LINDA L. HOLDEMAN*

*In July 1989, Title VII was twenty-five years old. It is generally assumed that the first twenty-five years have seen significant changes in the economic opportunities available to America's minorities and women. But with the rise to power of the Reagan appointees, the Supreme Court is clearly fashioning a new approach to issues of civil rights in employment. This article analyzes the new Court's emerging themes and proposes a congressional response.*

TABLE OF CONTENTS



* Senior Instructor in Law and Coordinator of the Lawyering Program, New York University School of Law. I wish to thank Anthony G. Amsterdam and Judy Scales-Trent for their thoughtful comments upon an earlier draft of this work.

## I. INTRODUCTION

It is a new day. With civil rights activists reeling from blow after blow to hard-won victories of Title VII's first twenty-five years, the 1988 term has ended. As the dust settles and initial reactions moderate, it remains clear that the new majority has begun to re-fashion civil rights law in the employment arena.

First came *City of Richmond v. J.A. Croson Co.*,[1] narrowing, perhaps to impossible limits, the evidentiary basis necessary to defend minority set-asides of public contracts.[2] *Wards Cove Packing Co., Inc. v. Atonio*[3] drastically increased the difficulty of proving a disparate impact case, and rendered some kinds of employment practices virtually immune from disparate impact analysis.

*Martin v. Wilks*[4] followed, allowing subsequent collateral attacks upon existing Title VII consent decrees, with no apparent time limitation. *Martin's* impact was magnified by *Independent Fed'n of Flight Attendants v. Zipes*,[5] which held that Title VII plaintiffs may not recover their attorneys' fees against intervenors unless the intervenors' action was frivolous or unreasonable.

*Martin* was handed down with *Lorance v. AT&T Technologies, Inc.*,[6] which held that Title VII's 180 day[7] limitations period for challenging an intentionally discriminatory seniority system begins to run when the seniority system is adopted rather than when the challenged provision is first applied to the plaintiff. This is true despite the fact that the statute of limitations will often expire before any employee has actually been adversely affected or before potentially affected employees have been notified, and in some cases there may not have been a plaintiff with standing to bring the case during the fatal 180 days.

*Public Employees Retirement System of Ohio v. Betts*[8] further restricted challenges to seniority systems, holding that in age discrimination cases, the plaintiff bears the burden of proving actual intent to use the seniority system in order to discriminate on the basis of age in other aspects of the employment relation.

*Patterson v. McLean Credit Union*[9] held that 42 U.S.C. § 1981 does not

1. 109 S. Ct. 706 (1989).
2. A minority set-aside provision reserves some portion of public contracting funds for award to minority business enterprises. *See infra* § II A1(a).
3. 109 S. Ct. 2115 (1989).
4. 109 S. Ct. 2180 (1989).
5. 109 S. Ct. 2732 (1989).
6. 109 S. Ct. 2261 (1989).
7. 42 U.S.C. § 2000e-5(e) requires a charge to be filed with the EEOC within 180 days of the alleged violation. However, if a charge is filed with a state or local deferral agency, the limitations period for the EEOC charge is extended to 300 days.
8. 109 S. Ct. 2854 (1989).
9. 109 S. Ct. 2363 (1989).

cover any "post-contract" conduct such as discharges from employment or racial harassment, even if such harassment is severe and pervasive enough to interfere with continued employment. The only victory for employment law plaintiffs came in *Price Waterhouse v. Hopkins*,[10] which required a disparate treatment defendant, who had acted out of both permissible and impermissible motives, to show that it would have made the same decision even absent the impermissible motive. Even *Price Waterhouse* proved to be only a partial victory, as it decided a number of issues in favor of employers.

A closer examination of these 1988 term cases yields telling clues to the new majority's philosophy, and those clues do not bode well for the economic future of minorities and women. Congress must re-visit the areas of equal employment and affirmative action if the level of equal employment opportunity which has been attained after twenty-five years of struggle is to be preserved.

## II. THE CASES

### A. *Affirmative Action and Reverse Discrimination*

The Court has never been at peace with affirmative action.[11] Yet, despite the Reagan administration's avowed intention to kill it, affirmative action emerged from the 1986 and 1987 terms alive, well and perhaps even more firmly implanted as a basic principle of American business.[12]

But even in the 1987 term, a new breeze was beginning to blow against race conscious remedial action. In *Johnson v. Transportation Agency*,[13] then newly appointed Justice Scalia filed a vigorous dissent, joined by Chief Justice Rehnquist and Justice White, attacking the entire rationale underlying affirmative action.[14] The appointment of Justice Kennedy added a fourth vote to the anti-affirmative action camp. With the support of the more moderate Justices Stevens and O'Connor, a controlling conservative coalition has formed. *City of Richmond v. J.A. Croson Co.*[15] is the first result.

---

10. 109 S. Ct. 1775 (1989).

11. "Agreement upon a means for applying the Equal Protection Clause to an affirmative-action program has eluded this Court every time the issue has come before us." Wygant v. Jackson Bd. of Education, 476 U.S. 267, 301 (1986) (Marshall, J., dissenting); *see generally* L. MODJESKA, EMPLOYMENT DISCRIMINATION LAW 270-303 (2d. ed. 1988) ("Term after term, and continuing to date, the Supreme Court has striven to determine the legitimacy of racial, ethnic and sexual preferences in employment. Inevitably, the broad pronouncements of early cases were forced to yield to the impact of facts unforeseen or insufficiently appreciated.") *Id.* at 270; *see also* Jones, *The Origins of Affirmative Action*, 21 U.C. DAVIS L. REV. 383 (1988); Jones, *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities*, 70 IOWA L. REV. 901 (1985).

12. Schwartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over But the Shouting*, 86 MICH. L. REV. 524 (1987).

13. 480 U.S. 616 (1987).

14. *Id.* at 657.

15. 109 S. Ct. 706 (1989).

1. *City of Richmond v. J.A. Croson Co.* (fourteenth amendment restrictions on race-conscious remedies)

a. *Factual Background*

The history of *City of Richmond* actually began in the mid-1970s when Congress undertook to analyze and document the gross underrepresentation of minority-owned businesses in the nation's business arena. A number of congressional and agency studies found that pervasive racial discrimination had seriously impaired the ability of minorities to form and competitively operate business ventures.[16] Congressional and agency reports specifically isolated the construction industry as one of the areas in which an evolved business system, though facially neutral, operated to perpetuate past inequities.[17]

Faced with this record, Congress enacted a minority set-aside provision[18] as part of the Public Works Employment Act of 1977 ("Act").[19] The Act appropriated four billion dollars in federal funds for grants to be used by state and local governments for public works projects. The Act contained a set-aside provision which required grantees to use at least ten percent of grant funds for contracts with minority business enterprises ("MBEs").[20] The set-aside provision included a waiver procedure for use where MBEs were not available or where an MBE attempted to exploit the program by overcharging for goods or services.[21]

In *Fullilove v. Klutznick*,[22] the Supreme Court held that this minority set-aside requirement passed constitutional muster under either intermediate scrutiny or strict scrutiny. The Court found that Congress had abundant evidence from which to conclude that minority-owned businesses had been denied effective participation in federal public contracting,[23] that the evidence before Congress showed that the pattern of

16. *See, e.g.*, H.R. REP. No. 468, 94th Cong., at 1-2 (1975) (Report of House Committee on Small Business) (past inequities have contributed to current lack of participation; minorities comprise 16% of population but minority businesses realize only 0.65% of gross business receipts); H.R. REP. No. 1615, 92d Cong., at 3 (1972) (Report of the Subcommittee on Minority Small Business Enterprise ("long history of racial bias" resulting in "major problems" for minority owned businesses)); H.R. DOC. No. 169, 92d Cong., at 1 (1971) (paucity of minority business ownership); H.R. REP. No. 1615, 92d Cong., at 3 (1972); H.R. DOC. No. 194, 92d Cong., at 1 (1972).

17. H.R. REP. No. 1791, 94th Cong., at 182 (1977) (summarizing H.R. REP. No. 840, 94th Cong., at 17 (1976)); U.S. GENERAL ACCOUNTING OFFICE, QUESTIONABLE EFFECTIVENESS OF THE 8(A) PROCUREMENT PROGRAM, GGD-75-57 (1975); U.S. COMM'N ON CIVIL RIGHTS, MINORITIES AND WOMEN AS GOVERNMENT CONTRACTORS 16-28, 86-88 (May 1975) (barriers encountered by minority businesses in government contracting at federal, state and local levels); H.R. REP. No. 468, 94th Cong. (1975) (existing efforts to increase minority participating in public contracting "totally inadequate").

18. 42 U.S.C. § 6705(f)(2) (1982).

19. 42 U.S.C. § 6701 (1982).

20. A "minority business enterprise" was defined by the Act as "a business at least 50% of which is owned by minority group members or, in case of a publicly owned business, at least 51% of the stock of which is owned by minority group members." 42 U.S.C. § 6705 (f)(2) (1982).

21. 42 U.S.C. § 6705 (1982).

22. 448 U.S. 448 (1980).

23. "Congress had before it . . . evidence of a long history of marked disparity in the

discrimination existed in state and local contracting as well,[24] and that the set-aside provision was narrowly tailored to counteract that pattern of discrimination.[25]

Three years after *Fullilove*, the Richmond City Council undertook to study the status of the city's public contracting business.[26] The council reviewed the array of congressional documentation of the present effects of past discrimination in the construction industry, including state and local public contracting. The congressional record reflected that 16-18% of the country's population was made up of minority individuals, while only 0.65% of business gross receipts were realized by minority businesses. As disturbing as these statistics were, the Richmond City Council found that the Richmond public contracting statistics were three times worse. Richmond's minorities numbered slightly over half the city's population (as compared to the 18% national percentage), but still accounted for only 0.67% of public construction spending during the preceding five years.[27]

The council also heard testimony from a number of city officials that the local construction industry had a long exclusionary history. No witness denied local industry discrimination. The council heard testimony that the area trade associations had virtually no minorities among their roughly 400 members.[28] Exclusion from these skilled trade unions and training programs prevented minorities from following the traditional career and training path from laborer to entrepreneur.

Relying upon the uncontroverted evidence of local discrimination in the construction industry, and the uncontroverted evidence that local minority participation was three times worse than the national statistics found by Congress, the Richmond City Counsel adopted the Minority Business Utilization Plan ("Plan"), modeled closely after the federal set-aside program approved in *Fullilove*.[29] The Plan provided that at least thirty percent of the dollar amount of each city construction contract must be sub-contracted to MBEs.[30] The Plan was limited to a five year life and provided for a waiver if qualified and willing MBEs were unavailable.

Approximately six months after the Plan's enactment, the City of Richmond invited bids on a plumbing project at the city jail.[31] The cost of the fixtures would constitute approximately seventy-five percent of the project price. The regional manager of J.A. Croson Company

---

percentage of public contracts awarded to minority business enterprises" resulting from "the existence and maintenance of barriers to competitive access which had their roots in racial and ethnic discrimination, and which continue today, even absent any intentional discrimination or other unlawful conduct." *Id.* at 478.

24. *Id.*
25. *Id.* at 480-89.
26. City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989).
27. *Id.* at 714.
28. *Id.* at 742 (Marshall, J., dissenting).
29. *Id.* at 739.
30. Ordinance No. 83-69-59, *codified in* Richmond, Va., City Code, § 12-156(a) (1985).
31. City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 715 (1989).

("Croson"), was interested in bidding on the project. Twelve days before bids were due, Croson contacted several local MBEs that were potential suppliers of the particular brands of fixtures required by the project. One of the MBEs contacted was Continental Metal Hose ("Continental"). Continental was a distributor and would have to purchase the fixtures elsewhere for resale to Croson.

Continental sought quotations for the fixtures in order to prepare its bid, but encountered difficulties in obtaining any quotations. One of the possible suppliers, a white-owned business, had already given a quotation directly to Croson and refused to give a quotation to Continental. The agent of the other possible supplier refused to do business with Continental without a credit check, which would take at least thirty days to complete. Continental informed Croson that these difficulties were delaying Continental's bid.

Project bids were opened on October 13 and Croson was the only bidder. On October 19 Croson filed a request for waiver of the set-aside provision. Prior to a decision on the request, Continental secured a quote from another supplier and submitted a bid to Croson. However, the bid was seven percent higher than the fixture price Croson had included in its bid for the project. That figure was presumably based on the quote made directly to Croson by the white-owned supplier or on bids from other white-owned businesses.

Croson persisted in the waiver request, arguing that Continental was not an authorized supplier for the brands specified (despite the fact that it was Croson who had solicited Continental's bid), and arguing that Continental's bid was seven percent higher than the fixture price of Croson's project bid. The city denied the waiver request, declined to raise the contract price, and subsequently decided to reopen the project for new bids.

Rather than submitting an adjusted bid reflecting Continental's participation, Croson filed suit, arguing that the Richmond set-aside plan violated the equal protection clause of the fourteenth amendment. After the case had progressed through a lengthy procedural history,[32] the United States Supreme Court noted probable jurisdiction to consider the constitutionality of the Plan.[33]

b. *City of Richmond* opinion

Writing for the Court, Justice O'Connor found the Richmond Plan to be constitutionally infirm. Though portions of the opinion com-

32. The district court upheld the Plan in all respects. *See* Supplemental App. to Juris. Statement 112-232 (Supp. App.). The United States Court of Appeals for the Fourth Circuit affirmed. Croson v. City of Richmond, 779 F.2d 181 (4th Cir. 1985) (*Croson I*). The Supreme Court vacated the Fourth Circuit opinion and remanded in light of Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986). *See* Croson v. City of Richmond, 478 U.S. 1016 (1986). On remand the Fourth Circuit struck down the set-aside plan as violative of the fourteenth amendment. Croson v. City of Richmond, 822 F.2d 1355 (4th Cir. 1987) (*Croson II*). The Supreme Court granted certiorari from the 1987 Fourth Circuit opinion.

33. 108 S. Ct. 1010 (1988).

manded less than a majority, most of the opinion reflected at least a broad consensus on the part of the six subscribing justices.[34]

In what is probably its most significant holding, *City of Richmond* holds that remedial racial classifications are suspect and, as such, are subject to strict scrutiny.[35] The degree of the majority's hostility to remedial race-conscious classifications was evident throughout the majority and concurring opinions, and was expressly reflected in the application of the strict scrutiny standard.[36] In what is becoming a familiar pattern, Justice O'Connor purported to seek a conceptual middle road between "rather stark alternatives,"[37] but then set out an evidentiary burden that destroyed the middle road she purported to construct.[38]

Under strict scrutiny, the state must identify and prove a compelling interest which justifies the remedial racial classification, and the classification must be narrowly tailored to address that interest. Justice O'Connor, joined by Chief Justice Rehnquist and Justice White, concluded that the city's interest in remedial race-conscious action was sufficiently compelling only if it could show that such action was necessary in order to eradicate the effects of the city's own prior discrimination, or that the city had become a passive participant in a system of racial exclusion practiced by the local construction industry.[39]

---

34. Section II commands the support of only its author, Chief Justice Rehnquist, and Justice White; Section IIIA, only the support of these three Justices and Justice Kennedy.

35. *City of Richmond*, 109 S. Ct. at 721. Chief Justice Rehnquist and Justices O'Connor, White, Kennedy and Scalia adopted the strict scrutiny standard. Justice Stevens avoided the issue and focuses instead on the need to identify the characteristics of disadvantaged classes which might justify special treatment. *Id.* at 732.

36. Historically, virtually no legislative action has withstood strict scrutiny analysis; the application of strict scrutiny is usually the death knell of the challenged provision. Gunther, *The Supreme Court, 1971 Term — Forward: In Search of Evolving Doctrine On a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). There are rare exceptions in which a legislative classification has survived strict scrutiny; *e.g.*, *Fullilove*, 448 U.S. 448 (1980).

37. *City of Richmond*, 109 S. Ct. at 717.

38. Last term in Watson v. Fort Worth Bank and Trust, 108 S. Ct. 2777 (1988), Justice O'Connor struggled conceptually for a middle ground between the "stark and uninviting alternatives . . ." of whether to apply disparate impact analysis to subjective employment decisionmaking (which alternative might induce employers to adopt surreptitious quota systems) or to restrict disparate impact analysis to objective employment practices (which alternatives might induce all employers to interject subjective elements and so invalidate the disparate impact model entirely). *Id.* at 2786. But her introduction of a newly articulated disparate impact proof model (now confirmed by *Wards Cove Packing Co.*, *infra* at p. 66) belied her conceptual struggle. *See*, Holdeman, *Watson v. Fort Worth Bank and Trust: The Changing Face of Disparate Impact*, 66 DEN. U.L. REV. 179 (1989).

39. *City of Richmond*, 109 S. Ct. at 720. The decision in Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) had raised doubt as to whether the State had authority to employ race-conscious remedies to eradicate the effects of discrimination other than its own. Justices Kennedy and Scalia would so hold, but Justice Kennedy aptly noted that such a holding was not essential since the strict scrutiny standard was already sufficient to defeat the Plan. *City of Richmond*, 109 S. Ct. at 734. Justice Stevens' position was not fully fleshed out, but would seem to be less limiting than Justice O'Connor's. Justice Stevens was willing to consider compelling interests in present and future consequences, such as the school board's argument in Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986), that an integrated faculty provided educational benefits to students. *Id.* at 731.

Even more surely fatal for such legislation than the nature of, or factual basis necessary to establish, the requisite compelling interest (e.g., that race-conscious action is necessary to eradicate the effects of past discrimination, and that such discrimination was practiced by the city or that the city was a passive participant in discrimination by the local industry) is the level of proof which is required to establish the factual basis. The proof requirements imposed by the majority reject normal circumstantial proof and exceed proof requirements in civil litigation.[40]

In finding the city's interest in race-conscious action justified, the district court had relied upon the following evidence: (1) the congressional determination that past discrimination in the construction industry had resulted in stifled minority participation on both national and local levels, and the congressional studies and hearings which supported that determination; (2) the fact that MBEs were awarded only 0.67% of city construction dollars while minorities constituted roughly 50% of the city's population; (3) the fact that there were almost no MBEs represented in local contractors' associations; (4) the testimony of witnesses that widespread discrimination was practiced in the local construction industry; and (5) the ordinance's express declaration of its remedial purpose.

