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Affirmative Action, Equal Access and the Supreme Court's 1988 Term: The Rehnquist Court Takes a Sharp Turn to the Right

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AFFIRMATIVE ACTION, EQUAL ACCESS AND THE SUPREME COURT’S 1988 TERM: THE REHNQUIST COURT TAKES A SHARP TURN TO THE RIGHT

Mary C. Daly*

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The author wishes to acknowledge her deep appreciation to her colleague, Professor Har- old S. Lewis, Jr., who read an earlier version of this Article. His comments and suggestions greatly enriched the author’s understanding of the entwinement between the Supreme Court’s affirmative action jurisprudence and its interpretations of Title VII.
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I. THE 1988 TERM — THE REHNQUIST COURT TAKES A RIGHT TURN IN ITS AFFIRMATIVE ACTION JURISPRUDENCE HEADING IN THE DIRECTION OF EQUAL ACCESS AND AWAY FROM EQUAL ACHIEVEMENT

A. Introduction

The Supreme Court's jurisprudence of voluntary or "benign" affirmative action has taken a new direction. Prior to the 1988 Term, the Court had decided nine affirmative action cases; seven considered the use of race/gender-conscious preferences in employment; one considered their use in public contracting; and one considered their use in a medical school admissions decision. In four of these cases, the Court tested the constitutionality of the challenged program under the Equal Protection Clause of either the Fifth or Fourteenth Amendment. In five of these cases, it ruled on their le-

1. Comprehensively defined, "affirmative action" includes a variety of activities aimed at "overcom[ing] the effects of past or present practices, policies, or other barriers to equal employment opportunit[ies]." EEOC Guidelines, Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964 As Amended, 29 C.F.R. § 1608.1(c) (1990); see also Office of Federal Contract Compliance Programs (OFCCP), Affirmative Action Programs, 41 C.F.R. §§ 60-2.1-2.32 (1990). Encompassed within this definition are training plans, recruitment efforts, elimination of any adverse impact caused by selective criteria not validated pursuant to EEOC Guidelines, and the restructuring of promotion and lay-off procedures.

This article employs the term "affirmative action" in a more restrictive sense, however, to refer specifically to decisions by employers and public contracting officials, giving preferences in hiring or promotions or the letting of contracts to individuals based on their race, color, or sex. While it contains references to gender-conscious preferences, the article focuses more on race-conscious decision-making. Ironically, because of the Court's adoption of the strict scrutiny test in reviewing race-conscious plans (see infra notes 189-237 and accompanying text), they may be more difficult for the states to adopt than gender-conscious plans. See Associated Gen. Contractors of Cal., Inc. v. City and County of San Francisco, 813 F.2d 922 (9th Cir. 1987).

2. This article addresses only those cases in which the Court reviewed voluntarily adopted affirmative action plans. For the sake of completeness, all nine cases are identified below and a brief description of their facts is given. See Appendix, infra pp. 1128-32. Each case is characterized in terms of the equal access/equal achievement constructs discussed in Part I. This article, however, does not analyze the Court's review of race/gender-conscious plans which the lower courts have imposed following a trial on the merits of the underlying discrimination claim or in entering a consent judgment. In such cases, the Court has weighed additional concerns not examined here such as statutory interpretation and the inherent power of district courts.

3. The Fourteenth Amendment provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Fifth Amendment applicable to the federal government contains no similar provision. However, in Bolling v. Sharpe, 347 U.S. 497 (1954), the Court read an equal protection component into the due process clause of the Fifth Amendment. The Court's "approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975).
gality under Title VII of the Civil Rights Act of 1964, as amended. In none of the cases, however, did the Court ever consider the two anti-discrimination norms together.

Despite the vast factual and legal differences among the nine cases, the Court and scholars viewed them in combination as establishing certain overarching principles. These principles favored — or at least tolerated — the use of race/gender-conscious preferences in employment-related decisions and in the letting of public contracts. Distilled to their essence, these principles permitted race/gender-conscious preferences if an adequate "factual predicate" rooted in prior discrimination existed, and the harm to "innocent" employees or contractors was minimized. The doctrinal development of these principles proceeded torturously over the course of the nine cases. It was marred by constantly shifting coalitions of Justices and ambiguous, sometimes contradictory pronouncements in a multitude of majority, plurality, concurring, and dissenting opinions.

In three cases decided during the 1988 Term, City of Richmond v. J.A. Croson Co., Wards Cove Packing Co. v. Atonio, and Martin v. Wilks, the Court clarified some of the prior decisions' ambiguity and resolved several outstanding issues. In doing so, the Court evidenced a dramatic shift in its jurisprudence, making it more difficult for employers and public contracting officials to use race/gender-conscious preferences. These cases upset the expectations of

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   It shall be an unlawful employment practice for an employer —
   (1) to fail or refuse to hire or to discharge any individual, or otherwise to discrimi-
   nate against any individual with respect to his compensation, terms, conditions, or
   privileges of employment, because of such individual's race, color, religion, sex, or
   national origin; or
   (2) to limit, segregate, or classify his employees or applicants for employment in any
   way which would deprive or tend to deprive any individual of employment opportu-
   nities or otherwise adversely affect his status as an employee, because of such indi-
   vidual's race, color, religion, sex, or national origin.

Id. § 703(a) (codified as amended at 42 U.S.C. § 2000e-2(a)).

5. See infra notes 74-75 and accompanying text.

6. For a more complete discussion of the unstable character of these decisions, see
   Daly, Some Runs, Some Hits, Some Errors — Keeping Score in the Affirmative Action

10. See infra notes 162-88 and accompanying text.
11. See infra notes 181-88 and accompanying text.
many scholars who read the most recent of the nine cases as an endorsement of the use of race/gender-conscious preferences.\textsuperscript{12}

This Article evaluates the impact of the three cases. Its central thesis is that the three cases represent the Rehnquist Court's preference for equal access as the substantive construct of the anti-discrimination norm contained in Title VII and the Equal Protection Clause. They also represent the Rehnquist Court's corresponding rejection of the alternate, equal achievement construct.\textsuperscript{13}

Part I lays the foundation for this thesis, giving an overview of the equal access/equal achievement debate. Part II traces the Court's decisions concerning the statistical disparity needed by an employer or public contracting official as a factual predicate in order to implement a race/gender-conscious plan. It shows how the Court initially used its selection of the appropriate statistical baseline to prefer the equal achievement construct and how the decisions of the 1988 Term marked a rejection of that construct in favor of the equal access construct. Part III analyzes the Court's selection of the strict scrutiny standard of review in Equal Protection Clause challenges to affirmative action plans and, additionally, demonstrates that the selection of such a standard manifests the Court's equal access preferences. Part IV finds further evidence of the Court's preference for the equal access construct by reference to its decisions encouraging the intervention of non-minority employees to challenge judicially-approved plans containing race/gender-conscious relief. In conclusion, Part V considers the future of affirmative action in light of the new decisions. It calls for Congress to exercise its enforcement power under Section 5 of the Fourteenth Amendment to strike a more appropriate balance between equal access and equal achievement as anti-discrimination norms. Such legislation would facilitate more rapid integration of minorities and women into the economic mainstream of the nation and foster racial and gender harmony in the workplace. It would also have the advantage of clearly illuminating


\textsuperscript{13} Part I's discussion of the equal access/equal achievement construct provides a framework for the subsequent analysis in Parts II and III of the substantive holdings of the three cases. Part I is not intended to be a comprehensive articulation of the equal access/equal achievement antimonies. Other writers have ably explored these antimonies in great detail, and the reader is directed to their work for a full elaboration. See sources cited infra notes 14-15.
congressional intent in an area of the law where the courts have rumbled in the dark for too long without guidance from the legislative branch.

B. The Equal Access/Equal Achievement Debate

In debating the meaning of equality, legal commentators have suggested two constructs of anti-discrimination laws. The first is that of equal access. At a minimum, the equal access construct acts as a restraint on government decision-making. This restraint, in the form of anti-discrimination laws, prohibits the government from using immutable characteristics such as race, color, or sex to deny individuals full participation in the political community. The explanation for the restraint is straightforward. Because these characteristics are beyond the individual's control, the government should neither bestow a benefit nor impose a burden based on their presence or absence. Many, but not all, of the proponents of the equal access construct would also argue that the government has an obligation to police private transactions of a public character to ensure that these immutable characteristics do not block access to economic opportunity. In their eyes, the government must legislate for


16. Compare N. Glazer, supra note 15, at xii-xiii (arguing against the "active involvement of government . . . in employment and education") with J. Rawls, A Theory of Justice 275 (1971) (describing a social system in which government "enforces and underwrites equality of opportunity in economic activities and in the free choice of occupation. This is achieved by policing the conduct of firms and private associations . . . . "). See generally Gal-
the general welfare of the community to prevent immutable characteristics from being used to construct a caste system affecting individuals' livelihood and self-sufficiency. These advocates extend the obligation of equal access to employers in the private sector as well as those in the public sector. At the heart of the equal access construct lies a negative duty not to impede advancement. This construct views minorities and non-minorities as having equal access when there is no legal or quasi-legal barrier faced by one and not faced by the other. In short, under the equal access construct, the government and certain segments of the private sector become the great equalizers, assuring that no member of society is hobbled in the race for economic security and advancement.

The second construct is that of equal achievement. It demands that government take a more active role in the distribution of economic benefits within the community. Citing the continuing, pernicious effects of years of discrimination, proponents of the equal achievement construct argue that the promise of equal access is illusory. Pointing to the failing school systems in many minority communities, deteriorating family structures, the shrinking job market for unskilled workers and entrenched sexism in vocational and professional training, its proponents demand a forced redistribution of economic opportunity. In their view, the race for economic security

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17. See generally Rosenfeld, Substantive Equality, supra note 14, at 1687-91 (discussing opportunity as a negative freedom); Westen, The Concept of Equal Opportunity, 95 Ethics 837 (1984-85) (same).

18. J. Rawls, supra note 16; Westen, supra note 17; see Sunstein, Legal Interference With Private Preferences, 53 U. Chi. L. Rev. 1129, 1154-55 (1986) (arguing that it is proper for government to act to change private preferences based on race and gender stereotyping through legislation outlawing discrimination in employment).


20. Cf. J. Rawls, supra note 16, at 62 (analyzing two theories of justice whereby “[a]ll social values . . . are to be distributed equally unless an unequal distribution . . . is to everyone's advantage.”); id. at 73 (describing the liberal interpretation of justice as dependent upon the concept of fair equality of opportunity); L. Thurow, The Zero Sum Society 187-89 (1980) (criticizing equal opportunity on the grounds that discrimination must be practical in order to equalize past discrimination); Horowitz, The Jurisprudence of Brown and the Dilemmas of Liberalism, 14 Harv. C.R.-C.L. L. Rev. 599, 608 (1979) (arguing that discrimination problems cannot be redressed without acknowledging the validity of vindicating group rights as well as individual rights).


22. See Fallon, supra note 21, at 832-33.
is rigged unless those who suffer from the legacy of slavery, Jim Crowism, racial discrimination, and sexism are given catch-up points to compensate for their disadvantage in the competition.23

Proponents of both constructs find solace and support in the anti-discrimination norm of the Equal Protection Clause and Title VII. The proponents of the equal access construct look to Justice Harlan's dissent in *Plessy v. Ferguson*: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens . . . . The law regards man as man, and takes no account of his surroundings or of his color . . . ."24 In their view, that statement sets the norm for government and private sector decision-making in employment and contracting. It represents the norm government should establish to regulate private transactions of a public character, such as employment. Its champion is Professor Bickel, whose oft-quoted observation is a manifesto of the proponents' sensibilities:

[A] racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice. Moreover, it can easily be turned against those it purports to help. The history of the racial quota is a history of subjugation, not beneficence. Its evil lies not in its name, but in its effects; a quota is a divider of society, a creator of castes, and it is all the worst for its racial base, especially in a society desperately striving for an equality that will make race irrelevant.25

The proponents of the equal achievement construct have also found articulate defenders of their vision in a Supreme Court Justice and a distinguished professor of constitutional law. Thus, they look to Justice Blackmun's famous admonition, "[i]n order to get beyond racism, we must first take account of race . . . in order to treat some persons equally, we must treat them differently,"26 as explaining why equal access cannot overcome the multiple hurdles society places, both consciously and subconsciously, in the way of minorities and women in the market place. They particularly defend race-conscious preferences as a product of the democratic process. According to Professor Ely, when the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself,

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the reasons for being unusually suspicious, and, consequently, employing a stringent brand of review, are lacking.

Whites are not going to discriminate against all whites for reasons of racial prejudice, and neither will they be tempted generally to underestimate the needs and deserts of whites relative to those, say, of blacks or to overestimate the costs of devising a more finely tuned classification system that would extend to certain whites the advantages they are extending to blacks.27

Part of the difficulty with the Court's affirmative action jurisprudence over the past ten years is attributable to its vacillation between the Harlan/Bickel and the Blackmun/Ely points of view. As the chart in the Appendix suggests, of the nine cases decided between 1978 and 1988, the Court endorsed the equal achievement construct six times and the equal access construct five times.28 Regents of the University of California v. Bakke,29 illustrates the Court's vacillation perfectly. In that case, the Court struck down an admissions program to a state medical school because it denied equal access to white applicants by setting aside sixteen seats exclusively for minority applicants.30 Yet it approved the use of race as a "plus" in admission programs, a mechanism favoring redistribution of educational opportunities and conforming to the construct of equal achievement.31

The cases decided in the 1988 Term, City of Richmond v. J.A. Croson Co.,32 Wards Cove Packing Co. v. Atonio,33 and Martin v. Wilks,34 mark the end of the Court's vacillation. Each of the cases raised, in one fashion or another, the equal access/equal achievement dilemma.35 Regardless of the origin of the anti-discrimination norm, (i.e., Title VII or the Equal Protection Clause) and despite vastly different legal and factual issues, the Court resolved each of the three cases in a manner reflecting equal access values rather than equal achievement values. That it did so under the leadership of Chief Justice Rehnquist is hardly surprising. In each of the nine

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30. Id. at 315-20.
31. Id.
35. See infra notes 162-88, 238-53 and accompanying text.
cases decided prior to the 1988 Term, he voted to strike down the race/gender-conscious preferences at issue. The Chief Justice stated his view in one of the earlier affirmative action cases to reach the Court, United Steelworkers v. Weber, and he has not departed from it: "There is perhaps no device more destructive to the notion of equality than the numerus clausus - the quota. Whether described as 'benign discrimination' or 'affirmative action,' the racial quota is nonetheless a creator of castes, a two-edged sword that must demean one in order to prefer another." A vehement and vocal foe of both "goals" and "quotas," Chief Justice Rehnquist has vigorously defended the equal access construct. In his view, race/gender-conscious preferences are tolerable only to benefit individual, actual vic-

36. When Justice Rehnquist joined Justice Powell's plurality opinion in Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273-78 (1986), which struck down the plan before the Court but suggested approval of limited race-conscious remedies without a formal administrative, legislative or judicial finding of prior discrimination, speculation abounded that his opposition to race/gender-conscious preferences was softening. See Little, Race-Conscious Remedies' Affirmative?, NAT'L L.J., July 28, 1986, at 13; Thomas, Reagan's Mr. Right; Rehnquist is Picked for the Court's Top Job, TIME, June 30, 1986, at 24. However, even before the 1988 Term, Professor Choper astutely observed "all indications suggest that Justice Rehnquist would subsequently disclaim [the] broad language. . . ." Choper, Continued Uncertainty as to the Constitutionality of Remedial Racial Classifications: Identifying the Pieces of the Puzzle, 72 IOWA L. REV. 255, 273 (1987).

38. Id. at 254 (Rehnquist, J., dissenting).
39. A great deal of intellectual energy has been spent distinguishing "goals" from "quotas." The debate centers on rigidity and the absence of choice in the decision-maker. Critics have maintained that a quota is a fixed numerical designation which must be met regardless of whether the beneficiaries of the affirmative action program are qualified. Defenders, in rebuttal, say that implicit in any quota is the requirement of competency. In their surrebuttal, critics dispute the defenders' interpretation and claim that even if true, quotas too often result in the selection of minimally qualified candidates.

In comparison both sides see "goals" as aspirational in character, i.e., percentages toward which personnel managers and government contracting officers should aspire. Critics complain, however, that while distinct in theory, in practice goals are treated as quotas, which results in the hiring or promotion of either unqualified or minimally qualified candidates. See generally R. FULLINWIDER, supra note 15, at 162-80 (discussing various views defining the difference between "goals" and "quotas" and the divergence between theory and practice); Duncan, The Future of Affirmative Action: A Jurisprudential/Legal Critique, 17 HARV. C.R.-C.L. L. REV. 503, 506-09 (1982) (arguing that the distinction between "goals" and "quotas" is not merely one of semantics, both are viable and necessary for implementing affirmative action programs); Kilgore, Goals, Quotas, Preferences and Set Asides: An Appropriate Affirmative Action Response to Discrimination?, 19 VAL. U.L. REV. 829 (1984-85) (arguing that the mechanisms used in affirmative action programs benefit persons who did not actually suffer any identifiable harms and in fact such mechanisms injure innocent parties). City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), contains no hint whatsoever that labeling a race-conscious preference a "goal" or "quota" is constitutionally significant.
tims of discrimination. Even in such instances, he has urged caution in their implementation to protect the interests of "innocent" parties.

Until the 1988 Term, the Chief Justice had great difficulty persuading a majority of the Court to accept his views. Two critical events, however, appear to have propelled the Court's jurisprudence in a new direction under his leadership. The first was the retirement of Justice Powell. Justice Powell recognized the strengths and weaknesses of both the equal access and equal achievement constructs, casting his vote on a case-by-case basis. His successor, Justice Kennedy seems less tolerant of the equal achievement construct and voted consistently in favor of the equal access construct in the 1988 Term. The second critical event is Justice O'Connor's more pronounced discomfort with the cost of the equal achievement approach. A frequent opinion-writer in the area of affirmative action, Justice O'Connor had vacillated between the two constructs. Her uncertainty ended in the 1988 Term with her assuming a more aggressive, unsympathetic attitude. With these changes, one in personnel and the other in attitude, Chief Justice Rehnquist gained needed support for equal access as the substantive content of the anti-discrimination norm of Title VII and the Equal Protection Clause. What is particularly striking about the transformation of the Court's doctrine is the manner in which it was accomplished. The three decisions thrust the Court's affirmative action jurisprudence in a new direction without overruling a single precedent. On a surface level, one can read the Court's decisions simply as a tightening up of previously established principles or a refusal to extend precedent. Such a reading, however, would tell only half the tale, akin to reading Hamlet as nothing more than the story of a son who murders his stepfather. The decisions of the 1988 Term do clarify precedent. But they also distort it. In combination, these decisions acutely hobble efforts

42. See Taylor, Powell Leaves High Court; Took Key Role on Abortion and on Affirmative Action, N.Y. Times, June 27, 1987, at 1, col. 6.
43. See Daly, supra note 6, at 67-72.
44. See id. at 72-78.
by employers and public contracting officials to implement race/gender-conscious preferences.

To label these decisions as reflecting the jurisprudence of the "Rehnquist Court" may strike some readers as presumptuous since the Chief Justice wrote only the opinion in Martin v. Wilks, which involved intervention, an issue of long-standing concern to the Chief Justice. In City of Richmond and Wards Cove Packing Co. he simply joined the majority opinion. Nevertheless, the label fits. All three reflect the attitude of the Chief Justice in the previous nine decisions. The only question outstanding is whether they go as far as he would like them to in limiting affirmative action. Furthermore, the Chief Justice would certainly have incurred political wrath if he had written each of the decisions cutting back on affirmative action. Such opinion-writing might well make it more difficult for the Bush Administration to win Senate approval for a conservative replacement, especially in the wake of Justice Brennan's retirement, or upon the retirement of any other member of the present Court. In light of the Bork debate and Rehnquist's familiarity with the politics of appointment to the Supreme Court, it is not unfair to speculate that the Chief Justice is sensitive to such concerns. Moreover, since the Chief Justice, as a member of the majority in Martin, City of Rich-


46. Justice Brennan's resignation at the end of the 1989 Term is certain to have a profound effect on the Court's affirmative action jurisprudence. Justice Brennan was the champion of the equal achievement construct. From the very first affirmative action case to reach the Court, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), to the very last, Metro Broadcasting, Inc. v. FCC, 58 U.S.L.W. 5053 (U.S. June 27, 1990), Justice Brennan was the intellectual lightening rod for the liberal members of the Court. With the exception of Fullilove v. Kluczniak, 448 U.S. 448 (1980), he is the author of every decision in which the Court rejected a Title VII or Equal Protection Clause challenge to voluntary or court-mandated, race-conscious programs. Johnson v. Transportation Agency, 480 U.S. 616 (1987); United States v. Paradise, 480 U.S. 149 (1987); Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986); Local 28 of Sheet Metal Workers' Int'l Ass'n v. BBOC, 478 U.S. 421 (1986); United Steelworkers v. Weber, 443 U.S. 193 (1979). In Bakke, he wrote the seminal opinion for a four Justice plurality, constructing a powerful argument for the application of the intermediate standard of review to government action which benefitted rather than disadvantaged minorities. For a more complete analysis of Justice Brennan's contributions in this area, see Daly, supra note 6, at 48-52.

Justice Souter, who replaced Justice Brennan, indicated to the Senate Judiciary Committee that he approved of affirmative action plans for "remedial" purposes. Exerpts from the Senate Hearings on the Souter Nominations, N.Y. Times, Sept. 15, 1990, at 10, col. 1. Whether he endorses the equal achievement construct or how broadly he interprets the equal access construct is not known.

mond, and Wards Cove Packing Co., was able to select an opinion writer for the majority whose views would adequately reflect his own, there was no reason for him to dramatize the shift in the Court's views even more starkly by writing the majority opinion in all three cases.

Finally, if any doubt lingers about the genuineness of the new direction of the Rehnquist Court, other non-affirmative action, civil rights cases decided during the 1988 Term will most certainly dispel it. These cases show the same substantive retreat from the positive, civil rights values embodied in the equal achievement construct. Moreover, the technique of decision-making manipulating the retreat is also the same. In none of these significant, non-affirmative action civil rights cases did the Rehnquist Court ever overrule precedent. Instead, it ignored the controlling precedent, glossed it with a narrow reading and placed greater procedural and substantive burdens on plaintiffs.

II. The Hidden Significance of Statistics in the Equal Access/Equal Achievement Debate

A. The Fourteenth Amendment and Title VII: An Unstable Partnership in Pursuit of Equality in the Workplace

The Equal Protection Clause of the Fourteenth Amendment provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Its sweep is majestic and its prohibitions extend to all activities undertaken by government including activities as diverse as the operation of the jury system, the issuance of licenses, and the establishment of residential districts for zoning purposes. No dispute exists that at a minimum its substantive content embodies the equal access construct. As such, the Four-

48. E.g., Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989) (stating that racial harassment relating to conditions of employment is not actionable under 42 U.S.C. § 1981); Will v. Michigan Dep't of State Police, 109 S. Ct. 2304 (1989) (stating that neither states nor state officials are "persons" within the meaning of 42 U.S.C. § 1983 in actions for money damages); Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261 (1989) (stating that the administrative limitations period begins to run under Title VII when an employer adopts a facially neutral change in a seniority system, not when the change first effects an employee).

49. U.S. Const. amend. XIV, § 1.

50. E.g., Buchanan v. Warley, 245 U.S. 60 (1917) (holding that a municipality cannot zone property using racially-restrictive criteria); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding that a municipality cannot license laundries in a racially discriminatory manner); Strauder v. West Virginia, 100 U.S. 303 (1880) (holding that states cannot exclude blacks from grand and petit juries).
teenth Amendment clearly prohibits racial discrimination in public employment. For obvious political and social reasons it was rarely, if ever, used to pursue even equal access as a means of combating the blatant discrimination which permeated hiring and promotion decisions in both the North and the South prior to the Civil Rights movement.

With the Civil Rights movement, minorities vigorously invoked the Equal Protection Clause to attack segregation in public schools and state-operated places of public accommodation such as amusement parks, beaches, and golf courses. The Fourteenth Amendment, however, turned out to be a cumbersome weapon to compel non-discrimination in public employment. Part of its unwieldiness stemmed from the Supreme Court's decision in Washington v. Davis, requiring actual purposeful intent to establish an Equal Protection Clause violation.

The difficulty in satisfying this requirement lead almost all victims of discrimination by public employers to rely instead on Title VII of the Civil Rights Act of 1964. As originally enacted, Title VII applied only to private employers and was enacted pursuant to Congress' commerce clause power. Congress invoked its commerce clause power to outlaw private acts of discrimination because in the infamous Civil Rights Cases, the Court had limited Congress' enforcement authority under Section 5 of the Fourteenth Amendment to acts of discrimination by the states.

Distressed by the minimal progress being made in integrating public employment, Congress amended Title VII in 1972 to make

53. Generally speaking, discriminatees would elect to file a suit based solely on the Equal Protection Clause only in instances in which time was of the essence and the need for an injunction was so great that compliance with 42 U.S.C. § 2000e-5(f)(1) was impossible. That provision requires a discriminatee to wait 180 days after filing a charge with the EEOC before commencing a Title VII action. The plaintiff's imminent layoff typifies the kind of instance in which a plaintiff would bypass a Title VII claim. See, e.g., Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).
55. 109 U.S. 3 (1883).
56. Id. at 6.
public employers subject to its encompassing scheme.\(^5\) Consistent with the *Civil Rights Cases*, Congress relied upon its Section 5 enforcement authority.\(^6\) The 1972 amendments to Title VII left no doubt concerning Congress' endorsement of the equal access construct and its intent to make non-discrimination in hiring and promotion decisions a universally observed principle of the workplace.

The history of the 1972 amendments to the Civil Rights Act of 1964, however, also suggests Congress' awareness and endorsement of the equal achievement construct. The 1969 Report of the Civil Rights Commission, which played an instrumental role in the enactment of the 1972 amendments, urged the adoption of goals to "giv[e] the work force the shape it presently would have were it not for such past discrimination."\(^7\)

Furthermore, Congress specifically rejected amendments limiting the powers of federal agencies and the courts to implement remedies modeled on the equal achievement construct.\(^8\) In 1965, President Johnson had issued Executive Order 11,246, containing broad findings of discrimination in the construction industry.\(^9\) The order

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Congress' decision to extend Title VII to the public sector sprang from three considerations. First, there was an abundance of evidence demonstrating racial bias in employment decisions in both the North and the South despite the prohibitions contained in the equal protection clause. H.R. Rep. No. 238, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 2137, 2152. Second, racially motivated employment decisions had a highly adverse impact on "governmental activities which are most visible to the minority communities (notably education, law enforcement, and the administration of justice) with the result that the credibility of the government's claim to represent all the people equally is negated." *Id.* at 2153. Third, the absence of administrative remedies to resolve discrimination complaints in the public sector hindered the nation's goals of equal employment opportunity. The expense and time involved in litigation rendered constitutional redress "an empty promise" for disadvantaged individuals. *Id.*


\(^{60}\) *Id.* at 1167-68.

required federal contractors to establish race/gender-conscious employment "goals." The federal government exerted enormous pressure on contractors to speed up the hiring and promotions of minorities and women, and lower courts vigorously enforced the order. The absence of intentional discriminatory conduct on the contractors' part was irrelevant to their obligations. During the debate on the 1972 Amendments, several Senators and Congressmen undertook two concerted efforts to hobble Executive Order 11,246 and to cabin the power of the lower courts to order race/gender-conscious relief. They failed dismally on both occasions. By blocking attempts to retreat from the equal achievement construct, Congress implicitly acknowledged the construct's contribution to the overriding legislative goal of bringing minorities and women into the economic mainstream as rapidly as possible. That acknowledgement, moreover, must be viewed against Congress' belated recognition that discrimination was not the result of individual "ill-will" as was originally conceived by Congress in 1964. By 1972, Congress understood that neutral employment practices, intertwined with social forces beyond the individual applicant's or employee's control, could trigger a racially stratified work force as decisively as ill-will. This understanding, in part, diluted the hostility the failed amendments sought to exploit.

The Court, through a number of far reaching decisions, reinforced the determination expressed by Congress in 1964 and again in

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11,246, its enforcement and its validity).
62. E.g., Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971); Joyce v. McCrane, 320 F. Supp. 1284 (D.N.J. 1970); cf. Porcelli v. Titus, 431 F.2d 1254 (3d Cir. 1970) (holding that the Board of Education's action of abolishing a promotional list, in order to create a more racially integrated faculty, did not violate the white teachers' Fourteenth Amendment rights who were on the promotional list), cert. denied, 402 U.S. 944 (1971).
63. For a detailed description of their efforts, see Daly, Stotts' Denial of Hiring and Promotion Preferences for Non-Victims: Draining the "Spirit" from Title VII, 14 FORDHAM Urb. L.J. 17, 72-76, (1986); see also Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421, 466-70 (1986).
64. Two amendments to undermine Title VII and Executive Order 11,246 are of particular significance: the first attempted to limit the use of class actions in Title VII cases and the second proposed barring the executive and judicial branches from ordering race-conscious relief for non-victims. Daly, supra note 63, at 72-73, 82-83; see H.R. REP. No. 9247, 92d Cong., 1st Sess. § 3(e), reprinted in LEGISLATIVE HISTORY, supra note 59, at 147; Sape & Hart, Title VII Reconsidered: The Equal Employment Opportunity Act of 1972, 40 GEO. WASH. L. REV. 824, 841-45 (1972).
65. See supra note 59.
1972 to rid the workplace of discrimination and its lingering effects. For example, in *Albermarle Paper Co. v. Moody*, the Supreme Court described Title VII, as a "spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."67 In *Dothard v. Rawlinson*, the Court acknowledged the sweeping policy choice made by Congress in the 1972 amendments, holding that Title VII case law determining the liability of private employers was equally applicable to public sector employers.68 *Dothard* was a clear signal to the states and municipalities that they risked substantial monetary liability and judicial scrutiny of their employment practices if they did not immediately end personnel policies adversely affecting women and minorities. Consequently, public sector employers walked a "tightrope" risking liability to their minority employees if they did not act thoroughly enough to eradicate the vestiges of discrimination, and liability to their non-minority employees if they acted too precipitously without sufficient proof of their potential Title VII liability.69

After the 1972 amendments, when faced with the prospect of statutory liability, which is less easily avoided than constitutional liability,70 public employers sought to forestall Title VII litigation by establishing affirmative action programs to integrate their work forces on an accelerated basis.71 Almost every state in the United States has put in place an affirmative action plan containing prefer-

ences in hiring and promotion to minorities.  

ment units have implemented similar plans. These programs reflect
democratic acceptance of the equal achievement construct. Furthermore,
in virtually every instance it was a white legislative majority
that voluntarily disadvantaged itself to benefit minority group
members.

The adoption of race-conscious preferences by states and municipal
governments raised the difficult question of the relationship be-
tween the anti-discrimination norm of the Equal Protection Clause
and that of Title VII. While various Justices and scholarly commen-
tators have contributed mightily to the intellectual frenzy over this
question, a definitive answer has yet to emerge. In not a single case
has the Court ever considered race-conscious preferences under both

§ 296 (McKinney 1982), N.Y. Exec. Order Nos. 6 and 20, *reported in* 8B Fair Empl. Prac.
Man. (BNA) 455:3071-72, and N.Y. COMP. CODES R. & REGS. tit. 9, §466, *reprinted in* 8B
Employment Opportunity for Construction Regulations, ch. 123:2-3-01-2-3-09, *et seq., reprinted
in* 3 Empl. Prac. Guide (CCH) ¶ 27,251, Regulations of Pa. Human Rts. §§ 49.51-49.102,

73. See supra note 12. For a more elaborate bibliography, see Daly, *supra* note 6, at 18
n.4.
the Equal Protection Clause and Title VII.

Despite the uncertainty produced by the absence of a direct answer, a synthesis of the existing case law suggested that the Equal Protection Clause and Title VII were unstable partners in pursuit of equality in the workplace. Ultimately, a consensus formed that in examining an employer's decision to implement an affirmative action plan containing race/gender-conscious preferences the Court would probe most deeply in two areas: (1) the factual predicate underlying the employer's decision to implement the plan\(^7\) and (2) the impact of the plan on "innocent" employees who bore no responsibility for past or present discrimination suffered by minority employees.\(^8\) The Court scrutinized both areas regardless of the particular norm involved. It seemed to make no difference whether the plaintiff challenged the preference under Title VII or the Equal Protection Clause. The Court employed the same analysis. Because the decisions of the 1988 Term left the area concerning the impact on "innocent" employees undisturbed, this Article will not address the controlling principles. In contrast, the decisions of the 1988 Term significantly departed from the Court's prior analysis of the factual predicate issue. By transforming the substantive content of the principles used to evaluate statistical disparities, the Court effectively promoted the equal access construct over the equal achievement construct, thereby moving closer to Harlan and Bickel's color-blind standard and away from Blackmun and Ely's tolerance of race-con-
B. How Statistics Have Come to Play Such a Pivotal Role in the Equal Access/Equal Achievement Debate

"In cases concerning racial discrimination, 'statistics often tell much and the Courts listen'" has long been an axiom of employment litigation. In amending Title VII in 1972, Congress presaged the significance of statistics:

In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization. . . . This view has not been borne out by experience.

Employment discrimination as viewed today [1972] is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs, and the literature on the subject is replete with discussion of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effects of pre-act discriminatory practices through various institutional devices, and testing and validation requirements.

Because statistics are an ideal mechanism for exploring the differences and similarities accorded different groups and measuring "systems" and "effects," they have assumed a pivotal role in employment discrimination litigation. Statistical analyses are utilized extensively by both plaintiffs and defendants alike.

78. See supra notes 24-27 and accompanying text.

77. Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 426 (8th Cir. 1970) (quoting Alabama v. United States, 304 F.2d 583, 586 (5th Cir.), aff'd per curiam, 371 U.S. 37 (1962)). The Supreme Court enthusiastically jumped on the statistics bandwagon in the early, critical years of its Title VII jurisprudence. "Our cases make it unmistakably clear that '[s]tatistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue." International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977). Of course, statistical proof must be focused, comprehensible, and relevant to the jobs at issue. This is not always the case. As one court testily observed, "too many use statistics as a drunk man uses a lamppost — for support, and not illumination." Keely v. Westinghouse Elec. Corp., 404 F. Supp. 573, 579 (E.D. Mo. 1975).