First, the majority discounted both the congressional declaration of industry discrimination and the array of congressional and agency studies which were sufficient to uphold the congressional minority set-aside approved in *Fullilove*. Congress had essentially created a presumption, applicable to each state and local jurisdiction, that construction industry discrimination had stifled minority participation. But a state or local government could rebut the presumption by showing evidence negating any local discrimination.[41]

The majority in *City of Richmond* reasoned away the proof value of the congressional *presumption* of discrimination by holding that, because it was rebuttable, it had "extremely limited" probative value.[42] This

40. The majority suggested that evidence akin to a *prima facie* case against named persons would be required. "There is nothing approaching a *prima facie* case of a constitutional or statutory violation by *anyone* in the Richmond construction industry." *City of Richmond*, 109 S. Ct. at 724 (emphasis in original). *See also id.* at 729, where Justice O'Connor criticized the Plan because "there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors."

41. *See* Fullilove v. Klutznick, 448 U.S. 448, 487 (1980). The authority for *Fullilove's* declaration that the congressional set aside program provided local governments the opportunity to demonstrate the lack of local discrimination is unclear. The statute itself does not provide for such a waiver. 42 U.S.C. § 6705(f)(2) (1982). Section 6706 empowers the Secretary of Commerce, acting through the Economic Development Agency, to prescribe regulations implementing the set-aside provision. Those regulations allow a waiver if there are no MBEs in a "reasonable trade area," but make no mention of rebutting the presumption of discrimination in the local construction industry.

42. The probative value of [the congressional] findings for demonstrating the existence of discrimination in Richmond is extremely limited. By its inclusion of a waiver procedure in the national program addressed in *Fullilove*, Congress explicitly recognized that the scope of the problem would vary from market area to

proposition is contrary to any conventional understanding of the effect of a presumption.

The minimum operative effect of a presumption is that it shifts the burden of producing evidence with regard to the presumed fact, at least until some contrary evidence is offered.[43] In *City of Richmond*, the city counsel began with the congressional presumption, and then heard additional evidence which supported the presumption. Not one witness or fact called the presumption into question, either during the fact finding process,[44] or later at trial.[45] So the majority's treatment of the evidentiary value of the presumption is puzzling indeed.

Second, the majority reasoned away the congressional *evidence* which was the foundation for the presumption by pointing to the congressional power to enforce the fourteenth amendment under section five, a power not conferred upon state and local governments.[46] The majority did not explain the non sequitur that a difference in enforcement power would affect the probative value of evidence itself.

The opinion also discounted the congressional evidence because it was national in scope rather than specific to the City of Richmond. Although the Court is correct in noting the national scope of such evidence, the congressional facts and findings did include direct evidence that the pattern of discrimination in the construction industry existed in state and local public construction contracting.[47]

Moreover, the majority rejected the testimony of local witnesses to "widespread" discrimination, including even the testimony of the city manager who supervised city procurement matters, as being too general and too conclusory,[48] despite the fact that the testimony of witnesses such as the city manager would normally be regarded as expert rather than lay testimony and would thus be entitled to include expert conclusions.[49] The Court held that the city council's declaration of remedial purpose was too self-serving to be entitled to weight, despite principles of comity and the deference generally accorded to the factfinding process of legislative bodies. However, as Justice Marshall observed, the Court has held that "[l]ocal officials, by virtue of their proximity to, and their expertise with, local affairs, are exceptionally well-qualified to make determinations of public good 'within their respective spheres of authority.' "[50]

---

market area. *See Fullilove*, 448 U.S. at 487 (noting that the presumption that minority firms are disadvantaged by past discrimination may be rebutted by grantees in individual situations).

*City of Richmond*, 109 S. Ct. at 726.

43. McCORMICK ON EVIDENCE 973-76 (E. Cleary ed. 3d. ed. 1984).

44. *City of Richmond*, 109 S. Ct. at 743 (Marshall, J., dissenting).

45. *Id.* at 749.

46. *Id.* at 726-727.

47. Fullilove v. Klutznick, 448 U.S. 448, 478 (1980).

48. *City of Richmond*, 109 S. Ct. at 743, n.5 (1989) (Marshall, J., dissenting).

49. Part of the function of an expert witness is to draw inferences from the facts which a factfinder would not be competent to draw, or to offer an expert opinion which will aid the factfinder in understanding the facts. McCORMICK, *supra* note 43, at 33.

50. *City of Richmond*, 109 S. Ct. at 748 (Marshall, J., dissenting) (quoting from Hawaii

Finally, the Court rejected the most telling evidence of all, the gross statistical disparity between the percentage of the city's minority population and the percentage of prime contracts awarded to minority firms.[51] Rather than comparing the contract dollars awarded to MBEs with the general population statistics, Justice O'Connor held that the proper statistical model is the comparison between the contract dollars awarded to MBEs and the number of existing qualified MBEs. No doubt the conceptual justification for this choice is the rejection of race-conscious preference as a remedy for historic society-wide discrimination.[52]

However, the evidentiary result is inappropriate. The Court's effort to isolate past discrimination in the construction industry from past society-wide discrimination effectively deprives the statistical tool of its ability to measure *past* discrimination of any kind. It is elementary market place economics that few small businesses subject to significant limitations in procuring business opportunities will long survive. Nor does the majority's statistical formula account for the numbers of MBEs which might have been formed but for widespread knowledge in the minority community of industry discrimination. Only the foolish would undertake to acquire the "special qualifications" which Justice O'Connor correctly observes are necessary,[53] when other such minority enterprises are failing on all sides.

Use of qualified labor market statistics are appropriate in some contexts. The Court has correctly required such a statistical analysis when the task is to measure *current* discrimination.[54] But a requirement of qualified labor market statistics is manifestly inappropriate when, as here, the task is to measure the effects of *past* discrimination. While some portion of the disparity between contracts awarded and general population statistics may be due to society-wide discrimination, it is unlikely that a local society which discriminated to the extent evidenced by the Richmond statistics would be home to a construction industry free of that same sort of discrimination. This kind of reasoning process is precisely the nature and function of circumstantial evidence in a courtroom.[55]

The same problems are apparent in the Court's rejection of the city's evidence that MBE membership in area trade organizations was extremely low. The Court held that this evidence would be relevant only if it were compared to the number of MBEs eligible for membership. But again this sort of statistical comparison can only measure current discrimination; it cannot measure the effect of past discrimination which has resulted in a dearth of local MBEs. And again, even if some

Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984)); *see also* Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 777-78 (1982) (O'Connor, J., concurring in judgment in part and dissenting in part).

51. *City of Richmond*, 109 S. Ct. at 725.

52. *Id.*

53. *Id.*

54. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989).

55. *See infra* p. 79.

portion of the disparity were due to societal discrimination, the Court's conclusion that the membership statistics had no probative value reflects a further rejection of normal circumstantial evidence.

Circumstantial evidence is evidence which requires additional reasoning to reach the proposition to which it is directed;[56] in effect, it is evidence that circumstances are as one would expect them to be if the fact in question were true. In *City of Richmond*, much of the rejected or undervalued evidence is circumstantial in nature. The congressional record and legislation created a presumption that discrimination in the local construction industry had caused the low level of minority participation in the industry. The dearth of minority contractors in the area trade associations, and the dearth of minority contractors awarded prime contracts constituted strong circumstantial evidence in support of the presumption. Yet the Court rejected this evidence because although the national statistics established a nationwide pattern of industry discrimination, the Richmond statistics might be the result of entrepreneurial choices made by blacks in Richmond; or the Richmond statistics might be a result of societal discrimination rather than industry discrimination. This hypothesis implicitly conjectures that Richmond's construction industry, though a part of a local society which discriminated three times as much as the national construction industry (which itself was grossly discriminatory) was untainted by either local or national racism.

These examples demonstrate the Court's rejection of the normal function of circumstantial evidence. They also raise the question of what standard of proof was required by the Court's strict scrutiny analysis. The majority seemed to be requiring far more than clear and convincing evidence. By requiring the city to disprove such unlikely causes as the possibility that blacks in Richmond, Virginia have equal access to the construction industry, but choose instead to become bankers or university professors, the Court seems to be requiring nothing less than proof to a moral certainty. In order to justify a remedial racial classification by a state or local government, the Court required proof tantamount to a criminal conviction of an industry. On the face of the opinion, remedial legislation is subjected to the same fatal constitutional standard as anti-minority segregation statutes. Such a construction of the fourteenth amendment is incongruous with its historical context and the traditional rationale underlying strict scrutiny. The fourteenth amendment and strict scrutiny did not arise in a historical vacuum, and are not predicated on an abstract principle that race consciousness is *malum en se*. Rather, they are remedial measures to eradicate the pernicious effects of anti-minority segregation statutes. Race-conscious remedial legislation has not been so pernicious and can hardly bear the same historical and cultural stigma as Jim Crow laws. Yet the *City of Richmond* decision holds both forms of legislation to be equally suspect.

56. MCCORMICK, *supra* note 43, at 543.

Not only did the majority underrate the probative value of each individual piece of evidence, but it failed entirely to consider the cumulative weight of the evidence. Repeatedly the majority held that the specific evidence being discussed was insufficient, "standing alone," to justify remedial action.[57] Nowhere did the majority consider the combined probative value of the city's direct and circumstantial evidence of discrimination. The device of separately analyzing items of circumstantial proof in isolation is a classic method of de-valuing each item. However, as Professor McCormick has observed:

> But when [circumstantial evidence] is offered and judged singly and in isolation, as it frequently is, it cannot be expected by itself to furnish conclusive proof of the ultimate fact to be inferred. Thus the common argument of the objector that the inference for which the fact is offered "does not necessarily follow" is untenable, as it supposes a standard of conclusiveness which probably no aggregation of circumstantial evidence, and certainly no single item thereof, could ever meet.[58]

Moreover, strict scrutiny analysis requires more than evidence sufficient to prove the existence of past industry discrimination. The evidence must be specific enough to enable the governmental actor to prove that the scope of the race-conscious remedy does not exceed the compelling interest which justifies it.[59] A strict and rigid construction of such an inherently difficult task would effectively prevent any race-conscious action, and such seems to be the effect, if not the intent, of the majority opinion. Just as it would be "sheer speculation how many minority firms there would be in Richmond absent past *societal* discrimination,"[60] it is and always will be "sheer speculation" how many minority firms there would be in Richmond absent past *construction industry* discrimination. To require proof of that sort renders defense of race-conscious remedial legislation a virtual impossibility. The statistical evidence in *City of Richmond* forced a choice between running the risk of addressing some societal discrimination in an affirmative action program and failing to address any past discrimination including industry discrimination. The majority's choice of the latter option reveals that the Court is willing to leave even industry discrimination unredressed rather than risk imposing on a particular industry any share of the burden of redressing societal discrimination.[61]

The majority opinion devoted little attention to the second prong of equal protection analysis, narrow tailoring. Justice O'Connor observed that the lack of quantified proof of precisely identified discrimination

57. City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 723-728 (1989).
58. MCCORMICK ON EVIDENCE 436 (E. Cleary ed. 2d ed. 1972).
59. *City of Richmond*, 109 S. Ct. at 726-728.
60. *Id.* at 724 (emphasis added).
61. Even if the 30% set-aside did partially address societal discrimination, the burden on the industry was almost non-existent. As Justice Marshall pointed out, public construction accounted for only 3% of local construction. *Id.* at 750 (Marshall, J., dissenting). Thus the set-aside affected only 1%, and if even half of the set-aside addressed societal discrimination, that would affect only 0.5% of Richmond's construction market.

rendered the determination of whether the Plan was narrowly tailored "almost impossible."[62] In addition, she pointed to the city's failure to first consider race-neutral alternatives and failure to justify the selection of thirty percent as the set-aside percentage.[63] Finally, she found fault with Richmond's adoption of the congressional definition of an MBE, which included Oriental, Indian, Eskimo or Aleut business owners,[64] and with the unlimited geographic scope of the Plan.[65]

Certainly race-conscious state action should not be undertaken if there are viable alternatives. However, it would have been reasonable to find that the city had concluded that other alternatives were ineffective. In 1975, the city had enacted a city code provision prohibiting discrimination by contractors.[66] Yet there were still virtually no minority-owned contractors in area trade associations. Further, the congressional record before the city council included the congressional finding that alternatives other than race-conscious action were not effective to address the effects of past discrimination in the construction industry.[67] Nonetheless, the record was not strong that the city had genuinely considered alternatives to the set-aside provision.

The majority's objection that the selection of the thirty percent figure was not justified by the city is less compelling. As Justice Marshall observed, the thirty percent figure was patterned directly on the method of calculation approved in *Fullilove*.[68] Congress had selected its ten percent figure because it fell roughly halfway between the percentage of minority contractors and the percentage of minority population. Application of the same calculation to the city's evidence yielded the thirty percent figure. The calculation allowed a healthy margin to account for the effects of societal discrimination, and yet provided a significant encouragement to the entry of minority owned businesses in the market.

Nor did the thirty percent figure key to "outright racial balancing" or rest upon the "assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population"[69] as Justice O'Connor stated. Instead, the thirty percent figure provided a cushion of roughly fifty percent to allow for societal discrimination, career choices, or other factors effecting the dearth of minorities in the market.

The majority's insistence on strong evidence that the race-conscious remedy does not overstep the effects of past industry discrimination is one of the most serious evidentiary hurdles in the strict scrutiny analysis. Logically, it should be possible to overcome this hurdle, despite the impossibility of distinguishing the effects of industry discrimi-

62. *Id.* at 728.
63. *Id.*
64. *Id.* at 713.
65. *Id.*
66. Richmond, Va., Code, 17.2 (1985).
67. *City of Richmond*, 109 S. Ct. at 751 (Marshall, J., dissenting).
68. *Id.* at 751-52.
69. *Id.*at 728.

nation from societal discrimination with certainty and precision, if the race-conscious remedy is limited so as to provide reasonable assurance that it did not exceed the bounds of the effects of past industry discrimination. The *City of Richmond* formula effectively conceded half of the existing disparity to societal discrimination and so refrained from redressing the disparity beyond the thirty percent remedy. Yet the majority's rejection of Richmond's thirty percent calculation is an implicit rejection of this method of insuring that the race-conscious remedy does not overstep its bounds.

Nor does the Court offer any explanation of its rejection. If the Court's reason for requiring evidentiary precision is, in fact, the legitimate concern that race-conscious remedies should be limited to the effects of past industry discrimination, there is no reason to reject a Plan that settles for a substantially smaller race-conscious remedy than past discrimination might justify. A fifty percent cushion surely insures that the remedy does not inadvertently address societal discrimination to any significant degree. It would appear then, that the insistence on precision, even when unnecessary to accomplish the Court's stated justification, is simply another device to insure the demise of race-conscious remedies.

In its defense of the new strict scrutiny standard, the Court relies on the assertion that this Plan was imposed on the construction industry by a black majority.[70] However, the Court does not limit the application of strict scrutiny to that context. Indeed such a characterization of the *City of Richmond* facts is questionable. The Court inferred that the Plan resulted from overreaching by a racial majority because the population of Richmond was fifty-two percent black (failing to inquire as to the racial breakdown of registered voters), the city council was composed of four whites and five blacks (though the vote on the Plan did not divide along racial lines), the Plan included groups other than blacks in its definition of MBEs (which logically tends to disprove rather than support the Court's inference), and the Plan's failure to restrict MBEs to local businesses (which also tends to negate a charge of self-interested overreaching by a local majority). The Court's readiness to find illicit discrimination by a black majority stands in dramatic contrast to the presumption of innocence afforded the white construction industry.

Yet the larger issue raised by the Court, concerning remedial legislation which favors a group which constitutes the majority within a given jurisdiction, is a real issue and must be answered. The most oppressive discrimination against racial groups has often occurred in localities where those racial groups are a numerical majority of the populace. The overall statutory scheme of the 1960's civil rights legislation relied substantially on the Voting Rights Act of 1965 to empower disadvantaged racial groups to enact state and local legislation to redress the inherited legacy of socio-economic injustice. As the Voting Rights Act begins to

70. *Id.* at 722.

achieve its purpose, the strict scrutiny standard is invoked to thwart any translation of political equality into economic equality.

It is admittedly appropriate for the federal courts to remain especially alert to preclude legislative oppression of minorities by majorities. However, the strict scrutiny standard, as implemented in *City of Richmond*, exceeds cautious regard for fair treatment of a racial minority. It is the denial of political redress for racial discrimination. Political action by a majority which is socially and economically marginalized is simply not equivalent to political action by a majority which is also socially and economically dominant. The earlier standard of intermediate review was appropriate to safeguard the interests of an economically dominant numerical minority. The *City of Richmond* strict scrutiny standard denies both the democratic interest in allowing majority rule and the social policy in favor of achieving equal opportunity for economically marginalized racial groups. The judicial over-riding of majority rule is appropriate to curtail oppression but not to thwart the redress of legitimate grievances.

The significance of *City of Richmond* would be hard to overstate.[71] The adoption of strict scrutiny analysis applies to all governmental race-conscious action, and will generally defeat all such efforts.[72] Further, it signals that private voluntary affirmative action is in jeopardy, and that judicially imposed race-conscious remedies will be closely examined.

2. *Martin v. Wilks* (collateral attack upon consent decree)

In 1974, a group of black individuals and a branch of the NAACP filed class actions against the City of Birmingham, Alabama, alleging racial discrimination in hiring and promotion in city employment. After trial but before a judgment was entered, the parties agreed to the entry of consent decrees setting out extensive remedial hiring and promotion goals.[73] The district court published notices and held fairness hearings on the proposed decrees. The Birmingham Firefighters Association ("BFA") appeared as amicus curiae and filed objections to the proposed decrees. After the hearings, the BFA also moved to intervene on the grounds that the decrees would affect the rights of its members. The district court denied the motion as untimely and subsequently approved and entered the decrees.[74] Seven white members of the BFA then filed suit against the city seeking an injunction against enforcement of the decrees on the grounds that the decrees would illegally discriminate

71. One intriguing result of *City of Richmond* may be its effect on the level of scrutiny adopted for sex discrimination. If white males constitute a "suspect classification" it may be difficult to maintain intermediate scrutiny of discrimination against women. Craig v. Boren, 429 U.S. 190 (1976).