79. See generally W. CONNOLLY JR., D. PETERSON & M. CONNOLLY, USE OF STATISTICS IN EQUAL OPPORTUNITY LITIGATION §§ 1.01-2.02 (1989) (outlining the general history of the use of statistics in civil rights cases and by plaintiffs); B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1331-91 (2d ed. 1983) (discussing the types and sources of statistics).
The principles of statistical analysis which have evolved under Title VII to determine employer liability for discrimination are inextricably linked to the Court's affirmative action jurisprudence under both Title VII and the Equal Protection Clause. Thus, a brief review of these principles is necessary to assess the critical cases of the 1988 Term and the new direction of the Rehnquist Court.

A Title VII plaintiff has essentially two theories of liability from which to choose. The first is the disparate treatment theory in which the plaintiff attempts to show that the defendant's alleged discriminatory conduct was prompted by an actual, purposeful intent to discriminate. This theory closely resembles the actual, purposeful intent standard of the Equal Protection Clause enunciated in Washington.

Not all commentators agree that the two theories are compatible. E.g., Fallon & Weiler, Firefighters v. Stotts: Conflicting Models of Racial Justice, 1984 SUP. CT. REV. 1, 10-26; Fiss, supra note 15, at 237-40; Comment, When Doctrines Collide: Disparate Treatment, Disparate Impact, and Watson v. Fort Worth Bank & Trust, 137 U. PA. L. REV. 1755 (1989) (authored by Anita M. Alessandra). At a minimum, the two theories are bottomed on the principle that certain immutable characteristics (e.g., race, color, sex, national origin) and one mutable characteristic, religion, are irrelevant to the market place because they are nonpredictive of success in employment. By removing these characteristics from consideration in an employment decision, both theories advance fundamental notions of fairness and evenhandedness. It hardly seems fair to deny an individual an employment opportunity because of an attribute such as race or gender over which that individual has no control. While the choice of religion is subject to an individual's control, punishing a believer because of credo runs counter to the nation's ethos dating from the colonies' first settlement through the waves of immigrants in the 1900s and continuing even into the 1980-90s (e.g., Jews immigrating from the Soviet Union). Fallon, supra note 21; Fiss, supra note 15, at 240-49. For an insightful analysis of the tension between the two theories, see Blumoff & Lewis, Jr., The Reagan Court and Title VII: A Common-Law Outlook on A Statutory Task, 69 N.C.L. REV. 1, 7-17 (1990).

According to the Supreme Court, "[d]isparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.

The theory embraces individual claims of disparate treatment as well as systemic claims. In the latter case, the plaintiff alleged that the employer deliberately treated an entire category of employees or applicants less favorably than another category because of the individual’s race, color, religion, sex, or national origin.

In *Griggs v. Duke Power Co.*, Chief Justice Burger articulated for a unanimous Court a second theory of liability which revolutionized employment discrimination law. Under this theory, later labeled “disparate impact,” the employer’s motive was irrelevant. "[G]ood intent or absence of discriminatory intent does not redeem employ-
ment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability . . . . Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation."87

The disparate impact theory has been applied to a diverse range of employment practices, including height and weight requirements, testing procedures, and educational requirements.88 Initially, the disparate impact theory was applied to objective hiring and promotion devices.89 The Supreme Court ultimately expanded its scope by approving its use to evaluate subjective criteria such as a supervisor’s ratings, assessments of interpersonal skills, and other non-quantifiable characteristics.90

Until recently, Title VII doctrine emphasized the two theories' analytical distinctness.91 Linkage rather than separateness seems to

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88. See, e.g., Dothard v. Rawlinson, 433 U.S. 321 (1977) (height and weight requirements); Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975) (employment tests); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (employment tests and educational requirements). If the plaintiff makes out a prima facie case of disparate impact, the employer must produce evidence of business necessity or job-relatedness. SCHLIE & GROSSMAN, supra note 79, at 1228-31. See generally I C. SULLIVAN, M. ZIMMER & R. RICHARDS, supra note 79, at 147-95 (discussing the various attempts to create exceptions to the broad scope of a disparate impact claim). A consistent verbal formulation of the quantum of evidence necessary to demonstrate a legitimate business need has escaped the Court. Until the 1988 Term, the standard, however formulated, seemed to have some teeth in it. E.g., Griggs, 401 U.S. at 432 (requiring a "manifest relationship to the employment in question."). Even if the employer had met his burden, the plaintiff would nonetheless prevail upon a showing of an alternate practice with less adverse impact. In Watson v. Fort Worth Bank Trust, 487 U.S. 977, 977-99 (1988), the Court considerably relaxed the last two requirements, demanding only a "normal and legitimate" business need.

89. See, e.g., Atonio v. Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987), rev'd and remanded, 109 S. Ct. 2115 (1989); Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985).

90. Watson, 487 U.S. at 989-90.

91. In International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), the Court typically observed:

Claims of disparate treatment may be distinguished from claims that stress "dispa-
be on the rise, however, with the Court currently describing the disparate impact theory as "functionally equivalent to intentional discrimination." Whether characterized as analytically distinct or functionally equivalent, both theories acknowledge a prominent role for statistics in measuring claims of systemic disparate treatment and disparate impact. There is no way to understand what the statistics really mean, however, without a consensus on the baseline or standard against which they are to be interpreted. In *Hazelwood School District v. United States*, a case involving allegations of systemic disparate treatment, the Court laid down two general principles: (1) for non-skilled entry level jobs, the baseline was the racial and gender makeup of the labor force in the relevant market area; and (2) for jobs requiring specialized skills, the baseline was the racial and gender makeup of the labor force in the relevant market area possessing those skills. In commenting upon its selection of these baselines the Court explained:

"[A]bsent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of longlasting and gross disparity between the [racial and ethnic] composition of a work force and that of the general population thus may be significant even though § 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population."

*Hazelwood* thus laid down the rule that evidence of "longlasting and gross disparity" created a prima facie case of systemic disparate treatment in violation of Title VII. Evidence of a prima facie case
shifted the burden of going forward to the employer who had to show a business necessity for the practice. In subsequent systemic treatment cases, the Court cited *Hazelwood* approvingly and/or fashioned alternate, consistent verbal precepts.\(^9\)\(^8\)

In contrast, the Court never defined “disparate impact” in any meaningful way, expressing a clear preference for a case-by-case analysis.\(^9\)\(^8\) The Court has recently approved of applying the *Hazelwood* formula and the alternate precepts to disparate impact cases as well as to disparate treatment cases.\(^1\)\(^0\)

Some commentators have

longstanding and gross disparity could be measured by calculating the “standard deviation.” *Id.* at 308 n.14; *id.* at 317-20 & nn.5 & 9 (Stevens, J., dissenting). The Court had earlier approved this methodology in *Castaneda v. Partida*, 430 U.S. 482, 496-97 n.17 (1977), cert. denied, 452 U.S. 940 (1981), a jury selection case. See generally B. SCHLEI & P. GROSSMAN, supra note 79, at 1370-75; I C. SULLIVAN, M. ZIMMER & R. RICHARDS, supra note 79, at 80-91.

\(^9\)\(^8\) E.g., Connecticut v. Teal, 457 U.S. 440, 446 (1982) (requiring a showing of “significantly discriminatory impact”); New York City Transit Authority v. Beazer, 440 U.S. 568, 584 (1979) (stating that a violation of the Act could be established by “statistical evidence showing that an employment practice has the effect of denying the members of one race equal access to employment opportunities.”); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (requiring a showing that the defendant’s practices of selecting applicants resulted “in a significantly discriminatory pattern”).

\(^9\) The Court’s opinions are sprinkled with observations such as statistics “come in infinite variety and ... their usefulness depends on all of the surrounding facts and circumstances.” Teamsters, 431 U.S. at 340, quoted in Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 996 n.3 (1988); cf. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973) (stating that the facts will vary in Title VII cases so that a given set of specifications to establish a prima facie case may not be applicable in every situation).

According to EEOC Guidelines, adverse impact occurs if the selection rate of members of a protected group is less than four-fifths of the rate at which the group with the highest selection rate is selected. EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(D) (1989). Some courts have adopted a “standard deviation” analysis analogizing to the Supreme Court’s decisions in jury selection cases. E.g., Rivera v. Wichita Falls, 665 F.2d 531, 536 n.7 (5th Cir. 1982) (citing Castaneda v. Partida, 430 U.S. 482 (1977)); Guardians Ass’n v. New York City Police Dep’t v. Civil Serv. Comm’n, 630 F.2d 79, 86 & n.4 (2d Cir. 1980) (citing Castaneda, 430 U.S. 482 (1977)); see supra note 97. See generally W. CONNOLLY, JR., D. PETERSON & M. CONNOLLY, supra note 79, § 11.08 (discussing the significance that federal courts have attached to standard deviation analysis); Shoben, Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII, 91 HARV. L. REV. 793 (1978) (advocating the use of a statistical procedure to measure the possible discriminatory affects of employment tests in Title VII cases).

Professors Zimmer, Sullivan & Richards probably sum up the Court’s statistical assessment most accurately. They describe the Court as “eyeballing” the numbers to find impact. M. ZIMMER, C. SULLIVAN & R. RICHARDS, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 247 (2d. ed. 1988).

\(^1\)\(^0\) In Watson v. Fort Worth Bank Trust, 487 U.S. 977, 994-95 (1988), a disparate impact case, the Court assumed without discussion that the formula of the systemic disparate treatment cases was fully applicable to disparate impact cases.

Our formulations, which have never been framed in terms of any rigid mathemati-
similarly failed to see any difference in the kind of statistics needed to prove a systemic disparate treatment case and a disparate impact case.101

How the *Hazelwood* formula of "longlasting and gross disparity" between the racial makeup of the relevant labor force and that of the employer's work force crossed the line dividing the liability side of the Court's Title VII jurisprudence from the affirmative action side is easy to understand.102 Mindful of the rule laid down in the *Griggs* formula, have consistently stressed that statistical disparities must be sufficiently substantial that they raise such an inference of causation. In *Griggs*, for example we examined "requirements [that] operate[d] to disqualify Negroes at a substantially higher rate than white applicants." 401 U.S., at 426, 91 S. Ct. 851. Similarly, we said in *Albermarle Paper Co.* that plaintiffs are required to show "that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." 422 U.S., at 425, 95 S. Ct. 2375. Later cases have framed the test in similar terms. See, e.g., *Washington v. Davis*, 426 U.S. at 246-247, 96 S. Ct. 2040 ("hiring and promotion practices disqualifying substantially disproportionate numbers of blacks"); *Dothard*, 433 U.S., at 329, 97 S. Ct. 2726 (employment standards that "select applicants for hire in a significantly discriminatory pattern"); *Beazer*, 440 U.S. at 584, 99 S. Ct. at 1365 ("statistical evidence showing that an employment practice has the effect of denying the members of one race equal access to employment opportunities"); *Teal*, 457 U.S. at 446, 102 S. Ct. 2530 ("significantly discriminatory impact").

Id. 101. Professors Sullivan, Zimmer and Richards even go so far as to say that the difference "between prima facie cases under the two theories is essentially a matter of the scope of response available to the defendant." 1 C. SULLIVAN, M. ZIMMER & R. RICHARDS, supra note 79, at 104; see Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments*, 63 CHI.-KENT L. REV. 1, 30-34 (1987) (discussing the applicability of the disparate impact model to cases involving the subjective judgments of employees); Laycock, *Statistical Proof and Theories of Discrimination*, 49 LAW & CONTEMP. PROBS. 97, 102 (1986) (discussing the contradictions between statistical and individual proof); Note, *Availability of Disparate Impact Theory to Attack a Multicomponent Employment System*, 31 VILL. L. REV. 377, 384-85 n.29 (1989) (authored by Penelope M. Taylor) (discussing the four-fifths rule and the standard deviation method as two methods of proving discriminatory impact).

102. Determining the appropriate labor pool is not necessarily easy. The difficulty is illustrated by the decisions of two panels of the Court of Appeals for the District of Columbia, both of which were reviewing reverse discrimination challenges to affirmative action plans adopted by different District of Columbia agencies. In *Hammon v. Barry*, 826 F.2d 73, 77 (D.C. Cir. 1987), *limited reh'g en banc granted*, 833 F.2d 367 (D.C. Cir. 1988), *order granting reh'g vacated*, 841 F.2d 426 (D.C. Cir.), cert. denied, 486 U.S. 1036 (1988), one panel used a metropolitan area figure in which blacks constituted 29.3% of the workforce. Barely a year later, another panel used a workforce figure in which blacks constituted 60%. *Ledoux v. District of Columbia*, 820 F.2d 1293, 1304 n.18 (D.C. Cir. 1987), *limited reh'g en banc granted*, 833 F.2d 368 (D.C. Cir. 1987), *panel decision and order granting reh'g en banc vacated and remanded without opinion upon parties' joint motion*, 841 F.2d 400 (D.C. Cir. 1988); see *Abron v. Black & Decker Mfg. Co.*, 439 F. Supp. 1095, 1105 (D. Md. 1977) (holding that "the appropriate labor force is that which is encompassed in the area within which an employer can reasonably expect people to commute"). *See generally* 1 C. SULLIVAN, M. ZIMMER & R. RICHARDS, supra note 79, at 67-73 (discussing the use of statistical evidence,
Griggs v. Duke Power Co., that good faith was no defense to a valid Title VII claim, and unmindful of the theoretical distinctions between claims of systemic disparate treatment and disparate impact, employers began to compare the racial and gender composition of their work force with the racial and gender composition of the appropriate labor market. When the comparison revealed evidence of long lasting and gross disparity approaching the Hazelwood baseline, they modified their employment procedures for the purpose of eliminating the disparity. In some instances, they simply intensified their recruiting efforts in minority communities or eliminated the employment practices responsible for the disparity. In many instances, both public and private employers initiated racial preferences in hiring and promotion decisions in order to make the racial and gender makeup of their work force more closely resemble that of the relevant labor pool.

Self-imposed remediation by employers posed several problems for the Court. As a threshold matter, there was the question of whether Title VII as a guarantor of equal access even permitted a private employer to adopt an affirmative action plan with an equal achievement component. The Court answered that inquiry positively in United Steelworkers v. Weber, in 1979 when it approved a private employer's voluntary implementation of a race-conscious plan in the absence of a judicial or administrative finding of liability. In 1987, in Johnson v. Transportation Agency, it gave a similar answer to a public sector employer.

Both cases endorsed the Hazelwood methodology of comparison in an affirmative action context and considerably loosened its restraints. In making this endorsement, the Court revealed a great deal about its views on affirmative action in general. The endorsement signalled the Court's unwillingness to accept justifications for race-

104. Employers were not alone in having great difficulty in keeping the two theories separate. See C. Sullivan, supra note 61, at 281-94.
106. See id. at 894 & nn. 24-25.
conscious preferences other than self-remediation. Employers were not free to consider race in making hiring or promotion decisions in order to raise their own standing in the minority community or even to alleviate the dissatisfaction of minority employees. The Court eased the way for race-conscious programs but only to the extent that the employer could justify their adoption to eliminate “longlasting and gross disparity” for which the employer presumably bore the responsibility.\textsuperscript{109} Culpability, although the employer did not have to directly confess to it, was what gave statutory legitimacy to the challenged program. This culpability, moreover, was not dependent on the employer’s intent to discriminate. The Court dispensed with moral blameworthiness. Culpability could spring from the adoption of neutral employment practices having an adverse impact as well as from conscious, purposeful motivation. Intent and impact were both “sins of racism” for which the Court would approve affirmative action “only as a precise penance . . .”\textsuperscript{110}

While the Court’s linking of remediation to this unique concept of culpability prompted scholarly criticism,\textsuperscript{111} the degree to which it thwarted employers’ desires to implement race-conscious preferences in affirmative action plans is difficult to assess. The most likely reason for an employer needing to raise its standing in a minority community is disproportionality between the racial composition of its work force and that of the local labor market. Similarly, the most likely reason for an employer needing to alleviate the dissatisfaction of minority employees is the use of hiring and/or promotion criteria having a disproportionate impact. The Court’s linking of culpability to remediation, thus, had more symbolic significance than anything else. It served to protect the use of race-conscious preferences from more intense criticism and lessened the political incentive to dispute their adoption. In light of the substantial criticism of race-conscious preferences, even when linked to remediation, it is easy to imagine the intense criticism likely to have erupted if the Court had approved of race-conscious preferences for purposes unrelated to denials of equal access. By restricting race-conscious “remedies” to culpability, the Court was, on the surface of its jurisprudence, only permitting the employer to correct for a denial of equal access which occurred

\textsuperscript{110} Sullivan, Comment, Sins of Discrimination: Last Term’s Affirmative Action Cases, 100 Harv. L. Rev. 78, 80-81 (1986); Abram, Affirmative Action: Fair Shakers and Social Engineers, 99 Harv. L. Rev. 1312 (1986).
\textsuperscript{111} See, e.g., Sullivan, supra note 110.
intentionally or unintentionally somewhere in the hiring or promotion process.

At surface level, Hazelwood's formula for selecting the appropriate labor pool for statistical comparisons can facilely be interpreted as a device to promote equal access. Careful attention to the statistical baselines selected by the Court, however, exposes the Court's transformation of the Hazelwood formula from an equal access construct to an equal achievement construct. Underlying the transformation was the looseness with which the Court applied the principle of using general population figures for unskilled jobs and refined figures for skilled jobs. Until the 1988 Term, the Court consistently applied the Hazelwood formula to prefer the labor pool which had the greater percentage of minority group members. There is only one possible exception to that observation and even the exception evaporates under analysis. The selection of the labor pool with the greater percentage of women or blacks accelerated the integration of these previously excluded groups into the economic mainstream. It upset the economic status quo by refusing to look at where minorities actually were on the rungs of career ladders (almost inevitably at the bottom) and looked to where they would have been absent public, private, and institutional racism and sexism. Furthermore, by selecting the labor pool with the greater percentage of minority group members, the Court assured that the employer would keep the race/gender-conscious plan in effect for a much longer period of time until, for example, its work force obtained racial/gender parity with the labor pool.