72. As Justice Marshall correctly observes, "strict scrutiny is strict in theory, fatal in fact." City of Richmond v. J.A. Croson Co., 109 S. Ct. at 752 (quoting Fullilove v. Klutznick, 448 U.S. 448, 518-19 (1980)).

73. Martin v. Wilks, 109 S. Ct. 2180 (1989).

74. United States v. Jefferson County, 28 Fair Empl. Prac. Cas. (BNA) 1834 (N.D. Ala. 1981).

against them. The district court denied injunctive relief.[75] The Eleventh Circuit affirmed the denial of intervention and the denial of injunctive relief, both on the basis that the white firefighters could file a Title VII action asserting specific violations under the consent decrees.[76]

A third group of non-minority plaintiffs then brought suit against the city, alleging denials of promotions because of their race. The city admitted making race-conscious hiring and promotion decisions pursuant to the consent decrees but moved to dismiss the complaint as an impermissible collateral attack[77] on the earlier decrees. The district court granted the motion to dismiss.[78]

The Eleventh Circuit reversed, holding that the plaintiffs' claims were not precluded because they had not been parties to the litigation which resulted in the consent decrees. The court recognized the "strong public policy in favor of voluntary affirmative action plans"[79] which had caused most other circuits to preclude collateral attack by non-parties to consent decrees.[80] However, the Eleventh Circuit found the due process interests of non-minority employees to outweigh the public policy interest in equal employment opportunity. The Supreme Court granted certiorari.[81]

In an opinion which opened thousands of consent decrees to collateral attack by non-minority employees, the Supreme Court affirmed the Eleventh Circuit. The facts of *Martin* present a relatively compelling due process claim favoring the non-minority employees, as they or their privies in interest had attempted during the initial litigation and immediately thereafter to present their case as parties, and had been denied that opportunity. The holding of *Martin*, however, is not limited to cases in which non-minority employees have been so vigilant or have been denied a prior opportunity to assert their claims in a timely manner. Chief Justice Rehnquist wrote the opinion, joined by Justices White, O'Connor, Scalia and Kennedy. The majority recognized that a non-party may intervene pursuant to Rule 24, or may be involuntarily joined pursuant to Rule 19. However, since Rule 24 intervention is permissive, the failure to intervene may not be given preclusive effect.[82]

The fallout from *Martin* could be enormous. Of the hundreds of thousands of operative voluntary affirmative action plans affecting mil-

75. *Martin*, 109 S. Ct. at 2181.

76. United States v. Jefferson County, 720 F.2d 1511, 1518, 1520 (11th Cir. 1983).

77. Collateral attack on a judgment is permissible only if the court had no jurisdiction over the subject matter, or if the judgment is the product of corruption, duress, fraud, collusion, or mistake. *See* Restatement (Second) of Judgments §§ 69-72 (1982); Griffith v. Bank of New York, 147 F.2d 899, 901 (2d Cir. 1945), *cert. denied*, 325 U.S. 874 (1945).

78. *Martin*, 109 S. Ct. at 2181.

79. In re Birmingham Reverse Discrimination Employment Litig., 833 F.2d 1492, 1498 (11th Cir. 1987).

80. *See, e.g.*, Thaggard v. City of Jackson, 687 F.2d 66 (5th Cir. 1982), *cert. denied*, 464 U.S. 900 (1983); Dennison v. City of Los Angeles, 658 F.2d 694 (9th Cir. 1981); EEOC v. McCall Printing Corp., 633 F.2d 1232 (6th Cir. 1980).

81. Martin v. Wilks, 108 S. Ct. 2843 (1988).

82. *Martin*, 109 S. Ct. at 2182.

lions of employees,[83] a significant percentage are either consent decrees or judicially imposed decrees. All of these decrees are now in some degree of jeopardy. Since the factual basis for most collateral attacks on decrees would be current employment decisions taken pursuant to the decrees, there would seem to be no applicable statute of limitations which would protect the decrees. The limitations period for both a fourteenth amendment claim and a Title VII claim would commence with the specific employment decision being challenged, and not upon the entry of the decree.[84] Thus, for those many decrees entered without formal party participation of non-plaintiff employees, any currently aggrieved employee can now challenge the decree.

For those decrees resulting from litigation in which non-plaintiff employees participated as parties, the degree of vulnerability will depend largely on whether the district and circuit courts are willing to find sufficient identity of interest between the employee parties and the currently aggrieved employee.[85] For instance, a current plaintiff claiming sex discrimination would not necessarily have sufficient identity of interest with white male intervening employees in the original Title VII action.

The uncertain status of all existing decrees poses an awkward problem, not only for women and minority employees whose employment rights are rendered dubious, but also for employers who are faced with potential monetary liability whether they comply with or defy the standing court orders. Indeed, the employer's position is rendered all the more precarious by the fact that cases, long since resolved, may now be relitigated before new judges appointed during the Reagan years.

3. *Independent Federation of Flight Attendants v. Zipes* (attorneys' fees against intervenors)

Following quickly on the heels of *Martin*, the Court's decision in *Independent Fed'n of Flight Attendants v. Zipes*[86] further opened the door for challenges to existing and proposed remedial decrees. In 1970, a group of female flight attendants brought suit against Trans World Airlines ("TWA"), challenging its policy of terminating the employment of flight attendants who became pregnant. One month after suit was filed TWA abandoned its policy of pregnancy-based discharges, and shortly thereafter, the parties reached a settlement agreement which included an award of competitive[87] seniority for the class members.

83. Schwartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over But the Shouting*, 86 MICH. L. REV. 524, 525 (1987).

84. *See* In re Birmingham Reverse Discrimination Employment Litigation, 833 F.2d 1492, 1498 (1987). *Compare* Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261 (1989), discussed *infra* p. 40.

85. *See Birmingham*, 833 F.2d at 1498.

86. 109 S. Ct. 2732 (1989).

87. "Competitive seniority" refers to seniority used to award scarce benefits to competing employees. "Noncompetitive seniority" or "benefit seniority" refers to seniority used to award employment benefits which are available to all employees without competition. Franks v. Bowman Transp. Co., 424 U.S. 747, 766 (1976).

At this point, Independent Federation of Flight Attendants ("IFFA") was granted leave to intervene to oppose the award of competitive seniority to the plaintiffs. IFFA argued that the district court lacked jurisdiction to award relief to time-barred class members and that the award of competitive seniority would violate the collective-bargaining agreement between IFFA and TWA. The district court rejected IFFA's arguments and the Seventh Circuit affirmed.[88] The Supreme Court granted certiorari and affirmed the district and circuit courts on both issues.[89]

Plaintiffs then successfully petitioned the district court for an award of attorneys' fees against IFFA under 42 U.S.C. § 2000e-5(k). The more than twelve years of litigation, including five appeals, had virtually all resulted from the objections of the intervenors and their predecessors in interest, as TWA had ceased its challenged practice almost immediately after suit was filed. The district court held that "unsuccessful Title VII union intervenors are, like unsuccessful Title VII defendants, consistently held responsible for attorneys' fees."[90] The Seventh Circuit affirmed,[91] and the Supreme Court granted certiorari[92] and reversed.[93]

Title VII's attorneys' fee provision, 42 U.S.C. § 1988, provides for a discretionary award of attorneys' fees to the prevailing party.[94] In *Albemarle Paper Co. v. Moody*,[95] the Court had ruled that a Title VII prevailing plaintiff is to be awarded attorneys' fees against an unsuccessful employer in all but special circumstances. In *Christiansburg Garment Co. v. EEOC*,[96] the Court ruled that a prevailing defendant is to be awarded attorneys' fees only when the plaintiff's action was frivolous, unreasonable or without foundation.[97] The distinction between the two standards was based upon the strong policy in favor of enabling plaintiffs to bring Title VII suits, the plaintiff's status as a private attorney general and the unsuccessful defendant's status as a violator of federal law.[98] The Supreme Court had never ruled on the standard to be applied to fee awards against intervenors; however, the district and circuit court authority almost uniformly supported fee awards against intervenors using the same basis as awards against defendants.[99]

88. Air Line Stewards and Stewardesses Ass'n Local 550 v. Trans World Airlines, Inc., 630 F.2d 1164 (7th Cir. 1980).

89. Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982).

90. Air Line Stewards and Stewardesses Ass'n Local 550, TWU, AFL-CIO v. Trans World Airlines, Inc., 640 F. Supp. 861, 867 (N.D. Ill. 1986).

91. Zipes v. Trans World Airlines, Inc., 846 F.2d 434 (7th Cir. 1988).

92. Independent Fed'n of Flight Attendants v. Zipes, 109 S. Ct. 835 (1989).

93. Independent Fed'n of Flight Attendants v. Zipes, 109 S. Ct. 2732 (1989).

94. 42 U.S.C. § 2000e-5(k) (1982).

95. 422 U.S. 405 (1975).

96. 434 U.S. 412 (1978).

97. *Id.* at 415-421.

98. *Id.* at 418-419.

99. *See, e.g.*, Morten v. Bricklayers, Masons and Plasterers, 543 F.2d 224 (D.C. Cir. 1976); Haycraft v. Hollenbach, 606 F.2d 128 (6th Cir. 1979); Allen v. Terminal Transp. Co., 486 F. Supp. 1195 (N.D. Ga. 1980), *aff'd sub nom.* United States v. Terminal Transp. Co., 653 F.2d 1016 (5th Cir. 1981), *cert. denied*, 455 U.S. 989 (1982); Van Hoomissen v. Xerox Corp., 503 F.2d 1131 (9th Cir. 1974); Akron Center for Reproductive Health v. City

Justice Scalia delivered the opinion in *Zipes*, writing for a five Justice majority.[100] The Court held that attorneys' fees may be awarded against intervenors in Title VII litigation only upon a finding that the intervenors' action was frivolous, unreasonable, or without foundation.[101] The Court's reasoning focused almost entirely upon the "innocent" status of an intervenor defending its "rights," even if unsuccessfully, and referred to intervenors as "particularly welcome since we have stressed the necessity of protecting, in Title VII litigation, 'the legitimate expectations of . . . employees innocent of any wrongdoing,' *Teamsters v. United States*, 431 U.S. 324, 372 (1977)."[102]

Justice Scalia reasoned that the Court's ruling in *Martin v. Wilks*[103] effectively required the stricter standard for fee awards against intervenors. Under *Martin*, employees objecting to a Title VII remedy may either intervene prior to judgment or may collaterally attack the remedy after judgment. In a collateral attack, the objecting employees would be Title VII plaintiffs, presumptively shielded from a fee award upon losing, and presumptively entitled to a fee award upon winning. If, as intervenors, unsuccessful objecting employees were presumptively liable for fees, Justice Scalia reasoned that objecting employees would be more likely to opt for post-judgment collateral attack.[104]

This reasoning heightens the impact of both *Martin* and *Zipes*. Absent *Zipes*, it would be far from clear that *Martin* plaintiffs attacking Title VII decrees would be entitled to the same favored treatment which *Albemarle Paper Co.* and *Christiansburg Garment Co.* had afforded to plaintiffs seeking to further the goals of Title VII. This holding invites third-party challenges to Title VII claims with the same incentives heretofore offered to invite the assertion of such claims, reflecting a major shift in public policy not supported by the legislative history of the statute. The *Zipes* fee standard is therefore framed so as to remove any disincentive to non-minority employees' prompt defense against minority claims. Nor was the Court willing to limit its holding to fees incurred to defend the remedy, as opposed to fees incurred to defend against arguments as to liability. The *Zipes* majority held that either sort of argument, made by an intervenor, is made for the purpose of defending its own employment rights, and that such a purpose is "entitled to no less respect than

of Akron, 604 F. Supp. 1268 (N.D. Ohio, 1984); Thompson v. Sawyer, 586 F. Supp. 635 (D.D.C. 1984), *aff'd on other grounds*, 678 F.2d 257 (D.C. Cir. 1982); Vulcan Soc'y of Westchester County v. Fire Dep't, 533 F. Supp. 1054 (S.D.N.Y. 1982). *Cf.* Charles v. Daley, 846 F.2d 1057 (7th Cir. 1988); Robideau v. O'Brien, 525 F. Supp. 878 (E.D. Mich. 1981).

100. Chief Justice Rehnquist and Justices White, O'Connor, Kennedy and Scalia constituted the majority. Justices Blackmun, Marshall and Brennan dissented. Justice Stevens took no part in the case.

101. Independent Fed'n of Flight Attendants v. Zipes, 109 S. Ct. 2732 (1989).

102. *Id.* at 2735.

103. Objecting employees may still be inclined to choose collateral attack, since as successful Title VII plaintiffs, they would be presumptively entitled to a fee award from the employer defendant. Thus Justice Scalia's reasoning actually supports Justice Blackmun's concurring opinion which would hold that the adjudicated Title VII violator, the employer, should bear the plaintiff's attorneys' fees expended against the intervenors.

104. *Zipes*, 109 S. Ct. at 2736-38.

the rights asserted by [a Title VII plaintiff]."[105]

*Martin* and *Zipes* are a powerful duo. Together they declare open season on thousands of existing remedial decrees, and on all future remedial decrees. The Court has issued a clear invitation to non-minority employees to challenge claims made by minority litigants—claims, which were heretofore resisted principally by employer defendants. Indeed, the door is wide open to collusive arrangements whereby the employer may substantially delegate the defense of its case to non-minority employee intervenors, thus all but nullifying § 1988.

### B. *Seniority Systems*

#### 1. *Lorance v. AT&T Technologies, Inc.* (statute of limitations for Title VI claim)

While it may be open season on remedial decrees, the season is essentially closed on bona fide seniority systems. In *Lorance v. AT&T Technologies, Inc.*,[106] a decision issued on the same day as *Martin*, the Court limited a Title VII plaintiff's opportunity to attack intentional[107] discrimination in a seniority system to a 180/300 day[108] period immediately following the system's enactment, whether or not the system has yet harmed any minority employee.

Prior to 1979, AT&T's seniority system computed a worker's competitive seniority[109] based upon years of plantwide service. No change in seniority occurred upon promotion to the more skilled and better paid "tester" position. Tester positions had almost exclusively been held by men, and nontester positions had been held predominantly by women.

In the mid-1970's, women began to exercise their seniority rights to qualify as testers. In 1979, AT&T and Local 1942, International Brotherhood of Electrical Workers, AFL-CIO entered into a collective bargaining agreement which changed the manner of calculating tester seniority. For a tester with less than five years in a tester's position, the new system calculated seniority based only on years as a tester, and discounted completely years in other plant positions. Testers with more than five years in a tester position (mostly men) could regain full plantwide seniority by completing a training program.[110]

During 1982 an economic downturn necessitated demotions, which

105. *Id.* at 2738.

106. 109 S. Ct. 2261 (1989).

107. In a challenge to a seniority system, intentional discrimination is the only vehicle open to a Title VII plaintiff. 42 U.S.C. § 2000e-2(h). For a potential disparate impact challenge, the statute already gives conclusive deference to the expectations of non-minority workers, no matter how disparate the *effect* of the seniority system upon minorities.

108. 42 U.S.C. § 2000e-5(e) requires a Title VII charge to be filed with the EEOC within 180 days of the occurrence of the challenged action. If the complainant has first instituted proceedings in a 706 deferral (state or local) agency, this limitations period is extended to 300 days.

109. *See Lorance*, 109 S. Ct. at 2263 n.1.

110. *Id.* at 2261.

were accomplished by seniority ranking. The *Lorance* plaintiffs, women who had become testers between 1978 and 1980, were demoted, though they had greater plantwide seniority than men who were retained as testers. They promptly filed administrative charges and then filed suit, alleging that the 1979 alteration of the seniority calculation formula was the product of a conspiracy between the company and the union to protect incumbent male testers and to discourage women from seeking the traditionally male tester jobs.[111] AT&T sought summary judgment, arguing that the statute of limitations began to run upon adoption of the seniority system in 1979, and that it had expired by at least 300 days after the adoption of the system. The plaintiffs argued that the continued use of a seniority system is an ongoing violation of Title VII if the system is designed, operated and maintained with the intent to discriminate.[112]

The district court staked a middle ground. The court refused to completely insulate an intentionally discriminatory seniority system after its first 180/300 days, but also refused to permit a plaintiff to wait to challenge the system until it had actually operated to her detriment. The court held that the limitations period begins to run for each employee at the time that employee becomes subject to the discriminatory system.[113] Therefore, while the *Lorance* plaintiffs' claims were time barred, there would be a continuous supply of possible plaintiffs as new employees were hired.[114] The Seventh Circuit affirmed the district court, and the Supreme Court granted *certiorari*[115] to decide the statute of limitations issue.[116]

Justice Scalia, who authored the *Martin* opinion, also wrote for the *Lorance* majority. The Court held that the limitations period commenced upon the adoption of the system,[117] and thus completely protected intentionally discriminatory seniority systems more than 300 days old. The Court's ruling was based upon a theoretical construct focusing on the date of the "intent" required by § 703(h), and upon seniority as a present contract right (albeit a right to favorable treatment in a future situation which might or might not arise). Justice Scalia wrote:

Under the collective bargaining agreements in effect prior to

111. *Id.*

112. Lorance v. AT&T Technologies, Inc., 827 F.2d 163, 165 (7th Cir. 1987).

113. *Id.* at 166 (emphasis added).

114. *Id.* at 167.

115. Lorance v. AT&T Technologies, Inc., 109 S. Ct. 217 (1988).

116. The majority of circuits had embraced the "continuing violation" theory advocated by the *Lorance* plaintiffs. *See, e.g.*, Patterson v. American Tobacco Co., 634 F.2d 744, 750-51 (4th Cir. 1980) (continued application of unlawful seniority system constitutes "continuing violation," hence not time barred by failure to challenge system at inception); Cook v. Pan American World Airways, Inc., 771 F.2d 635, 646 (2d Cir. 1985) (maintenance of discriminatory seniority system constitutes continuing violation of ADEA); Morelock v. NCR Corp., 586 F.2d 1096, 1103 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979) ("continuing violation" of ADEA); *but cf.* Bronze Shields, Inc. v. N.J. Dep't. of Civil Serv., 667 F.2d 1074, 1077 (3d Cir. 1981), *cert. denied*, 458 U.S. 1122 (1982) (discussion of precedent and commentary regarding "continuing violation" theory).

117. Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261, 2264 (1989).

> 1979, each petitioner had earned the right to receive a favorable position in the hierarchy of seniority among testers (if and when she became a tester), and respondents eliminated those rights for reasons alleged to be discriminatory. Because this diminution in employment status occurred in 1979 [petitioner's claims are time-barred].[118]

Thus, under the *Lorance* holding, testers hired more than 300 days after the adoption of the discriminatory system would never have a right to challenge it. Nor would current testers who were unaware of the offending provision in the new system, with the possible exception of those who could demonstrate that their employer acted affirmatively to conceal the discriminatory provision. Further, it is unclear whether other plant employees who, at the time the seniority system was adopted, aspired to become testers would have standing to challenge the discriminatory system. While the logical extension of Justice Scalia's language would seem to support standing, it is doubtful that this Court would be particularly receptive to a challenge to an entire seniority system based merely upon a plaintiff's argument that she may one day wish to become a tester.[119]

However, even if the Court adopts an expansive notion of standing to challenge seniority systems, the actual effect of *Lorance* will be essentially the same. For most plaintiffs, the risks and practical considerations inherent in filing suit against a current employer outweigh all but the most sure and serious harm. Few are the employees who will be willing to challenge a system which has not yet, and may never, cause them any harm. Fewer still are the attorneys who would undertake such a case, promising no back pay award, especially since the case may be defended by intervenors protecting their seniority claims so that the chance of a substantial attorneys' fee award is diminished.[120]

Perhaps most striking, though, is the juxtaposition of *Lorance* and *Martin*. Under *Lorance*, victims of *intentional* discrimination, accomplished by a unilateral and perhaps undisclosed act on the part of their employer, must immediately file a charge or lose their right to challenge the discrimination. This is so whether or not they are yet harmed and indeed whether or not they are even aware of the discriminatory act. Under *Martin*, white men who wish to oppose remedial relief for victims of adjudicated prior discrimination may, at any time, challenge a judgment, despite the fact that it was entered only after direct notice to them, and after contested hearings covering all aspects of the proposed decree. Under *Lorance*, minorities and women hired after an intentionally discriminatory seniority system is 300 days old must rely on those who were employed during the first 300 days to protect their rights, whether or not those earlier employees were or would be harmed by the

---

118. *Id.* at 2263-64.

119. C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE 2D § 3531 (1984).

120. *See* Martin v. Wilks, 109 S. Ct. 2180 (1989).

seniority system. Under *Martin*, white males are expressly not required to rely on earlier employees to protect their rights.

Admittedly the issues raised by claims barred by a statute of limitations (particularly in the context of seniority systems on which other employees have relied for years) and claims based on collateral attack of a systemic equitable decree are set in different doctrinal contexts and there are some differing policy considerations. However, the overriding concern for the due process rights of non-minority employees in *Martin* is notably not reflected in a corresponding concern for the due process rights of women and minorities in *Lorance*. A minority employee may rely on an operative Title VII decree as surely as a non-minority may rely on an intentionally discriminatory seniority system. The interest in prompt resolution of claims is present in both cases. Yet the Court has elected to shield intentionally discriminatory seniority systems after 180 days, but exposes public judicial decrees to attack at any time. Again this reflects a major shift in public policy. The implementation of Title VII's original goals is curtailed, while the statute is turned against itself to dismantle its own decrees.

2. *Public Employees Retirement System of Ohio v. Betts* (application of the exception for seniority systems in ADEA claims)

*Public Employees Retirement System of Ohio v. Betts*[121] is another limitation on challenges to seniority systems. *Betts* involved non-competitive or benefit seniority in the context of an age discrimination claim.

The Age Discrimination in Employment Act of 1967 ("ADEA") proscribes employment discrimination based upon age. Section 4(a)(2) forbids an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age."[122] However, the ADEA provides an exception for employment actions taken pursuant to the terms of "any bona fide employee benefit plan, which is not a subterfuge to evade the purposes of" the Act.[123] The issue in *Betts* is the scope of this exception.

The Public Employees Retirement System of Ohio ("PERS") was established in 1933. PERS provides retirement and disability plans for employees of the State of Ohio. An employee may only receive benefits from one of these plans, and in 1959, PERS was amended to provide that employees who are sixty and over may not receive benefits under the disability plan. In 1967, the ADEA was enacted and in 1974 it became applicable to state governments. In 1976, PERS was amended to include a minimum benefit amount payable under the disability plan, but not under the retirement plan.

121. 109 S. Ct. 2854 (1989).
122. 29 U.S.C. § 623(a)(1) (1982).
123. 29 U.S.C. § 623(f)(2) (1982).

June Betts had been an employee of the State of Ohio since 1978. Prior to 1985, she developed medical problems which continued to worsen until, in 1985, her supervisor determined that Betts was no longer physically able to perform her job. Betts was given the option to retire under the PERS retirement plan, but she was not eligible to receive disability benefits because she was sixty-one years old. Because the minimum benefit award applied only to the disability plan, Betts' monthly check was less than half of the amount which would have been paid under the disability plan.

Betts brought suit against PERS, alleging a violation of the ADEA. The district court found the PERS scheme to be discriminatory on its face. At issue then was the scope of the exception for bona fide benefit plans. The district court, relying on the EEOC interpretive regulation that the exception applied only if any reductions in employee benefits are justifiable by cost considerations, found that the exception did not apply to the PERS provision.[124] The PERS provision was not justified by increased cost and thus not covered by the exemption. The court of appeals affirmed the district court's decision,[125] and the Supreme Court noted probable jurisdiction.[126]

The majority opinion, written by Justice Kennedy, reaffirmed the Court's earlier holding in *United Air Lines v. McMann*[127] that no pre-ADEA action can be a subterfuge.[128] The Court then focused on the scope of the exception as it applied to post-ADEA employment actions, and specifically to the 1976 PERS amendment providing a minimum payment for disability benefits.

The Court held that the EEOC's construction of the word "subterfuge" was contrary to the plain meaning of the ADEA, and thus that it was entitled to no weight.[129] The Court then proceeded through a complex and sometimes convoluted exercise in statutory analysis, and ultimately concluded that a benefit plan is a "subterfuge" only if it is a method of discriminating in other, "nonfringe-benefit aspect[s] of the employment relation[ship]."

Additionally, the Court held that the "subterfuge" exception is not an affirmative defense but is instead a part of the ADEA plaintiff's *prima facie* case. Further, the plaintiff must prove actual intent on the part of the employer in order to negate the application of the exception.[130]

The Court's holding that a pre-ADEA employment action cannot be regarded as a subterfuge is correct. However, the construction of the

124. Betts v. Hamilton County Bd. of Mental Retardation, 631 F. Supp. 1198 (S.D. Ohio 1986).

125. Betts v. Hamilton County Bd. of Mental Retardation & Development Disabilities, 848 F.2d 692 (6th Cir. 1988).

126. Public Employees Retirement System of Ohio v. Betts, 109 S. Ct. 256 (1988).

127. 434 U.S. 192 (1977).

128. Public Employees Retirement System of Ohio v. Betts, 109 S. Ct. 2854, 2861 (1989).

129. *Id.* at 2862-65.

130. *Id.* at 2865-68.

scope of the exception to exclude only those benefit plans which are a method of discriminating in other aspects of the employment relationship is, as Justice Marshall pointed out, an immunization of "virtually all employee benefit programs from liability" under the ADEA.[131] The scope of the exception now protects even plans devised expressly for the purpose of discriminating against older workers, and even if the reason for the discrimination is the employer's hostility to or stereotypes of older workers.

The conversion of the affirmative defense into an element of the plaintiff's *prima facie* case and the requirement of proof of actual intent will have limited practical impact, since most benefit plans will not affect non-benefit employment actions covered by ADEA. However, even in those cases where non-benefit actions are proven to be affected by the benefit plan, it will be very difficult for the employee to prove as part of its *prima facie* case that the employer intended such a secondary discriminatory impact. The most a plaintiff will usually be able to show is that the employer operated from mixed motives. In that context, plaintiffs may draw some comfort from the *Price Waterhouse* ruling that, at least in the Title VII context, a plaintiff's showing that the employer was influenced by an impermissible motive, as well as by legitimate motives, shifts to the defendant the burden of proving that it would have committed the same act absent the impermissible motive. However, in the ADEA fringe benefit context, it may prove difficult for plaintiffs to capitalize on the *Price Waterhouse* rationale. To the extent that the courts will apply the reasoning of *Price Waterhouse* in such cases, it seems to follow that the employer need only show that it deliberately sought to discriminate against protected employees in the benefit package, and would have done so even absent secondary discriminatory effects. There is no need to justify or even claim a non-discriminatory business reason.

*Betts* is another expansion of the rights of employers, another burden placed upon plaintiffs, another category of employment decisions placed beyond the reach of equal employment opportunity. The EEOC interpretation of the bona fide employee benefit plan exception, heretofore accepted by the courts, construed the statute to accommodate legitimate business interests of the employer, that is, cost considerations. The holding in *Betts* shields deliberate discrimination without regard to any such legitimate need of the employer.

### C. *Section 1981.* Patterson v. McLean Credit Union *(applicability of the Civil Rights Act of 1866 to private contracts)*

In 1976, *Runyan v. McCrary*[132] held that the Reconstruction Enforcement Act, 42 U.S.C. § 1981,[133] prohibits racial discrimination in

131. *Id.* at 2869.

132. 427 U.S. 160 (1976).

133. 42 U.S.C. § 1981 (1982) provides as follows:

All persons within the jurisdiction of the United States shall have the same right in

the making and enforcement of private contracts.[134] In *Runyan*, two black children had been denied admission to private schools expressly because of their race. They filed suit, alleging that § 1981 prohibited such racially discriminatory admissions policies. The Supreme Court agreed, holding that the school's refusal to contract with the plaintiffs based upon their race was a "classic violation of § 1981."[135]

In 1987, in *Patterson v. McLean Credit Union*, the Supreme Court granted *certiorari* to determine whether § 1981 applies to a claim of racial harassment in employment.[136] After oral argument, the Court shocked courtwatchers and civil rights activists by setting *Patterson* over to the next Term and requesting the parties to brief and argue the question of whether the *Runyan* holding should be reconsidered.[137]

Patterson, a black woman, was employed by McLean Credit Union from 1972 to 1982. She testified at trial that during her employment she was given more work than white employees, subjected to racial slurs, assigned more demeaning tasks than white employees, denied training opportunities available to white employees, not notified of promotion opportunities, passed over for the promotion opportunities she sought, paid less than white employees, and singled out for scrutiny and public criticism. She alleged that her selection for layoff was also based upon her race. After the 1982 layoff, she filed suit, alleging that these actions by the credit union had violated her civil rights under 42 U.S.C. § 1981.[138] Both the district court and the Fourth Circuit held that § 1981 applied to her claims for failure to promote and discriminatory discharge, but that § 1981 did not apply to her claims for racial harassment.[139] Other circuits had held that § 1981 reaches claims of maintenance of a hostile working environment and private racial harassment.[140]

The Supreme Court opinion was handed down at the end of the 1989 term. The Court declined to overturn *Runyan* though Justice Kennedy, writing for the majority, did not conceal the reluctance of the subscribing Justices in letting *Runyan* stand.[141] The decision is based almost entirely on the "fundamental importance" of the doctrine of *stare*

---

every State and Territory to make and enforce contracts, . . . as is enjoyed by white citizens . . . .

134. *See also* Johnson v. Railway Express Agency, 421 U.S. 454, 459-460 (1975); Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 439-440 (1973); *cf.* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441-443 n.78 (1968).

135. *Runyan*, 427 U.S. at 172.

136. Patterson v. McClean Credit Union, 484 U.S. 814 (1987). The Court also granted certiorari to review the jury instruction on the § 1981 promotion claim. *See* Section D. *infra*.

137. Patterson v. McClean Credit Union, 485 U.S. 617 (1988).

138. Patterson also alleged intentional infliction of emotional distress under North Carolina tort law. Patterson did not bring a Title VII claim, presumably because the limitations period had expired. 805 F.2d 1143, 1144 (4th Cir. 1986).

139. Patterson v. McClean Credit Union, 805 F.2d 1143 (4th Cir. 1986).

140. *E.g.*, Erebia v. Chrysler Plastic Products Corp., 772 F.2d 1256, 1255, 1256-1259 (6th Cir. 1985), *cert. denied* 475 U.S. 1015 (1986); Taylor v. Jones, 653 F.2d 1193 (8th Cir. 1981).

141. Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2369 (1989).

*decisis* to the preservation of a judicial system not based upon arbitrary discretion.[142]

However, the majority emphatically precluded any broad reading of § 1981's scope. The Court adopted the narrowest possible reading of the "making" and the "enforcement" of contracts. According to *Patterson*, the "making" of a contract covers only the contract's formation, but not subsequent problems arising from the conditions of continuing employment; "enforcement" of contracts covers only the right of access to a legal process to resolve contract claims.[143] Under this strict construction, Patterson's claims of racial harassment, including the failure to train, and the failure to give wage increases, were not actionable under § 1981.

Though the credit union had not argued that § 1981 did not reach claims for failure to promote, the Court held that promotion claims are actionable under § 1981 only where the promotion "rises to the level of an opportunity for a new and distinct relation between the employee and the employer."[144] The Court cautioned lower courts not to "strain in an undue manner the language of § 1981" in making this determination,[145] but rather to adopt the same sort of narrow reading used in the *Patterson* analysis.

What is the real significance of *Patterson*?[146] It is true that all of Patterson's claims not reached by § 1981 are covered by Title VII. Indeed, Title VII's scope is more comprehensive and broader than § 1981.[147] There are, however, some differences between the two statutes which make § 1981 more helpful to a civil rights plaintiff. Title VII's 180/300 day statute of limitations[148] is substantially shorter than the customary two or three year statute of limitations applicable to § 1981 claims.[149] Section 1981 requires no complex administrative procedures prior to suit, as does Title VII.[150] Section 1981 reaches conduct by any person, while Title VII covers only employers of fifteen or more

142. *Id.* at 2370.

143. *Id.* at 2772-73.

144. *Id.* at 2377.

145. *Id.*

146. Some commentators argue that the greatest import of *Patterson* may prove to be in the context of private associational and contractual relationships other than employment claims. *See* L. MODJESKA, EMPLOYMENT DISCRIMINATION LAW 328-29 (2d ed. 1988).

147. For instance, § 1981 prohibits only racial and certain ethnic discrimination, while Title VII proscribes private discrimination based on race, color, religion, sex or national origin. *See* Shaare Tefila Congregation v. Cobb, 107 S. Ct. 2019 (1987). Section 1981 prohibits only purposeful discrimination, while Title VII proscribes both disparate treatment and disparage impact. *See* Gen. Bldg. Contractors Assn. v. Pennsylvania, 458 U.S. 375 (1982); *See also*, Sections D and E *infra*.

148. *See supra* note 6.

149. The statute of limitations governing a § 1981 claim corresponds with the state statute of limitations governing personal injury. Goodman v. Lukens Steel Co., 482 U.S. 656, 660-62 (1987). In Owens v. Okura, 109 S. Ct. 573 (1989), the Court held that, in states with multiple personal injury limitations periods, the applicable provision, at least for the purposes of § 1983, is the limitations period for general or residual personal injury claims.

150. 42 U.S.C. § 2000e-5(b), (e), (f)(1) (1982).

persons, labor organizations, and certain conduct by employment agencies.[151] Section 1981 plaintiffs are entitled to a jury trial, while Title VII claims are tried to the court. Successful § 1981 plaintiffs may recover broad equitable and legal relief, sometimes including punitive damages, while Title VII relief is limited to back pay and affirmative job relief. *Patterson* has cut off these § 1981 advantages from all but plaintiffs alleging discrimination in hiring.[152] It is only the larger significance of some of the other recent cases and the fact that the Court reluctantly reaffirmed *Runyan* which makes *Patterson* seem to pale by comparison.

On the one hand, *Patterson* reflects the real incongruity of leaving the same employment relationships subject to both § 1981 and Title VII, as § 1981 tends to undermine Title VII's statutory, administrative, and equitable structure, allowing plaintiffs to circumvent the reasonable protections afforded to employers. Such protections are the necessary prerequisite to the aggressive equitable relief necessary to achieve the goals of the Civil Rights Act of 1964. On the other hand, the narrow reading of § 1981 arbitrarily focuses on the inception of the employment relationship while allowing rampant discrimination in the ongoing dynamic of that relationship. This focus disregards the legislative intent and the public policy underlying § 1981. A far more coherent approach to civil rights in the employment context could have been achieved if the Court had found an implied partial repeal of § 1981 so as to exclude from its coverage employment relationships governed by Title VII but otherwise left § 1981's scope intact.

### D. *Disparate Treatment* — Price Waterhouse v. Hopkins *(standard of causation)*

The most commonly used proof model for a Title VII claim of intentional discrimination is the disparate treatment model. First articulated in *McDonnell Douglas Corp. v. Green*,[153] the disparate treatment model requires the plaintiff to present a *prima facie* case which disproves the most common legitimate causes for the employer's action, thus raising an inference of discrimination.[154] In a hiring context, for instance, in order to establish a *prima facie* case, the plaintiff need only prove:

> (i) that he belongs to a [protected group]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[155]

151. 42 U.S.C. § 2000e (1982). Fifteen percent of employees are not covered by Title VII. Carver, *Employment Practices*, Lab. L. Rep. (CCH) No. 364, at 6 (July 17, 1989).

152. Under *Patterson* some claims of failure to promote *may* be considered as claims of discrimination in hiring. *See supra*, p. 51.

153. 411 U.S. 792 (1973).

154. Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); International Bd. of Teamsters v. United States, 431 U.S. 324 (1977).

155. *McDonnell Douglas*, 411 U.S. at 802.