1. The Employment Cases

   a. Weber

Fearful of litigation by disgruntled black employees and in response to heavy pressure from the Office of Federal Contract Compliance threatening disbarment from federal contracts, Kaiser Aluminum & Chemical Corporation (Kaiser) and the United Steelworkers Union of America (USWA) entered into a collective bargaining plan, one provision of which was designed to open up career paths in the skilled trades to minority workers. The collective bargaining agreement provided that unskilled workers would be of-

112. See infra notes 169-71 and accompanying text.
113. See Daly, supra note 6.
fered the opportunity to participate in a training program, the successful completion of which would enable them to move into a different career ladder with higher paying jobs.\textsuperscript{115} Kaiser admitted applicants to the training program based on their employment seniority and their race: 50\% of the trainee slots were reserved for unskilled black workers.\textsuperscript{116} When Weber, a white applicant, was turned down in favor of black employees with less seniority, he sued claiming that the training program violated Section 703 of Title VII which, \textit{inter alia}, prohibited discrimination in apprenticeship programs.\textsuperscript{117} Weber essentially contended that Title VII guaranteed equal access and nothing more.\textsuperscript{118} He sought equal access and nothing less.

Kaiser defended its adoption of the race-conscious program by pointing to the wide disparity between the percentage of skilled black craftworkers it employed (1.83\%) and the percentage of blacks in the local labor force (39\%).\textsuperscript{119} The Court approved this comparison, without discussion, finding the race-conscious program was designed "to eliminate conspicuous racial imbalance in traditionally segregated job categories."\textsuperscript{120} Had the Court used the 4.3\% figure, which approximated the percentage of blacks possessing the appropriate trades skills,\textsuperscript{121} the imbalance in the case would have disappeared and Kaiser's right to rely on the local work force discrepancy as prima facie evidence of a valid potential Title VII claim would have been severely undermined.

That the Court approved the Kaiser/USWA affirmative action plan is somewhat surprising. As Justice Rehnquist's dissent suggested, the drafters of Title VII in 1964 may have had only the equal access model of equality in mind.\textsuperscript{122} On the other hand, as Justice Brennan's majority opinion makes abundantly clear, Congress intended Title VII to be a potent tool, accomplishing the herculean task of integrating minorities into the nation's economic mainstream.\textsuperscript{123} The Kaiser/USWA plan furthered that goal. Use of

\textsuperscript{115} Id. at 197-98.
\textsuperscript{116} Id. at 199.
\textsuperscript{117} Id. at 199-200.
\textsuperscript{118} Id. at 193, 197-200, 209-11.
\textsuperscript{119} Id. at 198-99.
\textsuperscript{120} Id. at 209.
\textsuperscript{121} See id. at 212 (Blackmun, J., concurring) (advocating the adoption of the "arguable violations" theory).
\textsuperscript{122} Weber, 443 U.S. at 230-54 (Rehnquist, J., dissenting).
\textsuperscript{123} Id. at 202-08. Dean Schatzki's observation concerning both Justices' analysis of
a labor force figure reflecting the percentage of blacks with skilled trades experience would have locked minorities into the status quo. That status quo, moreover, was itself the product of countless discriminatory acts by the public and private sector, including the skilled trades unions. The plant where Kaiser implemented the challenged training program was located in Louisiana. Blacks had almost no opportunity to pursue skilled trades positions in that state prior to the time Weber was decided.\(^{124}\) Louisiana's schools were racially segregated, and the schools for black children were considerably inferior to those for white children.\(^{125}\) Vocational training for blacks in the skilled trades was essentially unheard of. Discrimination in the private sector reinforced and compounded discrimination in the public sector. Because of discrimination by employers, blacks stood no realistic chance of gaining entry level jobs in industries with career ladders leading to skilled trades jobs. Because of union discrimination, blacks were excluded from apprenticeship programs teaching such skills. In short, racial discrimination in employment in the South was as systemic and pernicious as segregation in education. Hobbled by years of discrimination in education and employment, minority workers were simply unable to enter the race for economic security and better jobs without a boost.

With hindsight it can be seen that the Court fashioned the disparate impact theory in Griggs to compel employers to dismantle the blocks upon which they built their segregated work force.\(^{126}\) It used Weber to accelerate the dismantling process, to encourage employers to voluntarily remedy the effects of over a hundred years of employment and educational apartheid by others. It selected general labor pool statistics rather than more refined ones to promote equal

Congress' intent is worth noting, however.

Whether or not the members of Congress thought of voluntary affirmative action, they did not discuss the issue. That being so, it is difficult for me to understand how either the majority or the dissent found much solace in the history. Justice Rehnquist stated, on the one hand, that Congress never thought about the matter; on the other hand, the Justice was convinced the history rejected affirmative action ... I fail to see how the legislative history can lead someone to both of Rehnquist's conclusions—that the Congress did not deal with affirmative action and that the Congress clearly rejected it. For the majority, Justice Brennan also overstates enormously the meaning of the legislative history. The truth is, Congress did not discuss or debate the issue.


125. Id.
126. See Blumrosen, supra note 66, at 62.
achievement over equal access.

b. Johnson

The use of general undifferentiated labor force statistics to promote the equal achievement construct in voluntary affirmative action plans received a second strong boost from the Court in Johnson v. Transportation Agency. In response to a striking disparity between the racial and gender makeup of its work force and that of the local labor pool, the Transportation Agency had adopted an affirmative action plan which strongly encouraged management personnel to consider race and gender as a “plus” in hiring and promotion decisions. In deciding to implement such a plan the Transportation Agency was heavily influenced by the concentration of women in certain positions, such as office jobs, and their complete absence in other positions, such as those involving manual labor. No woman held a skilled craft position even though women comprised approximately 5% of the refined local labor pool.

Johnson, a white male, challenged the Transportation Agency's selection of Joyce, a female, for a road dispatcher's job. Johnson was tied for second in the selection list with a score of 75, but the appointing official picked Joyce, who was ranked next with a score of 73. The appointing official considered the Transportation Agency's affirmative action goals in making the final decision.

A majority of the Justices, citing Weber, approved the Transportation Agency's reliance on general labor force statistics as the baseline for its decision to implement a gender-conscious affirmative action plan. It endorsed the Agency's reliance on the theory that the road dispatcher's job was one in a series of increasingly more responsible jobs which were filled by employees who were unskilled workers.

128. E.g., United States v. Paradise, 480 U.S. 149 (1987); Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986); see also Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) (holding that a consent decree is a proper method of obtaining affirmative action under 703(g) of Title VII even though a party objects to its use). For a brief description of these cases, see Appendix, infra pp. 1128-32.
129. Johnson, 480 U.S. at 620-23.
130. Id.
131. Id. at 619-22.
132. Id. at 623-26.
at the time they were hired. Since the "feeder" positions\textsuperscript{133} called for no specialized skills, the Transportation Agency could look at the gender makeup of the general labor pool in deciding if a discrepancy sufficient to constitute a "manifest imbalance" existed.\textsuperscript{134} Johnson represented a significant development in the Court's affirmative action jurisprudence for two reasons. First, it extended Weber's approval of voluntary race-conscious plans in the private sector under Title VII to gender-conscious plans and to plans in the public sector as well.\textsuperscript{135} Second, Johnson altered without discussion Weber's formula authorizing such plans "to eliminate conspicuous racial imbalance in traditionally segregated job categories."\textsuperscript{136} The clear focus of Weber was the dismantling of years of both state-imposed and privately-enforced apartheid in education and the market place. The discrimination in Johnson, as Justice Scalia acerbically pointed out in his dissent, arose from very different social forces. The absence of women arguably was attributable in part to women's conception of what were appropriate jobs for women as much, if not more, than any policy of excluding female applicants.\textsuperscript{137}

That the decision in Johnson was specifically designed to promote equal achievement over equal access is readily revealed by the different approach taken by the majority opinion and Justice O'Connor's concurring opinion. Although Justice O'Connor voted to approve the Transportation Agency's use of the gender-conscious preference, she did so because refined labor pool statistics showed that five percent of the workers possessing the necessary skills for the road dispatcher's job were female.\textsuperscript{138} She labelled the complete absence of female employees among the Transportation Agency's skilled trades workers the "inexorable zero."\textsuperscript{139} Her vision demanded the termination of the gender-conscious preference when the percentage of female skilled trades workers reached five percent of the Transportation Agency's labor force in such jobs. Under the major-

\begin{itemize}
  \item \textsuperscript{133} See Daly, supra note 6, at 24 (discussing feeder positions).
  \item \textsuperscript{134} Johnson, 480 U.S. at 631-40.
  \item \textsuperscript{135} Of course, it did nothing to resolve the critical question alluded to earlier: whether race/gender-conscious plans compatible with Title VII nonetheless violated the equal protection clause. See supra notes 73-76 and accompanying text.
  \item \textsuperscript{136} See also Daly, supra note 6, at 26-27 (pointing out that the Court in Johnson reduced the quantum of proof required to establish the necessary factual predicate for implementing a voluntary race/gender conscious program to proof of a mere statistical imbalance in the work force).
  \item \textsuperscript{137} Johnson, 480 U.S. at 668.
  \item \textsuperscript{138} Id. at 656 (O'Connor, J., concurring).
  \item \textsuperscript{139} Id. at 657.
\end{itemize}
ity opinion, however, the plan terminates at a much higher figure, roughly fifty percent. Clearly, by selecting the general labor pool statistics, the majority favored equal achievement over equal access.

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In sum, both Weber and Johnson can be read as encouraging employers to adopt the equal achievement construct by looking to general labor force statistics rather than more refined ones. As a policy choice, this encouragement is quite sensible. Congress’ overarching goal, in the enactment of Title VII and in its 1972 amendments, was the integration of previously excluded groups, especially racial minorities, into the mainstream of the American economy. Reliance on refined labor pool statistics would have frustrated that goal. Refined labor pool statistics represent the combined effect of years of public and private discrimination. They are the product of overt and subtle forces which excluded minorities and women from skilled craft positions and professional employment. They are the product of substandard schools which inadequately prepared minorities for jobs, other than the most menial, and imposed stereotypical notions of “women’s work” on the female labor force.

c. Wygant

There is one pre-1988 Term decision, Wygant v. Jackson Board of Education,141 which appears to cut against the equal access/equal achievement analysis described above. Reflection, however, shows that this is not the case. The critical issue in Wygant was whether the Equal Protection Clause prohibited a public sector employer from voluntarily adopting a collectively bargained race-conscious layoff plan.142 The plan called for a scuttling of the traditional “last-hired, first-fired” rule in order to preserve very recent gains in minority employment.143 The gains themselves were the result of a voluntary affirmative action plan. But that plan ignored Hazelwood’s

140. The fact that, in Johnson, only five percent of the workers who possessed the necessary skills for the road dispatcher’s job were female is exemplary of the type of past discrimination which affirmative action programs were created to counteract. Instead of helping women and minorities achieve greater skilled labor employment equality, the O’Connor formulation, requiring the use of refined labor pool statistics, would actually help those employers “‘freeze’ the status quo of prior discriminatory employment practices.” Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).
142. Id. at 269-70.
143. Id. at 270-71.
admonition; instead of looking to the labor pool of qualified minority teachers, it looked to the percentage of minority students in the Jackson School District.

For the purpose of the analysis contained in Part I of this Article, Wygant advances the equal achievement construct by making it easier for public employers to adopt race-conscious preferences without violating the Fourteenth Amendment. The most important section of the Court’s opinion in Wygant dealt with its incorporation of Hazelwood into the Court’s affirmative action jurisprudence under the Equal Protection Clause. Simply put, Wygant stands for the proposition that before a public sector employer can implement an affirmative action plan, it must be able to show “a strong basis in evidence for its conclusion that remedial action was necessary.” That “strong basis in evidence” is controlled by Hazelwood and, thus, appears to be synonymous with Weber’s “prima facie” standard and Johnson’s “manifest imbalance” standard. Wygant advances the decision in Washington v. Davis, where the Supreme Court forcefully laid down the rule that an Equal Protection Clause violation had to be predicated on actual, purposeful intent. Wygant teaches that a public sector employer can rely on a mere statistical imbalance to demonstrate “a strong basis in evidence for its conclusion that remedial action was necessary.” Thus, consistent with the Fourteenth Amendment, a public sector employer can implement race/gender-conscious preferences based on evidence which standing alone would be insufficient to prove the underlying violation!

What undermined the constitutionality of the layoff plan

144. See supra notes 94-106 and accompanying text (explaining the Hazelwood principles used in establishing a prima facie case of systemic disparate treatment under Title VII).

145. Wygant, 476 U.S. at 274-75.

146. Technically speaking, only the four Justices in the plurality endorsed the “strong basis in evidence” standard. Justice White concurred in the judgment. In his view, the layoff procedure was tantamount to firing white employees in order to hire black employees, an act clearly violating the equal protection clause. Id. at 294-95 (White, J., concurring).

147. Justice Brennan attempted to distinguish the two standards in Johnson, 480 U.S. at 633-34 nn.10-11. His success is questionable. See Daly, supra note 6, at 34-36. The similarity between the two formulae is significant. In Johnson, 480 U.S. at 632, 635, the majority labelled the statistical disparity a “manifest imbalance.” Justice O’Connor labelled it “prima facie evidence of past discrimination.” Id. at 649-52 (O’Connor, J., concurring). Moreover, the Court employs both formulae in measuring the adequacy of the statistical discrepancy which is the cornerstone of the employer’s factual predicate.


149. Id. at 239-42, 246.

150. Wygant, 476 U.S. at 277 (plurality opinion); id. at 290 (O’Connor, J., concurring in part and in the judgment).
adopted by the Jackson School Board was the absence of statistics in the poorly constructed record showing any significant disparity between the percentage of minority teachers hired and the percentage available in the relevant labor pool.\textsuperscript{151} The Court could not have approved the minority-student population as a baseline without undermining \textit{Hazelwood}. Furthermore, approval of any baseline beyond that of the "qualified" labor pool would have resulted in an unprecedented backlash against race/gender-conscious plans.\textsuperscript{162}

Stated bluntly, as a political matter, the Court would have struck a frightful blow against the equal achievement construct had it not adhered to the equal access construct in \textit{Wygant} by insisting upon strict application of \textit{Hazelwood}'s rule of refined baseline statistics for jobs involving specialized skills.

2. Public Contracting With the Federal Government: \textit{Fullilove}

The Court's use of statistics as a tool for advancing the equal achievement construct is not confined to cases involving employment. In \textit{Fullilove v. Kluznick},\textsuperscript{163} the Court considered the constitutionality of a Congressionally mandated affirmative action plan specifically requiring race-conscious preferences in a narrow category of federal contracts. That case arose out of the Public Work's Employment Act of 1977 (PWEA) in which Congress appropriated four billion dollars for federal grants to state and local governments for the construction of local public works projects.\textsuperscript{164} The primary goal of the legislation was to stimulate the stagnant economy and the mordant construction industry by a one-time infusion of major funding.\textsuperscript{165} Section 103(f)(2) of the PWEA required that "at least ten percent of the amount of each grant shall be expended for minority business enter-

\textsuperscript{151.} Id. at 277-78.
\textsuperscript{152.} To begin with, education is always a sensitive issue. Questions involving the integration of pupils, teachers, administrators, and facilities have often triggered deep seated emotional and political rifts in communities. They are volatile topics. Moreover, lurking in the subtext of almost all debates over the merits of affirmative action plans is the charge that the beneficiaries of race/gender-conscious preferences are minimally qualified or unqualified. This charge would have surfaced with a vengeance and wrenched communities if the Court had chosen general statistics rather than refined ones.
\textsuperscript{153.} 448 U.S. 448 (1980).
\textsuperscript{154.} Pub. L. No. 95-28, tit. I, § 103, 91 Stat. 116 (1977) (codified at 42 U.S.C. § 6705(f)(2) (1982)). The PWEA defined "minority business enterprise" as "a business at least 50 per centum of which is owned by minority groups members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members." Id. To benefit from the set-aside an individual had to be a citizen \textit{and} be Negro, Spanish-speaking, Oriental, Indian, Eskimo or Aleut. \textit{Id.}
prises” (MBEs). The language adding the MBE requirement was inserted into the statute as a result of an amendment from the floor of the House. There was no legislative history to explain the need for the set-aside, the selection of the 10% figure, or the choice of the beneficiaries.

Six Justices voted to uphold the program. There was, however, no majority opinion. Even though they could not agree on a common set of legal principles, the six Justices uniformly preferred a statistical analysis which favored the equal achievement construct. For example, Chief Justice Burger’s opinion, in which Justices Powell and White joined, frequently cited Congressional and executive branch studies revealing the very low percentage of public contracts awarded to MBEs in comparison to the percentage of minorities in the nation’s population. Justice Powell commented similarly in a separate concurring opinion. By emphasizing the very small percentage of the total funds expended in the United States for construction projects that the 10% set-aside affected, he added a second dimension to the Court’s statistical analysis which also endorsed the equal achievement construct. Justices Marshall, Brennan, and Blackmun made a similar observation.

Displaying great deference to Congress, the six-Justice majority examined Congress’ choice of the ten percent figure uncritically. For example, the Court compared minority and non-minority business enterprises using general population figures; it never compared the 10% figure to the percentage of MBEs in the United States; it never discussed how the concentration of MBEs in certain areas of the country, and their absence in others, would effect the 10% requirement in each state. In short, the Court’s endorsement of the 10% figure promoted the equal achievement construct over that of equal access in precisely the same way as its endorsement of general population statistics in Weber and Johnson.

157. See Days, supra note 155.
158. Fullilove, 448 U.S. at 459, 463-67 (Burger, C.J.).
159. Id. at 503-06 (Powell, J.).
160. Id. at 514-15.
161. Id. at 521 (Marshall, J.).
C. The 1988 Term: The Rehnquist Court’s Transformation of the Hazelwood Formula from an Equal Achievement Construct into an Equal Access Construct

The looseness with which the Court applied Hazelwood’s formula for baseline comparisons ended abruptly with the 1988 Term. In two critical cases, City of Richmond v. J.A. Croson\textsuperscript{162} and Wards Cove Packing Co. v. Atonio,\textsuperscript{163} a majority of the Justices displayed a decided preference for a stricter application of Hazelwood. By making it far more difficult, if not impossible, for public employers and contracting officials to rely on general population statistics, the Court restricted the use of race-conscious plans almost as effectively as if it had banned them entirely. Precisely how the Court emasculated Weber, Johnson, and Fullilove without overruling them is described below.


The history which led up to the adoption of the challenged set-aside program in City of Richmond reflects the general pattern of race relations in many southern cities. The former capital of the Confederacy, Richmond, Virginia, greeted Brown v. Board of Education\textsuperscript{164} and its progeny with hostility and avoidance. It took many years and lengthy court battles before the Richmond government recognized that segregation in education, housing, and public recreation facilities was no longer tolerable. Until black voting strength threatened their control of the City’s government, Richmond’s white citizens lived, peaceably, if not contentedly, with integration. Race became a contentious issue in Richmond again when the city sought to annex adjacent white boroughs to assure a white voting majority. Ultimately, the Supreme Court rebuffed that attempt, and more blacks than whites were elected to the City Council.\textsuperscript{165}

Familiar with the discrimination in Richmond, the black-dominated City Council held several days of public hearings examining Richmond’s public contracting policies and procedures. What it discovered was hardly startling. Although blacks compromised fifty per-

\textsuperscript{162} 488 U.S. 469 (1989).
\textsuperscript{163} 109 S. Ct. 2115 (1989).
\textsuperscript{164} 347 U.S. 483 (1954).
\textsuperscript{165} City of Richmond v. United States, 422 U.S. 358 (1975). For the troubled history of Richmond’s efforts to comply with Brown v. Board of Education, see Bradley v. School Bd. of City of Richmond, Va., 462 F.2d 1058 (4th Cir. 1972), aff’d by an equally divided Court, 412 U.S. 92 (1973).
percent (50%) of the general population, black-owned business received only .67% of the City's public contracts. Furthermore, at the public hearings, there was testimony indicating how discrimination permeated both the nation's and Richmond's construction industry and how the local contractors' associations, in which members solicited for new business opportunities, were overwhelmingly white.  

Casting about for a solution to the history of exclusion, the City Council adopted an MBE program modeled after the federal set-aside program approved in Fullilove. The critical statistic which motivated the Richmond City Council to adopt the MBE program was not very different from that which motivated Congress. In the five years prior to the program's adoption, MBEs had won only .67% of the contracts awarded by Richmond. A federal study, of which Congress was aware, showed that MBEs received only .65% of the gross receipts realized by businesses nation-wide. 

The program's definition of an MBE and its selection of favored groups mirrored the federal statute. The only significant difference between the two plans was that Congress adopted a 10% figure, halfway between the percentage of minority contractors and the percentage of minorities in the general population; the Richmond City Council adopted a 30% figure, which was slightly more than halfway between the percentage of local minority contractors and the percentage of minorities in Richmond. 

The J.A. Croson Company, controlled by non-minority entrepreneurs, challenged the Richmond set-aside program after the City rejected its bid on a prison construction project because it had not complied with the set-aside requirement. Distinguishing Fullilove on several different grounds, the majority opinion in City of Richmond seized upon the statistical disparity which prompted the Richmond City Council to enact the MBE provision in the first place. Upon invoking the Hazelwood formula, the Court found the set-aside program fatally flawed because it rested on a comparison between the percentage of minorities in the general population (50%) and the percentage of contracts let to MBEs (.67%). Insisting that the appropriate comparison was between the percentage of local MBEs and the percentage of contracts let to them, the Court flatly rejected any attempt to rely on general population statistics.

166. City of Richmond, 488 U.S. at 477-81; id. at 533-36 (Marshall, J., dissenting).
169. Id. at 501-03.
Literally reading *Hazelwood*, the Court declined to follow the reasoning of *Weber*, *Johnson*, and *Fullilove* that encouraged the use of general population figures. *Johnson* and *Fullilove* had avoided a literal reading of *Hazelwood* by emphasizing that the jobs calling for specialized skills were at the upper rungs of a career ladder whose lower rungs required no special training. *Weber* looked to general population figures because of the obvious political, educational, and social barriers in the South which prevented blacks from entering the skilled trades. The reasoning of these three cases clearly protected the City of Richmond's selection of the 30% figure from constitutional invalidation. That the Court chose to ignore those cases in favor of a rigid reading of *Hazelwood* starkly reveals its hostility to the equal achievement construct and its preference for the equal access construct.

Two other portions of the Court's opinion also reflect that hostility. First, the majority went out of its way to question the premise upon which *Hazelwood* rested, namely that there will be a fairly direct relationship between the percentage of minorities in the general population and the percentage of minorities in each job category, trade, or profession. The majority found "'completely unrealistic' [the] assumption that minorities will choose a particular trade in lockstep proportion to their representation in the general population."170 This questioning of *Hazelwood* can only further erode reliance upon the equal achievement construct. Second, the Court commented extensively on the City's failure to consider alternate, race-neutral devices for encouraging participation of MBEs in public contracting.171 By requiring that the City experiment with devices such as modifying bonding requirements or offering special financial assistance to small businesses, the Court was expressing a classical view of the equal access concept, one which sees the role of government as removing barriers to competition, not rewriting the rules of the competition to give one competitor an advantage over the other.

2. *Wards Cove Packing Co. v. Atonio*

As discussed earlier, the Court originally crafted the *Hazelwood* formula in the context of a Title VII liability case.172 It later incorporated that formula into its affirmative action jurisprudence as a benchmark to measure the employer's factual predicate. Thus, the

170. *Id.* at 507.
171. *Id.* at 507-09.
172. *See supra* notes 94-97 and accompanying text.
Court in *Weber* and *Johnson* spoke of a “conspicuous racial imbalance” and in *Wygant* it spoke of a “strong basis in evidence.” The *Hazelwood* formula dictated the selection of the baseline measurement regardless of whether the plaintiff’s reverse discrimination claim alleged a violation of the Equal Protection Clause or Title VII.

In light of *Hazelwood*’s dual character, the Supreme Court’s decision in *Wards Cove Packing Co. v. Atonio* takes on a heightened significance. Although that case involved the salmon canning industry, whose employment demands are hardly typical of most American industries, the Court nevertheless used *Wards Cove Packing Co.* to alter markedly the character of Title VII litigation in various ways that will affect labor practices in almost all industries nation-wide. Two holdings are particularly important for the future of affirmative action: The first deals with the selection of the appropriate baseline to conduct a race/gender-conscious work force comparison; the second deals with a requirement of specific causation, linking the statistical disparity to specific employment practices.


The plaintiffs in *Wards Cove Packing Co.* challenged the hiring and promotion policies of two private sector employers who maintained salmon processing plants in remote areas of Alaska. Their work force consisted of two separate categories of employees: unskilled workers who held “canning jobs” on the cannery line and mostly skilled workers who held non-cannery jobs such as carpenters, cooks, bookkeepers, machinists, engineers, and medical personnel. Most of the unskilled workers were Filipinos hired through a longshoremen’s union and Native Americans who lived in remote villages near the canning plants. The skilled workers were mostly white and hired in the continental United States through word-of-mouth recruitment and nepotism.

The linchpin to the plaintiffs’ Title VII disparate impact case was the stark statistical disparity between the low percentage of minorities holding skilled non-cannery jobs and the high percentage of minorities holding unskilled cannery jobs. A five-Justice majority severed the linchpin, relying principally on *Hazelwood*. The majority

173. See supra note 114 and accompanying text.
175. Id. at 2119-20.
176. Id.
objected to the lump sum approach in which the two groups of jobs were compared. Pointing out that the non-cannery jobs included electricians, doctors, boat captains, and accountants, the majority viewed a comparison between the percentage of minorities filling such jobs and the percentage of minorities filling cannery jobs as “nonsensical.” The Court insisted that the proper comparison for a prima facie disparate impact was the percentage of qualified minority workers in the relevant labor market.

*Wards Cove Packing Co.*, in a hammerjack fashion, repeated the message of *City of Richmond* decided only a few months earlier: employers must read *Hazelwood* literally. The only appropriate comparison is between the racial composition of the employer’s work force and the racial composition of the local labor pool of qualified applicants.

Precisely how *Wards Cove Packing Co.* and *City of Richmond* will affect an employer’s decision to implement a race/gender-conscious hiring or promotion plan, either voluntarily or as part of a consent judgment, is best illustrated by reconsidering the statistical disparity in *Weber* and *Johnson*. In *Weber*, although the local labor force was 39% black, only 15% of the Kaiser work force was black. Furthermore, almost all the blacks were concentrated in low paying, unskilled jobs. The percentage of minorities holding skilled jobs in the Kaiser plant was 1.83%. Kaiser and the USWA designed the 50/50 training program not from any benign motive to assist the careers of unskilled workers, but to get more blacks into skilled jobs so that the “gross disparity” would diminish and Kaiser could retain its federal contracts. That disparity was predicated on general population figures. The percentage of qualified minorities in the local labor pool was approximately 4.3%. Had Kaiser looked to the latter figure, the “conspicuous racial imbalance” in its work force would have disappeared. In *Johnson*, there were no women among the 238 skilled trades workers employed by the Transportation Agency, although the local labor force pool was 36.4% female. While it is unclear whether those statistics alone would have assured the Transportation Agency’s Title VII liability, they would certainly have channeled the litigation in a different direction. Here the appli-
cation of *Wards Cove Packing Co.* would have inhibited, if not entirely immobilized, the employer's decision-making process.

The Court was quite explicit in *Wards Cove Packing Co.* as to the policy concern prompting its strict application of the *Hazelwood* formula. The Court reasoned that without such a limitation, an employer whose work force was racially skewed ran the risk of a Title VII lawsuit regardless of its responsibility for the disproportionate racial or gender makeup of its work force. The vissitudes associated with such a risk (*e.g.*, lengthy litigation, detailed discovery, redirection of the attention of executive management away from strictly business matters, substantial attorneys' fees, etc.) would undoubtedly lead many employers to adopt *sub silentio* a system of race/gender based quotas. The Court feared affirmative action plans would become a subterfuge to mask the distribution of employment benefits along racial/gender lines.

In articulating this concern, the Court implicitly acknowledged the hidden fear omnipresent in the equal access/equal achievement debate. In its purest form, equal achievement calls for the bestowal of "catch up" points for minorities and women still suffering from the legacy of Jim Crowism and sexism. As society progresses in eradicating racial and gender discrimination and stereotyping, the need for those "catch up" points will diminish. Many critics charge, however, that society will ultimately become less willing to tackle the herculean task of eradicating racism and sexism if minorities and women are guaranteed a "share of the pie" in the guise of "catch up" points. These critics insist that equal access is the only construct certain to avoid the pitfall of perpetual, forced distribution of economic benefits. The Government should remove barriers. It should not give a boost over them.

b. Specific Causation and Statistical Disparity

To date, most of the Court's affirmative action jurisprudence has focused either on the factual predicate which led to the plan's adoption or on the effect of the preferences on "innocent" non-minority employees. *Wards Cove Packing Co.* suggests that a third factor is about to enter the analysis: specific causation. There is an intimate, organic relationship between the principles invoked to test an employer's liability under Title VII and those invoked to test an employer's right to implement a race/gender-conscious program. The flip-side of *Hazelwood*'s liability rule of "evidence of longlasting and gross disparity between the [racial and ethnic] composition of a work
force and that of the general population" is Weber's "manifest imbalance" and Wygant's "strong basis in evidence." When the Court recasts the statistical formulae measuring disparities for liability purposes, those decisions necessarily impact upon its affirmative action jurisprudence.

Causation is also a "flip-side" concept. In cases challenging race/gender-conscious preferences, the Court has stopped short of demanding an explicit admission of discrimination by the employer or public contracting official. It reasoned that requiring such an admission would bring voluntary remedial reforms to a grinding halt because the admission would then become the basis for a lawsuit by minority employees and applicants. At the other end of the spectrum, the Court has cautioned the lower courts against accepting an admission of discrimination, fearful that it would be the product of political capitulation to minority pressure groups. Accordingly, the Court has attempted to strike a balance between the two extremes by imposing the requirement of a factual predicate.

The Court devoted a substantial part of its analysis of the "compelling interest" prong of the strict scrutiny test in City of Richmond to showing the absence of sufficient proof of the factual predicate. The Court's decision in Wards Cove, a Title VII liability case, reflects an identical concern. In Wards Cove, the Court held that the showing of a statistical disparity was only one part in the unfolding of the employee's burden of proof. It characterized a showing of causation as an "integral part" of the plaintiff's burden. The "plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack."

By emphasizing the causal link between the employer's employment practices and the statistical disparity, the Court has sent a clear signal of its disfavor of Title VII claims. By making it more difficult for Title VII plaintiffs to prove their case, the Court has channeled its jurisprudence away from the equal achievement construct. The message the Court is sending is that equal access, as

182. See supra notes 165-71 and accompanying text.
184. Id.
185. Similarly, by specifically making disparate impact cases more difficult, the Court has impeded the equal access construct insofar as it motivated the decision in Griggs v. Duke Power Co., 401 U.S. 424 (1971).
manifested by the disparate treatment theory of liability, is the only construct which merits the Court's endorsement. The emphasis on causation in *Wards Cove* manifests the same judicial philosophy as the emphasis on the factual predicate in *City of Richmond*.

Furthermore, to the extent the Court places a greater burden on plaintiffs in proving liability, it correspondingly diminishes the incentive for employers to consider the need for race/gender-conscious plans. Why should an employer bother to conduct the rigorous analysis called for in establishing a "manifest imbalance" or a "strong basis in evidence," run the risk of disgruntling its non-minority employees, and open itself to a reverse discrimination suit, if the likelihood of a Title VII suit by its minority employees is reduced significantly by the heavy burden placed on plaintiffs?

The degree to which the Court wanted to reduce the incentive, moreover, is apparent from the Court's final observations in *Wards Cove*. The Court placed a third hurdle in plaintiffs' paths by holding that even if they showed both statistical imbalance and causation, the employer could still avoid liability by "producing evidence of a business justification for his employment practice." The opinion, furthermore, made quite clear that all the employer had to do was *produce* such evidence; "[t]he burden of persuasion ... remains with the disparate-impact plaintiff." How the Court characterized the evidence of business justification is also revealing: "[T]here is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster. ..."

Given the "flip-side" relationship between Title VII liability principles and the principles governing an employer's decision to implement race/gender-conscious preferences, the Court's harsh approach to the causation issue in *Wards Cove* clearly signals an even greater reluctance to approve affirmative action plans containing such preferences. It is not difficult to envision the Court demanding proof of causation from employers in addition to the necessary statistical disparity. It is only a matter of time before non-minority employees will expand their challenges to race/gender-conscious plans to include issues relating to causation and business justification. The likelihood of such issues being raised constitutes a further disincentive to include race/gender-conscious preferences in the first place. Whether viewed directly as a liability case or indirectly as a "flip-

187. *Id.*
188. *Id.*
side” affirmative action case, *Wards Cove* sends a powerful message of disapproval of the equal achievement construct by the Rehnquist Court.

III. THE HIDDEN SIGNIFICANCE OF THE STANDARD OF REVIEW IN THE EQUAL ACCESS/EQUAL ACHIEVEMENT DEBATE

Over the past fifty years, the Court has articulated three standards of review in deciding Equal Protection Clause challenges to government action. The Court uses the rational basis test in reviewing claims of an economic, social, or welfare character. This test is the most deferential to government and requires only that the state demonstrate a legitimate end and that the means be rationally related to that end. Its application rarely invalidates the government’s challenged action. The Court subjects classifications involving gender, alienage, or illegitimacy to the intermediate test. More demanding than the rational basis test it requires an important governmental objective and substantially related means. The outcome of its application is uncertain in part because of the elasticity and open-ended nature of its formulation. Harshest of all the standards is the strict scrutiny test, which calls for a compelling interest and narrowly tailored means. Labelled “‘strict’ in theory and fatal in fact” by Professor Gunther, because it is nearly impossible to satisfy, the Court’s decision to apply the strict scrutiny test signals a certain constitutional death knell. It is the test traditionally invoked to review legislation hostile to racial minorities. The only legislation to survive this test in the last half century involved the Japanese internment statutes, legislation almost surely unconstitutional under cur-

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189. See United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); see also Bankers Life Casualty Co. v. Crenshaw, 486 U.S. 71 (1988) (upholding Mississippi penalty statute which required money judgments from unsuccessful appellants where statute was reasonably tailored to achieve the state’s legitimate objection of deterring frivolous appeals); Bowen v. Owens, 476 U.S. 340 (1986) (upholding certain provisions of the Social Security Act which treated surviving divorced spouses and widowed spouses differently for benefit purposes where it was rational for Congress to make the distinctions based upon levels of dependency); Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) (applying the rational relationship test to state actions and policies affecting the mentally retarded).