In the second stage of proof, the defendant may rebut the inference of discrimination simply by articulating some legitimate, nondiscriminatory reason for the challenged employment decision.[156]

In the third and final stage of the *McDonnell Douglas* model, the plaintiff must prove, by a preponderance of the evidence, that the employer's articulated reason was a mere "pretext" for discrimination.[157] In other words, the plaintiff must prove that the defendant's true motive was based upon the plaintiff's membership in a protected group. But what if the defendant's true motive was based partly upon plaintiff's race or sex and partly upon the articulated legitimate, nondiscriminatory reason? The Supreme Court answered this question in another 1989 case, *Price Waterhouse v. Hopkins*.[158]

Price Waterhouse is a nationwide professional accounting firm. Partnership decisions are made through a series of steps beginning when the partners in a local office submit the name of one of their senior managers as a candidate for partnership. All partners in the firm then have the opportunity to comment on the candidate. The firm's admissions committee reviews the comments and recommends to the policy board that the candidate be accepted, rejected or placed on hold. The policy board decides whether to submit the candidate's name to the entire partnership for a vote, to reject the candidate, or to place her on hold. The comments by partners, and the decisions of the admissions committee and the policy board are completely discretionary, employing no guidelines or fixed criteria.[159]

In 1982, Ann Hopkins had been employed at Price Waterhouse's Office of Government Services in Washington, D.C. for five years. Her performance had been excellent. As a senior manager she had successfully procured major contracts for the partnership and she was respected and liked by her clients. The partners in her office praised her skills and proposed her as a candidate for partnership that year. Only seven of the 662 partners in the firm were women. Of the eighty-eight candidates for partnership that year, Hopkins was the only woman. However, the partners in her office and others who commented on her candidacy also offered criticism, primarily centered on her lack of interpersonal skills in dealing with staff members and her "masculine" behavior. Partners commented that she was "macho," "overcompensated for being a woman," "needed" a course at charm school, used unladylike language, and was too aggressive.[160]

At the conclusion of the candidacy process, the policy board decided to put Hopkin's candidacy on hold, and advised her to walk, talk and dress "more femininely, . . . wear make-up, have her hair styled, and wear jewelry."[161] Subsequently, the partners in her local office refused

156. *Id.* at 807.
157. *Id.*
158. 109 S. Ct. 1775 (1989).
159. *Id.* at 1781.
160. *Id.* at 1782.
161. *Id.*

to repropose her for partnership, resulting in constructive discharge.[162] Hopkins filed a Title VII suit against Price Waterhouse alleging discrimination in the partnership decision. Price Waterhouse articulated Hopkins' lack of interpersonal skills as the legitimate reason for her rejection and argued that, even if impermissible sex stereotyping did taint the candidacy process, the firm's legitimate reasons would have resulted in the same decision.

The district court found that Price Waterhouse had violated Title VII by giving credence to sexual stereotypes. On the issue of remedies, the court held that Price Waterhouse could avoid equitable relief by proving by clear and convincing evidence that it would have made the same decision absent the discrimination. The trial court ruled that Price Waterhouse had not carried this "heavy burden."[163]

The United States Court of Appeals for the District of Columbia Circuit affirmed, but used a different analysis. The appeals court considered the mixed motive issue as part of the liability phase of the litigation, holding that an employer could avoid a finding of a Title VII violation by proving that legitimate reasons alone would have resulted in the same decision. The circuit court agreed that the appropriate proof standard for this "affirmative defense" was clear and convincing evidence. The Supreme Court found the circuits in disarray on the effect of mixed motives in a Title VII case,[164] and granted *certiorari* in *Price Waterhouse*.[165]

Justice Brennan wrote the Court's opinion. He was joined by Justices Marshall, Blackmun and Stevens, with concurring opinions by Justices White and O'Connor. The Court accepted the proposition that an employer should not be held liable for violating Title VII if the employer would have made the same decision absent discriminatory motives. However, the Court rejected Price Waterhouse's argument that the words "because of" mean "but-for causation," thus rejecting the next step of that rationale: that "but-for causation" was part of a plaintiff's burden of proof.[166]

Instead, the Court held that the causation language of Title VII, ". . . to discrimination . . . *because of* . . . such individual's . . . sex,"[167] simply means that the discriminatory reason was a "motivating factor" in the employment decision. The Court held that "but-for causation" was an affirmative defense, based upon Title VII's policy of preserving the employer's decision-making autonomy in areas not proscribed by the statute. Thus, the burden of proving "but-for causation," as an affirmative defense, rests upon the employer.[168] The Brennan opinion does not regard the creation of this affirmative defense as a change in

162. *See id.* at 1781 n.1.
163. *Id.* at 1783.
164. The holdings of the 11 circuits which had considered the effect of mixed motives in Title VII cases reflect five different approaches to the issue. *Id.* at 1784 n.2.
165. Price Waterhouse v. Hopkins, 108 S. Ct. 1106 (1988).
166. *Price Waterhouse*, 109 S. Ct. at 1784-86.
167. 42 U.S.C. § 2000e-2(a)(1), (2) (1982) (emphasis added).
168. *Price Waterhouse*, 109 S. Ct. at 1786-90.

the *McDonald Douglas* framework, since the result is conceptualized as an affirmative defense rather than a partial shifting of the burden of proof.[169]

As for the standard of proof required, the Court saw no reason to depart from the conventional rule of proof by a preponderance of the evidence. However, the Court offered some guidance in applying the preponderance standard. Justice Brennan wrote that in most cases the employer will be expected to include objective evidence as to the probable decision absent discrimination.[170] The standard requires the employer to prove what it *would have done*, as opposed to what it would have been justified in doing.[171]

The O'Connor concurrence differs conceptually from the Brennan opinion. Borrowing from tort analysis, Justice O'Connor employed an evidentiary shifting of the burden, based on proof by plaintiff sufficient to create an inference of causation. This conceptual difference allows her to justify arguing for a limitation upon the holding. She wrote that a plaintiff must show "direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion" in order to shift to the defendant the burden of proof on "but-for" causation.[172]

Justice White saw little point in this conceptual debate, though he himself utilized language of a shifting burden rather than an affirmative defense. He did not view the holding as a departure from *McDonnell Douglas*, but instead a refinement recognizing the difference between mixed motive cases and pretext cases. The three Justice dissent entered the conceptual debate, arguing that the Brennan opinion's definition of "because of" strips the phrase of all causal significance. Characterizing the issue as one of burden shifting, Justice Kennedy argued that there is no compelling reason to shift the burden, and that the increased complexity of the disparate treatment proof model will make the shifting burden unworkable.[173]

A word of caution regarding the dissent's characterization of the holding is in order. The primary opinion, Justice Brennan writing for a plurality, clearly held that a plaintiff need only prove that a protected characteristic "played a motivating part in an employment decision" in order to require a defendant to prove that "it would have made the same decision even if it had not taken the plaintiff's [protected characteristic]

169. *Patterson*, handed down just six weeks after *Price Waterhouse*, reaffirms the *McDonnell Douglas* proof model, albeit in a § 1981 case. Patterson v. McClean Credit Union, 109 S. Ct. 2363, 2377-78 (1989). *See supra* Section C.

170. This holding [may be] a plurality position, as Justice White's concurrence specifically disagrees that there should be any special requirement of objective evidence by the employer, *Price Waterhouse*, 109 S. Ct. at 1795-96, and Justice O'Connor's concurrence does not set out her position on this issue. Justice Kennedy's dissent mischaracterizes the court's holding. *Id.* at 1806.

171. *Price Waterhouse*, 109 S. Ct. at 1787-88 (emphasis added).

172. *Id.* at 1805. Again, Justice Kennedy mischaracterizes Justice O'Connor's position as to the Court's holding. *Id.* at 1806-14.

173. *Price Waterhouse*, 109 S. Ct. at 1806-14.

into account."[174] Only Justice O'Connor's concurrence would require the plaintiff to prove, by "direct evidence," that the protected characteristic was a "substantial factor" in the decision in order to trigger the defendant's burden to prove "but-for" causation.[175]

Justice White's concurrence adopts the *Mt. Healthy* standard, which uses "motivating factor" and "substantial factor" interchangeably. His opinion does not require "direct evidence" from either party, and requires the defendant to prove that the employment action would have been taken anyway.[176]

Combining the plurality and the two concurrences, the Court's holding is as follows: A plaintiff need only prove that a protected characteristic played a substantial part or in other words, that it was a motivating factor in the employment decision. Upon such proof, which need not be of any special variety, the defendant must then prove that it would have made the same decision, even absent the discriminatory reason.

However, the dissent characterizes the Court's holding differently. Justice Kennedy writes that the Court held that "in a limited number of cases," where a plaintiff presents "direct and substantial evidence," the burden of proof shifts to the defendant to prove that the "decision would have been supported by legitimate reasons."[177]

None of the controlling *Price Waterhouse* opinions require the defendant to prove merely that the decision would have been supported by legitimate reasons. Rather, they require that the employer would have made the same decision.[178] Further, Justice White's concurrence, the key fifth vote, uses "motivating factor" and "substantial factor" interchangeably, adopting the *Mt. Healthy* language, and none of the opinions in the combined majority mention "substantial *evidence*" (as opposed to "a substantial factor"). The dissent seems to have been reading a different set of opinions than those ultimately issued.

The majority's holding on the causation issue is clearly a middle road. *Price Waterhouse* required the Court to decide (1) what causation standard is required; (2) whether the analysis operates in the liability or the damages phase of the case; (3) who bears the burden of proof; and (4) by what standard of evidence causation must be proven. The Court chose the pro-employer "but-for causation" standard, placed the analysis in the liability phase of the litigation (a pro-employer decision), placed the burden of proof on the defendant (a pro-employee decision), but chose the lower "preponderance" standard (a pro-employer decision). Although *Price Waterhouse* may be regarded as a strengthening of the disparate treatment model, in a pro-employee sense, closer analysis reveals the decision to be a delicate refinement and balancing of the

174. *Id.* at 1795.
175. *Id.* at 1798.
176. *Id.* at 1795.
177. *Id.* at 1806.
178. *See Id.* at 1788.

evidentiary burdens of the parties. The result is not so much a more pro-employee model as a more viable model in that each party is effectively required to produce the evidence reasonably available to that party in a coherent order.

Another aspect of *Price Waterhouse* is worthy of comment. The opinion removes any doubt about the legitimacy of a Title VII claim alleging sex stereotyping.[179] Justice Brennan wrote:

> As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming *or insisting* that they matched the stereotype associated with their group, for "in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[180]

Further, *Price Waterhouse* legitimates not only expert proof of sex stereotyping in the form of testimony by social psychologists,[181] but also "lay" proof. Justice Brennan wrote:

> It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring "a course at charm school." Nor, . . . does it require expertise in psychology to know that, if any employee's flawed "interpersonal skills" can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism.[182]

E. *Disparate Impact.* Wards Cove Packing Co., Inc. v. Atonio *(statistical proof and re-articulation of impact proof model)*

The Supreme Court articulated the disparate impact proof model primarily in *Griggs v. Duke Power Co.*[183] and *Albemarle Paper Co. v. Moody*.[184] While the individual disparate treatment model can be effective in proving discrimination against a relatively unsophisticated employer whose articulated motives are illicit, it fails to address the more subtle but equally invidious discrimination which results from "artificial, arbitrary, and unnecessary barriers"[185] "to full employment."[186] These barriers, though facially neutral, are discriminatory in effect. In order to

179. However, Justice Kennedy cautioned that the sex stereotyping still must have a causal result in order to violate the statute. *Id.* at 1807.

180. *Id.* at 1791, citing to Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707 n.13 (1978), quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971) (emphasis added).

181. While the Brennan opinion has no difficulty with expert testimony of sex stereotyping, at least where the employer's challenge is untimely, Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1793 (1989), Justice O'Connor cautions that such testimony "standing alone" would not constitute the "direct evidence" of "substantial reliance" which she would require in order to shift the burden on causation. *Id.* at 1793.

182. *Id.* at 1793.

183. 401 U.S. 424 (1971).

184. 422 U.S. 405 (1975).

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

186. Holdeman, *Watson v. Fort Worth Bank and Trust: The Changing Face of Disparate Impact*, 66 DEN. U.L. REV. 179, 181 (1989).

address such facially neutral employment practices in the Title VII context, the disparate impact proof model was adopted following fourteenth amendment precedents.[187] The next thirteen years saw further refinements in the application of the proof model,[188] but no retreat from the basic principles of its operation. A disparate impact plaintiff had to demonstrate that a particular employment device had a statistically adverse impact upon a protected group in marked disproportion to its impact on employees outside that group.[189] After the plaintiff established this *prima facie* case, the burden of persuasion (not merely the burden of production) shifted to the defendant to establish the business necessity or manifest job relatedness of the challenged employment practice.[190]

If the defendant proved the business necessity of the employment practice, the plaintiff was required to demonstrate the existence of other reasonable alternatives which would have less adverse impact on the protected group.[191]

In 1988, in *Watson v. Fort Worth Bank & Trust*,[192] a unanimous Court extended disparate impact analysis to subjective employment decision-making. Disparate impact was clearly applicable to objective procedures such as manual dexterity test and to objective criteria such as height, education, or strength; but the circuits were divided as to whether disparate impact analysis could be applied in cases of subjectively measured criteria such as professionalism, leadership, and congeniality, or cases of subjective procedures such as interviews or evaluations, or cases in which employment decisions were made arbitrarily without fixed criteria or procedures. *Watson* brought such cases under the umbrella of the disparate impact proof model. However, the newly forming conservative wing of the Court, in a plurality opinion, re-articulated this proof model in terms which raised serious doubt about the continuing vitality of the *Griggs/Albemarle* formulation.[193] In the 1989 case of *Wards Cove Packing Co., Inc. v. Atonio*,[194] the *Watson* plurality was joined by Justice Kennedy, enabling a new majority to restructure the disparate impact proof model, dramatically increasing the difficulty of proving a disparate impact claim.

187. *See* Lau v. Nichols, 414 U.S. 563 (1974); Perkins v. Matthews, 400 U.S. 379 (1971); Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir., 1977).

188. *See, e.g.*, Connecticut v. Teal, 457 U.S. 440 (1982); New York City Transit Authority v. Beazer, 440 U.S. 568 (1979); Dothard v. Rawlinson, 433 U.S. 321 (1977).

189. *Griggs*, 401 U.S. at 424.

190. *Griggs*, 401 U.S. at 432; Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

191. *Griggs*, 401 U.S. at 424.

192. 108 S. Ct. 2777 (1988). Until *Watson*, the circuits had been divided as to whether disparate impact analysis was applicable to subjective employment decision-making.

193. Holdeman, *Watson v. Fort Worth Bank and Trust: The Changing Face of Disparate Impact*, 66 DEN. U.L. REV. 179 (1989).

194. 109 S. Ct. 2115 (1989).

1. Facts

A group of former employees brought a class action suit against Wards Cove Packing Co. Inc. and Castle and Cooke Inc., owners and operators of a number of Alaska salmon canneries and fish camps. The complaint alleged that Wards Cove Packing Co. and Castle and Cooke had discriminated on the basis of race in hiring, firing, paying, promoting, housing and messing (providing food) at their Alaska canneries.

Salmon canning is a seasonal enterprise coinciding with the summer salmon run. Most of the canneries are located in remote areas of Alaska, and consequently the canning companies transport most employees to the canneries, feed and house them there, and transport them from the canneries when their work is completed.

There are two general categories of jobs: cannery worker-labor jobs and non-cannery jobs. The non-cannery employees are hired in the Seattle area in the early spring and are sent to the canneries in preseason (late April or May) to dewinterize, repair and prepare the facilities for the salmon run. They also stay after the canning season ends to winterize and shut down the facilities.

Non-cannery jobs include carpenters, machinists and other skilled trades, but also include some unskilled positions. At the canneries operated by the defendants, these employees are mostly white, and they are paid from two to three times as much as cannery workers. Most non-cannery jobs are filled by word-of-mouth recruitment. The mostly white supervisors have virtually complete discretion in making hiring decisions. There is no advertising or posting of job openings. Rehire preference is given to former non-cannery employees, but not to cannery employees, for non-cannery jobs. Many non-cannery employees are related to other non-cannery employees.

Cannery employees are hired later in the spring and are employed only during the season, which lasts from three weeks to two months. Most are hired either from Alaska Native villages or through a largely Filipino local of the International Longshoremen's and Warehousemen's Union ("ILWU Local 37"). Most cannery workers are non-white, largely of Filipino, Alaska Native, Japanese or Chinese descent. Rehire preference is given to cannery employees for cannery jobs, and many cannery employees are related to other cannery employees.

Non-cannery workers arrive at the cannery sites approximately one month earlier and stay one month later than the cannery workers. They are assigned to the smaller, nicer and better insulated bunk houses. As the cannery workers arrive, the remaining large bunkhouses are opened and the cannery workers are housed there. Since almost all non-cannery workers are white, housing is almost entirely racially separate. Bunk houses are often identified by racial labels such as the "Eskimo quarters" or "the Filipino house."

Each cannery has two mess halls, one identifiably white and the other identifiably non-white. The union contract with Local 37 provides

for a separate cooking crew for Local 37 workers. The mess halls are often designated as "the Filipino mess house" and "the White mess house."

Other racial labeling is also common. The salmon butchering machine is called the "chink" and the operator is "the chink man." Cannery workers are referred to as "Eskimo labor" or "the Filipino crew"; cannery worker sign-on pay as "Filipino sign-on pay"; certain employee badge numbers are reserved for "Filipinos" and others for "Natives"; laundry bags and mail slots are marked with designations like "Oriental Bunkhouse."

The plaintiffs alleged that all of the these employment practices discriminate on the basis of race in violation of Title VII. The complaint alleges that 1) the employers intentionally discriminated (the disparate treatment proof model), and that 2) even if there was no intent to discriminate, these employment practices nonetheless had an adverse impact on minorities and were not necessary to the employer's business (the disparate impact proof model).

The trial court entered judgment in favor of the employers on several grounds, including a holding that the disparate impact proof model is not applicable to subjective employment practices.[195]

The employees appealed to the U.S. Court of Appeals for the Ninth Circuit, which ultimately reversed the trial court's decision. The full court held that disparate impact analysis should have been applied to all of the challenged employment practices.[196] In a second opinion, the court remanded the case to the trial court with instructions as to how the disparate impact analysis should apply.[197] The employers appealed to the Supreme Court, which granted *certiorari* to hear the case.

While the plaintiffs claimed discrimination in pay, promotion, housing and messing, these disparities stemmed directly from the fact that most employees hired for non-cannery jobs were white and most hired for cannery jobs were minorities. At the heart of the case, then, is the claim that the defendants' hiring practices had a disparate effect on minorities.