While it has long been true that government action which burdened minorities was subject to the strict scrutiny test, until the Court’s decision in *City of Richmond v. J.A. Croson Co.* in the 1988 Term, it was an open question whether that standard applied to government action benefitting minorities ("benign discrimination"). *City of Richmond* resolved the issue in favor of the strict scrutiny test. Its selection, just like the Court’s insistence on the rigid reading of *Hazelwood*, represents a clear preference by a majority of the Justices for the limited construct of equal access. *City of Richmond* represents a rejection of the Court’s previous equal achievement approach articulated in *Regents of the University of California v. Bakke* and *Fullilove v. Klutznick*.

The Court’s initial consideration of which standard of review to apply took place in *Bakke*. The resulting decision — characterized by block voting, multiple lengthy opinions, and a “swing” vote — presaged most of the Court’s subsequent affirmative action decisions. *Bakke* arose out of the California Board of Regents’ decision to set aside sixteen out of 100 seats exclusively for minority applicants for admission to the medical school at Davis. A special admissions committee admitted several minority applicants whose college grade point averages and medical school boards were lower than those of Mr. Bakke, a white male.

Four Justices, the so-called “Stevens” group, voted to strike down the Davis plan on statutory grounds, concluding it violated Title VII of the Civil Rights Act of 1964. These Justices never reached the constitutional issue. The four Justices in the “Brennan” group concluded the Davis set-aside was not prohibited by Title VII. Accordingly, they reached Bakke’s equal protection claim.

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194. *See supra* notes 94-97 and accompanying text.
196. 448 U.S. 448 (1980).
198. *Id.* at 408-420 (Stevens, J., concurring in the judgment in part and dissenting in part). Section 601 of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 252 (1964) (codified at 42 U.S.C. § 2000d (1982)) provides that, “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”
199. *Bakke*, 438 U.S. at 324-56 (Brennan, J., concurring in the judgment in part and dissenting in part).
They rejected it, finding no constitutional flaw in the program. In their view, a state’s decision to benefit a racial minority and impose a corresponding disability on the white majority was substantially different from a decision by a white majority to disadvantage the minority. Because the decision’s character favored rather than disabled the minority, they rejected the strict scrutiny test.  

The Brennan group’s rejection of the strict scrutiny test did not, however, lead it to embrace the rational basis test. Suspicious of any use of race as a determinant by the state, it favored application of the intermediate test: the state would have to show that the conferring of the benefit served an important governmental objective and that the means (i.e., the racial classification) was substantially related to this objective. Given this standard, the Justices in the Brennan group had little difficulty accepting the Davis set-aside. In their judgment, Davis’ justification for the set-aside was more than adequate. Davis’ justification rested exclusively on the equal achievement construct. Minority applicants needed catch-up points in the race for economic security and social status represented by participation in the medical profession. The equal achievement construct justified the set-aside as necessary to compensate for past societal discrimination, to assist minorities in entering the medical profession which had for so long excluded them, to create a cadre of minority physicians who would bring their skills to minority communities, and to foster a racially diverse student body.

Ultimately, the Davis program floundered because the Brennan group could not gain a fifth vote. Justice Powell declined to join either the Brennan or Stevens group because he disagreed with their reasoning. In particular, he rejected the Brennan group’s advocacy of the intermediate test. Assailing any government decision based on race — whether hostile or benign — as pernicious, he invoked the strict scrutiny test. Of the various equal achievement rationales advanced by Davis to justify the program, he accepted only one, the need for diversity in the student body, as sufficiently compelling to pass constitutional muster. Nevertheless, the Davis program did not survive. In his view, the exclusive setting aside of the sixteen seats was not sufficiently narrowly tailored to satisfy the second

200. Id. at 359-62 (Brennan, J., concurring in the judgment in part and dissenting in part).
201. Id. at 362.
202. Id. at 289-91 (Powell, J.).
203. Id. at 311-15.
prong of the strict scrutiny test.\textsuperscript{204}

Although Justice Powell was not willing to go so far as the Justices in the Brennan group, the equal achievement construct still emerged the victor in \textit{Bakke}. Government could give catch-up credit, "pluses," to minorities to assist them in competing for government benefits. The Equal Protection Clause did not require government to judge the qualifications of minority applicants with precisely the same criteria used for non-minorities.

The Court's subsequent decision in \textit{Fullilove v. Klutznick} reaffirmed this victory. As discussed earlier, \textit{Fullilove} involved a Congressionally enacted, ten percent set-aside for MBEs.\textsuperscript{205} While five Justices in \textit{Bakke} approved the use of race as a "plus," six Justices in \textit{Fullilove} approved an almost absolute ten percent set-aside based on race. The equal achievement construct had clearly triumphed over the equal access construct.

That victory was short lived, however. It ended with the Court's decision in \textit{City of Richmond}. The impact of that case, moreover, reaches well beyond the mere designation of the strict scrutiny test. Even more important is how rigorously the Court interpreted the "purpose" and the "means" prong of the test, bearing testimony to Professor Gunther's characterization, "'strict' in theory and fatal in fact."\textsuperscript{206} Its interpretation marks a clear turning away from the equal achievement construct toward the equal access construct.

\textbf{A. The Purpose Prong — Whose Purpose?}

One of the sub-issues buried in \textit{Bakke} was the constitutional competence of the Board of Regents to adopt the race-conscious admissions program. The Justices in the Brennan group had little difficulty with the sub-issue because they saw the setting aside of the sixteen seats as an educational decision.\textsuperscript{207} Justice Powell found it more troublesome, characterizing the Board of Regents' "broad mission [as] education, not the formulation of any legislative policy or the adjudication of particular claims of illegality."\textsuperscript{208}

In \textit{Fullilove}, Congress enacted the MBE program relying on a

\textsuperscript{204} \textit{Id.} at 315-20.

\textsuperscript{205} See \textit{supra} notes 153-61 and accompanying text.

\textsuperscript{206} Gunther, \textit{supra} note 191, at 8.

\textsuperscript{207} \textit{Bakke}, 438 U.S. at 362-69 (Brennan, J., concurring in the judgment in part and dissenting in part).

\textsuperscript{208} \textit{Id.} at 309 (Powell, J.).
panapoly of enumerated powers: the Commerce Clause, the Taxing and Spending Clause, and Section 5 of the Fourteenth Amendment. Regardless of their division on other matters, the six Justices who voted in favor of the constitutionality of the MBE program uniformly agreed that their decision was heavily influenced by the identity of the legislating body. Given the broad mission of Congress to correct malfunctioning of the social order on a nationwide basis, these six Justices found no constitutional impairment, in the absence of specific attribution of fault by Congress to the federal government, for the dismal participation of MBEs in public works contracting. In an extraordinary display of deference to Congress, the Court relied on a plethora of government studies clearly documenting the exclusion of minorities from the federal contracting system. Missing from those studies was any attribution of government responsibility for the exclusion. Nonetheless, the Court gave its constitutional blessing to Congress' purpose of eradicating discrimination.

Subsequent to Fullilove, many states and municipalities adopted set-aside programs modeled after the federal one. For the most part, the lower courts brushed aside objections to these programs based on the non-federal character of the enacting legislature.

City of Richmond effectively overturned these post-Fullilove lower court decisions. The reasons which led the Court to treat municipal and state MBE programs differently from the Congressional set-aside are fairly clear. Justice O'Connor's opinion drew a sharp
distinction between the powers of Congress to remedy discrimination under Section 5 of the Fourteenth Amendment and the constitutional ability of the states to remedy discrimination.217 Literally interpreting the history of the Fourteenth Amendment, she insisted that the drafters were suspicious of all state decision-making based on race. Her opinion refused to accord states and municipalities the deference given Congress in Fullilove.

In selecting the strict scrutiny standard of review and applying it so rigorously to municipal legislation, the Court has sent an unmistakable signal that race-conscious preferences are rarely acceptable except as Congressionally mandated. In the grand debate between Professors Bickel and Ely,218 Professor Bickel’s views have obviously prevailed. It is unfortunate, however, that the debate’s resolution occurred in a factual setting in which the richness of Ely’s position could not be fully appreciated. Ely justified a less than strict standard of review on the white majority’s imposition of a burden on

O’Connor’s opinion which analyzed the authority of the states to adopt race-conscious legislation. Justice Scalia’s opinion concurring in the judgment endorses Part II’s reasoning. City of Richmond, 488 U.S. at 520-23 (Scalia, J., concurring in the judgment). Thus, at least four solid votes exist to support Justice O’Connor’s rationale for treating state and municipal MBE programs more harshly than the federal program in Fullilove. While Justice Kennedy expressly found Part II “both precise and fair,” he refused to join it because “[t]he Fourteenth Amendment ought not to be interpreted to reduce a State’s authority . . . .” Id. at 518 (Kennedy, J., concurring in part and concurring in the judgment). The actual significance of his refusal is de minimus, however. He vigorously supported the use of the strict scrutiny test because it “will operate in a manner generally consistent with the imperative of race neutrality, because it forbids the use even of narrowly drawn racial classifications except as a last resort.” Id.


Recently, the Supreme Court decided Metro Broadcasting, Inc. v. FCC, 58 U.S.L.W. 5053 (U.S. June 27, 1990). In that case, the Court rejected an equal protection challenge to two minority preference programs adopted by the FCC. Relying on Fullilove, a five Justice majority found the race-conscious programs constitutional because they “have been specifically approved—indeed, mandated by Congress.” Id. at 5057. The most startling aspect of the Court’s decision is its endorsement of the intermediate test in reviewing race-conscious programs adopted by Congress. Id. Barely a year before in City of Richmond a majority of the Justices had adopted the strict scrutiny test in reviewing a municipal MBE program. Nothing in City of Richmond suggested that the Court’s adoption of the strict scrutiny test was not an across-the-board determination applicable to all race-conscious programs regardless of the state or federal character of the implementing organ of government. Coalescing majority support for applying the intermediate test to congressionally approved programs must have brought great personal satisfaction to Justice Brennan. Commencing with Bakke, the very first affirmative action case to the reach the Court, Justice Brennan had consistently argued that a less vigorous standard of review ought to be applied to government action intended to benefit minorities, not disadvantage them. Metro Broadcasting is the last opinion he wrote prior to his resignation.

218. See supra notes 25-27 and accompanying text.
The set-aside plan in the City of Richmond case, however, was enacted by a city council, the majority of whose members were not white. Thus, on one level, the set-aside can be read as a preference favoring the racial majority (blacks) and disfavoring the racial minority (whites). Justice O'Connor obviously read the plan this way. She attempted to hoist proponents of Ely's views on their champion's own petard by quoting Ely: "Of course it works both ways: a law that favors Blacks over Whites would be suspect if it were enacted by a predominantly Black legislature."220

O'Connor's reading is obviously one dimensional and is fatally flawed by its disregard of the nation's history of racism.221 Blacks in Richmond suffered over two hundred and twenty-five years of slavery. Whites completely dominated the City's superstructure from after the Civil War until the middle of the 1980s. They controlled housing, education, and economic opportunity. It is the height of absurdity to label the decision of the first black Richmond City Council "suspect" when it merely adapted a Congressionally created, Court-approved scheme to lessen the vestiges of pervasive discrimination. Had the City of Richmond Court been as concerned with racial justice as it purported to be with the constitutional guarantee of equal protection, it would not have applied the strict scrutiny test to begin with. Had it been seeking only to constitutionally enshrine Ely's view it would have limited strict scrutiny review to legislation enacted to benefit majority group members or burden non-majority group members. It would have reserved for another day the very distinct issue of which standard of review to apply when a majority group voluntarily disadvantages itself to benefit an historically ill-treated and abused minority. This resolution, which would have resulted in the invalidation of the Richmond set-aside would have been consistent with Ely's views. Instead, the Court chose to render a "political" decision, jeopardizing tens of thousands of affirmative action plans nationwide.

The factual setting of City of Richmond, moreover, was an anomaly. Blacks have gained political control over very few municipal and city governments. Furthermore, there is no "minority" ma-

219. See supra note 27 and accompanying text.
221. For a moving personal criticism of the majority opinion's refusal to contextualize the racism leading to the adoption of the Richmond program, see Williams, The Obliging Shell: An Informal Essay on Formal Equal Opportunity, 87 Mich. L. Rev. 2128 (1989).
The overwhelming majority of set-aside programs are adopted by legislatures with "non-minority" majorities that have recognized the importance of minority entrepreneurial success to economic, political, and social integration. In other words, the democratic process has freely accepted the equal achievement construct over the equal access construct. In interfering with the democratic process the Court emulates its predecessor that decided *Lochner v. New York*. It hides its political preferences behind the rhetoric of equal protection, just as the *Lochner* Court hid its *laissez-faire* theory of the market place behind the rhetoric of liberty of contract.

B. The Purpose Prong — What Purpose?

*City of Richmond* is important in another respect as well. Unlike the standard-of-review holding just discussed, however, this part of the Court's opinion is befuddled by poorly selected language and hazy conceptualization. As noted earlier, *Bakke* stands for the general proposition that preferences based on race are constitutionally tolerable if used to promote ethnic diversity in a student body. *Fullilove* stands for the proposition that Congress can employ race-conscious preferences to eradicate pervasive discrimination in public contracting. In contrast, *Wygant v. Jackson Board of Education* stands for the proposition that the state may not act to remedy societal discrimination. The Court criticized such action for having "no logical stopping point" and for being "too amorphous," "insufficient," and "overexpansive." Without altering any of these propositions, *City of Richmond* injects a hybrid concept — identified discrimination. The concept of

222. 198 U.S. 45 (1905).
223. See supra note 203 and accompanying text.
225. Id. at 275-76 (Powell, J., plurality opinion). There was no majority opinion in *Wygant*. The quoted language is found in Justice Powell's plurality opinion in which Chief Justice Burger and Justice Rehnquist joined. Justice White concurred only in the judgment. He viewed the school board's layoff provisions which retained newly hired minority teachers at the expense of more senior white employees as the equivalent of firing whites to hire blacks, clearly an equal protection clause violation. *Id.* at 294-95 (White, J., concurring in the judgment). A very definite shift has occurred in Justice White's affirmative action views in the eleven years since he joined the Brennan group in *Bakke* which approved of government action to remedy societal discrimination. *See Bakke*, 438 U.S. at 362-73 (Brennan, J.); *Daly*, supra note 6, at 58-61. The proposition that government is powerless to remedy societal discrimination most likely commands Justice White's vote as well, creating a five-Justice majority for this proposition.
identified discrimination suggests the existence of a spectrum of acts which have impeded the access of minorities to jobs and education. At one end lies societal discrimination which government is powerless to remedy because of its amorphous character. At the other lies government-imposed discrimination which the state is obligated to remedy. Past the middle mark on the government-imposed side is identified discrimination. It consists of government activities which perpetuate private acts of discrimination and is, therefore, more specific in character than societal discrimination. Thus, Justice O'Connor writes:

[If the city could show that it had essentially become a “passive participant” in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from tax contributions of all citizens, do not serve to finance the evil of private prejudice.]

On first view, identified discrimination appears to reflect the equal achievement construct. The government is constitutionally free to prefer contractors of one race over those of another race to make up for the years the disadvantaged group was excluded from the economic opportunity represented by public contracts. The government need not confine its efforts simply to removing barriers. Although the concept of identified discrimination in theory reflects the equal achievement construct, examination of the remainder of the opinion in City of Richmond proves identified discrimination an unworkable concept, masking the Court's preference for the equal access construct.

226. City of Richmond, 488 U.S. at 492.

227. The origin of the term “identified discrimination” is obscure. Justice Powell used it twice without elaboration first in Bakke and later in Fullilove. Bakke, 438 U.S. at 307 (Powell, J.); Fullilove, 448 U.S. at 497, 503-06 (Powell, J., concurring). Its elusive quality is well illustrated by one prominent district court case. In South Fla. Chapter of Associated Gen. Contractors, Inc. v. Metropolitan Dade County, 552 F. Supp. 909 (S.D. Fla. 1982), aff'd in part and rev'd in part, 723 F.2d 846 (11th Cir.), cert. denied, 469 U.S. 871 (1984), the district court found that although “societal discrimination” might be responsible for the low percentage of black contracting, “identified discrimination” also caused their exclusion from public contracting. Id. at 925-26. The district court nowhere defined the term, and it is difficult to see how the “identified discrimination” is any different from the societal discrimination.

The City of Richmond pressed the concept of identified discrimination in its brief to the Supreme Court. A student commentator has also argued its relevancy. Note, The Nonperpetuation of Discrimination in Public Contracting: A Justification for State and Local Minority
While the introduction of such an undefined concept would be disturbing in and of itself, the actual character and extent of the proof offered in City of Richmond renders its introduction even more problematic. In enacting the federal MBE program, Congress was acutely conscious of the racial apartheid characterizing the construction industry. In Weber, the Court itself commented upon the virtual exclusion of minority workers from skilled trades unions. Indeed, the Court approved of "judicial notice" of the systemic discrimination.\(^2\) Excluded from construction jobs through direct employment because of contractors' prejudices, denied entry into the craft trades by biased unions, and offered minimal vocational training in substandard public schools, minorities were highly unlikely to end up as entrepreneurs in the construction industry. Despite the abundance of Congressional studies, private reports, and judicial opinions attesting to the dismal record of minority access to the skills predicate to entrepreneurial endeavors, the majority opinion in City of Richmond found no record of discrimination sufficiently "identified" to satisfy the purpose prong of the strict scrutiny test.\(^2\) In light of the data reflected in the record and the information abundantly available in a form appropriate for judicial notice, identified discrimination becomes an elusive—if not a meaningless—concept.