2. Statistics

The statistical component of a disparate impact case is the vehicle for proving the degree of impact caused by the employer's practice.[198]

195. Atonio v. Wards Cove Packing Co., 34 Empl. Prac. Dec. (CCH) 33,821 (W.D. Wa. 1982).

196. Wards Cove Packing Co., Inc. v. Atonio, 810 F.2d 1477.

197. Wards Cove Packing Co., Inc. v. Atonio, 827 F.2d 439.

198. In order to establish a *prima facie* case, the disparity of impact must be substantial. The Uniform Guidelines on Employee Selection Procedures provide a suggested benchmark of eighty percent. A selection rate for any race, sex, or ethnic group which is less than 4/5 of the rate for the group with the highest rate will generally be regarded by the federal enforcement agencies as evidence of disparate impact. 29 C.F.R. § 1607.4 (1988). While the "80% rule" is not a strict formula for determining disparate impact, it is a benchmark of prosecutorial discretion, Clady v. County of Los Angeles, 770 F.2d 1421 (9th Cir. 1985); and, as part of the Uniform Guidelines, is entitled to great deference by

In other words, the purpose of the statistical comparison is to isolate and measure the effect of the employer's practice from the effect of all other possible causes for the imbalance. Thus, the preferred statistical comparison is between the racial composition of employees in at-issue jobs and the racial composition of the qualified relevant labor market.[199] For most at-issue jobs, this comparison effectively eliminates other possible causes for the impact, such as a dearth of qualified applicants.

If there are no barriers or practices deterring qualified minorities from applying for at-issue jobs, a court may properly compare the racial composition of those hired with those who applied.[200] If such statistics are difficult or impossible to obtain, or if barriers have skewed the applicant flow, other reasonably reliable statistical comparisons (a surrogate pool) may also be probative.[201]

In *Wards Cove*, plaintiffs offered neither applicant flow statistics nor labor market statistics. Instead plaintiffs rested their statistical case almost entirely upon an internal comparison of the employer's work force. Simply put, plaintiffs demonstrated that most of the cannery workers were minorities and that most of the non-cannery workers were white, and argued that the packing companies' hiring and promotion policies either caused or perpetuated this racial stratification in the work force without a business justification.

Presumably, the *Wards Cove* plaintiffs were unable to gather either relevant labor market statistics or applicant flow statistics. Though the *Wards Cove* opinions and trial record did not shed light on the plaintiffs' trial strategies, one may surmise that applicant flow statistics were unavailable because of the highly informal, geographically segmented, and substantially undocumented hiring procedure used by the employers. Even if plaintiffs could have gathered statistics measuring expressions of job interest, such statistics could not measure the effects of challenged employment practices such as failure to post job openings, separate and geographically diverse hiring channels, and the chilling effect on potential applicants of the existing racial stratification in the workforce.[202] These factors would operate to skew the applicant flow.

Relevant labor market statistics would seem to have been more fea-

---

the courts. Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975). Statistical comparisons must be valid in terms of significance (based on a sample large enough to yield reliable results), Kim v. Commandant, Defense Language Institute, 772 F.2d 521 (9th Cir. 1985); Soria v. Ozinga Bros. Inc., 704 F.2d 990 (7th Cir. 1983); Harper v. Trans World Airlines, Inc., 525 F.2d 409 (8th Cir. 1975); scope (covering the appropriate category of employees), Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 482 (9th Cir. 1983); Kirkland v. New York State Dept. of Correctional Services, 520 F.2d 420 (2nd Cir. 1975); and time (covering appropriate length of time), Capaci v. Katz & Besthoff, 720 F.2d 1291 (5th Cir. 1983); Roman v. ESB, Inc., 550 F.2d 1343 (4th Cir. 1976); Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607.4, 1607.15 A(2) (1988).

199. Hazelwood School Dist. v. United States, 433 U.S. 299, 308 (1977).

200. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2119, 2120-21 (1989); *See* Teamsters v. United States, 431 U.S. 324, 365 (1977).

201. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 329-30 (1977) (allowing use of national general population statistics).

202. *See Teamsters*, 431 U.S. at 365-66.

sible to obtain than applicant flow statistics, but undoubtedly there would be significant difficulties there, too. The skills required for the at-issue jobs were diverse, ranging from medical personnel to machinists and from carpenters to clerical workers.[203] The relevant labor market included the entire northwestern United States rather than one geographically restricted area within normal commuting distance, as would be customary for jobs not requiring residence at the job site. Perhaps most importantly, the relevant labor market would include only those willing to undertake a seasonal position requiring several months away from home, living in primitive conditions.

Presumably because of these difficulties, plaintiffs used what was, in effect, a surrogate pool. That is, they used the pool of cannery workers as a surrogate for the pool of qualified applicants or the relevant labor market.

Not surprisingly and not unreasonably, the Court rejected the plaintiffs' statistical comparison. Writing for the majority, Justice White observed that a racially imbalanced workforce, without more, does not constitute a violation of Title VII, nor does it constitute evidence of a statutory violation. Absent improper limitation on the applicant flow, such statistics, according to the majority, are "irrelevant to the question of a *prima facie* statistical case of disparate impact." To hold otherwise, observed Justice White, "would almost inexorably lead to the use of numerical quotas in the workplace . . . ."[204]

The majority found a number of problems with the use of these workforce statistics. First, most of the at-issue jobs (non-cannery jobs) were skilled positions. Non-cannery positions included such jobs as carpenters, machinists of several varieties, crane operators, institutional cooks, pipe fitters, clerical workers, medical personnel, and radio operators. The plaintiffs failed to show that any significant percentage of the cannery workers possessed any of these skills. Without evidence establishing that cannery workers were qualified for non-cannery jobs, the plaintiffs' statistics cannot separate the effect of the hiring procedure from the effect of a lack of qualified minorities.[205] Thus, with regard to the skilled non-cannery positions, the workforce statistics failed to establish a pool of qualified applicants.

Second, for skilled and unskilled positions alike, the majority found additional flaws in the use of cannery workers as a surrogate pool. Justice White wrote that the use of cannery workers was an analysis "at once both too broad and too narrow in its focus." Since plaintiffs had made no showing of how many cannery workers would seek non-cannery positions, he found the pool too broad. Since the district court had found that non-whites were overrepresented in cannery positions, as compared with the relevant labor market, he found the pool too

203. Atonio v. Wards Cove Packing Co., 34 Empl. Prac. Dec. (CCH) 33,821, 33,833-33,835 (W.D. Wa. 1982).

204. *Wards Cove*, 109 S. Ct. at 2123.

205. *Id.*

narrow.[206]

The dissenting Justices did little to effectively attack the majority's statistical approach. Agreeing that the ideal statistical analysis should compare the racial composition of at-issue jobs with the racial composition of the relevant labor market, Justice Stevens argued that the district court had made insufficient findings regarding the nature of the relevant labor market, especially for non-cannery jobs, that the court had made no findings regarding the extent to which cannery workers possessed non-cannery job skills, despite "persuasive" testimony, from individual plaintiffs; and that the labor market statistics offered by the employers were deficient in that they did not identify workers willing to accept seasonal work. The dissent implies agreement with the majority that racial stratification of the workforce does not establish a *prima facie* case, but argues that the stratification should be treated as significant evidence in a *prima facie* case.[207]

Conceptually, the majority is correct. If the purpose of statistical proof is to isolate and measure the effect of a challenged employment practice, an internal analysis of the employer's workforce, without more, measures little. Only in the unusual employment setting of totally internal hiring would such workforce statistics measure the effects of the hiring procedure, and then only if virtually all lower level employees were both qualified for and desirous of the at-issue jobs.

The Court was therefore correct in finding the statistical analysis presented by the *Wards Cove* plaintiffs to be insufficient to establish a *prima facie* case. This is not to say, however, that the Court's articulation of standards for statistical proof is entirely satisfactory. Despite the almost self-evident fact that hiring processes such as those used in *Wards Cove* have a disparate impact by perpetuating racial stratification in the work force, the degree of precision of statistical analysis required by the Court may well have placed these practices beyond attack, at least in the "unique" case[208] of intense, seasonal employment. A plaintiff cannot rely on applicant statistics because the very hiring practices challenged prevent the gathering of accurate applicant statistics by both deterring potential non-white applicants and by failing to document job inquiries. A plaintiff will be hard pressed to rely on qualified labor market statistics because the skills required for upper tier jobs are too diverse to tailor the pool, and because it is often difficult to identify and exclude those unwilling to accept seasonal employment away from home.

The only remaining option is the use of a surrogate pool, and the most obvious possibility for use as a surrogate is the employer's own lower level work force. The *Wards Cove* decision would allow a plaintiff to use work force statistics, in such a case, provided that the plaintiff carefully tailor that pool to reflect only workers qualified for upper level jobs. However, the majority went on to impose unrealistically strict evi-

206. *Id.*
207. *Id.* at 2127.
208. *Id.* (Stevens, J., dissenting).

dentiary standards, requiring direct proof of even the most obvious components of the analysis. For instance, in *Wards Cove*, non-cannery positions often paid three to four times as much as cannery positions for a season only about a month longer.[209] Non-cannery positions entitled the employee to heated bunkhouses, and more comfortable accommodations. Yet the majority was unwilling to infer that most cannery workers would prefer non-cannery jobs, objecting instead that the plaintiffs had not proven how many cannery workers would seek non-cannery jobs absent the challenged practices.

The majority's objection to the plaintiffs' evidence on this point is another occasion upon which the Court has implicitly rejected normal circumstantial evidence and instead required direct evidence. By applying a requirement of direct evidence *sub silentio*, the majority is able to avoid the necessity of justifying its rejection of standard evidentiary principles. In 1989, we are clearly a long way from the time (1976) when a nearly unanimous Court held that:

> Measured against these standards, the company's assertion that a person who has not actually applied for a job can never be awarded seniority relief cannot prevail. The effects of and the injuries suffered from discriminatory employment practices are not always confined to those who were expressly denied a requested employment opportunity. A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection. If an employer should announce his policy of discrimination by a sign reading "Whites Only" on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs. The same message can be communicated to potential applicants more subtly but just as clearly by an employer's actual practices — by his consistent discriminatory treatment of actual applicants, by the manner in which he publicizes vacancies, his recruitment techniques, his responses to casual or tentative inquiries, and even by the racial or ethnic composition of that part of his work force from which he has discriminatorily excluded members of minority groups. When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application.[210]

Finally, the majority's strict statistical proof requirements are problematic because here, as often, the quality of statistical evidence available to the disparate impact plaintiff is almost entirely within the control of the employer. The more informal, subjective, and undocumented the employment procedure, the less likely the plaintiff will be able to compile the statistics necessary to challenge the discriminatory effect of the

209. *See* Plaintiff's Brief at 5.
210. Teamsters v. United States, 431 U.S. 324, 365-66 (1977).

employer's arbitrary practices. The problem is obvious. The proof requirements encourage the very conduct which is so often a cloak for impermissible discrimination. The majority discounts this problem by pointing out that employers subject to the Uniform Guidelines on Employee Selection Procedures[211] ("Guidelines") are required to maintain records sufficient to calculate the impact of employment practices.[212] Yet seasonal employers like the *Wards Cove* defendants are exempted from the Guidelines' recordkeeping requirements.[213] Even for covered employers, the recordkeeping requirements carry no meaningful sanctions and are notoriously unenforced. In the face of the obvious incentives to keep incomplete records, the Court's citation to the Guidelines is little more than a convenient choice to avoid having to justify the results of the evidentiary standards now imposed.

3. Identification

After discussing the issue of statistical proof, the majority went on to clarify other parts of the impact proof model left uncertain by last term's plurality decision in *Watson*.[214] Under the pre-*Watson* proof model, a plaintiff was required to demonstrate that the challenged employment practice had a disparate impact on a protected group. Implicit in this *prima facie* case was a requirement that the plaintiff identify the offending employment practice. However, the degree of specificity required for such identification had never been directly addressed by the Court, and the degree of specificity can easily be outcome determinative.

Consider a multi-component hiring procedure which combines a degree requirement, a check of references, a preference for three years of relevant experience, and an interview. The interviews are conducted by a single decision-maker who subjectively assesses the applicant using a list of criteria such as ability to relate well with others, communication skills, appearance, leadership skills and attitude. After completing the process, the decision-maker makes an intuitive decision from among the applicants with the required degree, based upon the responses of references, the interview, and the nature of the applicant's prior experience. This procedure results in almost exclusively hiring of white males to the virtual exclusion of other people. How specifically must a plaintiff identify the offending practice or employment qualification in order to successfully challenge this hiring procedure? A plaintiff would be able to assess the impact of the degree requirement. Since it operates essentially as a screening device, its impact will be clearly traceable. This is precisely the kind of identification requirement which the Supreme Court has implicitly applied in its earlier disparate impact decisions. For instance, in *Griggs v. Duke Power Co.*,[215] the challenged practice was a

211. 29 CFR § 1607.1 (1988).
212. *See* 29 CFR § 1607.4(A) and (C).
213. 29 CFR § 1602.14(b) (1988).
214. 108 S. Ct. 2777 (1988). *See* Holdeman, *Watson v. Fort Worth Bank & Trust, The Changing Face of Disparate Impact*, 66 DEN. U. L. REV. 179 (1989).
215. 401 U.S. 424 (1971).

requirement of a high school degree or a passing test score. In *Albemarle Paper Co. v. Moody*,[216] the challenged practice was a pre-employment test. In *Dothard v. Rawlinson*,[217] the challenged practice was a height and weight requirement. In *New York Transit Authority v. Beazer*,[218] the challenged practice was the automatic exclusion of all applicants who were methadone users. In *Connecticut v. Teal*,[219] the challenged practice was a pre-promotion screening examination.

But identification becomes a thornier issue when a plaintiff challenges the impact of either subjective *criteria* used for employee selection, or subjective *procedures* (methods) for employee selection. In *Wards Cove*, the plaintiffs had challenged several objective employment practices (word-of-mouth hiring, separate hiring channels, nepotism, re-hire preferences) and the practice of subjective decision-making. The Court held that, in such a case, the plaintiff must:

> . . . demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking here, specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites.[220]

The dissenting Justices address this identification requirement only briefly, by pointing out that traditional tort causation concepts do not require that the offending act be the sole or even the primary cause of the harm.[221] The import of the identification holding is potentially enormous. The majority opinion may well be read (as the dissent understood it) to require the *Wards Cove* plaintiffs not only to measure the combined impact of the challenged practices — a task difficult enough — but to separate the impact of each component from the others. Apparently, the only characteristics of an employment procedure which may be successfully challenged are those which, operating in a vacuum, would have an individual impact level sufficiently egregious to establish disparate impact.

It is anomalous indeed that an employer may not significantly impact a protected group by using a single-component employment device, but that same employer may permissibly accomplish an even greater adverse impact against a protected group by combining the impact of several components. The majority does not even attempt to justify this result, either conceptually or practically.

Further, the evidentiary difficulties of such a task are staggering for the plaintiff. Rare will be the employment practice for which the statistical effect of each component can be isolated and separately measured. Even a personnel specialist with strong incentives would find it a chal-

---

216. 422 U.S. 405 (1975).
217. 433 U.S. 321 (1977).
218. 440 U.S. 568 (1979).
219. 457 U.S. 440 (1982).
220. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2125 (1989).
221. *Id.* at 2132, *citing to* RESTATEMENT (SECOND) OF TORTS §§ 430-33 (1965) and Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989).

lenging task to create a procedure with individual components, each of which would have a separately measurable impact level after the components had been used in combination and simultaneously. However, the *Wards Cove* holding gives employers every incentive to select systems which do not document or memorialize the discrete impact of each aspect of the decision-making process.[222] Certainly a prophylactic policy of not keeping records will be far easier than using quotas and therefore, a far more real danger.[223] This is particularly true since quotas would buy protection from disparate impact challenges only at a high price — significant loss of employer autonomy — whereas use of untrackable systems will maximize the kind of employer autonomy which has often served as a mask for discrimination.

There will be other battlegrounds in addition to the proof problems, perhaps the largest of which will be semantic. The Court has never defined the various terms often used interchangeably to refer to employment actions challengeable by impact analysis: employment practices, devices, procedures, components, systems, criteria. The *Wards Cove* requirement speaks primarily in terms of specific employment "practices".[224] It is not difficult to imagine the semantic battles which will accompany the identification requirement, as plaintiffs identify a certain employment "practice" and defendants seek to divide the employment action into a group of "practices."

The *Wards Cove* majority seeks to justify the requirement of isolating each component "practice" by reliance on *Connecticut v. Teal*,[225] but the Court misremembers the theoretical underpinnings of the *Teal* holding. In *Teal*, the defendant had used a pre-promotion screening test which had a disparate impact upon minorities. The defendant had compensated for the disparate impact of the test by manipulating the second step of the promotion process. The *Teal* holding focused upon the rights of individual applicants for promotion. The Court held that to allow a second stage in the selection process to cure the disparate impact of the first stage "ignores the fact that Title VII guarantees [the applicants at the first stage] the opportunity to compete equally with white workers. . . ."[226]

The *Teal* rationale does not support the proposition that employment actions must be analyzed in subcategories. Indeed, the *Teal* emphasis on individual applicants would support the opposite result. Under *Teal*, the key is equality of opportunity, at each stage of the deci-

222. In fact, it has been cogently argued that *Wards Cove* not only negates the employers need to validate their employment criteria but actually discourages them from doing so as such validation procedures could only serve to build the case against the employer. C. Craver, *Employment Practices*, 364 Lab. L. Rep. (CCH) 4 (July 17, 1989).

223. *See*, Holdeman, *Watson v. Fort Worth Bank & Trust, The Changing Face of Disparate Impact*, 66 DEN U.L. REV. 179, 190-192 (1989).

224. 109 S. Ct. at 2127.

225. 457 U.S. at 450.

226. *Id.* at 451.

sion-making process. It by no means legitimates multi-component systems which work cumulatively to deny such equality of opportunity.