For two reasons, the exhortation for identified discrimination places an almost insurmountable hurdle in a plaintiff's path. First, the absence of a definition to give the term substantive content means endless rounds of litigation in the district courts and the courts of appeals. Second, it portends the introduction of still another bevy of experts, testifying in barely comprehensible professional jargon. Trial transcripts in employment discrimination cases are already replete with the testimony of statistical experts opining on multiple regression analysis, the chi square test, and binomial distribution.\(^3\) To initiate or defend the standard disparate-impact class

\(^{Business Set-Asides After Wygant, 101 HARV. L. REV. 1797, 1804-08 (1988); see also Note, supra note 215, at 604 n.103 (1986) (discussing the Court's treatment of the concept of societal discrimination).}

The City invoked the concept to avoid triggering the "vague" and "amorphous" fears which led to Wygant's condemnation of remediation of societal discrimination as an acceptable predicate for affirmative action. Its strategy rested on showing that identified discrimination was more like state-sponsored discrimination than societal discrimination because its origins, structure, and effects were descriptive and quantifiable.

\(^2\) City of Richmond, 488 U.S. at 506.
\(^2\) See supra note 79.
action, attorneys frequently must familiarize themselves with the ponderous language and dense concepts of psychometricians. More than one court has lamented that employment discrimination cases now consist of one side’s expert testifying in terms so obtuse that only the other side’s expert can understand them! To this war of experts, City of Richmond interjects still a new vocabulary: that of the industrial sociologist. Part-historian, part-economist, part-statistician, this expert is trained to analyze racial and gender composition of a given industry’s work force and attribute whatever stratification exists to specific employment practices, procedures, structures, patterns, or industry culture. In view of the doctrinal deformities, evidentiary perplexities, and practical weaknesses associated with “identified discrimination,” it is difficult to fathom the reason why the Court bestowed its constitutional blessing on the concept.

C. The Means Prong — Race/Gender-Conscious Preferences as the Last Resort

Fashioning a constitutionally valid MBE program after City of Richmond will not be easy. It is most unlikely that any race-conscious set-aside can be constitutionally valid without a detailed record of failed, ambitious, alternative remedies. The approach which


232. The affirmative action jurisprudence of Justice O’Connor suggests an explanation. While clearly not a moderate or centrist in the same vein as Justice Powell, Justice O’Connor has not been an unwavering opponent of affirmative action. She is sympathetic to the goal of bringing women and minorities into the mainstream of the American economy and accelerating their access to jobs and promotions from which they were formerly excluded. At the same time, she is sensitive to the impact of racial preferences on innocent employees who share no responsibility for the discrimination. In light of this tension, it is not surprising that in City of Richmond she sought to carve out a middle road of sorts. This is entirely consistent with her prior decisions in this area. In Wygant, for example, she very pointedly noted the possibility of other compelling purposes which might satisfy the strict scrutiny test, such as assuring a diverse faculty in educational institutions. Her discomfort level with rigid formulations at the expense of broader understanding is also well illustrated by her concurring opinion in Wygant. It strove mightily to reconcile the diverse views of the splintered Court by identifying overarching principles accepted by proponents of both the strict scrutiny and intermediate standards. See Daly, supra note 6, at 72-78.

Undoubtedly prompted by a motive, similar to that of reconciliation, of looking to shared concerns rather than divided interests in the Court’s opinions, Justice O’Connor envisioned identified discrimination as a bridge between irremedial societal discrimination and remedial state-sponsored discrimination.

233. City of Richmond, 488 U.S. at 506-08; id. at 525-28 (Scalia, J., concurring in the judgment). In insisting upon evidence of failed, alternative remedies, Justice O’Connor was
holds the greatest promise involves the restructuring of government assistance programs in a racially neutral way, whereby the beneficiaries of government set-asides are businesses run by individuals defined by economic or cultural disadvantage rather than by race (DBEs). While a substantial portion of the DBEs will be MBEs, such a set-aside will not trigger strict scrutiny review. This too is an equal achievement construct, but one that adds more runners to the race. The establishment of DBE programs is the solution clearly most favored by a majority of the Court.\textsuperscript{234}

\textsuperscript{234} City of Richmond, 488 U.S. 508-10 (majority opinion); id. at 525-28 (Scalia, J., concurring in the judgment). Prior to City of Richmond, Congress had enacted several statutes containing DBE provisions. For example, the Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097 (1983), directs that not less than ten percent of the sum appropriated "shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals . . . ." Id. § 105(c), 96 Stat. 2097, 21001. The statute defines "socially and economically disadvantaged individuals" by reference to the definition of that term in section 8(d) of the Small Business Act. 15 U.S.C. § 637(d). That statute, in turn, provides that "socially and economically disadvantaged individuals" are presumed to include (but are not limited to): "Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, and other minorities . . . ." 15 U.S.C. § 637(d)(3)(c) (1988).

The Department of Transportation has issued regulations containing a "rebuttable presumption" that Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans and Asian-Indian Americans are "socially and economically disadvantaged." 49 C.F.R. § 23.62 (1989). In contrast, non-minority group members must be specifically designated socially and economically disadvantaged by the Small Business Administration in order to qualify for the set-aside. 15 U.S.C. § 637(d)(3)(c).

From the Court's perspective, DBE legislation (provided it is administered even-handedly) is the perfect solution because it eliminates the problems attendant with the strict scrutiny standard of review. With the racial preference removed, state and local set-asides for disadvantaged individuals fall into the category of economic and social welfare legislation. As noted earlier, such legislation is subject only to the rational relationship/legitimate end test.  

In conclusion, the Supreme Court's adoption of the strict scrutiny test can mean only one thing for ninety-nine percent of race-conscious preferences: their end. City of Richmond puts the purpose and means of such preferences under microscopic judicial review. Given the historical functioning of strict scrutiny analysis, it is naively optimistic to conclude that the Court's decision merely calls for "affirmative action programs [to] be carefully designed - not dismantled." Professor Rosenfeld is much closer to the mark when he describes City of Richmond as striking "a major blow against long-standing, concerted efforts to narrow the economic gap between black and white entrepreneurs."  

From a doctrinal standpoint, the selection of the strict scrutiny test reflects an important lesson often only fully understood by Court aficionados: How the Court can rechannel an entire course of jurisprudence without overruling precedent. Simply by deciding an issue left open in prior cases, the Court in City of Richmond tightly tied the hands of state and local governments trying to rectify the years of pervasive public and private prejudices. Furthermore, by its selection of the strict scrutiny test for equal protection review it has cabined the power of state and local government employers under Title VII. From now on, whenever such governments adopt race-conscious preferences, their implementation must serve a "compelling purpose" and their structure must rest on narrowly tailored means.

235. See supra note 189 and accompanying text.
IV. THE REHNQUIST COURT'S ENCOURAGEMENT OF CHALLENGES TO AFFIRMATIVE ACTION PLANS BY NON-MINORITY EMPLOYEES AS A MANIFESTATION OF ITS PREFERENCE FOR THE EQUAL ACCESS CONSTRUCT

The third case decided in the 1988 Term that manifests the Rehnquist Court's preference for the equal access construct is *Martin v. Wilks.* In that case, the Court made it easier for non-minority employees to challenge judgments or voluntary settlements incorporating race/gender-conscious preferences. The decision's effect is certain to add to the list of imponderables which employers and the courts must weigh before adopting affirmative action plans. By encouraging non-minority employees to bring such suits, *Martin* correspondingly discourages decision-makers from using such preferences. Equal access thus becomes the safer course of action; equal achievement becomes the riskier.

Prior to *Martin*, most courts of appeals had adopted the doctrine of "impermissible collateral attack." Under that doctrine, if a judgment had the practical effect of disturbing a non-party's legal status or property interests, the non-party could challenge the judgment in a *separate* lawsuit only on *limited* grounds. The courts of appeals had almost uniformly applied the doctrine to dismiss separate, post-judgment lawsuits brought by non-minority employees. In the courts' view, the judgments affected only the non-minority employees' expectations of employment or advancement, not their legal rights.

Additionally, many courts were disturbed by the "sit-on-your-hands" attitude taken by the non-minorities or groups representing their interests. Though such groups were often fully aware of the underlying litigation and the possibility of race/gender-conscious preferences, they deliberately elected not to intervene in the lawsuit, and waited for the litigation to conclude before making their objections formally known. For example, in *Martin*, the underlying litigation was commenced in 1974 by black firefighters against the City of

240. Although it is not entirely free from doubt, it appears that the courts applied less restrictive rules to non-minority employees challenging voluntary plans. See supra note 75 and accompanying text.
Birmingham, Alabama, alleging violations of Title VII in various hiring and promotion practices. After a bench trial, but before judgment, the parties entered into consent decrees which adopted race-conscious preferences in promotions. The district court held a fairness hearing at which the Birmingham Firefighters Association appeared as amicus curiae and filed objections to the plan. The district court rejected its objections and approved the decrees. Subsequently, a group of white firefighters commenced a separate action, alleging that the promotion preferences called for in the consent decree violated Title VII and the Equal Protection Clause. The district court denied that motion, conducted a hearing and ultimately dismissed the white firefighters' complaint. On appeal, the Court of Appeals for the Eleventh Circuit reversed the district court's dismissal of the complaint and ordered a new hearing. The court rejected the doctrine of impermissible collateral attack.

A majority of the Justices in Martin agreed with the Eleventh Circuit. In an opinion by Chief Justice Rehnquist, the Court concluded that the doctrine was inconsistent with Rules 19 and 24 of the Federal Rules of Civil Procedure. Starting from the well-established premise that "[u]nless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights," the majority concluded that the non-minority employees, who had never been formally joined as parties in the underlying Title VII litigation, were free to attack its validity in a separate action. The Court supported this conclusion by reference to the mechanisms established in Rule 19(a) for mandatory joinder, in Rule 19(b) for permissive joinder, and in Rule 24(a) for permissive intervention.

242. Id.
243. Id. at 2185 (quoting Chase Nat'l Bank v. City of Norwalk, 291 U.S. 431, 441 (1934)).
244. Id. at 2185-88.
245. Rule 19 provides in pertinent part:
(A) PERSONS TO BE JOINED IF FEASIBLE. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the
Linking the holding in *Martin* to the equal access construct is not difficult. To begin with, Chief Justice Rehnquist wrote the majority opinion in *Martin*. His rejection of the equal achievement construct has been unwavering. He has championed the equal access principle in each of the nine cases, from *Weber* through *Johnson*, never departing from his original view that a race/gender-conscious preference is "a creator of castes, a two-edged sword that must demean one in order to prefer another." Given this perspective, the Chief Justice's authorship of the majority opinion in *Martin* takes on heightened significance. Making it easier for disgruntled employees to challenge race/gender-conscious preferences will inhibit their

person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

(b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (A)(1)-(2) thereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

FED. R. CIV. P. 19. Rule 24 provides in pertinent part:

(A) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question or law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

FED. R. CIV. P. 24.

246. See supra notes 36-41 and accompanying text.

adoption. Employers, weary of years of litigating employment discrimination cases, worn out by document requests, interrogatories and depositions, and exhausted by experts' esoteric analyses, will have far less incentive to adopt race/gender-conscious preferences, fearful of a second full round of litigation.

That the Rehnquist Court used Martin to further its rejection of the equal achievement construct in the 1988 Term is borne out by Independent Federation of Flight Attendants v. Zipes,248 decided ten days after Martin. Zipes raised the issue of whether a plaintiff in a Title VII action could recover attorney's fees from an intervenor who had not violated the statute. Justice Scalia wrote the majority opinion in which the Chief Justice joined. Zipes held that attorney fee awards were permissible only if the intervenor's action was frivolous, unreasonable, or without foundation.249 That is the standard earlier applied by the Court to fee requests by prevailing defendants!250 The Zipes holding clearly sends a signal encouraging non-minority employees to intervene in order to challenge race/gender-conscious preferences. Justice Scalia's opinion bluntly stated "[a]n 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.'"251 Zipes gives non-minority employees an incentive to challenge race/gender-conscious preferences by guaranteeing that if they are unsuccessful their only monetary loss will be out-of-pocket legal expenses.252 The knowledge that non-minority employees have only limited losses to bear most certainly will influence employers in deciding whether to sign a consent order containing such relief. It is also likely to discourage judges from ordering such preferences for fear of prolonging and complicating the underlying litigation. Martin delivered the second half of the right-left cross by permitting non-minority employees to challenge an affirmative action plan in independent actions should they choose not to intervene, despite the Zipes protection.

249. Id. at 2735-39.
252. See, e.g., Davis v. City of San Francisco, 890 F.2d 1438, 1438-52 (9th Cir. 1989), cert. denied, 111 S. Ct. 248 (1990) (denying successful minority plaintiffs' requests for attorney's fees on appeal against union which intervened on behalf of incumbent non-minority employees in Title VII suit).
Furthermore, in both consent and judicially-imposed judgments, litigation over race/gender-conscious preferences may delay implementing the remainder of the relief, such as back pay or the establishment of training programs, to the injury of minority employees and applicants. *Martin* and *Zipes* thus discourage plaintiffs' counsel from seeking such preferences.

Finally, *Martin* and *Zipes* signal that the Court is likely to become more aggressive in scrutinizing the effect of race/gender-conscious plans on non-minority employees. It makes no sense for the Court to create a procedural mechanism for challenging race/gender-conscious preferences, if it does not intend to encourage non-minority employees to use them. Furthermore, while the Court has never found an employment plan unreasonably burdensome, with the exception of the one in *Wygant*, it has always expressed solicitude for non-minority employees. It would be entirely consistent with the Rehnquist Court's jurisprudential approach to resolving affirmative action issues to strike down such plans because of their burdensome character. It would permit the Court to eviscerate such plans without actually reversing case law.

V. CONGRESS SHOULD EXERCISE ITS POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT TO MAKE EQUAL ACHIEVEMENT THE PREFERRED CONSTRUCT OF THE NATION’S ANTI-DISCRIMINATION POLICIES

The lingering effects of Jim Crowism, inferior schools for minority students, sexism, and skewed vocational training based on gender stereotypes have contributed significantly to the exclusion of minorities and women from full participation in the nation's economy. It is highly ironic that while the courts and scholars have debated the meaning of equality and wrestled with the virtues and vices of the equal access and equal achievement constructs, employers and government contracting officials have seized the initiative by adopting race/gender-conscious programs throughout the fifty states and at all levels of the economy. The decisions of the 1988 Term raise considerable doubt as to the continued validity of these efforts. In light of the need for such programs and their proven success,

254. *See supra* note 72.
255. Measured by almost any standard, the economic gap between non-minorities and minorities and between men and women is deeply disturbing. For example, in 1988 the unemployment rate for Whites was 4.7%, while the unemployment rate for Blacks and Hispanics
Congress should statutorily legitimize race/gender-conscious programs.

There are two advantages to federal statutory intervention. The first advantage is that the policies adopted by Congress will represent values selected through the democratic process. As a practical matter, race/gender-conscious preferences have become a fixed feature of the country’s labor policy, adopted regularly by both public and private sector employers. They are also a common feature in public contracting. They have assumed their place with no input from Congress. Given the controversial character of such preferences, Congress’ avoidance of the issue may be understandable. That does not make it acceptable. Congress is duty bound to legislate for the general welfare. It has done so concerning a host of other controversial issues. An issue of such overriding significance as affirmative action belongs in the halls of Congress. The contours of legislation respecting employment and public contracting rights are fairly obvious. Congress should strike a balance between the needs of the nation’s minority community and women for accelerated economic growth.

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was 11.7% and 8.2%, respectively. U.S. DEP’T OF LABOR, 113 MONTHLY LAB. REV. 77 (July 1990). In 1988, the median income for White families was $33,915; the median income for Black and Hispanic families was $19,329 and $21,769 respectively. BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1989, at 450, table 727 (109th ed.) [hereinafter STATISTICAL ABSTRACT]. Numerous studies confirm these grim statistics. E.g., NATIONAL RESEARCH COUNCIL, A COMMON DESTINY: BLACK AND AMERICAN SOCIETY (G. Jaynes & R. Williams eds. 1989) (compiling data and research concerning the status of blacks in American society since World War II); R. Farley & W. Allen, THE COLOR LINE AND THE QUALITY OF LIFE IN AMERICA (1987) (providing numerous statistics for unemployment rates, personal income, and employment earning by race and sex.).

Women on the average earn only 65% as much as men. N.Y. Times, Feb. 2, 1988, at A20, col. 3. In 1986, the median income of full-time female workers was $16,843 while the median income of full-time male workers was $25,894. STATISTICAL ABSTRACT, at 432, Table 711.