4. Business Justification

Once a plaintiff had established that the challenged practice had a disparate impact, the pre-*Watson* proof model required the employer to shoulder the burden of persuasion (not merely production) to establish that the challenged practice was a business necessity or manifestly job related.[227] The *Watson* plurality raised doubt as to whether the Court intended to maintain this burden allocation.[228]

In one paragraph, the *Wards Cove* majority dispenses with the requirement that the employer shoulder the burden of proof on business justification. Justice White made no attempt to justify the break with precedent. He pointed out that plaintiffs generally bear the burden of proof, citing Federal Rules of Evidence, Rule 301, and that disparate treatment plaintiffs bear burden of proof at each stage. Then he wrote:

> We acknowledge that some of our earlier decisions can be read as suggesting otherwise . . . . But to the extent that those cases speak of an employer's "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.[229]

In the same section the majority significantly lowered the level of business need necessary to justify the use of an employment practice with a disparate impact. The Court did not justify the change, nor even admit that its holding constituted a break with precedent. Dispensing with the requirement that the challenged practice be justified by "manifest job relatedness" or "business necessity," Justice White wrote:

> Though we have phrased the query differently in different cases, it is generally well-established that at the justification stage of a disparate impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer.[230]

Justice White framed the inquiry as a middle ground between a "mere insubstantial justification" and an "indispensable" practice. The dissenting Justices pointed out the new standard, Justice Stevens writing, "I am astonished to read" the majority's "casual — almost summary — rejection of the statutory construction that developed in the wake of *Griggs*. . . ."[231]

Certainly the shifting of the burden of proof on justification back to the plaintiff, and the simultaneous increase in the standard to be proven will have a significant effect. Even if shifting the burden of proof only

227. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).
228. *See* Holdeman, *supra* note 221, at 194-196.
229. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2126 (1989).
230. *Id.* at 2125.
231. *Id.* at 2131.

makes a difference in close cases, that difference is significant.[232] But that is not the only significance. The pre-*Watson* allocation was useful, not only in that it placed the burden of proof on the party who had the ability to gather and maintain the evidence, but also because it was consonant with the public policy of eradicating racial and sexual stratification in employment. If such a policy is a national priority, then once it has been established that an employment practice has a discriminatory effect, it is reasonable to require the employer to prove that the practice is justified. The former rule also relieved plaintiffs of the rather awkward task of proving a negative, i.e., that the practice is not justified.

5. Alternative Practices

Finally, the majority discussed the third stage of the impact proof model. In stage three, an employment practice which has a disparate impact, but which is sufficiently justified, may still be unlawful if "other [practices] without a similarly undesirable racial effect would also serve the employer's legitimate interest."[233]

After quoting the well-worn language from *Albemarle*, Justice White rather casually added that:

> [o]f course, any alternative practices which respondents offer up in this respect must be *equally effective* as petitioners' chosen hiring procedures in achieving petitioners' legitimate employment goals. Moreover, "[f]actors such as the *cost or other burdens* of proposed alternative selection devices are relevant in determining whether they would be *equally as effective as the challenged practice* in serving the employer's legitimate business goals." Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777 (1988) (O'Connor, J.). "*Courts are generally less competent than employers* to restructure business practices," Furnco Construction Corp. v. Waters, 438 U.S. 567, 578 (1978); consequently, the judiciary should proceed with care before mandating that an employer must adopt a plaintiff's alternate selection or hiring practice . . . ."[234]

This articulation of stage three is small comfort to a plaintiff who has met the Court's strict standards for statistical evidence and specific identification in stage one, but who has failed to prove the lack of business justification in stage two. A stage three plaintiff must prove (1) that the alternative device would have had less adverse impact, and (2) that it would have served the employer equally well.

Proof of the impact level of the alternative device often will be impossible. Assessment of the impact of a device actually used is difficult enough. Proof of the impact level of a hypothetical device will be even more difficult. Even if a plaintiff can establish that the impact level of

232. *See* Justice Kennedy's concurring opinion in Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1800 (1989).

233. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

234. Wards Cove Packing Co. v. Antonio, 109 S. Ct. 2115, 2127 (1989) (emphasis added).

the alternative device would be substantially less disparate, the requirement that the proposed device must serve the employer equally well will often be impossible. This is particularly true since Justice White's language seems to almost create a presumption in favor of the employer who is more "competent" in these matters.

The effect of the majority's interpretation of stage three is to elevate the most trivial business interest of the employer above the plaintiff's and society's interests in equal employment opportunity. This shifting of the weight afforded to these competing socio-economic interests belies any claim that equal employment opportunity is still a strong or even a viable public policy.

## III. THE NEW GENERATION — REAGAN'S LEGACY.

There are two major ideological principles at work in the 1989 term. First, the opinions clearly signal a shift in the balance between the interests of disadvantaged groups, employers, and advantaged groups.

With Title VII's enactment, Congress declared that the eradication of employment discrimination was to be considered a national policy of the highest priority.[235] In the first quarter century the Court gave meaning to that declaration by its willingness to place a judicial thumb on the scales in favor of disadvantaged groups, when doing so would encourage or assist Title VII plaintiffs to fulfill their role as private attorneys general.

The very creation of the two primary proof models are examples. The disparate impact proof model, freeing the plaintiff from the tether of intent,[236] was a major step.[237] The disparate treatment proof model, though still requiring proof of intent, eased the burden by requiring the employer to first articulate its non-discriminatory reasons.[238] The adoption of a presumptive fee award to prevailing plaintiffs[239] but not to prevailing defendants[240] is another example of the Court's recognition of the social policy.

Title VII's second quarter century, however, sees a Court unwilling

235. *See* S. REP. No. 872, 88th Cong., 2d Sess., pt. 1, at 11, 24 (1964); H.R. REP. No. 914, 88th Cong., 1st Sess., pt. 1, at 18 (1963); H.R. REP. No. 914, 88th Cong., 1st Sess., pt. 2, at 1-2 (1963).

236. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

237. Some argue that it was a step far beyond Title VII and the congressional intent which enacted it. *See* Gold, *"Grigg's An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition and a Recommendation for Reform,"* 7 INDUS. REL. L.J. 429 (1985).

238. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). *But see* Furnish, *"Formalistic Solutions to Complex Problems: The Supreme Court's Analysis of Disparate Treatment Cases Under Title VII,"* 6 INDUS. REL. L.J. 353 (1984).

239. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968) (a prevailing plaintiff should "ordinarily recover an attorney's fee unless special circumstances would render such an award unjust").

240. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978) (fee award to prevailing defendant only upon showing "that the plaintiff's action was frivolous, unreasonable, or without foundation").

to tip the balance of competing interests in favor of women and minorities; willing instead to elevate the interests of employers and advantaged employees at the expense of plaintiffs' interests.

Perhaps the most dramatic shift is the elevation of the interests of advantaged groups. *City of Richmond's*[241] adoption of strict scrutiny review for voluntary state and local government affirmative action by state and local government renders such governmental initiatives all but a dead letter, and the future of all affirmative action is shrouded.

The implicit conceptual underpinnings of this holding reveal a dramatic reversal of national policy. Strict scrutiny was historically applied to racial classifications which disadvantage minorities primarily because of the magnitude of the damage done by slavery and by the powerful vestiges of slavery which have operated to deprive minority citizens of full participation in American society. Racial classification was subjected to strict scrutiny because it was historically invidious, unjust, and oppressive — a tool to perpetuate the legacy of slavery. The decision to apply strict scrutiny to remedial racial classification implicitly regards the past twenty-five years of affirmative action as similarly invidious and effectively equates the efforts of states to achieve racial equality with Jim Crow laws.

The theme is continued in *Martin v. Wilks*. The majority opinion agreed that identification of persons appropriate for joinder will be difficult for plaintiffs, but responded that those difficulties "arise from the nature of the relief sought."[242] The majority expressly intended that affirmative relief be difficult to secure.

The *Martin* dissent by Justice Stevens points out that the majority mischaracterized the holding of the lower court, and therefore sidestepped the real issue of whether a court ordered plan is a defense to a subsequent claim of intentional discrimination. Justice Stevens pointed out that the district court did not hold that the white fire fighters were bound by the prior decree, but rather that race-conscious promotions made because they are required by a court order are not made with the requisite discriminatory intent.[243] The majority simply conceptualized the question in a way which insured the answer it desired.

Even if this sleight-of-hand was not an intentional device, the consequences of the *Martin* holding cannot have evaded the Court. In the face of the contrary holdings of the great majority of the federal courts of appeals,[244] the majority opened to attack thousands of decrees entered during the past twenty-five years. The gravity of this action is manifest.[245] Nor can it realistically be considered a coincidence that

241. City of Richmond v. J. A. Croson Co., 109 S. Ct. 706 (1989).
242. Martin v. Wilks, 109 S. Ct. 2187 (1989).
243. *Martin*, 109 S. Ct. at 2193 n.15.
244. *Id.* at 2185 n.3.
245. The *Martin* holding also comes at the expense of employers' significant interests in avoiding re-litigation of remedial decrees, particularly given the inevitable uncertainty as to what evidence would be relevant and what the proof standards would be when relitigating a remedy imposed years before.

*Martin* was issued together with *Lorance v. AT&T*,[246] in which the Court protected from challenge all facially neutral seniority systems more than 180 days old, no matter how seriously they impact individuals who have no other opportunity to challenge the discriminatory system. While there are policy reasons for treating seniority systems differently from other Title VII violations,[247] the juxtaposition of these two opinions remains a none too subtle clue to this Court's agenda.

However, if there were any doubt, the elevation of the interests of nonminority employees is explicitly set out by Justice Scalia in *Zipes*.[248] He wrote:

> While innocent interveners raising non-Title VII claims are not, like Title VII plaintiffs, "the chosen instrument[s] of congress," [citation omitted] neither are they disfavored participants in Title VII proceedings. An intervenor of the sort before us here is *particularly welcome*, since we have stressed the necessity of protecting, in Title VII litigation, "the legitimate expectations . . . of employees innocent of any wrongdoing,"[249]

In the footnote referencing this assertion, Justice Scalia directly pinpointed the difference between the two approaches. He observed that the dissent had favored the interests of prevailing plaintiffs, and that the majority rejects this "judge-made ranking of rights."[250] Despite Justice Scalia's nod to the special role of Title VII plaintiffs as "chosen instruments," *Zipes* substantially insulates non-minority employees from attorneys' fee liability on the theory that such intervenors were protecting their own "rights" and "legitimate expectations," although the attorneys' fee issue can arise only after a judicial determination that the intervenors did not have such rights and their expectations were not legitimate. *Zipes* elevated even the colorable, but invalid claims of nonminority litigants above the social policy of Title VII enforcement articulated in *Christiansburg Garment Co.*[251]

While the elevation of the rights of non-minority employees may be the most dramatic change in the new approach, plaintiffs do not fare well against employers either. *Wards Cove Packing*[252] is the clearest example. The icy tone of Justice White's opinion carries no apology or regret that what Justice Blackmun called the "plantation economy"[253] of the packing industry is placed beyond challenge. It contains no hint that

246. Lorance v. A.T. & T. Technologies, Inc., 109 S. Ct. 2261 (1989).

247. Congress intended to protect vested competitive seniority rights of employees, even if the seniority system perpetuated the effects of the employer's prior discrimination. The loss by innocent employees of job benefits long earned and relied upon was too high a cost. *See* International Bd. of Teamsters v. United States, 431 U.S. 324, 352-354 (1977).

248. Independent Fed'n of Flight Attendants v. Zipes, 109 S. Ct. 2732 (1989).

249. *Id.* at 2737-38 (emphasis added) (quoting Teamsters v. United States, 431 U.S. 324, 372 (1977)).

250. *Id.* 2737-38 n.4.

251. Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

252. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989).

253. *Id.* at 2136.

any Title VII principle could require the packing company to so much as post a notice that non-cannery hiring is about to commence.

Instead, by requiring separate analysis of each challenged employment practice, the majority adopted a statistical standard impossible for plaintiffs to meet. As if that were not enough, the Court modified the traditional impact proof model to shift the burden of proof on business justification to the plaintiff.

The most direct evidence of the majority's elevation of employer's rights is the significant change in the standard of business justification. In effect, the *Wards Cove* majority held that an employment practice which has a grossly disparate impact upon minorities is justified by a *de minimis* difference in cost, convenience, or efficiency, notwithstanding the availability of substantially adequate non-discriminatory alternatives. This holding elevates any interest of the employer, regardless of its weight or the degree to which it is impaired, above the plaintiff's interests in equal employment opportunity. It precludes any sort of balancing of needs or interests. Justice Scalia's rhetoric to the contrary, this holding reflects nothing less than the majority's own "judge-made ranking of rights."[254]

Another significant indication of the Court's elevation of employers' interests at the expense of plaintiffs is implicit in *Zipes*. Justice Blackmun's concurring opinion fashioned an approach which would protect nonfrivolous intervenors from fee awards by placing fee liability on the Title VII wrongdoer whose discrimination had necessitated the remedy. However the majority opinion does not even address that approach as an option. While discussing the competing interests of the two sets of employees (the plaintiffs and the intervenors), the majority simply assumes that the fee liability of the employer extends only to the expenses caused by the employer's defense but does not extend to fees caused by the employer's underlying violation of Title VII. This despite the fact that continued liability for plaintiff's attorneys fees would discourage employers from bargaining with plaintiffs by sacrificing the legitimate rights of other employees (a conceptual underpinning of the majority's opinion), and thus would serve the interest of both plaintiffs and intervenors.

It can be no coincidence that, in seven out of the eight major employment cases, the interests of the employers and/or non-minority employees were protected at the expense of plaintiffs' interests. The new majority has rejected the Court's role in effectuating the congressional policy underlying Title VII's enactment. No longer will the interests of minority and women employees receive special consideration from the Court, and in some instances, the interests of employers and non-minority employees will be elevated far above those of minority employees.

The second major ideological principle at work in the 1989 term is a

254. *Id.* at 2138.

strong antipathy for systemic remedies as opposed to individual remedies.

Witness first the adoption of the strict scrutiny standard for state and local governments' remedial schemes in *City of Richmond*. The nearly impossible statistical proof standards required to justify a race-conscious plan insure that few such plans will survive — clearly the Court's intention.

Nor do system-wide challenges to private employment practices fare better. In *Wards Cove*, the Court used the same method — impossibly high statistical proof requirements — to effectively curtail multi-component challenges, and significantly toughened the proof model for all disparate impact cases.

The relationship between the disparate impact proof model and systemic remedies is both theoretical and practical. Although seldom articulated so directly, one of the ideological underpinnings of the disparate impact model is the notion that employers ought to do what they reasonably can do in order to improve employment opportunities for disadvantaged groups. Thus, employers were not to use employment practices which had a disparate impact unless those practices were really necessary. While usually unspoken, the converse was also true. The advantages to avoiding a disparate impact challenge altogether operated to encourage employers to utilize employment practices which would insure at least a minimal degree of employment opportunity for minorities and women. So, conceptually, the disparate impact proof model implements significant elements of the affirmative action principle.

Even absent this conceptual similarity, the effects of disparate impact prevention and remedies are systemic in nature. Prevention usually requires work force analysis, statistical studies of particular employment practices, and affirmative efforts to increase minority participation. Remedies for disparate impact usually require additional affirmative measures. So the Court's rather transparent intention to make the disparate impact model less viable is further evidence of the increasing disfavor of systemic remedies for discrimination.

The holdings in *Martin* and *Zipes*, resulting as they will in the challenge to and possible dismantling of large numbers of functioning remedial decrees, are two more pieces in the puzzle. Juxtaposed against the severe time limitations placed upon challenges to seniority systems by *Lorance*, it is clear that both systemic challenges and remedies are targets in these three cases as well.

Additionally, it is noteworthy that, of eight cases, the only successful minority or woman plaintiff was the disparate treatment plaintiff. *Price Waterhouse* was the only occasion on which the Court protected the plaintiff's interests over those of the employer, but it was a major ruling without which the disparate treatment model could have been vitiated.

Finally, the Courts' substantial re-emphasis on the concept of intent is key to the shutting down of systemic remedies. *Wards Cove*, and its

predecessor *Watson v. Fort Worth Bank and Trust*, signal a conceptual return to "intent" in the context of the disparate impact proof model.[255] *City of Richmond* spoke of "individual victims" and a "*prima facie* case" against individuals in the construction industry. *Lorance* and *Betts* both focused on proving actual intent to discriminate by enactment of a seniority or benefit system, and *Betts* elevated proof of intent to part of the *prima facie* case.

*Price Waterhouse* and *City of Richmond* remind us that the conservative Justices have their differences. Justices O'Connor and White were the swing votes in *Price Waterhouse*, reflecting some reason for optimism for individual disparate treatment plaintiffs seeking individual remedies. Justices Scalia and Kennedy wrote concurring opinions significantly to the right of the majority holding in *City of Richmond*, boding ill for future affirmative action plans to come before the Court — plans raising issues beyond the limited scope of voluntary remedial plans by state and local governments.

Despite these differences, however, the consensus is transparent. Absent a strong congressional response to the 1988 term, the Court is likely to continue the course which it has charted by the conceptual framework of its recent holdings. The Court will pay careful attention to the interests of non-minorities and employers, rejecting the principle that the strong national policy underlying the Civil Rights Act of 1964 requires a construction of Title VII which makes it a forceful tool for societal change. The Court will continue to close down opportunities for systemic remedies, whether aimed at discrimination by a particular employer, or a particular industry, or at historic societal discrimination.

The Court may not admit these agenda items, but instead may take the sorts of opportunities selected for the 1989 term: the manipulation of burdens of proof and issues of causation (*City of Richmond*, *Wards Cove Packing*, and *Price Waterhouse*); the creation of nearly impossible statistical and other evidentiary requirements (*City of Richmond* and *Wards Cove*); technical construction of statutory language (*Martin*, *Patterson* and *Lorance*); and the continuing emphasis on and construction of the concept of intent (*Wards Cove Packing*, *City of Richmond*, *Martin*, and *Lorance*).

The Court may sometimes claim to reaffirm the goals of ending discrimination and the importance of the viability of Title VII but will construct and justify its adverse holdings by the same sorts of devices it used in the 1988 and 1989 terms. The Court will give with one hand but take away with the other.[256] *Watson v. Fort Worth Bank and Trust* purportedly extends the scope of disparate impact analysis while creating nearly impossible proof requirements. *Patterson v. Mclean Credit Union* reaffirms the application of § 1981 to private employment contracts while limiting the definition of "making a contract" to include only hiring decisions. *City of Richmond* ostensibly allows race conscious plans by state and local

255. Note, *The Supreme Court, 1987 Term-Leading Cases*, 102 HARV. L. REV. 143, 308, 316 (1988).

256. Patterson v. McLean Credit Union, 109 S. Ct. at 2379 (Brennan, J., dissenting).

governments but applies such strict review that the plans become virtually impossible to justify and tailor.