256. Numerous studies have documented the effectiveness of race/gender-conscious plans in opening up high paying jobs to women and minorities in occupations from which they have traditionally been excluded. H. HAMMERMAN, A DECADE OF NEW OPPORTUNITY: AFFIRMATIVE ACTION IN THE 1970's, at 5 (1984); EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEP’T OF LABOR, EMPLOYMENT PATTERNS OF MINORITIES AND WOMEN IN FEDERAL CONTRACTOR AND NON-CONTRACTOR ESTABLISHMENTS (1984); OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, EMPLOYMENT PATTERNS OF MINORITIES AND WOMEN IN FEDERAL CONTRACTOR AND NON-CONTRACTOR ESTABLISHMENTS, 1974-1980, at 37 (1984); see also J. LEONARD, THE IMPACT OF AFFIRMATIVE ACTION (1983).


integration and the expectations of non-minority and male workers and entrepreneurs.

Overlooking the interests of the latter group would be a serious mistake. In general, non-minority and male workers and entrepreneurs bear no direct responsibility for the debilitating political and social conditions which led to labor-force apartheid in major segments of the American economy. While it is true that "innocent" non-minorities have in the abstract benefitted from the absence of competition by qualified minority workers and entrepreneurs, that response is most unlikely to get a sympathetic reception from non-minorities foreclosed from a job, a promotion, or a public works contract. Abstract truth is cold consolation for dollar deprivation.

Legislating the role of race/gender-conscious preferences in the workplace has the additional benefit of bestowing a democratic endorsement on the equal achievement construct. While non-minority and male workers whose employment opportunities may be restricted as result of the legislation can hardly be expected to embrace such a statute, it is bound to be more palatable as a policy agreed to during the legislative give-and-take. Part of the problem with race/gender-conscious preferences is the perception that they are being imposed on non-minority and male workers from "on high" by courts or employers. A national labor policy authorizing their establishment would go far to dispel this perception.

The second advantage to federal statutory intervention lies in the development of uniform rules. Such a statute would articulate guidelines to protect the legitimate expectations of non-minority employees and applicants. For example, it might put a cap or ceiling on the percentage of promotions or new hires selected by an employer as a goal for increased minority participation in its workforce. The guidelines might establish criteria for selecting the geographic limits of the labor pool area to avoid inconsistent choices by similarly situated employers.

Congress should not limit its efforts to amending Title VII. Congress' intervention should apply to state MBE programs as well as public employment. As noted earlier, in City of Richmond, the Court clearly endorsed the equal access doctrine, limiting the states' decision-making power about how best to spend their funds to promote the common welfare of their citizens. The Court's various holdings lock minorities into the status quo that is the direct result

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259. See supra notes 162-71 and accompanying text.
of near virtual exclusion from skilled craft unions. To correct the Court's shortsightedness Congressional legislation should address three areas. First, it should permit set-asides linked to the percentage of minorities and women in the labor pool who possess the qualifications for entry level positions in the public-works construction industry. Second, it should authorize the states to rely on Congressional studies and federal agency reports in concluding that state set-asides are needed. Third, it should set percentage guidelines to ensure that the set-asides are reasonable and do not trammel the interests of non-minority contractors.

There should be little doubt about Congress' authority to enact the employment and state-MBE legislation described above. Section 5 of the Fourteenth Amendment gives Congress "the power to enforce . . . by appropriate legislation" the equal protection guarantees of the Fourteenth Amendment. Despite the considerable disarray in the nine opinions caused by inconsistent majority, plurality, concurring and dissenting opinions, at least seven Justices acknowledged the sweep of Congress' Section 5 powers in the context of affirmative action review. A surprising consensus exists between the Court's conservative and liberal wings. In *City of Richmond*, Justice O'Connor joined by Chief Justice Rehnquist and Justice White acknowledged the power of Congress to "identify and redress the effects of society-wide discrimination . . . ."Ironically, they used the sweep of Congress' Section 5 power in part to justify their denial of similar authority to the states! Taken at face value their views in *City of Richmond* shackle them from aggressive review of subsequent Section 5 legislation. While Justice Kennedy declined to join that part of Justice O'Connor's opinion girdling state power,

260. With respect to private employers, Congress originally enacted Title VII by virtue of its commerce clause power. Regents of the Univ. of California v. Bakke, 438 U.S. 265, 367 (1978) (Brennan, J., White, J., Marshall, J., Blackmun, J., concurring in part and dissenting in part); see supra note 54 and accompanying text. That power is checked only by the specific provisions of the Bill of Rights. In this instance, the equal protection component of the due process clause is the most obvious check to consider. Arguably, the compatibility of race/gender-conscious preferences with the equal protection component was resolved affirmatively in *Weber* when the Court held that the establishment of voluntary race/gender-conscious preferences was not prohibited by Title VII. See United Steelworkers v. Weber, 443 U.S. 193 (1979).

263. Admittedly, the conservative Justices have several doctrinal escape hatches. To begin with, *City of Richmond* did not directly involve Congress' Section 5 power. Furthermore, in *Fullilove*, which did directly consider the issue, there was no majority opinion. Finally, there is the rigor of the strict scrutiny test itself. See Gunther, supra note 192.
he did so because the Fourteenth Amendment "ought not to be interpreted to reduce a State's authority" to remedy discrimination. Implicitly, his opinion supports a broad reading of Congress' Section 5 authority. Based on their position in *Bakke* and their dissent in *City of Richmond*, Justices Brennan, Marshall, and Blackmun read Section 5 broadly. Questions exist only as to the positions of Justices Scalia and Stevens. In *City of Richmond*, Justice Scalia cautiously acknowledged *Fullilove*’s deference to Congress' exercise of Section 5 power, but he did not indicate any affirmative support for the case. Given his staunch opposition to race/gender-conscious preferences, commitment to the strict scrutiny test, and avowed hostility to extending such preferences to non-victims of discrimination, his support of future *Fullilove*-like statutes is highly unlikely.

Justice Stevens’ position is more difficult to assess. On the one hand, he voted with the Court's conservative wing in *City of Richmond* to strike down the municipal set-aside. In that case, as in *Fullilove*, he was critical of the alleged remedial character of the City's MBE program and the selection of the program's beneficiaries. On the other hand, he also reaffirmed his alliance with the Court's liberal wing in *City of Richmond*. In that case, as in *Wygant* and *Fullilove*, Justice Stevens disavowed "sin" or the culpability cri-

264. *City of Richmond*, 488 U.S. at 518 (Kennedy, J., concurring in part and in the judgment).

265. *See id.* at 557 ("[Section] 5 "is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." (emphasis in original) (Marshall, J., dissenting) (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)); *see also* Regents of the Univ. of California v. Bakke, 438 U.S. 265, 368 (1978) (stating that "[t]o the extent that Congress acted pursuant to § 5 of the Fourteenth Amendment [our] cases impliedly recognize that Congress was empowered under that provision to accord preferential treatment to victims of past discrimination in order to overcome the effects of segregation . . . ") (Brennan, J., White, J., Marshall, J. Blackmun, J., concurring in part and dissenting in part). Justices Brennan, Marshall, and Blackmun did not address the issue of Congress' Section 5 power in *Fullilove*. They instead advocated the use of the intermediate test rather than the strict scrutiny to review legislation which benefited minorities. *See Fullilove v. Kluznick*, 448 U.S. 448, 519 (1980) (stating that "the proper inquiry is whether racial classifications designed to further remedial purposes serve important governmental objectives and are substantially related to achievement of those objectives"). Given the strength of the views they expressed in *Bakke*, their failure to address the Section 5 issue in *Fullilove* is inconsequential.

266. *City of Richmond*, 488 U.S. 521-22 (Scalia, J., concurring in the judgment).


268. *City of Richmond*, 488 U.S. at 511-17 (Stevens, J., concurring in part and in the judgment).

terion discussed earlier and endorsed the right of employers and public contracting officials to adopt race/gender-conscious preferences for forward-looking reasons. Such reasons include the intangible benefits flowing from an integrated faculty, the provision of better services to minority citizens, the prevention of racial tension, and the elimination of racial caste systems.

In light of Katzenbach v. Morgan, it is not surprising that seven Justices, liberal and conservative alike, acknowledged Congress' sweeping Section 5 power regarding affirmative action. The Katzenbach plaintiffs challenged the constitutionality of Section 4(e) of the Voting Rights Act of 1964 enacted pursuant to Section 5 of the Fourteenth Amendment. Congress adopted Section 4(e) in response to a New York State statute which had effectively disenfranchised the State's Puerto Rican residents through the imposition of an English language literacy test. The statute affirmatively ordered the states to permit any citizen to vote who possessed a sixth-grade education from a public school under the jurisdiction of the United States, including Puerto Rico.

What made Katzenbach a particularly difficult case was an earlier decision of the Court in Lassiter v. Northampton County Board of Elections, upholding a North Carolina literacy requirement similar to New York's. Katzenbach raised the formidable issue of Congress' authority to outlaw a practice the Court had previously held constitutional. By drawing a powerful analogy to the Necessary and Proper Clause, the Court concluded Section 5 did not

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270. See supra note 110 and accompanying text.
273. Id. at 643.
274. Id. at 645 n.1.
275. Id. at 643.
277. Katzenbach, 384 U.S. at 646-47.
278. If the Court sticks to the view that the Framers of the Fourteenth Amendment intended to give Congress "the same broad powers expressed in the Necessary and Proper Clause," id. at 650, imagining the limits of the power strains constitutional ideation. Congress' power under The Necessary and Proper Clause is virtually unbounded. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 319 (1819). The Bill of Rights guarantees are its only check. Using the guarantee of "equal protection" in the Fifth Amendment to strike down legislation designed to integrate minorities into American society would be an exercise of raw judicial power, especially if, as this Article suggests, Congress carefully crafts the statute to diffuse any
"confine the legislative power . . . to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the 'majestic generalities' of § 1 of the Amendment." The Court went on to conclude that it need only "perceive a basis upon which the Congress might resolve the conflict as it did." Certainly the abundant evidence of the economic disparity which exists between whites and blacks, men and women, as well as the success of race/gender-conscious programs, provides a basis for the Congressional enactment proposed herein.

Katzenbach, logically leads to the question of what constitutional authority, if any, would cabin Congress in authorizing the states to implement MBE programs and race/gender-conscious preferences in employment. The "one way ratchet theory" of Section 5 views the equal protection guarantees of the Fifth and Fourteenth Amendments as a restraint on Congress' power. It relies on express language in Katzenbach, affirmatively denying the proposition that Congress could invoke Section 5 to dilute equal protection guarantees. Fullilove, however, sets to rest any doubts about the applicability of the one-way ratchet theory. In Fullilove, six Justices discounted a similar argument directed to Congress' power under the Equal Protection Clause of the Fifth Amendment. Fullilove, supported by Bakke and City of Richmond, places the fate of race/gender-conscious preferences in state MBE programs and employment decisions in Congress' hands. Congress clearly has the power under Section 5 to enact the statute called for in this Article.

279. Katzenbach, 384 U.S. at 648-49. The Katzenbach Court also found support for its broad view of Congress' power in decisions construing the analogous enforcement provision of the Fifteenth Amendment. Id. at 651. Between Katzenbach and City of Richmond several decisions revisited the issue of Congress' Section 5 power, but their jurisprudence is obscure. E.g., EEOC v. Wyoming, 460 U.S. 226, 259-64 (1983) (Burger, C.J., dissenting); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 732-33 (1983).


281. See supra notes 255-56.

282. See generally Cohen, Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma, 35 STAN. L. REV. 387, 388 (1983) (advocating the premise that "Congress should be able to approve unconstitutional policy choices in state laws when Congress is not constitutionally prohibited from directly adopting the same policy itself."); Cohen, Congressional Power to Interpret Due Process and Equal Protection, 27 STAN. L. REV. 603, 614 (1975) (arguing that congressional decisions are not entitled to any more deference than state legislative decisions which reject judicial interpretations of the Due Process and Equal Protection Clauses).

283. Several scholars have commented favorably on Congress' power to create substan-
VI. CONCLUSION

Under the leadership of Chief Justice Rehnquist, the Court brought some order to its affirmative action jurisprudence. For the time being, in the Bickel/Ely, Harlan/Blackmun debate on the meaning of equality the Court has declared the proponents of the equal access construct the winner. In taking such a sharp turn to the right, however, the Court has dead-ended the economic progress of minorities and women. Race/gender-conscious programs make sense because they foster progress. Until such time as the powerful, lingering effects of racism, Jim Crowism, and sexism dissipate, such programs are needed to counteract the public and private, individual and institutional biases whose synergy operates on a daily basis to deny minorities and women equal access to employment and entrepreneurial opportunities. Equal achievement paves the way for equal access. Equal achievement strengthens the hobbled runners, enabling them to compete without catch-up points in future races. There is no constitutional need for the Court to be the sole drafter of the rules governing the race. The drafters of the Fourteenth Amendment in Section 5 specifically entrusted the eradication of inequality to Congress. Congress should live up to that responsibility by crafting legislation balancing the needs and expectations of all the runners in the race for economic security and advancement. It should straighten out the turn taken by the Rehnquist Court and pave a path between equal access and equal achievement.

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284. See supra notes 25-27 and accompanying text.
285. See supra notes 260-62 and accompanying text.
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<td>Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (equal protection clause claim brought by a rejected white applicant challenging a special admissions program to a state medical school which reserved 16 out of 100 seats exclusively for minority applicants).</td>
<td>x</td>
<td>x</td>
<td>The striking down of the exclusive reservation of 16 seats for minorities is an endorsement of the equal access construct; the approval of race as a “plus” is an endorsement of the equal achievement construct.</td>
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<td>United Steelworkers v. Weber, 443 U.S. 193 (1979) (Title VII claim brought by a white employee challenging the implementation by a private sector employer of a training program, admission to which was determined by the applicant’s race).</td>
<td>x</td>
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<td>The Court’s approval of the setting-aside of trainee slots based on race is an endorsement of the equal achievement construct. Supporting this characterization is the Court’s refusal to condition the selection of the black trainees on proof of actual victimization by the employer and its choice of a sweeping statistical baseline to measure the racial composition of the employer’s work force. See supra notes 79-81 and accompanying text.</td>
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<td>Fullilove v. Klutznick, 448 U.S. 448 (1980) (Equal Protection Clause claim brought by white contractors challenging a provision of the Public Works Employment Act of 1977 which set aside 10% of the funds appropriated pursuant to the statute for minority business enterprises).</td>
<td>x</td>
<td></td>
<td>The Court’s approval of the 10% MBE set-aside is an endorsement of the equal achievement construct. Supporting this characterization are: the Court’s quick, unquestioning approval of Congress’s selection of the 10% figure, its relaxed, almost nonexistent, requirement of government responsibility for the low participation of minority business enterprises in public contracting, and its casual discussion of whether the participating minority business enterprises had to be actual victims of discrimination by the government. See supra notes 153-61 and accompanying text.</td>
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By restricting the district court's authority to modify a consent judgment to protect newly hired minority firefighters, the Court gave greater weight to the equal access construct (i.e., minority and non-minority firefighters were being treated in the same fashion). It refused to allow the district court to give minorities "catch-up" points to which would have had the effect of recognizing how long the city had excluded them from access to these jobs. Its refusal constituted a rejection of the equal achievement construct. Furthermore, the Court's opinion contained dicta suggesting that Title VII relief was limited to actual victims of discrimination. This dicta clearly manifested an endorsement of the equal access construct. Note, however, that a majority of the Justices disavowed the Stotts dicta in Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. at 471-75 (1986) (4-Justice plurality opinion); id. at 484 (Powell, J., concurring opinion); id. at 499 (White, J., dissenting).

The Court's disapproval of a layoff provision designed to retain newly hired minority teachers reflects an endorsement of the equal access construct. Supporting this characterization are: the opinion's rejection of remediation of societal discrimination and the role-model justification for race/gender-conscious preferences; and its refusal to remand the case for factual clarification in light of the unseemingly state of the record.
### Case | Equal Access | Equal Achievement | Comment
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Local 28 of Sheet Metal Workers' Int'l Ass'n of EEOC, 478 U.S. 421 (1986) (Title VII claim brought by non-minority union members to set aside a judicially-mandated 29% membership goal which the district court imposed following a finding of egregious discrimination. | x | x | The Court's opinion displayed a decided preference for the equal achievement construct (1) by permitting the district court to order preferential relief for individuals who were not specifically the object of the union's discriminatory practices; and (2) by refusing to consider the union's claim that the district court's selection of a 29% minority-membership goal far exceeded the percentage of minorities in the relevant labor force. Tempering this preference is the Court's emphasis on the egregious character of the defendant's refusal to observe the strictures of Title VII and its contumacy in face of repeated court orders to cease its discriminatory practices. The Court appears to be endorsing the equal achievement construct as a last resort, when all else fails to achieve equal access.

Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) (Title VII claim brought by non-minority firefighters challenging a consent judgment signed by the city and a black firefighters association, which called for promotion quotas). |  | x | In holding that § 706(g) did not apply to consent judgments, the Court endorsed the equal achievement construct by allowing employers to use race-conscious preferences without fear of challenge under that provision. In addition, it used City of Cleveland as a vehicle for retreating from the sweeping equal access language it used in Stotts.

United States v. Paradise, 480 U.S. 149 (1987) (Equal Protection Clause claim brought by non-minority state troopers to upset a judicially-mandated 50/50 promotion plan, which the district court imposed fol- | x | x | The Court's approval of a race-conscious, one-for-one promotion quota reflects the equal achievement construct. At the same time, its repeated insistence on the outrageous character of defendant's be-

The Court's approval of an immutable characteristic (sex) as a "plus" is an endorsement of the equal achievement construct, as is the Court's selection of general population statistics to measure the discriminatory impact of the employer's personnel decisions. See supra notes 127-39 and accompanying text.