Convenient concern for *stare decisis* will mandate a holding when it serves one of the agenda items (*Lorance*), but will not stand in the way of destroying 18 years of pro-plaintiff precedent without so much as a reason for the change *Wards Cove Packing*: "but to the extent that those cases speak of an employers' 'burden of proof' — they should have been understood to mean an employers' production — but not persuasion — burden."[257] *Patterson* demonstrates that some genuine fidelity to *stare decisis* will impose some restraint on the Court's reshaping of civil rights law. The reformulation of one issue into another issue will guarantee the desired result *Martin*: the lower courts holding that decisions based on a court order do not constitute intentional discrimination rearticulated as a question of whether third parties may be required to intervene under the Federal Rules of Civil Procedure.

The legitimate concern that employers will be forced to use quotas will be used to justify the continued shutting down of systemic remedies. *Watson v. Fort Worth Bank and Trust, Wards Cove Packing, City of Richmond.* Strained or technical constructions of statutory language will seem to force the desired holding. *Patterson, Lorance, Betts, Martin.* Circumstantial evidence will continue to be discounted in cases requiring substantial statistical proof, with no admission that this is a deviation from normal rules of evidence, nor any justification for the different standard. *Wards Cove* and *City of Richmond.*

The real effects of the Court's holdings will be washed away by simple denial. Examples of these effects may be found in *Zipes*: the prospect of uncompensated fees of $200,000 or more will not discourage private plaintiffs form bringing Title VII claims; *Wards Cove Packing* and Justice Kennedy's dissent in *Price Waterhouse*: broad discovery rules and the EEOC's record-keeping requirements will provide plaintiffs with all the necessary information to comply with difficult proof requirements. Holdings will be justified by the familiar and convenient use of the old saw that Congress either did or didn't ratify by silence or by some other enactment—or by its converse, that Congress revisits Title VII often and can always act if it does not agree.

The new Court's two ideological principles, that is the favoring of the interests of employers and historically advantaged employees over those of women and minorities, and the restriction of Title VII's force to individual claims with individual remedies effectively signals the demise of a strong national policy of aggressively working toward equal employment opportunity. In order to evaluate this action and determine the appropriate congressional response, it is necessary to explore the theoretical underpinning of Title VII and of the Court's present ideological principles.

It is not possible to isolate a single controlling theory which moti-

257. 109 S. Ct. at 2126.

vated and guided America's struggle for racial equality over the past twenty-five years. A variety of ideas and forces were at work. In part, lawmakers and judges accepted a view of humanity which rejected racism and assumed the existence of morally prescribed minimum standards of dignity and well-being. In response, they wished to eradicate the socio-economic vestiges of slavery and racial segregation. Policy was also guided by free market rationalism which sought to open economic decision-making to rational principles rather than allowing such decision-making to be blocked by logically irrelevant barriers such as race or sex. Moreover, Title VII and the case law which strengthened it arose in an era which foresaw unlimited economic growth. It was assumed that government policy could facilitate a growing pie, so that the status of the underclass could be uplifted without serious cost to historically advantaged groups. Technology and automation were increasingly rendering obsolete an unlettered lower class, so that this group which had once had economic utility as "common labor" or "hands" would become a burden to society.

After twenty-five years, the Supreme Court has reassessed this aggressive quest for racial and sexual equality. The first likely justification for abandoning the quest would be that the goal has been sufficiently achieved. That, however, is not the case.

Using the economic status of African Americans as an example, the statistics belie any notion that the goals of Title VII have been achieved. Indeed African Americans constituted a more disproportionate share of the nation's unemployed in 1985 than in 1967. Their unemployment rate in the first quarter of 1989 was 2.5 times that of whites. In 1967, African American families' median income was 59% of median income of white families. By 1985, that figure had dropped to 57.6%. African Americans have made steady progress in managerial and professional occupations, but at a rate which would achieve parity only in another fifty-four years.[258]

It is unlikely that the Court is operating, or that Congress will operate, under any illusion that the goals of Title VII have been achieved. It is more likely that the Court has recognized that Title VII's goals cannot be achieved without the support of educational and job training programs which have already been dropped from federal policy. Yet, the inadequacy of civil rights legislation to accomplish its task does not call for its dismantling but rather its preservation until supplementary programs can be set in place. Nor does the inadequacy of Title VII explain the Court's action in clearing the way to attack existing decrees which have resulted in jobs for women and minorities. The ideological premises of the conservative bloc indicate a hostility to Title VII's successes rather than its failures to achieve racial equality.

The assault on systemic remedies and the elevation of the employer's interests (especially interests in autonomous decision-making)

258. B. Tidwell, STALLING OUT: THE RELATIVE PROGRESS OF AFRICAN AMERICANS 18-26 (Washington: The National Urban League Research Department, 1989).

may be understood in terms of the United State's declining economic power in increasingly competitive world markets. The underlying premise of the conservative bloc may be that American business needs to be freed from the burdens of Title VII if it is to compete effectively and thereby benefit American society as a whole. In the narrow context of minority set-asides and some affirmative action decrees, advancing the interests of minorities and women has occurred at the expense of legitimate business interests such as efficiency and productivity, in that the most qualified applicant has not always been hired and the low bidder has not always been awarded the contract. Yet the Court's express concern goes beyond these cases in which such interests are overtly subordinated to the goals of racial and sexual equality. The Court is concerned that employers will use numerical quotas as a safeguard against civil rights liability, thus adjusting their management policies on the basis of social policy factors which will not contribute to efficiency, productivity, and general competitiveness.[259]

The Court is operating here in two modes — the mode of economic policy-making and the mode of distributive justice. From the standpoint of economic policy, the Court's premise is dubious. There is a total dearth of evidence that businesses operating under affirmative action decrees have been unable to compete effectively with businesses not subject to such decrees. The existence of surreptitious quota systems is speculative and unproven. It is doubtful that employers will be so willing to relinquish their managerial autonomy when genuinely neutral subjective decision-making remains lawful. The real effect of a viable disparate impact model is to raise a red flag before the employer's eyes, when its practices have a substantial disparate impact on a protected group, so that prudence will require that employer to insure that its practices are genuinely neutral and reasonably necessary to its business enterprise.

Nor can it be argued persuasively that productivity is impaired by the cost of internally monitoring compliance. The small employer can insure compliance without extensive personnel analysis. The large employer must have in place a personnel department which will insure fair and reasonable employment practices for the benefit of morale and productivity even absent Title VII. Any added management costs attributable to disparate impact analysis of affirmative action decrees would be *de minimis*.

In summary, there is not a compelling factual case, from the standpoint of economic policy, for the Court's departure from the twenty-five year old policy of advancing racial and sexual equality. Instead, the Court is operating from a Spencerian economic utilitarianism which trusts a free market (i.e., a market in which management is free of non-contractual obligations to labor and society) to produce the greatest good for the greatest number, albeit at the expense of those who enter

259. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989); Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777 (1988).

the competition with a disadvantage. Interestingly, few if any of the emerging competitors in the world markets operate on the basis of this nineteenth century philosophy. While it is not unprecedented for the Supreme Court to arrogate unto itself the province of economic policy,[260] that role has been left to other branches of government for the past fifty years.[261] Deference to the modern federal system, and the superior capacity of Congress and the executive branch to fully assess such complex questions would dictate that such decisions should be eschewed by the Court.

Regarding the distributive justice mode, the Court is at least attempting to perform its proper function. Moreover, even if the economic policy considerations mitigated against preservation of a viable Title VII, it might be hoped that our society would not sacrifice distributive justice to productivity. Yet, what is just in this context? In *Zipes*, the conservative bloc "welcomed" non-minority interveners to protect "the legitimate expectations of employees innocent of any wrongdoing."[262] The Court seems painfully aware that the socio-economic advancement of minorities and women can be accomplished only at the expense of non-minorities and men who have not personally oppressed anyone. The Court is consistently concerned to insure that members of historically advantaged groups not be deprived of the fruits of their qualifications and merit in order to advance the goals of racial equality.

The Court's new conception of Title VII is akin to the concept of a statutory tort action with limited remedies. The Court conceives of individuals with statutory rights to be free from discrimination, and entitled to injunctive relief against wrongdoers who intentionally violate those personal rights. This framework is suggested throughout the 1989 decisions. For example, in *City of Richmond*, the Court disallows remedies for societal discrimination, limits remedies to industrial discrimination, and refrains from limiting remedies to the City's own discrimination only because strict scrutiny had killed the remedies anyway.[263] Civil rights remedies, in the mind of this Court, may operate only against tortfeasors.

Such a conceptual framework, however, is grossly inadequate to comprehend the distributive justice issues which are at the heart of civil rights litigation. We have inherited a *de facto* caste system which itself is a remnant of slavery, segregation, and *de jure* denial of women's status as adult citizens. This system is perpetuated sometimes by racial and sexual stereotyping (*Price Waterhouse*), sometimes by actual conspiracies to foreclose opportunities to disadvantaged groups in order to hoard them for the advantaged group (*Lorance*), sometimes by customs and practices which skew applicant flow (*Wards Cove*), sometimes by legacies of racism and sexism which discourage women and minorities from even compet-

260. J. NOWAK, CONSTITUTIONAL LAW 343-44 (3d ed. 1986) (discussing Lockner v. State of New York, 198 U.S. 45 (1905)).

261. *Id.* at 114.

262. 109 S. Ct. 2732, 2736 (1989).

263. *See supra* note 39.

ing for economic opportunities historically reserved for whites and/or males (*City of Richmond*), sometimes foreclosed by social networks, and sometimes by the racism and sexism which have impaired the educational, social, and professional formation of disadvantaged groups so as to handicap them in free market competition.

The result of this inheritance is a distribution of wealth and opportunity disproportionate either to individual need or individual merit. It is disproportionate to need in that human needs are relatively equal; and to the extent that needs are unequal, the needs of the disadvantaged groups are greater as a result of past deprivation; yet, the greater wealth and opportunity goes to the advantaged groups. It is disproportionate to merit in that the distribution is irrationally skewed by discrimination whether at the personal, industrial, or societal level. Advantages born of such discrimination do not correspond to merit in any ethical sense. Thus members of the advantaged groups, even though they may be personally innocent of wrongdoing are unjustly enriched. Correspondingly, disadvantaged groups are unjustly impoverished; and the larger society, including all groups, is impoverished by the suppression of potential contributions by members of disadvantaged groups on arbitrary and anachronistic grounds.

The Court's concept of civil rights actions as statutory tort claims does not comprehend the equitable nature of Title VII remedies, the ethical grounding of the statutory scheme in the concept of unjust enrichment, or the systemic and societal goals of civil rights legislation. If civil rights claims were tortious in nature, they would entail jury trials, actual and punitive damage awards, a much longer statute of limitations, and no mandatory administrative procedure before filing. Instead, the statutory scheme is framed so as to favor negotiated and equitable resolutions, with limited monetary liability exposure for employers, but including aggressive prospective remedies.

The present Court operates from a highly atomistic, individualistic view of society. Hence, it can support the claims of a plaintiff such as Ann Hopkins in *Price Waterhouse* but is strongly disinclined to permit the problems of racism and sexism to be addressed systemically by either legislation or lower courts. Discrimination issues are restricted to one-on-one showdowns, deciding who is right and who is wrong. Such a distortion of civil rights legislation leaves only a hollow echo of the ideals which formed this social policy for these past twenty-five years. The result will almost certainly be a closing of many doors now open to women and minorities, a fortifying of the *de facto* socio-economic caste system, and growing disparity of wealth between the haves and the have-nots. Moreover, this cannot be a mere return to bygone years, as the technological obsolescence of the unlettered lower class has rendered the status of the poor far more desperate.

## IV. The Congressional Response

In light of the current makeup of the Court and the majority's ap-

proach to vital Title VII issues, the only recourse for preservation of much of Title VII's vitality will be a congressional response.[264] Much legislative work will already be required simply to address the major results of the 1989 term. The following is a list of legislative actions necessary to respond to the 1989 cases.

1. Congress must review the economic status of minorities and women and find that the effects of hundreds of years of discrimination have not yet been eradicated. Congress must reaffirm the strength and importance of the national commitment to eradicating the effects of discrimination and to opening channels to economic progress for all American citizens.

2. Congress should clarify the scope of § 1981 to establish that its prohibitions against racial discrimination apply to all phases of making, performing and enforcing private contracts but excluding from coverage those employment relationships subject to Title VII.

3. The 180/300 day filing requirement should be amended to clarify that, in the case of intentionally discriminatory seniority systems, such time period should commence to run upon notice to the employee of actual adverse action based upon the seniority system. "Adverse action" would be defined as action negatively affecting wages, benefits, terms, or conditions of employment other than seniority status as such.

4. Congress should clarify that employment actions taken in the good faith belief that they were required by an existing court order do not violate Title VII. This principle should be enacted as an affirmative defense so that the burden of its proof will fall on the party with better access to the evidence, the employer. However, affirmative action decrees should remain subject to the continuing equitable jurisdiction and oversight of the Court, and be subject to periodic reviews to be held after public notice to all interested persons.

5. Congress should require that, prior to the entry of a remedial decree, the parties must jointly identify and notify potentially affected groups, and the Court must hold a fairness hearing in order to consider the positions of these groups. Congress should include a fee provision requiring the defendant to pay the prevailing plaintiff's reasonable attorney's fees during the entire remedial phase unless the plaintiffs' actions are found to be frivolous, unreasonable, or without foundation. If some portion of plaintiff's fees were incurred in response to frivolous or unreasonable actions on the part of an intervenor, the intervenor would pay that portion of plaintiff's fees rather than the defendant.

6. Congress should enact a third category of Title VII violation prohibiting the use of employment practices which have a substantially

264. The Fair Employment Reinstatement Act, introduced by Sen. Metzenbaum, is an attempt to repair the damage done to disparate impact analysis by *Wards Cove*. S. 1261, 101st Cong., 1st Sess., 135 CONG. REC. 90-H.B. 7 (1989). Sen. Simon has introduced a bill which relies on § five of the fourteenth amendment and *Fullilove*, S. 1235, 101st Cong., 1st Sess., 135 CONG REC. 82-H.B. 5 (1989) to empower state and local governments to enact minority set-asides despite *City of Richmond*.

disparate adverse impact upon protected groups when reasonable alternatives exist. Such alternatives should be reasonably effective to serve the employer's needs, but need not be equally effective. The alternative practices and the employer's business needs should be required to be disclosed at the administrative stage of the proceedings. The new section should provide an affirmative defense for practices that have a substantial business justification. An employer's failure to comply with the record-keeping requirements of the Uniform Guidelines on Employee Selection Procedures should create a rebuttable presumption that challenged practices have a substantial disparate impact. Such record-keeping requirements would require elaboration and clarification commensurate with their new significance in light of this amendment.

7. Congress should enact a definition of "employment practices" which requires no more specificity in identifying the challenged employment practices than the employer has used in complying with the EEOC's record-keeping requirements for employers, unless more precise identification is possible by recourse to other reasonably available sources of proof.

The fourteenth amendment holding in *City of Richmond* is by far the most difficult to repair. The holding is a majority only because a three Justice plurality was willing to tiptoe around *Fullilove* based upon the "unique" enforcement power granted to Congress by § 5 of the amendment, and the § 1 constraint upon the power of states.[265] In that portion of Justice O'Connor's opinion, she supported this key distinction, in part, by quoting Professor Bohrer: "Congress may authorize, pursuant to § 5, state action that would be foreclosed to the states acting alone."[266]

It is unclear how far the plurality would be willing to take this distinction. It is possible that a carefully drafted, supported, and tailored congressional "authorization" could pass muster with one or more of the plurality, with Justice Stevens, and with the three dissenting Justices.

However, even if there is a realistic possibility that a majority would allow what would, in effect, be a congressional delegation of § five enforcement power, the risk may be too great. Constitutional construction is the one arena in which the Court is virtually uncheckable, and the risk of another more serious ruling limiting congressional power[267] may well outweigh the damage of the *City of Richmond* defeat.

265. City of Richmond v. J. A. Croson Co., 109 S. Ct. 706, 719 (1989).

266. *Id.* at 720, Justice O'Connor quoting: Bohrer, *Bakke, Weber, and Fullilove: Benign Discrimination and Congressional Power to Enforce the Fourteenth Amendment*, 56 IND. L.J. 473, 512-13 (1981).

267. *See* Justice Kennedy's concurring opinion in which he writes, "[t]he process by which a law that is an equal protection violation when enacted by a State becomes transformed to an equal protection guarantee when enacted by Congress poses a difficult proposition for me; but as it is not before us, any reconsideration of that issue must await some further case." City of Richmond v. J. A. Croson Co., 109 S. Ct. 706, 734 (1989).

## V. Conclusion

The effects of two hundred years of slavery and another hundred years of overpowering economic discrimination cannot be eradicated by twenty-five years of Title VII and limited voluntary affirmative action plans. Most of the heavy burdens of three hundred years of injustice are still with us. It is clear that *someone* is going to have to carry these burdens. It is also clear that even quotas and affirmative action programs would only shift a small portion of these heavy burdens to America's advantaged classes — to those who, innocent though they may be, have inherited the benefits of an economic system built upon the backs of their fellow citizens — to those who are more able to carry their share of an added burden. Racism and sexism are deeply ingrained in American culture. Even the cases, selected by the Court as opportunities to reject pro-plaintiff doctrines this past term, attest to this fact, as the evidence portrays "Filipino bunkhouses", women referred to charm schools to further accounting careers, and cities with black majorities awarding all but 0.67% of their contracts to white owned businesses. It is the persistent irony of American culture that its democratic ideals continue to be undermined in this way. Yet the democratic values implicit in our governmental system are understood not as absolute accomplishments, but as goals which we are always in the process of attaining. The 1988 term of the Supreme Court is an unfortunate step backward from such attainment. It can be remedied only by prompt and vigorous congressional action.